

Reader for the course

# **Philosophy of Law and Economics**

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The texts in this collection provide some background for the discussions in class. However, the topics of our discussions are not limited to those raised in the texts. You are free to bring up other subjects as long as these involve some significant philosophical distinction within the broad range of “law and economics”.



## **Introduction**

This course is about elements of reality that are of interest to economists and lawyers alike: elements that constitute the common ground of their studies, theories and professional activities. After all, both law and economics are concerned with human beings and how they interact. The many differences between their respective approaches (methods, theories) to their common “material object” certainly warrant the claim that law studies and economic studies have different “formal objects”, but they should not obscure the fact that there is a common material object. Thus, ultimately, there can be no contradiction between what is true “in law” and what is true “in economics”. This should not be understood in the trivial sense in which a statement about one thing cannot contradict a statement about another thing. It should be understood in the non-trivial sense in which no two true statements about the same thing can contradict one another. It follows that a true theory of law cannot presuppose or imply a false theory of economics, and vice versa.

Just as there are obvious differences between the approaches of law and economics to their common material object, just so there are significant differences among schools of law as well as among schools of economics. In this context, a school refers to a group of students, scholars and researchers with a shared commitment to particular theoretical presuppositions, assumptions and methods of research and theory-construction. In other words, a school refers to a particular “formal object” (defined in terms of its theoretical and methodological approaches) as the relevant representation of the reality it purports to study.

The separation into distinct schools is a dynamic process, as differences arise among their adherents that may develop into diverging tendencies and perhaps lead to the formation of distinct schools. Occasionally, a school may disappear or merge into another. In the field of law, the top-division is generally taken to be the split between natural law theorists and so-called legal positivists, neither of them constituting a monolithic bloc. In economics, a similar pervasive line of division exists between natural law economists and positivist economists. In both cases, the main division appears to be between those who see the object of the study of law, respectively economics, as a manifestation of human nature and those who see it as a “given” system of incentives (stimuli) to which human beings react (respond) more or less predictably because of some innate or acquired disposition. Thus, the natural law approach is concerned with the problems of order and disorder in human affairs on the assumption that an understanding of human nature reveals principles of order that are valid universally for all human actions and interactions. In contrast, the positivist approach is primarily concerned with analysing existing systems of incentives and considering ways to modify them so as to make people behave in one way rather than another.

As they are stated here, it would seem that both approaches are complementary rather than mutually exclusive. Indeed, natural law theorists in law or economics have never denied that there is a place for considering and tinkering with systems of incentives, as long as this is done with due regard to the natural-law principles of law and economics. However, beginning at the latest in the eighteenth century but mainly in the nineteenth century, as far as the study of human affairs was concerned, positivism became virtually synonymous with a denial of the relevance, even the existence, of natural law. It embraced the stance that there is no human nature to consider, as it supposed that, for all practical purposes, man and human society can be made into

anything one wants them to be, either by wholesale revolutionary, or by gradual piecemeal social engineering and education. The question, whose wants (“ideals”) should guide the process of reconstructing man and human society, was deemed to have no scientific relevance.<sup>1</sup> That question was left to politics, which in tandem with the rise of the modern “sovereign” state and its cult of democracy (“collective self-government”) came to embody the notion that humanity can control the conditions that define its own existence.<sup>2</sup>

With respect to law and economics, differences among schools are the primary occasion for doing philosophy of law, respectively philosophy of economics. In the former, we look at the differences among theories of law<sup>3</sup> to arrive at an informed judgement on which of them provides the better understanding of law as it really is. The same goes, *mutatis mutandis*, for the philosophy of economics. The whole point of doing philosophy is to supply a reality check on thought and theoretical ingenuity, and hence to keep “education in science” from falling into the trap of dogmatic indoctrination.

Every science endeavours to know the truth about the real world and needs theories and methods to arrive at the truth. However, theories and methods are only means to the end of true knowledge, not ends in themselves—a fact that should be reflected in the curricula of institutions of higher education, especially the universities. In its classical “catholic” conception, the university was indeed supposed to provide a scientific education that prepares the mind for a study of the real world as “the work of God”, i.e. as something that can only be discovered, not made or made up, by the human intellect. It was not supposed merely to multiply the number of people who accept the theories of this or that professor or author or school, no matter how fashionable or “authoritative” they may be. Hence, philosophy was seen as a necessary part of the curriculum in every one of its faculties and departments.

That classical aim has always, but perhaps never more so than in recent times, been compromised by “practical considerations”. For one thing, where large numbers of students are involved, it is easier to teach theories, which are readily reduced to sets of questions-plus-the-correct-answers, than to induce the elusive spirit of critical scientific

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<sup>1</sup> ‘Positivism’ is sometimes linked to ‘positive’, i.e. ‘non-normative’, ‘descriptive’. However, natural law theories are also descriptive in that they attempt to describe the laws of nature. To what use we ought to put our knowledge of the laws of nature is a separate question. In our discussion, ‘positivism’ refers to the idea that science is not concerned with the nature of things but only with “data” about things.

<sup>2</sup> This development was partly a consequence of attempts to define the formal objects of the study of man and society as epistemologically akin to the formal objects of the physical sciences (see further down in the text). It was also partly a consequence of the decline of the traditional Christian religion (with its intense focus on persons and their relations) and the rise of the religion of Man or Humanity (which regarded the species rather than the individuals that compose it). In effect, ‘positivism’ and the ‘Religion of Humanity’ were closely connected in the thought of Auguste Comte (1798-1857), the self-styled inventor of “sociology” (which he presented as the current master-science, and which would find its completion in “anthropology”, the true science of Man). His emphasis on statistical analysis and on rational decision-making as the application of quantitative, mathematical methods combined easily with empiricist (especially utilitarian) approaches to practical problems. The main theme of the religion of Humanity (which existed also in other versions, e.g., in Marxism) was “the liberation of Man” from the shackles of religion, metaphysics, and history. It subverted the traditional idea that there are absolute limitations on human knowledge and power because human nature and the natural world that man inhabits are “gifts of God” or “givens” of reality, not human creations. According to the Humanist religion, Man (i.e., the present or at the latest the next generation) can and will escape from history and take command of his own future (i.e., of all later generations), thereby becoming the God-Creator of a New Order. Shortly after Comte’s death, his vision of a scientifically enlightened, harmonious humanity, solidified by universal “altruism”, was shaken by the impact of Darwinism and its emphasis on rivalry and natural selection in a universal “struggle for life”. This further radicalized positivist tendencies in that it was taken as proving that universal norms and values (including altruism) are irrelevant: only the particular norms and values that prove advantageous in the struggle of one group against all others can make a difference.

<sup>3</sup> For an overview, see the chapter Theories of Law.

inquiry.<sup>4</sup> This carries the risk that a university class becomes a place where students come to study and absorb particular theories rather than to learn how to acquire knowledge of the particular aspects of reality that the theories profess to deal with. The means of understanding risk becoming its end.

For another thing, the demands of the labour market for academically trained students favour the production and reproduction of skills that meet the requirements of existing arrangements in government, social services, industry, commerce, the media, and formal schooling itself. Inevitably, formal schooling at the university level can and does serve other interests than fostering science and philosophy. There is therefore a permanent risk that these other interests overshadow the interests of science and philosophy to which the institution of the university was supposedly specifically dedicated. The risk is especially great in the fields of law and economics, where formal schooling is nowadays more often than not seen as a requirement for entering a labour market centred on large established organizations (the state's court system and legislative and administrative branches, local government, political parties and interest groups, international bureaucracies, corporations and professional associations). In such an environment, it is to be expected that prevailing prejudices and preconceptions, especially those that are widely shared among social elites, influence or even determine the curricula of schools and universities. It is not surprising that in the Soviet Union only Marxist economics and the principles of socialist legality were taught. Nor is it surprising that when Marxist economics was introduced in the 1960s as a formal subject at western universities, it quickly lost ground again to the mixture of Keynesian macroeconomics and neo-classical or “mainstream” microeconomics. It had little to offer to those out to make a career in the political and economic institutions of the so-called mixed economies in the Western world.

One is therefore entitled to ask whether or to what extent prevalent theories of economics in the modern western (or to a large extent “westernised”) world owe their widespread acceptance to their scientific qualities rather than to their conformity with the interests of western political and economic institutions and the worldviews of the elites that man them. Similar questions arise with respect to established theories of law, which are almost without exception wedded to the idea that law is really only “positive law”, i.e., the rules and regulations promulgated or sanctioned by the official, legal authorities of political corporations (states) or associations of such corporations. Thus, law is conceived primarily as “national law” (and international law accordingly as a consequence of the co-existence of many systems of national law). The approach of legal positivism mirrors that of economic positivism, which also tends to identify the geographical extent of “the economy” with the area controlled from a single national political centre. The international economy is accordingly discussed far more often in terms of trade among countries (states) rather than in terms of border-crossing trade among persons and business entities.

In the next chapter, we shall take a closer look at these mainstream approaches to the study of law and economics. First, however, we should consider the common reality that provides the basic reason for studying law or economics from a scientific rather than a merely practical point of view.

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<sup>4</sup> It is a telltale sign when course books hide arguments and controversies behind a few references in footnotes and bibliographies and only list the main conclusions of one or a few theories.

### 1. *Human actions and interactions*

Law and economics are concerned primarily with human actions (*actiones humanae*), which constitute a subset of the things human beings are capable of doing (*actiones hominum*). For example, sneezing, sweating, blinking, dozing off, digesting, stumbling, getting sick and the like are things human beings are capable of doing but they are not human actions—although, say, pretending to sneeze or to stumble may well be a human action. Students of law and students of economics are obviously not concerned primarily with such *actiones hominum*. They focus on human actions such as buying, selling, saving, investing, giving, stealing, respecting or violating rights, commanding, obeying, rewarding, punishing, negotiating, arguing, studying, taking care.

An action in the relevant sense of the word is a purposeful use of means for a particular goal, i.e., for achieving a particular result that is thought to be a satisfactory realization of a desired condition. It implies that the agent of the action is an actor, i.e., someone who prefers to act in one way rather than another while being aware that how he will act is a matter of choice for him. An actor can do many things but, typically, he cannot do all of them at the same time. What he can do in a particular situation depends on the means available to him, but these do not dictate what he will do. He must make a choice, in fact, several choices involving a great many factual and value judgments about the situation he is in, the means available to him, his skills in employing them; also about how the world works and the causal and means-ends relationships that characterize it. In many cases, he must also make judgments about how others are likely to perceive and react to what he does or does not do. Moreover, and not least, an actor must rely on judgments about himself, what his talents are, what makes him tick, what makes him happy or unhappy, what he really wants, what sort of person he is, what his limits are, and so on. Self-knowledge is as fallible as is knowledge of other things. It happens that an actor succeeds in achieving his goal only to discover that it does not produce the satisfaction he expected from its achievement. Conversely, it happens that an actor fails to achieve his goal only to realize that he was lucky not to have succeeded. An actor is or can be made aware of the possibility that what he wants is not necessarily good for him: want-satisfaction does not automatically translate into a satisfactory personal condition. Even from his own point of view, the fact that an actor wants something does not guarantee that trying to get it is the right thing to do.

Each of those judgments may be more or less autonomous (reflecting the actor's own deliberations) or heteronomous (accepted on the authority of others), more or less wise, competent, informed, considered, or impulsive, intuitive, habitual, tainted by unconsidered prejudices. An action may seem to be as entirely spontaneous as a sneeze or a blush, but it would still make sense to ask the actor what his motives or reasons for doing it were. It may be of interest to find out what made him sneeze or blush, but it would be odd if the answer referred to his purpose, to what he hoped to accomplish by sneezing or blushing.

Another way to make the distinction between mere *actiones hominum* and *actiones humanae* is to point out that among the things human beings are capable of doing some require a reference to the fact that [most] human beings are persons while other things require no more than a reference to the fact that [all] human beings are [biological] organisms.

Students of law and students of economics share an overriding interest in the actions of human persons. In fact, their shared interest can be narrowed down to the interactions of human persons and to the effects one person's actions have on other persons. For example, a person who commits suicide would not be of interest to either a

student of law or a student of economics if his act did not change the situation of other persons or if it was not perceived by other persons as a reason for reacting to it in one way or another.

Of course, things and beings other than persons may enter into the study of law and the study of economics but only as objects or means or conditions of human action—not as economic agents or subjects of law or rights. From the point of view of law as well as from the point of view of economics, human persons are the primary subjects. A dog wandering into a butcher's shop and running away with a sausage would not be considered as engaging in an economic transaction unless one were of the opinion that the animal was a person, a being capable of personal action. Nor would the dog be considered a potential defendant in a court case unless one believed the beast to be a person. Note that only persons can suffer economic damages or enjoy economic profits, and that only persons can have, assert, or waive claims in law or suffer infringement of their rights.<sup>5</sup> Thus, in the example just given, the dog causes economic damage to the butcher, but it would not make sense to say that a beggar who steals a dog's food causes economic damage to the dog, or that the dog had a lawful claim against the beggar (again, unless one were to consider the dog a person). However, if the dog had an identifiable owner, a human person, then the incident would be of interest to a student of law or of economics, regardless of one's opinion of the dog's personhood.

### *Persons*

In studying law or economics, then, we presuppose the concept of a person. A philosophically sound definition of that concept is a subject in itself, but for our present purpose, we need not go into great detail. Only one element needs explication: what makes a human being a human person is the capacity to speak, i.e. to have, communicate (by oral, written, or other means) and understand factual and counterfactual thoughts and arguments. *Speech* (Greek: *logos*, Latin: *ratio*) implies reason and logic. It is to be distinguished from mere *voice*, which includes the capacity to express feelings of pleasure, pain, fear, anger, anticipation and the like, and maybe even the ability to name individual things (the use of proper names) or sorts of things (the use of generic names). It does not imply the capacity to speak. There is a wide gap between being able to use expressions such as “This is a snake” correctly and being able to understand and use expressions such as “If I were built like a snake then I would not be able to walk.”

The distinction between speech and voice goes back at least to the Greek philosopher Aristotle (384-322 BC). It is involved in the classical definition of man as a rational animal. It is also in evidence in discussions about a great many topics that are relevant to students of law and economics. For example, in human organizations there is usually a clear distinction between, on the one hand, the rulers, leaders, directors, governors, administrators, managers, generals or however they are called, and on the other hand, the “ordinary members” (employees, personnel, citizens, soldiers, and the like). A common feature of organizations is that the organizational (constitutional, statutory) rules reserve speech for the leadership, which is authorized to speak for the organization and to participate in argumentations and deliberations that are meant to result in decisions on and in behalf of the organization, its parts, and its members. The leadership comprises persons who represent the organization as a whole or some

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<sup>5</sup> Because it disregards the nature of things and considers only “data”, positivism leads some of its practitioners to reduce human action to observable behaviour (as if the study of man is the study of just another sort of animal). If that were so and if man is a subject of rights then any animal would be a subject of rights. See the chapter Human Dignity: Reason or Desire?

significant parts of it. In that sense, their speech is the speech of the organization or some part of it. They are the “known” or “notable persons” within the organization and their speech is “named”—what they say and why they say it is to be noted and known within the organization. For this reason, they are often referred to as notables or nobles (from the Latin verb *noscere*, to know, recognize).

In contrast, organizational rules often permit the lower echelons only to voice an opinion (for example, by casting a vote). Of course, this does not mean that the people in the lower echelons, the “ordinary members”, lack the capacity of speech—after all, they are human persons and their speech capacities may be essential for their work in the organization. It does mean that their speech has no legal standing, no legal authority, in the decision-making or the representation of the organization. Voting, which is a common form of voice in human institutions, is often anonymous and one's reasons (if any) for voting one way or another are irrelevant to the institutional meaning of the vote.

In modern societies, we can see how the media pay homage to the distinction between speech and voice, if we take note of, on the one hand, the people they are likely to interview and, on the other hand, the people whose opinions are polled and then published in the form of anonymous statistics. This gives us an easy way to identify the nobility of a particular society—and, by implication, the mass of people who, from the point of view of the social organization, are merely nameless persons (“nobodies”, “hoi polloi”, “the many”). In the discourse of lawyers and politicians, the nameless are often referred to collectively as ‘the citizens’, ‘the people’ or even simply as ‘society’. In the discourse of economists, one often hears a reference to ‘the market’ when the subject is the actions of the masses of nameless consumers, savers and investors or their reactions to policies and undertakings of big economic players such as governments, central banks, and large financial and industrial corporations.

It follows that a person's position in an organization may have consequences for the degree and the manner in which he can deploy his personal capacities in it—the degree and manner in which he can be himself. That is only to be expected because a position in an organization usually implies a more or less well-defined organizational role or function, and therefore a more or less considerable degree of role-playing: acting not “as oneself” but as a functionary whose function is defined by rule-making decisions of higher-ups in the organizational hierarchy. Clearly, the fact that human persons may or may not act “as themselves” but “in this or that [organizational] capacity” is highly relevant for studies of law and economics.

Obviously, we should not lose sight of the “animal” part in the definition of man as a rational animal. The human animal is a mammal, a biological organism of a particular kind, with a distinctive life path between conception and death. All sorts of things, genetic defects, accidents, diseases, may prevent an individual human animal from becoming a human person or turn a human person into a mere non-rational animal. In fact, there are human beings who are not human persons and therefore cannot present themselves as persons. Like non-human animals they must be represented by human persons if they are to participate at all in human intercourse: someone who is capable of self-representation must take it upon himself to speak in their behalf. Foetuses and very young children and those unfortunates who are genetically or accidentally deprived of the potential to develop personal, rational capacities cannot represent themselves and cannot choose or designate those who will represent them. In contrast, persons who lose their personal capacities later in life may have had the occasion and taken the opportunity to authorize particular others to represent them “after their minds are gone” and even after they die. Similarly, people who are so severely handicapped physically

that they cannot do much without the help of others may nevertheless have full powers of speech and self-representation. They may have the ability to appoint those who will act on their behalf where their own physical powers fail.

As most potential persons (foetuses, small children) become actual persons and all actual human persons eventually become former persons, the need for representation-by-others is inevitable in every human being's life but can only be met if there are actual self-representing persons. Again, the fact that human persons may act as representing themselves or as representing others is highly relevant for the study of law and economics—and so is the fact that potential persons have to be represented by persons they did not themselves appoint, while former persons often have representatives whom they did appoint personally.

Note that the capacity for self-representation is merely that: a capacity for self-representation, which is implied in the speech capacity. Thus, the definition of man as a rational animal in no way implies that a person cannot be very stupid, wrongheaded, mistaken, misinformed, intellectually lazy, or unreasonable. Only a rational being can be more or less reasonable, more or less unreasonable. It makes no sense to call a non-rational thing (e.g., a stone) reasonable, unreasonable, or more reasonable than another non-rational thing (say, a cloud). In contrast, it does make sense to consider how reasonable or how unreasonable a person is. However, judging a person unreasonable, silly or mad is not the same as denying that he is a person or as saying that he lacks the capacity to speak for himself.

Human persons are natural persons—persons “by nature”, naturally capable of acquiring the capacity of speaking for themselves and representing themselves. However, people like to personify many things that are not natural persons, thinking and speaking of them, and to some extent treating them, as if they are persons. For example, human organizations (firms, associations, states, political parties) are commonly personified: they are said to want things, to deliberate, to plan, to undertake actions, to be responsible for what they do, and the like. Because they are not natural persons, natural human persons must represent them—and the actions that are ascribed to them are in fact actions of natural persons. Although they are quasi-persons at best, it is proper to call them artificial persons, because they are not natural entities or natural beings but man-made constructions, represented and animated, so to speak, by human persons. Obviously, artificial persons are of great interest to students of law and economics. Nevertheless, it is necessary to keep in mind that statements that are true of natural persons may not be true when applied to artificial persons, and vice versa.

Some people like to personify non-human natural beings such as dogs or trees. As dogs and trees have none of the characteristics of a person, and as they are not animated by human persons in the way that human organizations are, there is no point in taking their personification seriously. However, many people believe that there are supernatural persons (gods, angels, demons, or the spirits of former persons such as one's ancestors) and that these may animate or inspire (“possess”) not only human beings but also things like dogs and trees. Nevertheless, supernatural persons do not often (if ever) present themselves as such and typically play a role in the affairs of men only to the extent that there are human persons (priests, saints, prophets) who are or claim to be inspired or animated by them, who are or claim to be their representatives. From a scientific point of view, supernatural persons themselves are off-limit but their human representatives are not.

To sum up: human persons are self-representative, may animate or represent artificial persons (organizations or parts thereof), and may represent or be animated by supernatural persons. They are the primary objects of study in law and economics.

Artificial persons are neither natural entities or beings nor self-representative persons. They are legitimate objects of study in law and economics but should not be considered independently of the natural persons that represent, animate, inspire or possess them.<sup>6</sup>

## ***2. Orders of conviviality, community and society***

Another common characteristic of the studies of law and economics is their focus on problems of order and disorder in human affairs. Human relations and interactions can be orderly and they can be disorderly. The concept of order suggests that things have their proper place (relative to other things) and the concept of disorder suggests that things are out of place. Order also connotes co-ordination—i.e., at the very least, absence of interpersonal conflict—in the execution of the actions and activities of several, possibly a great many persons. Disorder connotes lack of co-ordination and hence at least the potential for interpersonal conflict. Actions may, of course, “conflict” in the sense that, under the circumstances in which they are executed, one of them precludes the successful conclusion of the other. However, such conflicts are not necessarily interpersonal: even a single individual person may undertake several actions that are in conflict with one another. Moreover, even when the actions are of different persons, they do not necessarily lead to interpersonal conflict. For example, a football match involves two teams that engage in conflicting actions, but this does not imply that there is a conflict between the two teams. A more pertinent example: economic competition involves people undertaking conflicting actions but does not imply that these people are in conflict with one another.

The first task of the philosophy of law and economics is to identify the relevant order(s) of things: the order(s) with respect to which actions can be classified as either lawful or unlawful. Given that the primary subjects of the studies of law and economics are persons, the relevant orders of things are orders of persons. The most important and basic of these is the order of natural or human persons, which is the natural order or natural law of the human world. In addition, there are orders of artificial persons (human organizations), each of which defines an artificial order of positions, roles and functions that are to be occupied or performed by human persons—in short, a social order, an order of society. A human organization constitutes an artificial or social order, an artificial or social law (described as the “positive law” of that organization). Obviously, the relation between the natural law (or order) of human persons and the innumerable social laws (or orders) that one can find in the history of the species is a subject of the utmost importance. In the study of law, this refers in the first place to the relation between natural rights and social rights. The former are rights of natural persons, the latter rights of artificial persons, which may be human organizations considered as a whole, or positions or functions defined by their organizational rules. In the study of economics, the corresponding reference is to the relation between natural economic and artificial economic orders. The natural economic order is the order of exchange among persons acting independently of one another but with full mutual respect for their natural rights: the free market.<sup>7</sup> Artificial economic orders are, for example, companies, firms, and in particular, in the modern world, states as organizers of “national economies”. The peculiar feature of states (and other “total societies” such

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<sup>6</sup> In the chapter *The Law of Persons*, we shall attempt a logical analysis of the difference between natural and artificial persons.

<sup>7</sup> Note that the definition refers to respect for natural law and to absence of government regulations and interventions that are incompatible with the natural order. The presence of such regulations and interventions distort the market, and then it is no longer free—whether or not the government acts to do something about the effects of the distortions.

as certain sects) is their ambition to position their own positive law above the natural law, their attempt to render ineffective any appeal by their subjects to the natural law. In the field of economics, this translates into the ambition to displace or at least regulate the market so as to make it serve the interests of the state and the dominant groups (“elites”) that set its goals and determine its policies.

Both in the study of law and the study of economics, the concept of disorder is related to the concept of crime: criminal actions violate or upset the natural order of persons. Such actions are called criminal because they do not discriminate among various things and their places in the natural order. In other words, they betray confusion about, ignorance of, or disregard for the boundaries that mark the proper place of a thing in its relations to other things. To kill one of one's own chickens is not a crime; to kill a chicken in the wild is not a crime; however, to kill a neighbour's chicken may well be a crime. To buy a chicken from your neighbour is not a crime but to steal it is a crime. And so on. A world in which indiscriminate killing or stealing would be “normal conduct” would be a world “without law” as well as a world “without economy”. Non-criminal actions are called lawful: they do not violate or upset the natural order (that is to say, the law) of things. They respect the boundaries that define the order of things, for example, the boundary that marks the distinction between one's own chicken and a neighbour's chicken.

With respect to social orders (societies), disorder is related primarily to rule-violations and acts of disobedience to the constituted hierarchy of authority—in short, illegal actions.<sup>8</sup> These fail to respect the artificial or conventional boundaries defined by the constitution or statutes of the organization, for example, the boundaries that mark the distinction between the positions or the functions of the Chief Financial Officer and the Head of the Department of Legal Affairs, of the commanding officer and the subaltern, and so on. No organization can exist or function effectively when disobedience is rife among its members: that would be a “breakdown of social order”. Similarly, no organization can exist or function effectively when there is pervasive disregard for the boundaries that mark off different functional competences.

Rule-violations and disobedience per se are not usually considered crimes because they concern boundaries and distinctions that are merely conventional, not natural. Nevertheless, states often treat them as if they are crimes even when they do not involve violations of the natural order. In part, states may do so because they or large segments of their subject population deem certain aspects of their own social orders of greater, more fundamental importance than the natural order of persons. Here we encounter such beliefs as that a particular social order has a religious foundation in a higher supernatural order, or that it embodies superior knowledge of human affairs. However, the criminalization of mere rule-violations and acts of disobedience may also be a preferred policy for no other reason than that states have the means to enforce their regulations and commands.

Another source of disorder in a social order may be the design of the order itself, that is to say, the rules that define it. Unlike natural laws, social orders are constructed things, which need to be adapted to their purpose, available resources (both human and non-human), and the environment in which they they seek to maintain themselves. As these criteria may and are likely to change over time, maintaining an artificial order requires continual tinkering with its rules, chains of command, organizational structures and subdivisions, and programs of socialization (which are intended to make the people in the organization identify with the organization and their position or function in it).

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<sup>8</sup> See the chapter “The lawful and the Legal” for a discussion of the different connotations of the words lawful / unlawful and legal / illegal.

There is, of course, no guarantee that such tinkering will be successful in maintaining or improving the organization's efficacy or efficiency or, indeed, in maintaining its identity. Whether the tinkering is drastic (“revolutionary”) or incremental and piecemeal, it is in any case based on imperfect knowledge of present and a fortiori future conditions.

Too little adaptation may lead to frustration and erosion of loyalty among the members of an organization; too much adaptation may have the same effects. Loyalty depends largely on the congruence of individual and social interests, i.e., on the degree of socialization of the members. However, because the members are natural persons, born as human beings with all their genetically and experientially determined individuating characteristics, socialization can never be total or complete: the “human factor” is always to be reckoned with. Inevitably, there is always tension between those who identify more fully with the organization as it is and those who are rather dissatisfied with it; and within these groups, tension between those who prefer one particular way of strengthening, respectively changing, the organization as it is and those who prefer other ways. To put it differently, in every organization, there is more or less open, more or less acute political conflict, as individuals and groups vie for power or influence in one or another of its decision-making, policy-making circles. Consequently, conflict management is an important factor—but it may be a source as well as a solution of conflicts within a social order.

Apart from the natural order of persons and the artificial orders, we should also mention communities. However, the general concept of community covers many arrangements. After all, a community is merely a group of people who have something in common: e.g., language, religion, ethnicity, nationality, hobby, preference, illness, place of residence, or any particular purpose whatsoever. It follows that most people are members of many communities, some of which they may hardly be aware of. Obviously, with respect to some communities, the sense of community may be quite low among their “members”, in which case the community as such will not or hardly be detectable as a determinant of their actions. Thus, the community of speakers of Dutch need not be marked by a high sense of community, and belonging to it imposes no other requirement than the ability to speak Dutch. The rules of the language are virtually the only rules of the community.

In other cases, however, the sense of community can be very pervasive. Then, the community is seen as a repository of customs, mores, norms and values that give direction to, or impose side constraints on, its members' lives and works regarding a broad range of pursuits. For example, a group has many things in common and shares the belief that all these things are intrinsically connected to a particular way of leading a good and righteous life. Alternatively, a group's members believe that their common thing is something of the highest value to them, which they should honour and defend even at great cost to their other (private or common) interests.

It is to be expected that not all people in a community value the common element to the same extent. Occasionally, those that do place a high value on it try to transform the community into a society or proto-society (say, an association of likeminded people), or at least to create a platform from which they can claim to speak for the community, to “represent” it. Of course, a community can be a community even if it is not represented by, or has not been transformed into, a society or association. Likewise, being a member of a community does not imply being a member of a society or association. Nevertheless, people who seek to create formal social (including political) organizations often appeal to a sense of community in their endeavours to recruit supporters and collaborators.

Disorder in communities manifests itself primarily in defection from the traditional norms, values, rules, and deferential relations that give them their peculiar identities. Attempts to stem the disintegration of a community by transforming it into a society in order to deal more effectively with “deviants” may or may not succeed. They are in any case likely to exacerbate existing tensions as they diminish the scope for gradual adaptation “at the margin” and put a premium on getting control of the inevitably scarce positions of power and decision-making in the society.

It will be helpful to bear in mind that ‘law’ means order; in the case that is of interest to us, it means order of persons. Hence, ‘natural law’ means natural order (of persons); ‘social law’ means the order of a society; and ‘community law’ means the order of a community. The problem of describing a particular law is of course different from the problem of ascertaining its normative import. The latter problem revolves around the questions, why a particular order ought to be respected, by whom, in what sort of circumstances, and just what the notion of respecting an order implies. That problem is, moreover, different from identifying the means (if any) people devote to the goal of ensuring compliance with that order.

Assuming that we have an adequate description of the natural order of persons, we need to establish what follows deductively from the thesis that it ought to be respected. In other words, we need to identify the primary or principal rules of law (principles of law) for that order, as well as its secondary rules as they apply to broad classes of common situations. Only then can we begin to apply the rules of law to particular situations. The reason for this “deductive” approach is obvious: the natural order is given; it needs to be discovered before we can say anything about it.

In the case of community and positive law, that approach does not work well. The reason is that communities and societies are not given but evolving, occasionally consciously constructed and in any case historical phenomena. They have existence but no essence or permanent being. We can hardly identify them except by noting which rules, norms and value actually (and in a relevant period of history) determine or influence the behaviours, actions and opinions of the people who make up a community or society. Moreover, we should expect these rules, norms and values to be focal points in the education of the members of the community or society. Therefore, we are most likely to learn about the order of a society or a community by first getting acquainted with the rules, norms and values in question. In short, we get to know about community or social law (as distinctive orders of human affairs) almost exclusively through our knowledge of their rules and norms. For example, under the paradigm of positive law, lawyers study legal codes and official records of decisions. In communities, figures of authority are expected to be knowledgeable about the traditions of the community, i.e., about what their ancestors have taught them. That is why community law and social law is primarily a matter of knowing texts (either written or spoken) and not of having an insight into human nature and the human condition. Of course, communities do not rely on formal legislation but on principles based on experience (which may be recorded as a form of judge-made law).

### *Conflicts of order*

From the standpoint of an individual person, community norms and values are as real as are the rights and obligations derived from his being a member of the largest community of all: the community of human persons, the order of which is simply the natural law. They are also as real as the rights and obligations derived from his voluntary or coerced membership in particular organizations, most notably political societies that control a preponderance of the means of coercion, intimidation and

indoctrination. Thus, there is reason to consider not only natural law and the organizational phenomenon of positive law but also the laws of unorganized yet in some cases remarkably stable and distinctive communities.

Theoretically, it is possible that these three layers of law are in perfect harmony. In practice, there may well be many, occasionally insurmountable, conflicts. In the nature of things, the natural law takes precedence over community law and over the positive laws of societies. That is so because communities and societies are merely historical arrangements of human affairs that appear at certain times in certain places, adapt or fail to adapt to changing circumstances, and ultimately change beyond recognition, if they do not disappear altogether. In contrast, the natural order of human persons remains the same as long as human nature remains the same.

Because of the great variety of communities and societies, it is impossible to state a fixed order of precedence regarding a particular community's law and a particular society's law. However, to the extent that a society (e.g., a nation-state) proclaims itself to represent an independent community (e.g., a nation), it would appear to recognize the law of that community as having a more elevated status than its own rules and regulations: one would then expect these to reflect and respect the laws of the community. To the extent that a society creates its own community (the community of its members or subjects), its laws *determine* the laws of that community. In that case, the positive law of the society takes precedence over the norms and values that its members may subscribe to or develop independently of the formal societal hierarchy. This is the case, for example, with the modern Western state, which typically legitimizes itself by referring to its own procedures of decision-making rather than independent religious, moral or other orders of community. It will continue to defer to “public opinion”, because this a significant source of political power, but only the outcome of official decision-making procedures determines what is to be [positive] law.

Depending on the context, the notion that, in case of conflict, the natural law trumps both community law and social law is associated with the many varieties of libertarianism (e.g., [classical] liberalism, free-market capitalism—also anarcho-liberalism, and anarchocapitalism<sup>9</sup>). Certain theological views (to the extent that they refer to a “God of the world”, as distinct from a god of a tribe or sect, and reject theocracy or sacerdocracy) also qualify. The common element is the primacy of the natural law over social and traditional law. This is the essence of philosophical constitutionalism: the notion that neither societies (even state societies) nor communities are “sovereign” (i.e., not bound by any law that has its origin outside the particular society or community in question). It follows that these libertarian views are essentially agnostic concerning questions of politics (i.e., questions concerning the policies particular persons or societies should pursue). As long as people or

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<sup>9</sup> In contemporary discussions, the prefix ‘anarcho’ serves to distinguish libertarian views that reject the classical-liberal claim that the state’s legislative, executive and judicial branches are capable of maintaining respect for rational law. In these discussions classical liberalism is sometimes called minarchist libertarianism. The anarcho-liberals point out that the centralization and monopolization of powers in the hands of the state make the state the de facto judge and executioner in all cases (including those in which he is one of the parties.)

The literal meaning of the Greek word ‘archè’ is head. ‘Anarchy’, therefore, means an order without a “head”, leader or commander (‘archont’), as opposed to monarchy (one head), polyarchy (many heads), patriarchy (the head is the father), matriarchy (the head is the mother), and so on. The suffix ‘-cracy’ (as in democracy, aristocracy, plutocracy, autocracy) derives from the Greek ‘kratos’, meaning force, [physical] power, or violence. It specifically denotes an organization of *coercive* power: who has the right to force others to obey? (A leader or commander need not have coercive power.)

organizations respect the requirements of the natural law, they are free to make their own decisions.

The primacy of community law is a typical tenet of traditionalist, conservative or “communitarian” views. They are not constitutionalist views in the philosophical sense, although there is a certain likeness in that they support the idea of a historical constitution: societies, including states, are not sovereign but should show respect for community norms and values. The main theoretical problem of communitarian thought is, of course, that communities are hard to delineate and are subject to sometimes rapid change (even decline and disintegration). As noted already, attempts to strengthen a community by turning it into a formal organization are likely to fail in the long run because they will almost inevitably lead to power struggles and the politicization of community life.

According primacy to the social law of a society—usually a political society such as a modern state—is the hallmark of socialist and collectivist doctrines (e.g., [political or policy] liberalism<sup>10</sup>, social-democracy, fascism, corporatism, communism). Here, there is no longer any trace of constitutionalism, philosophical or historical. Everything is political, i.e., subject to the policy enacted by those who happen to have control over the commanding positions in the particular society.

(I shall use the terms ‘libertarian’, ‘communitarian’, and ‘socialist’ to refer to the positions noted here. I am of course aware that other writers often use them with different primary meanings.)

#### *Constitutions and the separation of powers*

Intellectuals continue to refer routinely to the concept of the separation of Church and State (i.e., of the “spiritual” and the “worldly” powers). This concept was arguably one of the solidest constitutional foundations of historical Western civilization, its moral and intellectual bulwark against caesaropapism. In recent times, however, the State has taken over or provided alternatives for all of the Church’s functions. Traditional religion has been declared “a merely private matter”, which leaves one’s affiliation with the State as the only legitimate basis of one’s “public” persona. Thus, although there still is a (largely ceremonial) Church separate from the State, the separation of worldly and spiritual powers has been effectively undone. The State claims supremacy in both spheres. The loss of this fundamental notion of the separation of powers, which implied an external limit on the province of the state and its political action, has far-reaching effects. Certainly, lip service paid to the legal-political principle of the *trias politica* (the separation of powers into legislative, executive and judicial branches of the state) does not compensate for it. The *trias politica* merely expresses a formal rule for the internal organization of a state. As such, it is not essentially different from, say, the separation of the departments of production, commerce and finance in an enterprise or corporation. Moreover, the rule is honoured more in the breach than in the observation of it. Indeed, it is virtually impossible to maintain in representative democracies, where the effective rule is that the ruling parties (executive branch) are at

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<sup>10</sup> Classical liberalism is committed to the rule of law, hence imposes on the state maximum respect for the natural law. It is a constitutional view in that it restricts, as a matter of principle, the state’s normal function to the enforcement of the natural law (the “nightwatchman” conception of the state). Political liberalism rejects the classical-liberal constitutional view and, like socialism, accepts the concept of the *sovereign* legislative powers of organized society (in practice, the state), not restricted by any other law. Hence, it permits the state to make any laws its rulers want, but insist that the policies pursued by the state should be “liberal”, i.e., rely to a fair extent on private initiatives under general legislated rules for their implementation. It is constitutionally socialist but politically liberal. Other parties join constitutional socialism to other policy-prescriptions giving the government more or less extensive powers to impose its will in economic, cultural, moral, health-related and other matters.

the same time the parliamentary majority parties (legislative branch) and the state-appointed judges are required to apply the legal rules promulgated by the legislature.

In this respect, it is worth noting that for more than a century, formal schooling has been controlled effectively by the state. This has led to an almost uniform political indoctrination of large classes of “intellectuals” and hence of the media and social, educational and cultural organizations in which they find employment. It is no wonder, then, that most people have great difficulty even recognizing the philosophical concept of politics, which is pre-occupied with constitutional limits on socially organized power. They are accustomed to the state-friendly concept of party politics, which is pre-occupied with advocating one or another set of policies to be implemented by the social authorities, but does not challenge the state's claim to have authority to regulate all areas of life. As a result, they tend to present, for example, libertarian views as merely “extreme” variants of political liberalism. They are not aware of the difference between libertarian deregulation (i.e., restoring the full force of the principles of law regarding property, contracts and liability, for example, to the business of banking) and a political-liberal deregulation (i.e., abolishing this or that regulation without abolishing other regulations and the legal privileges and immunities they confer, for example to banks).

Nevertheless, there are remnants of the constitutional impulse even in today's politics as reported by the media (in the West), usually in connection with some controversial “ethical question” (abortion, euthanasia, homosexual marriage) or ill defined social right such as the right to privacy. However, although in these areas many people feel moral outrage as they perceive the state intruding in spheres of life where it simply does not belong, the state does not recognize their opposition as having a constitutional meaning. It treats them as opponents of a particular policy, not as critics of the state's institutional claims to sovereignty and omni-competence. Everything is fit to be fixed by legislation, and legislation is entirely a matter of political power and influence.

#### *Law and law enforcement*

The positive law of societies (especially of course political societies) is much easier to enforce than either community or natural law. Societies are after all designed as systems that are specifically concerned with rules: with making, changing, applying and securing adherence to rules. Even small societies like clubs have a government and it, or some designated part of it, has statutory authority not only to make decisions in internal conflicts or about rule-violations but also to see to it that the decisions are effectively applied and enforced. The means of securing conformity to the rules may differ from one society to another but, in any case, rule-enforcement is part of any society's organizational scheme.

Things are different in communities. There the application of sanctions is typically a matter of letting members publicly but in their own name express their approval or disapproval of someone's action, and take appropriate measures as they see fit and at their own expense to enhance or reduce that person's standing in the community, perhaps even to the point “excommunication”. Such measures are of course as much subject to what the community deems appropriate as other types of action are. In many cases, communities are functioning *kritarchies*—that is to say, marked by the presence of one or more well-known figures of high standing within the community, whose counsel is sought and readily accepted in moments of crisis or scandal (such as when a serious crime or transgression of community norms occurs). These figures of authority

will also step forward spontaneously as spokespersons for the community when there is an external interest at stake, or an external threat.

With respect to the natural law, enforcement is essentially a matter of self-defense, at least to the extent that there is no community or society that has respect for the natural law among its basic principles. This is not to say that there is no internal mechanism of enforcement connected to natural law. There certainly is one. Violations of natural law inevitably cause suffering, directly but also indirectly. Such foreseeable suffering may be enough to motivate people to take measures for preventing or containing such violations. Moreover, widespread indifference in the face of violations of natural law is likely to cause suffering on a much larger scale. Thus, people know that there is a price to pay for not acting to forestall and discourage such transgressions. However, the dire consequences of violations of the natural law fall primarily on the victims and other innocents, not on the perpetrators; and no institution of a communitarian or social nature is specifically authorized by the natural law to enforce the natural law. Every person has the right to act according to the natural law and to help maintain respect for it, but apart from the victim of a crime no one else may have a strong motive to act to ensure that the harm done by criminal activity falls preponderantly, or entirely, on the criminal.

Of course, problems of enforcement are essentially technical. They are of a different nature than the problem of identifying the law and the available means of enforcing it. Unless there is an answer to the question what the law is that should be enforced, enforcement is as likely to be a source of crimes and violations as it is likely to be an adequate means of reducing their number or severity. Communities and societies cannot always be counted on to act decisively against violations of natural law. Indeed, they may themselves be guilty of such crimes. The numbers of innocent people that have been killed in foreign or civil wars, or in the course of the execution of repressive policies, by modern states is staggering. Communities that effectively restrain internal crimes may tend to protect members that have committed crimes against outsiders.

One clear mark of positivism in thinking about law is the idea that law is whatever is effectively enforced. As Blaise Pascal noted a long time ago in his *Pensées*, “Unable to fortify justice, we have justified force.” He wrote this when the notion of absolute sovereignty was associated with the rule of kings who claimed to be supreme, sovereign legislators: legislation (“making law”) was turned into an attribute of military and police—in short, political—power. The absolute kings are no longer with us, but the positivist (and ultimately barbaric) tendency to reduce law to force remains a vigorous strain in Western thinking. It is the “Right is might” or “Have power, have right” doctrine confirmed by Abraham Lincoln in a speech (January 12, 1848) commenting on the communist agitation in Europe: “Any people anywhere, being inclined and having the power, have the right to rise up and shake off the existing government, and form a new one that suits them better. Nor is this right confined to cases in which the whole people of an existing government may choose to exercise it. Any portion of such people, that can, may revolutionize, and make their own of so much of the territory as they inhabit.”<sup>11</sup>

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<sup>11</sup> The argument works both ways. As president of the U.S.A. (1861-1865), Lincoln put the doctrine into effect when his troops defeated the Southern secessionist states. Defeated in combat, the Southern states had no rights, while the government in Washington had the right to “reconstruct” the South. Lincoln accordingly redefined the American republican-federalist constitution of “united states” as the charter of a centralized unitary state, the embodiment of a mythical “perfect and perpetual (i.e. holy) Union”—hence, the custom of treating the name ‘United States of America’ as a singular rather than a plural noun.



## Session 2

### ***Model-theoretic approaches***

In their different ways, the study of law and the study of economics are now predominantly “model-theoretic”: they suppose that their material object is for all practical purposes a deterministic system that, although not directly knowable in itself, can nevertheless be known indirectly by its observable effects. Thus, via the detour of studying those effects, the system can be modelled symbolically as a formal object, a formal symbolic system of more or less fixed theoretical functions. Such models certainly do serve a cognitive purpose—knowing the real system and understanding how it works—but they also serve the practical purpose of controlling reality. They typically attempt to establish functional relationships between supposedly more or less directly controllable variables and other variables that are not directly controllable.

Economic models suppose that human beings react or can be made to react to changes in certain key variables of the system in ways that maintain or restore a socially preferred equilibrium. This social preference is not known directly but only through the observable reactions of people to observable data. The economist's task is to identify the functions that describe the relations among these observables. Ideally, then, the economists' theoretical functions should make it possible to fully describe the preferred equilibrium, predict how people will react to deviations from it, and suggest ways of ensuring that those reactions will return the system to it with little or no delay.

Economic models are usually presented as mathematical structures, suggesting that many, if not most, economic variables are quantifiable in principle and measurable in practice. The suggestion is bolstered by the use of “the measuring rod of money”, i.e. prices as direct measurements or as indicators of an underlying real phenomenon called “utility”. However, as money has no fixed value, it is often necessary to invoke hypothetical, calculated values, such as when one refers to “constant prices in 1980 dollars”. Moreover, while it is widely accepted that utility is really an ordinal concept (so that one can only speak of greater or lesser utility), its link to money prices is often taken as sufficient reason for treating utility as a cardinal value (as if there were a fixed unit of utility). In this way, one can get much more mileage out of the models, i.e., more “theorems” and deductions of in-principle testable hypotheses. The “realism” of the assumptions on which such methods are based is, of course, a matter of discussion.

Legal-positivistic models assume that positive law is the tentative or imperfect expression of a common social or collective will, interest or opinion, which is not known in itself but can be known by observing the manner and degree of compliance with the positive law. If lack of compliance is due to inconsistencies, ambiguities or other causes of uncertainty in the positive law, officials and lawyers should remedy these shortcomings. Ideally, the positive law should be fully “effective”, i.e., really expressive of the social will: if it is then what the laws prescribe will be realized because human beings either obey or can be made to obey the laws<sup>12</sup>. Thus, to the extent that effectiveness can be assumed, the positive laws describe the society: one can infer the actual workings of the real social system from the symbolic model of its positive law. Under the paradigm of positive law, lawyers' services are preponderantly focused on guiding clients through the labyrinthine structures and procedures of modern societies and institutions. Traditional aims, such as justice and fairness, are less

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<sup>12</sup> People who do not obey the law are considered deviants: they have not sufficiently internalised the common will. As long as deviance is sporadic and unsystematic, it is not deemed a challenge to the “effectiveness” of the law.

in evidence, as lawyers assume that these are “social” or “political” in nature and hence that compliance with the positive law (as the expression of the social will, interest or opinion) is the most reliable way of achieving them.

Obviously, unlike economists, lawyers are not renowned for their use of mathematical models or reliance on quantifiable data. Their models distinguish between functions that are internal to the positive law itself (and identify the legally necessary consequences of some action or event) and relationships that are more or less undetermined (because the legal consequences of an action or event cannot be predicted). Moreover, lawyers do not assume a given probability distribution to explain such indetermination of particular consequences. Instead, they base their judgments on their experience and appreciation of the concrete situation. In short, they regard their work as an “art” rather a “science”. Nevertheless, there are movements that claim to be able to enhance the “scientific value” of legal models (by wedding them to models used in other disciplines, e.g., psychology, sociology, and most recently, economics) and so to increase the efficiency of the law (by bringing in other considerations than mere effectiveness or compliance versus ineffectiveness or non-compliance).

### *1. Abstraction in law and economics*

Judging by the curricula of modern universities, it would seem that the study of law and the study of economics are essentially confined to particular models (regarding this or that national system of law, or this or that national economy) and general models that abstract from national peculiarities (legal theory, general economics). In the law schools, the focus is on the particular local (national) system of law, whereas legal theory is typically considered an “academic” subject. In contrast, in economic faculties, general economics usually takes first place.

This difference reflects a difference in the purpose of abstraction in economics and in law. In economics, abstraction leads to a consideration of human beings engaging in economic activities unencumbered by any conventions and institutional constraints other than those that make such activities conceptually possible. General equilibrium models, the most abstract model-theoretic representations of economic reality, make no mention of institutions or other historical factors. Their ambition is to model aspects of a natural universal phenomenon: human behaviour—which is supposed to be essentially the same everywhere and at all times, and therefore the same in every particular economy. In this way, general economics retains a link with human nature, and therefore with an independent, objective real touchstone for any economic model. This explains why one who is not familiar with general economic principles will not be considered an economist at all: they are the foundation of all economic science. It also explains why there is considerable overlap between the basic propositions of general model-theoretic economics and the principles of economics that were identified by other (and older) approaches in their search for the natural laws of economic order. However, model-theoretic abstraction assumes without much supporting argumentation that human behaviour, to the extent that it is relevant for the study of economics, can be described adequately in terms of mathematical, mostly continuous functions and operations (such as differentiation and integration). It also assumes that economic data fall into homogeneous groups with a constant underlying distribution, so that statistical methods and the calculus of probability can be applied to them. Natural law economics, in contrast, does not assume a priori that economic reality is amenable to mathematical analysis. Its starting point is the study of economic reality, not the application of a preferred method, no matter how powerful it may be in other domains of inquiry (such as physics). In other words, the nature of the material object should ultimately

determine the nature of the appropriate methods of research and analysis—not the other way around.

In legal theory, the favoured mode of abstraction leads to a consideration of social institutions as formal structures that are in no way dependent on human beings or other causal constraints. Legal theory has no ambition to provide a reality check for any system of positive law. On the contrary, it treats such systems as the data against which its own conclusions should be checked. It is a meta-science (if it is a science at all), not the foundation of legal science. Within the paradigm of positive law, a lawyer's knowledge is always primarily knowledge of particular local institutions (organizations, customs, practices). Hence, knowledge of legal theory is not a prerequisite for being a competent lawyer. In the same way, a person may be a competent speaker of a language without having any knowledge of general linguistics.

The case would be different if one were to revert to the old tradition of teaching general jurisprudence, which, like general economics, used to start from a conception of human nature, human action and interaction. Its aim was to identify general principles of law. It sought to explicate, and explain the reason for, such concepts as property, contract, liability, restitution, crime, guilt, innocence, justice, and the like, independently of how these concepts are used in any particular system of positive law. It would provide a way to check to what extent positive law conforms to real law, to law as it is in the nature of things—in short, to natural law. However, in the law schools, courses in general jurisprudence seem to have been largely superseded by courses that merely offer “introductions” to the study of positive law and the language of its practitioners. Similar remarks apply to the study of economics. The at present nearly undisputed dominance of model-theoretic pragmatic approaches in law and in economics and their focus on functional relationships should nevertheless not blind us to the potential of other and older traditions that were primarily concerned with truth and causal relationships in the human world itself—with the natural laws of the human world.

## ***2. Modeling behaviours and actions***

Until about the middle of the nineteenth century, law and economics were regarded as mainly natural rather than social sciences: their ambition was to identify the true principles of law and economics rather than provide formal models of, and detailed guides to expert action within, a particular society. Nowadays, the study of natural law has been virtually abandoned in the law schools. Where it survives, it is likely to be in the form of a study of antiquated literature produced by long-dead authors who, even in their own times, had no “legal” but only intellectual authority. Thus, it appears as if the natural law is a collection of merely subjective opinions in speculative books, and as if the positive law is an objective given, recorded in legal codes and collections of court verdicts, or observable in the common practices of judges and other officials. Similarly, in economics, causal analysis of human actions and how they interact over time is rare in comparison to the ubiquitous reliance on formal models and their in-principle instantaneous functional relationships. Where such models were once merely analytic and didactic aids in searching for or teaching economic principles, they appear to have become the very things that economists need to know.

The differences between, on the one hand, natural law jurisprudence and natural law economics, and on the other hand, positivism in law and in economics, stem from a philosophical distinction that is often overlooked. In English (now the dominant academic language), the philosophical meaning of the words ‘reality’ and ‘real’ is ambiguous. They are used to translate not only the corresponding German words

‘Realität’ and ‘real’ but also the words ‘Wirklichkeit’ and ‘wirklich’. The former denote what is, as far as it is intelligible; the latter denote what is, as far as it is effective (i.e., productive of physical effects; hence, tangible, observable, manipulable).

Positivism and empiricism, which constitute an influential tradition in thinking about science, require scientists to focus on the search for [recurring patterns of] observable, preferably measurable effects, because only these can supposedly be known objectively. In other words, science should concentrate on *Wirklichkeit*. It should not bother with *Realität*, with trying to grasp the true essence of things, as this would necessitate a metaphysical “going beyond the physical effect”—and in the estimation of most positivists and empiricists, metaphysics, like religion, has nothing to do with science, if it is not antithetical to everything that they say science stands for.

If we could get at the essence of things, we would be able to understand the world in terms of its own first principles. However, the methods that have proven so successful in science—that is to say, in the physical sciences—do not reveal the essences of things. They can only give us systematic knowledge of how the world appears to us. We can only get knowledge “from the outside”, never “from the inside” of things. This is sometimes expressed by saying that the scientific method is inductive: it leads from particular observations to the formulation of general propositions, some of which may even be deemed universal in scope (“laws of nature”).

This attitude certainly makes sense with respect to the physical sciences. Indeed, it makes more or less sense with respect to all the sciences that deal with non-intelligent matter or beings whose intelligence (if they have any) is of an entirely different sort from ours, so that no intelligent communication is possible between them and us. There is no way in which we can communicate intelligently with particles and electromagnetic waves, cells and strings of DNA. Even with properly trained, long-domesticated higher animals, communication does not rise to the level of intelligent discourse<sup>13</sup>. Our knowledge of them is limited to what we can learn from our observations of what they do. It does not rest on any understanding of why they do what they do (except to the extent that we surmise there is some analogy with what we would do in roughly similar circumstances). Moreover, our knowledge of them has no effect on how they behave. We can sometimes force or train them to behave in ways that they would not have shown otherwise, but this merely confirms that our relations with them are restricted to physical interactions.

As far as the physical sciences are concerned, understanding *why* things happen in the way they do in terms of what the objects of study *really* are, is not in the offing. We can only observe how such objects behave; systematize our observations of them; hypothesize about fixed or constant relationships that can be rendered as functions, e.g. of the form  $x=f(a,y)$ <sup>14</sup>; and test whether the hypothesized relationship holds in all already observed and in hitherto unobserved circumstances.

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<sup>13</sup> The root of the problem is the fact that there is no shared language or no way to translate the language (if there is one) of a species of animal into any human language or vice versa. Any human language is translatable into any other human language, at least as far as rational or logical content and structures (*speech*) are concerned, even when it is notoriously difficult to translate rhetorical nuances and other evocative and pragmatic aspects of the use of a language. In other words, human beings constitute one *logical* (or *speech*-)community, and no other species or kind of thing fits its conditions of membership. (Perhaps some manmade artificial intelligence may fit in at some future time but we are not there yet.)

<sup>14</sup> The letter *a* stands for a constant (or coefficient) and *x* and *y* are variables denoting observable or measurable aspects of particular kinds of things or phenomena. Simple examples would be  $x=a+y$ ,  $x=ay$ ,  $x=y^a$ ,  $x=ya^2$  (cf. Albert Einstein's famous equation  $e=mc^2$ ) and  $x=a/y$  (cf. Boyle-Mariotte's law of the inverse proportionality of the pressure and the volume of a gas at constant temperature). Unless at least rough estimates of the relevant constants are available, there is no point in using such functions in calculations or for deriving and testing predicted values.

Systematically successful prediction is, therefore, the touchstone of knowledge of what happens and how it happens. Note, however, that this statement relies on an assumption, namely, that the world, which we admittedly can know only from the outside, is a constant deterministic system of a kind that we can confidently describe by applying our logical and mathematical skills of classification and calculation to our observations of its effects. The assumption of constancy is obviously not an observable quality of the physical world itself. It reflects our determination to understand the world and its relation to what *we* can observe in such a way that empirical science is (perhaps even the only) valid method for acquiring knowledge of what is out there, independently of our observations of it. At least in that sense, there is a metaphysical dimension to the physical sciences.

Moreover, at its most advanced frontiers, physical science may well shade into pure metaphysics as the mathematical development of particular hypotheses outpaces our capabilities of observation and measurement. Nevertheless, the limits of those capabilities determine the limits of our empirical science. One may believe that the known universe originated in a “Big Bang” but that belief rests on one's belief in some of our present cosmological theories and how they make sense of currently observed data. No human person actually observed the Big Bang—indeed, our theories explain why it would have been impossible for a human person to observe it. More generally, if we would need to measure the values of two variables and find that measuring the value of one of these makes it physically impossible to measure the value of the other, then we hit upon a fundamental uncertainty that we cannot resolve empirically.

We reach another sort of limit when we have to deal with physical arrangements that we know to be intelligently designed. For example, the physical sciences cannot by themselves predict that, or explain why, one house has a flat roof and the house next to it a sloping roof. Moreover, we cannot predict future knowledge that is not presently available. Therefore, we cannot predict any action or behaviour that relies on or embodies such presently unavailable future knowledge.

In our studies of non-intelligent things, there is no point in trying to understand why (for what purpose, from which motive, on what sort of reasoning) such things *choose* to behave as they do or appear to do.<sup>15</sup> However, in the sciences of human actions, choices and intelligent designs are as ubiquitous as is the fact that the knowledge upon which human actors act is not constant or even equally distributed. This means that it is rare, if not altogether impossible, for us to discover the constants that we would need if we were looking for quantifiable functional relationships for use in calculations and predictions of human actions. Thus, while we may say that demand for a good varies inversely with the price of the good, we cannot meaningfully express this in a formula such as  $d=a/p$  or  $\Delta d=a/\Delta p$ . The latter formula implies that there is some fixed relation between the magnitude of a change in the price and the magnitude of the corresponding change in the quantity demanded. However, we do not have even a good approximation of the “true” value of the relevant constant  $a$ . The reason is that the actions that constitute “demand”, namely making an offer to buy at a particular price, are human choices. They are not fixed responses to some objectively ascertainable signal—not even responses with fixed probabilities.

What is demanded and priced is an economic good. As such, it is not something objective that has and retains its economic qualities regardless of what it means to any

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<sup>15</sup> One may of course hypothesize that the observable universe is an object of choice for a supernatural person and try to understand why *he* chose to have this particular universe rather than another. However, we cannot answer that question, which is entirely metaphysical, by means of the methods of the physical sciences.

particular person. On the contrary, it is subjective in that it is more or less of a good in the estimation of an individual person. It is person-relative in that one person's estimation need not match another's. Finally, it is situation-relative in that a person's estimation of its quality as good need not remain constant regardless of his particular situation at any particular moment.

In this context, "situation" refers to such things as a person's goals, values, preferences, moods, expectations, knowledge, information, perceptions, fantasies, insights, skills, budget, and available means of action, as well as to other factors, including his relations to other people, his position in one or another society, and the like. All of these can vary significantly from one person to another and for any person from one moment to the next. Not all of these factors are observable, let alone quantifiable or measurable, as some of them exist only "in the actor's mind" and even there perhaps only for a fleeting moment or at a low level of awareness. A person's "situation" is neither a given constant nor an observable or measurable variable: it is a unique, truly historical constellation of external and internal factors, subject to sudden, occasionally quite dramatic changes.

Thus, whether or not there is a constant relation between a person's actions and his situation, a formula such as  $x=f(a,y)$ —where  $y$  denotes a person's situation, and  $x$  his action, say, of making, or not making, an offer to buy—has no empirical significance. Even if for every person there was such a constant relation, we should not assume that it is the same for every person. Moreover, people can, and occasionally do, confound or surprise others by doing something entirely unexpected or novel. They may even surprise themselves, acting "out of character", "on the spur of the moment", yet not "at random". In short, they can and do act in defiance of any presumed behavioural constant. We make sense of this by saying that human actions reflect a person's choices.

Of course, it is always possible to find a function that more or less accurately fits a particular set of data. However, data are always of the past, and a retrospective fit provides no guarantee that the same function will fit new data as they become available. In the physical sciences, where constancy of the real system can be assumed, adding more data to the set will generally allow us to narrow the margin of error in calculating the value of the physical constants we need to make our functions operational. Even if the data are collected at very different dates and places, we regard them as data concerning the same underlying reality. Hence, we can attempt to inductively generalize from the data and fine-tune our generalizations by looking at more data.

In the sciences of human action, in contrast, adding more data to the set is unlikely to produce such a positive result. The underlying reality is simply that at any moment people employ the means at their personal disposal according to their personal priorities, beliefs, expectations, and the like. There is not the kind of homogeneity in the data about human actions in the flux of real-life situations that we expect and find for example in sets of data concerning volume and pressure in a gas held at constant temperature. Consequently, there is no reason to believe that we can fine-tune behavioural functions by extending our sets of data about actions and their effects. In the sciences of human action, the particular histories of the particular actors matter. Thus, we should not expect to be able to inductively extract a valid theory of human action from historical accounts. Either there is no possibility of arriving at a truly general theory of, say, economics (a position often called radical historicism), or the

theory must have another basis than induction from historical, i.e. *dated*<sup>16</sup>, data. The obvious alternative is deduction from the first principles of human action itself.<sup>17</sup>

It is to no avail to try to overcome these difficulties by using the methods and techniques of statistical analysis and the calculus of probabilities. In the sciences of human action, we are not dealing primarily with unchanging routines and homogeneous classes of events, which lend themselves to statistical and probabilistic analysis. Instead, we are usually dealing with qualitatively unique events in qualitatively unique situations. To the extent that activities appear to be behavioural regularities, they are likely to be revealed sooner or later as historical illusions, valid in one period for one group of persons but not for another period or for other groups. Yet, no independently observable condition may serve to separate the one period or group from others. The only relevant change may be that first one person, then another, and eventually many people become aware of hitherto unrecognised opportunities of action. In taking advantage of these opportunities, they create opportunities that did not exist at an earlier date and render formerly profitable actions unsustainable. Discovering and taking advantage of an opportunity is typically the feat of one person, not of a whole class of people in a similar situation. His undertaking creates a new situation not only for himself but also for others as they come to experience or know about his action or some of its consequences.

An undiscovered opportunity is of course not a relevant datum for any human agent, not even if he is a scientist. Thus, their science does not enable economists to know more, or sooner, about business opportunities than entrepreneurs do. The reason is the same as why it is not only physically but also logically impossible for earlier scientists to predict what new knowledge later scientists will acquire. Time is not a merely external parameter of human action, useful for locating actions relative to earlier, later or simultaneous actions. Rather, timing is an intrinsic property of human action. Thus, whereas it makes no sense to say of a physical event that it occurred ahead of its time, or after its time has passed (as distinct from “ahead or after the moment we expected it to occur”), we are continually reminded of the importance of choosing the right moment for undertaking, or abandoning, an action.

Because action reveals new information, generates new knowledge, changes expectations, and so on, it modifies the situation in which agents will undertake further action. This is not at all like a laboratory experiment in which an intervention reveals new information about the behaviour of, say, a gas, and so increases our knowledge of its properties as well as our power to use it for our purposes. *We* learn something new from the experiment, but the gas does not: its behavioural constants remain as they were. In contrast, a human action always has the potential of revealing something new about our situation that will induce us to act differently from the way we did before we had that revelation. After all, that is the point of learning. Moreover, learning is a personal process. One person learns *this*; another learns *that*; and what one person has learned does not spread automatically or instantaneously or in exactly the same form to another, let alone all others.

### *Perils and paradoxes of scientism*

None of the considerations mentioned in the previous section enter into the positivistic mindset that has given us the modern model-theoretic approach in

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<sup>16</sup> “Dated” both in the sense of referring to a particular date and in the sense of not being relevant at the present moment.

<sup>17</sup> This is the road taken by Ludwig von Mises, Murray Rothbard, and others (e.g. F.A. Hayek) within the ambit of the Austrian School of Economics.

economics. It has mimicked the physical sciences with its basic assumption that its object of study is a deterministic system that we can get to know only from the outside, i.e., by formulating hypotheses about how it will behave and then gathering data to test the hypotheses. This is the fallacy of scientism<sup>18</sup>: expecting knowledge about the world of human action from the application of the methods of the physical sciences, even though the relation of the physical scientist to his objects of study is known to be fundamentally different from that of, say, an economist to the human beings who are the object of his studies. Thus scientism induces economists to regard human beings as if they were of a different kind of species than the economists who study them—as “behavioural units” defined by one or another behavioural function (e.g., utility maximization), whose “intelligence” is limited to their having some built-in algorithms for transforming “given” inputs into optimised outputs. We marvel at that sort of “intelligence” when we see spiders spinning their intricate webs in a great variety of conditions, but we are entitled to ask if it is what people exhibit in their economic activities. Obviously, the economists would not describe themselves as mere behavioural units hard-wired to maximize some function or other.

The basic assumption entails the need to derive the values of constants or coefficients in order to make the hypothetical functions that supposedly describe the functional relationships of the system (the real economy) operational—fit for doing calculations and making quantifiable predictions. The model-theoretic approach has, in fact, been called ‘the hydraulic view of the economy’. It supposes the economy to be like a hydraulic system of containers of various shapes and sizes linked together by a complex arrangement of pipes. In such a system, changes in the volume, pressure or temperature of the water in one container eventually affect the contents in all of the other containers—at which point the whole system returns to a state of rest (equilibrium).

It may well be that the hydraulic analogy is a useful *didactic* device, if the purpose is to illustrate that changes in one part of an arrangement of connected parts will spread throughout the whole arrangement. As a scientific hypothesis about the nature of an economy, it is worthless. Moreover, it is a fallacy to think that “this does not matter because it is merely a starting point upon which we can improve by adapting our functional description of the system to make it fit an ever-expanding set of data.” By similar fallacious reasoning, one can argue that “it really does not matter that interventions and regulations in the economy produce unforeseen and often undesired consequences because we can always deal with these when they manifest themselves”. There is no reason to expect the later, ostensibly “corrective” interventions and regulations not to produce their own unforeseen and undesired effects; and no reason to expect the people reacting to the emerging undesired consequences to have the same desires as those that agitated for the original interventions and regulations. In short, there is no reason to believe that the real economy is a constant, unchanging system that will progressively reveal its inner workings as more data become available. There are and can be no constants in human actions and interactions if these by themselves modify the situations of the actors by revealing new information, knowledge and insights to them, by redrawing the boundaries between what appears feasible, possible or likely and what appears infeasible, impossible or unlikely. Moreover, there is no chance of extracting information from the data (about the past, or about distant places)

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<sup>18</sup> The term was coined by Hayek, *The Counter-revolution of Science* (1952). It “involves a mechanical and uncritical application of habits of thought to fields different from those in which they have been formed.” (Hayek, *The Pretense of Knowledge*, his 1974 Nobel Prize acceptance speech)

that will remain valid for all future events wherever they may happen. There is no reason to believe that such data fall and will continue to fall into homogeneous classes that lend themselves to statistical analysis. Nor is there a reason to believe that relative frequencies (probabilities) of choices made in the past will last into the future. At best, the approach may *seem* to work in situations where the trends of the recent past in the relevant locality do not change much. However, where trends are driven by human actions, they are bound to change. In other words, the empiricist approach has limited practical value in the study of economics, and no cognitive value to speak of in discovering general, universal truths, valid for all times and places.

Several paradoxes follow from the failure to consider human action as something else than in principle predictable behavioural responses to “scientifically observable” data. For example, the model-theoretic approach of the ubiquitous equilibrium models used by economists comprehends competition not as something human agents engage in but as a condition of the economic system itself. Hence, “perfect competition” is the conceptually ideal, perfectly efficient form of the system—in the same sense that the theoretical construct of a frictionless machine provides an engineer with an upper but unattainable limit of mechanical efficiency. However, under the equally unattainable conditions of perfect competition, there is no scope for competitive activity. All agents (or rather, behavioural units) possess the same faultless and complete information at exactly the same time as every other agent. Thus, they all respond instantaneously to the present condition of the system and do so in exactly the right way to immediately bring about the efficient equilibrium condition implied in the data to which they respond. This may be a good description of how a thin layer of water turns itself into a sheet of ice when its molecules are exposed to freezing temperatures, but it has no relevance for understanding rivalry among human agents.

Another paradox is that profit has to be understood as rent accruing to a factor of production and not as the reward of successful entrepreneurial action (which has no place in a deterministic system). However, entrepreneurship manifests itself precisely in initiating action, bringing together factors of production and the means of paying for their use, and employing them according to some business plan. Of course, the entrepreneur may foresee in his business plan a payment to himself for letting the enterprise have the benefit of his own factors of production (labour services or capital) or for putting at risk the capital that he invests in the enterprise. Such payments are to be understood, however, as wages, interest payments, and risk premiums, not as profits. Entrepreneurial profit or loss derives from being alert to opportunities and acting on the judgment, which might turn out to be correct or incorrect, that there is a way to make available factors of production produce higher-valued output than they do in their present uses. But being alert, exercising judgment and acting on it is not a factor of production: it cannot be produced, sold, hired, loaned or given away.

Still another paradox appears in the inclusion of the so-called law of diminishing marginal utility. It is typically thought (and taught) to be a sort of physiological or psychological law of saturation: the first cigarette gives more pleasure than the second, the second more than the third, and so on, until the smoker's craving for a cigarette disappears. However, whether the example corresponds to a law of physiology or psychology or not, it is in any case doubtful whether the demand for, say, money, labour, or lorries is a matter of physiology or psychology. Nevertheless, there is an obvious relation between marginal utility and human action as the purposeful employment of means to one or another of an actor's ends. A means of action that can equally well serve either a higher- or a lower-valued but not yet attained end will be used to the attain the former rather than the latter. It derives its utility from the highest-

valued not yet attained end for which it can be employed. Obviously, this highest-valued but not attained end is of a lower value than any end that has already been attained by using the means in question. In other words, the utility of a means of action inevitably diminishes as it is used to secure successively less valuable ends. In short, marginal utility is a necessary feature of human action, regardless of the actor's physiology or psychology.

It is also paradoxical to see a complex phenomenon such as the structure of production, which encompasses a multitude of more or less specific items (capital goods) employed in a great diversity of partly complementary, partly competing lines of production, represented model-theoretically by a single value called Capital. This value is (except in the case of a fully centralized economy) of no interest to anybody: people are concerned about the value of *their* capital goods, not of all capital goods. Endeavouring to maintain or increase the value of their capital goods, they may (and often do) diminish the value of the capital goods employed or held by others. The model-theoretic notion of Capital refers at best to an *ex post facto* statistic, not to a determinant of economic activity.

The use of capital goods implies credit. The capital goods required for any undertaking have to be put in working order weeks, months, even years before they will be capable of earning enough revenue to pay back what they have cost—and there is no certainty that they ever will be capable of doing that. The entrepreneur buys the final products on credit for sale to the public sometime in the future, yet in the meantime he must have the means to pay his workers and suppliers. In most cases, he will get this money from capitalists (i.e., savers-investors) who grant him loans or buy shares in his enterprise.<sup>19</sup> Credit must therefore come out of real savings. It constitutes a waste of savings in those cases in which it goes towards mal-investments, i.e., projects that eventually return losses rather than profits. However, if capital goods are treated as constituting a homogeneous quantity (represented by a single variable) then the possibility of mal-investment drops out of sight: with one variable one can only represent “too much” or “too little” investment.

Surely, a valid economic science should be able to explain the phenomena of competition, profit, marginal utility and capital, and not be satisfied with explaining them away or merely postulating their existence. Moreover, there are other problems. Microeconomics and macroeconomics appear to require different models with no satisfactory way of deriving one from another. Yet, there can be no doubt that there is only one economic reality: ultimately, micro-models and macro-models refer to the same thing. Part of the problem here is that the model-theoretic approaches of mainstream economics are particularly disappointing when it comes to dealing with the phenomenon of money, which is by all accounts an essential condition for the very existence of complex economies.

The study of economics is on the wrong track if it confines itself in the manner of a physical science to the study of economic *effectivity* (“Wirklichkeit”) while foregoing to pay attention to economic *reality* (“Realität”). The former boils down to a form of description of a state of the economy in a particular place at a particular time that ignores the fact that human persons, their actions and interactions drive the economy. The proper study of economic reality, by definition, aims to reveal the principles that make it intelligible. If scientific predictions of the kind that are prized in physical science are not forthcoming from economic research, then we want to understand why

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<sup>19</sup> In other cases, he may get the money from the government as a grant or subsidy. That money is likely to be tax money (in which case it represents savings forced on the tax-paying public); or it may be in the form of, say, newly printed paper money (in which case it does not represent any savings).

this is so. Distorting the reality of human persons and their actions merely because one is addicted to a borrowed method that is unable to deal with anything else than behavioural units and stimulus-response connections is not the way to go. Unlike in the physical sciences, where the scientist-observer and the things he studies are entirely different sorts of entities with no possibility of intelligent communication, in the sciences of human action both are of exactly the same kind. Thus, if the world of human action can be known at all, it can be known “from the inside”, not just from its effects as they appear on the researchers' data-registering apparatus but from the first principles of human action itself—its essence.

The question remains whether similar criticisms apply to the legal-positivistic approach to law. The latter does not rely on mathematical models (although the so-called Law & Economics movement suggests that it should). So, much of the critique of model-theoretic approaches in economics would not be relevant for the student of law. However, the idea that the study of law reduces to the study of the positive law of this or that society and ultimately, therefore, to the study of a society's common will, interest or opinion, remains counterintuitive. After all, societies (and cultures) come and go, but they remain at all times phenomena produced by human actors, their actions and interactions. Unless we should suppose that, merely because they are social, all social arrangements are equally lawful from the perspective of human nature, we cannot dismiss the study of natural law. We shall return to the question later. It will appear that the methodological confusion is at least as great in the study of law than it is in the study of economics.

### ***3. Knowledge and power***

In a good model, some variables should correspond more or less directly to observable, preferably measurable conditions in the real material object. The formal model-theoretic relations should then be sufficient to predict with greater or lesser precision how changes in some real conditions will play out over time. If a model is correct, interventions in the real world that match particular settings of the controlled variables should yield particular desired effects. If it is not correct, the model should be refined or altered, and re-tested until changes of rules, procedures, incentive-structures, and the like, do produce the desired effects.<sup>20</sup>

For obvious reasons, one does not admit to testing for—i.e., trying to produce—undesirable effects in law or economics, although one can try to check a model by applying it to past events to explain how undesired effects came about as the consequence of particular interventions by law-makers, policy-makers or administrators. For equally obvious reasons, the actual testing of models in law and economics is rarely of the kind that one would find in science laboratories, where tests are highly controlled so as to exclude contamination of the results by unknown factors. Hence, testing in law and economics usually takes the form of keeping large records of data and then checking changes in the data between the period just prior to the intervention and a later period in which its consequences should have become observable. The changes in the data should somehow and to some extent match the predictions or expectations based on the model. However, there inevitably remains a lot of uncertainty regarding the manner and degree in which factors that were not or inadequately accounted for in the model have contributed to the observed changes in the data.

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<sup>20</sup> See Milton Friedman's essay "The Methodology of Positive Economics." (1953), excerpted below.

The models, then, are the formal objects of positivistic approaches to law and economics. Because the corresponding material objects are supposed to be unknowable in themselves, the primary purpose of the formal objects is not the discovery of truth about any underlying reality but gaining insights into “what works”. In other words, the primary concern is with the efficacy and the efficiency of actions (policies) based on the model in use. Failures or disappointments can be met either by tinkering with the model (experimenting with new or more complex functions) or by investing more resources in making human behaviour conform to the specifications of the model (e.g., by stricter control and enforcement or other means of changing the incentives for human agents to act in one way rather than another). Thus, the models serve not only as tools of knowledge and understanding; they serve also as tools of control. Indeed, with its supposition that it is dealing with deterministic aspects of reality, the model-theoretic approach suggests the possibility of planning and inducing changes to produce real improvements in society in the same way in which engineers can use theoretical and experimental physics to improve existing ways of doing things.

To the extent that this control motive, this desire to improve society, is present, we may expect models in law and economics to have a particular interest in variables that are more or less directly controllable by those who are in a position to apply the model. Obviously, the latter cannot be envisaged as working in institutional environments similar to physics laboratories, in which the researches intervene from the outside in a well-controlled, well-designed and well-insulated system to detect how it behaves under specific conditions. While academic economists and lawyers may produce formal models as they see fit, the decision to intervene in human society according to one model or another is clearly political. It is reserved for people in political institutions, the state, the government, or the public sector. To them falls the task of formulating a clear conception of the desirable condition of society. They should have at their disposal the right and enough means of control to implement the interventions: information-gatherers, inspectors, monitors, law-enforcement officers, and a wide array of educational, regulatory, fiscal and monetary tools.

Thus, positivism in law and economics tends to emphasize questions concerning what the government can do or what it would need to implement a particular policy. It accordingly tends to emphasize distinctions between public sector law and private sector law, public sector economy and private sector economy. This scheme implies that, ideally, the public sector is the controlling sector, able and empowered to set the values of directly controllable variables, while the private sector is the controlled, dependent sector, reacting in predictable ways to public-sector decisions. In this way, the positivistic approach fosters the idea that the studies of law and economics prepare their practitioners to be “counsellors of the Prince”. Consequently, even questions concerning the merits of government intervention versus of the merits of letting the market work are framed as policy-questions: “letting the market work” is just another policy-option the government may accept or reject. Similarly, questions concerning the merits of legislation and regulation versus the merits of letting independent courts find justice in particular cases are framed as policy-questions to be decided by the legislative branch of government. In both cases, we have the idea of an omni-competent decision-maker, an absolute “Prince”, with the authority to draw and re-draw the boundaries between the public and the private sectors, even though he is at the same time party and judge and executioner in the case before him.<sup>21</sup> The basic notion of

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<sup>21</sup> Although advocating, as a matter of principle, the primacy of de-centralized [evolutionary] judge-made law over centralized [constructivist] legislation, the classical-liberal author F.A. Hayek (in *Law, Legislation, and Liberty*, Vol.I, 1974) also writes about the need for legislation to correct judge-made law when it goes

constitutional thought, that such boundaries are matters of principle rather than of decision, does not fit readily into the positivists' schemes. Moreover, the idea of an absolute "Prince" with an exclusive interest in "doing the right thing" is absurd. Because of political rivalry and power struggles, "uneasy lies the head that wears a crown."<sup>22</sup> A lot, if not most, of a ruler's or government's energy is bound to be devoted to keeping power, defeating opponents, forging supportive coalitions, and creating more instruments of control. It is likely that, on most occasions, partisan politics will have a higher priority than any real or imagined "public interest".

Natural law approaches in law and economics do not have this fixation on "Princes" and their apparatus of rule. There is no reason to suppose a priori that economic reality or real law imply the need for a *political* ruler, judge and enforcer. The starting point of natural law approaches is the nature of things, not the specifics of a particular social system in a particular period of history. The primary justification for this starting point is that the nature of things can be presumed to be far more constant than the manifold social and historical guises in which the things in question appear. From the natural law perspective, social and historical phenomena are explananda ("what needs to be explained"). It will not do to extrapolate from any particular society in any particular period to the whole of human experience, even if it is our own society as it is today, even if it is some other presently "extremely successful" society.

The use of the model-theoretic approach in economics explains the disconnect between the economic discourse of academic specialists (and the politicians and the media, who take their clues from them) and the economic discourse of ordinary people, who are nevertheless engaged daily in solving economic problems. Confronted with academic discourse, people readily acknowledge that they do not understand and cannot follow the reasoning because they are not familiar with all the assumptions and technicalities that go into the models. They do not look at the world through model-theoretic glasses. Being told that these models are "scientific", they are inclined to accept on the authority of the specialists that their own "common sense" provides bad guidance, and to bow to the "Prince", who invokes the counsel of these specialists. Obviously, such trust is entirely misplaced if the model-theoretic assumptions and technicalities fail to capture the reality of economic actions and relations—a reality that, one would think, is largely constituted by the common sense people have gained in actually and continually dealing with situations and problems of all kinds.

Similar remarks apply to the discourse of lawyers. For them, the law is indeed wrapped up in the procedures and technicalities of the national positive law and the state-imposed institutions that virtually monopolize its administration. Moreover, it is riddled with rules and regulations that provide exemptions, immunities, privileges and other "exceptions" to the general principles of law that people take for granted in everyday-life, where they deal with one another directly (on a person-to-person basis), not through the institutional structures of formal societies. Yet, the specialists (and the politicians and the media) maintain that in law, as in economics, common sense cannot

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the wrong way. This notion of a god-like legislator with power to override the judges "but only when necessary" obviously abstracts from the reality of politics. Does anyone really believe that the legislators will remain idle, possibly for years or decennia on end, only to become active when there is some necessity of which they and they alone are the judge? Is it not far more likely that they will see such necessities wherever they look, and that they will be under constant pressure from partisan advocates and lobbyists to "correct" the judge-made law. Reasoning similar to Hayek's is also common in the literature on economics, for example, when economists justify government intervention "only in the case of proven market failures." This is the notion that the government is like a fire brigade—but a fire brigade with the authority to define what is and what is not a fire.

<sup>22</sup> This is Shakespeare's famous rendition of the basic insight of Nicolo Machiavelli: the problem for politicians is to get and keep power given that others have similar ambitions.

be trusted. It is no wonder that people are led to believe that one has to be a lawyer to know the law, when they are continually told that the law is the same thing as the lawyer's model of a society; not a reality that owes nothing to any model.

### *Man and citizen*

The gap, noted above, between “academic” and “ordinary” discourse is not simply a question of the academics' use of “technical” language. The root cause is the difference, to which we drew attention in the introduction, between natural persons and artificial persons. To be more precise, the difference between a human person speaking and acting in his own name, on his own personal responsibility, and a human person speaking and acting in some corporate capacity, i.e., performing a role or function in a formal organization. This is especially true, of course, where the state is concerned: it imposes upon every natural person a legal status (“citizen”, “legal alien”, “illegal alien”) with particular “rights”, “duties” and “obligations”, all of them organization-specific and often widely at odds with common sense.

Consider the difference between a natural person and a citizen. If you take, say, € 100 from your neighbour's pocket without his permission, you are a criminal—a thief or a robber. However, as a citizen you have the right to cast a vote to authorize the state, its government or officials to impose a tax of €100 on your neighbour and to use the proceeds or part of them to provide a subsidy, grant or tax-relief to you. Moreover, if your vote carries the day, it may even become an illegal, punishable act for your neighbour to resist this imposition or to seek to avoid having to suffer it. From the point of view of the natural law, theft is theft, whether it is the act of one or more individuals or the act of an organisation acting on behalf and with the consent or authorisation of one or more individuals. Likewise, self-defence is self-defence, whether it is undertaken by a single aggrieved person or by an organisation acting in his behalf and at his request. Not so where the positive law of a political entity such as the state is concerned. According to the positive law, the question of the lawfulness or criminality of an act is not resolved with reference to the real nature of the act but with reference to the social status of those who commit it. This is true with respect to any act that would be criminal under natural law, not only with respect to stealing. Thus, a citizen (an artificial person) has a right to do what no natural person has a right to do. Conversely, there are many sorts of things that a natural person would have the right to do under the natural law to which most citizens have no right under the positive law of the state, although usually some citizens (the representative agents or officials of the state) still retain the right to do them on behalf of the state. The specifics depend on the particular positive law that applies to the case.

The foregoing explains the libertarian thesis that where the positive law is entirely subordinate to the requirements of natural law, it is merely a way of “legalizing crime” or else “criminalizing lawful actions”. The implication of the positive law is, therefore, that an individual person in a society always has hope that there may be legal means to get what he cannot get in ways that are compatible with his natural rights and obligations. All he has to do is to get enough control or influence over the political decision-making processes to ensure himself of the collaboration of the organs of the state. It does not really matter whether he achieves this control or influence in an occasional voting procedure or by persistent lobbying of the relevant authorities. Some people are more adept than others in making the most of their natural rights; just so some people are better placed and more adept at making use of the opportunities offered by the positive laws of a particular society—including opportunities for

modifying either the rules of the positive law or the conditions of its implementation or enforcement.

Rent seeking (as economists call the attempt to secure some benefit or other from the use of political, legislative or administrative means) is, therefore, a regular feature of political organisation. This practice covers not only the actions of citizens seeking favours. It also covers the actions of politicians and bureaucrats who, on the one hand, threaten to impose or enforce rules that will harm the interests of some individuals or groups and, on the other hand, are willing to withdraw their support for, or to actively oppose, the legislative or regulatory proposals in return for concessions or funding from their targets.

Unlike the principles of natural law, which are universally known, and to a lesser extent, the principles of community law, which are well known locally, the positive law is riddled with uncertainty, as it is subject to sudden, possibly far-reaching changes. It is, in fact, the result of decisionist policy-making, not of law making (in a proper sense of the word ‘law’). Because this uncertainty also affects economic life—via changes in the tax-and-subsidy laws, the regulatory regime superimposed on property law, contract law and liability law, and not least the monetary policies—a positive-law regime prompts all sorts of groups and interests to invest heavily in political activities and organisations, which only increase the overall uncertainty of the regime. It is hard to predict which of these “investments” will eventually pay off and who will eventually end up paying for them (in the form of taxes, fees, or loss of freedom of action). Moreover, as many people face the choice of getting what they want either in *lawful* ways (e.g., via the market) or in legal ways (via the state), the economic meaning of the price system changes from a common source of information about relative scarcities to a politically manipulable variable with highly reduced information value.

This uncertainty is particularly manifest in democracies with “mixed economies”, where both “the market” and “the democratic process” offer ways in which people can express their preferences. In this respect, both are ethically neutral in that they merely record which preferences are expressed. However, while markets allow the formation of as many niche markets as people are willing to sustain, the democratic process (especially voting) is concerned with identifying who will privileged access or control of the monopolist organisation of the state. Thus, markets allow people to express and satisfy their desires at their own risk and expense; the political democratic process allows some people to satisfy their desires at the expense of others. In economic terms, the democratic process is therefore “inefficient” by definition. It does not permit the equalization of costs and benefits “at the margin” because it is, in effect, a winner-takes-all game.



## **Theories of Law\***

What are laws? What are the criteria for their existence and validity? Must laws satisfy certain moral requirements in order to be binding? What connection, if any, is there between the existence of laws and the various jural agencies and activities? What are the conditions for the existence of jural agencies? Instead of taking up these questions one by one, we shall focus upon two traditions in legal Philosophy - legal positivism and natural law - and see how important representatives of each tradition treat them. These traditions are not monolithic: in determining the existence of laws and jural agencies, the various criteria (behavioural, deontic, etc.) are differently emphasised by theorists who belong to the same tradition.

### **1. Legal Positivism: Austin**

By way of getting our bearings, it is useful to begin by contrasting the traditions in a vivid manner. An early intimation of legal positivism is to be found in a fragment of a classical statement preserved in Justinian's Digest: "What pleases the Prince has the force of law". In modern terms: whatever is enacted by the lawmaking agency is the law in the society. Contemporary legal positivists would generally accept this thesis. And they would also agree with the nineteenth-century English writer John Austin that "the existence of law is one thing its merit or demerit is another."<sup>23</sup> With varying degrees of emphasis, natural law theorists reject both of these theses. They tend to maintain that lawmaking is a purposive activity that must satisfy certain moral requirements in order for it to have laws as its outcome. Secondly, they tend to maintain that the question of the existence of laws cannot be completely separated from the question of their moral obligatoriness or moral quality. Thus, natural law theorists adopt, or come close to adopting, a moral-deontic position.

It is essential that we should immediately note that Austin's quoted statement does not imply that laws cannot be morally evaluated; quite the contrary. Austin was a utilitarian. Like Jeremy Bentham, Austin thought it possible to construct a "science of legislation" based upon the Principle of Utility (the greatest happiness principle), which would provide guidance to the legislator. But, following Bentham, he held that we should clearly distinguish those laws (good or bad) that actually do exist in a society from laws that might exist if the legislator were properly enlightened. Secondly, he held that the laws should also be distinguished from the society's prevailing rules of morality ("Positive morality").

Austin wished to give an account of the general features of legal systems, and therefore set out to determine "the province of jurisprudence." The key word in jurisprudence, according to Austin, is command.

The laws of a society are the general commands of the sovereign - the supreme political authority - to govern the conduct of the society's members. The sovereign is that individual, or determinate group of individuals (a) toward whom the bulk of the society has a habit of obedience, and (b) who is in turn not habitually obedient to any one else. A command of the sovereign (a law) imposes an obligation or duty on the persons who are directed to act or not to act in a certain way. We may say that Austin's

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\* Adapted from M.Golding: Philosophy of Law, an introductory text

<sup>23</sup> John .i.Austin;: The Province of .i.Jurisprudence; Determined, first published 1832 (New York: Noonday Press, 1954), p. 184. Selections from writers discussed in this chapter may be found in M. P. Golding, ed., The Nature of Law (New York: Random House, 1966).

theory combines elements of behavioural or psychological-behavioural (according to how we understand the term "habit") and deontic approaches to the existence of laws and the lawmaking agency. Austin's interpretation of the deontic element is brought out in his analysis of "commands." What is a command? Austin's definition has two components. A command is a signification of desire that someone should refrain from acting in a certain way. It will usually (though not necessarily) be formulated in the imperative mood. Obviously, however, not every expression of desire is a command. If I say "Am I ever thirsty!" then I thereby signify my desire for a drink but I haven't issued a command. Austin, therefore, distinguishes a command, from other significations of desire "by this peculiarity... that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire."<sup>24</sup> Commands are orders backed by threats. It is in virtue of evils (sanctions) that expressions of desire not only constitute command but also impose an obligation or duty to act in the prescribed ways. "Command" and "duty", says Austin, are correlative terms. The command situation, then, involves the relationships of superiority and inferiority. That laws emanate from superiors is considered by Austin to be a necessary truth.

Austin's theory, with its great stress on the agency for making the laws, was quick to find its critics. We can consider only a few objections.<sup>25</sup> One of the most damaging criticisms, I think, is brought out by Sir Henry Sumner Maine. We need not accept all of Maine's account of the evolution of legal institutions in order to agree with him that explicit legislation comes at its later stages. Legislation presupposes not only a centralisation of authority that is lacking in many communities but also a "new order" of ideas. In the classic oriental despotism, the chieftain could command anything, and the smallest disobedience might be followed by death. He raised armies, collected taxes, and executed his enemies. But, says Maine, the chieftain never made a law. Although he issued particular commands, he would not have dreamed of changing the rules, the immemorial usages, under which his subjects lived. Laws, therefore, are not necessarily to be identified with made laws.<sup>26</sup> There are two ways in which Austin can reply to this objection. The first is to say that the regime of rules referred to by Maine is not a legal system but, at best, a positive morality. If the rules are such as to impose obligations, they presuppose a commander, Austin would argue. But this reply, which involves Austin's command theory of obligation (including moral obligation), is implausible, as we shall see. In order to hold that laws derive their obligatoriness from sanctions, one needs only to presuppose the existence of jural agencies for their enforcement. It is not necessary to assume that the laws are also someone's commands.

Austin's followers suggest a second course. Let us grant, they say, that Austin's theory is incorrect as applied to primitive legal systems; it is, nevertheless, accurate for modern ones. Thus in so-called systems of municipal law, customary rules of conduct, no matter how immemorial, are not to be accorded the status of law unless they receive the imprimatur of the sovereign. This reply, however, aside from conceding a very major or point, does not relieve Austin of all his difficulties.

Austin insisted that when the sovereign is a body of individuals, it must be a determinate body. That is to say, there is a rule (e.g., an election law) whereby it may be determined for any individual in the society whether he is a member of the sovereign

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<sup>24</sup> Ibid. p. 14.

<sup>25</sup> An important issue that we cannot consider is .i.Austin;'s denial. as a consequence of his theory, of jural status to international law.

<sup>26</sup> Sumner Maine: *Early History of Institutions*, 7th ed. (London: John Murray, 1897), pp. 375-86. For an elaboration of this criticism in relation to modern systems, see Lon L. .i.Fuller;, *Anatomy of the Law* (New York: American Library, 1969).

body. The reason for this insistence is that only a determinate body can be said to express its will, signify its desire. Who, then, is the sovereign in a federal system?

Austin's answer for the United States is "two-thirds of the Congress and three-fourths of the States": this "body" has the ultimate authority to change the Constitution. But it seems absurd to say that this (shifting) body wills, or desires, the laws. Second, in the modern legislature, the laws that are enacted are meant to bind not only the ordinary citizen but also the legislators themselves. On Austin's theory, we would have to conceive of the legislators as commanding, ordering, and threatening themselves. But this also seems absurd. Even if we confine Austin's theory to a hypothetical King Rex, an absolute monarch who is above the law, there is difficulty. When Rex I dies and his son Rex II assumes the throne in virtue of a law of succession, we cannot conceive of that law as a command of the king. Furthermore, it may take some time before we can say that the members of the society have built up a habit of obedience, or are generally obedient, toward Rex II. During the interim the society continues to be governed by laws; but they cannot be said to be the commands of the sovereign in Austin's sense. I think enough has been said to show that if we wish to regard laws as commands, they must be "depsychologised," as Hans Kelsen says. That is to say, we should not necessarily regard laws as the expressions of someone's desires.

## ***2. Commands and Obligations***

Two further objections should be considered. The first, which is from Professor Lon L. Fuller, is part of a broad attack on legal positivism.<sup>27</sup> Law (or, perhaps more strictly, lawmaking) in Fuller's view is the enterprise of subjecting human conduct to the governance of rules. Abstractly stated, this is consistent with Austin. But Fuller goes on to point out that there are radical forms of "legal pathology" which may infect the attempt at regulation of conduct. Even confining ourselves again to the simple situation of King Rex, there are eight ways in which Rex can fail to make law:

- (1) failure to achieve rules at all, so that every issue must be decided on an ad hoc basis,
- (2) failure to publicise or make available to the affected party the rules that he is expected to observe,
- (3) abuse of retroactive legislation,
- (4) failure to make the rules understandable,
- (5) enactment of contradictory rules,
- (6) enactment of rules that require conduct beyond the power of the affected party,
- (7) introduction of such frequent changes in the rules that the subject cannot orient his actions by them, and
- (8) lack of congruence between the rules as announced and their actual administration.

There are, therefore, certain conditions that must be met in order to accomplish the subjection of conduct to rules. It is incorrect simply to identify lawmaking with Rex's issuing of commands. (Later on we shall examine Fuller's interpretation of the conditions for successful lawmaking.)

The second line of criticism comes from Professor H. L. A. Hart, who argues that Austin's analysis confuses having an obligation to do something with being obliged

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<sup>27</sup> L. L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969).

(forced) to do it.<sup>28</sup> When a gunman sticks a gun in my back and says "Hand over your wallet," he has issued an order backed by a threat. I might describe this situation by saying that I was obliged - had no choice but - to hand over my wallet, but I would hardly say that I had an obligation to do so. Hart also points out that whether someone has an obligation to do something on a particular occasion is independent of the likelihood of his incurring the threatened evil on the particular occasion. The connection between sanctions or coercion and obligation, therefore, is not to be explained by the lawmaker's use of force, threatened or actual. For this still leaves us at the level of being obliged rather than having an obligation. What is required instead, according to Hart, are rules that confer authority or power on persons to prescribe behaviour and to visit breaches of the prescriptions with the appropriate "evils." So far our discussion has been rather negative. It seems to me that Austin has no response to these criticisms other than a modification of his theory. Its contours may be suggested. Hart's criticism does show, I think, that the correlativity between command and duty breaks down. Austin, however, might easily concede the point that the sovereign (the state or government) is simply the "gunman writ large." What distinguishes the tax collector, who in effect sticks a gun in my back when he sends me his bill, from the ordinary gunman is that the former is acting under the colour of a (depsychologised) general command of the sovereign, who must be conceived as combining both the lawmaking and law-enforcing agencies. The sovereign's commands are laws because they are generally enforceable, though enforcement may fail in a particular case. It is the situation of the "gunman writ large" that characterises a general command as a law and as imposing a legal obligation. In this way, the correlativity between command and duty is restored.

One may question, however, the usefulness of the term "legal obligation" in this connection. Does it point to anything more than a grandiose kind of coercive system, and if so, why retain it? An exponent of traditional natural law doctrines would argue that there is no kind of obligation that is entirely separable from moral obligation. But Austin cannot allow for any necessary linkage between legal and moral obligation because "the existence of law is one thing; its merit or demerit is another." Unfortunately, Austin's extended comment on this tenet of legal positivism serves to muddy the waters.

The context is a discussion of a passage in Blackstone's Commentaries according to which human laws are of no validity if they are contrary to the laws of God. Now, says Austin, if this means that positive laws ought to be framed so as to conform to divine law, he would agree. But Blackstone seems to mean that a law which conflicts with divine law is not binding or obligatory, and therefore is not a law. This is "stark nonsense", as anyone who violates a law on this ground will be shown when the threatened punishment is inflicted upon him. From this it would seem that Austin identifies the bindingness of the law with its enforceability. Austin also goes on to castigate Blackstone for having mischievously abused language. The laws of God, whose index [according to Austin] is the Principle of Utility, are uncertain; so that what appears pernicious to one person may appear beneficial to another. Austin therefore concludes that to proclaim generally that "all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy..."<sup>29</sup> With this statement Austin comes very close to revealing himself as a crypto-idealist, to use the late Felix Cohen's term. That is, he seems to invest all laws with a kind of moral

<sup>28</sup> .i.Hart;: "Legal and Moral Obligation" in A.I. Melden (ed.): *Essays in Moral Philosophy*. (Seattle: University of Washington Press, 1958), pp.82-107

<sup>29</sup> .i.Austin;:, *The Province of .i.Jurisprudence; Determined*, p. 186.

imperativeness: the law is the law, it is morally binding, and there is a moral duty to obey it. If this is Austin's view, then legal obligation is more than just enforceability, and Austin has transformed his legal positivism into an ideology, as Professor Norberto Bobbio would put it.<sup>30</sup>

### 3. *The Natural Law Theory: Aquinas*

It may be possible to save Austin by the introduction of a few apt distinctions, but we shall not pursue the matter further. Austin was a member of a long line of thinkers who emphasised the "will" element in lawmaking. Let us now turn to a natural law theorist, St. Thomas Aquinas. His tradition emphasises the reason element. The heart of his position is this:

“As Augustine says, that which is not just seems to be no law at all. Hence, the force of a rule of law depends on the extent of its justice.... Every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.” (Summa Theologiae, I-II, q. 95)<sup>31</sup>

Clearly, Austin would have found this statement as offensive as Blackstone's. A law, according to Aquinas, is "an ordinance of reason for the common good, promulgated by him who has the care of the community." This general definition is meant to apply to four kinds of law: eternal, divine, natural, and human (positive) law. Eternal law is God's law for the governance of the universe, in the whole and in its parts; divine law directs human beings to their supernatural end (the vision of God), while natural law directs them to their earthly goal (happiness). Human law governs human beings as members of the particular communities to which they belong. Our focus is on the third and fourth kinds of law.

We can immediately note that for Aquinas, positive laws have a coercive power, that is, they are backed up by sanctions. This is apparently contained in the notion of having 'the care of the community'. It brings out the difference between offering advice on how social and personal ends are to be attained and legislating on these ends. Thus, a way is provided for distinguishing between morality and the laws of a society, though they are related. But in contrast to a positivistic view, it is not this coercive backing which characterises the laws as laws, according to Aquinas. Laws possess their directive power, their authority to govern conduct, insofar as they are grounded on reason. It is in virtue of this that the pronouncements of the lawmaking agency impose obligations and exist as valid laws in the society.

This grounding of laws on reason has two aspects, and for convenience of exposition, we shall consider them separately, although Aquinas would not admit to a hard and fast distinction between them. Although he would agree with Austin that laws are in some sense willed or commanded, basic to his theory is a crucial distinction (which Austin's analysis does not allow for) between the rational directing of conduct and arbitrary expressions of desire that something should be done or forborne. A non-arbitrary command is a purposive act of will. It aims at the achieving of an end, and it is a function of reason to supply directions, or plans, toward ends. Lawmaking is itself a purposive activity, in which directions, laws, are issued for the achievement of ends that people have as social beings and as members of particular communities. In framing laws, the rational lawmaker will quite properly take into account the given social,

<sup>30</sup> Felix Cohen, *Ethical Systems and Legal Ideas* (Ithaca: Cornell University Press, 1959); N. Bobbio: "Sur le positivisme juridique" in *M. Langes Paul Roubier* (Paris: Dalloz et Sirey, 1961), I, 53-73

<sup>31</sup> *Basic Writings of St. Thomas Aquinas*; Anton C. Pegis, ed. (New York: Random House, 1954), Vol. II, 784.

economic, and historical circumstances. Legal systems, therefore, will to some extent differ in content and change over time.

This aspect of Aquinas' theory is of the first importance, for it provides a theoretical basis for one kind of rational critique of lawmaking. It insists that human laws are means to ends and that they should be reasonable means to those ends. Whether a purported law has the "force of law" depends on its being a reasonable direction toward the attainment of a given end. Contemporary nonthomist exponents of natural law, such as Lon Fuller and Philip Selznick, also stress this point. As Selznick says, it is the function of legal scholarship to "reduce the arbitrariness" in positive law.

One of the criticisms that have been levelled at this aspect of Aquinas' theory is that it fails to explain why laws have the authority of obligations. For lawmaking, on this theory, involves what Immanuel Kant called "hypothetical imperatives." When the lawmaker issues his directive to do A, he is presupposing the validity of a hypothetical imperative of the form "If you wish to achieve end E, then you ought to (must) do A" or, perhaps, "If you wish to achieve E, then A is the best thing to do." Clearly, such hypothetical imperatives do not give rise to obligations. We can see this by considering the hypothetical imperative "If you wish to fix the kitchen sink, then you ought to (must) use a wrench." Even if it is assumed that one does wish to fix the sink, the consequent ("You ought to use a wrench") hardly amounts to an obligation to use a wrench. Laws, it is argued, are in exactly the same case.

Aquinas' reply to this objection ultimately rests on his conception of the ends to which laws are directed. This brings us to the second aspect of the grounding of laws on reason. It invokes the concepts of the common good - a law is "an ordinance of reason for the common good" - natural law and justice. This part of his theory is highly controversial.

As we saw above, according to Aquinas, lawmaking is a purposive activity. Its basis is the fact that humans are goal-oriented. It is natural for creatures to seek ends, and each kind of animate being has inclinations toward ends that are appropriate to its nature or essence. The fixing of the essences of things, and of the inclinations of creatures toward ends that complete their nature, is an aspect of the divine governance of the universe, i.e., eternal law. Natural law, in the traditional Thomist view, is "the participation of the eternal law in the rational creature." Just as it is a function of reason to supply directions for achieving ends, it is also a function of reason - without any divine assistance - to apprehend those ends that are appropriate to human nature. As such, these ends are apprehended as proper objects of pursuit, i.e., as goods. The principle underlying this operation of reason is: "Good is to be done and pursued; evil is to be avoided." Aquinas calls this the "first precept" of natural law. In the case of the lawmaker, who has the care of the community, the precept might well be formulated: the common good is to be done and pursued; what is bad for the community is to be avoided. Because the common good, for Aquinas, is the province of legal justice, a purported positive law that is not in conformity with natural law, justice, and the common good is to that extent "no longer a law, but a perversion of law" Enforcement of an unjust law is violence perpetrated against the citizen.

What gives content to the natural law is the rational apprehension of the essence of man and the human good. Aquinas develops this along Aristotelian lines. Man is by nature a social animal: he desires to live a life in common with other men, and he satisfies his needs and wants only in co-operative enterprise with others. One, therefore, ought to co-operate with others for one's own good as well as theirs. The first precept of natural law could, in fact, be formulated in this way. Now, social living has certain prerequisites whose fulfilment makes it possible. It requires, for example, that we

should not harm our neighbours, which implies a prohibition against murder and theft. (This does not mean that it is necessarily contrary to natural law to kill in self-defence.) It requires the institutionalisation of marriage and family life, hedged about with various prohibitions and responsibilities. It requires some mode of education as a way of initiating the young into society. This list could easily be extended, in the spirit of Aquinas, by following the tables of "basic needs" put forth by contemporary social scientists.

Such institutions, duties, and prohibitions are principles of natural law. Natural law, so conceived, should be distinguished from laws of nature of the sort that scientists seek to discover, namely, statements of uniform occurrence. The term, however, is ambiguous, and writers who use the language of natural law theory often switch without warning from one sense to the other. Aquinas wishes to maintain, on the one hand, that natural law can be violated (which would be impossible if the term referred to uniform occurrences) and, on the other hand, that there is a close connection between natural law and what man is - human, nature. Because natural law contains prescriptions of what ought or ought not to be done, he has been criticised for illegitimately deriving normative propositions from factual propositions about human nature; it is held to be fallacious to deduce statements of what ought to be solely from statements of what is the case, or to infer judgements of value from judgements of fact.

Whether there really is a fallacy here is much debated.<sup>32</sup> Some contemporary moral philosophers have denied a sharp division between normative and factual judgements. Among legal philosophers, some of Aquinas' recent followers<sup>33</sup> think that there is a "blending" of what is and what ought to be; and Fuller (a nonthomist natural law theorist), in his early book *The Law in Quest of Itself* (1940), holds that we should "tolerate a confusion" between the two.

It is precisely this that is denied by the legal positivist's dictum "the existence of law is one thing; its merit or demerit is another." If fact and value, or Is and Ought, somehow merge, how then can we conceptually distinguish the law that is from the law that ought to be. Far from providing a way of evaluating the law, argues the positivist, this confusion actually prevents its evaluation. The natural law theorist, it would seem, is in danger of falling into a position which holds that the laws that prevail in a society have, by the very fact that they prevail, a certain degree of "moral oughtness" attached to them.

We will be in a better position to see whether Aquinas can escape this danger after examining a few more details of his theory.

### **3. Law and Morality**

The principles of natural law are a meeting ground for law and morality. They are binding in every society and their enforcement is required in every society. We may therefore say that a necessary condition for the existence of a legal system in the society is that the laws should contain at least the minimum content provided by these principles. This view has received sympathetic appreciation from Hart, who is a positivist of sorts, in his important book *The Concept of Law*<sup>34</sup>. He calls this the "core of good sense" in the doctrine of natural law, but his interpretation of it differs from that of Aquinas.

<sup>32</sup> See Chapter Six of William Frankena's *Ethics*, 2nd ed.

<sup>33</sup> See, for example, Heinrich Rommen, *The .i.Natural Law*, trans. T. Hanley (St. Louis: B. Herder, 1947).

<sup>34</sup> H. L. A. .i.Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 189-95. See also the discussion of "jural postulates" in Roscoe Pound, *Outlines of Lectures on .i.Jurisprudence*, 5th ed. (Cambridge: Harvard University Press, 1943), pp. 168-84.

In a discussion reminiscent of Hume's treatment of justice, Hart points out various facts about human nature that make necessary some of the rules of social morality and law: men are vulnerable and liable to harm; they are approximately equal in intellectual and physical abilities; they are not completely selfish but have limited good will toward others; and they are limited in their powers of foresight and self-control. Finally, the resources that men need or desire are relatively scarce. Given these facts, if men are to live in society, they require rules that provide for the protection of the person and property, and that guarantee a degree of mutual forbearance and respect for the interests of others. Such rules are "fundamental" to a legal system in that without them there would be no point in having any other rules at all. In this way Hart dissociates himself from the thesis maintained by some positivists that "law may have any content." He would agree, however, that the presence of such rules in a society does not exclude the presence of laws that are bad or unjust.

Hart, then, also dissociates his position from Aquinas'. First of all, the necessity of the rules that comprise the minimum content of a legal system is dependent upon the prior assumption that survival in proximity with others is one of the aims that men have. Society, as Hart says, is not a "suicide club." This assumption, which is admittedly reflected in the way we think and talk about the human world, is a much more modest assumption than that of Aquinas, which holds that men are naturally inclined toward the human good, that is, toward ends that fulfil the human essence. It seems to me that, for Hart, the rules in question merely have the status of hypothetical imperatives: if men wish to survive in groups, they must have such and such rules. But for Aquinas, these rules have a more compelling status.

Second, contrary to what appears to be Aquinas' view, these rules are neither self-evident nor deducible from self-evident truths about human nature. The particular facts about human nature and the condition of relative scarcity are so obvious as to deserve to be called "truisms," according to Hart. But he insists that there is no necessity in them. Rather, these facts are contingent and are possibly subject to change. If, as is logically conceivable, there were a superabundance of commodities, there might be no recognition of private property and no prohibition against theft. Other changes in the minimum content of the laws of a society might also follow if there should be marked changes in human vulnerability, limited good will, etc. The minimal overlap between law and morality is, if necessary, merely "contingently necessary." Hart, therefore, would not agree that the principles of natural law are self-evident or that they are analytically contained in the concept of the existence of a legal system in a society.

On the last point, I think, Aquinas has a plausible reply. The concept of the existence of a legal system in a society, he could argue, is a concept that has developed within a framework of fairly specific ideas about man and his environment. Regarding this concept, the inclusion of the principles of natural law in the laws of a society is a matter of necessity in a stronger sense than Hart's; that is to say, it concerns the conditions for the application of the concept of a legal system. If human nature should change and men should become angels or beasts, our concept of law would simply not apply to them.

In the final analysis, Aquinas' disagreement with Hart turns on his theory of the essence of man, an essence fixed by the "participation of the eternal law in the rational creature." It is precisely this doctrine of a fixed human nature, with its theological underpinnings, that has proved a stumbling block to contemporary acceptance of natural law theory, in the words of the nonthomist natural law theorist A. P.

d'Entrèves.<sup>35</sup> But Philip Selznick, also a nonthomist, holds that we should not overlook the "psychic unity" of mankind and the existence of cross-cultural universals. Social-scientific research may yet reveal to us what human nature is, according to Selznick, and it would be a piece of dogmatism to maintain otherwise. Principles of natural law, on this position, should be viewed as hypotheses that are open to revision as research progresses.<sup>36</sup> Some contemporary thomists are also sympathetic to this idea. It is not clear to me, however, how far it can be made compatible with Aquinas' doctrine of natural law and human nature, which is a doctrine that is really presented within a definite theological-ethical framework.

Aquinas' treatment of the process of lawmaking can be only briefly considered. As we saw, the laws of a society will include the principles of natural law. They will also include laws which, though not in themselves self-evident, can be deductively derived from the principles. Such laws have "some force from the natural law" and are, as it were, re-enacted by the lawmaker. Another mode of derivation mentioned by Aquinas is that of "determination," in which the lawmaker fills in the gaps in the natural law. Thus, a principle of natural law forbids deception, but it is the task of the lawmaker to determine - to specify - the penalty for using the mails for fraudulent purposes, for example.

These two modes of derivation, however, do not really exhaust Aquinas' treatment. Laws are directions for achieving the common good, and most laws especially in the modern state cannot be derived from principles of natural law either by deduction or by determination. Rather, they represent the practical judgement of the lawmaker as to how the common good can be promoted in the given circumstances. Such laws cannot in any sense be said to exist prior to their enactment. They are as much products of legislative will as of rational purpose.

We may now take up the question that we earlier postponed; namely, whether or not Aquinas is in danger of falling into a position which holds that whatever the lawmaker enacts is the law - the law is the law - and that some degree of "moral oughtness" attaches to the prevailing laws. It seems to me that if there is a danger here it is not a danger that results from any blending of the law that is with the law that ought to be. Nor is it peculiar to Aquinas' theory.

Aquinas is quite explicit on the matter. He lists the ways in which a purported law may be unjust and hence contrary to natural law: it may aim at the lawmaker's private good rather than the common good, it may aim at the common good but its burdens may be unfairly imposed, or it may exceed the constitutional or customary authority of the lawmaker to enact it into law. An unjust purported law is "violence rather than law" and there is no obligation to obey it except perhaps to avoid "scandal or disturbance".

Still, the above-mentioned danger arises because the judgement of the citizen may be opposed to the judgement of the lawmaker as to whether some enactment promotes the common good or is in fact unjust. Both judgements are fallible. Shall we therefore say that it is the citizen's judgement which must give way, that he must obey the law?

The dilemma here is not so much Aquinas' - his theoretical position is clear enough - as it is that of the conscientious citizen who must weigh obedience to what he believes is an unjust enactment against the harms that might result from disobedience.<sup>37</sup> But Aquinas also admits that in estimating these harms one must also take into account the fact that the enactment was made under the colour of law and that any disobedience to it undermines the authority of laws. (Aquinas, like Austin, has a fear of anarchy.) One

<sup>35</sup> D'Entrèves: "The Case for .i.Natural Law; Re-examined," *.i.Natural Law; Forum*, 1 (1956), 27-46.

<sup>36</sup> Selznick: "Sociology and .i.Natural Law;" *.i.Natural Law; Forum*, 6 (1961), 84-104.

<sup>37</sup> For a discussion of the basis of political obligation, see Joel Feinberg, *Social Philosophy*.

reason for compliance is that the enactment is an enactment of the lawmaker, and to this extent Aquinas would appear to assign, 'moral oughtness' to it.

We shall take leave of Aquinas with a final point. It is his precept that the lawmaker should pursue the common good. But what is the common good, and how shall we discover it? The problem of determining the common good or the public interest, as it is now called, is exacerbated in modern societies. There are a variety of groups whose interests are often in conflict. What is needed is a way of adjusting conflicting interests, and Aquinas does not give us much help on this score. Resort to natural inclinations, or needs and wants, does not seem to be enough. These are also frequently in conflict, and a method of adjustment is required. I do not mean to suggest that this problem is insuperable. Nor is it exclusive to theorists who analyse the nature of law in terms of the common good. It must be faced by anyone who believes that the laws ought to promote the good of man and society.

#### ***4. The Prediction Theory: Holmes***

Aquinas' theory, as we have seen, brings into play a grand metaphysical structure. Let us now turn to a writer whose starting point seems to be at the opposite extreme: Oliver Wendell Holmes, Jr., one of the great Justices of the US. Supreme Court. His essay "The Path of the Law" is probably the most influential essay in American legal thought. His position is popularly called the bad man or prediction theory of law.

Holmes would have endorsed Austin's statement that the existence of law is one thing, its merit or demerit another. As a result of the overlap in phraseology - both speak of rights, duties, malice, intent, negligence, etc. - he found a confusion between moral and legal concepts at every turn in traditional doctrine. The law is not a "brooding omnipresence in the sky." Nor is it coextensive with any system of ethics. If one wishes to know what the laws of a society are one must, according to Holmes, approach the question from the perspective of the bad man.

The bad man does not give two straws for morality but he, no less than the good man, wishes to avoid an encounter with the law. When he asks his lawyer whether some contemplated action is legal, what he wants to know is how public power is going to affect him. In answering this question, according to Holmes, the lawyer's job is one of prediction. A legal duty, says Holmes, is "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgement of the court - and so of a legal right."<sup>38</sup> Laws are "prophecies of what the courts will do in fact." The kind of prophecy intended by Holmes is a generalised prediction of judicial judgements in a given type of case and not, as some later American "legal realists" held, a prediction of the decision of some particular judge in a specific case.

This is a bracing view. Just as Austin washed the law with logical acid, Holmes bathes it in cynical acid. Holmes does not deny that moral conceptions influence the growth of the law. One of his major contributions to legal philosophy, in fact, is that judicial decision making frequently involves value judgements. These are often unarticulated major premises which are hidden from sight by the logical form into which the judge's opinion is cast. The prediction theory, however, is not a theory of the development of law but of the "limits" of law, a theory of what are the laws of a society.

This theory, I think, has the merit of providing one very illuminating way to look at law, but it cannot stand as a general theory (if Holmes really meant it as such). A serious difficulty is that in adopting the perspective of the potential litigant, it leaves

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<sup>38</sup> O. W. .i.Holmes; . Jr., "The Path of the Law." Harvard Law Rev., 10 (1897), 458.

out the perspective of the judge. The judge is surely not trying to predict what he or other judges will decide when he asks himself what the law is on the issue of the case.

It might be replied that the judge is trying to predict what higher courts would decide if his judgement should be appealed. But this holds no water because the judge in question might be a member (or the sole member) of the highest appellate court. Moreover, a legal system need not provide for appeals.

An important question that Holmes does not take up is whence the courts derive their authority. What is it that constitutes courts as jural agents and the decisions of judges as jural acts? A standard way of answering this is by reference to power-delegating laws or laws of competence.

To interpret these as predictions of the judgements of courts would seem to involve a circularity. It might be possible to handle this with some elaborate version of a behavioural approach to law, but I think it will to have include statements about the behaviour of others besides judges.

One problem with Holmes' theory is that it is court-centred, and does not seem to apply to legal systems without courts. This consideration led some of Holmes' "realist" followers to broaden the theory to cover any law-enforcing or law-applying officials. But, as Hermann Kantorowicz points out, what these officials enforce or apply are laws and not predictions about each other's judgements or behaviour.<sup>39</sup> This should not be understood to mean that the laws are always ready-made and waiting to be enforced or applied. Professor Fuller demolishes any such idea in his *Anatomy of the Law*, and both Holmes and Kantorowicz would agree with him.

Kantorowicz' point, however, is well-taken and can be extended to show that the court-centred, or even official-centred, view also distorts the perspective of the ordinary member of society in relation to laws. Consider the game of baseball. It has rules which the players know and follow. It would be grossly misleading to say that these rules are simply generalised predictions of what umpires would decide. So also for the laws of a society. Both ordinary citizens and judges use laws as guides to action. Of course, the law is a much more serious and open-ended affair than baseball, and the decisions of judges and other officials have high visibility for the citizen: judges and officials are participants in the lawmaking process. The point nevertheless stands, and it serves us as a transition to the theory of another legal positivist, Hans Kelsen. Kelsen is probably the most influential twentieth-century legal theorist, particularly on the European Continent and in Latin America.

### **5. *Laws as Norms: Kelsen***

It should be noticed that on the prediction theory laws are descriptive statements. The deontic, or "ought," element has entirely dropped out. This is completely unacceptable to Kelsen, for laws, he maintains, are norms.

Their meaning cannot be expressed without using normative language, particularly the term "ought." But this term does not refer to a moral ought.

Kelsen calls his theory a pure theory of law.<sup>40</sup> This can be explained by an attempt to describe the legal system of, say, a people living on an island in the South Pacific. Kelsen would first of all insist that our account should be kept clear of any ideological or ethical bias (as is contained in Aquinas' doctrine of natural law, for example). Kelsen thus endorses Austin's dictum on the existence of law. Second, he would insist that we

<sup>39</sup> Kantorowicz: "Some Rationalism about Realism", *Yale Law Journal*, 43 (1934), 1240-52

<sup>40</sup> Kelsen's writings are voluminous. His main works in English translation are *The Pure Theory of Law*, trans. M. Knight (Berkeley.: University of California Press, 1967) and *General Theory of Law and .i.State*; trans. A. Wedberg (Cambridge: Harvard University Press, 1946).

should not confuse our statements of what are the laws with descriptive statements about the behaviour of either officials or nonofficials. One of the principal aims of the pure theory is to provide the conceptual tools for "representing" the laws of a society in a way that expresses their jural character and actual content and also displays their interconnections within the system.

There are many kinds of systems of norms. A legal order, according to Kelsen, is a normative system which uses coercive techniques to secure compliance. From this Kelsen draws the conclusion - to which I do not think he is entitled - that a statement representing the content of a law must represent it as sanction-stipulating. The canonical form of such statements is a hypothetical: If it is determined by competent authority that such and such (e.g., a particular act) has occurred, then a competent authority ought to impose this or that sanction (e.g., a jail sentence, an order to pay a creditor).<sup>41</sup> The "ought" is essential here, and according to Kelsen (especially in his later writings) it can mean "must", "may", or "is authorised". Now it is important to notice that the statements by which we represent the laws of the island society are not laws ("legal norms"). These statements are not prescriptions, but reports that may be true or false. It is one of Kelsen's intriguing theses, which we cannot examine here, that the hypothetical statements which represent laws must employ a deontic term, but that the "ought" in the consequent is used descriptively, not normatively. Our statements, however, by no means describe the way people behave in the society although, as we shall see shortly, their truth does presuppose some descriptions of this sort.

In order to represent the laws we first have to identify them. This in turn requires, on Kelsen's view, that we should be able to identify acts of lawmaking. His slogan is that "all law is positive law" which means for him that laws are created and annulled by acts of will, a doctrine which seems to have its origins in a Kantian separation of the realms of Is and Ought and a sharp distinction between cognition and volition.

These acts of will are not Austinian commands, which are expressions of desire. When the absolute monarch, King Rex, in our island society issues his command that everyone should take a bath on Saturday nights, his wanting them to do this is irrelevant to its status as law. I think this is correct. But it also seems to me that the doctrine that laws are created by acts of will is subject to the kinds of criticism that Maine and Fuller advance against the command theory. In any event, if this doctrine is plausible in Rex's case, it is implausible in the case of a multimembered legislature, as Axel Hägerström points out.<sup>42</sup> At best, Hägerström's objection is only partially mitigated by another Kelsenian thesis; namely, that laws are not the acts of will themselves but, rather, the "objective meaning" of such acts. This thesis is the key to identifying acts of lawmaking and the laws of the society.

Suppose both King Rex and John, who is a member of the island community, want everyone to take a bath on Saturday nights and each issues the declaration: "Everyone should take a bath on Saturday nights!" In Kelsen's terms their declarations are identical in "subjective meaning," but only Rex's has an "objective meaning" which is established as a law, for Rex's declaration is in consonance with another law which states that the commands of Rex are valid (i.e., binding) laws.

This, of course, is a highly simplified model of lawmaking, but it illustrates Kelsen's position that laws regulate the creation of laws. A law, as he puts it, derives its validity from another law (or laws). The laws of a legal system thus form a hierarchical

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<sup>41</sup> In order to facilitate our representation we are permitted to speak in the usual way, that (for example) the law forbids smoking in the subway. But the "real content" can only be expressed in the canonical form, which tells a law-applying official what he ought to do.

<sup>42</sup> Hägerström: *Inquiries into the Nature of Law and Morals*, trans. C. D. Broad (Stockholm: 1953)

structure, and the validity of a lower legal norm is justified by appeal to a higher legal norm, either because the content of the former conforms to the latter or because the creation of the former is authorised by the latter. This aspect of Kelsen's theory raises many intricate points which we cannot go into here, but what is important for us is his view that the validity of a law can only be derived from another law which is itself a valid law. Our representation of the laws of the society must also reflect this fact. There is a correspondence between the conditions for the validity of a law and the criteria for identifying law-creating acts of will. Laws function as "schemes of interpretation" for such identifications. Legal norms cannot be identified unless we already have (what might be called) a normative perspective.

The above considerations lead to the focal point of Kelsen's theory and its most characteristic doctrine. In tracing back the validity of one law to that of another, we ultimately come to the law from which the validity of all the others of the given system is derived. This is the Basic Norm (Grundnorm) of the system. It states, for example, that King Rex should be obeyed, or that laws made in conformity with procedures for lawmaking as specified in the constitution are valid. The Basic Norm of a system, however, is not itself a positive law. Indeed it might never be expressed by those who live under the system. Its validity is presupposed in the making of laws and in identifying acts of will as law-creating acts; it supplies the normative perspective. With the Basic Norm we reach the limits of legal positivism. One might, of course, attempt to derive the validity of the Basic Norm of a system from a moral or ideological norm of some sort (e.g., a principle of legitimacy) but Kelsen refuses to take this step. Once we reach the Basic Norm we have all that is necessary for the representation of the laws of a society, and Kelsen is not disturbed by the apparent paradox that the existence of laws presupposes the existence of law.

There is one more point to consider before we turn to some critical comment. We saw that according to the pure theory the laws of a society should not be identified with statements about the way people behave. The fact that all the Islanders take a bath on Saturday nights does not imply that there is a law to this effect. Nor, on the other hand, would their failure to take a bath show that there is no law that requires bathing. When behaviour conforms to a law (irrespective of the motive for such conformance), the law is said by Kelsen to be "effective." Now when we assert that a system of valid laws exists in a society, a necessary condition of the truth of the assertion is that the laws are by and large effective. A group of laws may lose validity by ceasing to be effective (e.g., the laws of czarist Russia were no longer effective in the Soviet Union). The truth of statements representing the laws of a society therefore presupposes certain descriptions of the behaviour of its members (strictly speaking, the behaviour of officials). Nevertheless, according to Kelsen, what confers validity upon the laws is not their effectiveness. Validity is ultimately derived from the Basic Norm of the given system.

Kelsen provides many important insights and original ideas. Nevertheless his theory suffers from internal difficulties.

Consider the point just mentioned: that the validity of the laws of a system is established by reference to its Basic Norm. It seems to me that Kelsen is moving in a circle. For the Basic Norm is discovered in our representation of the system by tracing back through the valid laws to the presupposed norm from which they all derive their validity. (And what really guarantees that there is one norm that does the job?) But this process assumes that we can already tell what the valid laws are independently of the Basic Norm.

The meaning of "valid law" is also problematic. Although Kelsen explicitly rejects any so-called "recognition theory" it is not clear that he entirely escapes one at some level. A recognition theory holds that the valid laws are norms that are recognised or accepted as binding by those who are subject to them. Now, in a recent article Kelsen maintains that a Basic Norm is presupposed by anyone who considers a particular effective coercive order to be a system of valid laws. By this he means that when the members or officials of the society consider the particular order to be a system of binding norms, they are presupposing the validity of some Basic Norm.<sup>43</sup> (There is no necessity that these individuals should view the effective coercive order as a legal system; they can instead view it as a plain "gunman writ large" situation; there need be no difference for them between the tax collector and a bandit. This is contrary to Austin's view. According to Austin, given a habit of obedience - i.e., effective commands - we have a legal system and legal obligations.) Apparently, then, Kelsen does employ something like the notion of "recognition" - for these individuals to consider a law to be valid is the same as their considering it binding on them - and his complaint against the recognition theory is only that it leaves out the Basic Norm. It seems that Kelsen cannot completely escape a recognition theory at some level, especially because the starting point for giving a representation of a legal system is its valid laws, as we saw above.

But this conclusion raises the question of whether or not the doctrine of the Basic Norm is superfluous. Does the legal scientist really need a normative perspective in order to give a representation of the valid laws of a system, even if it only serves an "epistemological function"?

Professor Alf Ross, who seems to hold what Kelsen would call a recognition theory, argues this point. Ross uses the game of chess as an example. It is quite unnecessary to think that there is some Basic Norm of chess that either we or the players presuppose in order to give a representation of the valid rules of chess. Ross concedes that behavioural considerations alone are insufficient: if no one ever opens with a rook's pawn, that would not show that there is a rule that forbids it. We must also take into account a psychological factor. We need to know the "spiritual life" of the players, what they believe or experience as binding upon them. So also with law, except that the relevant individuals are judges (or law-applying officials). A valid system of legal norms in a given territory is comprised of "the norms which actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed."<sup>44</sup> Reference to a Basic Norm, according to Ross, only distorts the relationship between the idea of a norm and social reality (i.e., patterns of behaviour).

The notion of what is "felt" to be binding seems somewhat obscure to me. Instead of analysing it further, however, let us turn to the positivistic position of H. L. A. Hart, who freshly reworks many of the insights of Kelsen and Ross.

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<sup>43</sup> Hans Kelsen, "On the Pure Theory of Law," *Israel Law Rev.*, 1 (1966), 1-7. Contrary to what he appears to say elsewhere, in this article Kelsen denies that the Basic Norm is also a presupposition of the legal scientist who is constructing a representation of a particular system. For the legal scientist, the Basic Norm serves only an epistemological function; that is, as a device for interpreting a coercive order as a system of valid laws. It is the members or officials of the .i.society; who presuppose the Basic Norm (i.e., presuppose its validity) when they regard the order as a system of norms which are binding upon them. This topic merits further research. Kelsen's position should be compared with that of .i.Hart; on the internal and external points of view, discussed later in this chapter.

<sup>44</sup> Alf Ross, *On Law and Justice* (London: Stevens and Sons, Ltd., 1958), p. 55.

## 6. Rules: Hart

Hart's book *The Concept of Law* is one of the truly elegant works in legal philosophy. Its aim is to give an account of the central features of legal systems in terms of which their other features may be understood, in order to bring out the complex relationships of legal systems to other types of social institution. For this we need the idea of a rule. Rules are central to legal systems and to other types of institutions. As Hart's extensive critique shows, neither orders backed by threats nor predictions of behaviour do the job of explaining what rules are. Basic to Hart's analysis of legal validity and the existence of a legal system is his distinction between internal and external points of view regarding rules.

Hart begins by asking what it is for a society or group to have a rule. This question he answers in terms of the acceptance of the rule. "Acceptance", does not mean moral approval or a feeling of being bound. A rule (e.g., "A man must take off his hat on entering a church") sets up a standard of conduct. A group of persons cannot be said to have accepted a rule merely when the standard is generally complied with, for this would amount to viewing the rule purely from an external perspective. It must also be the case that a deviation from the standard is generally taken by the group as a fault open to criticism and as a good enough reason for making a criticism.

To have such an "internal point of view" or "reflective critical attitude" regarding the conduct specified by the standard (the conduct itself being the "external" aspect of the rule) is to accept the rule. When an observer of the group makes a statement to the effect that a given rule exists in it, this means both that the members generally comply with the particular standard and that the members have adopted an internal point of view regarding it. The motives for the acceptance of a rule may vary from member to member. Finally, according to Hart, a rule will be considered as imposing an obligation when the general demand for conformity to its standard is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great.<sup>45</sup> Now Hart concedes that it is possible for a society to have a set of rules comprised only of the kind just mentioned. Such a social structure is said to be a regime of primary rules of obligation. It works successfully only so long as the community is closely knit and in a stable environment. Under other conditions this kind of regime will prove defective in three ways. (1) Uncertainty: doubts will arise as to what the rules are or as to their precise scope. (2) Static character: the only mode of change in the rules will be the slow processes of growth and decay. (3) Inefficiency: the rules will be maintained only by diffuse social pressure and there will be no way of settling with finality whether or not a rule has been violated.

These defects, says Hart, may be remedied by the introduction of secondary rules. For the first defect, a rule of recognition may be adopted, which specifies some characteristic in terms of which the primary rules may be authoritatively identified. This rule may amount to no more than specifying a list of primary rules carved on a public monument. Or it may actually be a complex set of rules such as is found in modern societies (e.g., "What the Queen in Parliament enacts is law"). The second defect may be remedied by the adoption of rules of change, which provide for deliberate alteration of primary rules, generally by designating individuals who have the authority under certain conditions to initiate changes. Legislative enactment and repeal are to be understood in terms of such rules rather than in terms of orders backed

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<sup>45</sup> Quære: If the acceptance of a rule is based on fear, aren't we at the level of "being obliged" rather than at that of obligation? Shouldn't there be some moral ground for the acceptance?

by threats. Obviously, there is a close connection between such rules and rules of recognition.

Finally, inefficiency may be remedied by introducing rules of adjudication, which authorise individuals to determine, usually according to a specified procedure, when a primary rule has been violated and to provide for its enforcement. Legal history, says Hart, suggests that this third kind of secondary rule tends to be adopted before the other two.

With the above account, Hart has described the steps from the "prelegal into the legal world." Law is the union of primary and secondary rules. Because the introduction of secondary rules may take place in a gradual and partial manner, it would seem that the existence of a legal system can be a matter of degree. I think that Hart clearly avoids the kind of criticism that Maine made of Austin and that applies also to Kelsen.

There are, however, some difficulties to be noted. Secondary rules are characterised in several ways by Hart. Thus in some places any nonmandatory rule (for example, a rule providing for testamentary succession) seems accounted a secondary rule. But what is crucial about the rules of recognition, change, and adjudication is that they are rules about rules, as Hart says. In any case, the difficulty is that it is not at all clear that Hart's initial characterisation of rules and their existence applies to secondary rules. It is hard to see how these rules set up standards of conduct and, therefore, what would be the adoption of an internal point of view regarding them.

The concept of valid law is explained by Hart with reference to the secondary rules of a system and especially its ultimate rule of recognition. A primary rule of obligation is a valid law of a given system if it conforms to a rule of recognition. But here it should be noticed that there is a discontinuity between Hart's initial characterisation of primary rules of obligation and his position on the existence of rules of recognition, change, and adjudication. In the former case the individuals whose acceptance was held necessary are those who are subject to the rules in the latter case the essentially relevant individuals are the (law-applying) officials of the system. It turns out, therefore, that the general membership of the society need not have an internal point of view regarding a primary rule of obligation for it to be a valid law; it need only conform to a rule of recognition. In this event, it is not clear in what sense such a rule imposes an obligation, except in that it is a rule set by political superiors (officials) to inferiors, as Austin would say.

Two conditions must be satisfied for a legal system to exist in a society, according to Hart. First, the valid laws must be obeyed by the bulk of the membership. This apparently means that they must be effective in Kelsen's behavioural sense of the term. The second condition is that the rules of recognition, change, and adjudication must be accepted by the officials. But who are the officials? It seems circular to say that the officials are those who are empowered by rules that exist as rules because they are recognised by the officials. In order to get around this difficulty it appears that Hart would indirectly have to reinstate something like Austin's "habit of obedience." The officials are those individuals whom the bulk of the membership habitually obey. It is not just the laws that are obeyed.

Hart's treatment of the ultimate rule of recognition should be compared with Kelsen's doctrine of the Basic Norm. The Basic Norm, in Kelsen's view, must be presumed to be a valid law, for validity can follow only from validity. But according to Hart, it makes no sense to ask whether the ultimate standard for the validity of particular laws is itself a valid law. The ultimate rule of recognition of a system is not a valid law; its existence is a "matter of fact." Presumably, assertions to this effect are

made from an external point of view: the ultimate rule of recognition is said to exist as the concordant "practice" of officials in identifying the laws of the society by reference to certain criteria (e.g., being listed among the rules carved on a monument). But how can a practice - what is merely done - be a rule? One must therefore add, I think, that the practice is somehow accepted as a standard of conduct. That a standard is accepted is a matter of fact. However, it is debatable whether the acceptance in this case can be reduced to the behaviour of officials, which is what Hart apparently wishes to do. Ross, for one, would reject any such reduction.

I do not mean to suggest that the above-mentioned difficulties are in any way fatal to Hart's theory. On the contrary, it seems to me that his theory is highly illuminating, and it constitutes a positivistic approach to law which successfully avoids many of the rather serious difficulties and even obscurities that other positivists end up in. My main question about Hart's theory, however, is whether it covers the whole ground or needs supplementation of a major sort.

We have already encountered Hart's view that the "contingently necessary" connection between law and morality does not go counter to Austin's distinction between the existence and merits of a law. This is a distinction which Hart, like the other positivists, accepts. One issue we have not considered is whether Fuller's criticism of Austin's command theory has any force against Hart. When this criticism was first mentioned, I stated that it is not directed exclusively at Austin but is part of a broad attack on legal positivism. It is made in the name of a closer connection between law and morality than the positivists would admit.

Let us now turn to Fuller's theory and see how this claim is developed.

### ***7. Fuller's Critique of Positivism***

Fuller brings us back to the natural law tradition. The theory he defends, however, is nonthomist; the theological-metaphysical structure is absent. Moreover, Fuller does not propose anything like Aquinas' standards for evaluating particular purported laws. He is more concerned with the overall workings of legal systems, and he stresses the difficulty of evaluating individual laws. His theory is one of "procedural" natural law and it is supposed to serve with near-equal neutrality a variety of opposed substantive aims. Two related themes affiliate Fuller with the natural law tradition: an interest in discovering principles of social order which the lawmaker must take into account if he is to be successful at his task, and a stress on the role of reason in the lawmaking process.<sup>46</sup> Fuller begins his critique of legal positivism with these themes. He concedes that there is a purely arbitrary element in law. And he would concede, I think, that many rules have the status of law simply because they conform to stipulated procedures or rules of recognition. But this cannot be the whole story of what it takes to have a legal system. Homely examples are brought to bear on the point. A group of people are shipwrecked on an island, or a group of people go on an extended camping trip. It soon emerges that various individuals will have to be assigned certain tasks and that the conduct of the members will have to be regulated. Obviously, these processes of task assignment and regulation are purposive in character, and if we wish to understand them we have to see not only the element of fiat but also the role that reason plays in them. It is just this which the positivists' account of a legal system leaves out. They begin with a supposedly finished system, and make no place for the problems involved

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<sup>46</sup> The theme of J. Fuller's earlier writings, that there is a "fusion" of Is and Ought, is hardly mentioned explicitly in his most recent works.

in "creating and managing" a legal system.<sup>47</sup> If a society were to suffer a devastating revolution and started to create its legal system anew, it would get little guidance from the legal positivist, Fuller argues.

Underlying Fuller's position is a concept of law (or lawmaking) as the enterprise of subjecting human conduct to the governance of rules.<sup>48</sup> Law is an "activity", and a legal system is the result of sustained purposive effort. Fuller finds that the legal enterprise faces pervasive problems. There is the problem of keeping the various institutions and official roles in accord with one another. And there is the problem of contending with the ambiguities and uncertainties that are introduced by the fact that legal institutions and rules serve a multiplicity of ends. Fuller demonstrates that it is no easy task to devise rules which will ensure that our laws or jural agencies do not work at cross-purposes. The issue also touches the operation of a single jural agency. Consider Hart's secondary rules of adjudication by which individuals are empowered to decide controversies over the violation of a primary rule. Clearly, the institution thereby created cannot properly perform its function unless the roles of judge, prosecutor, and defendant are kept separate. But it is not merely a question of whether the institution is going to be able to carry out its task well. Fuller would argue, I think, that unless appropriate rules for its functioning are devised, there is also a question (of degree, perhaps) of whether an agency for adjudication actually exists.

Now it might be thought that at least some of these problems can be easily remedied by introducing a precise chain of command into which the jural agencies and activities fit. All we need, it might be said, are precise criteria of legal validity, e.g., rules of recognition. The simplest cure would be to designate a King Rex as the font of the law. But as Fuller shows in his eight ways in which Rex can fail to make law, this might be no solution at all. If Rex pursues a policy of secret legislation, excessive retroactive legislation, etc., he will fail in the enterprise of subjecting conduct to the governance of rules. King Rex is only a figure of speech. Fuller shows that even more sophisticated remedies might fail.

There is much in the above that a positivist of Hart's variety can agree with. Hart also maintains that rules are essential to a legal system and that Rex will have failed to make laws if he has failed to make rules. But what Fuller is trying to establish is intended to cut below Hart and other legal positivists. The point of Fuller's figure of speech is this: there are conditions for successful lawmaking that cannot straightforwardly be written into the positive law, and these conditions have to be met even if they are not written into the positive law.

Fuller admittedly has great difficulty in formulating these conditions in other than very general terms. They are best brought out as contrasts to the eight ways of failure. Fuller characterises these conditions as the morality that makes law possible. While Aquinas' theory centres around a morality "external" to the law, to which law must conform, Fuller's "legal morality" is internal to the law itself. It seems to me that there are difficulties in his characterisation of the eightfold path to "legality." Before we consider them, a bit more should be said about Fuller's theory. According to Fuller, a total failure with respect to any of the desiderata of "legal morality" does not simply result in a bad system of law but rather in no legal system at all. Total failure, however, will be extremely rare. Difficult questions arise concerning the jural status of a purported legal system when there is partial failure with respect to one or more of the eight conditions. Clearly, the desiderata are, at best, guidelines for constructing a legal

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<sup>47</sup> The utilitarians (especially Bentham) were concerned with the "science of legislation," but they sharply distinguished it from their theory of the existence of law.

<sup>48</sup> J. Fuller, *The Morality of Law*, p. 10.

system. It is difficult (as Fuller is aware) to apply any of the conditions in order to judge the legalness of an individual law.

Fuller, in fact, is at pains to point out, for instance, that retroactive legislation, which we generally hold to be morally reprehensible, is sometimes required to cure faults in the system. For these reasons Fuller's share in his exchange with Hart over the status of Nazi law is somewhat inconclusive.<sup>49</sup> Like a good positivist, Hart maintains that the instance under discussion was bad law, but law nonetheless. He would cure the evil with retroactive legislation. Fuller, on the other hand, maintains that this part of Nazi law was so defective in legal morality (because of ad hoc laws, secret laws, retroactive laws, etc.) that the given instance failed to achieve the status of law. However, even on his own terms, the issue is not easily settled. It seems to me that Fuller cannot entirely reject Austin's now-famous distinction when it comes to individual laws.

Let us now turn to Fuller's characterisation of the conditions for lawmaking. Why do they constitute a "morality"? Fuller in fact distinguishes two moralities, a morality of duty and a morality of aspiration. Certain activities, he holds, are governed more by a morality of aspiration than a morality of duty. For example, the achieving of excellence in the arts is a matter of aspiration, and artistic failures are not derelictions of duty.

Thus, wherever we have identifiable forms of sustained purpose, as in the professions and crafts, that can be pursued with different degrees of success, we have an "internal morality" co-ordinate with each of them. It is comprised of the conditions that must be met in order to achieve the enterprise's goal. Apparently because there is a legislative art that can be plied with varying degrees of success, Fuller holds that his legal morality is basically a morality of aspiration.

I find this explanation hard to accept, for it involves an overextension of the term "morality". It would seem strange to call the conditions for good golf-playing the "inner morality of golf" or the conditions for excellence in safe-cracking (a recognised profession) an "internal morality". Not all kinds of excellence are moral, so not all matters of aspiration involve a "morality of aspiration".

Interestingly, in his recent book *Anatomy of the Law*, Fuller usually refers to the conditions for success in the lawmaking enterprise as being "implicit laws" of lawmaking. Only rarely does he refer to them as a "legal morality. But I think that it is not incorrect to characterise them as moral guidelines for lawmakers and officials if they are to act in a fair and responsible fashion toward the members of a society. Fuller's legal morality is at least part of what is meant by the "rule of law" and the "just administration" of laws. Adherence to it will lessen arbitrary treatment of the public by lawmakers and law-appliers. The citizen is liable to suffer an injustice whenever laws are unclear or whenever administration of the law does not accord with the law as announced. It is doubtful, moreover, what the individual's "obligations" are in relation to the law or that there even are any laws which impose obligations on him, in such circumstances. I also think that it is not incorrect to characterise these guidelines as "internal" to the law, for they are derived from the nature of the enterprise of lawmaking, as Fuller defines it. (This point is also developed by Selznick.) I should like to add, however, that adherence to these guidelines does not entirely rule out the possibility of laws that are bad or unjust according to some substantive ("external") standard. Still, Fuller does show that there is a rather intricate connection between the questions of the existence of law and obligation.

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<sup>49</sup> H. L. A. Hart, "Positivism; and the Separation of Law and Morals," and Lon L. Fuller, "Positivism; ad Fidelity to Law - A Reply to Professor Hart," *Harvard Law Rev.*, 71 (1958), 593-629 and 650-72.

## **The law of persons**

### **1. Law as an order of persons and their means of action**

#### *1.1 An axiomatic approach*

For the moment, we shall disregard the distinction between natural and artificial persons. We focus on the general notion of law as an order of persons. What follows is an informal presentation of a formal theory of law in that sense.<sup>50</sup> For the sake of simplicity, we consider only persons and the means of action that belong to them. A full analysis should consider also the actions of persons. As we shall see, even our simplified discussion will bring to light many patterns of order that are familiar from the philosophical and theoretical literature on law.

‘X lawfully belongs to y’ is the basic relation in our conceptualisation of law. It is a relation between a means of action (‘x’) and a person (‘y’). As a synonym for ‘the means of action that lawfully belong to a person’, we occasionally shall use the term ‘property’. Alternatively, we shall say that if a means of action lawfully belongs to a person then that person is responsible or answerable for that means.<sup>51</sup>

We introduce two axioms that restrict the set of possible interpretations of the relation ‘x lawfully belongs to y’ (which we henceforth shall write simply as ‘x belongs to y’).

*Axiom 1.1.* Every person belongs to at least one person.

*Axiom 1.2.* If person P belongs to person Q then P’s property also belongs to Q

The first axiom recognises that it is appropriate to ask, with respect to any person, to whom that person belongs. Possible answers to that question are that the person belongs to himself and to no other person; that he belongs to himself and possibly also to other persons; or that he belongs only to one or more other persons. Only the answer ‘he belongs to no person’ is excluded. Thus, our axiom stipulates that in law there is no person for whom no one is responsible or answerable. It is an implication of the first axiom that every person is at the same time a means of action for some person or persons—himself or one or more others. For example, a corporate person is a means of action of its owners; a slave is a means of action of its master, whether the slave is considered a person or not.

The second axiom makes persons the central elements of law. Means of action follow the persons to whom they belong. Thus, what lawfully belongs to a person comes to belong lawfully to another when the former becomes the slave of the latter person (assuming there is such a thing as lawful slavery).

Obviously, the axioms allow us to define different sorts of persons in terms of the relation ‘x belongs to y’. For example, we can define the concepts of a real person (as against an imaginary one) and a free person (as against one who is not free) as follows:

*Definition 1.1.* A real person belongs to himself.

*Definition 1.2.* An imaginary person does not belong to himself.

<sup>50</sup> For a more technical and fuller exposition, see F. van Dun, “The Logic of Law” (in the Samples section of the website <http://allserv.UGent.be/~frvandun>). Some paragraphs of this section are taken almost verbatim from that paper.

<sup>51</sup> ‘X belongs to Y’ literally means that Y has an interest vested in X—an investment. In Dutch and German translations, it means that X listens to (or obeys) Y. In its French translation, it means that X is linked to Y (as part to whole, or as periphery to centre).

*Definition 1.3.* A free person belongs to himself and only to himself.

*Definition 1.4.* A person who is not free either does not belong to himself or belongs to at least one other person.

Obviously, only real persons can be free. An imaginary person, therefore, is not free. On the other hand, a real person who is not free must belong to some other person(s). Indeed, a real person is not free if and only if he belongs to some other persons.

We also can define the concepts of sovereign, autonomous, and heteronomous persons:

*Definition 1.5.* A sovereign person belongs only to himself.

*Definition 1.6.* An autonomous person belongs to no person who does not belong to him.

*Definition 1.7.* A heteronomous person is not autonomous.

It follows that free persons are sovereign. Because of Axiom 1, it also follows that sovereign persons are free. Although the definitions of ‘free person’ and ‘sovereign person’ differ, the two concepts are logically equivalent within the formal theory of law. Moreover, only real persons can be autonomous. Consequently, imaginary persons must be heteronomous. Heteronomous persons are not free.

This is a good place to introduce the distinction between the relations among ‘masters’ and ‘serfs’ on the one hand and among ‘rulers’ and ‘subjects’ on the other hand. If S is a heteronomous person who belongs to another person M, then S is a serf of M, his master. However, if S belongs to R, who is an autonomous person, then S is a subject of ruler R. Clearly, a master need not be a ruler because the concept of a master does not, whereas the concept of a ruler does, imply autonomy. Likewise, a subject is not necessarily a serf because an autonomous person can be the subject of a ruler, although he cannot be a serf. If the concept of autonomous subject strikes one as odd, one should bear in mind that at least one historically influential theory—Rousseau’s theory of citizenship—was centred on the notion that, in a legitimate state, subjects and rulers are the same persons. Rousseau’s ‘citizens’ were said to be free because they lived under a law that they somehow had made themselves. They ruled themselves and were their own subjects, although no individual in the state was a sovereign person. According to Rousseau’s conception of the legitimate state, every citizen should rule himself and every other citizen while being under the rule of every citizen.

From definitions 5 and 6, it immediately follows that sovereign persons are autonomous. It does not follow that all autonomous persons are sovereign. Thus, while every person is either autonomous or heteronomous, it is not the case that only heteronomous persons lack sovereignty. Persons—for example, Rousseau’s citizens—may be autonomous yet not sovereign. If that is the case for a particular person, we shall say that he is strictly autonomous.

*Definition 1.8.* A strictly autonomous person is one who is autonomous but not sovereign.

Obviously, an autonomous person is either sovereign or strictly autonomous. If he is sovereign then he is free and belongs to himself and only to himself. However, if he is strictly autonomous then he is not free because he then necessarily belongs to some other person or persons. In that case, the latter must in turn belong to him (otherwise he would not be autonomous).

Our definitions imply that every person either is sovereign or else either strictly autonomous or heteronomous. Thus, in law, the class of persons is partitioned exhaustively in three mutually exclusive subclasses of sovereign, strictly autonomous, and heteronomous persons. About the number of persons (if any) in any of those sets, our formal theory has nothing to say. However, some general quantitative results can be

derived. For example, we know that every non-sovereign person belongs to at least one other person. Consequently, strict autonomy and heteronomy appear only in a world with at least two persons. Conversely, if there is only one person in the world, then the concept of law implies that he must be sovereign. Also, if only one person is autonomous then he must be sovereign. Moreover, we can use a process of inductive generalisation to arrive at the result that all persons can be heteronomous only in a world with an infinite number of persons. In other words, only in such an infinite world can there be serfs who are not subjects, or masters but no rulers. Conversely, in a world with a finite number of persons, at least one must be autonomous and all serfs must be subjects of some ruler.

### *1.2 Autonomous collectives*

A strictly autonomous person always belongs to another strictly autonomous person, who in turn belongs to him. Thus, he is always ‘in community’ with at least one other strictly autonomous person. Both of them, we shall say, are members of the same autonomous collective. Obviously, every strictly autonomous person is a member of an autonomous collective. Indeed, while there may be any number of autonomous collectives (subject, of course, to the condition that such a collective must have at least two members), a strictly autonomous person is a member of one and only one autonomous collective. That is so because every member of an autonomous collective belongs to every one of its members. Consequently, if a person is a member of autonomous collectives C1 and C2, he belongs to every member of both collectives, every member belongs to him, and therefore (by Axiom 2) every member of C1 belongs to every member of C2, and vice versa. Then the members of C1 and C2 are members of the same autonomous collective, and C1 and C2, having the same members, are the same collective.

By Axiom 2, whatever belongs to a member of an autonomous collective belongs to every one of its members. An autonomous collective, therefore, is a perfect community, exhibiting a perfect communism of persons and their means of action.

The members of an autonomous collective may be masters and rulers of other persons. The latter are the serfs and subjects of each of the members. The members, of course, are rulers and subjects of one another. However, as autonomous persons, they cannot be serfs of any master. Nor can they be the subjects of any ruler who is not a member.

Autonomous collectives are well known in the history of the philosophy of law and rights. For example, we may represent Hobbes’ natural condition of mankind as an autonomous collective. In the natural condition, Hobbes wrote, there is no distinction between ‘mine’ and ‘thine’ as every person has a right to everything, including ‘one another’s body’. Consequently, there is no distinction between justice and injustice.<sup>52</sup> His argument was that the autonomous collective of the natural condition was an impractical, indeed life-threatening state of affairs. For him it was a dictate of reason that men should abandon the condition of the autonomous collective and should reorganise in one or more ‘commonwealths’. Each of those would be defined by the relationship between a free person (ruler-master) and a multitude of subjects (who are also serfs).

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<sup>52</sup> Thomas Hobbes, *Leviathan*; Book I, Chapter 13, “Of the Natural Condition of Mankind, as Concerning Their Felicity, and Misery”. Note the contrast with Locke’s ‘state of nature’, which is an order of sovereign persons for whom the distinction between justice and injustice is crucial. We shall examine the formal contrasts between the ‘rights’ of strictly autonomous and sovereign persons in the next section. The implications for human beings (natural persons) are spelled out thereafter.

No less famously, Rousseau's conception of the State is one of an autonomous collective. The social contract requires every human person who becomes a party to the contract to give all of his possessions, all of his rights, indeed himself, to all the others. In this case, the members of the autonomous collective give up the distinctions between 'mine' and 'thine' and between justice and injustice. Unlike Hobbes' men in the natural condition, however, the members of Rousseau's civil autonomous collective are not supposed to act according to their particular 'natural will' (their human nature). They are supposed to act as 'citizens', according to the statutory 'general will' of the collective itself. We have to suppose that the general will is the same for all citizens qua citizens, because by definition a citizen qua citizen is animated by nothing else than the statutory purpose of the association. Rousseau's citizens, therefore, are committed to act according to the legal rules that express the determinations of the 'general will' in particular circumstances. Rousseau set out to prove to his own satisfaction that an autonomous collective could be a viable option, at least in theory, if certain conditions were met. The essential condition was that a political genius should succeed in turning natural men and women into artificial citizens of the right kind.

Rousseau and Hobbes, then, agreed on the thesis that natural law — the principle of freedom among likes (natural persons of the same kind) — had to be replaced by positive legislation. Rousseau, however, thought that it was theoretically possible to reproduce the formal characteristics of natural law as 'liberty and equality' for the members of an autonomous collective. That was the basis of his claim to have 'squared the political circle', that is, to have proven that the state could be legitimate, in accordance with the formal requirements of justice. Formally, his solution requires that we distinguish sharply between natural persons and citizens. We have to suppose that for every Jean and Jacques, members of the same autonomous collective, there is a person that is different from both, a *citizen Jean* and a *citizen Jacques*. We also have to suppose that the latter 'civic personae' are merely numerically different manifestations of the same person, the Citizen. We can express those suppositions formally as follows:

*\* For every member of an autonomous collective there is another person who is his civic persona.*

*\* The civic personae of any two members of the same autonomous collective are identical.*

The relation between a natural person and his legal or civic personality (in Rousseau's theory) should be represented as

*\* A member of an autonomous collective legally belongs to his own civic persona but the latter does not legally belong to him.*

*\* Whatever belongs to a member of an autonomous collective legally belongs to his civic persona.*

Thus, the natural persons Jean and Jacques may be members of the same autonomous collective ('the People'), and then they are strictly autonomous in their dealings with one another. On the other hand, as natural persons they also legally and heteronomously belong to their own civic persona, the Citizen. They are subjects and serfs of the Citizen, who is a sovereign person. Hence, the Citizen may use force against them to free them from their own human nature and to make them into what they presumably want, and by accepting the social contract have committed

themselves, to be: citizens. That, of course, is Rousseau's 'paradox of liberty'.<sup>53</sup> It is not really a paradox within his system: there is no place for free natural men in the state, as they would immediately destroy the unity that is the necessary condition of the sovereignty (hence the liberty) of the citizen.

Note that we had to introduce a modal notion of belonging, namely 'to belong legally', to make sense of the theory. The way in which one natural person belongs to another natural person cannot be the same way in which one such person belongs to some artificial persona. Indeed, if A is a natural member of an autonomous collective and A belongs to his civic persona  $c(A)$  in the same way in which he belongs to the other natural members of the collective, then  $c(A)$  would be just another member of the collective — a strictly autonomous person. Rousseau's theory of the state then would be simply Hobbes' theory of the natural condition of mankind with an additional number of ghostly fictions participating in the war of all against all. Hobbes' theory of the social contract, by the way, also had to introduce a 'legal' notion of belonging. *Politically*, in the state, the subjects belong to the ruler. However, the latter *legally* belongs to the citizens, who supposedly have 'authorised' him to do what he wants. Thus, the Sovereign legally is the 'actor' or agent, of whose actions the citizens are legally supposed to be the 'authors'. Consequently, he rules them by their own authority.

We should also note that Rousseau's 'solution' to the problem of the legitimate state rests crucially on his inversion of the natural order of things. While the common aspect-person (the Citizen) is the product of the human imagination, the theory elevates him to the status of a sovereign person for whom his creators are merely subjects and serfs. It takes 'L'imagination au pouvoir!' very literally indeed. Rousseau's theory redefines the perspective on order among persons in terms of a 'legal' notion of belonging that requires a reference to the common aspect-person, the Citizen. That Citizen is the civic persona  $c(P)$  of every human member of the autonomous collective created by the social contract. If it were not for the inversion of the natural order of things, the notion of an aspect-person would be unobjectionable. For example, assuming that

\* *Aspect-persons are the serfs of the persons from whom they were abstracted,*

aspect-persons simply would be heteronomous (artificial or imaginary) persons under the responsibility of their human masters. Then, Jacques' rights-as-a-citizen could never supersede his personal rights. Thus, article 2 of the Declaration of the rights of Man and Citizen (1789) asserted that the protection of natural rights is the sole function of political association. In other words, the citizen was to be no more than a tool or instrument for safeguarding the natural rights of natural persons, all of which 'are born and remain free and equal in rights' (article 1 of the Declaration).

### 1.3 Rights

In this section, we introduce 'rights talk', without adding anything to the theoretical apparatus we have used so far. We reduce the notion 'right to do' fully to the notion of 'belonging'. First, we define the notion of a right to deny a person the use of some means.

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<sup>53</sup> "In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free...." J.-J. Rousseau, *The Social Contract* (Everyman's Library, E.P. Dutton & Co.; translated by G.D.H. Cole), Book I, chapter 7.

*Definition 1.9.* P has right to deny Q the use of X =: either X or Q belongs to P, and P does not belong to Q.

Note that this definition merely states the truth-conditions of statements of the form specified in the definiendum. Thus, to refute the claim that P has right to deny Q the use of X, one may point out that neither X nor Q belongs to P or that P is a serf or subject of Q.

As an immediate consequence, we have the theorem that no person has right to deny himself the use of himself. Indeed, according to definition 9, the statement that a person has right to deny himself the use of himself is true if and only if that person belongs to himself and does not belong to himself—but that is a contradiction, which cannot be true. Another consequence is that a person has right to deny himself the use of any means only if it belongs to him. The right to deny the use of a means to a person does not belong to one to whom that means does not belong. Making use of definition 9, we now define the notion of a right to use some means (or person) without the consent of some person.<sup>54</sup>

*Definition 1.10.* P has right to the use of X without the consent of Q =: X belongs to P and Q has no right to deny P the use of X.

Obviously, if a person P has right to the use of some means without the consent of person Q, then Q has no right to deny P the use of it. It also follows that all real, and only real, persons have right to the use of themselves without their own consent. An imaginary person does not have that right because he does not belong to himself.

*Definition 1.11.* P has absolute right to the use of X =: P has right to the use of X without the consent of any person.

Not surprisingly, all autonomous, in particular sovereign, persons have the absolute right to the use of themselves.

No person has right to the use of a means that belongs to an independent other person (that is, one that does not belong to him) without the consent of that person. Because a sovereign person is independent of any other, it also follows that no person has the right to the use of a sovereign person's property without his consent.

On the other hand, if person P belongs to Q then Q has right to the use of P and what belongs to P without his consent. For example, a master has the right to the use of his serfs and their belongings without their consent. For heteronomous persons (serfs) we have the following theorems. For every heteronomous P there is a person Q who has right to the use of P without his consent. If P is a heteronomous person then there is another person Q who has right to the use of P's means without his consent. Also, if a means belongs to a heteronomous P then there is a person Q without whose consent P has no right to the use of that means.

Concerning autonomous collectives, we see that a member of an autonomous collective has right to the use of all other members' means without their consent. Moreover, members of the same autonomous collective have right to the use of each other without consent. Of course, the autonomous collective itself may be based on a contract. That was the case with Rousseau's social contract, which first creates a 'People'. However, once the People has been created as an autonomous collective, no further consent is required when one member, acting as a citizen, exercises his sovereign function in making law for all the other members. Only the constitution of the collective requires actual consent, particular legislation does not.

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<sup>54</sup> Obviously, we can define slightly different notions of right in terms of our fundamental relation 'x belongs to y'. However, our aim is not to give a list of all possible concepts that we can define.

In our discussion so far, we have used the expression ‘x is property of p’ as synonymous with ‘x belongs to p’. We easily can define other and stronger notions of property. For example, we can define ownership as follows:

*Definition 1.12.* P owns X =: X belongs to P and to no person that does not belong to P.

Thus, a master owns what belongs to his serfs, if neither his serfs nor their belongings are the property of another, independent person. Clearly, self-owners are autonomous persons. Indeed, substituting ‘P owns P’ for ‘P owns X’ in definition 12 and making appropriate substitutions in its definiens, we find that ‘P owns P’ turns out to be equivalent to ‘P is an autonomous person’. Consequently, autonomous persons are self-owners. On the other hand, only self-owners can be sovereign, but not all self-owners need be sovereign. It also follows that an imaginary person cannot own what belongs to him, for what belongs to an imaginary person necessarily belongs to some other person who does not belong to him. To put this differently, an owner must be a real person.

Again, it is worth noting the essential implication of our definition for autonomous collectives. If a member of an autonomous collective owns X then every member of that collective owns X—which is another expression of the perfect community and communism of such collectives.

Of course, we could define other types of property—for example, common property, communal property—but we shall not overburden this informal discussion with too many definitions. A far more interesting extension of the logical analysis results if we introduce the concept of action by means of an appropriate set of axioms. Then we can consider law as an order persons, their means and actions, and include in our analysis the right to do something as well as freedoms, liberties, obligations, inalienable rights, and harms that are relevant from the point of view of law. However, this is not the place to expound this extension.<sup>55</sup> Here, we shall continue to look at law as an order of persons and their means. It should be clear that the relation ‘x belongs to y’ as delimited by the axioms 1 and 2 allows us to define quite a number of concepts that are familiar from the theoretical and philosophical literature on law.

#### *1.4 The general principle of justice*

One extension that we should consider is the concept of innocence. We have to consider the introduction of that concept as an extension because we do not define innocence in terms of the relation ‘x belongs to y’. Of course, theories of law may differ significantly in their stipulations regarding the material conditions of innocence. Nevertheless, the distinction between persons who are innocent and persons who are not is of the first importance in any theory of law. In fact, it is difficult to see in what way a theory of law can be practically relevant if it does not differentiate between innocent persons and others. One reason is that we need the concept of innocence to distinguish between justice and injustice—and that distinction, after all, is a primary reason for developing a theory of law.

We use the concept of an innocent person to formulate a general principle of personal justice.

*General principle of justice.* In justice, only innocent persons can be free.

Thus, a non-innocent person cannot be considered in justice to be a free person and to belong only to himself. He must have done something or something must have happened that gave some other person a lawful claim to his person. A non-innocent

<sup>55</sup> See “The Logic of Law” (referred to in note 50).

person always belongs to some other person. While this does not exclude him from being a member of an autonomous collective, it does rule out that he is a sovereign person. Notice that the principle does not say that all innocent persons are free. For example, we may have a theory of law that allows innocent persons to be slaves or serfs. Alternatively, we may have a theory that allows corporations or other artificial persons to be innocent and yet insists that artificial persons cannot be autonomous. Such theories are neither necessarily inconsistent in themselves nor formally inconsistent with the concept of justice.

From the general principle of justice, it follows that if no person is innocent, then no person is sovereign. It also follows that if there is only one person he must be innocent. The existence of a non-innocent person indicates the existence of at least two persons. Remembering what we deduced concerning autonomous collectives, we also see that, in a world with a finite number of persons, if none of them is innocent then there must be at least one autonomous collective (with at least two members). In such a finite world without innocent persons, there are, therefore, some strictly autonomous persons and perhaps also heteronomous persons, but no sovereign persons. For example, if one should interpret the doctrine of ‘original sin’ to mean that no human persons are innocent in the sense of law, then no human can be a free or sovereign person. In that case, autonomous collectives and master-serf relations are the only conditions of humankind that are consistent with the general principle of justice.

## ***2. Natural law***

### *2.1 Natural persons*

So far, we have discussed law without making the distinction between natural law and artificial law that we introduced in a previous part of this paper. It is time to return to that distinction and to extend our analytical apparatus by introducing another primitive concept: ‘x naturally belongs to y’ or ‘x belongs to y by nature’. How we should interpret that expression is not our concern here. Our interest is solely in making the distinction between natural and artificial law, not in analysing or proposing any particular material or substantive theory of natural law.

Natural law, as noted before, is the order of natural persons. We define the concept of a natural person as follows.

*Definition II.1.* A natural person belongs to himself by nature.

Thus, whereas a real person lawfully belongs to himself, a natural person naturally belongs to himself. Whereas the opposite of a real person is an imaginary person, the opposite of a natural person is an artificial person, one who does not naturally belong to himself.

The relation ‘x naturally belongs to y’ is logically independent of ‘x lawfully belongs to y’. Therefore, the axioms I.1 and I.2 do not apply to it. To constrain the permissible interpretations of ‘x naturally belongs to y’, we introduce the following axioms.

*Axiom II.1.* Only to a natural person can any means belong naturally.

*Axiom II.2.* No person belongs naturally to any other person.

*Axiom II.3.* No means belongs naturally to more than one person.

It follows from the definition and axiom II.2 that a natural person naturally belongs to himself and only to himself. Noting the analogy between that consequence and the definition of a [lawfully] free person, we can say that a natural person is naturally free.

Of course, nothing follows from this concerning the question whether a natural person is lawfully free or not.

Clearly, for every natural person, some means naturally belongs to him. Also, for every pair of natural persons, there is a means that naturally belongs to one of the pair but not to the other. It is out of the question that one person by nature is a serf or subject of another.

The definition and the axioms obviously make sense when applied to human persons. A human person naturally belongs to himself and himself alone. He has an immediate and indeed natural control of many parts, powers and faculties of his body, which he shares with no other person. To make my arm rise, I simply raise it. Other persons would have to grab my arm and force it to move upwards or they would have to make me raise it by making threats or promises. The same is true for other movements of the body and for thinking and speaking. A human body, as a means of action, belongs naturally to one person and one person only.

However, the concept of a natural person, as it is defined here, is purely formal. We are not defining what a *human* person is. Natural law theorists focus on natural persons (in an ordinary sense of the word ‘natural’) as the persons whose existence is necessary to make sense of law as an order of persons. However, although we may believe that human persons are natural persons, and perhaps the only natural persons, we cannot charge a purely formal theory with these assumptions. A legal positivist, for example, might apply the definition and the axioms to ‘states’ or to ‘legal systems’. Of course, he would not use ‘by nature’ or ‘naturally’ but an expression such as ‘legally necessary’ or perhaps ‘by the fundamental presupposition of legal science’. Disdaining talk about natural persons and their natural rights, he nevertheless assumes that the whole conceptual edifice of law rests on a collection of basic entities—states, legal systems—and their rights. In the terminology of this section, they are his ‘natural persons’. However, positivism clearly involves a misappropriation of the form of natural law. It is an attempt to base the theoretical edifice of law on a personification of certain theoretical constructs. In taking these as the primary data for defining the concept of law, it ignores the fact that those theoretical constructs merely are descriptions of patterns of human actions from which any reference to the actual human agents that produce those patterns has been eliminated.<sup>56</sup> (20)

## 2.2 *The Postulates of natural law*

The concept of a natural person that we defined in the previous section is independent of the general concept of a ‘person in law’ that we introduced earlier. We now have to establish some connection between the two, a logical link between, on the one hand, the concepts of a natural person and what naturally belongs to him and, on the other hand, the general theory of law as an order of persons and their means of action. To do that, we need to introduce some postulates of natural law. They are intended to capture the distinctive convictions that make up the idea of a natural order or law of persons, as far as we can express them in our formal system.

*Finitism.* The number of natural persons is finite.

No matter what a material theory of law may say about other sorts of persons, it cannot be a theory of natural law unless it denies that there is at any time an actual infinity of natural persons.

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<sup>56</sup> This is obvious in the norm-based and rule-based expositions of positivism in the writings of Hans Kelsen (*The Pure Theory of Law*) and H.L.A. Hart (*The Concept of Law*).

*Naturalism.* Every means belongs to at least one natural person.

With the help of Naturalism, we can deduce that every person belongs to at least one natural person. Note that the postulate of naturalism says ‘belongs [by law]’, not ‘belongs by nature’. According to Naturalism, the responsibility for any means or person—and therefore for any action—ultimately always rests with a natural person. It also follows that only natural persons are free or sovereign.

In conjunction with the postulate of Finitism, Naturalism implies that not every natural person can be heteronomous. In other words, at least one natural person must be autonomous. Consequently, natural law as an order of natural persons must contain at least one sovereign natural person or else at least one autonomous collective of natural persons with at least two strictly autonomous members.

Naturalism is the very heart of any natural law theory that takes the word ‘natural’ seriously. It forces any natural law theory that assigns sovereignty to a non-human person — if human beings are the prime candidates for being identified as natural persons — to classify such a person as natural. That move may not be plausible when it leads to a conflation of what in other discussions would be considered distinct categories, say, the natural on the one hand and the supernatural, the artificial, the fictional, or the imaginary on the other hand.

In addition to those postulates of Finitism and Naturalism, which determine the basic structure of natural law, we have two postulates that determine the relations between what naturally belongs to a person and what lawfully belongs to him.

*Consistency.* What belongs naturally to a person belongs to him.

A natural law theory holds that whenever it is established that something belongs naturally to a person, that fact is enough to say that the thing in question is the lawful property of that person. From the postulate of consistency and axiom II.2, we deduce that only real persons are natural persons and that what belongs naturally to a person belongs lawfully to any person to whom he belongs.

*Individualism.* What belongs naturally to a person belongs only to those persons to whom he belongs.

There can be no claim to a person’s natural property that is separate from a claim to that person himself. In short, in natural law, the natural property of a person is inseparable from the person whose natural property it is. The two are indivisibly linked.

From the postulates of individualism and consistency it follows that what belongs naturally to a person P belongs to another person Q if and only if P belongs to Q. Obviously, Q has right to deny P the use of what naturally belongs to P only if P belongs to Q. Also, Q has right to deny a natural person P the use of himself only if P belongs to Q.

### 2.3 *The Principle of natural justice*

Earlier we stated a general principle of personal justice. Here we should add what I take to be the principle of personal justice in natural law.

*Principle of natural justice.* Innocent natural persons are free.

In natural law, a person who is not free is either an artificial person or else he is not innocent. This is a way of saying that a justification must be given for denying freedom to a natural person—that is, for asserting that he lawfully belongs to some other person. That justification should consist in a proof of his guilt. Together with the general principle of justice, this gives us: A natural person is free (or sovereign) if and only if he is innocent.

Natural personal justice and Consistency entail that an innocent natural person is autonomous—in other words, that no innocent natural person is heteronomous. It also follows that no innocent natural person is strictly autonomous (i.e. a member of an autonomous collective). Thus, there is no innocent way in which a natural person can deprive himself of his freedom or sovereignty by making another person responsible for him, either as his master or as his ruler.

Other consequences of the principles of natural justice are 1) that for every pair of innocent natural persons, some means belong(s) to only one of them; 2) that for every innocent natural person, there is a means that belongs exclusively to him; 3) that what belongs naturally to an innocent person belongs to him exclusively; 4) that an innocent person owns what naturally belongs to him.

As we shall see, the combination of the concepts of innocence and justice sets the theory of natural law apart from the commoner types of political or legal ('positivistic') theories of law. The latter tend to pay little or no attention to the distinction between innocent and non-innocent people, and to focus on questions of efficacious and perhaps efficient government rather than questions of justice.

### **3. Law and human beings**

#### *3.1 The place of human beings in law*

We are now in a position to turn our attention to the status of human beings in natural law or the order of natural persons. Several postulates can be suggested.

*Anti-humanism.* No human being is a natural person.

Obviously, anti-humanism has no use for the principle of natural justice in its consideration of human beings. It may acknowledge that only innocent humans can be free persons, but it does not hold that in justice an innocent human being is entitled to freedom. Anti-humanism is the postulate underlying modern positivism. As we have seen, positivism reserves natural personhood to legal systems or states and personhood to artificial persons such as social positions, roles and functions within a legal system. People have a place in law only as holders of such positions or as performers of such roles and functions. Thus, human beings have no rights of their own. Natural law theories, on the other hand, are committed firmly to the view that the natural persons par excellence are human beings.

Weaker versions of anti-humanism imply that only some humans are not natural persons while others are. An anti-humanism of this sort could ride in on the back of the postulate of humanist naturalism.

*Humanist naturalism.* Every natural person is a human being.

This postulate asserts that only humans are natural persons. Consequently, it is unacceptable to those who believe the natural law comprises non-human yet natural persons (animals, gods, demons, personified historical or sociological phenomena like tribes, nations, states, or whatever). On the other hand, the postulate leaves open the weak anti-humanist possibility that some human beings are not natural persons. Arguably, some human beings cannot be classified as natural persons because of genetic or other defects that cause them to lack the capacity to act as persons. However, humanists certainly would refuse to leave open the possibility that some human beings that have that capacity should not be regarded as natural persons.

In conjunction with the postulate of naturalism and the general principle of justice, the postulate of humanist naturalism implies that all free persons are innocent human beings.

Radically opposed to anti-humanism is the postulate of naturalist humanism:

*Naturalist humanism.* Every human being is a natural person.

Clearly, naturalist humanism in conjunction with the principle of natural justice implies that all innocent human beings are free persons. However, it maintains that there may be natural persons other than human beings.

Of course, as noted before, one can make a good case for the thesis that very young children or humans with severe mental deficiencies should not be considered as persons because they do not have the requisite capacities to act as purposive agents. Moreover, they have no capacity for understanding what it is to have or to lack a right. However, if we read the postulate as a presumption—all human beings must be presumed to be natural persons when there is no proof to the contrary—then we can take much of the sting out of that objection. Another but rather vague way to do that, is to construe the words ‘human being’ as short for ‘normal human being’.

The conjunction of the two humanist postulates mentioned above gives us a general postulate of humanism.

*Humanism.* All human beings are natural persons; nothing else is a natural person.

In conjunction with the postulates of natural law and the principles of general and natural justice, Humanism implies that all and only innocent human beings are free.

Leaving aside merely fanciful and nominally possible interpretations of the concept of a natural person, we have to make do with the postulate of humanism. Assuming further that human beings enter the natural order as innocent persons, the postulate also implies that the ‘original status in natural law’ of every human person is that of a sovereign person.

If we are very liberal in our ontology of the natural world, the postulate of naturalist humanism might enter as a possible candidate. However, it would bring in its wake controversies about what non-human natural persons there could be, which we could not decide by any rational method. In any case, natural justice obtains only if innocent human beings are left to be free or to belong to themselves and only to themselves.

As noted above, the postulate of humanism implies that all and only innocent human beings are free. In other words, it implies that ‘sovereignty’ is the status in natural law of an innocent human being. Thus, all the propositions that we have derived about the rights of sovereign persons apply without restriction to innocent human beings. An innocent human being has right to the use of what he owns—in particular, his own body—without the consent of any other human or non-human person. Moreover, no natural or artificial person has right to the use of what belongs to an innocent human person without his consent.

Those propositions state the natural rights of a human person, at least in so far as he is innocent. They are the logical basis of the theory of libertarian anarchism, which is, therefore, a theory of natural law and justice. Its distinctive characteristic, which sets it apart from other theories of law as an order of persons, is its application of the concepts of a natural person, an innocent person, and the principle of natural justice, to human beings.

### 3.2 *Law without justice*

The proof of the sovereignty of innocent human beings crucially involves the principles of justice and the concept of innocence. If we leave aside references to the

principles of justice then we no longer can prove the thesis of individual sovereignty for innocent human beings. However, that does not mean that we cannot derive any conclusion about the status in natural law of humans. Indeed, the postulate of consistency implies that natural persons (which, according to Humanism, are human beings) are persons in the sense of law. Thus, any theory of law that denies that human beings are persons violates that postulate of natural law. Moreover, the combined postulates of Finitism and Naturalism imply that at least some natural persons (human beings) must be autonomous. Therefore, if we postulate Humanism, no theory of natural law can hold that all humans are heteronomous persons. At least some of them must be autonomous.

Consequently, if we reintroduce the concept of innocence but leave out the principles of justice, we have a choice of natural law theories that deny that freedom or sovereignty is the natural right of all innocent human beings. Among those theories, some are consistent with the notion of 'equal rights' for all innocent human beings. Their common characteristic is that they assign to every innocent human being the status of a strictly autonomous person or membership in an autonomous collective.

Other theories of natural law without justice are not compatible with the notion of 'equal rights'. For example, a theory of this sort may hold that while some innocent human beings are sovereign, others are strictly autonomous. Another possibility is that some innocent human persons are regarded as sovereign, while the others are regarded as heteronomous. Obviously, other distributions of the attributes of sovereignty, strict autonomy and heteronomy among human beings are also possible.

Philosophically speaking, an 'equal status' type of theory is considerably less demanding than an 'unequal status' type. Because it starts with the premise that, in respect of the law, human beings are fundamentally alike, it needs no justifying argument for discriminating among innocent human beings. An argument for assigning to such persons one status rather than another is all it needs to provide. Note, however, that a theory of a type that assigns to all or some innocent human persons the original status of a member of an autonomous collective need not assign all of them to the same collective. Similarly, theories that assign to all or some innocent human persons the status of a heteronomous person need not assign them all to the same masters or rulers. All of those theories require not only an argument for justifying their pick of the original status in law of any human being, but also an argument justifying a particular distribution of human persons among an untold number of autonomous collectives or rulers.

Only theories that assert that every human person originally (in his state of innocence) is a sovereign person avoid those complications of discrimination and distribution. Formally speaking, there is only one such theory. As we have seen, it is the humanistic theory of natural law to the extent that it makes a person's status in law depend on his innocence according to the principles of justice. It is the only type of theory that combines freedom and equality as defining the natural rights of innocent human beings. In short, it holds that, for human persons, 'freedom among likes' is the only lawful condition.

If we accept the postulate of humanism and the principles of justice, then the concept of natural human law is formally unambiguous. However, it does not leave any room for an original right of legislation, only for contractual obligation. In that sense, it has decidedly anarchistic implications, as indeed we should expect from any theory that takes freedom and likeness ('equality') for human beings seriously. Not surprisingly, at all times, major political and social thinkers have attempted to deny that conception of natural human law. They endeavoured to replace it with a conception of a social law in

which all or some human beings merely function as artificial persons, defined by imposed rules. They did so by attacking either the thesis that innocent natural human persons are free or the thesis that they all are equal in law.

For each of those strategies, we can distinguish between attempts to prove that for human beings the characteristic of freedom or equality is in fact false and attempts to prove that, although it is true, it nevertheless is undesirable. Plato's theory of the 'noble (or necessary) lie' grants that all humans are 'equally children of the Earth' but then argues that they must be convinced that their souls are made of different stuff (gold, silver, bronze) to make them accept the inequality imposed by the structure of the *polis*. Rousseau claimed that though 'men are born free, everywhere they are in chains', and proceeded to legitimate their loss of natural freedom (and its transmutation into the 'civic liberty' of a particular state). Aristotle flatly denied that likeness ('equality') was a natural relation. His theory of 'slaves by nature' was the egregious expression of that denial, which made social order 'natural' by citing nature as the formal cause of rule and servitude. Marx denied that freedom was even possible for a 'particular individual'. It would be attainable only in the advanced stages of communism, and then only for the 'universal individual'.

The denial of equality, which implied that natural freedom could be at most the privilege (that is, the 'liberty') of a social or political elite, dominated in attacks on natural law until the eighteenth century. At that time, the attack began to aim at the concept of freedom, making 'equality' quasi-sacrosanct. However, that 'equality' no longer was the natural likeness of human beings (as members of the same species), but an equality of social position. To become 'socially equal', human beings had to renounce their freedom.

The denial of equality implied that at least some innocent individuals lacked the natural right of freedom or had the status of a heteronomous person. It implied a distinction between rulers and masters, on the one hand, and others who, although they are innocent, are subjects and serfs. This made it possible to introduce the notion of lawful political rule or legislation 'of one man over another'.

The denial of freedom by theories that nevertheless assign an original status of strict autonomy to all or some human persons allows the introduction of the notion of lawful political rule or legislation of a 'republican' kind. Indeed, as we have seen, within an autonomous collective every member has right to the use of every other member as well as of all means that do not belong to any one outside the collective. In other words, every member has right to impose his will or rule on the other members while being himself subject to the rule of every other member. In its crude form, such a collective is what Hobbes called 'the natural condition of mankind' and Marx 'raw communism'.<sup>57</sup> In its civic form, it is the republic of Rousseau, in which human beings have no status except as means of action, or serfs and subjects, of the artificial person that is the Citizen.

The common element of those freedom- or equality-denying theories, therefore, is the idea of one or more natural persons ruling innocent others — and that idea, disguised as the power of legislation, is very much the centrepiece of most political or legal theories of law. Clearly, all attempts to justify legislation (as distinct from contractual obligation) must reject the principle of natural justice, which is that innocent natural persons are free.

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<sup>57</sup> See the essay "Private Property and Communism", in K. Marx, *Economic and Philosophical Manuscripts of 1844* (Moscow: Foreign Languages Publishing House, 1956; translated by Martin Milligan). The text can also be found in *Marx-Engels, Collected Works*, Volume 3 (Moscow: Progress Publishers), 293-305.

As we noted before, among lawyers of a positivistic persuasion, the common denial of natural law and justice takes the form of a denial of the postulate that human beings are natural persons. In this, they make use of Rousseau's strategy of substituting particular aspect-persons as the primary subjects of law. We have seen that Rousseau considered natural persons under a certain aspect, as citizens, and assumed that they accordingly have rights only as citizens. Thus, in the legal order of the state, neither Jean nor Jacques has any rights; only citizen(Jean) and citizen(Jacques) have rights.

Obviously, the aspects under which we can consider natural persons are innumerable. They do not form a closed set. Any aspect of a person P might be personified. A theory of law that took aspect-persons as its starting point would have an arbitrary basis in its selection of relevant aspect-persons a(P), b(P), c(P), and so on ad infinitum. It would allow us to say that P is one person but also that, from the point of view of law, P-as-a-woman is a different person with a different set of rights. Similar constructions are possible, as the case may be, for P's rights as a consumer, a member of some 'minority' or other, a worker, a child, a childless person, a pensioner, a veteran, an obese person, a Muslim, and so on. The multiplication of persons would apply to every natural person. It is then all too tempting to dismiss P himself altogether and simply add P-as-a-human-being, say h(P), to the list of aspect-persons.

As soon as we admit aspect-persons as persons in their own right and not simply as heteronomous serfs of a natural person, we can assign a different status in law to each aspect. Consequently, a natural person P, considered under one aspect, a(P), might be sovereign and at the same time, considered under another aspect, b(P), heteronomous or a member of this or that autonomous collective — yet P himself need not have a status in law. Arguably, that is very nearly the ruling conception of persons and rights in fashionable opinion today. However, it is indicative of a complete dissociation of the concepts of 'person' and 'rights' from any reality. With the suggestion that a natural person is simply a 'theoretical construct', the result of assembling apparently pre-existing different aspect-persons, it is also a denial of the proposition that a natural person *is* an individual person. It is in fact a complete dissolution of the idea of a natural law.

#### 4. Conclusions

Libertarian anarchism rests on the notion of natural law as an order of natural persons rather than a binding set of rules or commands. As a normative theory, it holds not only that we have good reasons to respect the natural order but also that we have no right not to respect it.<sup>58</sup> However, whether or why natural law ought to be respected—that is to say, whether we ought to respect one another for the free persons we are—was not the issue here. My purpose was not to try to justify any particular position in ethics or politics. It was only to explicate and to de-mystify the concept of the natural law that libertarian anarchism presupposes. Any one who can grasp the notions of a human person and what belongs to him, of innocence and the distinction between artificial and natural persons should be able to comprehend what natural law and natural rights are. Nevertheless, I hope that the analysis will help the reader to get a clearer view of some of the problems of justification in ethical or political discourses about law. At the very least, it should clarify the logic of the claim that individual human beings are sovereign persons in natural law.

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<sup>58</sup> For a proof of that statement, see F. van Dun, *Het Fundamenteel rechtsbeginsel* (Antwerp: Kluwer-Rechtswetenschappen, 1983)

## Elements of law

### 1. The Lawful and the legal

Familiar linguistic data indicate that the language of law and rights refers in a confusing way to a variety of very different ideas, and ultimately to a variety of very different situations, relationships and activities.<sup>59</sup> To discover these differences is the object of the ancient science of *etymology*, the "study of the real or true state of things",<sup>60</sup> i.e. the attempt to uncover the real differences in the things themselves, or in the significance of things for human needs and aspirations. In this paper I shall review the etymological evidence for the thesis that the *lawful* (what answers to law or justice) and the *legal* (what answers to the enacted laws) are not just distinct concepts, but belong to categorically different perspectives on the social aspect of human existence. As we disentangle the concepts of the lawful and the legal, that are nowadays usually assimilated, or even considered identical, we discover a recognisably "liberal" picture of society as the peaceful order of relations among *separate* but (in a definite sense of the word) *equal* human beings, each of them a naturally, i.e. *physically*, finite person with his or her own equally finite, physically delimited sphere of being and work, i.e. property. In other words, we discover not just that there is a difference between the lawful and the legal, but also the distinctive characteristic or principle of law ("freedom among equals") and of justice ("to treat others as one's likes").

Before we begin our etymological enterprise, we shall consider the equation of the concepts of the lawful and the legal, first in the way lawyers commonly use the word 'law', and then in the light of the dominant positivistic paradigm of thinking about law. Because legal positivism has historically defined itself in opposition to theories of natural law, I shall comment on the nature of that opposition. Positivism rests to some extent on a legitimate critique of a number of historically important theories of natural law, but it has failed to grasp the extent to which these theories of natural law have betrayed the basically naturalistic concern of natural law. We shall see, however, that

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<sup>59</sup> In English, 'law' refers as much 1) to general conditions of social order and justice as to 2) [the "legal system" or the totality of] particular rules promulgated or invoked by political, legislative and judicial authorities. In the continental languages, similar meanings belong to the words corresponding etymologically to 'right', which also mean 3) *right*, in particular a [*subjective*] *right*. This true for 'Recht' in Germanic languages, such as Dutch and German, and for the French 'droit', the Italian 'diritto', and their equivalents in other Romanic languages. In the latter, laws are referred to by means of words deriving from the Latin 'lex': 'loi', 'legge', 'ley'. In Germanic languages the corresponding terms have no etymological connection with 'lex': 'wet' (in Dutch), and 'Gesetz' (in German). On the other hand, 'ius', which was much more important in the language of Roman Law than 'lex', has almost completely vanished from contemporary languages. Its derivative 'iustitia' survives in words such as 'justice' (English, French), 'justitie' (Dutch), 'Justiz' (German), 'giustizia' (Italian), but not always with the same original meanings of what is in accordance with or conducive to *ius*, or of a peaceful, friendly disposition. For example, in Dutch and German, these meanings now belong to the words 'rechtvaardigheid' and 'Rechtfertigkeit' (literally: aptness or readiness for *recht*) that have, however, also acquired the moralistic overtones of Aristotle's notion of justice as "perfect virtue, insofar as it is displayed towards others". (Aristotle-NE V,i,15) In the same languages, 'justitie' and 'Justiz' are used to refer almost exclusively to the state's apparatus of law courts and enforcement agencies. Thus, there is a "minister van justitie" and a "Justizminister", but not a "minister van rechtvaardigheid", nor a "Rechtfertigkeitsminister". What was *ius* for the Romans, is now either *law* (droit, recht, diritto, derecho), or a *right* (un droit, een recht, ein Recht, un diritto).

<sup>60</sup> The Stoics were keen etymologists in this sense. Modern etymology is concerned almost exclusively with the similarities of word-forms in various languages, and the explication of these similarities, if possible, in terms of a number of well-established rules of phonetical transformation.

our etymological investigation reveals a viable naturalistic conception of natural law that is immune to the positivists' critique.

## 2. *Legal positivism and natural law*

The doctrines of legal positivism<sup>61</sup> have provided the law schools with the comforting notion that law is to be found in the things lawyers know and practise. Consequently, to study these things, to familiarise oneself with them, to acquire the necessary skills to use and apply them in a wide range of real life (or: court) situations, should suffice as the proper aims of an education in the law. It is little wonder, that the "education in the law" these schools provide resembles nothing so much as an initiation in the rites and customs of a particular profession, its dogmas, doctrines and prejudices, especially concerning the so-called "sources of law": legislative, judicial and administrative rulings, treaties, and the main currents of opinion among the members of the profession. Positivism has rationalised the idea that "law" has its source in the decisions of designated political and professional authorities. By equating the lawful with the legal, it has helped to push the study and practice of law away from considerations of justice into a mere expertise in legality.

It is a common opinion among lawyers, that law is a fairly definite *something* at a given time and place, but may and is likely to be different at different times or places. Some go so far as to say that, conceptually, law can be *anything*. As one textbook puts it: "It is impossible to define [law] in a way that does justice to reality.... Almost all jurists who give a definition of law, give a different one. This is, at least in part, to be explained by the fact that law has many aspects, many forms, and also by its majesty or grandeur."<sup>62</sup> Apparently, law defies definition.<sup>63</sup> Law students should realise that the definitions of the theorists and philosophers never capture more than one or a few aspects or forms of law. Lawyers, who deal with all the aspects and forms of the law, should know that the legal material is a turbulent mass of diffuse, heterogeneous, often fleeting and sometimes contradictory things. However, in the same chapter of the same book, we can also read this: "Thus, law is society, human existence, or rather that particular aspect of it that we call social order."<sup>64</sup> If this means that law is a principle of society, or a principle of social order, it is a statement with which few people would disagree. "L'ordre social est un droit sacré, qui sert de base à tous les autres".<sup>65</sup> With these words, Jean-Jacques Rousseau expressed what is really the traditional conception of law as well as the reason for the esteem in which it is traditionally held.

### 2.1 *Critique of positivism from a natural law perspective*

Clearly, the lawyers' attitude towards law is ambiguous. On the one hand, when lawyers want to justify their claims to authority and prestige, they adopt the language of natural law, with many references to "principles of social order or justice". On the other

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<sup>61</sup> In this century, legal positivism is best known in the forms developed by Kelsen-1960 and Hart-1961. But positivism has a far longer history, especially if we include such phenomena as the Legalist School in ancient Chinese philosophy.

<sup>62</sup> Van Apeldoorn-1985, p.1. This is a well-known and widely used introduction to the study of law for Dutch law students. It is a very thorough but also very conventional textbook, written by prominent Dutch lawyers and academic jurists.

<sup>63</sup> Apparently, law is held to be undefinable in a formal as well as a material sense. Formal definitions, in John Austin's words, aim to "determine the Province of Jurisprudence", i.e. to demarcate law from what is not law, but easily confounded with it (e.g. morality, religion, social science). Material definitions aim to supply a criterion for distinguishing what is lawful or just from what is not lawful or unjust.

<sup>64</sup> Van Apeldoorn-1985, p.5.

<sup>65</sup> Rousseau-1762, I,1.

hand, they show no inclination whatsoever to make the study of social order or justice the basis of their activities as students or practitioners of the law. In fact, they are prone to accept the positivists' repudiation of the very notion of natural law as irrelevant, or even utterly "unscientific" and "ideological". Positivism justifies this repudiation of natural law *inter alia* with the argument that science should be value-free, and that the lawyers' science can be value-free only if it sticks to the "law as it is", without concern for "what the law ought to be". But "the law as it is" is simply what, according to the general consensus among lawyers, currently is or embodies "law". From this perspective, natural law should be relegated to the domain of extra-legal speculation about what law ought to be: natural law exists only as mere opinion, it does not exist as a fact, it is not law.

It is easy to see that the positivistic critique of the notion of natural law rests on a misconception. The basic tenet of any doctrine of natural law is that the existence of law is independent of opinions about what law is or ought to be. From the perspective of natural law theory, the maxim that a science of law should consider only "law as it is, and not what one might believe ought to be law" is as self-evident as the maxim that science should study "the world as it is, and not as one might believe it ought to be". Natural law is not a human fabrication; it is not something to which the distinction between *ought* and *ought not* applies. On the other hand, what is called 'positive law' is a product of human activity, of human interests and opinions. Surely, the natural law theorists will say, there is nothing scientific about restricting one's study of human opinions to determining what they are, without any attempt to critically evaluate their truth value. Every science aims to go beyond the opinions on its subject-matter, even those currently held by its own practitioners, to the truth of the matter. If, as the positivists claim, law is "positive law" and "positive law" reflects human opinions, then the proper scientific attitude is to check whether *the opinions* that make up the positive law agree with natural law. From the natural law perspective, then, legal positivism amounts to a refusal to make law the subject of a critical scientific inquiry.

The positivists may object that the opinions that make up the law as they define it are not opinions about matters of fact, but about what *ought* or *ought not* to be the case, about what is good or bad, better or worse. The point of the objection is, of course, that such opinions about norms and values may not be the sort of opinions of which we can sensibly ask whether they are true or not; or that, if there is some sense in asking this, we have no agreed on procedure for deciding such issues other than the appeal to effective authority. But this objection misses the point. Natural law theory, properly understood, is not some sort of normative moral theory. It does not seek to make moral judgements. It seeks to identify the principles of social order, to judge human actions as either lawful or unlawful, depending on their relation to such principles. The question "What is law?" is logically distinct from, and prior to, the question "Should we live according to law?".

## 2.2 Natural law: metaphysics and moralism versus naturalism

It is true, that some moralists have tried to represent their own particular moral ideals as principles of social order, often to justify attempts to legislate and enforce their programs of "moral reform". These attempts to read particular moral ideals into the principles of social order have in the end tended to discredit the paradigm of natural law by shifting the focus of attention from the objective conditions of society to the significantly different concept of "the good or perfect society". This shift originated

with the reaction of Plato and Aristotle<sup>66</sup> against the historical and naturalistic approaches to social order of the fifth century thinkers and philosophers of Athens' Golden Age: the Sophists, and naturalists such as Democritus.<sup>67</sup> Visions of the perfect society underlie the false conception of natural law (*ius naturale*) as a system of natural laws (*leges naturales*). They present law as essentially normative, an *ought* that defies reduction to any material condition of mere existence. Law, in this sense, provides a solution for every problem, and points the way towards excellence and perfection in every aspect of life. As such, laws can only be expressed in statements about what people should or should not be or do. Thus, natural laws appear to have the same form as *moral rules* and also as *laws* issued by those in authority. This makes natural law a "higher law", one that stands above, and serves as a model for, the directives and commands, the rules and regulations of the political authorities as well as the *mores* of the people.<sup>68</sup> Natural law, in short, is made to appear as an *ideal* legal system, with the distinguishing characteristic that its validity in no way depends upon its being enacted as positive law. However, the turn towards metaphysics and moralism did not obliterate all traces of a naturalistic investigation of social order. Aristotle did not repudiate such investigation; he merely tried to render it harmless to his own moralistic preoccupations by going beyond physics (the study of nature) to metaphysics (the attempt to fit nature into a teleology that discloses the ultimate meaning or direction of the world).<sup>69</sup> It is instructive to see how Thomas Aquinas at once proclaims the directive powers of natural law with respect to every aspect of life, and concedes that it would not be practical or wise for the human legislator to try to enforce all the prescriptions of natural law:

"[Because] law regards the common welfare...there is no virtue whose practice the law may not prescribe." [However,] "human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concerned. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid. These are the vices that do harm to others, the vices that would destroy human society if they were not prohibited: murder, theft, and other vices of this kind, which the human law prohibits."<sup>70</sup>

Saint Thomas refers to the naturalistic notion of law as the condition of social existence only indirectly, and then only by way of a merely pragmatic concession in an otherwise idealistic frame-work of natural laws that prescribe all the virtues. The same attitude prevails in the writings on natural law of the later Scholastics,<sup>71</sup> and also of the rationalistic natural law theories of the seventeenth century. We can understand why the positivists have always focussed their attention on this normative conception of

<sup>66</sup> Cf. Aristotle's famous distinction between "mere living" and "living well". For him "living well" denotes a particular community standard of "the good and virtuous life". It is the specific task of the leaders of a community to maintain this standard by all the means at their disposal (including political and legislative means). That is why they need "real power to make the citizens good and just" (Aristotle-*Politics*, III, 9, 1280b1-15).

<sup>67</sup> Cf. Flückiger-1954, 98-184

<sup>68</sup> The *locus classicus* for the Greek concept of the "higher law" is in Sophocles' *Antigone*, where the heroin invokes the "unwritten but certain commands of the Gods" concerning burial rites against the commands of King Creon. Most of the Greek metaphysical schools, most notably the Stoics, combined this religious "higher law" concept with speculation about "nature", thus giving rise to the confused and confusing notion of natural law passed on by Cicero's famous definition in his *De Republica*, III,22.

<sup>69</sup> For an impressive analysis of how Aristotle incorporated (and distorted) naturalism in his own social and political theory, see Havelock-1957.

<sup>70</sup> Aquinas-ST, Iallae, Qu. 96, Artt. 3 and 2.

<sup>71</sup> On the Spanish Dominican and Jesuit theologians of the 16th and 17th century, who made great advances in discovering the principles of natural social order, despite their adherence to the "higher law" paradigm, see Chafuen-1986, also Rothbard-1995, 97-133.

natural law as a "higher law". Apart from its metaphysical trappings, it exactly matches their own conception of law. But the "higher law" theory gets mired in all the endless and undecidable controversies about "the truth of norms", their existence and grounds of validity. It can hardly escape the fate of becoming no more than a rhetorical device for dressing up any political or legislative programme with the prestige of philosophy or religion.<sup>72</sup> Positivism has tended to relate the "natural law" exclusively to efforts to use metaphysical and theological schemata to read some particular moralistic conception of "the good society" into the natural order of things. It has failed to grasp that such efforts confound the natural with the meta-natural or the supernatural. Early modern positivists set out to provide a naturalistic foundation for the normative conception of law, without relying on the assumption that every valid law prescribes behaviour that is already prescribed "by nature". Arguing from the sceptical premises that there is no way of knowing the true principles of "the good society", and from the conviction that no society can exist when everybody acts on his or her own beliefs, the founding fathers of modern positivism arrived at the conclusion, that the basic condition of social life is that people do not act on their own judgements.<sup>73</sup> Thus Hobbes argued that, as no society is possible when we all do as we please, society is possible only when we all do what one of us wills. Moreover, since we are all naturally inclined to act on our own judgements, society cannot arise "by nature". Society is an artificial construction; it requires an architect, a sovereign, i.e. an individual monarch or a monarchical assembly that acts "as one man", capable of imposing his will on all. For Hobbes, the existence in this form of an irresistible "power to keep everyone in awe"<sup>74</sup> is the condition that makes society possible. Except for this fundamental law of social existence, law is what the sovereign as such wills. Again, the *lawful* and the *legal* coincide, only this time they do not do so only if human legislation accords in full detail with the prescriptions of nature; they coincide because no society could possibly exist if it were not organised by the legislative activity of rulers. It seems, then, that positivism holds that the lawful and the legal are necessarily identical, while classical [metaphysical] natural law theory only maintains that they *should* be identical. However, both approaches seem to agree, that law is essentially normative and that every aspect of human life and action could conceivably and lawfully be prescribed by human laws.

The outcome of the discussion so far is a dilemma: from the point of view of classical natural law theory a strong case can be made against legal positivism; but the positivists have an equally strong case against the classical idea of natural law. We should question the positivists' thesis of the equation of the lawful and the legal - or, as some positivists have expressed it, of law and the state<sup>75</sup> - because there seems to be no inconsistency in the idea of a state without law or justice, whereas the idea of a state without a legal system of some sort most certainly is inconsistent. Also, there is no inconsistency in saying that some law or collection of laws has no connection with justice; but it would be a contradiction in terms to declare that there is no logical connection between law and justice. On the other hand, the positivists are assuredly right in ridiculing the claim of classical natural rights theory, that "nature", on account of its

<sup>72</sup> Cf. Alf Ross's famous jibe: "Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature." Ross-1958, p.261

<sup>73</sup> Cf. Tuck-1994; Van Dun-1996.

<sup>74</sup> Hobbes-1652, XIV.

<sup>75</sup> This implies that the legal system of the modern state represents the full flower of law: every society without the characteristic institutions of the modern state and its legal system is thought to be either without law, or to have only primitive law, or to be somehow deficient. An early modern exponent of this "deficiency"-thesis was Locke-1690. For him, the state is the remedy for the deficiencies of natural society.

inherent *telos* or by divine providence, prescribes for us in minute detail what we ought to do or strive for, even if the practical import of this claim is usually weakened by conceding, that human laws should not presume to enforce everything the natural laws prescribe.

### 3. *The etymology of law and right*

The previous section left us in a dilemma. Is there an escape out of this dilemma? I think there is one, if we are willing to divest the notion of natural law of its metaphysical garments. This is where we can employ the resources of etymology in an endeavour to discover "the real or true state of things", i.e. the original meanings of terms which we may have lost sight of in the furor of the interminable squabbles among axe-grinding theorists. The search here is for a *naturalistic* conception of natural law, one that provides an unambiguous criterion for judging the lawfulness of actions, including legislative actions, without necessitating any recourse to "knowledge of metaphysical things", and without having to fall back on mere knowledge of the commands of the sovereign or his agents.

My starting point will be, that law as justice ("Recht", "Droit") seems to denote a horizontal relationship between equals, whereas law as the measure of legality ("wet", "Gesetz", "loi") seems to denote a vertical relationship within a hierarchy, between a superior law-giver or legislator and one or more inferiors or subjects. Let us, then, take a look at the concept of equality and its relation to the concept of justice.

#### 3.1 *Justice and equality*

In some languages, for example in Dutch and German, the word for equality is one that in a literal translation would be rendered in English as 'likeness': 'gelijkheid', 'Gleichheit'. The etymological root is 'like' ('lijk', 'leich') which means *body*, or *physical shape*. Thus, one's likes are those who are of similar shape, or those who have the same sort of body. There is no connection here with the Latin 'aequus' or 'aequalitas', which suggest not "likeness", "similarity", "sameness" or "being of the same sort", but rather "having the same measure". In a literal sense, the concept of *aequalitas* does not apply to human beings as such, but only to particular measures of shape, rank, ambition, ability or excellence: two persons cannot be equal as such, but they may be of equal height or equally good at doing something. Even if two persons were found to be equal in *all* respects, we should qualify their equality as an accidental and temporary condition. On the other hand, *likeness* or *similarity* is the outstanding characteristic of all human beings. In fact, it is only in their likeness or humanity that people are equal. However, this is an extremely abstract sort of equality. It adds nothing to the real or natural or objective likeness of all human beings, and it should not divert attention away from the fact that apart from their common humanity all people are different in many ways, and unequal with respect to many measures of shape, rank, ability or whatever.

The distinction between equality and likeness or similarity is of the utmost importance for the logic of justice. For most people "justice" and "equality" are inseparable. But there is a world of difference between justice-as-*aequalitas* and justice-as-*similitudo*. It is often said, that the fundamental requirement of justice is *equal treatment of all*. Taken literally, this is a requirement no one can possibly meet, and no one will appreciate. There is no way in which one can *treat* oneself as one can treat others, and no occasion on which one can meet out the same treatment to *all* others. Distributive equality applies, if at all, only to a well-defined, closed group,

when all its members stand in the same relationship to the same distributive agent (the parent and his or her children, the teacher and his or her pupils, the commanding officer and his troops, the hostess and her guests, and so on) - and even so it presupposes the inequality of the distributor with respect to those in his care. In complex situations distributive equality merely disregards the inequalities that, by way of specialisation and the division of labour and knowledge, give rise to all the advantages of cooperation and co-ordination.

It is precisely because "equal treatment" in complex situations is an absurd requirement, that Aristotle found it necessary to add the amendment, that distributive justice requires that equals be treated equally, but unequals unequally. The whole point of distributive justice would be lost, if it did not serve to perpetuate the right sorts of inequality.<sup>76</sup> And the point of distributive justice was for Aristotle essentially *political*: to make sure that the best, and only the best, rule, and that they perpetuate the particular morality or way of life of the community. Who are the best? They are those who within their community are considered the most eminent representatives of the community's way of life: its traditional "elite". Aristotle knew very well, that to apply the concept of distributive justice the rulers should be able to measure virtue; he also knew, that to measure virtue the rulers should always and continually keep the ruled under close "moral investigation" to determine the degree of their "political correctness or defects".<sup>77</sup> These consequences did not bother him in the least. The whole of his political thought was framed by his vision of the *polis* as a small, self-sufficient community ruled by a political elite.<sup>78</sup>

None of these complications arise with the concept of commutative justice,<sup>79</sup> which we can express as the requirement *that one treat all others as what they are, namely one's likes*, and not, say, as one would treat an animal, plant, or inanimate object. This requirement can of course be phrased in terms of equality, e.g. as the requirement that every one should accord all others equal respect, or that one should recognise in all one does that all others are equally human. But again nothing is added by using the language of equality rather than that of likeness or similarity, except the risk of confusing "equal justice" with "equal treatment". Equal justice is achieved by doing injustice to no one, i.e. by treating others as one's likes; equal treatment can only be achieved by not doing anything.

### 3.2 Liberty, freedom and right

With equality-as-*similitudo* we find an idea of justice that immediately brings into focus the idea of freedom. From an etymological point of view, 'freedom' is quite different from 'liberty'. The latter word is obviously derived from the Latin 'libertas', and refers to the status of a full member of some social unit (originally, a family or tribe). 'Libertas' is in fact the status of the *liberi*, i.e. the children, considered not as babies or young people, but as direct descendants. The same meaning attaches to the Greek 'eleutheria' (*liberty*), which is derived from a verb meaning 'to come'. *Eleutheria*, like *libertas*, is the status of "those who come later". In Dutch this meaning is rendered literally by the word 'nakomeling' (one who comes later). *Liberty* points to a *birthright*, an inherited status, or to the status of one who has been adopted as a full member of the

<sup>76</sup> Cf. the discussion of justice in Aristotle-NE, V.

<sup>77</sup> Aristotle-PO, III, 9, 1280b5.

<sup>78</sup> Aristotle-PO, III, 9, 1281a3-8: "It follows, that those who contribute the most to [a political society that exists for the sake of noble actions] have a greater share in it, when their political excellence is greater than that of men who may be of higher rank where freedom or birth or wealth is concerned."

<sup>79</sup> Unlike its distributive counterpart, commutative justice operates in a horizontal plane between equals (as give-and-receive-in-exchange or take-and-give-back). See Aristotle-NE, V

family or tribe. As a political term, 'liberty' suggest full membership in a political society, and points to notions such as *nationality* and *citizenship*.

Etymologists trace the origin of the word 'free' to an old Indian word 'priya' meaning: the *self*, or *one's own*, and by extension: *what is part of*, or *related to*, or *like oneself*, or even: *what one likes*, or *loves*, or *holds dear*. Latin seems to have transformed 'priya' into 'privus' (*one's own, what exists on its own or independently, free, separate, particular*), 'privare' (*to set free, to restore one's independence*), and 'privatus' (*one's own, personal, not belonging to the ruler or the state, private*). The picture that emerges from these linguistic considerations is clearly focussed on the person and his or her property, not on some conventional status within a well-defined social unit. Political society - which in Aristotle's view, is unified by a constitution (a "moral" convention), and not by the ties of kinship that define the family and the tribal village - may have forged a link between freedom and liberty, but this should not obscure the fundamental distinction. Logically speaking, freedom may well be a ground for claiming liberty under the constitution, but even if a constitution denies the status of liberty to a free person, it does not thereby automatically deprive him of his freedom. Conversely, if a constitutional convention grants liberty to a person, it does not automatically make him more free than he was before. The grant of liberty gives him full membership and status in the constituted political organisation, and nothing more. Freedom belongs to the natural human being, liberty to a role player, a functionary in an organisation. In modern terms, we might say, that liberty belongs to the "public sphere" (i.e. to one's involvement with the business of the state), while freedom belongs to the "private sphere" where people meet one another *as free natural persons* with full responsibility for their own actions, and not *as legal or fictional persons* ("citizens") who are likely to explain and justify their actions in terms of legally or constitutionally conferred powers and privileges.<sup>80</sup>

Thus, *free*, in the original sense of the word, is one who exists by his or her own efforts, one who is independently active, "his own man" or who lives "with a mind of her own". The proper context for the application of the word 'free' is the context of human interaction, where 'freedom' denotes leading one's own life, or making one's own decisions. This freedom is a correlation of *likeness* or equality-as-*similitudo*, but can hardly be reconciled with *aequalitas*. Likeness, as noted before, does not make one person the measure of another: it is not concerned with excellence in any respect. Also, to say that all people are alike does no violence to the fact that people are *separate* beings. Whether we are discussing the human person as a real physical entity (the human body) or as a source of physical activity (movement, emotions, thought), we always run into the inescapable fact of the separateness of persons: my body is nobody else's, my actions or deeds, my feelings and thoughts, are *as a matter of fact* my own, and this is true not only for me and mine, but also for you and yours, her and hers, and so on and on. My existence is and remains forever separate from your existence. We may say that freedom is a *reality* (one's own being, an inescapable fact beyond the reach of choice) as well as an *activity* (one's own *work*, Dutch: 'werkelijkheid', German: 'Wirklichkeit'). *Real freedom* (i.e. freedom as reality) is an inescapable fact of life: a person is free, and remains free until he dies; to destroy a person's real freedom one has

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<sup>80</sup> A strong hint of the direct, personal character of freedom can be found in the Dutch word for making love and having a continuing intimate relationship with someone else: 'vrijen'. Morphologically and etymologically this word is the same word as 'vrij' (*free*). It connotes not only the secondary meaning of 'priya' (*dear, lovable*), but also its primary meaning (*one's own*). Making love or getting intimately and sexually involved is even now often referred to as a way of making someone else one's own, or of giving oneself to someone else - "You're my girl", "He's my man", "I'm yours now".

to destroy the person. However, *organic freedom* (i.e. freedom as work)<sup>81</sup> is contingent and vulnerable. All sorts of circumstances can prevent a person from doing his work, but only when the hindrance comes from within the proper sphere of freedom - that is to say: when it is the work of others - is it a violation of the condition of equality-as-likeness, i.e. of [commutative] justice. Such a violation of a person's freedom is traditionally and properly identified as an infringement of his *right*.

Organic freedom is indeed the substance of [subjective] right, as we shall see. Here we should note only that the word 'right' is nowadays understood mainly as referring to elements in a real or ideal legal system. Not surprisingly, it has acquired excessively normative overtones: a right is what the law says, or ought to say, a person, animal, plant, or whatever, should be given or allowed to have or do. It has lost virtually all descriptive content.<sup>82</sup> Nevertheless, it is an indispensable word. In its original meaning it points to a very basic aspect of human life. Like the Dutch and the German 'Recht', the French 'droit' and the Italian 'diritto', 'right' reminds us of the Latin '[di]rectum', from '[di]regere', *to make straight*, or *erect*, and by extension of meaning: *measure, regulate, rule, control, direct, manage, govern*. The one who does the straightening, erecting, measuring, ruling or governing, is the *rex* (usually but misleadingly translated as 'king'<sup>83</sup>), that which is under his control is his *rectum* - it is his right. The word 'right', when shorn of the current overgrowth of legal and normative meanings, evokes the drama of the struggle against an hostile environment; it conjures up an image of force and violent activity, of using physical power, manipulating things and subjugating people. Might gives right.

### 3.3 *Ius and lex*

We may well ask how this extremely physical concept of right-as-might can be connected with justice. As we use the words 'right', 'recht', 'droit', 'diritto' now, the original meaning has almost completely vanished. The focus has shifted to the concept corresponding to the Latin 'ius'. In its original meaning 'ius' (plural: 'iura') stood for "a bond" or "a connection", but with little or no physical connotations. A *ius* originates in solemn speech ('iurare', to swear,<sup>84</sup> to speak in a manner that reveals commitment and obligation). As such a *ius* is a logical or rational, i.e. a symbolic, hence social or moral bond. When the speech is reciprocal, the result is an agreement or contract among equals, an association. *Ius* connotes commitment and obligation, but also equality in the sense of likeness. By speaking to another, and waiting for his answer, by committing oneself towards him and waiting for him to commit himself, one treats him as one's like. It should be clear, that a *ius* implies, that the persons involved are *mutually independent speakers*. If one of them is a right, or within the right, of the other, there is presumably no *ius* between them. This presumption may be defeasible, but it cannot be dismissed out of hand, since one person's speech acts may also be controlled by the

<sup>81</sup> Because there is no straightforward way to express in English the concept of what in Dutch should be called 'werkelijke vrijheid' (German: 'wirkliche Freiheit'), I have coined the expression 'organic freedom' to refer to it. In doing this, I allude to the meaning of the Greek 'organos', which is: *working, active*.

<sup>82</sup> Cf. Lomasky-1987, Chapter One: "The Use and Abuse of Basic Rights".

<sup>83</sup> The word 'king' originally denotes the descendant of a noble family ("kin") of ancient lineage, and in particular the descendant of the first family, the one that traces its origin to the beginning of the world (or of history: 'world' or 'wer-aldt' literally means *the age or time of man*). Thus, the king, by providing a link with the first age, is a symbol of tradition and justice: the one who knows and safeguards the original order of things. However, when the concepts of *king* and *rex* fused, and especially when, under the influence of chiliastic or millenarian expectations, the accession to the throne of a king came to be seen as the beginning of a new and glorious age (the millennium), the king became a symbol of radical change, a maker of a new, hitherto unknown order of things: a legislator rather than a mere judge.

<sup>84</sup> 'To swear' (Dutch: 'zweren') comes from the old German 'swerren', which means "to speak to another, expecting him to *an-swer*, i.e. to speak in turn".

other, if the former is under the control of the latter. A *ius*, in short, stands in stark contrast to right-as-might. It creates no physical bond (or yoke<sup>85</sup>) that serves to control or govern another as if he were an animal to be tamed and steered. Instead it creates a bond of an entirely different kind, a covenant that respects his likeness and leaves his freedom intact. The common idea of a bond links the notions of *ius* and *right-as-might*,<sup>86</sup> but the different natures of the bonds, logical in the one case, physical in the other, are too obvious to ignore. Even if we disregard the aspect of physical force and violence in the practice of ruling (*regnum*), we should not overlook the difference between speech by which one obligates oneself (swearing, promising) and speech by which one obliges others (commanding).

The Romans also used the word 'ius' in a sense in which it cannot be put in the plural. *Ius*, for them, was not just "a bond", but also "*the* social bond", the very existence of society, or its essential pattern. Conceptually, objective *ius* appears as the logical ground of specific *iura*, because these only express a commitment to act in accordance with objective *ius*. In Dutch, we refer to objective *ius* as "objectief recht", but also, and very appropriately, as "wet" (nowadays "[a] law", but originally: "what is known" or "what is common knowledge").<sup>87</sup> The English word 'law' in fact also referred originally to that which could be known by all, to the general order of things. It derives from 'laeg' (literally: *the lay-out or order of things*<sup>88</sup>).

From an etymological point of view, 'right' and its continental equivalents are clearly unfortunate translations of 'ius'. We should also recognise that the original meaning of the Dutch 'wet' has been completely lost, at least in the discourse of lawyers and jurists. In English 'law' is used as often to refer to a legal system (or to its constituent elements, the laws promulgated or invoked by the law-makers) as to the principles of social order as such. On the other hand, we can easily see that the original meaning of 'right' and the new meanings of 'wet' and 'law' are very similar to the meaning of the Latin 'lex' (*a law*, plural: 'leges'). There is the same suggestion of a hierarchical or vertical relation between one who commands or compels and those who are commanded or compelled. A *lex*, for the Romans, was a decision of the highest public authorities (in particular the *comitia*) that binds their subjects. *Lex* stood in clear opposition to *ius*, the latter being a source of obligation either because of the nature of things, or because of the solemn or sworn agreement of those involved. The word 'lex' is traced back to 'dilectus', *the raising of an army*; its original meaning was: *a public proclamation ordering the male population to do military service*.<sup>89</sup> It is related to the verb 'legere' (participle: 'lectum'), which means *to collect, to pick up, even to steal*.<sup>90</sup> There is a clear reference here to the formation of a military organisation, and to giving orders, ruling, and, generally, to using and manipulating people in the pursuit of particular ends. A *lex*, then, denotes power over human beings, in the same way that *regere* or *dirigere* denotes power over things in general.

### *Right, ius, and property*

Perhaps the positivistic current in thinking about law harks back to the original idea of right-as-might, and to its application in the form of *leges* to human material. This

<sup>85</sup> From the Latin 'iugum', which is related to 'iungere', *to connect physically or by physical means*.

<sup>86</sup> This link may have been exploited at an early stage by rulers to dignify their rule over their likes. It may also have played a role in the choice of using 'right' as the translation of 'ius'.

<sup>87</sup> 'Wet', from 'weten' (*to know*).

<sup>88</sup> The Swedish equivalent of 'law' is still 'lag'. Cf. Dutch 'leggen', German 'legen', *to lay*.

<sup>89</sup> The Dutch word 'lichting' probably derives from 'dilectus'. It has the same meaning: either *the act of raising troops, or the troops that have been raised by some particular act*.

<sup>90</sup> Cf. Thrasymachus' portrayal, in Plato's *Republic*, I, of the rulers of cities as "those who steal men".

would explain its fascination with the phenomena of power and its almost total neglect of questions of *ius* and *iustitia*. There is, however, a straightforward way to harmonise the original meanings of 'right' and 'ius'. We only have to restrict the meaning of 'right' to the government or management of one's own work. In the same way, we can harmonise the concepts of *ius* and *lex*, if we restrict the application of *lex* to a person's command over his own property. With these restrictions, the physical activity that is a characteristic of right-as-might as well as of *lex* remains intact, but it is *right* or *lawful* only if it stays within the bounds of *ius* or justice. From the naturalistic perspective of natural law, the bounds of justice are nothing else than the real and organic boundaries of every person as a physical and acting or working entity.<sup>91</sup> Specifically, *ius* implies that action across these boundaries must be based on, or sanctioned by, the agreement of those who are materially affected by it. In this sense, organic freedom as defined earlier is the source of right if, and only if, in exercising it one does not fail to deal with others as one's likes.<sup>92</sup>

The conception of property as the product of one's organic freedom within the bounds of justice is familiar to all students of political thought. It corresponds to Locke's assertion that the property of an object originally belongs to its maker.<sup>93</sup> Thus, the original title of property is *auctoritas*, the quality of being an *auctor*. 'Auctoritas' derives from the verb 'augere', which means "to grow [something]", and also "to improve, augment, produce, make, create, or found". *Auctoritas* is the original ground of lawful possession: what the *auctor* produces is, in an obvious sense, *his* - it is *by* or *of him*. This makes him solely responsible, answerable and liable for it, for what one produces cannot answer for itself, and, having no independent status in law, cannot be held liable.<sup>94</sup> In this sense, the *auctor* guarantees what he produces.<sup>95</sup> While we are nowadays inclined to view authority as perhaps primarily a direct vertical political relationship between one person who wields authority and another who is subject to it, in its original sense authority exists between a person and his work. In that sense, it applies to an interpersonal relationship only indirectly, as when one person who uses the property of another should concede the latter's authority over it.

Having authority over something is often confused with having a *say* over it. E.g. in Dutch, 'authority' is often translated as 'gezag' or 'zeggenschap' (literally: *say*, but also *command*, *jurisdiction*), although these words properly apply only to a relationship between persons. Ironically, to say in Dutch or German that something belongs to a person one should say that it *listens* to him ('toebehoren', 'zugehören'),<sup>96</sup> or that it *obeys* him. In these translations, the original idea of *auctoritas* is lost and replaced by the idea of a relationship between master and subject. In this respect, they remind us of the extravagant conception of property proposed by Aristotle in *Politics*, where he claims that, properly speaking, only articles of direct consumption (food, clothing, a bed) and slaves can be property.<sup>97</sup> The characteristic of property, for Aristotle, is that it is

<sup>91</sup> There is nothing metaphysical or moralistic about the boundaries of persons, which are the bounds of justice. It is fallacious to mystify and etherealise natural law as some "brooding omni-presence in the sky" (O.W. Holmes).

<sup>92</sup> Against the Hobbesian interpretation of unrestricted organic freedom as man's one and only natural right, Locke only had to remind us, that we are indeed by nature finite, limited beings, and that our organic freedom is compatible with the bonds of society only if it works these natural limits.

<sup>93</sup> Locke-1690, II.6: "For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker ... they are his Property, whose Workmanship they are...", and also chapter V, "Of Property".

<sup>94</sup> This is true even in the case of small children - the only case where *auctoritas* applies directly to human beings.

<sup>95</sup> In Roman law, the *auctor* acted as bail or surety.

<sup>96</sup> These words derive from 'toehoren', resp. 'zuhören', *to listen to*.

<sup>97</sup> Aristotle-PO, I,4. The relevant passage (in Benjamin Jowett's translation, revised by Jonathan Barnes) is this: "Thus, too, possession is an *instrument for maintaining life*. And so, in the arrangement of the

*immediately* useful to its owner. Articles of consumption are property because they yield their utility immediately in the use we make of them; and slaves are property because they are means of action (or *life*) that are serviceable without requiring any work on the part of the master, "whose will they obey or anticipate". Aristotle also considered a slave as "being better off when under the rule of a master... [because] he participates in reason enough to apprehend, but not to possess it". Thus, Aristotle cunningly suggests that owning slaves rests on *auctoritas*: the master "improves" the slave, who thereby becomes "a part of the master, and wholly belongs to him".<sup>98</sup> For the same reason that slaves are property, tools, i.e. "means of production", are *not* property in Aristotle's sense. They belong to the *banauisic* sphere of manual and wage labour, which, in the philosopher's appreciation, is a sort of "limited slavery". In this manner, while paying lip-service to the naturalistic conception of property as resting on *auctoritas*, Aristotle assimilated owning property to the rule of man over man, and at one and the same time justified the regulation of the trades by legislation as well as the legal inviolability of the ownership of slaves. Clearly, whether due to the influence of Aristotle or not, a lot of modern legal thinking about property fits nicely into the Aristotelian pattern: apart from an individual's claims to what he needs for direct consumption, only the state's claims to obedience are considered to be "inviolable property"; all other claims are subject to legislative regulation.<sup>99</sup>

#### 4. Law and society

##### 4.1 Peace, friendship, freedom, and property

Several old sayings express the idea that law or *ius* is a principle or necessary condition of society: *ubi societas, ibi ius* ("where there is society, there is law", or "without law, no society"), *fiat justitia ne pereat mundus* ("let there be justice, so that the world will not perish"). It is unfortunate that Latin, and also French and English, have only the word 'society' to express this idea which is, in fact, the fundamental presupposition of natural law. This is unfortunate because, as we shall see below, the

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family, a slave is a living possession, and *property a number of such instruments*; and the servant is himself an instrument for instruments. For if every instrument could accomplish its own work, obeying or anticipating the will of others, ... chief workmen would not want servants, nor masters slaves. Now the instruments commonly so called are *instruments of production*, whilst a possession is an *instrument of action* [i.e. for maintaining life - FvD]. From a shuttle we get something else besides the use of it, whereas of a garment or of a bed there is only the use. Further, as production and action are different in kind, and both require instruments, the instruments which they employ must likewise differ in kind. But life is action and not production, and therefore the slave is the minister of action. Again, a possession is spoken of as a part is spoken of; for the part is not only a part of something else, but wholly belongs to it. ... [T]he slave is not only the slave of his master, but wholly belongs to him. Hence we see what is the nature and office of a slave; he who is by nature not his own but another's man, is by nature a slave; and he may be said to be another's man who, being a slave, is also a possession. And a possession may be defined as an instrument of action, separable from the possessor." (My italics, Fvd) Note Aristotle's emphatic insistence that instruments of action are property (possessions), and that instruments of production (tools) are not. Property is wholly a part of the owner, but tools are not part of the artisan, and therefore are not property. On the contrary, the artisan is an instrument of the instrument, and so presumably a part of it.

<sup>98</sup> Aristotle-PO, I,5.

<sup>99</sup> Arguably, this is exactly what Aristotle had in mind. The city or state gives "man" (i.e. the full citizen) far more self-sufficiency or freedom from want by making it possible for him to rule over non-slave labour. With astonishing frankness Aristotle writes, that the slave is in fact a more excellent being than a worker, artisan or tradesman: "For the slave shares in his master's life; the artisan is less closely connected with him, and *only attains excellence in proportion as he becomes a slave*" [*Politics*, I,13, *in fine*; emphasis added - FvD]. Not being slaves by nature, the lowly but free workers, artisans and traders cannot be enslaved without injustice by any other man. However, in the cities they are a part of the whole, and wholly belong to it. Thus, the citizens of the city - its ruling class - are morally and constitutionally entitled to the obedience of the workers, artisans and traders.

ambiguities of 'society' may easily mislead us to read into these old truths a completely mistaken idea of law. However, we can infer the proper interpretation if we recall the original idea of law as *laeg*, the lay-out or order of things. The opposite of *laeg* is *orlaeg* (the old English word for war; it survives in Dutch as 'oorlog'), the desintegration of order (Dutch: 'war'). The modern English 'war', like the French 'guerre', derives from the Frankish 'werra' (*disorder, confusion*). Thus, society, or the condition of social existence, implies the absence of war and warlike actions that create disorder by destroying social bonds. In Latin, 'ius' stands in opposition to 'iniuria', the general term for typically warlike actions: insults, willfully inflicted injuries, takings of and damages to property, kidnappings,... Such acts destroy society, or the social bond (objective *ius*). That they do so is obvious when we consider a society of two persons. On an island with only two inhabitants, there is no society, if they engage in actions that are injurious to the other. In larger settings, such actions continue to produce their destructive effects, although these may not be so immediately obvious or threatening when they leave a large number of social bonds intact.

In the light of these considerations, we may say, that society is the absence of war, i.e. *peace*, in human relationships. Society is therefore a shared mode of existence without enmity, i.e. a condition of *friendly* interaction or *friendship*. Furthermore, the purpose of warlike action, the intention of an enemy, being the destruction or impairment of another's faculties of independent existence or work, war and enmity are direct threats to a person's freedom. It appears therefore, that society is the condition of *peace*, or *amity*, or *freedom*. The conceptual links among "peace", "friendship", and "freedom" should be obvious if we consider that we cannot have one of these things without any of the other two. In some languages, most conspicuously in Dutch and German, this link is suggested even by the form of the words: 'vrede', 'vriendschap', 'vrijheid', and 'Frieden', 'Freundschaft', and 'Freiheit'. Etymologists trace the origin of *all* these words to the old Indian word 'priya' (*one's own*) which I have discussed earlier as the root of 'freedom'. There is also nothing mysterious about this logical connection between the concept of property and the concepts of peaceful, friendly and free relations. Friendly relations are peaceful relations, without *iniuriae* to person or property. Peace is a condition in which people can enjoy their property and independence, without being subjected to hostile treatment. And people are free to the extent that others treat them peacefully and friendly, respect them, their work and their property - in one word, their right (the physical domain of which they are the authors) - by dealing with them according to *ius*, i.e. by abstaining from *iniuriae* or warlike action. Thus, the security of each person and his or her property against predatory attack emerges here as the necessary condition or principle of society, its basic law or *ius*. We see, then, that the definition of law as "society itself", which, as we have noted, lingers on even in some lawyers' textbooks, should not be taken as a mere rhetorical flourish. It reflects an immemorial pattern of thought that has been transmitted in many Indo-European languages, and even today forms the core of liberal views on man and society.

#### 4.2 Two concepts of society

From a natural law perspective, right is *id quod iustum est*, i.e. what is in accordance with objective *ius*, or law, or social existence. More specifically, a *subjective right* is action or activity that is in accordance with the requirements of society, the respect of the person and property of all people. It is in this precise sense that we should understand the ambiguous but popular definition of a right as *what is socially acceptable*. Unless we understand a right as what is acceptable to "society itself", we

lose the connection with objective *ius* or law. This happens when we interpret the phrase 'socially acceptable' as "what is acceptable to public opinion, or the ruling opinion, the opinion of the rulers, or of some dominant or majority group". Such a subjectivist interpretation sacrifices the objectivity of law on the altar of arrogance ("Law is what is acceptable to us, we are [the source of] the law"). More importantly, it leads us back to a confusion of the lawful and the legal, and into a confusion of two radically distinct concepts of society. As noted already, the latter confusion is all the more likely for speakers of English (or Latin or French), who have only the word 'society' to express both concepts. Speakers of the Dutch language do not have this problem: they can easily distinguish between "een samenleving" (literally: *a living-together* or *symbiosis*) and "een maatschappij" (literally: *a society* or *company*).

A society-as-symbiosis (*samenleving*) is not some well-defined, organised group, but precisely that condition of lawful co-existence that we have been discussing all along. It is perhaps best described as the way of life of those who live as free persons among their likes.<sup>100</sup> Thus, society-as-symbiosis is coextensive with objective *ius* or law. It is a *horizontal* society without hierarchical structure. It is also an inclusive society without a formal organisation based on certified membership. Anyone who accepts to live according to law is, by that fact alone, *in society*; anyone who does not is, by that fact alone, an outlaw, i.e. one who is *outside society*. While people in society *participate in society*, they do not *participate in the action of society*, because society is not a source of purposive action. It is a *general, a-centric* society because there is no particular common goal and no central authority that that controls or directs the activities of the rest. Interactions among those in society have the character of meeting, exchanging and parting, or of freely entering into, or exiting from, durable relationships on peaceful, friendly terms. Thus, society-as-symbiosis is *a catallactic society*.<sup>101</sup> It is inappropriate and misleading to say, that one who is in society is a part of society, or that he is related to society as a part is to a whole. The symbiotic relations among persons are catallactic, not mereological.<sup>102</sup> It is therefore nonsensical to hypostasise society-as-symbiosis, to ascribe some sort of legal or fictional personality to it. No person owns it, and no person is responsible or answerable for it.

A society-as-company (*maatschappij*, German: *Gesellschaft*) is a company of *mates* (Dutch: 'maten', literally: *people who share their meat*, or eat from the same table, or live from a single common source of income). The mates or members are to be distinguished very clearly from those who are not members and as such have no claim to a share of the income of the company.<sup>103</sup> The Latin *societas* also is a company of *socii* (literally: *followers*, but also mates, compagnons, partners, assistants). 'Societas' and 'socius' are related to the verb 'sequi', *to follow*. Thus, the constituent relationship of a *societas* is that of following, or, when it is looked at from the other side, of leading. The leaders lead by imposing their *lex*, that is to say: by directing the actions of the followers by calling on, or compelling, the followers to do as they are told. A society-as-company is not at all like the general condition of peaceful, friendly and free co-

<sup>100</sup> "Samenleving" denotes *living with or or among one's likes*. The word 'samen' belongs to the same etymological group as the Latin 'similis', the Greek 'homos', and the old Indian 'sama', all of them meaning "the same", or "similar".

<sup>101</sup> From the Greek *katallassein*: to exchange, to come to terms, to mediate, to conciliate; also *katallagè*: profit, conciliation.

<sup>102</sup> As a branch of formal logic, mereology (literally: the study of parts) deals with the relations of the parts of a whole to the whole itself or to other parts. I use the term here in a loose sense, to refer to approaches to the analysis of social phenomena in terms of an a-whole-and-its-parts model.

<sup>103</sup> Aristotle approvingly quotes earlier writers who define the members of a family as "companions of the cupboard" and "companions of the manager"; he also refers to the inhabitants of a village as "people suckled with the same milk". (Politics, I,2)

existence. It makes sense to ascribe a fictional personality to it, on account of its hierarchical structure implied by leading and following, commanding and obeying, ruling and being ruled. A company does have leaders, maybe even owners, who can be held responsible and liable for the actions of the whole. In contrast with a society-as-symbiosis, it does have a formal condition of membership, and usually a number of more or less elaborate procedures for admitting new members, determining the status of a member within the organisation, confirming and terminating membership. It is, therefore, an *exclusive, vertical society*. It is also a *mono-centric, particular society*. Society-as-company is not a catallactic society, but a mereologically organised whole, with each member playing its prescribed part in the action of the whole. It is coextensive with the actions of its members only, at least in so far as these take part in the action of the company itself.<sup>104</sup>

#### 4.3 Two concepts of justice

'*Ubi societas, ibi ius*' takes on a entirely different meaning if we interpret 'societas' in the exclusive sense, as society-as-company, rather than in the inclusive sense, as society-as-symbiosis. The conditions of existence of an exclusive society or company are very different from those of an inclusive society. They are usually discussed under such headings as loyalty, fairness (or distributive justice) and solidarity: *loyalty* of the members to the company or its leaders, and of the leaders to the stated goals of the company; the members' perception and appreciation of the *fairness* of its government or management, and the *solidarity* of its leaders and members, whether in the strong sense of a willingness to assume responsibility for all the actions of the company or any of its members, or in the weaker sense of a willingness to help other members. None of these factors is to be taken for granted, of course, and it is not surprising that a great deal of effort is spent in trying to figure out how companies can be kept going. The object of this "science of management (or government)" is not essentially related to the study of law, even if the existence of a company is undermined by conflict, internal hostility, and other divisive factors that reduce the company's ability to function as a unit. Society-as-symbiosis, on the other hand, reflects people's ability to go their own way, individually or in the company of others, in freedom, peace and friendship.

The idea of justice as "necessary for society" is therefore ambiguous in exactly the same way as the term 'society' itself. So is the idea of a right as "what is acceptable to society". However, within a particular or exclusive society, justice necessarily is a relativistic notion, whereas justice as the condition of existence of inclusive society is not. There are indeed many societies-companies of different sorts and sizes, with different organisational structures, conditions of membership and statutory purposes. Every particular exclusive society will have its own particular conditions of existence and success; and these serve as the standards for evaluating the justice of its principles of organisation and policy, its *leges*. On the other hand, society-as-symbiosis always and everywhere implies the fulfilment of the same condition, which is that people abstain from war-like action in their dealings with one another. However, because of their exclusive nature, many separate societies-companies can exist side by side and interact in more or less friendly ways, depending on whether they operate according to law or not. Note that an exclusive society's lawfulness depends in no way on whether it

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<sup>104</sup> Other contrasts have been used to make the same, or a similar, distinction: open-closed (Popper), cosmos-taxis, cosmopolitan-tribal (Hayek), nomocratic-telocratic (Oakeshott), natural-artificial, spontaneous-constructed, global-local, market-state. However, some of these contrasts are relevant only in particular discussions, and some are suggestive, and possibly misleading, rather than analytically useful.

acts in accordance with its own criteria of justice. There is also no reason why a company should meet the requirements of law in order to be successful in its own pursuits. There have been, and are, many companies that are organised in clear defiance of the principles of law; as well as many companies that are constituted in a lawful manner, yet operate in a warlike fashion. Such organised crime evokes the need for organised defence, maybe even for what is usually called a political organisation. The latter sort of organisation, like any other sort of company, may be organised in a lawful or unlawful manner. However, let it be ever so lawful in all respects, let it be ever so vital for the protection of society-as-*symbiosis* against predators, its own organisational principle or *lex* is in no way a determinant of law. And this holds true, even when a company grows really big and powerful enough to defy law with impunity and on a large scale - when it sets itself up as a state. As long as humans remain what they are - separate beings of the same sort, capable of independent action or work - law remains what it is. Moreover, law, which belongs to general society, takes precedence over *lex*. For unlike general society, companies are mere *means of action*, and not indispensable to social existence. People can and do move in and out of companies, become members or associates of more than one company; companies can be merged or split up, reorganised, dissolved, and so on - without anyone inflicting any unlawful harm on anyone else or weakening the texture of general society. General society is not a means of action of anyone. It is the condition under which every person can lawfully pursue his own goals, individually or in the company of others. But except for the leaders or organisers, most members of a company are primarily tools to be used and managed in furthering the goals of the company or its leaders.

### 5. Concluding remarks

Before drawing conclusions from the analysis presented here, I should recall the main findings. We found that etymology reveals a clear pattern underneath the confused and confusing language of law, rights and justice. On the one hand, "right" is at bottom is not a *moral* or *normative*, but a *physical* notion. It refers to what is under the effective control of a person, what he masters by skill, force or violence, or manipulates at will.<sup>105</sup> The notion of a *lex* applies when a large number of people are within the right of some other, who can set them to work by a single call or command. On the other hand, "justice" refers back to *ius*, which does indicate a social or moral bond, a commitment or agreement that originates in solemn speech. *Ius* can only exist between human persons, while right can exist between a person and anything (including another person) that can be manipulated or controlled by force or the threat of violence. The rational character of a *ius* presupposes the likeness of those things between which it exists, especially as regards the faculty of speech, the real and organic freedom which are given by their natural (biological, genetic) constitution, and therefore also their mutual independence. These presuppositions regarding the co-existence of physically bounded, mutually independent, rational beings correspond to the condition of objective *ius* or *law*, the basic order or lay-out of the world. This order is preserved as long as people exercise their organic freedom within the fixed boundaries of their physical being and the ever-changing boundaries constituted by their work - the two together defining the order of persons and their property. The exercise of power in this specific sense is the concrete manifestation of organic freedom; however, it reveals its lawful character as a *subjective right* only within the

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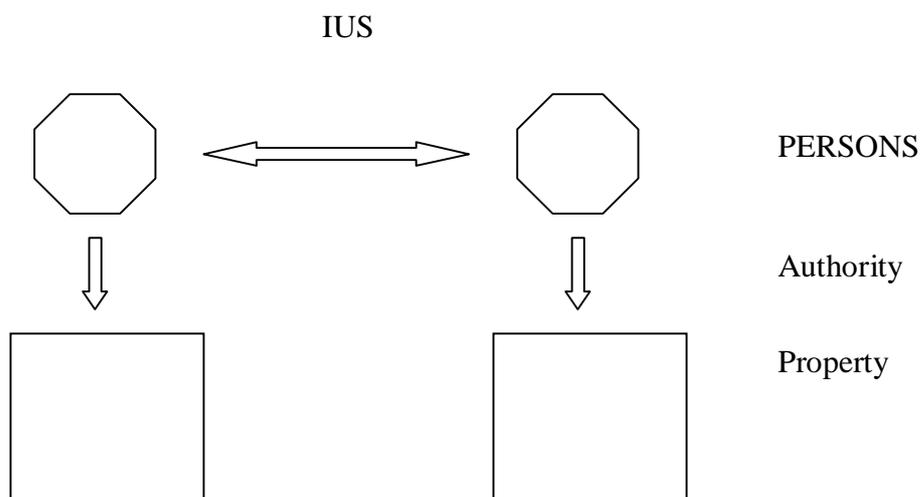
<sup>105</sup> The Romans did not consider this relationship as a *ius*, but as *dominium* (literally: *mastery*). Cf. Tuck-1979, Chapter I.

context of objective *ius*, when it is fitted into the general pattern of freedom among equals.

### *The logic of law*

As described here the complexity of the concept of law results from the combination of an inward-looking relationship between a person and his means [of life, action and production, i.e. his property] and an outward-looking relationship between a person and his likes. We can map this complexity diagrammatically as shown in the figure. The diagram represents the *basic form* of law as it is determined by its subject-matter: the peaceful, friendly and free symbiosis of human beings.

We can use the relationships depicted in the diagram to formulate a pure "logic" of law, as well as the axioms for a formal theory of law. This logic of law is not concerned with norms or directives. It is neither some kind of deontic logic, nor some kind of logic of imperatives. It is instead a logic of just rights. If the formulation of such a logic obviously exceeds the scope of this paper,<sup>106</sup> a few remarks are nevertheless in order. Being purely formal, the logic of law does not by itself force any interpretation of its basic terms ('person', 'means', 'is a means of') upon us. We can, if we wish, treat the diagram above as an empty box and then fill it up in any way we like, using whatever "model" that strikes our fancy.<sup>107</sup> However, under a naturalistic interpretation, one that uses objectively and publicly ascertainable criteria of identification, the logic clearly reveals the pattern of a natural law theory of human rights.



law and nothing else. It describes the order of the world - the basic lay-out of human affairs. We do not need any teleological or theological or otherwise metaphysical "knowledge" in order to be able to judge whether some action or relationship is lawful or not. To make such a judgement, we should not focus on what people *ought* to do according to some "moral" or "legal code", but on the objective or agreed on boundaries among persons. The interesting questions are strictly factual: Who did what, when, how, and to whom? Who made or acquired this? How did she make or acquire it, alone or with the help of others? Did the others consent to help? Did they consent to help only if some conditions were granted? Were these conditions honored? The common presupposition of all of these questions is, that every person is a finite, bounded being, separate from others not only in his being but also in his actions and work or *auctoritas*. Of course there may be all sorts of complications and uncertainties when we try to answer these questions with respect to particular cases or situations of an unfamiliar type. There is need for efficient and effective ways of dealing with these. This is precisely the area where the expertise of lawyers and jurists is so valuable. However, as it is clear what the questions are and aim at, there is a definite standard by which we can judge any proposed answers or methods for answering them. From this point of view, the objective of the practice of law is to determine and safeguard the law and the just rights of persons in situations where these may be unclear or contested. In this sense, the practice of law is a *rational discipline* of justice, not of legality.

For the layperson, who gives little thought to all but a few cases where determining rights is problematic, it may be difficult to grasp the point of much of what lawyers practise. However, just as one need not have the knowledge of an architect to know what a house is, one need not know the lawyer's business to know what is law or *ius*. The knowledge of law requires no more than an ability to grasp the idea of freedom among equals, the ability to recognise others as one's likes, i.e. at the same time, their likeness and their otherness. That knowledge consists in the recognition of the difference between what one is or does oneself and what one's likes are or do. This ability is, from a psychological, even biological, point of view, so vital, and at the same time, from a sociological point of view, so fundamental for the existence of social order, that we simply expect any person to possess it. *Nemo ius ignorare censitur*: nobody should be thought to ignore the law. While this old maxim makes no sense whatsoever when we take *ius* or *law* either as the specialised skills of lawyers or as the output of legislation and regulation by governments, it makes eminent sense when we take *law* or [objective] *ius* as the condition that makes society possible: the recognition of the separateness and likeness of persons. When it is applied to legal systems - and it often is - the maxim merely expresses the arrogance of rulers who assume that everybody else carefully takes note of, and obeys, their commands, or else turns for advice to those who specialise in listening to the rulers (lawyers, not as experts in *iustitia*, but as experts in the current state of legislation).

### *The obligation of natural law*

The modern intellectual is not likely to give up her objection to natural law merely on account of the fact that it has nothing to do with a metaphysical "higher law", and everything with the order of persons and their property rights. With an obligatory reference to Hume,<sup>108</sup> she will insist that one cannot logically infer a norm from a fact. Therefore, if natural law is given a naturalistic interpretation nothing follows from it regarding what we ought to do. In other words: even if natural law should tell us how

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<sup>108</sup> Hume-1740, III,1,i (*in fine*)

things are, it cannot tell us why they should not be different; it is no basis for criticism of human actions in general, nor, in particular, of legislative, judicial or administrative rule- or decision-making. However, Hume also expressly noted that it is not improper to call the rules of justice *Laws of Nature* "if by natural we understand ... what is inseparable from the species".<sup>109</sup> Hume's remark about the gap between *is* and *ought* was meant to "subvert all the vulgar systems of morality", not to condone action in defiance of what is inseparable from human nature. For Hume, justice is "an invention [that] is obvious and absolutely necessary; it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflection."<sup>110</sup> Justice is not something inevitable or unavoidable, but it is indispensable, the world and the human species being what they are. Why, then, should we act within the bounds of justice? Not because we cannot do otherwise, but because so much depends on it. Our intellectual may then cynically object, that there is no proof that she ought to care about the things that depend on natural justice. There is no direct reply to this objection other than a proof of the thesis, that we ought to be just.<sup>111</sup> If our intellectual only argues, that there is no reason for believing that aggression or warlike action is "unjust", she is plainly mistaken. To bring another within one's "right" by warlike means is just as obviously a violation of the conditions of *ius* as defence against injurious attack is a just subjective right. Democritus said it well: "It is needful to kill the enemy, whether a wild or creeping thing or a human being."<sup>112</sup>

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<sup>109</sup> Hume-1740, III,2,i (*in fine*)

<sup>110</sup> Hume-1740, III,2,i (*in fine*). In this respect, and despite his admiration for Hume (e.g. F.A. Hayek-1967), Hayek cannot be called a Humean: with his peculiar theory of "non-rational, spontaneous social evolution", Hayek almost obliterated Hume's insight into the role of "human inventiveness", or what for the ancient Sophists were the distinguishing marks of the human animal: its technical and social *skills*.

<sup>111</sup> For an attempt to give such a proof, see Van Dun-1983, 164-176. See also Van Dun-1986b, 17-32. A similar argument in Hoppe (1989), chapter 7.

<sup>112</sup> Diels/Kranz-1952, B259a. The "enemy" is anything, animal or man, that "does injury contrary to right", anything that does violence to another's security.

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## ***Concepts of order***

### ***1. Interpersonal Conflict***

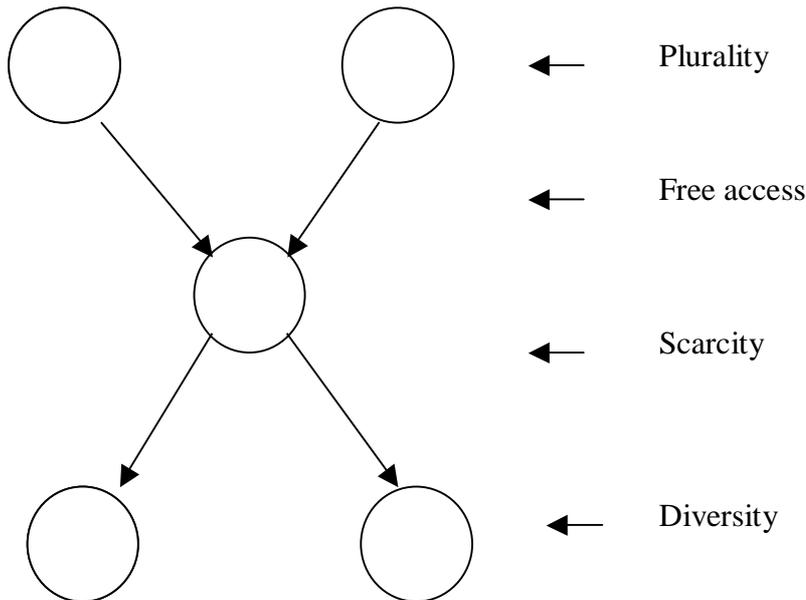
#### ***1.1 Causes***

Let us consider the necessary and sufficient causes of interpersonal conflict as well its possible cures. We shall begin our inquiry on a faraway island inhabited by only two persons, A and B. Because we are interested in interpersonal conflict, there have to be at least two persons. Evidently, this condition, which we shall refer to as “plurality”, is a necessary condition or cause of interpersonal conflict.

Obviously, plurality is not a sufficient condition. A and B must exhibit some diversity. They must have different opinions, values, expectations, preferences, purposes, or goals. If they were of one mind in all respects, in immediate agreement on all questions, there would be no possibility of conflict between them. Therefore, we should add diversity as a necessary cause of conflict.

Plurality and diversity do not constitute a sufficient set to explain significant conflicts other than mere differences of opinion. If plurality and diversity were the only conditions that mattered, A and B could easily agree to disagree and that would be the end of the matter. However, agreeing to disagree is no solution if A and B have access to some object M that is scarce in the sense that it can serve the purpose of either but not simultaneously the purposes of both of them. If A succeeds in getting control of the object, then B must live at least temporarily with the frustration of not being able to get what he wants—and vice versa. There is at most one winner and at least one loser. Therefore, we must add scarcity and free access to scarce means to the list of causes.

We can visualize the situation on the faraway island in the conflict-diagram, which depicts the separately necessary and jointly sufficient causes of interpersonal conflict.



### 1.2 Cures

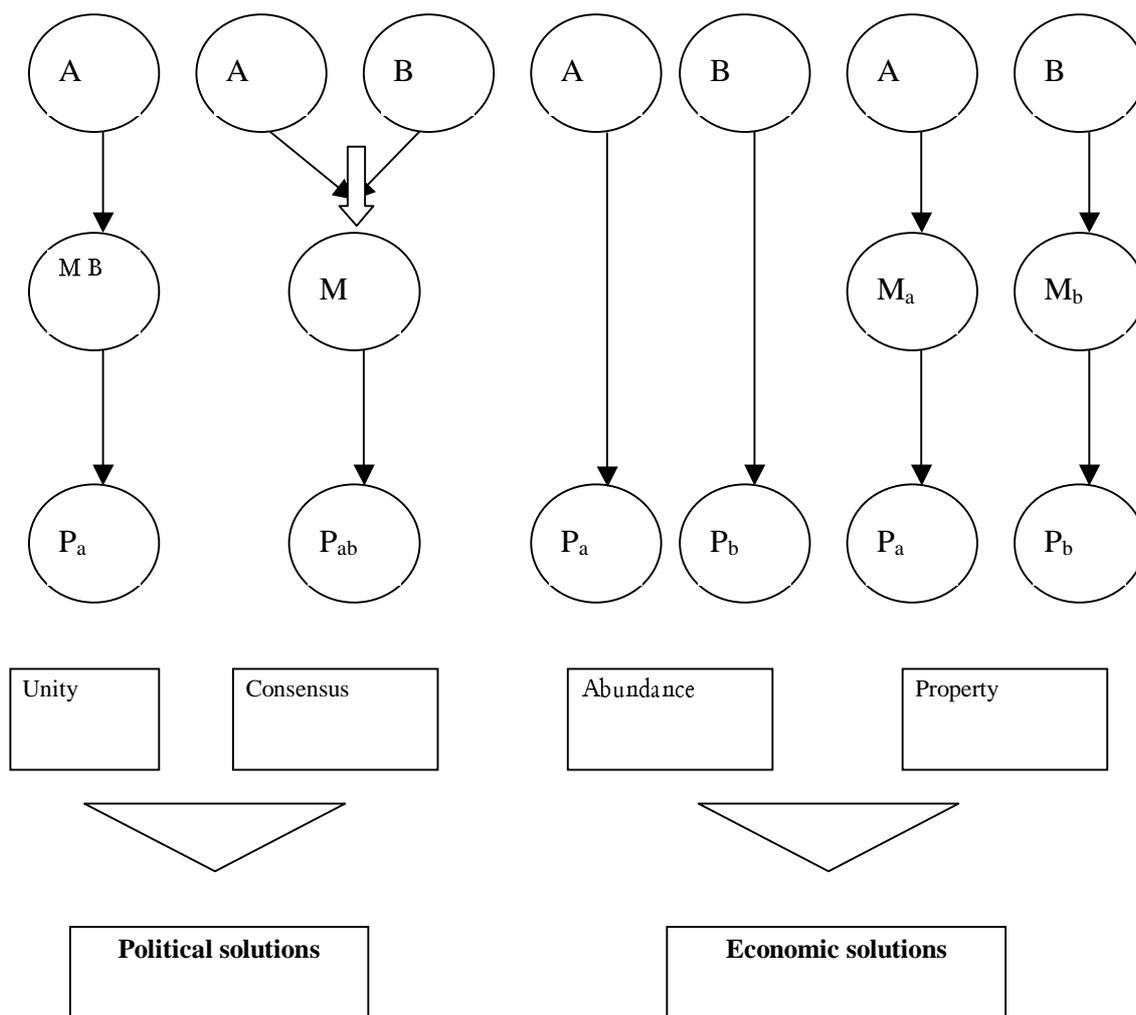
Given that each of the causes is necessary, it is sufficient to eliminate only one of them to eliminate the possibility of interpersonal conflict between A and B. Let us assume that we can tackle each of the four causes independently. Then there are four pure strategies for eliminating the possibility of interpersonal conflict. The first involves replacing plurality with its opposite, unity; the second replaces diversity with uniformity or consensus; the third eliminates scarcity and gets us into a condition of abundance; finally, the fourth introduces property, thereby getting rid of free access.

Confining ourselves to a “binary” classification that considers only two possible states for a cause (either it is present or it is not), we see that there are also eleven mixed strategies. Obviously, such a binary classification is not adequate if we want to study the “dynamics” of conflict and conflict-resolution, but for our analytic purpose it will do. Questions about weakening the causes to various degrees, about how much to invest in attempts to do that, about trade-offs between different solutions, and so on, are not on the agenda here.

Unity involves the merger of A and B into a single person or else the reduction of a person (B) to the status of a mere means or an unconditionally loyal subject of the other (A). In any case, only one decision-maker or ruler remains. Consensus, on the other hand, requires that a set of opinions, valuations, preferences and the like is available in terms of which A and B can agree on the purpose for which and the manner in which M will be used.

As the graphical representation makes clear, Unity and Consensus involve the replacement of a plurality of independently chosen actions with one common, collective or social action. They imply a subordination of the actions of many to what has been called a “thick ethics”, one that stipulates not just how but also which ends are to be pursued. In particular, they subordinate “law” (which they typically interpret as legislation or authoritative commands and regulations) to some ruling opinion about what is good and useful. In the case of Unity, that is the ruler’s opinion. In the case of Consensus, it is an opinion shared by the people that matter. For this reason, we may label Unity and Consensus “political solutions”.

Note the contrast with Abundance and Property. Neither of these eliminates the plurality of independent actions. There is no single “thick ethics” that guides the actions of all concerned. Nevertheless, Abundance and Property are formulas of order. They subordinate any person’s ethics to the requirements of law, which defines the boundaries within which persons can seek to achieve their ends. Abundance and Property thus leave the plurality of persons and the diversity of their purposes intact. They only affect the scarce means. For that reason, we may label them “economic solutions” of the conflict-situation. Abundance is a condition in which it is possible for every person to do and get whatever he wants, regardless of what anybody else might do and therefore also without having to rely on anybody else’s co-operation or consent. Property requires only that each person can know which parts of the set of scarce means are his and which are another’s.



Each of the pure strategies has had its share of famous defenders in the history of Western philosophy. Plato<sup>113</sup> and Hobbes<sup>114</sup> immediately come to mind as strong

<sup>113</sup> In his last work, *The Laws*, Plato still defended unity, even if he appeared to have given up the hope that it ever might be realized: “The first and highest form of the state and of the government and of the law is that in which there prevails most widely the ancient saying, that “Friends have all things in common.” Whether there is anywhere now, or will ever be, this communion of women and children and of property, in which the private and individual is altogether banished from life, and things which are by nature private, such as eyes and ears and hands, have become common, and in some way see and hear and act in common, and all men express praise and blame and feel joy and sorrow on the same occasions, and whatever laws there are unite the city to the utmost—whether all this is possible

advocates of unity. Despite the fact that we usually place them at the opposite poles of almost any dimension of philosophical thought and method, for both of them unity and only unity provides an adequate solution to the problem of interpersonal conflict. Like Plato's philosopher-king, Hobbes's Sovereign has the first and the last word on everything. Both argued forcefully that the slightest fissure in the structure of unity would lead to a breach of the political wall that protects the citizens from the ever-present threat of conflict and war.

Aristotle based his political thought firmly on the requirement of consensus. As he put it, political society (and its first imperfect manifestation, the family) demands a consensus on what is good and useful.<sup>115</sup> What he meant, obviously, was not the sort of ad hoc consensus that we find in transactions on a market. The latter require no more than a contingent agreement on such small things as a particular good, its price and time of delivery. Nor did Aristotle mean a consensus on the conditions that make such transactions possible.<sup>116</sup> While he agreed that justice in exchange is important, it was far from him to accept it as a respectable solution to the problem of conflict. What he had in mind was a sort of "deep consensus" to which the members of a political society<sup>117</sup> always could appeal to resolve their initial disagreements—a consensus on fundamental values and opinions that marked the very identities of the persons involved in it. Such a consensus could not take root except in the soil of shared experiences and longstanding affectionate and practical relationships.<sup>118</sup> It required common history, tradition and custom to ensure that all the citizens would be educated to respect and esteem the same outlook on life in its theoretical, practical and above all moral aspects. Rousseau's *Du Contrat Social* also exemplifies the consensus-solution. However, unlike Aristotle's, his consensus could not be assumed to be historically given and transmitted almost as a matter of course from one generation to the next. It had to be created ex nihilo by skilful legislative and political manipulation on the basis of no more than a formal agreement to agree. It was, at least initially, an artificial construction of the sort that only an exceptional political genius, working on a "young, not yet corrupted people", could hope to accomplish.

On a naive level of understanding, abundance merely involves a sort of equilibrium of supply and demand in the sense that resources are available in adequate quantities, so that everybody can satisfy his wants with ease and without detriment to anybody else. Before the technological and industrial revolutions of the nineteenth century, abundance was associated mainly with asceticism. Regardless of changes on the

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or not, I say that no man, acting upon any other principle, will ever constitute a state which will be truer or better or more exalted in virtue. Whether such a state is governed by Gods or sons of Gods, one, or more than one, happy are the men who, living after this manner, dwell there; and therefore to this we are to look for the pattern of the state, and to cling to this, and to seek with all our might for one which is like this." (*The Laws*, Book 5, 739c,d)

<sup>114</sup> "For by Art is created that great Leviathan called a Common-wealth, or State, (in latine Civitas) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the Sovereignty is an Artificiall Soul, as giving life and motion to the whole body." (Thomas Hobbes, *Leviathan* (London, 1968), Introduction).

<sup>115</sup> See T.A. Sinclair's translation of Aristotle's *Politics* (Book 1, section 2), 1253a16–18: "[H]umans alone have perception of good and evil, right and wrong, just and unjust. And it is the sharing of a common view in these matters that makes a household or a city."

<sup>116</sup> Aristotle, *Politics* (Book III, section 9), 1280a31–1281a1.

<sup>117</sup> At least its more notable members, those that fulfil the rather stringent conditions of citizenship that made them fit to rule. Among the inhabitants of a city that did not qualify as citizens Aristotle also counted the free men that were engaged in manual labor, trade and making tools. Their part in the political consensus of the city was minimal. It consisted in no more than acknowledging the right to rule of the best citizens.

<sup>118</sup> Although Aristotle made much of the fact that the *polis* was a "moral" rather than, like the family, a biological association, he insisted that it could not function well unless it was composed of family-groups that "occupy the same territory and can inter-marry". Aristotle, *Politics* (Book III, section 9), 1280b35

supply-side, there would be plenty for everybody if only people would reduce their desires (“demand”). Philosophies of asceticism stress control of desire and elimination of greed and covetousness. They look forward to a harmonious order of human affairs that should result from the adoption of a moral attitude of self-denial and contentment with a simple and natural life. The Cynics come to mind as proponents of this view, but we can give examples from more recent times as well (such as some of the more fundamentalist factions of today’s “Greens”). However, since the Enlightenment the idea of abundance rests primarily on the prospect of an enormous increase in the productive powers of mankind. Thus, abundance or liberation from wants and frustration now is identified with satisfaction of all desires, regardless of their number, quality or intensity. Many early nineteenth century utopian socialists already fitted this description, but it was not until Marx had reinterpreted the old gnostic doctrine of total spiritual liberation in terms of material and social conditions that abundance came to mean the eradication of scarcity by the expansion of productive power.<sup>119</sup>

Property rests on the idea that the physical, *i.e.* finite or bounded, nature of individual human beings, who are also rational agents and producers, is the primary fact that needs to be taken into account in any consideration of human affairs and relations. The objective or natural boundaries that separate one person from another also entail objective boundaries that separate one person’s words, actions and works from those of another. What lies within a person’s boundaries is his property. In so far as people respect each other’s property, there is order and justice; in so far as they do not respect it, there is disorder and injustice. Indeed, justice is respect for the natural order, *i.e.* the natural law, of the human world. Thus, justice requires human persons not only to respect other human persons but also their rights to the extent that these do not upset the natural law nor result from an infringement of it. For any person, these respectable rights are the accomplishments of which he is the author—the things that come into being under his authority, as his property. Being the rights of natural persons acting within their natural boundaries, they properly are called “natural rights”. In short, justice also requires restriction of access to any scarce resource to those who are by natural right entitled to it.

In Antiquity, the idea of Property apparently was taken up only by some of the Sophists. Unfortunately, with few exceptions, their thoughts are nearly inaccessible except through secondary and often hostile accounts. Their better known opponents, Plato and Aristotle in particular, were concerned primarily with the socio-political ordering of the city—with the positions, roles and functions that define its organisation, and the selection of its officials. Thus, their city implied a radical division between insiders and outsiders as well as between the higher and lower orders of socio-political organisation. They paid little or no attention to human affairs and relations among persons in so far as they were not defined in terms of social positions and functions. For them, the city was to a large extent the measure of the human person. In contrast, many of the Sophists apparently did develop a universalistic human perspective.<sup>120</sup> For them,

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<sup>119</sup> In *The German Ideology, Part I*, there is the famous statement that, under communism, “I can do what I want, while society takes care of general production”. That might mean that human life is split up in an autonomous spiritual part (the gnostic’s divine self?) and a material social part without any autonomy at all, which Engels described in his essay “On Authority” (1872). However, in his early manuscripts, Marx also hinted at true abundance with his vision of Man and Nature becoming truly One—the final realisation of the gnostic’s dream of recapturing the original status of the true God, who knows himself to be All and therefore wants nothing. “This communism ... is the genuine resolution of the conflict between man and nature and between man and man—the true resolution of the strife between existence and essence ..., between freedom and necessity, between the individual and the species.” (From the essay “Private Property and Communism” in the *Economic and Philosophical Manuscripts* of 1844)

<sup>120</sup> Eric Havelock, *The Liberal Temper in Greek Politics* (New Haven, 1957).

the concrete, historical, particular, finite natural human beings are at any time and place the measure of all things, including the city. They saw cities and other conventional social organisations as no more than ripples or waves, continuously rising, falling, and disappearing, on the sea of human nature. As the sea rarely is without waves, so human history rarely is without social and political entities. However, just as no single wave is permanent and no wave is the fulfilment of the nature of the sea, no city or other socio-political organisation is more than a transient phenomenon, shaped by a fleeting and contingent constellation of forces in human nature and its environment. Human beings may be sociable by nature, but they are not wedded by nature to any particular social order.<sup>121</sup> Thus, for the Sophists, it was imperative to pierce “the corporate veil” of the city. They were interested in what people really did to one another, not in the conventional representation of their activities by political, social or cultural authorities. For them, law was “a surety to one another of justice”, and societies were “established for the prevention of mutual crime and for the sake of exchange”.<sup>122</sup> Distant precursors of classical liberalism, they were not prepared to sacrifice the law of natural persons on the altar of any political organisation, even one that was dedicated to the production of happiness and virtue.

It was not until the spread of the biblical religion that the idea of persons and their property acquired a fundamental significance in western civilisation. That religion presented the world as essentially an interpersonal affair founded on mutual respect and covenant. It posited a relationship between a personal God (whom orthodox Christian doctrine eventually construed as a unified complex of three persons) and the human world (also an interpersonal complex involving many separate persons). According to its fundamental code, the Decalogue, the principal source of order in the relations between God and the world and in the relations among human beings is respect for the distinction between “thine” and “mine”. Politics had no part in this. While Jesus proclaimed that he had come to fulfil the Law (Matthew 5:17), he repudiated the offer of “all the kingdoms of the world, and the glory of them” (4:8).<sup>123</sup>

By the end of the seventeenth century, John Locke could give an account of order in human affairs that was entirely based on an appreciation of the human condition as an interpersonal complex, in which no person can claim any naturally given social position, rank or privilege. Understandably, a person’s property—the manifestation of his being, life or work in the natural order of the human world—was seen as his primary natural right, which reason could not but acknowledge as eminently respectable. “Property” took on its classical liberal guise.

### 1.3 Ranking solutions

Which type of solution one prefers depends on one’s opinions about the feasibility and desirability of eliminating or attenuating one or another of the causes of conflict. Few people believe that it is possible to do much about scarcity, although, as noted before, there have been those for whom it is really no more than an illusion, the effect of a false consciousness. As for plurality, diversity and free access, many people appear

<sup>121</sup> Cf. their rational capacities may be natural but no particular language or theory is *the* natural language of mankind.

<sup>122</sup> Aristotle, *Politics* (Book III, section 9), 1280b11 and 1280b30.

<sup>123</sup> “Il est impossible qu’il y ait entente absolument cordiale ... entre l’Etat et les chrétiens. ... [I] leur est même impossible de prendre l’Etat et sa raison tout à fait au sérieux.” [It is impossible that there was complete unanimity between the state and the Christians. ... It is not even possible for them to take the state and its reason / the reason for it completely seriously.] R.-L. Bruckberger O.P., *L’Histoire de Jésus-Christ* (Paris, 1965), p.177. Of course, Bruckberger was not referring to twentieth century European Christians, which he called “une collection de ballotins” (p.176), a collection of empty paper boxes.

to believe that they are far easier to manipulate than scarcity; however, they are also likelier to be considered values in their own right.

As we have seen, Abundance and Property tackle scarcity in different ways. Abundance refers to the elimination of scarcity in the fundamental sense of *intrapersonal* scarcity. That sort of scarcity refers to the fact that one can and therefore has to make choices. One cannot eat an apple and use it to make apple pie; therefore, one must choose what to do with it. Property leaves intrapersonal scarcity intact but removes free access and therefore *interpersonal* scarcity, which is the fact that one cannot have or use exactly the same thing that another person has or uses. Both sorts of scarcity imply the inevitable frustration of some wants, but only intrapersonal scarcity implies frustration for which one cannot blame another person. It depends solely on the variety of one's goals and the limitations of one's options. Even Robinson Crusoe, during the first lonely months on his island, had to face up to the intrapersonal scarcity of resources and to make choices about their most advantageous uses.

A person confronts intrapersonal scarcity when he becomes aware that whatever choice he makes has opportunity costs. Either he does *a* and gets whatever the consequences of doing *a* are, but then he cannot do *b* and therefore must forego its consequences; or else he does *b* at the cost of giving up whatever benefits doing *a* might produce. Choice and opportunity costs are inextricably linked.<sup>124</sup> The cause of the inability to do *a* and *b* simultaneously may be in the nature of the person himself (his physical constitution) or in the nature of the external means at his disposal. The latter aspect—one cannot have one's cake and eat it too—need no further comment. However, the physical constitution of the person is equally relevant. Human persons are finite beings, not only because they are mortal but also because at any moment their capacity for consumption is limited just as their productive capacity is limited. Consequently, a person, even one with infinite productive powers, or with immediate access to boundless supplies of consumption goods, would have to make economic choices. Unless he was completely indifferent with respect to all possible sequential orderings of enjoyments, he still would face the risk of getting much less out of life by choosing the wrong sequence of acts of consumption. Apparently, only a person with infinite capacities of consumption in an environment of superabundant consumption goods of every kind would be free from want and frustration.

Now, contemplate the co-existence of two or more persons, all of them with abundant material resources. From any person's point of view, all others are external resources that can be put to many uses. Therefore, to the extent that one has desires and ideals that can be satisfied or realized only if others are or do what one requires of them, scarcity persists despite the abundance of other, non-human resources. True abundance, then, is a tall order. However, if it were possible, abundance would have nothing to fear from plurality, diversity or free access. The disappearance of intrapersonal scarcity takes the sting out of those other causes of conflict.

Compared to Abundance, the other solutions, Unity, Consensus and Property, are less fantastic. However, they are not equal. Unity seems to be a more demanding condition than Consensus and the latter a more demanding condition than Property. Unity implies that diversity and free access have been eliminated as causes of conflict. The single remaining decision-maker has privileged access to all scarce resources and sets priorities for their use. Unity, however, may break down under the stress of

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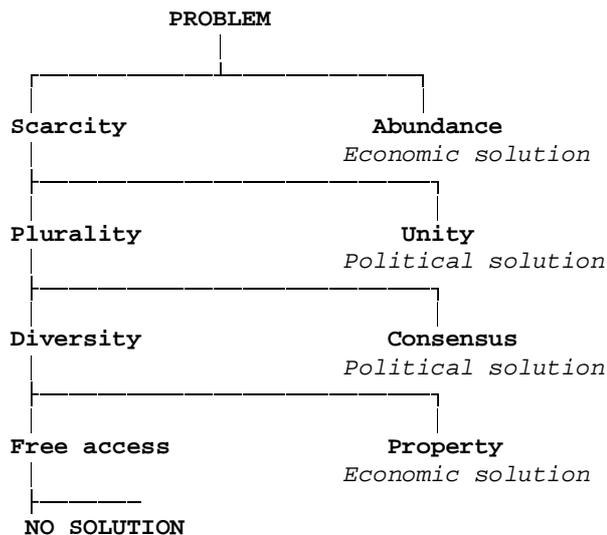
<sup>124</sup> Only he that has no choices faces no costs. No matter what he does, it is the best because the only possible course of action. Hence the Stoics' prescription for happiness: Renounce the illusion of freedom of choice, accept whatever happens as what is inevitably fated to happen, and so eliminate the risk of frustration and disillusionment. That, of course, is a classic ascetic version of the abundance-solution.

scarcity. The decision-maker could make the wrong choices and thereby undermine his position, leaving him with too few resources to maintain his command amidst general dissatisfaction with his rule. On the other hand, if he could maintain unity, then, in a worst-case scenario, all of his subjects would perish with him if he made the wrong choices.

Consensus implies that scarce resources will not be accessed by anyone in a controversial way. In other words, it implies the elimination of free access. However, like Unity, it is vulnerable to the problem of scarcity. It could be a consensus on choices that are unsatisfactory in their effects and so provide incentives to defect to those people on whose consensus it relied. Alternatively, the consensus may hold but at the cost of collective disaster. Moreover, given that Consensus leaves plurality intact, it must invest in strategies that will ensure that the consensus does not become spurious. Thus, Consensus is always threatened by scarcity and by plurality.

Property, finally, only solves the problem of free access. Compared to Abundance, Unity and Consensus, it is very nearly merely a technical matter. We may presume that most people will rise to the defence of their property as soon as they begin to understand how it can be taken away from them; and we may presume also that there is no iron law giving the advantage to the aggressors rather than the defenders. Thus, the property-solution appears to require no more than an adequate organisation of self-defence. However, Property is vulnerable to the effects of scarcity, plurality and diversity, which it does not eliminate but merely accommodates.

Because of such considerations, we can rank the different pure solutions on a single scale (see the figure). The ranking turns on the fact that a solution may imply the neutralisation or elimination of more than one cause of conflict. Thus, Abundance requires the elimination of scarcity and implies the neutralisation or elimination of all conditions under which Plurality, Diversity and Free Access would give problems. If it were possible, it would also, for that very same reason, be the most complete solution to the problem of interpersonal conflict. With Property, the reverse is true. It requires elimination of free access but does not imply a reduction of plurality, diversity or scarcity. Because it requires little tampering with the conditions of human existence, it is also the most vulnerable solution.



### 1.5 Utopianism

Abundance and Unity are more likely to be referred to as “utopian solutions” than either Consensus or Property. Marxian communism, with its prospect of a radical liberation from scarcity, fits the utopian idea very well. So does Plato’s idea of Unity.<sup>125</sup> While Hobbes is rarely charged with utopianism, there nevertheless is a strong utopian undertone in his work. His definition of war as consisting “not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary”,<sup>126</sup> leaves us with a definition of peace that is distinctly utopian.<sup>127</sup> His Commonwealth—“a real Unity of them all, in one and the same Person”<sup>128</sup>—is supposed to be the necessary condition of that utopian peace.<sup>129</sup>

If Consensus in its classical Aristotelian version cannot plausibly be charged with utopianism, the modern version, epitomized by the writings of Rousseau and other apologists for the sovereign republican State, does have a pronounced utopian streak. It derives from the idea that the republican state requires that human nature be changed.<sup>130</sup> The actual transformation of human beings into “true citizens” is necessary to produce a genuine political consensus without which the “general will” cannot but remain a lifeless legal fiction (and an easy target for the analytical attacks of rational choice theorists).

It was Plato who first adumbrated the theme of the transformation of human nature as a prerequisite of a just political order with his detailed description of the process by which natural human beings must be transformed into guardians of the city. Rousseau, an admirer of the Greek’s theory of political education, also shared his notion that among human beings the state cannot be justified. That idea, that human nature rules out a justification of the state, is the foundation of individualist anarchism,<sup>131</sup> but Plato

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<sup>125</sup> See the quotation from *The Laws*, Book 5, in note 4 above. Note, however, that in his better-known *Republic* (Book II, 369–75) Plato appears to argue that Unity should be restricted to the political sphere (the state) as the preferred way to eliminate uneconomic (violent, warlike) attempts to satisfy wants and desires. In other words, Unity is a way of sanitizing politics so that it will not interfere with the natural economic order of the supposed primordial “Golden Age”.

On this interpretation, Plato should be seen as the first theoretician of the nineteenth century’s political liberals’ ideal of a “constitutional state” with its radical separation of economics (“private law”) and politics (“public law”). Needless to say, nineteenth century constitutionalism failed to heed Plato’s warning that the “guardians of the state” (civil and military servants) should be separated from the economic order of society not only physically, by being confined to barracks, but also psychologically, by being subjected to an educational regime aimed at eradicating every trace of personal interest or affection for anything not ordained by the state.

Interestingly, Aristotle’s idea of a political constitution differs from Plato’s precisely by not envisaging a separation of political and economic power. Aristotle’s political citizens were the heads of the society’s economic units (households). This may be seen as a prefiguration of the modern corporate state, where the heads of significant interest groups (“corporations”) are the politically relevant (ruling, policy-making) citizens.

<sup>126</sup> Hobbes, Part I, chapter 13.

<sup>127</sup> Leibniz noted this in his “Caesarinus Fürstenerius”, in Patrick Riley (ed.) *Leibniz: Political Writings* (Cambridge, 1988). Against “the sharp-witted Englishman”, Leibniz argued that “no people in civilized Europe is ruled by the laws that he proposed; wherefore, if we listen to Hobbes, there will be nothing in our land but out-and-out anarchy.” (p.118) According to Leibniz, Hobbes’s argument was a fallacy: “[H]e thinks things that can entail inconvenience should not be borne at all—which is foreign to the nature of human affairs... [E]xperience has shown that men usually hold to some middle road, so as not to commit everything to hazard by their obstinacy.” (p.119)

<sup>128</sup> Hobbes, Part II, chapter 17.

<sup>129</sup> Eric Voegelin, “The New Science of Politics”, in M. Henningsen, *The Collected Works of Eric Voegelin*, vol. 5, *Modernity without Restraint* (Columbia and London, 2000), p.218 also notes the gnostic-utopian theme in Hobbes’s argument.

<sup>130</sup> J.-J. Rousseau, *Du Contrat Social*, Book II, chapter 7.

<sup>131</sup> Referring to the theory of rational choice, Anthony de Jasay’s *The State and Against Politics* (London, 1997) offer many detailed arguments for that proposition. It has been a constant theme in the work of, among others, the late Murray N. Rothbard, e.g. *The Ethics of Liberty* (Atlantic Highlands, NJ, 1982).

and Rousseau turned it into the proposition that to justify the state one should replace human nature with something that is by definition compatible with the state—“guardianship” or “citizenship”. However, states did not begin to control formal education on a scale and with a determination approaching the requirements of Plato’s or Rousseau’s program until the twentieth century. Whether openly proclaiming their utopianism or disguising it as piecemeal social engineering, modern Western states embraced the notion of a “revolt against nature”, sweeping away much of Europe’s Christian and classical liberal heritage.

Arguably, Property is immune to the charge of utopianism. Neither the Sophists nor those in the modern Lockean tradition are prominent figures in the literature on utopian thought. Descriptions of what a liberal or libertarian world might be under ideal conditions fail to give an impression of utopianism. Even with the problem of free access solved and property as secure as it can be, people still are left to their own resources, or dependent on the charity of others, to make something of life. Indeed, those “ideal conditions” merely ensure that *nobody* has any guaranteed immunity from the slings and arrows of life. It is no wonder that Property gets short shrift in an age dominated by utopian hankering after guaranteed satisfaction of wants, except perhaps in the “ersatz” form of allegedly market-friendly government-imposed pro-growth policies—that is to say, as a means to approach the Abundance solution to the problem of order. A lot of people still seem to believe that partisan politics—the art of externalising costs—can be universalized into the art of eliminating costs.

## 2. Types of Order

### 2.1 Social order and convivial order

Unity and Consensus, as political solutions, require social organisation: a social order or society, with a structure of command and obedience, and a hierarchical stratification of rulers and subjects, leaders and followers, directors and members or employees. Abundance and Property, on the other hand, as economic solutions, require no such thing as a society in that sense. The order they constitute is a convivial order,<sup>132</sup> in which people live together regardless of their membership, status, position, role or function in any, let alone the same, society.

A society is an economy in the classical sense of “a household”. It is also a teleocracy (a system of rule aiming to achieve a particular set of ends, which may be fixed by the society’s constitution, or left to the discretion of its leading organ). However, many societies have more or less extensive nomocratic<sup>133</sup> sectors, which are defined by general rules of conduct rather than end-specific rules. For example, in modern politically defined or state-dominated societies of the Western type, “private law” (*le droit privé*, the regulation of the so-called private sector and the interactions of private citizens) often is nomocratic.

A family, a club, a ranch, a firm, a corporation, a church, a criminal gang, a state, or a state-like concoction such as the European Union—these are all examples of societies in the sense that is relevant here. At this point in the argument our interest is in the difference between the social and the convivial types of order per se; it is not in the manner in which order is achieved or maintained. Therefore, we need not consider here

<sup>132</sup> From the Latin *convivere*, to live together. I use “conviviality” primarily because its literal meaning is the same as that of the Dutch “samenleving” (literally, living together), which stands in contrast to “maatschappij” (the Dutch word for society).

<sup>133</sup> As far as I know Michael Oakeshott (*Rationalism in Politics and Other Essays* (London, 1962)) introduced the terms “teleocracy” and “nomocracy”.

the obvious differences between, say, a criminal gang or a state, on the one hand, and, on the other hand, societies that pursue their economic, religious, cultural or recreational goals in peaceful ways, without resort to violence, coercion or fraud.

Because of their teleocratic structures and the unity of their planned collective actions, it makes sense to personify societies and to regard them as artificial or conventional persons defined by their constitution and social decision-rules. It does not make any more sense to personify a convivial order or to ascribe plans, opinions, values, decisions or actions to it, than it does to ascribe such things to its opposite, war. Thus, it makes sense to ask whether and how a particular society participates in the convivial order; but there is no sense in asking about the participation of the convivial order in a social order.

A convivial order is not a society. It is a catallaxy, an order of friendly exchange among independent persons.<sup>134</sup> We can find examples of convivial order in daily life, especially in the relations among friends and neighbours, among travellers and local people, and among buyers and sellers on open markets. We find them, in fact, wherever people meet and mingle and do business in their own name, whether or not they belong to the same or any social organisation. There is no need for them to be aware of each other's social affiliation or position, or of any teleocratic or nomocratic regulations that might be imposed by some society or other. Dealings between a natural and an artificial person (a society or one of its officials) or between two artificial persons may be said to be convivial by extension and analogy if they conform to the patterns (or laws) of friendly exchange among independent persons. However, the paradigm of conviviality is a relation between natural persons.

Although a convivial order is not a teleocracy and is an order maintained by adherence to general rules of conduct, it would be unwise to refer to it as a "nomocracy". The latter term, like "autocracy", "democracy" and "aristocracy", suggests a system of rule, government and administration, which does not apply to the convivial order.<sup>135</sup> A simple example of a nomocracy would be a soccer game. It is played according to a set of rules that apply equally to the competing teams and do not aim at a specific outcome of the game but nevertheless are eminently artificial and imposed legal rules. Similarly, a state-imposed nomocracy, for example in the form of "competition law", is the implementation of a policy by the social authorities. Nomocracies are social constructs just as much as teleocracies are.<sup>136</sup> In contrast, conviviality is an objective condition of interaction. Like its opposite or negation, which is war (disorder or confusion in, or a breakdown of, convivial relations), its presence or absence can be ascertained without reference to the rules of any organisation, system of government or administration. Consequently—to use what once was a commonplace among lawyers—the laws of conviviality must be discovered; they need not be invented. From the point of view of political science, the convivial order is anarchical, maintained by a variable mixture of prudence, common decency, informal pressure, and (where not criminalized) investments in means of self-defence.

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<sup>134</sup> On the distinction between "economy" and "catallaxy", see F.A. Hayek, "The Confusion of Language in Political Thought" in F.A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (London and Henley, 1978), pp.90–92.

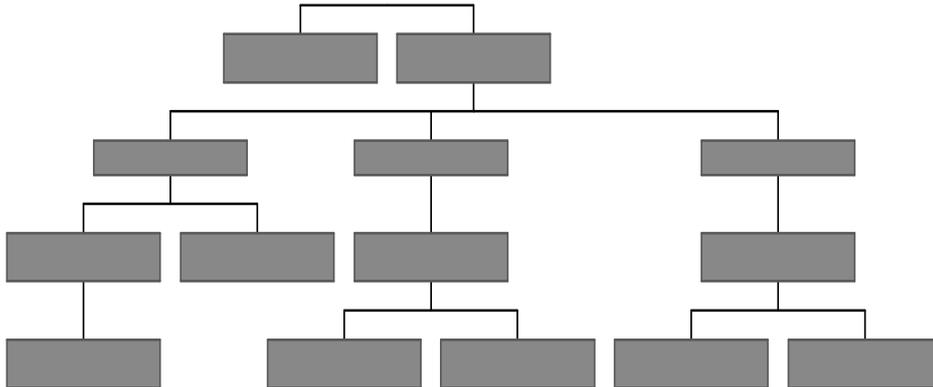
<sup>135</sup> For this reason, Hayek (in Hayek, "The Confusion of Language in Political Thought") preferred "nomarchy" to "nomocracy".

<sup>136</sup> Historically, the demise of teleocratic central planning in the last quarter of the twentieth century was not followed by the catallactic order of conviviality (the free market in the libertarian sense) but by more or less nomocratic forms of socialism ("the mixed economy", "the third way", "the active welfare state").

## 2.2 Significant differences

To appreciate the differences between a social and a convivial order, we can draw a diagrammatic representation of a social order (see the figure).

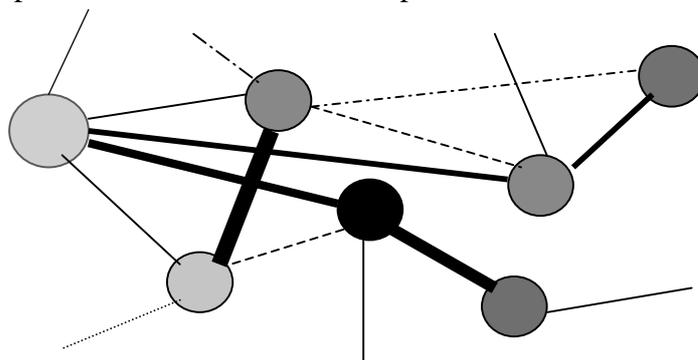
Students of legal systems, business administration, public administration, and social systems in general, are familiar with this type of organigram. From the family to the state, from the small entrepreneurial firm to the large corporation, the army or the church, every society can be represented by a more or less complex variation of the diagram. Indeed, a society is a system of social positions, each with its proper function, role, duties or entitlements—its proper “legal competence”.



*A social order or society*

A representation of the convivial order differs markedly from a social organigram. The figure gives us a snapshot of multifarious relations among many persons. Some of those relations are affective, others professional or commercial; some are fleeting, others durable; and so on and so forth. In the convivial order there is no formally fixed hierarchy of pre-defined positions, roles or functions. The fact that some people are more prominent or influential than others does not entail any difference in their status under the laws of conviviality.

Natural persons participate in a society as performers of one or more social functions or roles, as occupants of one or more social positions, each of which has a socially



*The convivial order*

defined utility function attached to it. Moreover, as participants in a society they move in a world that is characterized by clearly defined positions, rewards, and punishments, and hence more or less fixed relations between actions and consequences. Thus, like the players of a game, they are inclined, indeed expected, to have a strictly utilitarian attitude towards decision-making. However, unless they are fully socialized, having

internalized their “social identity”, there is no guarantee that they will abstain from seeking to use their position for purposes that are not part of, or may be at odds with, their social function. That is why societal organizers face the familiar problems of monitoring and controlling people to make them observe their “social responsibilities”. Apart from the societal organizers, the people in a society are no more than human resources, which—like other sorts of resources—have to be managed in the service of the goals set for the organisation. In their endeavours to control the “human factor”, societal organizers may well try to eliminate it altogether, for example by training animals, or introducing machinery and computers. Where elimination is not possible they will resort to indoctrination or set up systems of incentives, rewards and punishments, or rigorous and easily monitored step-by-step procedures and ergonomic micro-management to provide motivation and to ensure efficiency. Human resources management is an integral part of social existence.

In a convivial order, in contrast, people appear only as themselves, doing whatever they do under their own personal responsibility. There is nothing like a social responsibility in the convivial order. No society takes the blame or appropriates the praise for any individual person’s acts and no person can get away with any kind of mischief merely by noting that he is only doing his job. While one person may agree to assume a larger or smaller part of the responsibilities and liabilities of another, every act remains someone’s responsibility.<sup>137</sup> In contrast, many societies have systems for passing on social responsibility that lead to nowhere, for example by placing ultimate responsibility with an inaccessible deity, an anonymous “public” or “people”, or an abstraction such as “society itself”. Such arrangements are inconceivable in a convivial order, where there is no corporate veil and responsibility is necessarily personal, not diluted by organisation. Indeed, people may be held responsible—asked to justify themselves—by anybody, even a complete stranger, who is affected by their words or actions. Hence, to maintain themselves in the convivial order, people have to acquire an ethics of responsibility rather than an ability to prove that they are maximizing some “given” utility function.

Among other significant differences between a society and a convivial order, we note the conditions of membership. A society necessarily has clear boundaries that separate its members from non-members because it is essentially an organisation of men and resources that aims at some unique common goal or set of goals, which it tries to achieve by suitably co-ordinated collective or common action. To reach those goals, a society develops a strategy, assigns tasks and allocates resources to its officers and members.

All societies must work out the problem of securing enough income to pay for their expenses, and many face the additional problem of distributing a part or the whole of the social income among the society itself, its ruling members and its “rank and file”. A society does all of those things according to its customary, constitutional, statutory or legal rules, although contingency measures and the dictates of crisis management occasionally override their application. In any case, it must know who is a member of the society and who is not; what the members do and contribute and on what conditions they participate in social action. Formal and exclusive membership is a necessary condition of social existence.

A convivial order has no membership in that sense. It does not organize any collective or common action; it does not generate, let alone distribute, any social income. People can live convivially without being card-carrying members of the same

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<sup>137</sup> For a discussion of the implications of this for so-called “limited liability corporations”, see Frank van Dun, *Personal Freedom versus Corporate Liberties* (London, 2006, forthcoming).

club or association, without engaging in common pursuits or having a common leader, director, or governor. Whereas in a nomocracy such as a soccer game or a state's private sector, people need some sort of certificate of registration or licence to be permitted to play, they need no such thing in a convivial order. Conviviality requires no papers.

### 2.3 Elements of order: *lex* and *ius*

Societies or social orders and convivial orders differ in their constitutive relations of order. Social orders essentially are *lex*-based or *legal* orders. The term “*lex*” refers to the Latin verb “*legere*” [to choose; to pick]. It denotes a relationship in which a person holds a position that entitles him to choose or pick others to do what he commands them to do. Its original meaning was the act of calling men to arms or to report for military duty.<sup>138</sup> Later, “*lex*” came to denote any general command issued by a politically organized society, one that is capable of enforcing obedience to its commands by military force. Eventually, the word acquired the meaning of a directive or rule of conduct that is generally accepted within a given society as being applicable and enforceable in some way by the social authorities, even if the society is not political. Calling a legal order “a social order” serves to highlight the fact that acceptance of and obedience to the legal rules is to a large extent a matter of habit or custom.<sup>139</sup>

Thus, a social order implies the existence of a system of rules that define positions of “authority” or “command” to which other positions are subordinated. It is customary to personify such positions and to refer to them as to artificial persons, for example “ruler”, “legislator”, “director”, “rector”, “senate”, “general assembly”, “secretary”, “subject”, “employee”, “servant”, “private citizen”. It is no more a matter of empirical science to determine what those social personages can or cannot do than it is an empirical question what the King, the Queen or a Knight in chess can or cannot do. To answer such questions, one should consult the appropriate legal texts or rulebooks, or people (*legists*) that possess expert knowledge of the applicable rules. Of course, one should take care to consult the right books and experts. A Queen in chess is not the same thing as a Queen in bridge; the rules defining the French Presidency do not define the American Presidency; and what a Belgian citizen can or cannot do may differ widely from the legal competence of an Austrian citizen. Every society, whatever its size, form or function, has its own legal system<sup>140</sup>, which supplies the criteria for determining whether an act is legal or illegal. Maintaining social order, therefore, is largely a matter of preventing or suppressing illegal activity, or else of changing the rules to legalize activities that, for one reason or another, are deemed acceptable by the current social authorities.

In contrast to social orders, the convivial order is *ius*-based. The word “*ius*” refers to the Latin verb “*iurare*”, which means to swear; to speak solemnly; to commit oneself toward others. The *ius*-relation implies no positions of authority or command, but direct

<sup>138</sup> “*Lex*” is related to “*dilectus*”, (military) mobilisation—confer the Roman “legions”.

<sup>139</sup> “*Societas*” is related to “*sequi*” [to follow]: a society involves people who follow the same rules. In the representation of the solutions of the problem of interpersonal conflict, we see the *lex*-relation most clearly in the unity-solution, where A occupies the position of the legislator and B the position of the subject. In the consensus-solution, both A and B occupy the legislative position but only in so far as they are representatives of the consensus that supposedly defines the social order.

<sup>140</sup> Here we can see why legal positivists—for whom “law” denotes the legal system of a (state-dominated) society—must end up with empty-shell characterisations of “law”, such as Kelsen’s “dynamic system of norms that derive their validity from a single presupposed merely formal Grundnorm” [approximately foundational norm] and Hart’s “union of primary and secondary rules”. As for substance, “[positive] law can be anything”, “there is no logical connection between law and justice”, and so on.

personal contacts resulting in agreements, covenants and contracts, in mutual commitments, obligations or *iura*. Strictly speaking, the ius-relation can exist only between natural persons, as they are the only persons that are naturally capable of independent speech and action. It does not hold between a natural person and something that is not a person. In particular, it does not hold between social positions.<sup>141</sup> Unlike the lex-relation, the ius-relation holds between persons who need not be members or subjects of the same society. It holds between persons who are independent of one another, at least in the sense of not being related to one another as a superior to an inferior or as subjects of the same superior in any social organisation.<sup>142</sup>

What natural persons can or cannot do is not defined by any set of legal rules. It is defined by their nature, which we have to accept as “a given” and to study accordingly. Moreover, we do not have to know any legal rules to determine which acts are injurious to natural persons or which acts are infringements of the order of conviviality among such persons. To make such determinations, we must study what really happened, what real people really did to one another, taking into account their mutual commitments and obligations—their *iura*. In short, we must study the world as *jurists*, not as legists, because the objective here is to determine whether an act was just (in accordance with *ius*), not whether it was legal or illegal in some society. Admittedly, *iura* can be as varied and diverse as legal systems are, but compared to the myriad of forms, sizes and functions of social entities human persons are remarkably similar beings.

The jurist as such is not concerned with legal rules but with rules of law. The latter, in the strict sense, are deductions from the conditions that constitute the convivial order of beings of the same natural kind. Thus, they are implied in the ius- or speech-relation itself, which requires the speakers to be “free and equal” in their exchanges of questions and answers, arguments and counter-arguments, proposals and counter-proposals, in order to communicate to one another what their commitments are. Obviously, physical intimidation and threats, lies and deliberately misleading utterances, and the like, defeat the purpose of entering into a speech-relation. One who engages in such things places himself outside the law because he wilfully upsets the order of ius-based interaction by failing to deal with another as a free and equal person. In short, he is a criminal, one who does not respect the relevant distinctions (*discrimina*) that define conviviality.

In a wider sense, the concept of a rule of law also covers rules of justice, “technical determinations” of just and efficient ways to maintain or to restore the convivial order in a given historical context, where linguistic and other conventions enter into the understanding of human actions. One can easily recognize here the basic intuition of the theory of natural law—before it was derailed by attempts to derive the constitution of an ideal society from nature—that the fundamental patterns of order, the natural laws, of human relations are implicit in the rational nature of the physical human animal: its capacity of speech (*ratio*, *logos*) and its ability to act in accordance with such rationally undertaken commitments.

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<sup>141</sup> By extension and analogy, it can be applied also to any two personified objects, such as mutually independent societies, provided that these are represented or operated by natural persons.

<sup>142</sup> Referring to the types of order discussed in part I: the ius-relation most clearly finds a place in the property-solution. Neither A nor B having any say or authority over the other, any interaction between them must be justified in terms of their mutual respect, consent and contractual obligations. There is no other lawful way in which either of them could gain access to the means controlled by the other to reach ends that are beyond the powers embodied in his own means. Theoretically, we also could subsume the relations between A and B in the abundance-solution under the ius-relation, but there would be no point in doing so. Neither A nor B could gain anything from taking on obligations in a world without scarcity.

The study of “legal systems” and the “legal persons” they define is poles apart, with respect to its object as well as its methods, from the study of the *ius*-based convivial order among natural persons. The “law” (*leges*) of the legal positivists can be anything whatsoever, but the jurists’ law, the *ius*-based order of conviviality, is in its principles the same always and everywhere. The same act may be legal in one society and illegal in another; but we need no legal reference to say that it is just, or unjust. Likewise for distributive justice: it primarily concerns a distribution of burdens or benefits according to principles on which the parties had agreed as a *ius* established among free and equal persons, regardless of any socially imposed rules. With respect to distributions within a social setting, “distributive justice” stands for a distribution based on an appreciation of merit (which necessarily must be relative to some task or purpose). In contrast, social justice—the satisfaction of every member’s wants by society, according to a socially defined ranking of either wants or membership status—is independent of agreement or merit. It brings to mind the Marxian illusion that we all can and are entitled to do and have what we want while society takes care of production.<sup>143</sup>

#### 2.4 Conviviality, natural law, and justice

From the above considerations, we can induce the basic structure of law.<sup>144</sup> It is an interpersonal order that is *ius*-based. It comprises at least two independent and autonomous<sup>145</sup> persons. Paradigmatically, they are natural persons, each of them exercising legislative power over his own property—the means of action, which may be material things or non-autonomous persons, that belong to him. If we assume the existence of only one autonomous person, the formal structure of law is reduced to a *lex*-based order. Simple as it is, the schematic representation of the *ius*-based interpersonal order has many interesting properties, but this is not the place for a detailed formal analysis.

From a philosophical point of view, the analysis is of interest primarily when we consider how human persons fit into the scheme, leaving aside all kinds of artificial and supernatural persons and piercing through the “corporate veil” of social constructions. At least at the moment of first contact, before either one has had a chance to do anything to the other, two natural persons can stand only in the *ius*-relation to one another. They are, at that moment, two independent (free) persons of the same natural kind, neither one being subordinated to the other. Of course, in this case, *ex hypothesi*, there can be no subordination in consequence of some pre-existing *iura* or of some previous injustice committed by one of them against the other. They are in a Lockean “state of nature”, which is the convivial order by another name. Their relation is according to the natural law. In terms of a once current definition of law, it is a relation characterized by freedom and equality<sup>146</sup>. Law is a condition of freedom among likes, that is rational agents of the same natural kind.

Justice, or *ius-titia*, is that which is instrumental for bringing about or maintaining the condition of *ius*. It comprises all actions that effectively aim at keeping human relations within the order of speech among free and equal persons. Thus, its main function is to prevent disorder or confusion from affecting the convivial order of natural persons. Injustice is first of all the result of not respecting another natural person as a free and equal person, for example by confusing him with something that is

<sup>143</sup> See note 1010 above.

<sup>144</sup> The argument and a detailed analysis can be found in “The Logic of Law”, <http://allserv.rug.ac.be/~frvandun/Texts/Articles/LogicOfLaw.djvu>.

<sup>145</sup> On the technical meaning of “autonomy” in this context, see the text referenced in note 3535.

<sup>146</sup> For my reservations about the use of “equality” in this context, see the paper cited in note 22.

not a person at all but, say, a material object, animal, or a social construct. Other significant types of injustice result from confusing one natural person with another, especially when such confusion leads to rewarding or praising, punishing or blaming, one person for the words or actions of another. Such confusions, whether deliberate or not, whether rectifiable or not, betray an inability to abide by the conditions of conviviality.

Thus, with respect to the convivial order, “justice” has a clear and unambiguous objective meaning. Jasay rightly criticized the efforts of political and social theorists to appropriate the term “justice” while obfuscating its true meaning with various attempts to define justice as “something else”.<sup>147</sup> Obviously, justice has no place in the legal-positivistic view that “law” is the legal system of one or another society. Maintaining social order or upholding the prevailing conditions of legality has no logical or other necessary connection with maintaining the *ius*-based order of conviviality. Who will deny that “There is no logical connection between *lex* and justice” sounds more plausible than “There is no logical connection between *ius* and justice”?

### 2.5 *Conflicting Orders: Liberalism and socialism*

The convivial order requires no social organisation, only friendly, peaceful interpersonal relations. In that sense, it is a universal natural condition, the existence of which we can identify whenever and wherever there are contacts between people. In the same way we can identify its “negation”, which is war, or disorder or confusion in human affairs. Like that between life and death, the difference between convivial order and war comes, as it were, with the very nature of *homo sapiens* and his world. In contrast, societies are local, temporary and contingent constructions. There is no such thing as natural society. Nevertheless, awareness of the net advantages of co-operation and organisation leads people to adopt a social mode of existence, to form or join one or more societies on the expectation that they will improve their quality of life or their chances of achieving cherished goals. This raises questions about the compatibility of social and convivial orders.

A convivial order conceivably may disappear when too many individuals start making war on one another, although it is difficult to see how such criminality could become infectious without being socially organized. As the word is used at present, war is pre-eminently a social phenomenon in that it involves high degrees of social organisation and mobilisation. Indeed, societies may be outlaws from the point of view of conviviality because of the way in which they treat their members or outsiders or both. Many societies thrive by perfecting the art of disturbing the conditions of conviviality by invasive actions of lesser or greater magnitude, from occasional raids to legalising crimes or making lawful activity illegal<sup>148</sup> to all-out war. Although societies can be formed and operated on principles that are compatible with the convivial order, social orders are not necessarily compatible with the convivial order.<sup>149</sup>

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<sup>147</sup> Jasay, “Justice as something else”, which is the pivotal text in his beautiful collection of essays: *Justice and Its Surroundings* (Indianapolis, Ind., 2002).

<sup>148</sup> Prominent examples are the “underground economy” and other “victimless crimes”.

<sup>149</sup> “Society” is not the same as “community”. The latter term denotes a categorisation of people with some common property or relation: locality, nationality, language, occupation, religion, and so on. Thus we have local, national, linguistic, religious, artistic, cultural, academic, criminal and many other communities. There is even a human community, a community of the living, and a community of the dead. Members of a society usually have a community of interests, but the community of people with a common interest need not be socially organized. Indeed, they may be only dimly aware of one another’s existence. Community leaders typically are strong personalities, not occupants of some predefined position—but many such leaders aspire to organize or “socialize” their community. A community has no “collective

To some extent, all societies put the convivial order at risk. They imply some degree of hierarchical organisation and mobilisation—a concentration of power over men and resources that they can use for their particular social purposes. Moreover, societies tend to subvert the attitude of freedom among likes that characterizes conviviality. They offer rewards not just in the form of the accomplishment of their purpose or an occasional bonus or token of appreciation. They also offer differentiated social positions, which carry different sets of powers, privileges, immunities, perks of office, or financial benefits. Unlike the convivial order, where the concept does not even make sense, societies offer “career opportunities” and feed particular ambitions and rivalries regarding social position and rank. On the other hand, societies may languish, perish even, when they cannot adequately control the human factor. An atmosphere of either conviviality or war may pervade the social structure; the members may deal with one another as free and equal persons or alternatively as enemies. The social enterprise becomes pointless as the convivial attitude of live and let live or its warlike antithesis takes root to the detriment of social efficiency.

When there is incompatibility between social and convivial order, the question arises which type of order is more basic or worthy of respect than the other is. With regard to this question, classical liberals and philosophical socialists take radically opposed positions.

Philosophical socialists assert that social order trumps the natural law of freedom among likes. They focus on social orders, in which people occupy positions and perform roles and functions in the pursuit of some social goal. Consequently, efficiency in the pursuit of that goal trumps interpersonal justice, even—especially—if the goal is called “social justice”. For a socialist, human individuals are social resources or recipients of social benefits, in any case socially constructed “legal persons” with socially defined claims (“rights”) and duties. Hence, philosophical socialists face the task of socializing human beings to make them internalize the demands of society. In contrast, for a classical liberal, societies are human constructs, and human nature and natural conviviality trump social order. His task is to humanize societies to make them compatible with the natural law of conviviality. However, as among others Anthony de Jasay has warned, it is vain to expect the state to be of any help in that task. However, neither his nor anybody else’s critiques appear able to stop the relentless drive towards displacement of convivial modes of interaction by social forms that has characterized so much of recent history. If being reduced to a mere placeholder in a scheme of social organisation—a resource to be managed—is the true mark of servitude then we are now very close to reaching the goal of what Aldous Huxley, not too long ago, called the “most important Manhattan Projects of the future ...vast government-sponsored enquiries into what the politicians and the participating scientists will call “the problem of happiness”—in other words, the problem of making people love their servitude.”<sup>150</sup>

## *2.6 Natural law and its politically motivated denial*

A person’s freedom under the natural law comprises any action that is compatible with the natural law of conviviality. It includes taking on obligations towards other persons and by implication entering into society with them provided the society in question is itself compatible with natural law. It does not include coercing others into submission either to him or to a society of which he is a member. It does not include coercing other persons who are in society with him, except to enforce in the agreed

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decision-rules”. It need be no more than a segment or aspect of the convivial order. It is not a type of order distinct from either the convivial or the social order.

<sup>150</sup> Aldous Huxley, *Brave New World* (New York, 1953), p.xii (foreword).

manner the rules according to which they had consented<sup>151</sup> to behave and to act. Nor does it include coercing others who are in society with him by taking anything from them that they had not agreed to invest in that society. In justice, withholding the benefits of membership is the only proper way in which to enforce social rules and regulations. The ultimate sanction is expulsion if that option has not been foreclosed at the constitutional level. Most societies can live with those limitations, but political societies, states in particular, obviously do not. Consequently, proponents of political social orders face the problem of justifying the very existence of political societies—the problem of debunking natural law.

Logically promising strategies for addressing that problem involve the rejection of freedom or equality, either of which is a necessary condition of natural law. Such rejections have been based on one of two arguments: one is that the condition (freedom or equality) is a true but undesirable and possibly dangerous state of affairs; the other is that the condition is no more than an illusion. Thus, Plato insisted that politics must resort to “a shameful lie”. All citizens must be taught that they are children of their country (and therefore brothers and sisters), but also that they are by divine ordinance destined individually for unequal social ranks.<sup>152</sup> That indoctrination is necessary to ensure that they remain unaware of their natural condition and to make them accept social inequality. Similarly, Hobbes argued that equality was the root of all the evils of the “natural condition of mankind”<sup>153</sup> and that only an absolute political inequality<sup>154</sup> offered any hope of peaceful co-existence. Aristotle, on the other hand, went to great lengths to prove that social position is merely a reflection if not a fulfilment of natural endowment. The doctrine of “the slave by nature” was only the most telling illustration of his belief in natural inequality. For Aristotle, the freedom of the elite of noble citizens rested on their command over the lesser breeds of men. The natural inequality among human beings was his justifying ground of the socially necessary hierarchy and its division of human beings into free citizens and unfree subjects.

Until far into the eighteenth century, most attacks on natural law (in the sense of order among natural persons) were indeed attacks on equality. Later, the focus of the attacks shifted to freedom. Rousseau maintained that he could justify the fact that, although they are born free, people everywhere are in chains.<sup>155</sup> Natural freedom is a fact, but it also is dangerous to human existence; that is why it should be replaced with civil liberty, which is obtained when every citizen becomes one with all the other citizens and therefore with the state. Civil liberty, then, requires the transformation of the human being from a natural, independent person into an artificial or “moral” person, the citizen. The latter is everything a natural human being is not. Above all, the citizen is only a part of a larger whole, and a part that is impotent without the assistance of the rest.<sup>156</sup> A person’s natural freedom, his capacity for independent action and thought, must be eliminated if a state is to be legitimate and equality is to be instituted. Of course, that equality is no longer a qualitative sameness or likeness of natural kind, but a quantitative equality of rank and power in political society. Karl Marx went one giant step further by arguing that the particular individual’s freedom is an illusion—a reflection of his false consciousness. It will remain so until that individual is transformed into a true species-being and as a universal individual absorbs in himself

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<sup>151</sup> Obviously, “consent” does not refer to something outside the ius-relation. It refers to consent by a free rational agent, not to coerced or fraudulently obtained acceptance of conditions.

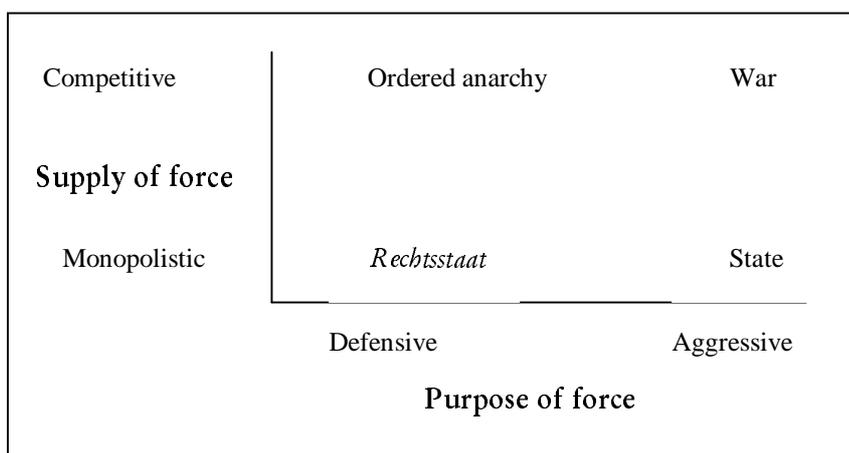
<sup>152</sup> Plato, *The Republic*, Book 3, 413c–415c.

<sup>153</sup> Hobbes, p. (Part I, chapter 13).

<sup>154</sup> Hobbes, p. (Part II, chapter 17).

<sup>155</sup> Rousseau, Book 1, chapter 1.

<sup>156</sup> Rousseau, Book 2, chapter 7.



the whole of humanity. Only then human society will become a universal society without differentiation of class or rank—a society of equals.

The vigorous currents of egalitarian and collectivist thought in the twentieth century and the strident rhetoric of “solidarity” indicate the enduring popularity of that mereological conception of the human person as an integral and dependent part of a larger whole.<sup>157</sup> So does the conception of his liberty as equal participation in the “democratic self-determination” of that whole. It obviously does not bear any resemblance to a person’s freedom within the natural law. As far as a seemingly overwhelming majority of Western intellectuals is concerned, the idea of justice as freedom among likes holds no attraction at all. Even many “liberals” cannot break free from the modern conception of liberty and equality as nomocratic legal constructs that must be democratically validated, regulated and enforced.

### 2.7 *Natural order, the problem of adequate defence*

The peculiar problem of the natural law theorist is the vulnerability of the property-solution that we noted earlier. To put it differently, it is the problem of the adequate defence of every person against aggression and coercion—in particular against organized aggression and coercion, against aggressive and coercive societies. Statistically, in a man-to-man confrontation, the defender stands at least an equal chance against the attacker. Against an organized attack, he is nearly helpless unless he can organize an adequate force in defence of his property. However, it is in the nature of things that defensive force is reactive, organized to be effective against known threats. The initiative lies with the aggressors. Innovative aggressive techniques and organisations, against which no adequate defence has yet been developed, provide a window of opportunity for aggressors.<sup>158</sup>

We can approach the problem of the instability of the convivial order by considering a graph. It represents the types of outcome that we can expect from different regimes concerning the availability of organized force. Each regime is characterized by a position on the organisational dimension (from monopolistic to competitive supply of force) and by the prevalence of force used for either defensive or aggressive purposes.

Under a regime where the defensive use of force prevails and where defensive force is supplied competitively (that is, where people actually can choose with whom they

<sup>157</sup> On the interpretation of those mereological ideas as reflecting a religious paradigm shift, see Frank van Dun, “Natural Law, Liberalism, and Christianity”, *Journal of Libertarian Studies*, 15/3(Summer 2001): p.1–36.

<sup>158</sup> Politically noteworthy examples are the invention of firearms and the organisation of standing armies towards the end of the middle ages, and the development of powerful techniques of “rational administration” and of vast public bureaucracies and police forces in the 19th and 20th centuries.

will contract for defence), the likely outcome is “ordered anarchy”.<sup>159</sup> Such a regime is the individualist-anarchist’s ideal of a pure rule of law. A competitive supply of adequate defensive force may give a person all the assurance he needs, but it is vulnerable to innovative aggression. Moreover, competitive rivalries among organized forces may degenerate into war, the same outcome as under a regime of competing suppliers of aggressive force.<sup>160</sup> In any case, it may not be easy for an individual to switch at short notice to another supplier of defensive force if he gets into a conflict with his current supplier and the latter does not want to let him go. Which other supplier will be willing to take on an organized force merely to gain a customer, who so far has not yet made a single payment or contribution?

The logical opposite of the rule of law is the police state.<sup>161</sup> It is a monopoly of force engaging in organized aggression possibly against outsiders but in any case against its subjects to raise revenue and to force them to implement its policies (which to some degree may be paternalistic, “for the good of the subjects”). Defensive force supplied monopolistically incorporates its “clients” willy-nilly into a single defensive organisation (as in a *Rechtsstaat*). However, if a person is dependent on one supplier of defensive force, he is virtually at the latter’s mercy and may end up as his subject. There is little he can do against that organisation, whether it sticks largely to a defensive function or proves itself a budding police state. In any case, the individual will find himself involved with an organized society specialising in the use of force and consequently with its political life.

In virtually every society there is a significant amount of politics. There are people jockeying for position, trying to make a career, quarrelling over rewards and disciplinary measures and the distribution of the social income. Almost everybody will use all sorts of pressure and influence (perhaps fraud and occasionally violence and force) to sway its officials’ decisions or to build coalitions. In societies where the use of force is monopolized, those activities are likely to be far more intense than in other social contexts. That is because in such political societies the stakes are not limited to what people are willing to pay but extend to what they can be made to pay, short of driving them to open revolt or other persistent illegal activity.

Amazingly, many people continue to believe that the risk of abuse of power can be averted by defining rules for its proper use. That belief was characteristic of nineteenth century political liberalism and its commitment to a formal constitution: some exercises of power are simply “not done”, regardless of the observance of formal and procedural niceties, because they are incompatible with the requirements of justice, and consequently fall outside the range of things to which people may be presumed to agree. However, as Rousseau had already pointed out, the “real” constitutional consensus is “not graven on tablets of marble or brass, but on the hearts of the

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<sup>159</sup> See for example his essays in *Against Politics*, especially “Self-contradictory contractarianism”, and “Conventions: some thoughts on the economics of ordered anarchy”.

<sup>160</sup> Just as there are individual rogues, so there may be rogues among the suppliers of organized force. If history shows one thing, it is that protection rackets can be very lucrative, durable and eventually successful in securing territorial monopolies of force. The development of a system of territorial monopolies may result in a sort of international ordered anarchy, in a war, or in the creation of a larger monopolistic political society. Most modern states are a “unification” of diverse small, often non-political societies. The contemporary tendency towards interstate co-operation and the formation of supranational political entities (and pressure groups) moves in the same direction.

<sup>161</sup> I use the term “police state” here in its original meaning of a state organized to mobilize men and resources for the purpose of implementing its external and internal (social) policies.

citizens”.<sup>162</sup> His problem was that citizens as such—being no more than artificial persons defined by the legal and constitutional rules of society—have no heart. Human beings do; hence, they must be cajoled into identifying as perfectly as possible with the role of the citizen they are supposed to perform. This was Rousseau’s substantial political point: either politics is successful indoctrination of the ideology of citizenship or it is no more than the usual clash of particular interests. That leaves us with the question: “Who is supposed to do the engraving? Who should supply the constitutional ideology?” Where there is no consensus on the answer to these questions, the “real constitutional power” is probably the most obstinately contested scarce resource in the political arena. That is particularly true when the consensus is not the living soul of a homogeneous local community but some presumed thing that must again and again be discovered by the ritual of complex procedures of social decision-making with unpredictable outcomes. As Jasay has argued, “It is a strange supposition that politics goes on within constitutional constraints, but that the constraints themselves are somehow above politics, determining it without being determined by it like any other product of collective decision-making.”<sup>163</sup>

### 3. “Rational choice” in the convivial order and in political society

#### 3.1 Which game shall we play?

In a political society, individuals continually face the familiar dilemma of “asking what I can do for my country” or “asking what my country can do for me”. We may expect that the second alternative would end up as the dominant strategy for most people. In a politically developed society, filled to the brim with vote-seeking politicians, pressure groups, lobby’s, consumer advocates and consultants, that expectation is eminently reasonable. The “good citizens” are sure to get the “sucker’s payoff.” However, the outcome of almost everybody trying to become a rent-seeker and a tax-consumer is likely to be what Anthony de Jasay called “the churning society.”<sup>164</sup> The irony of this “game” is that unless there are people choosing the second strategy, the others will get no answer to the question, what they can do for their country. The country asks nothing but what it is made to ask by those who are in charge of its vocal organs. The obvious way in which to interpret J.F. Kennedy’s call “Ask not what your country can do for you, ask what you can do for your country” is “Don’t tell us what to do, we’ll tell you.”

Do individuals prefer living in a country that asks nothing to living in a churning society? If they do, political society puts them in a classic Prisoner’s dilemma. However, it is one that is likely to maintain its character even if it is played an indefinite number of times. Indeed, the benefits generated by those who do not ask what their country can do for them often can be appropriated by those who are continuously looking for new answers to that question. It is not part of the game that the “good citizens” can securely accumulate the gains (if any) from their public-spirited actions in any round. On the contrary, those gains become part of the stakes in the next round. That is why in politics the key players never tire of exhorting their less

<sup>162</sup> J.-J. Rousseau, *The Social Contract*, trans. G.D.H.Cole (London, 1993), Book 2, chapter 12. As Joseph Servan de Gerbey put it, “A imbecilic despot may be able to constrain slaves with chains of iron; but a true politician binds them more effectively with the chains of their own ideas ... [T]he soft matter of their brains is the firm basis of the mightiest Empires.” My translation from the quote in L. Jerphagnon, *Le divin César; Etude sur le pouvoir dans la Rome impériale* (Paris; 1991), p.1.

<sup>163</sup> Anthony de Jasay, “The rule of forces, the force of rules” in Anthony de Jasay, *Against Politics* (London; 1997), p. 137.

<sup>164</sup> Anthony de Jasay, *The State*.

sophisticated fellows to ever higher degrees of good citizenship. Indeed, the “good citizen” must be thoroughly naïve if he believes that his politically active fellow citizens will leave him free to invest his resources, which he did not spend on rent-seeking, and to walk away with the payoff. The same is true if he believes that the politically active citizens will solve the political Prisoner’s dilemma by enforcing “good citizen” behaviour on themselves. Their role in public life is to translate into policy what they and their clients ask their country to do for them.

There is, then, a significant difference between Prisoner’s dilemmas in a convivial order and in a political society. In a convivial order, the co-operative strategy in a game G that prima facie looks like a Prisoner’s dilemma usually has opportunity costs in the form of benefits forgone by not participating in other games. The co-operative option may imply making a contribution to the production of a particular “public good.” However, making that contribution entails that fewer resources are available for investment in the production of other goods, be they private or public. On the other hand, the option of not contributing to the public good that is at stake in G keeps those resources available for other uses. When the benefits forgone are entered, as they should be, in the calculation of the payoffs for co-operative action, then G may turn out not to be a dilemma of any kind. “Non-co-operation in G” often is a misnomer for co-operation in any number of other games. Looking at G as if it were the only game in town misses the point of living in a convivial order, where people usually can choose which games they will play. It follows that there may be far less Prisoner’s dilemmas in a convivial order than the literature suggests. It also follows that enforcing co-operation in a game such as G, on the hypothesis that it is a Prisoner’s dilemma, may result in a significant loss of utility—even if the subjects are indifferent between being coerced and being asked politely to contribute. In a political society, on the other hand, the games of politics are not optional. The benefits forgone by adopting the “co-operative” strategy of asking what you can do for your country are the benefits that come from asking what it can do for you. If such a game looks like a Prisoner’s dilemma, it does so because it probably is one. Eventually, even the “good citizens” will become wise to the realities of politics.

Of course, the standard application of the Prisoner’s dilemma in political theory is to prove that people in a convivial order cannot solve the problem of the production of public goods. Organized societies, in particular political societies, produce their own Prisoner’s dilemmas. If the argument above is sound, they are of a more perverse character than such dilemmas are likely to be in a convivial order.

### 3.2 *An encounter in the woods*

Anthony de Jasay also has pointed out, pertinently, that we often have reason to rejoice when some groups do not succeed in solving their public goods problem either through “rational negotiation” or because they understand the benefits of co-operation in an indefinitely repeated Prisoner’s dilemma super-game.<sup>165</sup> For themselves, rival gangs could probably reach a Pareto-superior outcome, relative to the usual gang war,

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<sup>165</sup> Or because they are “constrained maximisers”, as David Gauthier, *Morals by Agreement* (Oxford, 1986) would have it. On the fallacy involved in that “solution” of the Prisoner’s dilemma, see Anthony de Jasay, *Against Politics*, p.26–7. Michael Taylor, *Anarchy and Cooperation* (New York; 1976) introduced the Prisoner’s dilemma supergame. However, it is a completely static analysis. Before the first round starts, each player is supposed to choose a strategy that will determine his move in every succeeding round (no matter what his circumstances may be in a particular round, no matter which other “games” might come to his attention in the mean time). That is perfect for playing computer tournaments (Robert Axelrod, *The Evolution of Co-operation* (New York, 1984)), but not particularly illuminating for analysing the historical existence of the species.

by co-operating in setting up and maintaining a consensus-based syndicate or uniting into a single commonwealth of gangsters. The question is, do we want them to succeed and to become more efficient in looting us? Hobbes's answer, of course, was that we should want that commonwealth if we did not have it already. That answer still carries enormous prestige, especially among those who have substituted the sovereign legislative power of a democratic republic for the original Hobbesian absolute monarch.

Underlying Hobbes's answer, there is the assumption that if there might be one real psychopath at loose in the world, the rational course for every other person would be to act like a psychopath. After all, he might be the next person coming up the road—so better beat him at his own game by striking first. In any case, the next person coming up the road is likely to think that you are that psychopath—and that again is reason enough to strike him down first. If we pursue that kind of reasoning, we get a good view of the sort of world Hobbes held to be inevitable if there were no state, but also of what Leibniz referred to as Hobbes's fundamental fallacy.<sup>166</sup>

Let us simply ask, what will happen if two strangers, each of them carrying a sword and some valuables, meet on a narrow path in the middle of a dense forest? Put the question to a dozen novelists, and you will get at least twelve different stories. However, when we put it to a twentieth century academic, he is likely to insist that the scene be interpreted as a Prisoner's Dilemma illustrating life in Hobbes's "Natural Condition of Mankind".

	<i>B</i>	<b>Disarm</b>	<b>Attack</b>
<b>A</b>			
<b>Disarm</b>		<b>Guaranteed Peace</b>	Defeat <i>Victory</i>
<b>Attack</b>	<i>Victory</i>	<i>Defeat</i>	<b>Battle</b>

*Hobbesian encounters*

A conventional representation of the scene as such a dilemma is given in the figure above. The Hobbesian thesis is that the men have no rational option but to attack one another, given that there is no effective police power to safeguard each traveller from an attack by the other. For each of them, the dominant "strategy" is to attack the other, no matter what the other's intentions might be. A battle between them is then the inevitable outcome—the equilibrium-solution of the game-theoretical representation of their encounter. It is, of course, a Pareto-inferior outcome relative to the outcome that would have resulted if each of them had laid down his sword. That we are dealing with a dilemma becomes clear once we note the assumed (and indeed reasonable) preference orderings of the travellers:

Victory > Guaranteed Peace > Battle > Defeat.

Lest we think that this story has an unavoidably bloody outcome, we should note that Hobbes himself pointed the way out of the dilemma—indeed, out of the misery of the natural condition of mankind. A "nice" bloodless solution is likely when one of the travellers realizes in time that he is no match for the other, throws his weapons down and offers to become the other's faithful servant. He thereby puts himself at the mercy of the stronger one, but then he has at least a chance that the other accepts his offer and,

<sup>166</sup> See note 18.

being able to enforce his will, agrees to let him live. Let us assume that the other does not disappoint him. The scene ends with both of them walking away as a small company, their forces united. The next man they meet sees that he is no match for the two of them and joins their little band. Before long, not only no solitary traveller but also no small company of travellers will dare to resist the group. All will make haste to join it, flattering its leader with the solemn declaration that they have no trust in those that do not trust him. The virgin forest gives birth to a sovereign and his state. The rest is politics and, as Hobbes would have it, comfort, convenience, and commodious living for all.<sup>167</sup>

Let us return to our question, “What will the travellers do?” This time we put it, say, to a seasoned trapper who has had many encounters with strangers in the woods. “What normally happens when I run into a stranger in the woods,” he answers, “is that we approach one another, watching the other’s every move, holding one hand close to our weapon but taking good care not to do anything provocative. In short, we are on our guard. That’s how we survive.”

Each traveller now has three strategies: ‘Disarm’, ‘Be vigilant’, and ‘Attack’. We must consider, therefore, nine possible combinations of strategies. In addition to the four outcomes that we know already from the Hobbesian interpretation, there are five new ones of three different types. 1) One traveller is vigilant while the other disarms—the result being that one is strong and the other weak. 2) One of them attacks while the other remains vigilant—the encounter turns into a confrontation between an aggressor and a defender. 3) Both remain vigilant, making as it were an armed peace as they walk by each other. That is a far more complicated scheme than the Hobbesian one. We may think of it as depicting encounters in the Lockean “state of nature” where every person “hath a Right to punish the Offender, and be Executioner of the Law of Nature.”<sup>168</sup>

	<i>B</i>	<b>Disarm</b>	<b>Be vigilant</b>	<b>Attack</b>
<b>A</b>	<b>Disarm</b>	<b>Guaranteed Peace</b>	<i>Strength</i> Weakness	<i>Victory</i> Defeat
<b>Be vigilant</b>	<i>Weakness</i> Strength	<b>Armed Peace</b>	<i>Aggression</i> Defence	
<b>Attack</b>	<i>Defeat</i> Victory	<i>Defence</i> Aggression	<b>Battle</b>	

#### *Lockean encounters*

There is no obviously reasonable order of preference among the various possible outcomes, even if we leave the preference ranking of the outcomes of the first Hobbesian representation as they were. However, there are preference rankings that do not affect the Hobbesian outcome. For example, any ranking that satisfies the following conditions leaves us with “Battle” as the equilibrium outcome:

- Victory > Strength > Guaranteed Peace
- Aggression > Armed peace > Weakness
- Battle > Defence > Defeat

<sup>167</sup> The same outcome could be assured even when the parties are approximately equal in strength prior to the battle. It is in the nature of combat that a single blow can upset that balance and force one party to unconditional surrender and submission. (Hobbes, , p.Part 2, chapter 20)

<sup>168</sup> John Locke, *Second Treatise of Government*, Chapter II, par. 8, in fine. Locke’s state of nature was not a “state of war”. It was, arguably, something very close to the middle road of “Armed peace”.

Assuming, reasonably, that “Guaranteed Peace” or even “Armed peace” is preferred to “Battle”, the equilibrium-outcome is still Pareto-inferior—no escape from the Hobbesian dilemma here! Note, however, that it is not evidently reasonable to prefer being an aggressor to enjoying an armed peace. Nor is it evidently reasonable to prefer to rush into an open battle rather than to take a defensive position and try to hold it.<sup>169</sup> Let us suppose that the preference rankings satisfy the following conditions

Victory > Strength > Guaranteed Peace

Armed peace > Aggression > Weakness

Defence > Battle > Defeat

Then the equilibrium-outcome is “Armed peace” (exactly as the trapper told us to expect). We still might have a dilemma if “Guaranteed Peace” is preferred to “Armed peace”—but that would be a dilemma of an entirely different sort than the Hobbesian one. In fact, in the setting of our story, there is no obvious reason to prefer “Guaranteed Peace” to “Armed peace” since the former involves losing one’s weapons. Thus, there are no a priori reasons why “Armed peace” should be Pareto-inferior. Hobbes, not one to let facts get in the way of theory, circumvented this result by defining “Armed peace” to be a manifestation of war.<sup>170</sup> With no more to go on than one of his innovative definitions, Hobbes made it appear as if life under an armed peace is just as “solitary, poore, nasty, brutish and short” as it is in an actual war-zone. No wonder Leibniz was unimpressed.<sup>171</sup>

Of course, we should not attach too much weight to game-theoretical models. “Modelling” the human world is a tricky business. Moreover, models are cheap. With a little ingenuity we can make them produce any desired result. In any case, real situations do not come with labels like “This is a Prisoner’s dilemma” attached to them. The mere fact that one does not see people in a convivial order produce what one has determined for oneself to be a public good, is no indication that those people are trapped in such a dilemma. They may have other priorities. What else can we expect in a world of endemic plurality, diversity and scarcity?

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<sup>169</sup> It might be rational to act as an aggressor if there were some assurance that aggression pays, but that it does is no law of nature. See Anthony de Jasay, *Against Politics*, p.199.

<sup>170</sup> See his definition of war (quoted in the text to note 17). Hobbes assumed that “Attack” in any case dominates “Be vigilant”: “there is no way for any man to secure himself, so reasonable, as Anticipation; that is ... to master the persons of all men he can.” (Hobbes, Part I, chapter 13).

<sup>171</sup> Locke also was unimpressed. Hobbes had maintained that only a fully assured peace is not a state of war. However, he also had maintained that the *pax victoris* that results from the unconditional submission of many to one is really the only way to achieve a *victoria pacis*. However, as Locke noted, the *pax victoris* need mean no more than the end of actual fighting; in other respects, it still is war by another name. Locke, for example chapter 11, par. 137.

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## ***The Methodology of Positive Economics***\*

### ***1. Introduction***

In his admirable book on *The Scope and Method of Political Economy* John Neville Keynes distinguishes among “a *positive science* ... a body of systematized knowledge concerning what is; a *normative or regulative science*..., a body of systematized knowledge discussing criteria of what ought to be...; an *art*..., a system of rules for the attainment of a given end”; comments that “confusion between them is common and has been the source of many mischievous errors”; and urges the importance of “recognizing a distinct positive science of political economy.”[1]

This paper is concerned primarily with certain methodological problems that arise in constructing the “distinct positive science” Keynes called for - in particular, the problem of how to decide whether a suggested hypothesis or theory should be tentatively accepted as part of the “body of systematized knowledge concerning what is.” But the confusion Keynes laments is still so rife and so much of a hindrance to the recognition that economics can be, and in part is, a positive science that it seems well to preface the main body of the paper with a few remarks about the relation between positive and normative economics.

### ***2. The relation between positive and normative economics***

Confusion between positive and normative economics is to some extent inevitable. The subject matter of economics is regarded by almost everyone as vitally important to himself and within the range of his own experience and competence; it is the source of continuous and extensive controversy and the occasion for frequent legislation. Self-proclaimed “experts” speak with many voices and can hardly all be regarded as disinterested; in any event, on questions that matter so much, “expert” opinion could hardly be accepted solely on faith even if the “experts” were nearly unanimous and clearly disinterested.[2] The conclusions of positive economics seem to be, and are, immediately relevant to important normative problems, to questions of what ought to be done and how any given goal can be attained. Laymen and experts alike are inevitably tempted to shape positive conclusions to fit strongly held normative preconceptions and to reject positive conclusions if their normative implications - or what are said to be their normative implications - are unpalatable.

Positive economics is in principle independent of any particular ethical position or normative judgments. As Keynes says, it deals with “what is,” not with “what ought to be.” Its task is to provide a system of generalizations that can be used to make correct predictions about the consequences of any change in circumstances. Its performance is to be judged by the precision, scope, and conformity with experience of the predictions it yields. In short, positive economics is, or can be, an “objective” science, in precisely the same sense as any of the physical sciences. Of course, the fact that economics deals with the interrelations of human beings, and that the investigator is himself part of the subject matter being investigated in a more intimate sense than in the physical sciences, raises special difficulties in achieving objectivity at the same time that it provides the

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\* Milton Friedman, *Essays In Positive Economics* (Chicago: Univ. of Chicago Press). I am indebted to Dorothy S. Brady, Arthur F. Burns, and George J. Stigler for helpful comments and criticism.

social scientist with a class of data not available to the physical scientist. But neither the one nor the other is, in my view, a fundamental distinction between the two groups of sciences.[3]

Normative economics and the art of economics, on the other hand, cannot be independent of positive economics. Any policy conclusion necessarily rests on a prediction about the consequences of doing one thing rather than another, a prediction that must be based - implicitly or explicitly - on positive economics. There is not, of course, a one-to-one relation between policy conclusions and the conclusions of positive economics; if there were, there would be no separate normative science. Two individuals may agree on the consequences of a particular piece of legislation. One may regard them as desirable on balance and so favor the legislation; the other, as undesirable and so oppose the legislation.

I venture the judgment, however, that currently in the Western world, and especially in the United States, differences about economic policy among disinterested citizens derive predominant from different predictions about the economic consequences of taking action - differences that in principle can be eliminated by the progress of positive economics - rather than from fundamental differences in basic values, differences about which men can ultimately only fight. An obvious and not unimportant example is minimum-wage legislation. Underneath the welter of arguments offered for and against such legislation there is an underlying consensus on the objective of achieving a "living wage" for all, to use the ambiguous phrase so common in such discussions. The difference of opinion is largely grounded on an implicit or explicit difference in predictions about the efficacy of this particular means in furthering the agreed-on end. Proponents believe (predict) that legal minimum wages diminish poverty by raising the wages of those receiving less than the minimum wage as well as of some receiving more than the minimum wage without any counterbalancing increase in the number of people entirely unemployed or employed less advantageously than they otherwise would be. Opponents believe (predict) that legal minimum wages increase poverty by increasing the number of people who are unemployed or employed less advantageously and that this more than offsets any favorable effect on the wages of those who remain employed. Agreement about the economic consequences of the legislation might not produce complete agreement about its desirability, for differences might still remain about its political or social consequences but, given agreement on objectives, it would certainly go a long way toward producing consensus.

Closely related differences in positive analysis underlie divergent views about the appropriate role and place of trade-unions and the desirability of direct price and wage controls and of tariffs. Different predictions about the importance of so-called "economies of scale" account very largely for divergent views about the desirability or necessity of detailed government regulation of industry and even of socialism rather than private enterprise. And this list could be extended indefinitely.[4] Of course, my judgment that the major differences about economic policy in the Western world are of this kind is itself a "positive" statement to be accepted or rejected on the basis of empirical evidence.

If this judgment is valid, it means that a consensus on "correct" economic policy depends much less on the progress of normative economics proper than on the progress of a positive economics yielding conclusions that are, and deserve to be, widely accepted. It means also that a major reason for distinguishing positive economics sharply from normative economics is precisely the contribution that can thereby be made to agreement about policy.

### 3. *Positive economics*

The ultimate goal of a positive science is the development of theory” or “hypothesis” that yields valid and meaningful (i.e., not truistic) predictions about phenomena not yet observed. Such a theory is, in general, a complex intermixture of two elements. In part, it is a “language” designed to promote “systematic and organized methods of reasoning.”[5] In part, it is a body of substantive hypotheses designed to abstract essential features of complex reality.

Viewed as a language, theory has no substantive content; it is a set of tautologies. Its function is to serve as a filing system organizing empirical material and facilitating our understanding of it; and the criteria by which it is to be judged are appropriate to a filing system. Are the categories clearly and precisely defined? Are they exhaustive? Do we know where to file each individual item, or is there considerable ambiguity? Is the system of headings and subheadings so designed that we can quickly find an item we want, or must we hunt from place to place? Are the items we shall want to consider jointly filed? Does the filing system avoid elaborate cross-references?

The answers to these questions depend partly on logical, partly on factual, considerations. The canons of formal logic alone can show whether a particular language is complete and consistent, that is, whether propositions in the language are “right” or “wrong”. Factual evidence alone can show whether the categories of the “analytical filing system” have a meaningful empirical counterpart, that is, whether they are useful in analyzing particular class of concrete problems.[6] The simple example of “supply” and “demand” illustrates both this point and the preceding list of analogical questions. Viewed as elements of the language of economic theory, these are the two major categories into which factors affecting the relative prices of products or factors of production are classified. The usefulness of the dichotomy depends on the “empirical generalization that an enumeration of the forces affecting demand in any problem and of the forces affecting supply will yield two lists that contain few items in common.”[7] Now this generalization is valid for markets like the final market for a consumer good. In such a market there is a clear and sharp distinction between the economic units that can be regarded as demanding the product and those that can be regarded as supplying it. There is seldom much doubt whether a particular factor should be classified as affecting supply, on the one hand, or demand, on the other; and there is seldom much necessity for considering cross-effects (cross-references) between the two categories. In these cases the simple and even obvious step of filing the relevant factors under the headings of “supply” and “demand” effects a great simplification of the problem and is an effective safeguard against fallacies that otherwise tend to occur. But the generalization is not always valid. For example, it is not valid for the day-to-day fluctuations of prices in a primarily speculative market. Is a rumor of an increased excess-profits tax, for example, to be regarded as a factor operating primarily on today’s supply of corporate equities in the stock market or on today’s demand for them? In similar fashion, almost every factor can with about as much justification be classified under the heading “supply” as under the heading “demand.” These concepts can still be used and may not be entirely pointless; they are still “right” but clearly less useful than in the first example because they have no meaningful empirical counterpart.

Viewed as a body of substantive hypotheses, theory is to be judged by its predictive power for the class of phenomena which it is intended to “explain.” Only factual evidence can show whether it is “right” or “wrong” or, better, tentatively “accepted” as valid or “rejected.” As I shall argue at greater length below, the only relevant test of the *validity* of a hypothesis is comparison of its predictions with experience. The

hypothesis is rejected if its predictions are contradicted (“frequently” or more often than predictions from an alternative hypothesis); it is accepted if its predictions are not contradicted; great confidence is attached to it if it has survived many opportunities for contradiction. Factual evidence can never “prove” a hypothesis; it can only fail to disprove it, which is what we generally mean when we say, somewhat inexactly, that the hypothesis has been “confirmed” by experience.

To avoid confusion, it should perhaps be noted explicitly that the “predictions” by which the validity of a hypothesis is tested need not be about phenomena that have not yet occurred, that is, need not be forecasts of future events; they may be about phenomena that have occurred but observations on which have not yet been made or are not known to the person making the prediction. For example, a hypothesis may imply that such and such must have happened in 1906, given some other known circumstances. If a search of the records reveals that such and such did happen, the prediction is confirmed; if it reveals that such and such did not happen, the prediction is contradicted.

The validity of a hypothesis in this sense is not by itself a sufficient criterion for choosing among alternative hypotheses. Observed facts are necessarily finite in number; possible hypotheses, infinite. If there is one hypothesis that is consistent with available evidence, there are always an infinite number that are.[8] For example, suppose a specific excise tax on a particular commodity produces a rise in price equal to the amount of the tax. This is consistent with competitive conditions, a stable demand curve, and a horizontal and stable supply curve. But it is also consistent with competitive conditions and a positively or negatively sloping supply curve with the required compensating shift in the demand curve or the supply curve; with monopolistic conditions, constant marginal costs, and stable demand curve, of the particular shape required to produce this result; and so on indefinitely. Additional evidence with which the hypothesis is to be consistent may rule out some of these possibilities; it can never reduce them to a single possibility alone capable of being consistent with the finite evidence. The choice among alternative hypotheses equally consistent with the available evidence must to some extent be arbitrary, though there is general agreement that relevant considerations are suggested by the criteria “simplicity” and “fruitfulness,” themselves notions that defy completely objective specification. A theory is “simpler” the less the initial knowledge needed to make a prediction within a given field of phenomena; it is more “fruitful” the more precise the resulting prediction, the wider the area within which the theory yields predictions, and the more additional lines for further research it suggests. Logical completeness and consistency are relevant but play a subsidiary role; their function is to assure that the hypothesis says what it is intended to say and does so alike for all users - they play the same role here as checks for arithmetical accuracy do in statistical computations.

Unfortunately, we can seldom test particular predictions in the social sciences by experiments explicitly designed to eliminate what are judged to be the most important disturbing influences. Generally, we must rely on evidence cast up by the “experiments” that happen to occur. The inability to conduct so-called “controlled experiments” does not, in my view, reflect a basic difference between the social and physical sciences both because it is not peculiar to the social sciences - witness astronomy - and because the distinction between a controlled experiment and uncontrolled experience is at best one of degree. No experiment can be completely controlled, and every experience is partly controlled, in the sense that some disturbing influences are relatively constant in the course of it.

Evidence cast up by experience is abundant and frequently as conclusive as that from contrived experiments; thus the inability to conduct experiments is not a fundamental obstacle to testing hypotheses by the success of their predictions. But such evidence is far more difficult to interpret. It is frequently complex and always indirect and incomplete. Its collection is often arduous, and its interpretation generally requires subtle analysis and involved chains of reasoning, which seldom carry real conviction. The denial to economics of the dramatic and evidence of the “crucial” experiment does hinder the adequate testing of hypotheses; but this is much less significant than the difficulty it places in the way of achieving a reasonably prompt and wide consensus on the conclusions justified by the available evidence. It renders the weeding-out of unsuccessful hypotheses slow and difficult. They are seldom downed for good and are always cropping up again.

There is, of course, considerable variation in these respects. Occasionally, experience casts up evidence that is about as direct, dramatic, and convincing as any that could be provided by controlled experiments. Perhaps the most obviously important example is the evidence from inflations on the hypothesis that a substantial increase in the quantity of money within a relatively short period is accompanied by a substantial increase in prices. Here the evidence is dramatic, and the chain of reasoning required to interpret it is relatively short. Yet, despite numerous instances of substantial rises in prices, their essentially one-to-one correspondence with substantial rises in the stock of money, and the wide variation in other circumstances that might appear to be relevant, each new experience of inflation brings forth vigorous contentions, and not only by the lay public, that the rise in the stock of money is either an incidental effect of a rise in prices produced by other factors or a purely fortuitous and unnecessary concomitant of the price rise.

One effect of the difficulty of testing substantive economic hypotheses has been to foster a retreat into purely formal or tautological analysis.[9] As already noted, tautologies have an extremely important place in economics and other sciences as a specialized language or “analytical filing system.” Beyond this, formal logic and mathematics, which are both tautologies, are essential aids in checking the correctness of reasoning, discovering the implications of hypotheses, and determining whether supposedly different hypotheses may not really be equivalent or wherein the differences lie.

But economic theory must be more than a structure of tautologies if it is to be able to predict and not merely describe the consequences of action; if it is to be something different from disguised mathematics.[10] And the usefulness of the tautologies themselves ultimately depends, as noted above, on the acceptability of the substantive hypotheses that suggest the particular categories into which they organize the refractory empirical phenomena.

A more serious effect of the difficulty of testing economic hypotheses by their predictions is to foster misunderstanding of the role of empirical evidence in theoretical work. Empirical evidence is vital at two different, though closely related, stages: in constructing hypotheses and in testing their validity. Full and comprehensive evidence on the phenomena to be generalized or “explained” by a hypothesis, besides its obvious value in suggesting new hypotheses, is needed to assure that a hypothesis explains what it sets out to explain - that its implications for such phenomena are not contradicted in advance by experience that has already been observed.[11] Given that the hypothesis is consistent with the evidence at hand, its further testing involves deducing from it new facts capable of being observed but not previously known and checking these deduced facts against additional empirical evidence. For this test to be relevant, the deduced

facts must be about the class of phenomena the hypothesis is designed to explain; and they must be well enough defined so that observation can show them to be wrong.

The two stages of constructing hypotheses and testing their validity are related in two different respects. In the first place, the particular facts that enter at each stage are partly an accident of the collection of data and the knowledge of the particular investigator. The facts that serve as a test of the implications of a hypothesis might equally well have been among the raw material used to construct it, and conversely. In the second place, the process never begins from scratch; the so-called "initial stage" itself always involves comparison of the implications of earlier set of hypotheses with observation; the contradiction these implications is the stimulus to the construction of new hypotheses or revision of old ones. So the two methodologically distinct stages are always proceeding jointly.

Misunderstanding about this apparently straightforward process centers on the phrase "the class of phenomena the hypothesis is designed to explain." The difficulty in the social sciences of getting new evidence for this class of phenomena and of judging its conformity with the implications of the hypothesis makes it tempting to suppose that other, more readily available, evidence is equally relevant to the validity of the hypothesis - to suppose that hypotheses have not only "implications" but also "assumptions" and that the conformity of these "assumptions" to "reality" is a test of the validity of the hypothesis *different from* or *additional to* the test by implications. This widely held view is fundamentally wrong and productive of much mischief. Far from providing an easier means for sifting valid from invalid hypotheses, it only confuses the issue, promotes misunderstanding about the significance of empirical evidence for economic theory, produces a misdirection of much intellectual effort devoted to the development of positive economics, and impedes the attainment of consensus on tentative hypotheses in positive economics.

In so far as a theory can be said to have "assumptions" at all, and in so far as their "realism" can be judged independently of the validity of predictions, the relation between the significance of a theory and the "realism" of its "assumptions" is almost the opposite of that suggested by the view under criticism. Truly important and significant hypotheses will be found to have "assumptions" that are wildly inaccurate descriptive representations of reality, and, in general, the more significant the theory, the more unrealistic the assumptions (in this sense).[12] The reason is simple. A hypothesis is important if it "explains" much by little, that is, if it abstracts the common and crucial elements from the mass of complex and detailed circumstances surrounding the phenomena to be explained and permits valid predictions on the basis of them alone. To be important, therefore, a hypothesis must be descriptively false in its assumptions; it takes account of, and accounts for, none of the many other attendant circumstances, since its very success shows them to be irrelevant for the phenomena to be explained.

To put this point less paradoxically, the relevant question to ask about the "assumptions" of a theory is not whether they are descriptively "realistic," for they never are, but whether they are sufficiently good approximations for the purpose in hand. And this question can be answered only by seeing whether the theory works, which means whether it yields sufficiently accurate predictions. The two supposedly independent tests thus reduce to one test.

The theory of monopolistic and imperfect competition is one example of the neglect in economic theory of these propositions. The development of this analysis was explicitly motivated, and its wide acceptance and approval largely explained, by the belief that the assumptions of "perfect competition" or "perfect monopoly" said to

underlie neoclassical economic theory are a false image of reality. And this belief was itself based almost entirely on the directly perceived descriptive inaccuracy of the assumptions rather than on any recognized contradiction of predictions derived from neoclassical economic theory. The lengthy discussion on marginal analysis in the *American Economic Review* some years ago is an even clearer, though much less important, example. The articles on both sides of the controversy largely neglect what seems to me clearly the main issue - the conformity to experience of the implications of the marginal analysis - and concentrate on the largely irrelevant question whether businessmen do or do not in fact reach their decisions by consulting schedules, or curves, or multivariable functions showing marginal cost and marginal revenue.[13] Perhaps these two examples, and the many others they readily suggest, will serve to justify a more extensive discussion of the methodological principles involved than might otherwise seem appropriate.

1. (London: Macmillan & Co., 1891), pp. 34-35 and 46.

2. Social science or economics is by no means peculiar in this respect - witness the importance of personal beliefs and of "home" remedies in medicine wherever obviously convincing evidence for "expert" opinion is lacking. The current prestige and acceptance of the views of physical scientists in their fields of specialization - and, all too often, in other fields as well - derives, not from faith alone, but from the evidence of their works, the success of their predictions, and the dramatic achievements from applying their results. When economics seemed to provide such evidence of its worth, in Great Britain in the first half of the nineteenth century, the prestige and acceptance of "scientific economics" rivaled the current prestige of the physical sciences.

3. The interaction between the observer and the process observed that is so prominent a feature of the social sciences, besides its more obvious parallel in the physical sciences, has a more subtle counterpart in the indeterminacy principle arising out of the interaction between the process of measurement and the phenomena being measured. And both have a counterpart in pure logic in Gödel's theorem, asserting the impossibility of a comprehensive self-contained logic. It is an open question whether all three can be regarded as different formulations of an even more general principle.

4. One rather more complex example is stabilization policy. Superficially, divergent views on this question seem to reflect differences in objectives; but I believe that this impression is misleading and that at bottom the different views reflect primarily different judgments about the source of fluctuations in economic activity and the effect of alternative countercyclical action. For one major positive consideration that accounts for much of the divergence see "The Effects of a Full-Employment Policy on Economic Stability: A Formal Analysis," *infra*, pp. 117-32. For a summary of the present state of professional views on this question see "The Problem of Economic Instability," a report of a subcommittee of the Committee on Public Issues of the American Economic Association, *American Economic Review*, XL (September, 1950), 501-38.

5. Final quoted phrase from Alfred Marshall, "The Present Position of Economics" (1885), reprinted in *Memorials of Alfred Marshall*, ed. A. C. Pigou (London: Macmillan & Co., 1925), p. 164. See also "The Marshallian Demand Curve," *infra*, pp. 56-57, 90-91.

6. See "Lange on Price Flexibility and Employment: A Methodological Criticism," *infra*, pp. 282-89.

7. "The Marshallian Demand Curve," *infra*, p. 57.

8. The qualification is necessary because the "evidence" may be internally contradictory, so there may be no hypothesis consistent with it. See also "Lange on Price Flexibility and Employment," *infra*, pp. 282-83.

9. See "Lange on Price Flexibility and Employment," *infra*, *passim*.

10. See also Milton Friedman and L. J. Savage, "The Expected-Utility Hypothesis and the Measurability of Utility," *Journal of Political Economy*, LX (December, 1952), 463-74, esp. pp. 465-67.

11. In recent years some economists, particularly a group connected with the Cowles Commission for Research in Economics at the University of Chicago, have placed great emphasis on a division of this step of selecting a hypothesis consistent with known evidence into two substeps: first, the selection of a class of admissible hypotheses from all possible hypotheses (the choice of a "model" in their terminology); second, the selection of one hypothesis from this class (the choice of a "structure"). This subdivision may be heuristically valuable in some kinds of work, particularly in promoting a systematic use of available statistical evidence and theory. From a methodological point of view, however, it is an entirely arbitrary subdivision of the process of deciding on a particular hypothesis that is on a par with many other subdivisions that may be convenient for one purpose or another or that may suit the psychological needs of particular investigators.

One consequence of this particular subdivision has been to give rise to the so-called "identification" problem. As noted above, if one hypothesis is consistent with available evidence, an infinite number are. But, while this is true for the class of hypotheses as a whole, it may not be true of the subclass obtained in

the first of the above two steps - the "model." It may be that the evidence to be used to select the final hypothesis from the subclass can be consistent with at most one hypothesis in it, in which case the "model" is said to be "identified"; otherwise it is said to be "unidentified." As is clear from this way of describing the concept of "identification," it is essentially a special case of the more general problem of selecting among the alternative hypotheses equally consistent with the evidence - a problem that must be decided by some such arbitrary principle Occam's razor. The introduction of two substeps in selecting a hypothesis makes this problem arise at the two corresponding stages and gives it a special cast. While the class of all hypotheses is always unidentified, the subclass in a "model" need not be, so the problem arises of conditions that a "model" must satisfy to be identified. However useful the two substeps may be in some contexts, their introduction raises the danger that different criteria will unwittingly be used in making the same kind of choice among alternative hypotheses at two different stages.

On the general methodological approach discussed in this footnote see Tryvge Haavelmo, "The Probability Approach in Econometrics," *Econometrica*, Vol. XII (1944), Supplement; Jacob Marschak, "Economic Structure, Path, Policy, and Prediction," *American Economic Review*, XXXVII, (May, 1947), 81-84, and "Statistical Inference in Economics: An Introduction," in T. C. Koopmans (ed), *Statistical Inference in Dynamic Economic Models* (New York: John Wiley & Sons, 1950); T. C. Koopmans, "Statistical Estimation of Simultaneous Economic Relations," *Journal of the American Statistical Association*, XL (December, 1945), 448-66; Gershon Cooper, "The Role of Economic Theory in Econometric Models," *Journal of Farm Economics*, XXX (February, 1948), 101-16. On the identification problem see Koopmans, "Identification Problems in Econometric Model Construction," *Econometrica*, XVII (April, 1949), 125-44; Leonid Hurwicz, "Generalization of the Concept of Identification," in Koopmans (ed.), *Statistical Inference in Dynamic Economic Models*.

12. The converse of the proposition does not of course hold: assumptions that are unrealistic (in this sense) do not guarantee a significant theory.

13. See R. A. Lester, "Shortcomings of Marginal Analysis for Wage-Employment Problems," *American Economic Review*, XXXVI (March, 1946), 62-82; Fritz Machlup, "Marginal Analysis and Empirical Research," *American Economic Review*, XXXVI (September, 1946), 519-54; R. A. Lester, "Marginalism, Minimum Wages, and Labor Markets," *American Economic Review*, XXXVII (March, 1947), 135-48; Fritz Machlup, "Rejoinder to an Antimarginalist," *American Economic Review*, XXXVII (March, 1947), 148-54; G. J. Stigler, "Professor Lester and the Marginalists," *American Economic Review*, XXXVII (March, 1947), 154-57; H. M. Oliver, Jr., "Marginal Theory and Business Behavior," *American Economic Review*, XXXVII (June, 1947), 375-83; R. A. Gordon, "Short-Period Price Determination in Theory and Practice," *American Economic Review*, XXXVIII (June, 1948), 265-88.

It should be noted that, along with much material purportedly bearing on the validity of the "assumptions" of marginal theory, Lester does refer to evidence on the conformity of experience with the implications of the theory, citing the reactions of employment in Germany to the Papen plan and in the United States to changes in minimum-wage legislation as examples of lack of conformity. However, Stigler's brief comment is the only one of the other papers that refers to this evidence. It should also be noted that Machlup's thorough and careful exposition of the logical structure and meaning of marginal analysis is called for by the misunderstandings on this score that mar Lester's paper and almost conceal the evidence he presents that is relevant to the key issue he raises. But, in Machlup's emphasis on the logical structure, he comes perilously close to presenting the theory as a pure tautology, though it is evident at a number of points that he is aware of this danger and anxious to avoid it. The papers by Oliver and Gordon are the most extreme in the exclusive concentration on the conformity of the behavior of businessmen with the "assumptions" of the theory.

## **Carl Menger: Pioneer of "Empirical Theory"**\*

The problems and ideas that moved Ludwig von Mises in his early years were addressed by the work of four great economic theorists: Carl Menger, Eugen von Böhm-Bawerk, Friedrich von Wieser, and Joseph Schumpeter. He knew all four personally, but Menger had retired from teaching a year before Mises discovered Menger's *Principles*. They met for the first time around 1910, when Mises was attending Böhm-Bawerk's seminar and preparing his first treatise, *The Theory of Money and Credit*. It was then customary that young men wishing to pursue an academic career in economics paid Menger a visit. He received them in his house amidst his impressive library and had them talk about their work and projects.[1]

Menger was born in 1840 in the Galician town of Neu-Sandez (today located in Poland). His father was a lawyer from a family of army officers and civil servants; his mother came from a rich Bohemian merchant family that had moved to Galicia. His full name was Carl Menger Edler von Wolfesgrün, but he and his brothers — the influential politician Max and the socialist legal scholar Anton — did not use their title of nobility.[2]

Menger was a fascinating and energetic personality. Intellectually vigorous into his old age, he was a true polymath in his youth.[3] He had studied law and government science first in Prague and then in Vienna. One of his teachers at the University of Vienna was Peter Mischler, a champion of marginal-value theory, but apparently Menger was not then interested in economics or an academic career. He preferred non-academic writing and in 1863 worked as a journalist for the *Lemberger Zeitung*. Around 1864, he began preparing for a doctorate in law and government science and passed the first exam in March 1865. Even at this point his new academic commitment was overshadowed by his literary pursuits.[4] When he passed the last of his four doctoral exams, in March 1867, he was in the process of writing several comedies.[5]

His literary interest was more than academic. Menger founded the journal *Wiener Tagblatt*, which first appeared on November 26, 1865. In an early issue, he began publishing an anonymous novel with the scandalous title *Der ewige Jude in Wien* (The Eternal Jew in Vienna).[6] In March 1866, he joined the economics staff of another Vienna journal, the *Wiener Zeitung*. This paper was "a pure government organ, controlled by the Council of Ministers and in particular by the President's Office of the Ministry of the Interior. The editorial staff was selected by the government, official articles were written in the ministries, and edited and submitted by the Council of Ministers." [7] Thus Menger became a government employee in a fast-track position that offered prospects to reach the highest strata within the Austrian civil service.[8]

A government position carried great prestige and was highly coveted by the young elites. Competition was fierce even for lesser positions. To succeed one needed *Protektion* — the friendly ear of someone sufficiently high in the government's pecking order to influence the nomination. In Menger's case, the initial *Protektion* might have come through his brother Max, but Carl quickly learned to stand on his own.

One of his tasks as an officer of the *Wiener Zeitung* was to write market surveys. As he later told his disciple, Friedrich von Wieser, this was his practical introduction to price theory.[9] He was struck by the discrepancy between the actual pricing process as explained by traders and the standard textbook explanations he had learned at the

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\* By Jörg Guido Hülsmann. [This article is excerpted from chapter 4 of *Mises: The Last Knight of Liberalism*.]

university. Upon closer inspection, he came to believe that prices ultimately depended on the value judgments of consumers. It was with this thesis that he eventually earned his *Habilitation* (the traditional central-European university professor's credential) in government science.[10] In 1871 he published his work under the title *Grundsätze der Volkswirtschaftslehre* (Principles of Economics).

In his book Menger presented a theoretical study of fundamental economic phenomena such as economic goods, value, exchange, prices, commodities, and money. He explained the properties of these phenomena and the laws to which they are subject at all times and places. This is of course what good economics textbooks always did and still do. What made Menger's book special is the method he used in his explanations. He tried to trace the causes of the properties and laws under scrutiny back to the simplest facts. His purpose was to demonstrate that the properties and laws of economic phenomena result from these empirically ascertainable "elements of the human economy" such as individual human needs, individual human knowledge, ownership and acquisition of individual quantities of goods, time, and individual error.[11] Menger's great achievement in *Principles* consisted in identifying these elements for analysis and explaining how they cause more-complex market phenomena such as prices. He called this the "empirical method," emphasizing that it was the same method that worked so well in the natural sciences.[12]

To the present reader, this label might be confusing, since it is not at all the experimental method of the modern empirical sciences. Menger did not use abstract models to posit falsifiable hypotheses that are then tested by experience. Instead, Menger's was an analytical method that began with the smallest empirical phenomena and proceeded logically from there. This put Menger in a position to consider market exchanges and prices as macrophenomena and to explain how they are caused by atomistic, but empirically ascertainable "elements of the human economy" situated in an economic microcosm of individual needs and the marginal quantities owned and acquired. In Menger's words, prices were "by no means the most fundamental feature of the economic phenomenon of exchange," but "only incidental manifestations of these activities, symptoms of an economic equilibrium between the economies of individuals." [13]

As later works and correspondence revealed, Menger was fully aware that his most important innovation was the consistent application of the new "empirical method," which he also called the "exact method," the "analytical-synthetic" or the "analytical-compositive" method. In a February 1884 letter to Léon Walras, criticizing Walras's claim that there was a mathematical method of economic research, Menger wrote:

It is rather necessary that we go back to the most simple elements of the mostly very complex phenomena that are here in question — that we thus determine in an *analytical* manner the ultimate factors that constitute the phenomena, the prices, and that we then accord to these elements the importance that corresponds to their nature, and that, in keeping with this importance, we try to establish the *laws* according to which the complex phenomena of human interaction result from simple phenomena.[14] , [15]

Only in this manner was it possible accurately to describe the essence of economic phenomena, and not just the contingent quantitative relationships in which they might stand with other phenomena at certain times and places. Referring to the disagreements between his theory of prices and the price theory of his French correspondent, Menger argued that real-life experience was the only legitimate way to decide the points under

contention. The merit of a theory "always depends on the extent to which it succeeds in determining the true factors (those that correspond to real life) constituting the economic phenomena and the laws according to which the complex phenomena of political economy result from the simple elements." Menger continues:

A researcher who arrives by the way of analysis at such elements that do not correspond to reality or who, without any true analysis, takes his departure from arbitrary axioms — which is only too often the case with the so-called *rational* method — falls necessarily into error, even if he makes superior use of mathematics.[16]

The empirical foundation of Menger's approach contrasted sharply with the Anglo-Saxon approach of that time, which was inspired by Ricardo's *Principles* and relied on fictitious postulates and on such arbitrarily constructed aggregates as price level, capitalists, landowners, and laborers. But Menger's approach also contrasted with the dominant fashions on the Continent and in particular in Germany, where economists — in the manner of historians — treated observed complex phenomena such as market prices as the starting point for their analysis rather than trying to explain them as resulting from more fundamental factors.

In one stroke, *Principles of Economics* departed from both paradigms. Menger had found the delicate balance needed to develop economic theory that remained in touch with the real world. The comprehensive architecture of his book also showed that the principle of marginal value, which had played only an obscure role in earlier theories, is of fundamental and all-pervasive importance in economic science.

The core of Menger's book is the chapter on value, which consumes a quarter of its pages. While financial analysts of Menger's experience stressed subjective factors in price formation — the personal judgment of consumers, entrepreneurs, traders on the stock exchange, etc. — academic economists relegated these subjective factors to a secondary position beneath supposedly objective factors independent of human perceptions. The British classical economists (Adam Smith and David Ricardo, most notably) had created a thoroughly objectivist price theory that sought to explain the natural or long-run prices of all goods by reference only to the costs of production, particularly the cost of labor. According to this labor theory of value, subjective factors can cause actual market prices to deviate from "correct" prices, but only temporarily and never by enough to outweigh the impact of the objective costs of labor. The value of a product was therefore ultimately one of its inherent qualities, just like weight or volume. It was "in" the good rather than an accidental feature that stemmed "from outside."

The writings of Smith and Ricardo were overwhelmingly successful in the Anglo-Saxon countries, and had made great inroads on the European continent. The French Revolution had shifted the center of economic research and learning from the Continent to Britain. The Napoleonic era was particularly effective in suppressing the classical-liberal movement on the Continent. Public attention naturally shifted to Adam Smith, the patron saint of the still-vigorous British branch of the movement. Smith became the main authority on economic theory, displacing Quesnay, reducing Turgot to a footnote, and condemning Condillac to oblivion.

But his popularity as the intellectual leader of political liberalism did not help Smith in Germany. German economists were far less receptive to the Smithian message than were their peers in the West. German economists tended to be government employees and abhorred unbecoming political affiliations. Wilhelm Roscher, a great historian of economic thought and one of the leading German economists of the nineteenth century,

famously observed that it was "a national peculiarity of the Germans [ ... ] to deviate from the rule of *free trade*, which has been imported from England and France, through numerous exceptions made for government interventionism."<sup>[17]</sup>

The German professors read Adam Smith, even read him attentively, but only to dismiss his views as lacking solid foundations. And while they did recognize Smith as an authority in the field, wrongheaded or not, they dismissed Ricardo almost out of hand. Smith's errors were debatable, but in Ricardo they found no scientific merit whatsoever. This preference for Smith over Ricardo grew stronger over the next century and culminated in the works of the very influential Younger Historical School, which rejected economic "theory" altogether.<sup>[18]</sup>

In his *Principles*, Ricardo had invented what today would be called macroeconomics, stressing the relationships between various aggregates such as price levels, average wages, average profits, but also between social aggregates such as laborers, capitalists, and landowners. On the basis of his insights about the relationships between such aggregate variables, he made the case for a far-reaching *laissez-faire* program. This approach did not meet with enthusiasm among German social scientists. Ever since the French revolutionary army had invaded Germany under the bloody banner of abstract human rights, Germans tended to be suspicious of sweeping political programs derived from theory without basis in observed reality. Under the trauma of the French Revolution, nineteenth-century German historians, jurists, and government scientists tended to stress the particular conditions of concrete human communities, rather than focus on features of an unobservable humanity *en masse*.

Ricardo did have an extremely able advocate in Jean-Baptiste Say, who was indefatigable in his efforts to promote British classical economics. Say's *Traité d'économie politique* is a masterpiece in its own right, in many ways more sophisticated than the books of Smith and Ricardo. Say gave an axiomatic exposition of Smithian economic science, enhancing enormously the prestige of the Scotsman's unsystematic *Wealth of Nations*.<sup>[19]</sup> He refined the British economists' focus on whole classes or aggregates of goods, sub-dividing economic science into a macroeconomic trilogy: production, distribution, and consumption of consumers' goods in general. Most important, he gave classical economics an appealing epistemological justification, showing it to be rooted in common experience. This empirically oriented methodology made much more sense to Continental scholars and convinced them that there was a scientific case to be made for Ricardian economics and the political program it seemed to entail.

Say was the central figure in the promotion of British economics on the European continent, but he clearly owed a far greater intellectual debt to the scientific tradition of his own country.<sup>[20]</sup> By the mid-nineteenth century, thanks to the efforts of Say, British economics had become the academic orthodoxy of Europe and America. It was against the background of this orthodoxy that Menger worked on a restatement of the explanation of the pricing process.

In developing his theory of value and prices, Menger relied on the remnants of an ancient price theory from the late-Scholastic School of Salamanca, which in the sixteenth and early seventeenth centuries had stressed precisely those subjective features of the pricing process that were conspicuously absent from the British classical school. But the Spanish late-scholastics never produced a treatise on economics, and their discoveries about the nature of value and prices were scattered across thousands of pages.<sup>[21]</sup>

The subjectivist theory of value survived only in this diffused form with one important exception: Etienne de Condillac's great treatise, *Commerce and*

*Government*. Published in the same year as Smith's *Wealth of Nations* (1776), Condillac's treatment gave the first full axiomatic presentation of political economy on the basis of the subjectivist theory of value. But the impact of his work was minimal because French economists rejected it. Condillac was already a famous philosopher when he published the book, and did not deem it necessary to follow the conventions of the disciples of Quesnay; rather, he presented his thoughts in an independent and original manner — an offense, it turns out, serious enough to prevent the translation of his work into English for more than 200 years.[22]

Still, *Commerce and Government* was one of the main sources of inspiration for Menger (who of course read French, among other languages) when he elaborated his economic value theory.[23] Menger pointed out that value can only come into existence once human beings realize that economic goods exist and that each of them has a personal — or, as Menger would say "subjective" — importance.

Most importantly, value always concerns the concrete units of a good, that is, the "marginal" units under consideration, like one cup of water, four loaves of bread, three diamonds, two glasses of milk, etc. It never concerns the total available stock of these goods, except when decisions are actually made about the total stock. This insight is the key to solving an apparent paradox of the subjectivist theory of value, which had prevented a wider acceptance of the theory. If the price of a good really depends on the subjective importance of the good, then how is it that water, which is essential to human survival, commands a far lower price than diamonds, which are much less important than water? This apparent paradox played in favor of the labor theory of value, virtually the only alternative to the subjectivist approach. Whatever the problems of the labor theory of value, it did not contradict reality as strikingly as its subjectivist competitor.

Menger showed that the paradox is only apparent: it vanishes as soon as we stop asking about the value of entire classes of goods, which are economically irrelevant because they are not subject to human decision-making. If we ask instead about the laws that rule the evaluation of individual units of a good, the answer becomes clear. Water is so abundant that it not only serves to satisfy the most important — and thus most highly valued — human need for water, but also far less important needs for water, such as decorative fountains; it is the value of the least important but still satisfied need that determines the economic value of every unit of water, which therefore commands a low market price. By contrast, diamonds are so rare that the available supply can only satisfy the most important needs for them, and as a consequence they are very expensive.

Menger also showed that the value of factors of production is always derived from the value of consumer goods and not the other way around. Contrary to the assertion of cost-of-production theorists, a bottle of wine is not valuable because it has been produced with valuable land and valuable labor; the land and the labor invested in winemaking are valuable in the first place because consumers value the bottle of wine.

Finally, Menger argued that the microphenomenon of value exists independent of any social system of the division of labor. Thus he starts analyzing the macrophenomena of exchange, prices, and money only after his chapter on value.

In the light of Menger's analysis, the market economy appeared as one great organism geared toward the satisfaction of consumer needs. Not only the market prices, but also the institutions of the market such as money are part and parcel of a rational order that can exist and operate without needing the assistance of political authorities.

In a way, Menger delivered a complement to Condillac's thesis that human needs are the great regulator of all human institutions. Condillac had made his case from an

economic and, most famously, from an epistemological point of view, arguing that perceptions are determined by needs.[24] He lacked the important element of marginalism, however, and it was on this that Menger built a complete and thorough revision of economic science.

### *1. Menger's work in the German context*

The ancient subjectivist theory of value had survived in fragmentary form in nineteenth-century German economic writings.[25] In this context, the young economist from Vienna was seen as a reformer rather than a revolutionary, thus avoiding the fate of Condillac.

Before Menger, various German economists had criticized the labor theory of value specifically and rejected the doctrine of inherent value in general. Menger's view that value was subjective (personal, individual) in nature was not exceptional among German authors of the first half of the nineteenth century. Indeed, some of them even knew the principle of marginal subjective value.[26] But their insights were merely disconnected observations. None of Menger's German predecessors recognized the central importance of marginal value and none had produced a unified subjectivist theory.

In the 1860s, two unconnected layers of analysis subsisted in the German textbooks. Their price theories typically featured cost-of-production explanations as a dominant component and allowed for an incoherent coexistence with the traditional subjective-value explanations.[27] Karl Marx heaped scorn and ridicule on this blatant display of eclecticism. He was right to do so.

Menger took what was no more than hinted at in the writings of his predecessors and presented it in a systematic treatise that revolutionized the profession's view on the relations between human needs, value, and prices. Through the systematic attempt to look for the causes of these relations in the simplest facts open to empirical inquiry (the "elements of the human economy"), Menger put the discussion of needs, goods, economic systems, production, prices, income, consumption, etc. on completely new ground.

The contrast to his eclectic German predecessors could not have been greater. Their eclecticism was reinforced by tendencies Menger avoided. In particular, German economists tended to engage in excessive and often pointless record keeping and classification of economic phenomena, an inclination that reflected the political climate of the time. The restoration of monarchy and the concomitant fight against liberalism between 1815 and 1848 made it imprudent to delve too deeply into theoretical considerations, which might lead to a critical appraisal of the limits of government. As William Johnston said: "At a time when it was forbidden to debate matters of fundamental principle, scholars retreated into collecting data." [28] The record-keeping approach to economic analysis reached its climax by the end of the century with the ascension of the Younger Historical School. As did many other academic employees of the new German central state, they saw themselves as "the intellectual bodyguards of the House of Hohenzollern." [29]

A related German shortcoming that Menger scrupulously avoided was historicism — the tendency to regard regularities in economic phenomena as "historical laws" — that is, as conditioned by the particular circumstances of time and place. Though the German economists of those days would have agreed with Menger that all economic phenomena were somehow related to one another and that one of the purposes of economic science was to find out what that relationship was, Menger's analysis revealed that these relationships were laws that held true at all times and places;

moreover, he showed that they could be studied without reference to the concrete historical context. His book featured many concrete illustrations of the general laws under discussion, but in essence Menger's *Principles* was an exercise in pure theory.

## 2. *Methodenstreit*

Meanwhile, in the universities of the German Reich, a vigorous movement had emerged that pursued an agenda diametrically opposed to Menger's view and advocated a radical break with the traditional approach in economic science.[30] While Menger sought to turn economic theory into an analytical science, the young radicals in Berlin pursued a complete overthrow of theoretical research, replacing it instead with historical studies.

The leader of this group was Gustav Schmoller, a young professor from the University of Halle.[31] Schmoller's great goal, overriding all his theoretical and methodological concerns, was to combat the growing intellectual and practical influence of *laissez-faire* liberalism in Germany. His strategy was to promote the discussion of the "social question" — by which he meant the question of *how* government could promote the welfare of the working classes. That the government could and should promote working class welfare was taken for granted.

Schmoller put his strategy into practice through an association of like-minded intellectuals and political leaders, most of whom were university professors and civil servants. In October 1872, he convened a first national meeting of "men of all parties of whom it can be assumed that they have interest in, and moral pathos for, the [social] question and that they do not believe the absolute *laissez faire et laissez passer* to be the right thing as far as the social question is concerned." [32] Schmoller and two others who would become long-time leaders of the group — the Breslau professor Lujo Brentano and the Berlin statistician Ernst Engel — addressed the meeting with lectures on strikes and labor unions, on German factory laws, and on the housing question.

The distinct anti-market and pro-government orientation of these university professors quickly earned them the sobriquet of *Kathedersozialisten*, or "Socialists of the Chair." [33] Significantly, their first meeting took place in the city of Eisenach, which in the same year had hosted the founding convention of the *Sozialistische Partei Deutschlands* (Socialist Party of Germany). Because the SPD was the very first socialist party in the world, Eisenach had become the symbol of the organized socialist movement. The group now founded the *Verein für Socialpolitik* (Association for Social Policy) with the explicit purpose of promoting welfare policies of the new German central state. The first president was Erwin Nasse, a professor from Bonn. Schmoller, who in 1872 had been a young man, became Nasse's successor in 1890 and remained president until his death in 1917. [34]

The *Verein* organized plenary meetings, which took place every other year, and meetings of an elected committee (*Ausschuss*). These meetings had a deep, and often immediate, impact on German policies because they provided a neutral territory for the representatives of the most powerful organized groups. University professors, labor union officials, high-ranking civil servants, and entrepreneurs met in the *Verein*, got to know one another, and forged political compromises on the issues of the day. The strong practical orientation was also visible in the *Verein's* publication series. Each volume addressed a different pressing social problem, analyzed its symptoms, and invariably ended with a call for government action. Ralph Raico states:

Many of the 134 intensively researched volumes that were published until 1914 virtually served as indictments of various flaws and

grievances of the existing system, and each of them called for government action. [ ... ] The main goal of the Socialists of the Chair, namely, to change public opinion within the educated bourgeoisie and especially within the bureaucracy, was attained to a large extent.[35]

Through these activities, the *Verein* became one of the most important vehicles for the consolidation and expansion of the new German government's civil service. The professors and the other civil servants saw themselves as neutral mediators among the various contesting social groups. Every solution to any perceived social problem invariably involved either their active participation, or their intermediation.[36] As they saw it, they promoted political compromise between the Left and Right, democracy and monarchy, utilitarianism and justice, laborers and entrepreneurs.[37] They considered themselves neutral arbiters because they considered these conflicts from the "higher" point of view of the new central government, which represented the entire nation.

The era of the *Verein für Socialpolitik* coincided with the heyday of German political centralization. Starting in the early 1890s, however, the government began to turn its back on the *Verein*. Its constant agitation for left-wing political reform had been too successful, and it risked losing its reputation for political neutrality.[38] For a while, Schmoller managed to steer against this trend, but the *Verein's* very success eventually spelled its doom. At the end of the nineteenth century, it had already attracted a great number of intellectuals and social leaders such as Max Weber, Ludwig Pohle, and Andreas Voigt who were in principle opposed to the *Verein's* blind pro-government prejudices and had joined only because of its practical importance.[39] Under the leadership of Max Weber, these men repeatedly clashed with the *Verein* establishment over the question of scientific "proof" in political matters; after World War I, Weber's followers would forever change the character of the *Verein*, turning it into a purely academic institution.

But in its glory days of the late 1870s and 1880s, the *Verein* and in particular the person of Gustav Schmoller completely transformed the landscape of German-language economic science. Schmoller also had a lasting influence on German economics through his personal friendship with Friedrich Althoff, a high-ranking civil servant in Prussia's Ministry of Education, who from 1882–1907 controlled the nominations to the chairs of political economy in Prussian universities. It soon became obvious that to obtain a full professorship one had to subscribe without qualifications to the program defined in Schmoller's writings.

Although Schmoller's agenda was targeted primarily against the heroes of the free-trade movement — classical economists such as Adam Smith, Jean-Baptiste Say, and David Ricardo — it effectively killed the teaching of any type of economic theory in German universities. The so-called Younger Historical School under Schmoller went far beyond the healthy skepticism of theoretical abstractions that had characterized the works of the previous generation of German economists. The Schmollerites denied outright that there were any universal social laws at all: there were only certain regularities that changed with the changing institutions of society. The job of government science was only incidentally to study these context-dependent regularities. Its essential task was to study the concrete meaning of the "idea of justice" at a given time and place, because this was the true basis of the "principle of social reform" — adjusting the existing social institutions to the prevailing feelings of what was right and just.[40] Schmoller thus advocated radical relativism and radical legal positivism, the

most suitable doctrines for justifying his belief in and adoration of omnipotent government.

Carl Menger had followed the growth of the Schmoller movement for some years. He realized that under the supervening influence of the Younger Historical School, Germany and Austria (which was fully in Germany's intellectual orbit) were in the process of destroying the work of a century of economic scholarship. Menger's first treatise fell on deaf ears. It had found followers in Austria, but this was due in part to his personal influence on academic nominations. The German universities were impenetrable.

Menger decided to lay the foundation for future works in positive economic analysis through a systematic methodological defense of his new approach.<sup>[41]</sup> The result of these efforts was another great book, *Untersuchungen über die Methode der Sozialwissenschaften und der politischen Ökonomie insbesondere* (Investigations into the Method of the Social Sciences with Special Reference to Economics).<sup>[42]</sup> Menger insisted that the economic laws he had discussed were "exact" laws of reality, and that the methods of historical research were entirely unable to discover such economic laws.

These views could not fail to offend the historicist sensibilities of the academic establishment, which were especially strong among economists of Menger's own generation. In fact, while historicism was already noticeable in the works of the Older Historical School (Roscher, Knies, Hildebrand, and others), in the writings of the Younger Historical School (Schmoller, Lexis, and others) it had become a dogma. Schmoller published a highly critical review of Menger's *Investigations*, claiming that Menger had neglected to substantiate his analysis with fitting historical studies; in today's jargon, Menger had indulged in an exercise in pure theory, which lacked "empirical evidence" in its support. This attack could have led to sober scholarly debate if Schmoller had not tried to stigmatize his opponent by labeling his approach the "Mancunian-individualistic method," associating Menger with the supposedly discredited Manchester School.<sup>[43]</sup>

The debate between Menger and Schmoller soon drew their disciples into a heated exchange, during which even the grand old man of German economics, Wilhelm Roscher, heaped scorn on Menger.<sup>[44]</sup> This collective exchange involved several more articles and books.<sup>[45]</sup> Its unusually polemical and emotional character resulted from the fact that for Schmoller, any kind of economic theory strengthened the case for capitalism.<sup>[46]</sup> The debate culminated in 1895, when Menger's last great student, Richard Schüller, published his Habilitation thesis in which he refuted point by point the criticism of the classical economists that Bruno Hildebrand had expressed in his inaugural lecture at the University of Vienna.<sup>[47]</sup>

In spite of the heated atmosphere in which it took place, the debate on method between Menger and Schmoller was useful for the clarification of the differences between theoretical and applied economic research. While it did not produce any lasting or definitive results, it did renew interest in the topic and highlighted the importance of certain fundamental distinctions that later economists, philosophers, and historians such as Max Weber, Heinrich Rickert, Ludwig von Mises, and Alfred Schütz would develop. Of particular concern would be the distinction between the fundamentally different natures of natural science, history, and economics.

What is less often seen is that the opposition that rallied all "theorists" behind Menger and all "historians" behind Schmoller caused some important differences within each group to be neglected. This was bound to promote confusion especially within the ranks of the theorists, who tended to be seen (and to see themselves) as

adhering to "the" economic theory, where they in fact held significantly different notions of the subject matter and contents of their science. Menger's unique contribution tended to be perceived as only one part of a broad consensus on the main outline of "the" new economic theory. Menger did not share this perception.

### ***3. The Austrian School and the Gossen School***

With just two books, Menger had put economic and social thought on completely new foundations. *Principles* pioneered the application of the empirical method in economic theory, and *Investigations* had justified the method and clarified the relationship between the resulting theory and other social sciences. Economic science was no longer just the study of visible economic phenomena such as prices, money, production; it had become instead the study of how these phenomena were caused by the interaction between human ideas and an environment offering limited resources for the satisfaction of human needs.

It took some time for both his opponents and his followers to grasp the full impact of the Mengerian revolution. For his contemporaries, the Mengerian project was attractive for reasons other than the grand new vision it implied. In particular, it was Menger's unique analytical method of developing economic theory as a descriptive science of the real world that attracted young disciples.

Menger's "empirical method" fit the ideal of its day. Schools and universities had thoroughly prepared the young scientific elite to appreciate the virtues of empirical research. More than the universities of other countries at that time, Germany's institutions of higher learning insisted on the necessity of empirical investigations in virtually all fields. Surprisingly, this orientation was the product of the "idealist" philosophy of Immanuel Kant, which stressed that knowledge about the objects of the exterior world could only be gained through sensory experience, and in particular through observation. German scientists were more willing than others to leave their armchairs and offices for field research to engage in systematic observation of nature. The famous Alexander von Humboldt was a pioneer of this movement, but others soon began to follow. German science excelled in biology, physics, chemistry, medicine, history, and virtually all other fields of knowledge.[48]

In the field of political economy, however, which was usually taught under the name of government science, the call for an empirical foundation had led to the idealization of historical research. The historicists claimed that there was no other social science but history, and that economic theory, insofar as it had scientific merit at all, had to be a generalization of historical findings. In this context, Menger's approach appeared as an attractive alternative because it showed that economic theory was an independent discipline that could be studied in its own right without abandoning the empirical agenda. The power of this message even attracted scholars of historicist background who had no personal contact with Carl Menger.

A case in point was young Ludwig von Mises. Steeped as he was in the prejudices of interventionism and in the quest for a truly scientific foundation for economic policy, Mises would not have found Ricardo convincing. But Menger convinced him that there was such a thing as a scientific economic theory — a body of propositions about empirical reality, distinctly different from the propositions derived from historical research. Mises yielded to the evidence and became a Mengerian, and he would remain one the rest of his life.

In later works, Mises would modify, generalize, and qualify Menger's views. In particular, he became famous for his interpretation of the epistemological status of the propositions of economic science, that is, for his claim that these propositions are true

on *a priori* grounds and therefore cannot be verified or refuted by the evidence of the senses. But these claims were attempts to clarify the position that Mises had inherited from Menger. The difference between Menger's Aristotelian rhetoric and the Kantian phrasing used by Mises is glaring, but the difference is mainly rhetorical. The principal thread of continuity between Menger and Mises is an adherence to the same scientific program of developing economic theory as a descriptive discipline, distinct from other descriptive disciplines such as biology or history. Both Menger and Mises believed that their theories described certain general features of human action that exist and operate at all times and places. This is what set them fundamentally apart from Wieser and Schumpeter, and this is what still sets Mengerian economists apart from all other economists.

Menger's method is also what most sharply distinguished him from Léon Walras and William Stanley Jevons, two authors with whom Menger is often conflated as co-founders of the marginal-utility approach in price theory. It is true that these three men published at about the same time systematic expositions of price theory based on the subjective and marginal nature of value. But apart from a broad agreement on these basic ideas, Menger's theory does not have much in common with the other two.[49]

Walras and Jevons had to overcome great obstacles in expounding their principles. Neither had the German subjectivist tradition to draw on, and both met with fierce resistance from the academic establishment. As far as originality and scientific merit are concerned, however, they cannot compare with Menger.[50] Unlike Menger, Jevons and Walras had a specific predecessor, albeit an obscure one, whom they acknowledged and praised: the independent German scholar Hermann Heinrich Gossen had anticipated their central tenets and their approach to price theory.

By following Gossen, Jevons and Walras developed a marginal-utility theory of prices that was markedly less successful at describing observed reality than was Menger's marginal-value approach. The differences between Menger on the one hand, and Gossen, Jevons, and Walras on the other, might seem arcane, but they came to play a major role in the development of Austrian economics, and it is against this background that one must appreciate the significance of Mises's contributions.

Gossen had worked for twenty years on a manuscript that he published in 1854 under the title *Entwicklung der Gesetze des menschlichen Verkehrs* (Deduction of the Laws of Human Interrelationships).[51] In this work he combined two central ideas into a general treatise on human behavior.

First, Gossen thought that economic science concerned laws that rule human psychology as it relates to human action. The most fundamental psychological laws, he claimed, were two laws of want-satisfaction that later came to be known as Gossen's First and Second Law. According to the First Law, the satisfaction derived from the consumption of any good will at some point reach a maximum. Neither higher nor lower consumption will produce greater satisfaction. According to the Second Law of Gossen, all goods should be consumed in such quantities that the contribution to overall satisfaction through the marginal consumption of each good is exactly equal.

Second, Gossen sought to describe human action with algebra and graphs, and relied on several implicit and false postulates in order to attain this goal. For example, he postulated that value is measurable and that the values of different persons can be meaningfully combined.

It was this procedure that made his approach especially contestable in the eyes of the academic establishment of German economists who abhorred speculations disconnected from the observed world. Gossen's book also suffered from grave formal shortcomings, being written in one continuous text, without chapter headings or a table

of contents. This format and his excessive use of algebra and graphs made his work a tedious and distasteful reading experience. It fell into oblivion where it probably would have remained were it not for W.S. Jevons.

When Jevons published the first edition of his *Principles of Political Economy* (1871), he considered his theory unprecedented. In 1878, professor Adamson, Jevons's successor at Owens College in Manchester, came across a reference to Gossen's book in a history of economic thought and informed his friend Jevons, who celebrated Gossen in the preface to the second edition of his *Principles* (1879).[52]

Walras was even more enthusiastic than Jevons. He compared Gossen to Copernicus and Newton, and translated Gossen's book into French.[53] When Menger told him in a letter that he believed there were significant differences between his own approach and that of Gossen, Walras waxed indignant and replied that he found it "odious" to think that Menger would refuse to recognize such an important predecessor.[54]

Gossen had indeed anticipated Jevons's and Walras's theories.[55] The three men had developed general theories that were analogous to Menger's general theory of value and prices, but differed from it in their psychological orientation and in the exact type of explanation they offered.

In Menger's theory, the term 'value' does not refer to a psychological feeling, but rather to the relative importance for an individual of the marginal unit of good X — that is, to the importance of X *in comparison to* the marginal units of other goods Y and Z. The market price of a good results from the interplay of sellers and buyers, for whom the goods bought and sold have different relative importance. In contrast, in the theories of the other three authors, the price of a good results from the interplay of sellers and buyers whose *feelings or well-being* are differently affected by control of the good. While Menger explained the pricing process as resulting from the importance of a good relative to the importance of other goods, Gossen, Jevons, and Walras explained the pricing process as the impact of a marginal quantity of a good on the psychology of the actor — an impact they called want-satisfaction (Gossen), utility (Jevons), and satisfied needs (Walras). Jevons's marginal utility thus played structurally the same role that marginal value played in Menger's theory — it delivered an explanation of market prices — but where marginal utility explains the price of a good by the good's direct impact on *human feelings*, Menger's marginal value explains the price of a good by how the good *ranks in importance* compared to other goods, according to the needs of the individuals involved in the pricing process.[56]

In the psychological approach of Gossen, Jevons, and Walras, the human psyche was the great common denominator for the economic significance of all goods; in the theory of Menger, there was no such common denominator. In his approach, "value" cannot be independent of the specific circumstances of time and space; it is inseparable from these circumstances and means different things in different economic settings. According to Gossen, Jevons, and Walras, the *amount* of "utility" derived from a good could be different in different situations, but according to Menger, the entire basis of value is different as soon as the economic context changes — because the good would then be compared to *different* other goods.

Whatever else one might think of the merits of the psychological approach, it had at least one great attraction, namely, that it allowed the possibility of a mathematical price theory based on marginal utility. With the human psyche as the common denominator of all economic values, it became conceivable to represent the want-satisfaction or utility derived from the consumption of a good as a mathematical function of the quantities consumed; it became conceivable to scale satisfaction and utility into units with which one could perform economic calculation completely disconnected from

market prices. It also became conceivable to combine individual utility functions into something like an aggregate utility function: one person's satisfaction and another person's satisfaction can be added into a single quantity representing "their" total satisfaction; and one person's gain added to a different person's loss can be mathematically combined to determine whether there is net gain or loss.[57]

These considerations probably played a role in prompting Gossen, Jevons, and Walras to choose the psychological approach. They did not begin with observation and then adopt algebraic and geometric techniques as the most adequate tools for representing what they observed. Rather, they began with an agenda — the need to apply mathematics in economics to make it more "scientific" — and were looking for a plausible hypothesis to justify their preferred approach.[58] This also explains other fictional stipulations to which they resorted, again, in distinct contrast to Menger's method. In their price theories they avoided one of the great pitfalls of economic theory *à la* Ricardo, namely, reliance on aggregates. But because they were eager to make political economy a mathematical discipline they fell prey to the other great pitfall, reliance on fictitious ad-hoc postulates. In order to allow for graphical and algebraic representations of utility, demand, and prices, Gossen, Jevons, and Walras assumed that all goods were infinitely divisible. And in order to justify their assumption that the market is in equilibrium, they neglected the existence of error.

Just as the classical economists had done before them, the Gossen School analyzed prices as they *would be* if certain special conditions were fulfilled: they analyzed hypothetical equilibrium prices rather than actual market prices. It is here, then, that we find the great divide between the Austrian and the Gossen Schools. Menger paved the way for dealing with real-world prices. His work made economics more scientific in the true sense of the word — increasing knowledge about real things — while the writings of Gossen, Jevons, and Walras dealt not with matters of fact, but only conjectures. William Jaffé was entirely right when he wrote:

Carl Menger clearly stands apart from the other two reputed founders of the modern marginal utility theory. [ ... ] No one familiar with the primary literature can doubt for a moment that Menger's treatment of the structure of wants in relation to *evaluation* was more profound and more penetrating not only than that of Walras who evinced no particular interest in such questions, but also than that of Jevons [ ... ][59]

Jaffé went on to identify the root of the greater profundity in Menger's quest for realism, which prevented him from developing "theory" in the sense of a mental construct that is out of touch with concrete experience:

Menger kept too close to the real world for either the verbal or symbolic formulation of the theory; and in the real world he saw no sharply defined points of equilibrium, but rather bounded indeterminacies not only in isolated bilateral barter but also in competitive market trading. [ ... ] With his attention unswervingly fixed on reality, Menger could not, and did not, abstract from the difficulties traders face in any attempt to obtain all the information required for anything like a pinpoint equilibrium determination of market prices to emerge, nor did his approach permit him to abstract from the uncertainties that veil the future, even the near future in the conscious anticipation of which most present transactions take place. Neither did he exclude the existence of non-

competing groups, or the omni-presence of monopolistic or monopoloid traders in the market.[60]

At the end of his career, Menger enlarged his approach to deal with social problems. In this respect too he was a pioneer. The very term "sociology" had recently been invented (by the French positivist Auguste Comte), and there were not yet any recognized professional sociologists around. Carl Menger became one of the first economists-turned-sociologist. Many other Austrian economists such as Schumpeter and Mises would follow in his footsteps. Mises later explained that this extension of interest is merely a natural consequence of the new viewpoint that Menger had developed in his *Principles*, for the gist of the new approach was an analysis that focused on individual human action and explained all social phenomena as resulting from the interaction of individuals.[61]

#### **4. The breakthrough of the Austrian School**

At the University of Vienna, Menger faced the determined opposition of Lorenz von Stein, the great champion of French socialism in Germany and Austria.[62] Stein rejected Menger's first petition for the Habilitation degree, accepting his application only after Menger had his *Principles* printed by the Vienna publisher Wilhelm Braumüller at his own expense and sent a proof of the first two chapters to Stein. Having accepted his application, Stein still failed Menger for the degree. After several favorable reviews of his book appeared in German professional journals, Menger applied again and this time he passed.

He immediately received offers to teach outside Vienna, but declined because of the heavy financial losses he would sustain if he abandoned his position at the *Wiener Zeitung*. Instead he stayed as a private lecturer at the University of Vienna. A year later the University of Basel made him a very attractive offer. To keep the gifted young professor, the University of Vienna offered Menger a position as *professor extraordinarius*[63] of political economy and allowed him to keep his position with the *Wiener Zeitung*. He accepted and stayed in Vienna for the rest of his career, teaching courses on banking, credit, general economics, and public finance.[64] In the fall of 1874, he abandoned his position with the *Wiener Zeitung* to have more time to devote to the research that would lead to the publication of *Investigations*.

In all his academic endeavors, Menger met with the continued resistance of the department, which was run by a group under Stein's leadership. Menger decided to form a new coalition and to wrestle down the old oligarchs. And in 1876 he succeeded, because a decisive change had occurred in his career. The previous fall, he had been approached to become the private tutor of Rudolf von Habsburg, the twenty-two-year-old Dauphin of Austria-Hungary.

This commission was to be the apex of Menger's pedagogic activities, but it also brought to light his political views, which he had always been careful not to reveal in any of his published writings. After a careful analysis of Prince Rudolf's notebooks, Erich Streissler concludes that these books "show Menger to have been a classical economic liberal of the purest water [ ... ] with a much smaller agenda for the state in mind than even Adam Smith." [65] Streissler goes on:

Menger's Rudolf Lectures are, in fact, probably one of the most extreme statements of the principles of *laissez-faire* ever put to paper in the academic literature of economics. There is just cause for economic action only in "abnormal" circumstances. Only when

"disaster is impending", only where "government support becomes indispensable" should the state step in. Otherwise "government interference" is "always [ ... ] harmful."[\[66\]](#)

Menger was smart enough not to present these views on government as his personal opinion. Rather he worked from carefully selected readings to drive his message home. He even chose as his main textbook Adam Smith's *Wealth of Nations*. Still, Menger's political views seem to have been familiar enough within the Austrian establishment to cause conflict over the question of his nomination as Rudolf's tutor. In fact it came to a confrontation between the conservative councilors of Rudolf's father Francis Joseph, and the more liberal-minded councilors of his mother Elisabeth. The empress eventually had the last word.

Menger took an extended leave of absence from the University for his work with Rudolf, which started in January 1876 and lasted for two years. He became "one of the most trusted teachers of the Crown Prince, trusted by Rudolf himself and by his elders."[\[67\]](#) Menger had made his career. His new monarchical *Protektion* quickly lifted him to the rank of full professor at the University of Vienna, the most prestigious position for an economist in the entire empire. He was now in a position of virtually unrivaled influence on the academic social sciences in Austria-Hungary. Other honors followed almost as a matter of course: he became a lifetime member of the *Herrenhaus*, the upper chamber of the Austrian parliament, member of the academies of sciences in Vienna and Rome, of the *Institut de France*, and of the Royal Society in Edinburgh.[\[68\]](#)

He used this power to settle conflicts within his department at the University of Vienna. And he also seems to have used it to fill Austria's other chairs of political economy with his followers, including Böhm-Bawerk and Wieser.[\[69\]](#)

Menger saw himself as the founder and leader of a new school of social research, and he strove to raise disciples and to spread them over the land. In a confidential March 1902 letter to the Austrian Ministry of Culture in which he petitioned for early retirement, he claimed that his teaching activities "have generated results that surpass the common results of teaching. This concerns in particular the foundation of the Austrian School of economics." He also points out that many excellent young scholars received their university professor's diploma (the Habilitation) under his auspices and that these scholars had obtained the majority of the chairs of political economy at the Austrian universities. Besides his main followers, Böhm-Bawerk and Wieser, he referred to Emil Sax, Johann von Komorzynski, Robert Meyer, Gustav Gross, Eugen von Philippovich, Victor Mataja, Robert Zuckerkandl, Hermann von Schullern-Schrattenhofen, Richard Reisch, and Richard Schüller. The list of those of his students who had not chosen an academic career is no less impressive. Among them were Moritz Dub, Viktor Grätz, Wilhelm Rosenberg, Rudolf Sieghart, and Ernst Seidler.[\[70\]](#) These men would play an important role in Ludwig von Mises's life and career.

Menger was successful not only in developing the continental tradition of economic science, but also in establishing a network of like-minded young thinkers within the confines of Austria-Hungary.[\[71\]](#) He only failed to get Böhm-Bawerk a chair at the University of Vienna. His favorite disciple applied twice, in 1887 and 1889, but each time the Ministry of Education chose a different candidate. They argued that Böhm-Bawerk represented the same abstract and purely theoretical school as the other chairholder (Menger) and that it was necessary to also have a representative of the new Historical School from Germany.[\[72\]](#) Even this did not prove to be a decisive obstacle. In the fall of 1889, Böhm-Bawerk went to Vienna to join the Ministry of Finance and became an adjunct professor at the University of Vienna; in 1905 he obtained a full

chair. Hence, in distinct contrast to all other modern (marginalist) schools of economic thought, the Austrian School quickly reached a position of power, protected by intellectual tradition and political patronage. Under the leadership of the next generation, it would obtain a position of unparalleled influence.

#### NOTES

[1] Mises, *Erinnerungen*, p. 19; F.A. Hayek, "Einleitung," Carl Menger, *Gesammelte Werke* (vol. I, Tübingen: Mohr, 1968), pp. XXXII.

[2] After Menger successfully discharged his commission to tutor Crown Prince Rudolf in economics, he obtained the right to accede to Knighthood. Menger did not apply because he preferred his bourgeois status. See Brigitte Hamann, *Rudolf: Kronprinz und Rebell* (Munich: Piper, 1978), pp. 77, 86.

[3] On Menger see in particular F. v. Wieser, "Karl Menger," Anton Bettelheim (ed.), *Neue österreichische Biographie: 1815–1918* (Vienna, 1923), vol. I, pp. 84–92, reprinted in idem, *Gesammelte Abhandlungen* (Tübingen: Mohr, 1929); F.A. Hayek, "Einleitung," pp. VII–XXXVI; Yukihiko Ikeda, *Die Entstehungsgeschichte der "Grundsätze" Carl Mengers* (St Katharinen: Scripta Mercaturae Verlag, 1997).

[4] Some ten years later, in a diary entry, he said his present health problems were due to the excessive professional activities of the past, as well as to bad nutrition during some periods of his adolescence, too much time spent in cafés, and too many love affairs. He then decided to spend more time in the countryside and to go out for walks regularly. See Karl Menger's biographical sketch of his father Carl's professional career, "X. Beginn der akademischen Laufbahn," *Carl Menger Papers* (Duke University, Box 21).

[5] Ikeda, *Die Entstehungsgeschichte der "Grundsätze" Carl Mengers*, pp. 65, 170.

[6] This was a fashionable subject of feuilleton novels, a new literary genre at the time. In France, the "king of the feuilleton novel," Eugène Sue had become rich and famous with *Le Juif errant* (1844–45). The protagonist of his novel symbolized the oppression of the Jewish people throughout the centuries.

[7] Kurt Paupié, *Handbuch der österreichischen Pressegeschichte 1848–1959* (Vienna: Braumüller, 1960), vol. 1, pp. 119f. Paupié also claims that Menger's own paper, the *Wiener Tagblatt*, had an official or semi-official character, in particular due to Menger's close ties with Belcredi (see *ibid.*, p. 119).

[8] Wieser emphasized: "He entered government service." F. v. Wieser, "Karl Menger," p. 84. See also F.A. Hayek, "Einleitung," p. XII; Kiichiro Yagi, "Carl Menger as Editor: Significance of Journalistic Experience for his Economics and for his Later Life," *Revue européenne des sciences sociales* XXX (92), 1992; Hamann, *Rudolf*, p. 78.

[9] Wieser, "Karl Menger."

[10] Apparently Menger did not abandon his literary interests. In January 1869 he published another novel, *Die Bettlerin von St. Marx* (The Beggareess of St. Marx) in another Vienna paper, the *Allgemeine Volkszeitung*. See Ikeda, *Die Entstehungsgeschichte der "Grundsätze" Carl Mengers*, p. 65, footnote 168.

[11] In the parlance of twentieth century analytical philosophy, Menger's "elements" would have been called "primitives" of economic theory.

[12] *Grundsätze*, p. VII. Barry Smith has convincingly argued that Menger applied Aristotelean realism in economic analysis. See Barry Smith, "Austrian Economics and Austrian Philosophy," W. Grassl and B. Smith (eds.), *Austrian Economics : Historical and Philosophical Background* (London: Croom Helm, 1986), pp. 1–36 ; idem, "Aristotle, Menger, Mises: An Essay in the Metaphysics of Economics," B.J. Caldwell (ed.), *Carl Menger and His Legacy in Economics* (Durham, NC: Duke University Press, 1990), pp. 263–288. See also Raimondo Cubbedu, *The Philosophy of the Austrian School* (London: Routledge, 1993), chap. 1, § 1.

[13] Menger, *Grundsätze*; translated as *Principles of Economics*, p. 191.

[14] Menger's February 1884 letter to Léon Walras, as translated and published in Étienne Antonelli, "Léon Walras et Carl Menger à travers leur correspondance,"

*Économie appliquée*, vol. VI, nos. 2–3 (1953), pp. 269–287. The passage is quoted from pp. 280f; the translation is mine.

[15] William Jaffé emphasizes that "Carl Menger avoided the use of mathematics in his economics not because he did not know any better, but out of principle. When he wrote to Léon Walras on June 28, 1883 that he had been for some time thoroughly acquainted with Walras's writings, he did not disclaim, as did other correspondents, sufficient knowledge of mathematics to follow these writings, which we may be sure he would have done if that had been the case. Instead, Carl Menger declared his objection in principle to the use of mathematics as a method of advancing economic knowledge." Jaffé, "Menger, Jevons and Walras De-Homogenized," *Economic Inquiry*, vol. XIV (Dec. 1976), p. 521. Robert Hébert reports that Menger owned the journals where the mid-nineteenth century French "econo-engineers" published their pioneering studies in mathematical economics. Menger also owned the books of the major representatives of this school of thought. See R.F. Hébert, "Jevons and Menger Re-Homogenized: Who is the Real 'Odd Man Out'?" *American Journal of Economics and Sociology*, vol. 57, no. 3 (1998), p. 329.

[16] *Ibid.*, p. 282.

[17] Wilhelm Roscher, *Geschichte der National-Oekonomie in Deutschland* (1st ed., Munich: Oldenbourg, 1874), pp. 1014f.

[18] See for example Gustav Schmoller, "Volkswirtschaft, Volkswirtschaftslehre und -methode," *Handwörterbuch der Staatswissenschaften* (3rd ed., Jena: Fischer, 1911), vol. VIII, p. 426, where Schmoller speaks of a battle of his school against Ricardo's one-sidedness.

[19] Yet by the same token Say also paved the way to displacing the continental tradition of economic thought that could be traced back to the Spanish late-Scholastics — a tradition that was still alive and vigorous in the Catholic countries of Europe. See below.

[20] M.N. Rothbard, *Classical Economics*, chap. 1.

[21] On scholastic economics and the economics of the late-scholastic School of Salamanca in particular, see Joseph A. Schumpeter, *A History of Economic Analysis* (Oxford: Oxford University Press, 1954); Marjorie Grice-Hutchinson, *The School of Salamanca: Readings in Spanish Monetary Theory, 1544–1605* (Oxford: Clarendon Press, 1952); Raymond de Roover, *Business, Banking, and Economic Thought* (Chicago: University of Chicago Press, 1974); Emil Kauder, *A History of Marginal Utility Theory* (Princeton, New Jersey: Princeton University Press, 1965); Murray N. Rothbard, *Economic Thought before Adam Smith* (Aldershot: Edward Elgar, 1995); Jesús Huerta de Soto, "New Light on the Prehistory of the Theory of Banking and the School of Salamanca," *Review of Austrian Economics*, vol. 9, no. 2 (1996), pp. 59–81.

[22] Shelagh Eltis and Walter Eltis, "The Life and Contribution to Economics of the Abbé de Condillac," in Etienne Bonnot, Abbé de Condillac, *Commerce and Government* (Cheltenham, UK: Edward Elgar, 1997).

[23] Menger quoted Condillac more than any foreign authority other than Adam Smith, and in contrast to Smith, he quoted him only favorably.

[24] See in particular Etienne de Condillac, *Essai sur l'origine des connaissances humaines* (1746), *Traité des sensations* (1754), *Le commerce et le gouvernement* (1776). These works are collected in his *Œuvres complètes* (Paris: Tourneux, Lecointe et Durey, 1822), vols. 1, 3 et 4.

[25] In 1807, Gottlieb Hufeland called the subjectivist theory the "traditional view" and recommended never to deviate from it. See Gottlieb Hufeland, *Neue Grundlegung der Staatswirthschaftskunst* (Giessen and Wetzlar: Tasche & Müller, 1807), p. 18.

[26] See in particular Erich Streissler, "The Influence of German Economics on the Work of Carl Menger and Marshall," B.J. Caldwell, ed., *Carl Menger and His Legacy in Economics* (Durham, NC: Duke University Press, 1990); idem, "Carl Menger, der deutsche Nationalökonom," B.P. Priddat (ed.), *Wert, Meinung, Bedeutung*

(Marburg: Metropolis, 1997), pp. 33–88; Yukihiro Ikeda, *Die Entstehungsgeschichte der "Grundsätze" Carl Mengers*.

[27] Erich Streissler points out that Alfred Marshall Principles (1891) had the exact structure of a typical German textbook. See Streissler, "the Influence of German economists on the work of Menger and Marshall," B.J. Caldwell (ed.), *Carl Menger and his legacy in economics* (Durham: Duke University Press, 1990), p. 51.

[28] William M. Johnston, *Vienna, Vienna — The Golden Age, 1815–1914* (Milan: Arnoldo Mondadori, 1981), p. 15.

[29] This point of view was not limited to intellectuals working in "ideological" fields such as history, political economy, or philosophy. In a public lecture given on August 3, 1870, Emil du Bois-Reymond, the rector of the Frederick-William University of Berlin and a pioneer of electro-physiology, proclaimed that his university was the "intellectual bodyguard of the House of Hohenzollern." See Bois-Reymond, *Über den deutschen Krieg* (Berlin: Hirschwald, 1870).

[30] Erich Streissler, "The Influence of German Economics on the Work of Carl Menger and Marshall." Through this work, Streissler has convincingly corrected the heretofore prevailing notion that the Younger Historical School was somehow more deeply rooted in the German tradition of economic science than Carl Menger. As Streissler stated, the real revolutionary was Gustav Schmoller, not Menger.

[31] Schmoller was a professor in Halle from 1864 to 1872. Being one of the first beneficiaries of the Prussian-German victory over France in the Franco-Prussian War, he moved to the University of Strasbourg (1872–1882), before finally receiving a chair at the University of Berlin (1882–1913).

[32] Gustav Schmoller, "Einladung zur Eisenacher Versammlung von 1872," printed in Franz Boese, *Geschichte des Vereins für Sozialpolitik, 1872–1932* (Berlin: Duncker & Humblot, 1939), p. 241.

[33] The smear term "*Kathedersozialisten*" was coined by Heinrich Bernard Oppenheim in his book *Der Katheder-Sozialismus* (Berlin: Oppenheim, 1872). See Raico, *Die Partei der Freiheit*, p. 200. The only Austrian participant in the initial 1872 meeting was one Dr. Friedmann (probably Otto Bernhard Friedmann), a journalist from Vienna.

[34] On the history of the *Verein* see Boese, *Geschichte des Vereins für Sozialpolitik, 1872–1932*; Dieter Lindenlaub, *Richtungskämpfe im Verein für Sozialpolitik: Wissenschaft und Sozialpolitik im Kaiserreich vornehmlich vom Beginn des "Neuen Kurses" bis zum Ausbruch des ersten Weltkrieges (1890–1914)* (Wiesbaden: Steiner, 1967); Irmela Gorges, *Sozialforschung in Deutschland. Gesellschaftliche Einflüsse auf Themen und Methodenwahl des Vereins für Sozialpolitik, der Deutschen Gesellschaft für Soziologie und des Kölner Forschungsinstituts für Sozialwissenschaften* (2 vols, Frankfurt am Main: Anton Hain, 1986).

[35] Raico, *Partei der Freiheit*, p. 188.

[36] Many years later, Mises characterized their attitude in the following words: "It is the mentality of officialdom — which, according to Brentano, was 'the only sounding board of the Association for Social Policy' — that considers as constructive and positive only that ideology which calls for the greatest number of offices and officials. And he who seeks to reduce the number of state agents is decried as a 'negative thinker' or an 'enemy of the state'." (*A Critique of Interventionism*, New York: Arlington House, 1977, pp. 82f) See also Mises, *The Historical Setting of the Austrian School of Economics* (New Rochelle: Arlington House, 1969), p. 31. On the history of the Bismarckian welfare state, and of its predecessor under Frederick II, see Gerd Habermann, *Der Wohlfahrtsstaat: Die Geschichte eines Irrwegs* (2nd ed., Frankfurt: Ullstein, 1997).

[37] Gustav Schmoller, "Eröffnungsrede zum 25jährigen Bestehen des Vereins auf der Kölner Tagung von 1897," printed in Franz Boese, *Geschichte des Vereins für Sozialpolitik, 1872–1932*, pp. 253ff, in part. 262f.

[38] *Ibid.*, pp. 260f.

- [39] In the early years, the most vociferous opposition to the *Verein's* agenda came from non-members such as Heinrich Oppenheim and Julius Wolf. See Raico, *Partei der Freiheit*, pp. 200ff. Pohle and Voigt published their influential and devastating critiques of the *Verein* only after they left it in 1905.
- [40] See for example Gustav Schmoller, "Die Gerechtigkeit in der Volkswirtschaft," *Schmollers Jahrbuch*, vol. 5 (1881), pp. 19–54; idem, *Zur Social- und Gewerbepolitik der Gegenwart* (Leipzig: Duncker & Humblot, 1890); idem, *Grundriss der allgemeinen Volkswirtschaftslehre* (Leipzig: Duncker & Humblot, 1900).
- [41] See his important February 1884 letter to Léon Walras, as translated and published in Antonelli, "Léon Walras et Carl Menger à travers leur correspondance," *Économie appliquée*, vol. VI, nos. 2–3 (1953), pp. 269–287. The letter is quoted on pp. 284f. The passage referred to is on p. 283.
- [42] Carl Menger, *Untersuchungen zur Methode der Sozialwissenschaften und der politischen Oekonomie im besonderen* (Leipzig: Duncker & Humblot, 1883); translated as *Investigations into the Method of the Social Sciences and of Political Economy in Particular* (New York: New York University Press, 1985).
- [43] Schmoller, "Zur Methodologie der Staats und Sozial-Wissenschaften," *Schmoller's Jahrbuch*, new series, vol. VII, no. 3, pp. 239ff. See also the review by Leser in *Conrad's Jahrbücher*, new series, vol. VII, pp. 273ff.
- [44] See the 1886 edition of Roscher's *Grundlagen*, quoted from Milford, "Hufeland als Vorläufer von Menger und Hayek," pp. 99f. In 1871, Menger had dedicated his *Grundsätze* to Roscher.
- [45] As far as Menger's contributions to the debate are concerned, see Carl Menger, *Die Irrthümer des Historismus in der deutschen Nationalökonomie* (Vienna: Alfred Hölder, 1884); idem "Zur Kritik der politischen Ökonomie," *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* XIV (1887); idem, "Grundzüge einer Klassifikation der Wirtschaftswissenschaften," *Jahrbücher für Nationalökonomie und Statistik*, new series, vol. XIX (1889). These papers have been reprinted in Carl Menger, *Gesammelte Werke*, edited by F.A. Hayek (2nd ed., Tübingen: Mohr, 1970), vol. III.
- [46] The model of opposition between libertarian-minded theorists and statist historians is not a complete reflection of the state of affairs. There were in fact market-friendly historicists such as Lujo Brentano, as well as theorists with strong statist inclinations such as Adolf Wagner, or even Wieser.
- [47] Richard Schüller, *Die klassische Nationalökonomie und ihre Gegner* (Berlin: Heymanns, 1895). Hildebrand had succeeded Lorenz von Stein, but stayed only one year in Vienna.
- [48] For an introduction to nineteenth century German thought on the nature of science, see the collection of original papers by Humboldt, Gauss, Chamisso, Virchow, Helmholtz, Ranke, Burckhardt, and many others in Wolfgang Schirmacher (ed.), *German Essays on Science in the 19th Century* (New York: Continuum, 1996).
- [49] Accounts of the differences between these authors can be found in J.R. Hicks, "Léon Walras," *Econometrica* (October 1934), p. 338; Joseph A. Schumpeter, *History of Economic Analysis* (Oxford: Oxford University Press, 1954), p. 918; William Jaffé, "Menger, Jevons and Walras De-Homogenized," *Economic Inquiry*, vol. XIV (Dec. 1976), pp. 511ff; Sandra J. Peart, "Jevons and Menger re-Homogenized?" *American Journal of Economics and Sociology*, vol. 57, no. 3 (1998), pp. 307ff. According to a widespread view, Walras eclipsed Menger and Jevons because he had pioneered general-equilibrium theory and *thereby demonstrated* the interdependency of all economic phenomena. This view is peculiar because this general interdependency is in fact a presupposition of any sort of economic analysis. It is in fact merely another way of saying that there is scarcity. Mark Blaug corrected this erroneous view, stressing that Menger too analyzed economic phenomena in their mutual interdependence. See Blaug, "Comment" [on O'Brien's "Lionel Robbins and the Austrian Connection"], B.J.

Caldwell, ed., *Carl Menger and His Legacy in Economics* (Durham, NC: Duke University Press, 1990), p. 186.

[50] Jaffé, "Menger, Jevons and Walras De-Homogenized," pp. 513ff, 518. A French predecessor was Jules Dupuit, who published two articles on marginal value in the late 1840s. See Robert Ekelund and Robert Hébert, *Secret Origins of Modern Microeconomics: Dupuit and the Engineers* (Chicago: Chicago University Press, 1999); and *L'oeuvre multiple de Jules Dupuit (1804–1866): Calcul d'ingénieur, analyse économique et pensée sociale* (Angers: Presses de l'Université d'Angers, 2002).

[51] Hermann Heinrich Gossen, *Entwicklung der Gesetze des menschlichen Verkehrs und der daraus fliessenden Regeln für menschliches Handeln* (Braunschweig: Vieweg & Sohn, 1854).

[52] See the preface of the 1879 second edition of his *Principles of Economics*, p. IL

[53] L. Walras, "Un économiste inconnu: Hermann-Henri Gossen." *Journal des Économistes* (April and May 1885). This is the same Walras who in his correspondence with Menger apologized that his German was not good enough to digest *Grundsätze*.

[54] See Walras's February 2, 1887 letter to Menger, as translated and published in Antonelli, "Léon Walras et Carl Menger à travers leur correspondance," pp. 269–287. The letter is quoted on pp. 285f. See also the exchange of letters between Jevons and Walras published in the *Journal des Économistes* (June 1874). In a January 27, 1887 letter to Léon Walras, Menger had emphasized that there was only a limited analogy between his approach and Gossen's, but that there was no conformity in the "decisive questions." See Antonelli, "Léon Walras et Carl Menger à travers leur correspondance," pp. 269–287. The letter is quoted on pp. 284f.

[55] Jaffé ("Menger, Jevons and Walras De-Homogenized," pp. 515f) stresses that Walras initially did not associate diminishing marginal utility with quantities *consumed*, but with quantities *possessed*. It is true that Walras was more cautious than Gossen and Jevons in speculating on the psychological underpinnings of his price theory, even though in his *Éléments d'économie politique* he eventually did bring in Gossen-style psychological analysis. But, as we shall see, the decisive consideration for our purposes is that value is for Walras (just as for Gossen and Jevons) a *two-sided* relationship, involving an acting person and one other object; whereas Menger's analysis of value features at least *three* elements: acting person and two things that are ranked from the point of view of the agent.

[56] These differences were not immediately obvious because Menger occasionally resorted to arguments that seemed to imply much stronger connections between value and utility.

[57] Gossen, *Entwicklung der Gesetze des menschlichen Verkehrs etc.*, pp. 80ff.

[58] This fact is crucial to understanding the history of twentieth-century economic thought. Gossen was already an enthusiastic mathematician and only studied law under the severe pressure of his father; see F.A. Hayek, "Einleitung," introduction to H.H. Gossen, *Entwicklung der Gesetze des menschlichen Verkehrs etc.* (3rd ed., Berlin: Prager, 1927), pp. Xf. All of his followers featured the same mindset. As Mark Blaug points out (*Great Economists before Keynes*, Cambridge: Cambridge University Press, 1986), Jevons first studied chemistry and biology and then turned his attention to economics. His "inspiration was Bentham's 'felicific calculus' of pleasure and pain, supplemented by the works of Dionysius Lardner [ ... ] and Fleeming Jenkin [ ... ], two British engineer-economists of the 1860s" (*ibid.*, p. 100). Walras pursued formal studies in letters, science, and engineering. From his father, the economist Auguste Walras, he adopted the conviction that some concept of utility maximization is the fundamental element of economic science. Walras's great follower Vilfredo Pareto was an engineer and turned to economics only at the age of 42. Similarly, Knut Wicksell's and Irving Fisher's first university degrees were in mathematics. Gustav Cassel, who according to Blaug (*ibid.*, pp. 41ff) had written the most widely read textbook of the interwar period, was a Ph.D.

in mathematics, then became a schoolmaster and then turned to economics, becoming the greatest popularizer of general-equilibrium economics à la Walras. In contrast, the predominant formative influence on Austrian economists did not come in the form of mathematical training, but through legal studies. Until the interwar period, all Austrian economists had to obtain a first degree in law before they could turn their research to economic problems. As a consequence, the Vienna economists distinguished themselves by a great capacity to think conceptually and, most importantly, by their eagerness to relate all of their concepts to the observed real world. Their training in law effectively counterbalanced the inclination some of them felt for the natural sciences (for example, Böhm-Bawerk had in his youth a great interest in theoretical physics; see Schumpeter, "Eugen von Böhm-Bawerk," *Neue Österreichische Biographie* (Vienna, 1925), vol. II, p. 65).

[59] Jaffé, "Menger, Jevons and Walras De-Homogenized," p. 519.

[60] Jaffé, "Menger, Jevons and Walras De-Homogenized," p. 520.

[61] Mises, *Money, Method, and Market Process*, edited by R. Ebeling (Auburn, Ala.: Mises Institute, 1990).

[62] See Karl Menger's biographical sketch of his father Carl's professional career, "X. Beginn der akademischen Laufbahn," *Carl Menger Papers* (Duke University, Box 21).

[63] Roughly speaking, this rank corresponded to a present-day associate professor in the United States.

[64] There must have been some *Protektion* involved. Here it should be remembered that Menger's journalistic activities had early on brought him in touch with established political forces. These connections probably played in his favor when he applied for the chair at the University of Vienna.

[65] Erich Streissler, "Menger's treatment of economics in the Rudolf lectures," E.W. Streissler, M. Streissler (eds), *Carl Menger's Lectures to Crown Prince Rudolf of Austria* (Aldershot: Edward Elgar, 1994), pp. 4, 14.

[66] *Ibid.*, p. 17. On Menger's liberalism see also Israel Kirzner, "Menger, Classical Liberalism, and the Austrian School of Economics," B.J. Caldwell (ed.), *Carl Menger and His Legacy in Economics*, pp. 93–106; Kiichiro Yagi, "Carl Menger as Editor: Significance of Journalistic Experience for his Economics and for his Later Life," *Revue européenne des sciences sociales*, vol. 30, no. 92 (1992); *idem*, "Carl Menger and Historical Aspects of Liberalism in Austria," essay presented at a symposium on *Carl Menger and the Historical Aspects of Liberalism* (Center for Historical Social Science Literature, Hitotsubashi University, December 18–19, 2004).

[67] *Ibid.*

[68] Kurt Rothschild, "Carl Menger," Walter Pollack (ed.), *Tausend Jahre Österreich* (Vienna: Verlag Jugend und Volk, 1974), vol. 3, pp. 67ff.

[69] Klaus H. Hennings, *The Austrian Theory of Value and Capital* (Cheltenham, UK: Edward Elgar, 1997), pp. 10f, 24 (13). Ludwig von Mises's characterization of Menger's and Böhm-Bawerk's attitude gives a somewhat misleading picture of the times. In *Erinnerungen* (p. 22), Mises stresses that these men were not interested in promoting their cause through their personal power (see also Mises, *Historical Setting of the Austrian School of Economics*, p. 39). But that does not mean that they did not have considerable power, nor that they never made any use of it.

[70] Hayek, "Einleitung," pp. XXXIIIff

[71] It appears that the main reason why Menger retired at the comparatively young age of sixty-two was that he had caused a scandal through an affair with his housemaid. The affair became public because of the birth of Karl, whom Carl Menger acknowledged as his son. Karl cost Menger his career, and he thereby also changed the history of the Austrian School of economics, which under Carl's guidance certainly would have taken a different course than it did under his successor, Friedrich von Wieser. But Karl's birth also led to a rapprochement between the Austrian School and the mainstream through a more direct route: Karl Menger himself would eventually become a famous mathematical economist.

[72] Shiheki Tomo, *Eugen von Böhm-Bawerk*, pp. 157–162.

## ***The Myth of Efficiency***\*

I am delighted that Dr. Rizzo, in chapter 4 [of *Time Uncertainty, and Disequilibrium*], is calling the highly touted concept of "efficiency" into grave question. I would like to carry his critique still further.

One of Rizzo's major points is that the concept of efficiency has no meaning apart from the pursuit of specified ends. But he concedes too much when he states, at least at the beginning of his paper, that "of course it [the common law] is efficient" relative to certain specified goals. For there are several layers of grave fallacy involved in the very concept of efficiency as applied to social institutions or policies:

- (1) the problem is not only in specifying ends but also in deciding *whose* ends are to be pursued;
- (2) individual ends are bound to conflict, and therefore any additive concept of social efficiency is meaningless; and
- (3) even each individual's actions cannot be assumed to be "efficient"; indeed, they undoubtedly will not be. Hence, efficiency is an erroneous concept even when applied to each individual's actions directed toward his ends; it is *a fortiori* a meaningless concept when it includes more than one individual, let alone an entire society.

Let us take a given individual. Since his own ends are clearly given and he acts to pursue them, surely, at least *his* actions can be considered efficient. But no, they may not, for in order for him to act efficiently, he would have to possess perfect knowledge—perfect knowledge of the best technology, of future actions and reactions by other people, and of future natural events. But since no one can ever have perfect knowledge of the future, no one's action can be called "efficient." We live in a world of uncertainty. Efficiency is therefore a chimera.

Put another way, action is a learning process. As the individual acts to achieve his ends, he learns and becomes more proficient about how to pursue them. But in that case, of course, his actions cannot have been efficient from the start—or even from the end—of his actions, since perfect knowledge is never achieved, and there is always more to learn.

Moreover, the individual's ends are not *really* given, for there is no reason to assume that they are set in concrete for all time. As the individual learns more about the world, about nature and about other people, his values and goals are bound to change. The individual's ends will change as he learns from other people; they may also change out of sheer caprice. But if ends change in the course of an action, the concept of efficiency—which can only be defined as the best combination of means in pursuit of given ends—again becomes meaningless.

If the concept of efficiency is worthless even for each individual, it is *a fortiori* in far worse straits when the economist employs it in an additive way for all of society. Rizzo is being extremely gentle with the concept when he says that it amounts "to little more than maximizing gross national product" which immediately breaks down once externalities are introduced into the system." The problem, however, is far deeper. For efficiency only makes sense in regard to people's ends, and individuals' ends differ,

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\* M.N.Rothbard [Reprinted from *Time, Uncertainty, and Disequilibrium*, Mario Rizzo, ed. (Lexington, Mass: DC Heath, 1979), pp. 90-95; *The Logic of Action One: Method, Money, and the Austrian School* (Cheltenham, UK: Edward Elgar, 1997), pp. 266-273]

clash, and conflict. The central question of politics then becomes: *whose* ends shall rule?

The blindness of economic thought to the realities of the world is systematic and is a product of the utilitarian philosophy that has dominated economics for a century and a half. For utilitarianism holds that everyone's ends are *really* the same, and that therefore all social conflict is merely technical and pragmatic, and can be resolved once the appropriate means for the common ends are discovered and adopted. It is the myth of the common universal end that allows economists to believe that they can "Ascientifically" and in a supposedly value-free manner prescribe what political policies should be adopted. By taking this alleged common universal end as an unquestioned given, the economist allows himself the delusion that he is not at all a moralist but only a strictly value-free and professional technician.

The alleged common end is a higher standard of living, or, as Rizzo puts it, a maximized gross national product. But suppose that, for one or more people, part of their desired "product" is something that other people will consider a decided detriment. Let us consider two examples, both of which would be difficult to subsume under the gentle rubric of "externalities." Suppose that some people pursue as a highly desired end the compulsory equality, or uniformity, of all persons, including each having the same living conditions and wearing the same shapeless blue garment. But then a highly desired goal for these egalitarians would be considered a grave detriment by those individuals who do not wish to be made equal to or uniform with everyone else. A second example of conflicting ends, of clashing meanings allotted to the concept of "product," would be one or more people who greatly desire either the enslavement or the slaughter of a disliked ethnic or other clearly defined social group. Clearly, the pursuit of product for the would-be oppressors or slaughterers would be considered a negative product, or detriment, by the potential oppressed. Perhaps we could jam this case into an externality problem by saying that the disliked social or ethnic group constitutes a "visual pollutant," a negative externality, for the other groups, and that these external "costs" can be (should be?) internalized by forcing the disliked group to pay the other groups enough to induce the latter to spare their lives. One wonders, however, how much the economist wishes to minimize social costs, and whether or not this proffered solution would really be "value-free."

In these cases of conflicting ends, furthermore, one group's "efficiency" becomes another group's detriment. The advocates of a program—whether of compulsory uniformity or of slaughtering a defined social group—would want their proposals carried out as efficiently as possible; whereas, on the other hand, the oppressed group would hope for as *inefficient* a pursuit of the hated goal as possible. Efficiency, as Rizzo points out, can only be meaningful relative to a given goal. But if ends clash, the opposing group will favor maximum *inefficiency* in pursuit of the disliked goal. Efficiency, therefore, can never serve as a utilitarian touchstone for law or for public policy.

Our cases of clashing ends bring us to the question of minimizing social costs. The first question to raise is: why *should* social costs be minimized? Or, why *should* externalities be internalized? The answers are scarcely self-evident, and yet the questions have never been satisfactorily addressed, let alone answered. And there is an important corollary question: even given the goal of minimizing costs, for the sake of argument, should this goal be held as an absolute or should it be subordinated, and to what degree, to other goals? And what reasons can be given for any answer?

In the first place, to say that social costs *should* be minimized, or that external costs *should* be internalized, is not a technical or a value-free position. The very intrusion of

the word *should*, the very leap to a policy position, necessarily converts this into an ethical stand, which requires, at the very least, an ethical justification.

And second, even if, for the sake of argument, we consent to a goal of minimized social costs, the economist still must wrestle with the problem: how absolute should this commitment be? To say that minimized social costs must be absolute, or at least the highest-valued goal, is to fall into the same position that the cost-benefit economists scorn when it is taken by ethicists: namely, to consider equity or rights heedless of cost-benefit analysis. And what is their justification for such absolutism?

Third, even if we ignore these two problems, there is the grave fallacy in the very concept of "social cost," or of cost as applied to more than one person. For one thing, if ends clash, and one man's product is another man's detriment, costs cannot be added up across these individuals. But second, and more deeply, costs, as Austrians have pointed out for a century, are subjective to the individual, and therefore can neither be measured quantitatively nor, *a fortiori*, can they be added or compared among individuals. But if costs, like utilities, are subjective, nonadditive, and noncomparable, then of course any concept of social costs, including transaction costs, becomes meaningless. And third, even within each individual, costs are not objective or observable by any external observer. For an individual's cost is subjective and ephemeral; it appears only *ex ante*, at the moment before the individual makes a decision. The cost of any individual's choice is his subjective estimate of the value ranking of the highest value foregone from making his choice. For each individual tries, in every choice, to pursue his highest-ranking end; he foregoes or sacrifices the other, lower-ranking, ends that he could have satisfied with the resources available. His cost is his second-highest ranking end, that is, the value of the highest ranking end that he has foregone to achieve a still more highly valued goal. The cost that he incurs in this decision, then, is only *ex ante*; as soon as his decision is made and the choice is exercised and his resource committed, the cost disappears. It becomes an historical cost, forever bygone. And since it is impossible for any external observer to explore, at a later date, or even at the same time, the internal mental processes of the actor, it is impossible for this observer to determine, even in principle, what the cost of any decision may have been.

Much of chapter 4 [in *Time, Uncertainty, and Disequilibrium*] is devoted to an excellent analysis demonstrating that objective social costs make no sense outside of general equilibrium, and that we can never be in such equilibrium, nor could we know if we were. Rizzo points out that since disequilibrium necessarily implies divergent and inconsistent expectations, we cannot simply say that these prices approximate equilibrium, since there is an important difference *in kind* between them and consistent equilibrium prices. Rizzo also points out that there is no benchmark to enable us to decide whether existing prices are close to equilibrium or not. I would simply underline his points here and make only two comments. To his point that tort law would not be needed in general equilibrium, I would add that torts themselves could not be committed in such a situation. For one feature of general equilibrium is certainty and perfect knowledge of the future; and presumably with such perfect knowledge no accidents could possibly occur. Even an intentional tort could not occur, for a perfectly foreseen tort could surely be avoided by the victim.

This comment relates to another point I would make about general equilibrium; not only has it never existed, and is not an operational concept, but also it could not conceivably exist. For we cannot really conceive of a world where every person has perfect foresight, and where no data ever change; moreover, general equilibrium is internally self-contradictory, for the reason one holds cash balances is the uncertainty

of the future, and therefore the demand for money would fall to zero in a general equilibrium world of perfect certainty. Hence, a money economy, at least, could not be in general equilibrium.

I would also endorse Rizzo's critique of attempts to use objective probability theory as a way of reducing the real world of uncertainty to certainty equivalents. In the real world of human action, virtually all historical events are unique and heterogeneous, though often similar, to all other historical events. Since each event is unique and nonreproducible, it is impermissible to apply objective probability theory; expectations and forecasting become a matter of subjective estimates of future events, estimates that cannot be reduced to an objective or "scientific" formula. Calling two events by the same name does not make them homogeneous. Thus, two presidential elections are both called "presidential elections," but they are nevertheless highly varied, heterogeneous, and nonreproducible events, each occurring in different historical contexts. It is no accident that social scientists arguing for the use of the objective probability calculus almost invariably cite the case of the lottery; for a lottery is one of the few human situations where the outcomes are indeed homogeneous and reproducible, and, furthermore, where the events are random with no one possessing any influence upon its successors.

Not only is "efficiency" a myth, then, but so too is any concept of social or additive cost, or even an objectively determinable cost for each individual. But if cost is individual, ephemeral, and purely subjective, then it follows that no policy conclusions, including conclusions about law, can be derived from or even make use of such a concept. There can be no valid or meaningful cost-benefit analysis of political or legal decisions or institutions.

Let us now turn more specifically to Rizzo's discussion of the law, and its relation to efficiency and social costs. His critique of the efficiency-economists could be put more sharply. Let us take, for example, Rizzo's discussion of the Good Samaritan problem. As he poses the problem, he supposes that B could save A "at minimal cost to himself," and he concludes that, from the point of view of the efficiency theorists, B should be liable for injuries to A if B doesn't save A. But there are more problems with the efficiency approach. For one thing, there is the characteristic confusion of monetary and psychic costs. For, since B's costs in this case are purely psychic, how can anyone but B, say a court, know what B's costs would entail? Suppose indeed that B is a good swimmer and could rescue A easily, but that it turns out that A is an old enemy of his, so that the psychic costs of his rescuing A are very high. The point is that any assessment of B's costs can only be made in terms of B's own values, and that no outside observer can know what these are.<sup>[1]</sup> Furthermore, when the efficiency theorists put the case that, in Rizzo's words, "clearly . . . A would have been willing to pay B more than enough to compensate his costs in order to be rescued," this conclusion is not really clear at all. For how do we know, or how do the courts know, if A would have had the money to pay B, and how would B know it—especially if we realize that no one except B can know what his psychic costs may be?

Furthermore, the question of causation could be put far more sharply. Rizzo's quotation from Mises on nonaction also being a form of "action" is praxeologically correct, but is irrelevant to the law. For the law is trying to discover who, if anyone, in a given situation has aggressed against the person or property of another—in short, who has been a tortfeasor against the property of another and is therefore liable for penalty. A nonaction may be an "action" in a praxeological sense, but it sets no positive chain of consequences into motion, and therefore cannot be an act of aggression. Hence, the wisdom of the common law's stress on the crucial distinction between misfeasance and

nonfeasance, between a wrongful aggression against someone's rights, and leaving that person alone.<sup>[2]</sup> *Vincent v. Lake Erie Transport* was a superb decision, for there the court was careful to investigate the causal agent at work—in this case, the boat, which clearly slammed against the dock. In some ways, tort law can be summed up as: "No liability without fault, no fault without liability." The vital importance of Richard Epstein's strict liability doctrine is that it returns the common law to its original strict emphasis on causation, fault, and liability, shorn of modern accretions of negligence and pseudo-"efficiency" considerations.

I conclude that we cannot decide on public policy, tort law, rights, or liabilities on the basis of efficiencies or minimizing of costs. But if not costs or efficiency, then what? The answer is that only *ethical principles* can serve as criteria for our decisions. Efficiency can never serve as the basis for ethics; on the contrary, ethics must be the guide and touchstone for any consideration of efficiency. Ethics is the primary. In the field of law and public policy, as Rizzo wittily indicates, the primary ethical consideration is the concept that "dare not speak its name"—the concept of justice.

One group of people will inevitably balk at our conclusion; I speak, of course, of the economists. For in this area economists have been long engaged in what George Stigler, in another context, has called "intellectual imperialism." Economists will have to get used to the idea that not all of life can be encompassed by our own discipline. A painful lesson no doubt, but compensated by the knowledge that it may be good for our souls to realize our own limits—and, just perhaps, to learn about ethics and about justice.

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[1] Marc A. Franklin, *Injuries and Remedies* (Mineola, NY: Foundation Press, 1971), p. 401.

[2] There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," *University of Pennsylvania Law Review* 56, no. 4 (April 1908): 219-221; cited in Williamson M. Evers, "The Law of Omissions and Neglect of Children," *Journal of Libertarian Studies* (Winter 1978).

## ***An Introduction to the Principles of Morals and legislation***\*

### ***1. Of The Principle Of Utility.***

I. Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain. subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

But enough of metaphor and declamation: it is not by such means that moral science is to be improved.

II. The principle of utility is the foundation of the present work: it will be proper therefore at the outset to give an explicit and determinate account of what is meant by it. By the principle of utility is meant that principle which approves or disapproves of every action whatsoever. according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government.

III. By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

IV. The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what is it?—the sum of the interests of the several members who compose it.

V. It is in vain to talk of the interest of the community, without understanding what is the interest of the individual. A thing is said to promote the interest, or to be *for* the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains.

VI. An action then may be said to be conformable to then principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.

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\* Jeremy Bentham

VII. A measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it.

VIII. When an action, or in particular a measure of government, is supposed by a man to be conformable to the principle of utility, it may be convenient, for the purposes of discourse, to imagine a kind of law or dictate, called a law or dictate of utility: and to speak of the action in question, as being conformable to such law or dictate.

IX. A man may be said to be a partizan of the principle of utility, when the approbation or disapprobation he annexes to any action, or to any measure, is determined by and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community: or in other words, to its conformity or unconformity to the laws or dictates of utility.

X. Of an action that is conformable to the principle of utility one may always say either that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that it is a right action; at least that it is not a wrong action. When thus interpreted, the words *ought*, and *right* and *wrong* and others of that stamp, have a meaning: when otherwise, they have none.

XI. Has the rectitude of this principle been ever formally contested? It should seem that it had, by those who have not known what they have been meaning. Is it susceptible of any direct proof? it should seem not: for that which is used to prove every thing else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless.

XII. Not that there is or ever has been that human creature at breathing, however stupid or perverse, who has not on many, perhaps on most occasions of his life, deferred to it. By the natural constitution of the human frame, on most occasions of their lives men in general embrace this principle, without thinking of it: if not for the ordering of their own actions, yet for the trying of their own actions, as well as of those of other men. There have been, at the same time, not many perhaps, even of the most intelligent, who have been disposed to embrace it purely and without reserve. There are even few who have not taken some occasion or other to quarrel with it, either on account of their not understanding always how to apply it, or on account of some prejudice or other which they were afraid to examine into, or could not bear to part with. For such is the stuff that man is made of: in principle and in practice, in a right track and in a wrong one, the rarest of all human qualities is consistency.

XIII. When a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself. His arguments, if they prove any thing, prove not that the principle is *wrong*, but that, according to the applications he supposes to be made of it, it is *misapplied*. Is it possible for a man to move the earth? Yes; but he must first find out another earth to stand upon.

XIV. To disprove the propriety of it by arguments is impossible; but, from the causes that have been mentioned, or from some confused or partial view of it, a man may happen to be disposed not to relish it. Where this is the case, if he thinks the settling of his opinions on such a subject worth the trouble, let him take the following steps, and at length, perhaps, he may come to reconcile himself to it.

1. Let him settle with himself, whether he would wish to discard this principle altogether; if so, let him consider what it is that all his reasonings (in matters of politics especially) can amount to?

2. If he would, let him settle with himself, whether he would judge and act without any principle, or whether there is any other he would judge an act by?

3. If there be, let him examine and satisfy himself whether the principle he thinks he has found is really any separate intelligible principle; or whether it be not a mere principle in words, a kind of phrase, which at bottom expresses neither more nor less than the mere averment of his own unfounded sentiments; that is, what in another person he might be apt to call caprice?

4. If he is inclined to think that his own approbation or disapprobation, annexed to the idea of an act, without any regard to its consequences, is a sufficient foundation for him to judge and act upon, let him ask himself whether his sentiment is to be a standard of right and wrong, with respect to every other man, or whether every man's sentiment has the same privilege of being a standard to itself?

5. In the first case, let him ask himself whether his principle is not despotical, and hostile to all the rest of human race?

6. In the second case, whether it is not anarchial, and whether at this rate there are not as many different standards of right and wrong as there are men? and whether even to the same man, the same thing, which is right to-day, may not (without the least change in its nature) be wrong to-morrow? and whether the same thing is not right and wrong in the same place at the same time? and in either case, whether all argument is not at an end? and whether, when two men have said, "I like this", and "I don't like it", they can (upon such a principle) have any thing more to say?

7. If he should have said to himself, No: for that the sentiment which he proposes as a standard must be grounded on reflection, let him say on what particulars the reflection is to turn? if on particulars having relation to the utility of the act, then let him say whether this is not deserting his own principle, and borrowing assistance from that very one in opposition to which he sets it up: or if not on those particulars, on what other particulars?

8. If he should be for compounding the matter, and adopting his own principle in part, and the principle of utility in part, let him say how far he will adopt it?

9. When he has settled with himself where he will stop, then let him ask himself how he justifies to himself the adopting it so far? and why he will not adopt it any farther?

10. Admitting any other principle than the principle of utility to be a right principle, a principle that it is right for a man to pursue; admitting (what is not true) that the word *right* can have a meaning without reference to utility, let him say whether there is any such thing as a *motive* that a man can have to pursue the dictates of it: if there is, let him say what that motive is, and how it is to be distinguished from those which enforce the dictates of utility: if not, then lastly let him say what it is this other principle can be good for?

## ***2. Of Principles Adverse to that of Utility***

I. If the principle of utility be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one. To prove any other principle, therefore, to be a wrong one, there needs no more than just to show it to be what it is, a principle of which the dictates are in some point or other different from those of the principle of utility: to state it is to confute it.

II. A principle may be different from that of utility in two ways: I. By being constantly opposed to it: this is the case with a principle which may be termed the principle of asceticism. 2. By being sometimes opposed to it, and sometimes not, as it

may happen: this is the case with another, which may be termed the principle of *sympathy* and *antipathy*.

III. By the principle of asceticism I mean that principle, which, like the principle of utility, approves or disapproves of any action, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; but in an inverse manner: approving of actions in as far as they tend to diminish his happiness; disapproving of them in as far as they tend to augment it.

IV. It is evident that any one who reprobates any the least particle of pleasure, as such, from whatever source derived, is *pro tanto* a partizan of the principle of asceticism. It is only upon that principles and not from the principle of utility, that the most abominable pleasure which the vilest of malefactors ever reaped from his crime would be to be reprobated, if it stood alone. The case is, that it never does stand alone; but is necessarily followed by such a quantity of pain (or, what comes to the same thing, such a chance for a certain quantity of pain) that, the pleasure in comparison of it, is as nothing: and this is the true and sole, but perfectly sufficient, reason for making it a ground for punishment.

V. There are two classes of men of very different complexions, by whom the principle of asceticism appears to have been embraced; the one a set of moralists, the other a set of religionists. Different accordingly have been the motives which appears to have recommended it to the notice of these different parties. Hope, that is the prospect of pleasure, seems to have animated the former: hope, the aliment of philosophic pride: the hope of honour and reputation at the hands of men. Fear, that is the prospect of pain, the latter: fear, the offspring of superstitious fancy: the fear of future punishment at the hands of a splenetic and revengeful Deity. I say in this case fear: for of the invisible future, fear is more powerful than hope. These circumstances characterize the two different parties among the partisans of the principle of asceticism; the parties and their motives different, the principle the same.

VI. The religious party, however, appear to have carried it farther than the philosophical: they have acted more consistently and less wisely. The philosophical party have scarcely gone farther than to reprobate pleasure: the religious party have frequently gone so far as to make it a matter of merit and of duty to court pain. The philosophical party have hardly gone farther than the making pain a matter of indifference. It is no evil, they have said: they have not said, it is a good. They have not so much as reprobated all pleasure in the lump. They have discarded only what they have called the gross; that is, such as are organical, or of which the origin is easily traced up to such as are organical: they have even cherished and magnified the refined. Yet this, however, not under the name of pleasure: to cleanse itself from the sordes of its impure original, it was necessary it should change its name: the honourable, the glorious, the reputable, the becoming, the *honestum*, the *decorum* it was to be called: in short, any thing but pleasure.

VII. From these two sources have flowed the doctrines from it which the sentiments of the bulk of mankind have all along received a tincture of this principle; some from the philosophical, some from the religious, some from both. Men of education more frequently from the philosophical, as more suited to the elevation of their sentiments: the vulgar more frequently from the superstitious, as more suited to the narrowness of their intellect, undiluted by knowledge and to the abjectness of their condition, continually open to the attacks of fear. The tinctures, however, derived from the two sources, would naturally intermingle, insomuch that a man would not always know by which of them he was most influenced: and they would often serve to corroborate and enliven one another. It was this conformity that made a kind of alliance between parties

of a complexion otherwise so dissimilar: and disposed them to unite upon various occasions against the common enemy, the partizan of the principle of utility, whom they joined in branding with the odious name of Epicurean.

VIII. The principle of asceticism, however, with whatever warmth it may have been embraced by its partizans as a rule of Private conduct, seems not to have been carried to any considerable length, when applied to the business of government. In a few instances it has been carried a little way by the philosophical party: witness the Spartan regimen. Though then, perhaps, it maybe considered as having been a measure of security: and an application, though a precipitate and perverse application, of the principle of utility. Scarcely in any instances, to any considerable length, by the religious: for the various monastic orders, and the societies of the Quakers, Dumplers, Moravians, and other religionists, have been free societies, whose regimen no man has been astricted to without the intervention of his own consent. Whatever merit a man may have thought there would be in making himself miserable, no such notion seems ever to have occurred to any of them, that it may be a merit, much less a duty, to make others miserable: although it should seem, that if a certain quantity of misery were a thing so desirable, it would not matter much whether it were brought by each man upon himself, or by one man upon another. It is true, that from the same source from whence, among the religionists, the attachment to the principle of asceticism took its rise, flowed other doctrines and practices, from which misery in abundance was produced in one man by the instrumentality of another: witness the holy wars, and the persecutions for religion. But the passion for producing misery in these cases proceeded upon some special ground: the exercise of it was confined to persons of particular descriptions: they were tormented, not as men, but as heretics and infidels. To have inflicted the same miseries on their fellow believers and fellow-sectaries, would have been as blameable in the eyes even of these religionists, as in those of a partizan of the principle of utility. For a man to give himself a certain number of stripes was indeed meritorious: but to give the same number of stripes to another man, not consenting, would have been a sin. We read of saints, who for the good of their souls, and the mortification of their bodies, have voluntarily yielded themselves a prey to vermin: but though many persons of this class have wielded the reins of empire, we read of none who have set themselves to work, and made laws on purpose, with a view of stocking the body politic with the breed of highwaymen, housebreakers, or incendiaries. If at any time they have suffered the nation to be preyed upon by swarms of idle pensioners, or useless placemen, it has rather been from negligence and imbecility, than from any settled plan for oppressing and plundering of the people. If at any time they have sapped the sources of national wealth, by cramping commerce, and driving the inhabitants into emigration, it has been with other views, and in pursuit of other ends. If they have declaimed against the pursuit of pleasure, and the use of wealth, they have commonly stopped at declamation: they have not, like Lycurgus, made express ordinances for the purpose of banishing the precious metals. If they have established idleness by a law, it has been not because idleness, the mother of vice and misery, is itself a virtue, but because idleness (say they) is the road to holiness. If under the notion of fasting, they have joined in the plan of confining their subjects to a diet, thought by some to be of the most nourishing and prolific nature, it has been not for the sake of making them tributaries to the nations by whom that diet was to be supplied, but for the sake of manifesting their own power, and exercising the obedience of the people. If they have established, or suffered to be established, punishments for the breach of celibacy, they have done no more than comply with the petitions of those deluded rigorists, who, dupes to the ambitious and

deep-laid policy of their rulers, first laid themselves under that idle obligation by a vow.

IX. The principle of asceticism seems originally to have been the reverie of certain hasty speculators, who having perceived, or fancied, that certain pleasures, when reaped in certain circumstances, have, at the long run, been attended with pains more than equivalent to them, took occasion to quarrel with every thing that offered itself under the name of pleasure. Having then got thus far, and having forgot the point which they set out from, they pushed on, and went so much further as to think it meritorious to fall in love with pain. Even this, we see, is at bottom but the principle of utility misapplied.

X. The principle of utility is capable of being consistently pursued; and it is but tautology to say, that the more consistently it is pursued, the better it must ever be for human-kind. The principle of asceticism never was, nor ever can be, consistently pursued by any living creature. Let but one tenth part of the inhabitants of this earth pursue it consistently, and in a day's time they will have turned it into a hell.

XI. Among principles adverse to that of utility, that which at this day seems to have most influence in matters of government, is what may be called the principle of sympathy and antipathy. By the principle of sympathy and antipathy, I mean that principle which approves or disapproves of certain actions, not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground. Thus far in the general department of morals: and in the particular department of politics, measuring out the quantum (as well as determining the ground) of punishment, by the degree of the disapprobation.

XII. It is manifest, that this is rather a principle in name than in reality: it is not a positive principle of itself, so much as a term employed to signify the negation of all principle. What one expects to find in a principle is something that points out some external consideration, as a means of warranting and guiding the internal sentiments of approbation and disapprobation: this expectation is but ill fulfilled by a proposition, which does neither more nor less than hold up each of those sentiments as a ground and standard for itself.

XIII. In looking over the catalogue of human actions (says a partizan of this principle) in order to determine which of them are to be marked with the seal of disapprobation, you need but to take counsel of your own feelings: whatever you find in yourself a propensity to condemn, is wrong for that very reason. For the same reason it is also meet for punishment: in what proportion it is adverse to utility, or whether it be adverse to utility at all, is a matter that makes no difference. In that same *proportion* also is it meet for punishment: if you hate much, punish much: if you hate little, punish little: punish as you hate. If you hate not at all, punish not at all: the fine feelings of the soul are not to be overborne and tyrannized by the harsh and rugged dictates of political utility.

XIV. The various systems that have been formed concerning the standard of right may all be reduced to the principle of sympathy and antipathy. One account may serve to for all of them. They consist all of them in so many contrivances for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept of the author's sentiment or opinion as a reason for itself. The phrases different, but the principle the same.

XV. It is manifest, that the dictates of this principle will frequently coincide with those of utility, though perhaps without intending any such thing. Probably more frequently than not: and hence it is that the business of penal justice is carried upon that tolerable sort of footing upon which we see it carried on in common at this day. For what more natural or more general ground of hatred to a practice can there be, than the mischievousness of such practice? What all men are exposed to suffer by, all men will be disposed to hate. It is far yet, however, from being a constant ground: for when a man suffers, it is not always that he knows what it is he suffers by. A man may suffer grievously, for instance, by a new tax, without being able to trace up the cause of his sufferings to the injustice of some neighbour, who has eluded the payment of an old one.

XVI. The principle of sympathy and antipathy is most apt to err on the side of severity. It is for applying punishment in many cases which deserve none: in many cases which deserve some, it is for applying more than they deserve. There is no incident imaginable, be it ever so trivial, and so remote from mischief, from which this principle may not extract a ground of punishment. Any difference in taste: any difference in opinion: upon one subject as well as upon another. No disagreement so trifling which perseverance and altercation will not render serious. Each becomes in the other's eyes an enemy, and, if laws permit, a criminal. This is one of the circumstances by which the human race is distinguished (not much indeed to its advantage) from the brute creation.

XVII. It is not, however, by any means unexampled for this principle to err on the side of lenity. A near and perceptible mischief moves antipathy. A remote and imperceptible mischief, though not less real, has no effect. Instances in proof of this will occur in numbers in the course of the work (See ch. xvi. [Division], par. 42, par. 44). It would be breaking in upon the order of it to give them here.

XVIII. It may be wondered, perhaps, that in all this no mention has been made of the *theological* principle; meaning that principal which professes to recur for the standard of right and wrong to the will of God. But the case is, this is not in fact a distinct principle. It is never any thing more or less than one or other of the three before-mentioned principles presenting itself under another shape. The *will* of God here meant cannot be his revealed will, as contained in the sacred writings: for that is a system which nobody ever thinks of recurring to at this time of day, for the details of political administration: and even before it can be applied to the details of private conduct, it is universally allowed, by the most eminent divines of all persuasions, to stand in need of pretty ample interpretations; else to what use are the works of those divines? And for the guidance of these interpretations, it is also allowed, that some other standard must be assumed. The will then which is meant on this occasion, is that which may be called the *presumptive* will: that is to say, that which is presumed to be his will by virtue of the conformity of its dictates to those of some other principle. What then may be this other principle? it must be one or other of the three mentioned above: for there cannot, as we have seen, be any more. It is plain, therefore, that, setting revelation out of the question, no light can ever be thrown upon the standard of right and wrong, by any thing that can be said upon the question, what is God's will. We may be perfectly sure, indeed, that whatever is right is conformable to the will of God: but so far is that from answering the purpose of showing us what is right, that it is necessary to know first whether a thing is right, in order to know from thence whether it be conformable to the will of God.

XIX. There are two things which are very apt to be confounded, but which it imports us carefully to distinguish:—the motive or cause, which, by operating on the mind of

an individual, is productive of any act: and the ground or reason which warrants a legislator, or other by-stander, in regarding that act with an eye of approbation. When the act happens, in the particular instance in question, to be productive of effects which we approve of, much more if we happen to observe that the same motive may frequently be productive, in other instances, of the like effects, we are apt to transfer our approbation to the motive itself, and to assume, as the just ground for the approbation we bestow on the act, the circumstance of its originating from that motive. It is in this way that the sentiment of antipathy has often been considered as a just ground of action. Antipathy, for instance, in such or such a case, is the cause of an action which is attended with good effects: but this does not make it a right ground of action in that case, any more than in any other. Still farther. Not only the effects are good, but the agent sees beforehand that they will be so. This may make the action indeed a perfectly right action: but it does not make antipathy a right ground of action. For the same sentiment of antipathy, if implicitly deferred to, may be, and very frequently is, productive of the very worst effects. Antipathy, therefore, can never be a right ground of action. No more, therefore, can resentment, which, as will be seen more particularly hereafter, is but a modification of antipathy. The only right ground of action, that can possibly subsist, is, after all, the consideration of utility which, if it is a right principle of actions and of approbation any one case, is so in every other. Other principles in abundance, that is, other motives, may be the reasons why such and such an act *has* been done: that is, the reasons or causes of its being done: but it is this alone that can be the reason why it might or ought to have been done. Antipathy or resentment requires always to be regulated, to prevent it doing mischief: to be regulated what? always by the principle of utility. The principle of utility neither requires nor admits of any another regulator than itself.

### ***3. Of the Four Sanctions or Sources of Pain and Pleasure***

I. It has been shown that the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view: the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be *made* to fashion his behaviour. But whether it be this or any thing else that is to be *done*, there is nothing by which a man can ultimately be *made* to do it, but either pain or pleasure. Having taken a general view of these two grand objects (*viz.* pleasure, and what comes to the same thing, immunity from pain) in the character of *final* causes; it will be necessary to take a view of pleasure and pain itself, in the character of *efficient* causes or means.

II. There are four distinguishable sources from which pleasure and pain are in use to flow: considered separately they may be termed the *physical*, the *political*, the *moral* and the *religious*: and inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, they may all of them termed sanctions.

III. If it be in the present life, and from the ordinary coursed of nature, not purposely modified by the interposition of these will of any human being, nor by any extraordinary interposition of any superior invisible being, that the pleasure or the pain takes place or is expected, it may be said to issue from or to belong to the *physical sanction*.

IV. If at the hands of a *particular* person or set of persons in the community, who under names correspondent to that of *judge*, are chosen for the particular purpose of dispensing it, according to the will of the sovereign or supreme ruling power in the state, it may be said to issue from the *political sanction*.

V. If at the hands of such chance persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule, it may be said to issue from the *moral* or popular sanction.

VI. If from the immediate hand of a superior invisible being, either in the present life, or in a future, it may be said to issue from the *religious sanction*.

VII. Pleasures or pains which may be expected to issue from the *physical, political, or moral* sanctions, must all of them be expected to be experienced, if ever, in the *present* life: those which may be expected to issue from the *religious* sanction, may be expected to be experienced either in the *present* life or in a *future*.

VIII. Those which can be experienced in the present life, can of course be no others than such as human nature in the course of the present life is susceptible of: and from each of these sources may flow all the pleasures or pains of which, in the course of the present life, human nature is susceptible. With regard to these then (with which alone we have in this place any concern) those of them which belong to any one of those sanctions, differ not ultimately in kind from those which belong to any one of the other three: the only difference there is among them lies in the circumstances that accompany their production. A suffering which befalls a man in the natural and spontaneous course of things, shall be styled, for instance, a *calamity*; in which case, if it be supposed to befall him through any imprudence of his, it may be styled a punishment issuing from the physical sanction. Now this same suffering, if inflicted by the law, will be what is commonly called a *punishment*; if incurred for want of any friendly assistance, which the misconduct, or supposed misconduct, of the sufferer has occasioned to be withholden, a punishment issuing from the *moral* sanction; if through the immediate interposition of a particular providence, a punishment issuing from the religious sanction.

IX. A man's goods, or his person, are consumed by fire. If this happened to him by what is called an accident, it was a calamity: if by reason of his own imprudence (for instance, from his neglecting to put his candle out) it may be styled a punishment of the physical sanction: if it happened to him by the sentence of the political magistrate, a punishment belonging to the political sanction; that is, what is commonly called a punishment: if for want of any assistance which his *neighbour* withheld from him out of some dislike to his *moral* character, a punishment of the *moral* sanction: if by an immediate act of *God's* displeasure, manifested on account of some *sin* committed by him, or through any distraction of mind, occasioned by the dread of such displeasure, a punishment of the *religious* sanction.

X. As to such of the pleasures and pains belonging to the religious sanction, as regard a future life, of what kind these may be we cannot know. These lie not open to our observation. During the present life they are matter only of expectation: and, whether that expectation be derived from natural or revealed religion, the particular kind of pleasure or pain, if it be different from all those which he open to our observation, is what we can have no idea of. The best ideas we can obtain of such pains and pleasures are altogether unliquidated in point of quality. In what other respects our ideas of them *may* be liquidated will be considered in another place.

XI. Of these four sanctions the physical is altogether, we may observe, the groundwork of the political and the moral: so is it also of the religious, in as far as the latter bears relation to the present life. It is included in each of those other three. This may operate in any case, (that is, any of the pains or pleasures belonging to it may operate) independently of *them*: none of *them* can operate but by means of this. In a word, the powers of nature may operate of themselves; but neither the magistrate, nor men at

large, *can* operate, nor is God in the case in question *supposed* to operate, but through the powers of nature.

XII. For these four objects, which in their nature have so much in common, it seemed of use to find a common name. It seemed of use, in the first place, for the convenience of giving a name to certain pleasures and pains, for which a name equally characteristic could hardly otherwise have been found: in the second place, for the sake of holding up the efficacy of certain moral forces, the influence of which is apt not to be sufficiently attended to. Does the political sanction exert an influence over the conduct of mankind? The moral, the religious sanctions do so too. In every inch of his career are the operations of the political magistrate liable to be aided or impeded by these two foreign powers: who, one or other of them, or both, are sure to be either his rivals or his allies. Does it happen to him to leave them out in his calculations? he will be sure almost to find himself mistaken in the result. Of all this we shall find abundant proofs in the sequel of this work. It behoves him, therefore, to have them continually before his eyes; and that under such a name as exhibits the relation they bear to his own purposes and designs.

#### **4. Value of a Lot of Pleasure or Pain, how to be Measured**

I. Pleasures then, and the avoidance of pains, are the *ends* that the legislator has in view; it behoves him therefore to understand their *value*. Pleasures and pains are the instruments he has to work with: it behoves him therefore to understand their force, which is again, in other words, their value.

II. To a person considered by *himself*, the value of a pleasure or pain considered *by itself*, will be greater or less, according to the four following circumstances:

1. Its *intensity*.
2. Its *duration*.
3. Its *certainty* or *uncertainty*.
4. Its *propinquity* or *remoteness*.

III. These are the circumstances which are to be considered in estimating a pleasure or a pain considered each of them by itself. But when the value of any pleasure or pain is considered for the purpose of estimating the tendency of any *act* by which it is produced, there are two other circumstances to be taken into the account; these are,

5. Its *fecundity*, or the chance it has of being followed by sensations of the *same* kind: that is, pleasures, if it be a pleasure: pains, if it be a pain.

6. Its *purity*, or the chance it has of not being followed by sensations of the *opposite* kind: that is, pains, if it be a pleasure: pleasures, if it be a pain.

These two last, however, are in strictness scarcely to be deemed properties of the pleasure or the pain itself; they are not, therefore, in strictness to be taken into the account of the value of that pleasure or that pain. They are in strictness to be deemed properties only of the act, or other event, by which such pleasure or pain has been produced; and accordingly are only to be taken into the account of the tendency of such act or such event.

IV. To a *number* of persons, with reference to each of whom to the value of a pleasure or a pain is considered, it will be greater or less, according to seven circumstances: to wit, the six preceding ones; viz. *intensity*, *duration*, *certainty* or *uncertainty*, *propinquity* or *remoteness*, *fecundity*, *purity* and one other, to wit: its *extent*; that is, the number of persons to whom it *extends*; or (in other words) who are affected by it.

V. To take an exact account then of the general tendency of any act, by which the interests of a community are affected, proceed as follows. Begin with any one person of those whose interests seem most immediately to be affected by it: and take an account,

1. Of the value of each distinguishable *pleasure* which appears to be produced by it in the *first* instance.

2. Of the value of each *pain* which appears to be produced by it in the *first* instance.

3. Of the value of each pleasure which appears to be produced by it *after* the first. This constitutes the *fecundity* of the first *pleasure* and the *impurity* of the first *pain*.

4. Of the value of each *pain* which appears to be produced by it after the first. This constitutes the *fecundity* of the first *pain*, and the *impurity* of the first pleasure.

5. Sum up all the values of all the *pleasures* on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole, with respect to the interests of that *individual* person; if on the side of pain, the *bad* tendency of it upon the whole.

6. Take an account of the *number* of persons whose interests appear to be concerned; and repeat the above process with respect to each. *Sum up* the numbers expressive of the degrees of *good* tendency, which the act has, with respect to each individual, in regard to whom the tendency of it is *good* upon the whole: do this again with respect to each individual, in regard to whom the tendency of it is *good* upon the whole: do this again with respect to each individual, in regard to whom the tendency of it is *bad* upon the whole. Take the *balance* which if on the side of *pleasure*, will give the general *good tendency* of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general *evil tendency*, with respect to the same community.

VI. It is not to be expected that this process should be strictly pursued previously to every moral judgment, or to every legislative or judicial operation. It may, however, be always kept in view: and as near as the process actually pursued on these occasions approaches to it, so near will such process approach to the character of an exact one.

VII. The same process is alike applicable to pleasure and pain, in whatever shape they appear: and by whatever denomination they are distinguished: to pleasure, whether it be called *good* (which is properly the cause or instrument of pleasure) or *profit* (which is distant pleasure, or the cause or instrument of, distant pleasure,) or *convenience*, or *advantage*, *benefit*, *emolument*, *happiness*, and so forth: to pain, whether it be called *evil*, (which corresponds to *good*) or *mischief*, or *inconvenience*. or *disadvantage*, or *loss*, or *unhappiness*, and so forth.

VIII. Nor is this a novel and unwarranted, any more than it is a useless theory. In all this there is nothing but what the practice of mankind, wheresoever they have a clear view of their own interest, is perfectly conformable to. An article of property, an estate in land, for instance, is valuable, on what account? On account of the pleasures of all kinds which it enables a man to produce, and what comes to the same thing the pains of all kinds which it enables him to avert. But the value of such an article of property is universally understood to rise or fall according to the length or shortness of the time which a man has in it: the certainty or uncertainty of its coming into possession: and the nearness or remoteness of the time at which, if at all, it is to come into possession. As to the *intensity* of the pleasures which a man may derive from it, this is never thought of, because it depends upon the use which each particular person may come to make of it; which cannot be estimated till the particular pleasures he may come to derive from it, or the particular pains he may come to exclude by means of it, are brought to view. For the same reason, neither does he think of the *fecundity* or *purity* of those pleasures.

Thus much for pleasure and pain, happiness and unhappiness, in *general*. We come now to consider the several particular kinds of pain and pleasure.

### 5. *Of Human Actions in General*

I. The business of government is to promote the happiness of the society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment. What happiness consists of we have already seen: enjoyment of pleasures, security from pains.

II. The general tendency of an act is more or less pernicious, according to the sum total of its consequences: that is, according to the difference between the sum of such as are good, and the sum of such as are evil.

III. It is to be observed, that here, as well as henceforward, wherever consequences are spoken of, such only are meant as are *material*. Of the consequences of any act, the multitude and variety must needs be infinite: but such of them only as are material are worth regarding. Now among the consequences of an act, be they what they may, such only, by one who views them in the capacity of a legislator, can be said to be material (or *of importance*) as either consist of pain or pleasure, or have an influence in the production of pain or pleasure.<sup>[1]</sup>

IV. It is also to be observed, that into the account of the consequences of the act, are to be taken not such only as might have ensued, were intention out of the question, but such also as depend upon the connexion there may be between these first-mentioned consequences and the intention. The connexion there is between the intention and certain consequences is, as we shall see hereafter, a means of producing other consequences. In this lies the difference between rational agency and irrational.

V. Now the intention, with regard to the consequences of an act, will depend upon two things: 1. The state of the will or intention, with respect to the act itself. And, 2. The state of the understanding, or perceptive faculties, with regard to the circumstances which it is, or may appear to be, accompanied with. Now with respect to these circumstances, the perceptive faculty is susceptible of three states: consciousness, unconsciousness, and false consciousness. Consciousness, when the party believes precisely those circumstances, and no others, to subsist, which really do subsist: unconsciousness, when he fails of perceiving certain circumstances to subsist, which, however, do subsist: false consciousness, when he believes or imagines certain circumstances to subsist, which in truth do not subsist.

VI. In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness, or false consciousness, that may have accompanied it.

What regards the act and the circumstances will be the subject of the present chapter: what regards intention and consciousness, that of the two succeeding.

VII. There are also two other articles on which the general tendency of an act depends: and on that, as well as on other accounts, the demand which it creates for punishment. These are, 1. The particular *motive* or motives which gave birth to it. 2. The general *disposition* which it indicates. These articles will be the subject of two other chapters.

VIII. Acts may be distinguished in several ways, for several purposes.

They may be distinguished, in the first place, into *positive and negative*. By positive are meant such as consist in motion or exertion: by negative, such as consist in keeping at rest; that is, in forbearing to move or exert one's self in such and such circumstances. thus, to strike is a positive act: not to strike on a certain occasion, a negative one. Positive acts are styled also acts of commission; negative, acts of omission or forbearance.

IX. Such acts, again, as are negative, may either be *absolutely* so, or *relatively*: absolutely, when they import the negation of all positive agency whatsoever; for instance, not to strike at all: relatively, when they import the negation of such or such a particular mode of agency; for instance, not to strike such a person or such a thing, or in such a direction.

X. It is to be observed, that the nature of the act, whether positive or negative, is not to be determined immediately by the form of the discourse made use of to express it. An act which is positive in its nature may be characterized by a negative expression: thus, not to be at rest, is as much as to say to move. So also an act, which is negative in its nature, may be characterized by a positive expression: thus, to forbear or omit to bring food to a person in certain circumstances, is signified by the single and positive term *to starve*.

XI. In the second place, acts may be distinguished into *external* and *internal*. By external, are meant corporal acts; acts of the body: by internal, mental acts; acts of the mind. Thus, to strike is an external or exterior act: to intend to strike, an internal or interior one.

XII. Acts of *discourse* are a sort of mixture of the two: external acts, which are no ways material, nor attended with any consequences, any farther than as they serve to express the existence of internal ones. To speak to another to strike, to write to him to strike, to make signs to him to strike, are all so many acts of discourse.

XIII. Third, acts that are external may be distinguished into *transitive* and *intransitive*. Acts may be called transitive, when the motion is communicated from the person of the agent to some foreign body: that is, to such a foreign body on which the effects of it are considered as being *material*; as where a man runs against you, or throws water in your face. Acts may be called intransitive, when the motion is communicated to no other body, on which the effects of it are regarded as material, than some part of the same person in whom it originated, as where a man runs, or washes himself.

XIV. An act of the transitive kind may be said to be in its *commencement*, or in the *first* stage of its progress, while the motion is confined to the person of the agent, and has not yet been communicated to any foreign body, on which the effects of it can be material. It may be said to be in its *termination*, or to be in the last stage of its progress, as soon as the motion or impulse has been communicated to some such foreign body. It may be said to be in the *middle* or intermediate stage or stages of its progress, while the motion, having passed from the person of the agent, has not yet been communicated to any such foreign body. Thus, as soon as a man has lifted up his hand to strike, the act he performs in striking you is in its commencement: as soon as his hand has reached you, it is in its termination. If the act be the motion of a body which is separated from the person of the agent before it reaches the object, it may be said, during that interval, to be in its intermediate progress, or in *gradu mediativo*: as in the case where a man throws a stone or fires a bullet at you.

XV. An act of the intransitive kind may be said to be in its commencement, when the motion or impulse is as yet confined to the member or organ in which it originated; and has not yet been communicated to any member or organ that is distinguishable

from the former. It may be said to be in its termination, as soon as it has been applied to any other part of the same person. Thus, where a man poisons himself, while he is lifting up the poison to his mouth, the act is in its commencement: as soon as it has reached his lips, it is in its termination.

XVI. In the third place, acts may be distinguished into *transient* and *continued*. Thus, to strike is a transient act: to lean, a continued one. To buy, a transient act: to keep in one's possession, a continued one.

XVII. In strictness of speech there is a difference between a *continued* act and a *repetition* of acts. It is a repetition of acts, when there are intervals filled up by acts of different natures: a continued act, when there are no such intervals. Thus, to lean, is continued act: to keep striking, a repetition of acts.

XVIII. There is a difference, again, between a *repetition* of acts, and a *habit* or *practice*. The term repetition of acts may be employed, let the acts in question be separated by ever such short intervals, and let the sum total of them occupy ever so short a space of time. The term habit is not employed but when the acts in question are supposed to be separated by long-continued intervals, and the sum total of them to occupy a considerable space of time. It is not (for instance) the drinking ever so many times, nor ever so much at a time, in the course of the same sitting, that will constitute a habit of drunkenness: it is necessary that such sittings themselves be frequently repeated. Every habit is a repetition of acts; or, to speak more strictly, when a man has frequently repeated such and such acts after considerable intervals, he is said to have persevered in or contracted a habit: but every repetition of acts is not a habit.

XIX. Fourth, acts may be distinguished into *indivisible* and *divisible*. Indivisible acts are merely imaginary: they may be easily conceived, but can never be known to be exemplified. Such as are divisible may be so, with regard either to matter or to motion. An act indivisible with regard to matter, is the motion or rest of one single atom of matter. An act indivisible, with regard to motion, is the motion of any body, from one single atom of space to the next to it.

Fifth, acts may be distinguished into *simple* and *complex*: simple, such as the act of striking, the act of leaning, or the act of drinking, above instanced: complex, consisting each of a multitude of simple acts, which, though numerous and heterogeneous, derive a sort of unity from the relation they bear to some common design or end; such as the act of giving a dinner, the act of maintaining a child, the act of exhibiting a triumph, the act of bearing arms, the act of holding a court, and so forth.

XX. It has been every now and then made a question, what it is in such a case that constitutes one act: where one act has ended, and another act has begun: whether what has happened has been one act or many. These questions, it is now evident, may frequently be answered, with equal propriety, in opposite ways: and if there be any occasions on which they can be answered only in one way, the answer will depend upon the nature of the occasion, and the purpose for which the question is proposed. A man is wounded in two fingers at one stroke---Is it one wound or several? A man is beaten at 12 o'clock, and again at 8 minutes after 12---Is it one beating or several? You beat one man, and instantly in the same breath you beat another---Is this one beating or several? In any of these cases it may be one, perhaps, as to some purposes, and several as to others. These examples are given, that men may be aware of the ambiguity of language: and neither harass themselves with unsolvable doubts, nor one another with interminable disputes.

XXI. So much with regard to acts considered in themselves: we come now to speak of the *circumstances* with which they may have been accompanied. These must necessarily be taken into the account before any thing can be determined relative to the

consequences. What the consequences of an act may be upon the whole can never otherwise be ascertained: it can never be known whether it is beneficial, or indifferent, or mischievous. In some circumstances even to kill a man may be a beneficial act: in others, to set food before him may be a pernicious one.

XXII. Now the circumstances of an act, are, what? Any objects (or entities) whatsoever. Take any act whatsoever, there is nothing in the nature of things that excludes any imaginable object from being a circumstance to it. Any given object may be a circumstance to any other.

XXIII. We have already had occasion to make mention for a moment of the *consequences* of an act: these were distinguished into material and immaterial. In like manner may the circumstances of it be distinguished. Now *materiality* is a relative term: applied to the consequences of an act, it bore relation to pain and pleasure: applied to the circumstances, it bears relation to the consequences. A circumstance may be said to be material, when it bears a visible relation in point of causality to the consequences: immaterial, when it bears no such visible relation.

XXIV. The consequences of an act are events. A circumstance may be related to an event in point of causality in any be one of four ways: 1. In the way of causation or production. 2. In the way of derivation. 3. In the way of collateral condition. 4. In the way of conjunct influence. It may be said to be related to the event in the way of causation, when it is of the number of those that contribute to the production of such event: in the way of derivation, when it is of the number of the events to the production of which that in question has been contributory: in the way of collateral connexion, where the circumstance in question, and the event in question, without being either of them instrumental in the production of the other, are related, each of them, to some common object, which has been concerned in the production of them both: in the way of conjunct influence, when, whether related in any other way or not, they have both of them concurred in the production of some common consequence.

XXV. An example may be of use. In the year 1628, Villiers, Duke of Buckingham, favourite and minister of Charles I. of England, received a wound and died. The man who gave it him was one Felton, who, exasperated at the maladministration of which that minister was accused, went down from London to Portsmouth, where Buckingham happened then to be, made his way into his anti-chamber, and finding him busily engaged in conversation with a number of people round him, got close to him, drew a knife and stabbed him. In the effort, the assassin's hat fell off, which was found soon after, and, upon searching him, the bloody knife. In the crown of the hat were found scraps of paper, with sentences expressive of the purpose he was come upon. Here then, suppose the event in question is the wound received by Buckingham: Felton's drawing out his knife, his making his way into the chamber, his going down to Portsmouth, his conceiving an indignation at the idea of Buckingham's administration, that administration itself, Charles's appointing such a minister, and so on, higher and higher without end, are so many circumstances, related to the event of Buckingham's receiving the wound, in the way of causation or production: the bloodiness of the knife, a circumstance related to the same event in the way of derivation: the finding of the hat upon the ground, the finding the sentences in the hat, and the writing them, so many circumstances related to it in the way of collateral connexion: and the situation and conversations of the people about Buckingham, were circumstances related to the circumstances of Felton's making his way into the room, going down to Portsmouth, and so forth, in the way of conjunct influence; inasmuch as they contributed in common to the event of Buckingham's receiving the wound, by preventing him from putting himself upon his guard upon the first appearance of the intruder.

XXVI. These several relations do not all of them attach upon an event with equal certainty. In the first place, it is plain, indeed, that every event must have some circumstance or other, and in truth, an indefinite multitude of circumstances, related to it in the way of production: it must of course have a still greater multitude of circumstances related to it in the way of collateral connexion. But it does not appear necessary that every event should have circumstances related to it in the way of derivation: nor therefore that it should have any related to it in the way of conjunct influence. But of the circumstances of all kinds which actually do attach upon an event, it is only a very small number that can be discovered by the utmost exertion of the human faculties: it is a still smaller number that ever actually do attract our notice: when occasion happens, more or fewer will be discovered by a man in proportion to the strength, partly of his intellectual powers, partly of his inclination. It appears therefore that the multitude and description of such of the circumstances belonging to an act, as may appear to be material, will be determined by two considerations: 1. By the nature of things themselves. 2. By the strength or weakness of the faculties of those who happen to consider them.

XXVII. Thus much it seemed necessary to premise in general concerning acts, and their circumstances, previously to the consideration of the particular sorts of acts with their particular circumstances, with which we shall have to do in the body of the work. An act of some sort or other is necessarily included in the notion of every offense. Together with this act, under the notion of the same offense, are included certain circumstances: which circumstances enter into the essence of the offense, contribute by their conjunct influence to the production of its consequences, and in conjunction with the act are brought into view by the name by which it stands distinguished. These we shall have occasion to distinguish hereafter by the name of *criminative* circumstances. Other circumstances again entering into combination with the act and the former set of circumstances, are productive of still farther consequences. These additional consequences, if they are of the beneficial kind, bestow, according to the value they bear in that capacity, upon the circumstances to which they owe their birth the appellation of *exculpativ*e or *extenuative* circumstances: if of the mischievous kind, they bestow on them the appellation of *aggravative* circumstances. Of all these different sets of circumstances, the criminative are connected with the consequences of the original offence, in the way of production; with the act, and with one another, in the way of conjunct influence: the consequences of the original offense with them, and with the act respectively, in the way of derivation: the consequences of the modified offense, with the criminative, exculpativ, and extenuative circumstances respectively, in the way also of derivation: these different sets of circumstances, with the consequences of the modified act or offense, in the way of production: and with one another (in respect of the consequences of the modified act or offense) in the way of conjunct influence. Lastly, whatever circumstances can be seen to be connected with the consequences of the offense, whether directly in the way of derivation, or obliquely in the way of collateral affinity (to wit, in virtue of its being connected, in the way of derivation, with some of the circumstances with which they stand connected in the same manner) bear a *material* relation to the offense in the way of evidence, they may accordingly be styled *evidentiary* circumstances, and may become of use, by being held forth upon occasion as so many proofs, indications, or evidences of its having been committed.





## Argumentation Ethics and the Philosophy of Freedom

*Reason is an ultimate given and cannot be analyzed or questioned by itself*  
- Ludwig von Mises.

*No person can disobey Reason, without giving up his claim to be a rational creature.*  
– Jonathan Swift.

### 1. Introduction

In justificatory argumentation two or more persons seek to justify or to excuse a belief or action, to determine whether it is a belief one *ought* to accept (or to reject) or an action one *ought* to undertake (or to forgo), or whether the circumstances of the case present sufficient reasons (e.g., necessity, duress, compulsion, coercion, manipulation) for excusing a person for believing or doing something that is contrary to right. Philosophers, scientists, and lawyers regularly and publicly engage in such argumentations. In fact, most people do the same at least occasionally, albeit in private, at home, at work, in clubs and barrooms.

Almost twenty years ago, H.-H. Hoppe presented<sup>172</sup> the argument that no justificatory argumentation can invalidate the principles of libertarian capitalism<sup>173</sup> because those principles are presupposed in every dialogue in which their validity would be questioned. Moreover, “no other ethic could be so justified, as justifying something in the course of argumentation implies presupposing the validity of precisely this ethic of the natural theory of property.”<sup>174</sup>

In this comment I shall focus on the argument from argumentation<sup>175</sup> itself rather than on its implications for political economy. My purpose is to clarify the relevance of argumentation or dialogue ethics for libertarian theorizing. I shall also endeavor to rebut some frequent criticisms of Hoppe's theory<sup>176</sup>, some of which have recently been revived by Robert Murphy and Gene Callahan<sup>177</sup>, but only insofar as they betray a serious misunderstanding of the argument from argumentation.

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<sup>172</sup> Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism*, Kluwer Academic Publishers, Boston, Dordrecht, London, 1989 (hereafter quoted as S&C), in particular chapter 7. See also the early symposium on Hoppe's argumentation ethics in *Liberty*, November 1988, especially Hoppe's replies to his critics.

<sup>173</sup> Hoppe explicitly mentioned the non-aggression principle (S&C, p.133), the implied principles of self-ownership, private property, and original appropriation through non-aggressive actions (134-136).

<sup>174</sup> S&C, p.144 (“Natural theory of property” is explained in S&C, chapter 2).

<sup>175</sup> My interest in the ethics of argumentation (or “ethics of dialogue” as I called it) dates back to the mid-1970s, when I began to work on my book *Het fundamenteel rechtsbeginsel*, Kluwer-Rechtswetenschappen, Antwerpen, 1983 (hereafter FRB), especially chapter 3. See also my “Economics and the limits of value-free science”, *Reason Papers*, XI, Spring 1986, 17-33, which refers to the ethics of dialogue.

<sup>176</sup> Hoppe cites Habermas and Apel and others as sources of inspiration for his theory of argumentation and discusses a few related approaches (S&C, chapter 7, especially footnotes 4-7.) See also Stephan Kinsella, “New Rationalist Directions in Libertarian Rights Theory”, *Journal of Libertarian Studies* (Hereafter JLS), 1996, XII, 2, 313-326.

<sup>177</sup> Robert Murphy and Gene Callahan, “Hans-Hermann Hoppe's Argumentation Ethic: A Critique”, JLS, XX, 2, 2006, 53-64; hereafter quoted as M&C. The paper is only slightly different from the text the authors published in September 2002 on Anti-State.com. Stephan Kinsella gave an immediate pertinent response on the same website.

## 2. *The argument from argumentation*

The key to understanding the argument from argumentation is, first, that when they are told or asked (not) to believe, say, or do something people are likely and in fact entitled to question why they ought (not) to believe, say, or do it; and second, that an exchange of arguments is a justificatory argumentation only if all the participants acknowledge certain facts and abide by certain norms — norms that no one can argue are invalid because adherence to those norms is a necessary condition of engaging in argumentation. In short, argumentation does not and cannot take place in a normative void:

“any truth claim [...] is and must be raised and decided upon in the course of an argumentation. And since it cannot be disputed that this is so, [...] this has been aptly called 'the apriori of communication and argumentation.' Now, arguing never consists of free-floating propositions<sup>178</sup> claiming to be true. Rather, argumentation is always an activity, too. [...] It] follows that intersubjectively meaningful norms must exist — precisely those which make some action an argumentation — which have special cognitive status in that they are the practical preconditions of objectivity and truth. Hence [...] norms must indeed be assumed to be justifiable as valid. It is simply impossible to argue otherwise, because the ability to argue so would in fact presuppose the validity of those norms which underlie any argumentation whatsoever.”<sup>179</sup>

For example, one cannot seriously make the argument *that one ought not to argue*, or *that one ought not to take argumentation seriously*, without destroying the point of making that argument.<sup>180</sup> A dialectical contradiction<sup>181</sup> emerges when someone states: You ought to take seriously the argument that you ought not to take argumentation seriously. One who seriously makes an argument in fact refers himself and at least the members of his audience to the norm that they ought to take their own and one another's arguments seriously and ought not to dismiss one another's questions or counterarguments without giving relevant, pertinent reasons for doing so. Thus, when the claim is made that one ought not to take argumentation seriously and this claim is presented not as a joke but as a serious proposition for argumentation then the opposite norm, “One ought to take argumentation seriously”, is in any case simultaneously posited or presupposed as valid and binding, and is, moreover, argumentatively or dialectically irrefutable.

The point of engaging another in an argumentation is to make him understand the reasons or arguments for believing, saying, or doing something, in such a way that he comes round to the conclusion that believing, saying, or doing it is justified as being in accordance with reason. There is no point in getting another to understand why he

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<sup>178</sup> Note added (FvD) — Contrary to the suggestion in M&C, p.55 note 2, Hoppe does not say that the *truth* of a proposition depends on the fact that someone makes that proposition; he does say that a statement enters into an argumentation only when one of the participants proposes it for consideration.

<sup>179</sup> S&C, p.130.

<sup>180</sup> Arguments of this type have been around for a long time; for an early version, “One ought to philosophize”, see Aristotle's *Invitation to Philosophy (Protrepticos Philosophias*, e.g. as translated by J. Barnes & G. Lawrence in J. Barnes (ed.), *The Complete Works of Aristotle*, vol. 2, pp. 2404-2416).

<sup>181</sup> Another term is 'performative contradiction'. However, it covers a range of actions that need not have anything to do with argumentation. Thus, when I say “Right now I am whistling” then I am not doing what I say I am doing (indeed I cannot *speak* and whistle at the same time). However, I can *write* and whistle at the same time. Therefore, the *communication* “Right now I am whistling” is not necessarily untrue. I used the term 'dialectical' in FRB according to its primary dictionary meaning (which refers to the art or practice of arriving at the truth by the exchange of logical arguments), because of its formal and semantic relation to 'dialogue' (and its evocation of the dialectics of Plato).

ought not ask for reasons, or why he ought not answer requests for reasons.<sup>182</sup> What, indeed, shall we make of the argument “Here are compelling reasons for why there can be no compelling reasons”?

In our present academic culture, dominated by empiricism and tainted by its attendant positivism and scientism, prescriptions such as “Be rational”, “Obey the dictates of reason”, or “Submit to the law of reason” probably sound archaic. Nevertheless, they are all argumentatively valid, and undeniably so: no compelling reasons can be given for not considering them valid. Even people who do not want to be rational or hate being reminded of such prescriptions cannot find such reasons. The best they can do is refuse to participate in argumentations and restrict themselves to one or another variety of “sales talk”<sup>183</sup>, making appeals to the others' fears and hopes, their greed and vanity, instead of their reason.

### 3. *Dialectical contradictions and dialectical truths*

Hoppe's argument raises the question, *which* norms underlie the praxis of argumentation and are therefore logically undeniable for any person who claims to take argumentation seriously. However, it is beyond dispute that there are descriptive and normative statements, *dialectical truths*, that are in any case argumentatively undeniable, and other descriptive and normative statements, *dialectical contradictions*, that are in any case argumentatively untenable — even if they are neither analytic tautologies or contradictions, nor empirically or mathematically true or false statements. Of course, not every argumentatively justified conclusion is a dialectical truth; only argumentatively justifiable conclusions that depend only on arguments referring to the nature and conditions of existence of argumentation qualify as dialectical truths.

I do not d-contradict myself when I try to convince my wife that our goldfish is not a rational being; but I do when I set out to convince my wife by rational argument that she is not capable of understanding or producing rational arguments.<sup>184</sup> While asking and answering questions, and getting answers to my questions, I cannot without contradiction maintain that I or my opponent in a discussion is not an answerable, responsible person. Thus, in any dialogue, the participants must accept it as a dialectical truth that each one of them is an “animal rationis capax”<sup>185</sup>, a being capable

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<sup>182</sup> There may be occasions when one *should* not ask for or give reasons, for example in an emergency or when there are other *prudential* considerations for not trying to engage another in argumentation. Nevertheless, the normative principle that one ought to act in accordance with reason remains intact: One is entitled to question whether the emergency or other prudential considerations upon reflection justify or excuse the action.

<sup>183</sup> Libertarian sales talk is just sales talk. If there are reasons for believing that libertarianism is a (or the) valid philosophy of human co-existence, then there is a reason for trying to “sell” it; if not then not. Bypassing the *cognitive skeptic* (“Is it true?”) to sell directly to *motivational skeptics* (“What is in it for me?”) is abandoning libertarian philosophy for certain defeat in the political market place, where the motivational skeptics quickly learn to accept offers of “free lunches” while they last, even or especially if they know that the offers will not last. (On cognitive and motivational skeptics, see Charles King, “Moral Theory and the foundations of Social Order”, in Tibor R. Machan, ed., *The Libertarian Reader*, Rowman and Littlefield, 1982.) Similarly, teaching children and young adults that they should not ask “Is it true?” but only “What is in it for me?” is abandoning their education in favor of preparing them for recruitment by demagogues.

<sup>184</sup> I would make a fool of myself if I were to try to convince our goldfish that it is (or is not) a rational being. No argumentation takes place; there is no d-contradiction.

<sup>185</sup> Jonathan Swift defined man as an “animal rationis capax” (an animal capable of reason) in a letter to Pope (September 29, 1725), referring to his *Gulliver's Travels*. In this text I shall adopt Swift's definition in preference to the more common definition of man as an “animal rationale” (a rational animal). The difference between the two definitions is important in so far as that by Swift's time “Reason” had come to

of reason — a *person* (as I shall henceforth write). Moreover, they must accept it as a dialectical truth that they are able to communicate and argue with each other and that each one of them is a separate person, capable of speaking his own mind and, unless specific sufficient reasons to the contrary are adduced, entitled to do so. The point of having a dialogue would be lost if one of the speakers were no more than a mouthpiece for the other with whom he is supposed to be arguing. There would not be a genuine dialogue if the participants were merely actors reading their lines from a script written by someone else. The very idea of a dialogue presupposes an irreducible plurality of natural persons<sup>186</sup>. Thus, in our argumentation, neither you nor I can deny that the other is a separate, independent other person. Moreover, the participants cannot but recognize that they constitute a “community” of free (separate, independent) persons of the same rational kind. *Freedom among likes* is the presupposition of argumentation, and cannot be denied in an argumentation.<sup>187</sup>

It is a dialectical truth that in the context of argumentation logic and facts ought to be taken seriously. Any attempt to argumentatively deny, refute or defeat that norm would imply the appeal to take logic and facts seriously. Anyone who considered the attempt successful would have to admit that the logic of the arguments or the facts it invoked are irrelevant for its conclusion. Similarly, it is a dialectical truth that one ought to be willing to respond to demands for reasons or justificatory arguments for, and to accept rational criticism of, every thing one does or says.

It is a dialectical truth that silencing an opponent by forcibly gagging him, or intimidating him by threatening to inflict harm on him (or indeed on anyone else), is not a permissible move in an argumentation. “I’ll burn down your house, if you dare to disagree with me” or “I’ll see to it that your children never get a decent job in this town” is an illegitimate a move in an argumentation, no less so than “I’ll cut out your tongue” is out of order. Such moves would destroy the conditions under which argumentation can serve its purpose. More generally, it is a dialectical truth that one ought to respect the physical integrity of one's opponents in an argumentation, not only their bodies but also their property (everything they own, i.e. *justifiably possess or control*, or are justified to repossess or bring back under their control<sup>188</sup>). This is, of course, just another way of stating the respectability of the condition of “freedom among likes” that I mentioned earlier.

It is also a dialectical truth that bribing an opponent, say, by promising him money or a lucrative or prestigious position in return for his not asking certain questions or only giving desired answers, is not a permissible move in an argumentation. Such a move would vitiate the argumentation to the extent that it casts doubt on the opponent's motive in asking questions or answering them.

stand for the perfection of reason. Arguably, the earlier medieval notion of “animal rationale” was no more demanding than Swift's notion of “animal rationis capax”. See note 200 to this text.

<sup>186</sup> Only natural persons (individual human beings capable of reason) have the faculty of representing themselves in speech; all other things (including humans incapable of reason, other animals, and supernatural and artificial persons such as organizations) must be represented in a dialogue or argumentation by one or more natural persons.

<sup>187</sup> For the argument that “freedom among likes” defines the condition of order (i.e. the law) of the human world, see FRB, and my “The Lawful and The Legal”, *Journal des économistes et des études humaines*, 1995, VI, 4, p.555-577.

<sup>188</sup> It is not as if persons come to an argumentation as disembodied minds and at the end of it go away with an assortment of bodily organs and other valuable things — prizes won in the argumentation game. Property rights may be *justified* in an argumentation; they are not *created* in an argumentation — no more than free-floating bodies and free-floating minds only come together to form a real person as a result of an argumentation.

Evidently, “Persons, i.e., beings capable of reason, ought to be rational” is a dialectical truth and “Our reason ought to be the slave of our passions” is a dialectical contradiction.

The above are examples of dialectical truths, or of dialectical contradictions, some of them “descriptive”, others “prescriptive” or “normative”. Together with others, some of which will be mentioned below, they constitute what I shall call *the law of reason*.

#### 4. *Rationally justified norms*

Clearly, engaging in argumentation entails a commitment to abide by a number of norms, because any violation of or departure from these norms vitiates and possibly even destroys the purpose of argumentation itself. These norms come into play whenever questions about the justifiability of actions of any kind (not only moves in an argumentation) are raised and submitted to argumentation. Any action, from merely holding one or another belief to producing large-scale effects in the physical world, may be questioned with respect to its justifiability. If an action cannot be argumentatively justified then it *is* unjustifiable; if it can be argumentatively justified then it *is* justifiable.

It is a dialectical contradiction to hold that an argumentatively justified conclusion is justified only within the context of argumentation itself<sup>189</sup> — for example, that assaulting another person in the course of an argumentation is unjustified, but that assaulting him afterwards is justified even if he has not done anything that would justify the infliction of pain or harm. Similarly, because bribing a person in the course of an argumentation is unjustified, it is also unjustified outside the context of argumentation.<sup>190</sup>

An argumentation that conclusively establishes that one is justified in claiming truth for a particular proposition, or validity for a normative principle, remains conclusive after the actual exchange of arguments has ceased. Of course, someone who did not hear the arguments may well reserve judgment until he has had a chance to evaluate them himself — but that too is an implication of the ethics of argumentation. However, a blunt refusal to accept the conclusion of an argumentation, unaccompanied by reasons that purport to justify the refusal, cannot commit anyone but the refuser himself and cannot be considered a justification in itself. A lazy skeptic can effortlessly respond to every argument with “I am not convinced”; but there is no point in engaging a lazy skeptic in an argumentation.

Moreover, dialectical truths oblige not just the actual participants in a dialogue in progress but all human persons. Justificatory argumentation appeals to reason, not to subjective preferences or personal quirks.

It is easy to refuse another person the opportunity to present his arguments, questions and answers, and thereby avoid having an argumentation *with him*.

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<sup>189</sup> Quite a number of Hoppe's critics like to argue that the ethics of argumentation binds only at the moment of argumentation itself and then only those who take part in it. (See the early *Liberty* symposium on Hoppe, referred to above in note 172, as well as Murphy and Callahan's critique, referred to in note 178.) If these critics were right, they would not only have “scored” against Hoppe, they would also have deconstructed the entire edifice of reason, law and justice without which the West would never have risen above the level of barbarism. (See section V of this text)

<sup>190</sup> A bribe, strictly speaking, is something offered or given to a person to make him do what he is under a justifiable obligation not to do. Offering the seller of a house more money than another candidate-buyer does is not bribery; offering the agent of the seller more money than his regular commission in return for not telling his principal about higher competing offers is bribery and not justifiable. Obviously, if the principal trusts his agent to do something that is unjustifiable, bribing the agent not to do it is justifiable— for example, bribing an agent of the mafia (or any other predatory organization) to lie to his principal about one's income.

Nevertheless, such a refusal is not a conclusive rational proof that he is not capable of reason. A's refusal to speak to B does not prove that B is beyond the pale of argumentative intercourse. Treating a person as if he were not a person is not justifiable on the mere ground that one has denied him the opportunity to prove himself capable of reason.

It is a dialectical truth that in dealing with one's likes (other human beings) one ought to *presume* that they are persons, at least until there is sufficient proof that they are not. The contrary presumption, that other people are not capable of reason anyway, is a dialectical contradiction, because it amounts to an aprioristic refusal to take their arguments seriously — it amounts to a refusal to even recognize their arguments as what they are: arguments. The *presumption of rationality* is implied in the practice of argumentation itself.

Obviously, the presumption of rationality is defeasible in particular cases. There may be occasions when someone is temporarily “out of his mind” or definitively “loses his mind”. Moreover, every human being goes through a stage early in life when his rational faculties and his knowledge of the world are still insufficient to allow him to participate in argumentations. However, it is customary not to hold young children responsible for their actions, and customary to hold grown-ups responsible for their actions, unless the particular case reveals sufficient reason to think otherwise. Few people are inclined to question whether this is a rationally justifiable custom — and with good reason, I should think.

If a man proves himself an *animal rationis capax* by engaging others in argumentation, then he *is* a person and ought to be regarded and treated as such by other persons. My questions and answers do not magically transform a non-rational blob into a responsible, answerable being capable of reason, who will once again become a non-rational blob as soon as I turn my back to him — nor am I so transformed by another's questions and answers.<sup>191</sup> There is no more evidence for the contrary proposition than there is for my saying that things exist only when I have an immediate sensation of them. Moreover, to assume the contrary would make all argumentations about anything other than the current argumentation itself pointless — and that would make the current argumentation pointless.

If there are norms that are undeniably valid for persons capable of arguing and actually participating in an argumentation then they are valid for all persons capable of arguing, even at times when they are not participating in an argumentation. Such norms are not like, say, the rules of chess that bind chess players only while they are playing the game. There is no apriori of chess to match the apriori of argumentation.

The ethics of argumentation does not contend “that whenever people are engaged in a debate, they have implicitly agreed to certain norms...”<sup>192</sup> To accept that contention is to uproot the argument from argumentation and reinterpret it as an argument about a game defined by rules that the participants have agreed upon. If that were the case, then obviously only the participants in an actual argumentation would be bound by those rules, and only for the duration of the argumentation game. However, the point of the apriori and the ethics of argumentation is that in order to participate in an argumentation people *must* accept the norms that are implied in the nature of argumentation. Whether an exchange of questions and answers is or is not an

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<sup>191</sup> A few radical materialists may deny the durability of anybody's personal identity (except their own) and thereby the possibility of argumentation among blobs of human matter, even the possibility that (again excepting themselves) the same man starts and finishes a single sentence, but they are prudent enough not to act on their “philosophy” to see how it would fare in a court of law.

<sup>192</sup> M&C, p.54.

argumentation does not depend on agreement, implicit or otherwise, on an arbitrary set of rules, but on compliance with the norms which *must* be adhered to if the exchange is to be an argumentation. Unlike the rules of chess, which define by stipulation what the game of chess is, the “rules” of argumentation are to be discovered in the nature of argumentation. Similarly, whether A proves B is not a matter of convention but of logic: “Although B does not follow logically from A, it is nevertheless the case that A proves B because we have agreed that a proof is constituted by rules that are different from the rules of logic” is no more than a roundabout way of saying “A does not prove B”.

To sum up: It is a dialectical truth that one should respect one's opponents in an argumentation as free and independent persons whom one should not even try to manipulate or intimidate with anything other than the force of one's arguments. Moreover, one cannot argue with d-consistency that argumentatively unjustifiable ways of dealing with other persons justifiably prevail outside the context of argumentation — those others might be one's opponents in a future argumentation. Therefore there can be no justification for having recourse to such ways of dealing with such others. In short: persons ought to respect their likes as free and independent persons.

Whether or not this is the principle of libertarianism or libertarian capitalism, it is in any case the rationally demonstrable foundation of the classical natural law ethic, the normative framework — the *law of reason* — within which natural persons (human beings, in so far as they are capable of reason) *ought* to solve their differences, disagreements and conflicts. Within this framework, a jurisprudence of freedom can propose and critically consider ways in which people ought to, or may, interact in various sorts of situations without violating the normative requirements implied in their nature as beings capable of reason.

### ***5. Significance for the history and philosophy of law***

A man accused of having committed a crime does not prove his innocence by proving that he committed no crime during the whole time he was in court (where his case was being argued). The point of the argumentation in court is to determine whether some particular action of his before he was hauled into court was justifiable or unjustifiable, excusable or inexcusable.

If a man proves his innocence with respect to a crime of which he has been accused, a *judge* would d-contradict himself if he were to say, “Congratulations, but I am going to hang you anyway. After all, it does not follow from the fact that you gave proof of your innocence that anybody ought<sup>193</sup> to pay attention to it, especially after the trial is over.” An agent, officer or magistrate in the service of a government might say such a thing without dialectical contradiction, but only if he makes no claim to do justice. An official condemns a man to the gallows, having heard only the arguments and witnesses of the prosecution and having denied the accused the right to defend himself. There is not a whiff of dialectical contradiction there as long as the official places himself in the realm of brute force or cunning manipulation, demonstrating by words or actions that he does not intend to justify his action. However, he would d-contradict himself if he were to go on to say that he has rendered justice and spoken truly as required by the ethics of argumentation, or to justify his refusal to justify his obviously unjust actions.

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<sup>193</sup> A proof of innocence implies that the man *ought* to be acquitted, released and left in peace; it does not imply that anybody has a *motive* for or *interest* in doing so. That is why those who want to cut every *ought* (appeal to reason) from the affairs of men and substitute for it appeals to satisfaction of wants, utility, self-interests or “happiness” are ultimately architects of injustice.

Perhaps the greatest merit of Western civilization was that, for a remarkably long time, it accepted the normative primacy of reason in human affairs, as the foundational principle of justice. This was the paradigm of natural law, which, in the words of Saint Thomas Aquinas, amounted to the recognition of “man's rational participation in the eternal law”.<sup>194</sup> Few thought of arguing against the principle that conflicts, disputes and disagreements ought not to be settled otherwise than by means of rationally justified actions in accordance with rationally validated principles. Force, intimidation, manipulation and so on may be excused on those occasions when they are used as means in *ultima remedio* to help establish or re-establish justice, but never when they are used autonomously to bring about whatever one can get away with.

Thus, it was accepted that there *is* a “court of reason” and that men should have and organize actual courts of justice to help ensure that reason should prevail.<sup>195</sup> The idea of a court of justice as an island of reason, where arguments would be appreciated on their merits, and where attempts at intimidation, trickery and so on would be checked and weeded out, became central to the ideology of the West. Inside the courts the ethic of dialogue or argumentation should reign supreme, regardless of how it fares in the rough-and-tumble of daily intercourse. Moreover, the findings of such a court, with respect to the justifiability of particular actions, should prevail over the emotional or calculated responses of those who witness or hear about them — at least to the extent that the court's findings are justifiable.

Only reason can justify — and that reason is not manifested in a monologue of one side's arguments, but in a dialogue, where arguments and counterarguments can be evaluated in an open confrontation. Thus, it was taken for granted that a court ought to hear all the parties involved in a dispute and give them an opportunity to justify or at least excuse their actions (“Audi et alteram partem”); that judges should arrive at the truth of the matter (in their verdicts, that is, *vera dicta* or truth-sayings) solely on the basis of “the merits of the case” as they emerge from the accounts of reliable witnesses and the arguments presented in court by the parties to the conflict; and that these verdicts should have normative authority as long as they are not shown to be wrong (that is, not *vera dicta* after all). Whatever the degree of social, economic or political inequality in a society, respect for the process of finding justice and a commitment to uphold its findings were held to be the keys to freedom and justice. The courtroom should provide the conditions that make fair argumentation possible (“equality before the law” and, via the practice of permitting the parties to call on advisors and advocates, even a rough equality of intelligence and argumentative skills).

It was a great idea, but of course the powerful, the rulers and their clients, often enough intervened in court proceedings and made a mockery of the independence of the courts of law, replacing them with boards of officials whose main function was (and is) to see to it that their master's voice is heeded by all. The judges were replaced with “magistrates”. The *jurists*, whose main concern is the knowledge and application of the principles of justice, were replaced with *legists*, whose main occupation is to know and apply their masters' wishes as these are revealed in legal edicts and codes.<sup>196</sup>

Nevertheless, even in this day of rampant legal positivism, the ideals of justice still fashion the way in which those boards and magistrates present themselves to the public

<sup>194</sup> Thomas Aquinas, *Summa Theologica*, I-II, Q.91, art.2, conclusion.

<sup>195</sup> “There is a court of reason” does not imply that such a court actually exists as a place where one can go and sit on a wooden bench. In the face of the fashionable neglect of and disdain for metaphysics, let us remind ourselves that (the law of) *being* does not reduce to (the law of) *existence*. Logically, existence is a contingency but being is not.

<sup>196</sup> For an etymological explication of the distinction between jurists (“ius”) and legists (“lex”), see “The Lawful and The Legal” referred to in note 187.

at large and to their masters. Unlike bureaucrats and diplomats, the magistrates posing as judges do not claim authority on account of their loyal subservience to their masters, but on account of their “independence” from them. Paying lip service to the ethics of dialogue and argumentation is vitally important for maintaining not only their position in society but also their status as possessors of a science of necessary things. While positivism rules the curriculum in the law schools, telling their students that only “the law” matters and that “the law” is nothing but the set of legal rules, edicts and decisions promulgated by the authorities that other rules in the same set designate as “legal”, the schools never tire of instilling in their students the sense that the implications of positivism do not apply to the magistrates and the advocates they are being trained to become. Like scientists, they should be aware that they are supposed to answer to a calling that transcends loyalty to any social or political regime. Like scientists, they should feel entitled to claim immunity from arbitrary interference, admittedly not as a general human right but as a professional privilege. And like scientists in the Age of Big Politicized Science, they should not have any qualms about serving and assisting the powers that be as long as the latter keep up the pretence of their “independence”.

Albeit in an increasingly emaciated and perverted form the ethics of argumentation still has a hold on the imagination as the bulwark of civilized co-existence, no matter how obscure the distinction between a scientist and a government expert, or between a judge and a magistrate, has become in public discourse. However, its force is sapped when the point of argumentation in a court no longer is to reveal which actions are justifiable and which are not but merely to determine which party complied with some set of arbitrary politically imposed rules. Then argumentation gives way to a contest in which one “legal mind” tries to outwit his opponent in a game that turns primarily on one's skills in combining officially recognized legal classifications of facts, legal rules, other legal data such as precedents, and currently fashionable notions into “a strong case”. Similarly, the ethics of argumentation and dialogue loses its grip on the intercourse of scientists if convincing the authorities of the social or political relevance of one's research becomes a priority.

The argument from argumentation is not a mere academic artifact without any practical significance. It underlies the Western tradition of the philosophy of law and its impressive harvest of principles of substantive and procedural justice, which command respect even after more than a century of systematic “debunking” at the hands of scientific positivists and others for whom man's reason counts for nothing and his voice (“vote”) for everything.<sup>197</sup>

## 6. *To argue or not to argue*

With few unfortunate exceptions, human beings are capable of reason. With unfortunately few exceptions, human beings prefer not to upgrade to the condition of an “animal rationale” by accepting or at least striving to live within the law of reason; many are opportunists, who appeal to the laws of reason, if at all, only when it suits them. For them, “What is in it for me?” is a far more pressing question than “What is the right thing to do?” Consequently, they prefer to get by on the basis of prudence rather than wisdom (prudence controlled by reason), just as they would do in their interactions with animals and other natural phenomena. Nevertheless, few people can resist the urge to distinguish between right and wrong, and to claim justification for their judgments in matters of right and wrong. However, many want the reward of

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<sup>197</sup> On the distinction between *speech* (logos, Latin ratio) and *voice* (phonè), see Aristotle, *Politics*, I, 2, 1253a9-15.

justification without arduous argumentation and are likely to settle for prejudices rather than well-argued judgments: “Many people would sooner die than think. In fact they do.”<sup>198</sup> That is not a refutation of the law of reason but an indication of man's imperfection in the light of his most distinctive faculty: reason.

Consider Jonathan Swift's statement that I have chosen as a motto for this paper: “[N]o person can disobey Reason, without giving up his claim to be a rational creature.”<sup>199</sup> It expresses a dialectical truth, “Reason ought to be obeyed” (for one cannot consistently argue that reason ought not to be obeyed), and it states an argumentatively justified consequence of disobeying reason: one thereby gives up the claim to be a rational being (for one cannot consistently argue that one is a rational being and reject the obligation to abide by the dictates of reason). Recall that Swift defined the human being as an “animal rationis capax” — not as a being that is always and everywhere, as it were automatically, in tune with reason, but as one for whom it is a matter of choice whether or not he or she will accept to be rational: to live or to strive to live, to accept to judge and be judged, in accordance with the dictates of reason.<sup>200</sup>

Obviously, it is physically possible for a human being to refuse to place himself under the authority of reason. However, he cannot without dialectical contradiction argue that the dictates of reason do not apply to him but only to others. The same holds for a man who wants to claim his rights according to the ethic of argumentation but refuses to recognize the obligations it imposes. That too is an argumentatively untenable position. Men who refuse to be bound by the ethics of dialogue or argumentation cannot hope to succeed in justifying that position argumentatively. Such people choose to act, and to interact with others, outside the “realm of reason”. Placing themselves outside the law of reason, the context where appeals to reason or justice can meaningfully be made, they choose to be *outlaws*. They not only give up the claim to be rational persons; they also free all others from the rationally, argumentatively valid obligation to treat them as persons according to the dictates of reason.

The point is that whether or not one activates one's rational capabilities *is* a matter of choice. We can choose to enter into civilized commerce with one another by accepting the apriori of argumentation and all that it entails, or we can refuse to do so and play the Hobbesian jungle game<sup>201</sup>. Some will choose the second option, thereby waiving their rights under the law of reason and justifying others to treat them as “wild things” (which one can try to manipulate but with which it is pointless to argue) — and if they do “injury contrary to right”, justifying others to treat them as “enemies”.<sup>202</sup> There is no contradiction in their choice as long as they do not pretend to be able to argue that

<sup>198</sup> Bertrand Russell, as quoted in Anthony Flew, *Thinking about Thinking*, Fontana / Collins, Glasgow, 1975.

<sup>199</sup> Jonathan Swift, *Gulliver's Travels*, Part IV, chapter 10. (Part IV is his “romance of reason”: *A voyage to the country of the Houyhnhnms.*)

<sup>200</sup> On the basis of Swift's definition, the fundamental choice for humans is “Either be rational or be irrational”, and the corresponding basic norm “Be rational”. (The distinction between *rational* and *irrational* applies only to beings capable of reason.) On the basis of the more common definition of man as an “animal rationale” (a rational animal), the fundamental alternative is “Either be reasonable or be unreasonable” and the basic norm is “Be reasonable”. (The distinction between *reasonable* and *unreasonable* applies only to rational beings.) Of course, some human beings may not even be capable of reason because of a genetic defect, an accident or an illness. For the purpose of this discussion, we need not consider them further: they are not potential opponents in argumentation. Although someone else may take it upon himself to represent them in an argumentation, for example in a court of law, they are not capable of self-representation (or indeed of choosing their representatives).

<sup>201</sup> Hobbes, *Leviathan* (1651), especially Part I, Chapter XIII.

<sup>202</sup> Democritus: “If a thing does injury contrary to right, it is needful to kill it. This covers all cases.” [B258] “According as has been written concerning wild things and creeping things, if they are 'enemy', so also is it needful to do in the case of human beings.” [B259a] (Fragments as translated in Eric A. Havelock, *The Liberal Temper in Greek Politics*, Jonathan Cape, London, 1957, p. 128).

placing themselves outside the law of reason is “the right thing to do”. Indeed, some people succeed remarkably well in placing themselves outside (or “above”) the law of reason. Nevertheless, they, their supporters, clients and apologists, cannot ever justify their stance in a rational argument. They may not care about that as long as they get their way, but that is their choice; it is not an argument with any rational force. Their choice to make themselves outlaws in no way invalidates the laws of reason.

### ***7. Outlaws and the presumption of innocence***

Hoppe had no pressing reason to discuss the concept of an outlaw in the context of his comparison of socialism and capitalism. Nevertheless, the concept is essential for a correct appreciation of argumentation ethics. Not understanding this, critics such as Murphy and Callahan assume 1) that Hoppe's theory implies that criminals are self-owners, who cannot rightfully be punished for their crimes because punishment violates their self-ownership<sup>203</sup>; and 2) that, if the theory should deny that criminals are self-owners, it cannot claim self-ownership for anyone:

“if Hoppe's argument doesn't prove that criminals own themselves, then it can't prove that non-criminals do, either, since there is nothing in the argument itself concerning criminal behavior.”<sup>204</sup>

Against Murphy and Callahan's reading of it, we must point out that the argument from argumentation clearly distinguishes between persons who stay within the law of reason and persons who avoid or evade that law. Among the former self-ownership is argumentatively undeniable; among the latter the question of ownership (as distinct from effective control), let alone self-ownership (as distinct from effective self-control), does not even arise.<sup>205</sup>

Of course, rational persons may be justified in using violence against a *brute* or a *criminal*, i.e. one who is by nature or by his own volition outside the law of reason, incapable or unwilling to submit to the test of justificatory argumentation. The ethics of argumentation restricts the range of one rational being's lawful actions with respect to other rational beings, who like him accept that actions should be justifiable; it does not impose restrictions on what a rational being may do to a rock that threatens to crush his home, a bear that threatens to tear him apart, a criminal who tries to rob him. A thing that is outside the realm of the law of reason, or a man who makes himself an outlaw, say, by fleeing from justice or refusing to make restitution to those he has unlawfully wronged, is not (or is no longer) in the same position as one who continues to submit to the law of reason or as the repentant robber who recognizes that his actions were unjustifiable and makes a genuine offer of full restitution to his victim. Murphy and Callahan simply assume that bashing the head of an outlaw, a brute or an unrepentant robber, is just as much a violation of an argumentatively justifiable property right as is bashing the head of an innocent person or a repentant criminal. They are wrong.

<sup>203</sup> M&C, p.58: “Hoppe has shown that bashing someone on the head is an illogical form of argumentation. He has not shown that the fact that one has ever argued demonstrates that one may never bash anyone on the head, nor has he demonstrated that one may not validly argue that it would be a good thing to bash so-and-so on the head.” They then assert “We cannot convince you of anything by clubbing you, but we may quite logically try to convince you that we should have the right to club you.” (M&C, p.58) True, they may try to convince me that they ought to have the right to punish me for my crimes, if I have committed any. There is a good chance that they will succeed. But how on earth do they hope to convince me by means of logical arguments that they should have the right to club me, regardless of what I may have done or will do? If the (unqualified) statement “We have a right to club you” were justifiable then clubbing a person would be a justifiable action also in an argumentation.

<sup>204</sup> M&C, p.64.

<sup>205</sup> See below, section VIII.

My argument here refers to the theory of crime and punishment implied in the ethics of argumentation, a theory that is familiar to libertarians.<sup>206</sup> Its bare outline<sup>207</sup> is as follows: Suppose that one person, T (a tortfeasor), intentionally or unintentionally, voluntarily or involuntarily, caused unlawful harm to another, V (his victim). Then there is an argumentatively justified obligation for T to undo, or compensate for, all the harm he caused V to suffer. This obligation corresponds to V's right not to suffer unlawful harm from another person. If T readily demonstrates his willingness and ability to make full restitution to V, the two must rely on negotiation, mediation, arbitration or adjudication to determine how and when full restitution is to be made. As soon as full restitution is made, the matter is settled, and V has no right to demand or extract *more* from T. In particular, V has no right to "punish" repentant T. However, if T *refuses* to honor his obligation to make restitution, for example by trying to evade being brought to justice, then he turns himself into a criminal<sup>208</sup>. Consequently, V has the right to *enforce* his claim against unrepentant T,<sup>209</sup> who is now no longer a mere tortfeasor but a criminal.

Thus, we have the *presumption of innocence*, i.e., the principle that no person shall be considered a criminal or punished as a criminal unless he willfully places himself outside the law of reason. Any "animal rationis capax" is to be presumed to accept the law of reason until it demonstrates that it does not.<sup>210</sup> However, one who does place himself outside that law, not only gives up his claim to be a rational person but every other claim as well that invokes that law, including claims to ownership or self-ownership. As will become clear in the next section, none of this implies or even suggests that claims of ownership and self-ownership cannot be justified within the law of reason.

### **8. Self-ownership as seen through positivist spectacles**

Argumentation ethics does not fit the modern academe's dominant paradigm of empirical science and its attendant positivistic and scientific methodologies. It is therefore no surprise that many of the academic critics of argumentation ethics have no use for it. Normative propositions such as "Being capable of reason, human persons ought to be rational" simply do not pass the positivists' muster and should therefore never be used in "scientific reasoning". Positivists do not care to argumentatively justify their rejection of such propositions: "dialectical truth" and "dialectical contradiction" are not in their methodological or epistemological repertoire. They do not, of course, deny that *they* themselves are capable of reason, and they do not deny that in their academic discourses they ought to show respect for truth and logic; ought to be willing to produce reasons or justifications for, and to accept rational criticism of, every thing they do or say; ought to respect each other as free and independent persons who should not even try to manipulate or intimidate one another with anything other

<sup>206</sup> Randy Barnett, "Restitution: A New Paradigm of Criminal Justice", in Randy Barnett & John Hagel, eds, *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Books, Cambridge, Mass., 1977.

<sup>207</sup> FRB, 224-231.

<sup>208</sup> A crime (*crimen*) is an act that does not discriminate between right and wrong.

<sup>209</sup> T invades the property of V and thereby places himself under the jurisdiction of the latter: either he recognizes his transgression and agrees to behave as V requests him to behave as long as he remains on V's property, or he refuses and consequently remains within the jurisdiction of V, thereby relinquishing any claim to be a self-owner

<sup>210</sup> This presumption is rationally justified as being undeniable in any argumentation. The contrary presumption, that a person rejects the laws of reason until he proves otherwise, a fortiori that a person rejects the laws of reason even if he may occasionally pretend to accept them, defines the Hobbesian view of man (which may fit some people but cannot be presumed to fit all).

than the force of their arguments; and indeed ought to respect the full range of libertarian rights in so far as they are relevant for academic intercourse<sup>211</sup>. They are unlikely to consider these norms rationally justified or even justifiable; they are far more likely to consider them as no more than “conventions” or “rules of the game”, like the rules of chess. In the perspective of positivism, such rules are not grounded in a rational appreciation of the essence or final form of science; rather, they happen to be the rules effectively followed by people who are conventionally regarded as scientists, and at least tolerated by public opinion and public authorities (the powers that be).

Consequently, the norms implied in argumentation ethics can enter the discourses of positivists only as “mere conventions” or as perhaps disguised empirical statements. Thus, we may expect two sorts of attack from positivists on any presentation of argumentation ethics such as Hoppe's: 1) argumentation is a conventional game and as such its rules have binding force only for those who play the game and only for the duration of the game; 2) the ethics of argumentation implies empirical generalizations which can be shown to be false by suitable counterexamples. Murphy and Callahan, indeed, try both sorts of attack, although they certainly would not like being labeled as positivists. They sum up their critique as follows:

“[Even] on its own terms, Hoppe's proof at most establishes fleeting and partial ownership of one's body. [... His] proof doesn't even succeed in this, for it confuses temporary control with rightful ownership.”<sup>212</sup>

The first sentence says that Hoppe has only shown fleeting ownership of one's body, namely, *ownership for the duration of the argumentation*, and even so only partial ownership, namely, *ownership of those parts of one's body that one effectively needs to participate in an argumentation*. The second sentence states that Hoppe does not demonstrate ownership but only effective use of those parts of one's body.

As we have seen already<sup>213</sup>, the “fleeting ownership” criticism fails. What a justificatory argument justifies (whether or not that is an ownership claim) is justified not only while the argumentation is in progress and not only for those who actually participate in it but for all time and for all actual and potential arguers — for all persons. This is also true for the validity of the norm “Beings capable of reason ought to respect each other as free, independent, separate persons”, which implies that they ought to abstain from using force or other non-rational means against one another unless there is justification for resorting to such means. As Hoppe put it:

'Nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone's control over his own body.' This rule is implied in the concept of justification as argumentative justification.... Since according to the nonaggression principle a person can do with his body whatever he wants as long as he does not thereby aggress against another person's body, that

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<sup>211</sup> E.g., using or threatening to use one's own or, say, the state's force or violence against an opponent or his property; taxing or regulating one's opponent's research; fraudulent doctoring or manufacturing of evidence; tampering with, stealing or destroying an opponent's research material; and so on — these are unlawful moves in any academic, scientific or philosophical discussion. The essential, internal norms and values of scientific and philosophical discourse are those of the ethics of argumentation, and such discourses presuppose respect for the full set of libertarian rights on the part of all who seek to participate in them. (See “Economics and the limits of value-free science”, referred to in note 175.) The picture has become more complicated with the rise of bureaucratic Big Science and the concomitant reduction of many scientists to employees working to agendas set by their superiors in the organization, department, or corporation that employs them — cf., for example, the transformation of the university from a “community of scholars” into a hierarchical organization of employees.

<sup>212</sup> M&C, p.64.

<sup>213</sup> See section IV of this paper.

person could also make use of other scarce means, just as one makes use of one's own body, provided those other things have not already been appropriated by someone else but are still in a natural, unowned state.”<sup>214</sup>

Clearly, it cannot be concluded from this that all human beings per se *are* self-owners. Moreover, there is no reason to suppose that the argument intends to show that all human beings as such *are* self-owners. Why then do so many critics seem to assume that the argument *intends* to prove precisely that, and therefore *fails* because it does not?

“At best, Hoppe has proven that it would be contradictory to argue that someone does not rightfully own his mouth, ears... and any other bodily parts essential for engaging in debate. But that clearly would not include, say, a person's legs...”<sup>215</sup>

It is a dialectical truth that the participants in an argumentation must have *physical control* over some parts of the world and in particular of their own bodies. This does not mean, however, that participants in an argumentation must have or even must be presupposed to have *ownership* of those parts of the world or their bodies. Ownership, unlike possession or effective control, is *not* a merely physical relation. 'Ownership' means justifiable control, that is, argumentatively justifiable control; therefore ownership can be determined only as the result of an argumentation about the justifiability of a person's having possession or control of one or another means of action.

Nevertheless Murphy and Callahan consider it “a more fundamental objection” that “one is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership.”<sup>216</sup> That proposition is simply true but the question is whether it is a relevant objection to Hoppe's argument. Suppose I am charged with a crime in China. To comply with some minimal requirements of justice the Chinese court concedes that I should be assisted by a competent translator. I need one to be able to participate in the arguments made in court. Yet, my need for such a translator does not prove that the one I eventually get is my property. Did Hoppe say anything to suggest otherwise? I cannot find any place where he logically committed himself to such an absurdity and Murphy and Callahan do not direct me to one. Instead, they attempt to make Hoppe sound as if he were a Georgist.<sup>217</sup> The insinuation is pointless. The fact that I need standing room in the Chinese court in order to be able to attempt to justify my actions does not make me the owner of a little piece of China. The Chinese are not contradicting themselves in conceding me standing room in the court without granting me ownership rights in Chinese soil. Murphy and Callahan suggest that if the Chinese are not contradicting themselves then also one who “concedes” another the use of his body or some parts of it for the duration of the discussion is not contradicting himself if he denies the other ownership of his body. True enough: denying that some person is a self-owner is not per se a dialectical contradiction. But that does not mean that his claim to be a self-owner — i.e., his claim that only he has justified and indeed justifiable possession and control of his body — cannot be justified.

Murphy and Callahan also claim<sup>218</sup> that a theist may be wrong in asserting that God owns all of us, but insist that he is not thereby contradicting himself. Therefore, or so

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<sup>214</sup> S&C, 133-134.

<sup>215</sup> M&C, p.56.

<sup>216</sup> M&C, p.60.

<sup>217</sup> M&C, p.61.

<sup>218</sup> M&C, 60-61.

they say, the thesis of self-ownership is not without a logically coherent alternative and so cannot be necessarily true. They fail to see that a dialectical contradiction is not a *contradictio in terminis* but a contradiction between what is said and the saying of it. In this particular case, they moreover fail to note the difference between arguing about God and arguing with God. The question of God's ownership would have to be decided in an argumentation with God<sup>219</sup>, not with any self-proclaimed representative of God, who would have a hard time proving his credentials anyway — so much so that it is doubtful that he would ever get to discuss the question of God's ownership itself. The same applies to discussions about Society or The People's having ultimate ownership of our bodies or other things.

The concept of ownership makes sense in the context of argumentation (the moral sciences), not in the context of describing the interaction of merely physical forces (the behavioral sciences). Unless I am prepared to argumentatively justify my actions and to accept justifying arguments made by or on behalf of others — in short, unless I agree to live within the law of reason, I cannot without dialectical contradiction claim ownership of anything, including ownership of myself. A wild animal, no matter how strong and cunning, makes no ownership claims; a man who does not care about the dictates of reason cannot consistently claim that his control over or use of some parts of the universe is to be respected because it is argumentatively justified.

In many cases, of course, possession or effective control is unjustified, even unjustifiable. The argument from argumentation does not deny that. But neither does it deny that there are cases of justified or justifiable possession or effective control. Recall once more Swift's definition of man as an “animal rationis capax”, bound by the argumentatively undeniable norm that it ought to be rational. Swift concluded: “No person can disobey Reason, without giving up his claim to be a rational creature.” We can now add: “Giving up the claim to be a rational creature entails giving up the claim to be a self-owner, or indeed an owner of anything whatsoever.” One who places himself outside the law of reason, thumping his nose at justificatory argumentation, cannot consistently claim to own what he possesses or controls. In contrast, a person who lives within the bounds of reason will have no difficulty proving justifiable possession of any part of his body or indeed of any other thing that he acquired without injustice to anyone. After all, one cannot without dialectical contradiction *presume* that another person does not own his body. A person is to be regarded as a self-owner unless and until specific reasons are adduced for holding that his control of his body is not justified. It would be a dialectical contradiction to deny this: there is no point to engaging in an argumentation with someone who believes that no person has a right to use his body to express himself or to speak his mind.

To appreciate the undeniable justifiability of *the presumption of self-ownership*, it suffices to step out of the rarified atmosphere of academic discourse, where self-ownership is just a word or free-floating concept. Let us sit down, you and I, and facing one another argue about who may be presumed to own (justifiably control) whom: I me and you you (self-ownership); I you and you me; I both of us; you both of us; I and you both of us; or none of us either of us.<sup>220</sup> Chances are that you and I are already in the

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<sup>219</sup> Assume that Murphy and Callahan refer to a theist in the Judeo-Christian tradition: Would God claim justifiable possession or control of a creature that He put out of his Garden when He discovered that it was capable of reason and free will? What does all the biblical talk about Covenants mean if we are asked to consider a covenant between an owner and his property?

<sup>220</sup> An academic might argue that humans are not individual persons at all but merely contingent aggregates of cells; or that they are merely abstractions (“Me man, you woman”; “Me philosopher, you economist”). Such a supposition certainly would remove self-ownership as an argumentatively defensible position... along with every other possible distribution of ownership. Indeed it would render the concept of

perfect condition for an argumentation of that kind, if there is no prior event that has caused one of us to be indebted or subordinated to the other, say, as debtor to creditor or criminal to victim. It will soon become obvious that the presumption of self-ownership is the only argumentatively robust principle in the list,<sup>221</sup> the only one that is part and parcel of the factual and ethical presuppositions of argumentation.

Of course, from the perspective of positivism this explication is to no avail: for the positivists, justification adds nothing to anything and ownership reduces to effective possession, either actual possession or possession recognized and protected by the powers that be; ethical notions must be eliminated from “scientific reasoning”, if not by simply ignoring them then by re-interpreting them as merely empirical concepts.<sup>222</sup>

Disregarding Hoppe's explicit protestations,<sup>223</sup> even Murphy and Callahan prefer to interpret Hoppe's dialectical statements about ownership (justifiable control) as empirical statements about the physical preconditions of the ability to speak (effective control) and to attack him by means of empirical counterexamples. Hence, their reference to the fact that a person without legs can argue with others<sup>224</sup> and their conclusion that, since legs are not needed for the purpose of communication, Hoppe's argument cannot even account for the fact that a person owns his own legs. Hence also, their reference to “slaves”. These do not *enjoy* libertarian rights, yet are able to argue. Therefore — or so Murphy and Callahan claim — libertarian rights are not necessary for the ability to argue, and Hoppe's argument cannot account for self-ownership at all. However, because the general empirical statements against which they are directed are not part of Hoppe's theory, the counterexamples do not affect the theory in the least.

Hoppe's argument is not that “This is mine” follows from “I need this to be able to participate in an argumentation” because it would be contradictory to say, “Indeed, you need it, but I deny that it is yours.” The argument is that when A and B enter into an argumentation both of them do so under the d-valid presumptions of rationality, innocence, and self-ownership—presumptions that will hold until there is proof that they should be withdrawn. Neither A nor B can deny that he is arguing with *another* person, one who is both a person and another person — in the words of the time-honored formula, a separate “free and equal person”. Neither of them can justifiably claim to own any other participant's justifiable possessions (his body or any part thereof, or any other, non-somatic means of action), or, of course, the law of reason itself. However, the fact that an outlaw (one who has placed himself outside the law of reason) needs his tongue to utter or his hand to write statements does not mean that he *owns* (as distinct from *possesses* or *has physical control over*) these body parts. One

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argumentation meaningless, and with it also the concept of the ethics of argumentation. Academics can, and in fact often do, dismiss the evidence that the objects of their research are arguers like them (see below, section IX) but do not often try to justify that dismissal.

<sup>221</sup> Rothbard appreciated this, not surprisingly, because he had made use of the device of listing the logical alternatives to the principle of self-ownership and had found each of them wanting (although not on account of their demonstrable untenability in an argumentation, see Murray N. Rothbard, *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982, p.45f).

<sup>222</sup> E.g., “desirable” means “desired”; “ought” means “is preferred”, and so on.

<sup>223</sup> S&C, p.137; M&C, p.62.

<sup>224</sup> Legless people can communicate and argue; so can a blind people, people attached to or using a device that replaces their heart or lungs, or remedies their severely incapacitated hearing. However, a distinction must be made between asking a person whether he can justify the possession of his natural body or any of its parts, and asking him whether he can justify his possession of an artificial contraption or device. “Where and how did you get that hearing aid?” makes sense in a way “Where and how did you get your stomach?” does not. The reason is not that a stomach cannot be acquired in unlawful, unjustifiable ways — given the state of modern medical technology it probably can be — but that there is a decisive reply that, if true, stops any request for a justification: “I was born with it; it's been a part of me for as long as I have been around.”

cannot at the same time repudiate the law of reason, which is what a criminal does, and invoke it to prove justifiable control, i.e. ownership.

Murphy and Callahan then claim that, even if one sets aside their remarks about fleeting and partial self-ownership,

“it's still the case that Hoppe has only proven self-ownership for the individuals in the debate... For example, so long as Aristotle only argued with other Greeks about the inferiority of barbarians and their natural status as slaves then he would not be engaging in a performative contradiction.”<sup>225</sup>

That is not true: Aristotle's general statement that barbarians have enough reason to obey orders and please their Greek masters but not enough to qualify as fully human<sup>226</sup> is not defensible in an argumentation. If Aristotle had tried to justify his views to a moderately articulate barbarian, the contradiction would have been obvious. He could only try to avoid the humiliation of being caught in a dialectical contradiction by *refusing* to justify his views to the so-called barbarians, by refusing to give them a hearing. However, the attempt would have been in vain. For that refusal itself is a contravention of the ethics of dialogue and argumentation. It exemplifies not simply an intellectual mistake but a morally vicious stance. Any person, Greek or non-Greek, could have made that clear.

There is no way in which Aristotle — the Philosopher! — could have argued that his refusal to let the “barbarian” others speak for themselves was argumentatively justified. Refusing to argue is not a form of producing an argument. There can be no argumentative justification for Aristotle's refusal to put his statements to the only relevant test: engage a non-Greek in an argumentation. After all, Aristotle was not merely stating the obvious, namely that the sentence 'Greeks are rational in a way non-Greeks are not' is not a *contradictio in terminis*. Yet, Murphy and Callahan claim (without argument) that Aristotle's refusal to talk to barbarians is as justified or as unjustified as our refusal to try to justify our views on zoos to a polar bear or a horse!

“[T]he Hoppeian might respond that horses are not as rational as humans, and therefore do not need to be consulted. But Aristotle need only contend the same thing about barbarians: they are not as rational as Greeks.”<sup>227</sup>

What sort of argument is that? Do I need only contend that I am the only rational person in the world to *justify* the claim that my arguments are unassailable? We should soon discover that polar bears and horses are not creatures with which it is wise or safe or indeed possible to reason. Are Murphy and Callahan suggesting that that is exactly what Aristotle would have discovered if he had had a face-to-face discussion with a barbarian, any barbarian; and that he therefore was justified in refusing to give any barbarian an opportunity to prove him wrong?

Murphy and Callahan's contention, that refusing another person a hearing is just as rationally justifiable or unjustifiable as not giving animals a forum in which to expound their views on zoos and animal rights, is ridiculous. It is precisely in the context of argumentation that we cannot overlook the difference between another person and another animal without making complete fools of ourselves. In defense of Murphy and Callahan one might point out that academics, including most economists and social scientists, tend to deem scientific only theories *about* humans beings that treat them not as potential opponents in an argumentation but only as suitable matter for “empirical

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<sup>225</sup> M&C, p.58.

<sup>226</sup> Aristotle, *Politics*, I, 5, especially at 1254b21-23.

<sup>227</sup> M&C, p.59.

research".<sup>228</sup> I should think that that is a fundamental flaw in much of contemporary social and economic science.<sup>229</sup> In an enquiry relating to the foundations of ethics it is utterly out of place.

Murphy and Callahan then refer to David Friedman who argued that Hoppe must be wrong when he claims that self-ownership is a prerequisite to debate because countless slaves have engaged in successful argumentation.<sup>230</sup> However, Hoppe did not make the empirical and absurd claim that a person is incapable of arguing merely because the powers that be *legally* classify him as a slave, or that being the *legally recognized* "owner" of one's body is a necessary condition for being capable of engaging in argumentation. His argument was that such legal classifications and the actions they sanction or legitimize cannot be justified in an argumentation with the slaves or indeed in any argumentation that takes the presuppositions of argumentation seriously.<sup>231</sup>

Consider, on the one hand, a master who enjoys debating the justifiability of slavery with his slaves after dinner and then sends them back to their cage, no matter what the outcome of the discussion may be. Consider, on the other hand, a master who frees his slaves after being exposed to the argument that slavery is not justifiable. Which of the two takes argumentation seriously? Which of the two acts as a rational being rather than a mere "animal rationis capax"? The first master obviously regards argumentation as no more than a parlor game; he refuses to argumentatively justify his actions outside that game and to make them conform to justified principles. He demonstrates by his actions that he does not take argumentation seriously if it does not suit his purposes. Why should his opponents in the discussion, his "slaves", take the argumentation in question seriously? Why should anyone? Hoppe answers: No one should take that argumentation seriously because it is not a genuine argumentation. Embracing Friedman's avowed positivism, which instructs him to find an *empirical* difference between the moves of a genuine argumentation and those of a mock argumentation, Murphy and Callahan jump to the conclusion that they have refuted Hoppe. They are mistaken: to refute the Hoppeian argument from argumentation they would have to show that the first master and his "slaves" can with d-consistency engage in serious argumentation, accepting the dialectical principles such argumentation entails. Murphy and Callahan do not even try to make that argument.

Recall that Aristotle defended slavery with the argument that it is not primarily a conventional institution but a natural (and justifiable) condition of "inferior people". His defense failed, as we have seen, because contrary to the requirements of the ethics of argumentation he had refused to submit his reasoning to the only test that could decisively refute it. The scandal of slavery is not in the fact that slaves are not, let alone cannot be, self-owners but in the fact that most of the people held as slaves are self-

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<sup>228</sup> However, as the "Austrian praxeologists" Murphy and Callahan claim to be they should be aware of Mises's statement, "The real thing which is the subject matter of praxeology, human action stems from the same source as human reasoning." Ludwig von Mises, *Human Action*, 3rd revised edition, Henry Regnery, Chicago, 1966 (hereafter HA), p.39. Not just the students of, but also the people studied by, praxeology are *rational* agents. Indeed, that is the basic insight of praxeology.

<sup>229</sup> That was the point of "Economics and The Limits of Value-Free Science", referred to in note 175.

<sup>230</sup> M&C, p.62. The reference is to D. Friedman, "The Trouble with Hoppe", *Liberty*, 1988. Note the ambiguity of the word 'successful' here. How many slaves have successfully argued their way to freedom?

<sup>231</sup> Obviously, as noted before, there may be cases where the use of force to deprive another of his freedom is justified, for example to make him pay for his crimes, or to stop him from completing the crime he is in the process of committing. There is the difference between a criminal and a man who is in a delirium: the latter is temporarily incapable of exercising self-control. Depriving him temporarily of his freedom of movement (he is ex hypothesi temporarily not capable of *acting*) is not a matter of justice but of prudence and maybe even kindness. One may be justified in using uninvited force against such persons. However, these are not paradigmatic cases of the sort of slavery to which Friedman or Murphy and Callahan refer.

owners, unjustifiably deprived of their freedom. In other words, the scandal of slavery has very little to do with the persons held as slaves and very much with the people holding them unjustifiably as slaves.

### 9. *The fallacy of scientism*

The conventions of academic writing tend to prevail over the requirements of the ethics of argumentation, even where adherence to those conventions leads to scientific fallacies.<sup>232</sup> The basic convention is the subject-object distinction, in particular, the notion that the subjects and the objects of research are qualitatively different sorts of entities. That notion is appropriate where the subject is a human person and the object some non-human, non-personal form of life or matter. However, it is inappropriate where both the subjects and the objects are human persons.<sup>233</sup> There is a difference between theorizing about the human world *as if* it were a separate realm of things with which we can have no intellectual, argumentative intercourse whatsoever, and theorizing from within the human world about the human condition.

The scientific fallacy results when academics pretend to study the human world “from the outside” as if they (*rational* beings) are no part of it, as if the objects of their study (*human animals* or, perhaps, mere *black boxes*) are as different from them as are snails or crystals. On the one hand, the academics recognize that in their own disputes, where they face one another, they should abide scrupulously by the requirements of the ethics of dialogue, if they want to be accepted as members in good standing of their academic communities. Thus, in the communications and argumentative exchanges within their academic community, ill defined as it may be, they fully accept that argumentation is between one person and another, between an *I* and a *You*, and also that the success or force of the argumentation does not depend on who is the *I* and who the *You*. On the other hand, people outside the academic community should never be considered even a potential *You* or *I*; they are assigned the status of an impersonal *It* or *Them* and should not be regarded as rational persons of the same sort as the academics who theorize about them. Consequently, it makes no sense to think that *among themselves* those human animals or black boxes are rationally bound by, and entitled to treatment according to, the ethics of argumentation in the way the academics are. As a corollary, statements about “ordinary people” should not be applied to the academics themselves.<sup>234</sup>

The scientific and positivistic insistence on a radical subject-object dichotomy between “us” and “them” precludes that the two sides of the dichotomy are united by any apriori of argumentation. Indeed, scientism requires that the rationality of ordinary people be methodically disregarded: their *arguments* must be re-interpreted as instances of mere behavior to qualify as legitimate scientific data. In a similar vein, the ethical notions that define the academic community must be emptied of their primary ethical content before they can be applied to the human objects of research. As Anthony de Jasay memorably put it with respect to justice, unless justice is defined as something

<sup>232</sup> F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, LibertyPress, Indianapolis, 1976 (1952) is the seminal discussion of scientism in English.

<sup>233</sup> As Mises put it with characteristic aplomb: “All authors eager to construct an epistemological system of the sciences of human action according to the pattern of natural sciences err lamentably.” (HA, p.39)

<sup>234</sup> I recall an incident involving the late George Stigler at a conference in Spain in the 1980s. Hearing that I had written a book on reason and natural law, Stigler started to ridicule reason, going so far as to say that there is as much reason in a monkey’s antics as in any human act. At that point I asked him whether he was trying to tell me something about how he wrote his books; he gave me a blank stare and stormed out of the room.

else than justice,<sup>235</sup> it has no place in the contemporary academy's "scientific" research concerning the human world. "Justice" is no more than a subjective relative value or it is a nominal standard imposed by the scientific observer that answers, say, to this or that quantifiable maximum or this or that calculable condition of equilibrium in the pool of human matter. Libertarianism likewise must boil down to the *mere belief* that ordinary human beings have more or less the same rights relative to each other as academics have in their academic community. However, any justification of that belief about the ethics of beings outside the academic community of scientists must be different in kind from the justification of the ethics of the academic community itself. Indeed, the subject-object dichotomy implies that rational, argumentative capacities cannot have the same kind of ethical implications for "ordinary people" that they have for intellectuals. Consequently, an academic's commitment to libertarianism as a valid principle for *all* human persons has the same sort of contingent relation to the ethics of argumentation as any opinion or theory of animal rights has.

If the separation of mankind in two distinct species — "we, the arguers who make up the academic community, and *they*, the black boxes we define as relevant behavioral units" — is made into an axiom of the scientific study of the human world, the relevance of "our" ethical principles to ordinary mankind must be as contingent, arbitrary or delusional as it is to mosquitoes or black holes. Hoppe explicitly refuses to accept that axiom.<sup>236</sup> Given the arguments that they set forth in their critique, it seems fair to say that critics such as Murphy and Callahan at least implicitly subscribe to that axiom. Hoppe most certainly does not appeal to the prevailing consensus in, or the mere conventions of, any particular human community, no matter how it labels itself. He appeals to the capacity of *all* human persons to recognize one another as persons, at least when they get involved in asking questions and giving answers, and arguing about the reasons for their questions and answers.

In scientific positivism the critics of argumentation ethics may well find all the arguments they need for their belief that an academic does not formally contradict himself when he says that human or other animals do (or do not) have one or another right. True as this is, it does not amount to an argumentative justification of any form of scientific positivism — unless, of course, it were true that academics belong to a different species than ordinary men and women.

The baneful influence of scientific positivism emerges most clearly in the context of education. What happens to education when the apriori and ethic of argumentation no longer binds teachers and pupils in a single community of rational persons? The enthusiasm with which many academics support, say, Hume's dictum that *reason is and ought to be the slave of the passions*,<sup>237</sup> as if it were a deep insight into the truth about human nature, raises the question what sort of education could be built upon the positivist principle as it is applied to human affairs. At the individual level, it translates into "Your reason is and ought to be the slave of your passions; do not question your

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<sup>235</sup> Anthony de Jasay, "Justice as Something Else", chapter 9 in his *Justice and Its Surroundings*, Liberty Fund, Indianapolis, 2002, 127-141.

<sup>236</sup> Cf. S&C, p.128, where Hoppe calls empiricism in general and emotivism in particular "self-defeating". Empiricism and emotivism reflect the positivist and scientific requirement that human actions and normative statements be interpreted as mere behavioral data before "science" can deal with them. For Hoppe's critique of empiricism, see S&C, chapter 6.

<sup>237</sup> David Hume, *A Treatise of Human Nature*, II, part 3, section 3. Hume attempts to explain this "somewhat extraordinary opinion" (his words) as a mere tautology in the terms of his own system (that defines reason as inert and therefore capable only of "serving" and "obeying" the passions by pronouncing on the existence of objects or the sufficiency of means for attaining an object). However, it was as an "extraordinary opinion", not as a mere analytical tautology, that Hume's dictum became the more or less explicit premise of so many academic discussions in the sciences of man.

desires, only the efficacy and efficiency of the means to realize them”<sup>238</sup>; at the institutional level, it translates into, say, “Schools and universities, the pursuit of scientific knowledge itself, are and ought to be the slaves of politics—or if not of politics then of public opinion”. In either case, we seem to be left with no principle of education at all, for what is the purpose of an education if not to teach men to learn to discern right from wrong?

Hume never leads us beyond the question of how to get what we want in the most efficient way, no matter what we want. To give only one example: Increased unemployment of certain classes of men may be an almost inevitable consequence of imposing an effective minimum wage. Some people (those who see their employment opportunities diminished or their labor costs increased by such a measure) will say that that is a reason for *not* imposing a minimum wage; others (employers fearing competition from regions with lower wage rates, union members seeking to restrict entry into the labor market, politicians looking for a client base of people dependent on political re-distribution and those hoping to become clients of such re-distributive schemes) will say that it is a reason for imposing a minimum wage.<sup>239</sup> Humean “reason”, having established the relation between minimum-wage legislation and unemployment, sits back until the balance of power among the passions tilts towards a particular goal and then enlists itself in the service of the winner. “Education” based on Humean reason teaches service to the ruling passion or opinion—in a word, conformism.<sup>240</sup> Questions of right and wrong, justice and injustice, and the presumptions of rationality, innocence and self-ownership, lie outside its scope.<sup>241</sup> At best, such questions are admitted only after they have been reduced to questions of compliance with existing, merely conventional rules. Of course, there is no reason to suppose that what lies outside the scope of Humean “reason” is irrelevant and cannot be subjected to justificatory argumentation. The effects of the adoption of Hume’s principle in “education” are easily observable in the proliferation of experts and social and economic theories that, while claiming to be scientific, are examples of sophisticated sales talk promising the greatest happiness to those who adopt them.

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<sup>238</sup> Ibidum, “Where a passion is neither founded on false suppositions, nor chuses means insufficient for the end, the understanding can neither justify nor condemn it. ’Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”

<sup>239</sup> The example brings out the emptiness of, for example, Mises’s remark, “If an economist calls minimum wage rates a bad policy, what he means is that its effects are contrary to the purpose of those who recommend their application.” (HA, p.883) Moreover, substituting “publicly announced purpose” for “purpose” in that sentence solves nothing: lying about one’s purpose may be (and often is) an effective means for achieving it.

<sup>240</sup> “What is learned in school is often very soon forgotten and cannot carry on against the continuous hammering of the social milieu in which a man moves.” (HA, p.878) Of course, schools and universities committed to the “Reason is and ought to be the slave of the passions” doctrine would not even think of going against the ruling opinion.

<sup>241</sup> In this respect, Hume consolidated the victory in much of Anglo-Saxon philosophy of Hobbes (and the theology of Power: God Almighty) over Aquinas (and the theology of Judgment: God the infallible Judge). In another respect, Hume’s criticisms of religion helped to undermine the ethics of responsibility and accountability that the Church, insisting on the regular practice of prayer and confession, brought to every parish and every aspect of daily life. That practice sustained the habit of thinking in terms of right and wrong rather than of more or less immediate rewards and punishments; indeed, it was predicated on the conviction that the ultimate consequences of actions could be determined only at the end of time, far beyond any person’s lifespan and the span of any generation’s predictive powers—in short, could not be determined at all by any human intelligence. The least we can say about this aspect of the “sociology of religion” is that the ethics of responsibility and accountability has not fared well since education became a political or state enterprise and the perfection of power (efficacy, efficiency) displaced the perfection of judgment as its *raison d’être*.

### ***10. But does it justify libertarianism?***

While I was working on my ethics of dialogue, some people began to call me a libertarian because of the considerable overlap between the conclusions I reached (in particular about the State being unjustifiable) and positions defended in the writings of Murray Rothbard and others who by that time had made “libertarianism” a distinctive brand of American political philosophy. At least to the extent of that overlap, the ethic of dialogue or argumentation does justify Rothbardian libertarianism. Since I received the label “libertarian” because of my work on that ethic, I suppose I may say that my libertarianism is identical to that ethic. Rooted in the philosophy of law rather than any particular theory of economics, it is the philosophy of people who accept that the ethic of justificatory argumentation is the proper framework for discovering rationally undeniable norms for human interaction as well as justifiable solutions to particular disagreements and conflicts. Advocating such a framework is admittedly far less spectacular than promising a ready-made solution for every conceivable problem. Nevertheless, it is all that libertarian philosophy can offer if it is to be true to the concept of freedom for all persons under the law of reason and the (in particular cases defeasible) presumptions of rationality, innocence, and self-ownership.<sup>242</sup>

With that in mind, it is fair to say that only libertarian rights can be argumentatively justified, because only libertarian rights define a context in which the conditions necessary for justificatory argumentation can be respected universally.

A final caveat: The arguments from the *apriori* of argumentation and the ethics it entails do not, and are not intended to, supplant the study of the natural law of the human world (that is to say, the natural conditions that mark the difference between order and disorder in the human world). They complement it by proving how we can be rational and argumentatively justify certain actions or statements if we are conscious of the fact that we, all of us, are *in* that world. The relative novelty of the word ‘libertarianism’ should not blind us to the fact that the complementarity of natural law and reason has been known and appreciated for a long time already. Nor should the radical nature of libertarianism blind us to the fact that it is radical only because it presses the demand for interpersonal justification among free and equal persons into corners where the argument from authority, be it God, Society, Science, Utility, or whatever other Convenient Abstraction, used to reign unchallenged.

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<sup>242</sup> I am a reluctant reader of articles in which “the” libertarian position on, say, lying, making false accusations, blackmail, incitement to violence, or copyright and trade mark infringement is spelled out legalistically in terms of absolute general rules: either “Everybody has a right to lie” or “Lying is in any case a punishable offense”. (See my “Against Libertarian Legalism”, JLS, XVII, 3, 2003, 63-89, and “Natural Law and the Jurisprudence of Freedom”, JLS, XVIII, 2, 2004, 31-54.) In my view, the key figure for a libertarian theory of law is a *judge*, not a *legislator*. According to the ethics of argumentation, lying is wrong and there is no argumentatively justifiable “right to lie” but that is not to say that every lie is a criminal violation of someone else’s rights. Whether a particular lie is excusably or not, whether it is inconsequential or not (as a cause of unlawful harm), depends on the particulars of the case. Conflicts caused by people lying to or about others ought to be settled by justificatory argumentation, hearing the parties to the conflict and taking the circumstances of their case into account.



## Session 8

### ***Human Dignity: Reason or Desire?***

#### ***Natural Rights versus Human Rights***

The Universal Declaration of Human Rights (henceforth UD) was introduced in Paris on December 10<sup>th</sup>, 1948, in the aftermath of the Second World War and the long period of economic depression and political turmoil that had preceded it. Although the UD was generally praised, it did not have an immediate impact on the legal profession. For example, as a law student, from 1965 to 1970, I did not hear anything about it, apart from a brief mention in a course on international law. I did read the document, however, in 1968, when the media drew attention to its twentieth anniversary. I confess that I was shocked. I read with distaste and disbelief the UD's message that a person's fundamental rights were none other than to be treated without cruelty and to be taken good care of by the powers-that-be. My first impression was that it was adapted from the charter of some society for the protection of animals, with human beings in the role of the animals and governments in the role of their keepers. Undeveloped as it then was, my thinking about rights clearly was inspired by other sources than the UD. It was not until later that I discovered how different those sources were.

Today, the UD's human rights have become accepted almost universally among lawyers, law students and the public as the indisputable basis from which all profound thinking about rights must start. The charge made by some commentators, that the UD is too much imbued with Western ethical and political values to deserve the epithet 'universal', is noted but not taken seriously. Nevertheless, that criticism merits consideration. It is true that those who make it are all too often no more than ideologues of fashionable 'cultural relativism', but it is equally true that the UD's underlying philosophy of the nature of human persons only came into vogue fairly recently even in the Western world. It does not fit in the long tradition of law and justice from which the notion of rights derives its status as a basic ingredient of serious thought about human relations and interactions. In fact, it has served to obscure the meaning and the significance of that tradition.

The starting point of my reflections on human rights is a remark by my friend and colleague Hans Crombag on the present fascination with human rights. He finds human rights "sympathetic but naïve".<sup>243</sup> In his appreciation, they are sympathetic because they are well intentioned, but also naïve because they are a legacy of the classical theory of natural law. I disagree with him on both points. I have little sympathy for the human rights doctrine of the UD — and not only for the reason mentioned above. I also believe that whatever good it can do could be done equally well under the aegis of the classical theories of rights. Moreover, over the past fifty years the UD has generated a hyperinflation of rights that can only destroy their value. However, what needs to be stressed is that the doctrine of human rights is neither naïve nor a legacy of classical natural law theory. As I shall argue below, it is a legacy of the sophisticated political philosophy of Thomas Hobbes and a repudiation of everything classical natural law stood for.<sup>244</sup> The logic of the UD's doctrine of human rights is remarkably similar to that

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1. H.F.M. Crombag, *De man van Susquehanna* (Amsterdam, Contact, 2000), chapter xxx, "Sympathiek, maar naïef" (adapted from an earlier paper in *De Psycholoog*, 24, 1989, p.514-517). See also his *Een manier van overleven: Psychologische grondslagen van moraal en recht*. (Zwolle: Tjeenk Willink, 1983), e.g. p. 14-21.
  2. However, I do not intend to add to or comment on the long debate on the relationship between the classical theories of natural law (in the tradition of Aristotle and Saint Thomas) and natural

of Hobbes' theory of the natural right of man—and both are very different from the logic of the classical theories of natural law and natural rights. As Crombag's remark illustrates, and my experience with many generations of law students amply confirms, people all too easily assume that human rights are tributes to be paid to the dignity of man as defined by the grand tradition of law and justice in the West. To refute that assumption is the purpose of this paper.

### *1. Human Rights in the Universal Declaration*

#### *A Dilemma*

In a superficial reading the UD seems to contain a lot of elements that should be acceptable without further comment. They are sometimes likened to the rights of man that figured so prominently in older documents, such as the French Declaration of the Rights of Man and Citizen (1789) or the American Bill of Rights, or influential books in the tradition of natural rights, such as Locke's *Second Treatise*. Articles 3, 4, 5, 9, 10, 11, 12, 13, 16, 17 of the UD are in this category. Other elements also remind us of such precedents. However, they do not concern the rights of man as such, but rather the rights of the citizen, i.e. the rights of members of 'political associations' or states. Examples are to be found in articles 6, 7, 8, 15 and 21. It is noteworthy that, unlike its predecessors, the UD does not explicitly distinguish between human rights and citizen rights. In the Declaration of the Rights of Man and Citizen, for example, the rights of man appear as natural rights and the rights of the citizen as no more than artificial constructs. Indeed, in its article 2 the French Declaration had stated unambiguously that the protection of the natural rights of man is the *raison d'être* of every political association.<sup>245</sup> Consequently, the rights of the citizen were presented as mere tools designed to further that end. It was probably no mere oversight that the authors of the UD did not make that distinction. As we shall see, it is a distinction that does not make sense within the basic philosophy of rights that appears to underlie the whole document.

Of course, the distinctive elements of the UD are the 'economic, social and cultural rights', which can be found in articles 22 to 28. Without these, there would have been no reason at all to make a big issue of the Declaration, since all the other elements had already been stated more clearly and elegantly elsewhere. The tone is set in article 22: "Everyone, as a member of society, has the right to social security and is entitled to the realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Among the rights listed we note rights to work; free choice of employment; just and favourable remuneration and conditions of work; and rest and leisure, including periodic holidays with pay. In addition there is "a right to an adequate standard of

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rights (the Lockean tradition). That debate goes back at least to Leo Strauss' classic *Natural Rights and History* and the works of Michel Villey, which presented natural rights as a radical 'modern' departure from the classical Aristotelian-Thomist theory of natural law. See e.g. F.D. Miller, *Nature, justice and rights in Aristotle's politics* (Oxford: Clarendon Press, 1995) and B. Tierney, *The idea of natural rights* (Atlanta: Scholars Press, 1997).

3. "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." (Art. 2, Déclaration des droits de l'homme et du citoyen, 1789). With respect to those natural rights, Laborde de Méréville had insisted, in a suggested Preamble, that "il est surtout indispensable d'ôter au corps législatif tous les moyens d'en abuser, en le renfermant dans la défense des droits de l'homme." Quoted in S. Rials (ed.), *La déclaration des droits de l'homme et du citoyen* (Paris: Hachette, 1988).

living” (art. 25), which includes food, clothing, housing, medical care and all sorts of social security.

Article 26 mentions “a right to education”. It turns out to be primarily a right to schooling, which in some cases should be at once free, compulsory and according to the choice of the parents. That schooling should be directed “to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms” and promote “understanding, tolerance and friendship among all nations, racial or religious groups, and the activities of the United Nations for the maintenance of peace.” According to article 27, “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Finally, article 28 declares that “everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.” Apparently, the “right to the United Nations” is a human right as well.

The UD presents the economic, social and cultural rights simply as human rights, as if they are of the same nature and on the same level as the other rights with their seemingly respectable ancestry. Anyone who is familiar with the classical doctrine of natural rights will see – and it has been said many times – that the UD’s distinctive ‘rights’ are incompatible with that doctrine. Enforcement of one person’s economic, social and cultural rights necessarily involves forcing others to give up their property or to use it in the way prescribed by the enforcers. It would constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by anybody else. It would also deny a person the right to improve his condition by accepting work for what he (but perhaps no one else) takes to be an adequate wage.

We have a dilemma here: either the ‘old’ rights of the UD are indeed the natural rights of the tradition and then the whole document must be interpreted as inconsistent propaganda; or they are consistent with the rest of the document, but then they cannot be assimilated to the tradition of natural rights and natural law.<sup>246</sup>

To mitigate the inevitable ‘conflicts of rights’ implied by the first hypothesis, lawyers and legal theorists often propose to rank various human rights as being more or less important than others.<sup>247</sup> By ranking rights in some hierarchical order, they hope to provide guidelines for weighing rights. However, this strategy is no more than a pragmatic evasion of the problem of inconsistency. Even so it only works where there is a genuine consensus on the relative importance of conflicting rights – a condition that is not likely to be fulfilled in the real world of politics.

I shall consider only the second horn of the dilemma. I shall take the UD seriously and not dismiss it (as lawyers used to do for a long time) as a politically powerful blast of hot air without relevance for questions of law and justice.

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4. There are a few clauses in the UD that do identify aspects of some genuine natural rights as well as some traditional ‘rights of the citizen’. Interestingly, however, they are not presented in the form of rights, but in the form of absolute prohibitions imposed on every one in general or political authorities in particular. Examples can be found in article 4 (“No one shall be held in slavery or servitude”), article 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”), and in articles 9, 11, 12, 15 and 17. They are clear examples of ‘negative rights’, meaning that they can be respected by anybody merely by not doing something to a person without his consent.

5. For an early formulation of this strategy, see e.g. H. Coing, *Grundzüge der Rechtsphilosophie* (Berlin: Walter De Gruyter, 1969) p. 222-223: „Zwischen den verschiedenen Grundrechten besteht eine bestimmte Rangordnung, die sich aus der in der Rechtsidee enthaltenen Rangordnung ergibt. Die geistigen Grundrechte gehen der Ehre, beide den ökonomischen Grundrechten des Eigentümers vor.“ As if there were only one uncontested ‘Rechtsidee’!

In truth, the UD was a political compromise, the product of inputs from different parties with mutually incompatible beliefs and ideologies. However, most people now seem to think that human rights *are* the human rights of the UD, or perhaps any ‘rights’ of the kind the document so prodigiously attributes to us. Even among lawyers, the idea that the UD’s human rights are fundamental rights, is now quite common (at least in the Western world). Whatever the actual history of its drafting, the document has come to be seen as a statement of a coherent doctrine of human rights. It does not follow, however, that it merely continues the tradition of the Rights of Man. The UD’s Preamble refers to Franklin D. Roosevelt’s ‘four freedoms’ as having been “proclaimed as the highest aspirations of the common people.” This suggests that those who wrote the Preamble did not intend the UD to be interpreted in terms of the classical theory of natural law and natural rights and its associated political ideal of a constitutional regime committed to the rule of law and substantive due process. It suggests, rather, that they intended the UD to be read as an original manifesto of the philosophy of the welfare state. One way to summarise the UD is by saying that people have a right to live in a welfare state without having scruples about its unprecedented peacetime powers of social control and mobilisation.<sup>248</sup> The statement must of course be qualified. Only the welfare states of the victorious Allies (including the Soviet Union), not those of the defeated Axis-powers, were to be the homes of human rights.

### *Contradictions and Practical Problems*

In one sense of the word, Crombag’s assessment of the UD’s human rights as “naive” is understandable. Not only is their enumeration chaotic, it also seems to be full of contradictions of a logical or practical nature. For example, what the UD tells us about education and working defies common sense. How can we reconcile free choice of employment or education with the idea that labour should receive just and favourable remuneration or that education should be free (i.e. 100% subsidised)? What are we to make of article 28 and its right “to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised”? The full realisation of almost any one of the ‘rights’ in the UD would impede the implementation of almost any other! The majority of the human rights mentioned in the UD are exposed to the risk of a ‘conflict of rights’. Most of them are indeed ‘rights’ to resources that are in short supply relative to the quantities needed to satisfy the desire for them.<sup>249</sup> Should we conclude that a human being’s fundamental ‘right’ is what can only be possible in

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6. On the drafting of the UD, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999). From the first day of his Presidency, ten years before the USA joined the fray of ww-II, Roosevelt saw himself as war leader. He exploited the sense of crisis (and, with his long ‘banking holiday’ of 1933, possibly provoked a real financial emergency). He did so to push a request through Congress for “broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe.” (From his Inaugural Address). He even based his authority for closing the banks on the Trading with the Enemy Act of 1917 (when the US entered WW I). “The crisis justified the casting aside of precedent, the nationalistic mobilization of society, and the removal of traditional restraints on the power of the state....” (J. Garry, *The New Deal, national socialism, and the great depression*, *American Historical Review*, 78, 1973, p.932). We should not forget the fascination with war, strong leadership, national planning, technocratic management and the like, that characterised the intellectual and political elite of the first half of the century. See e.g., R. Higgs, *Crisis and Leviathan* (New York: Oxford University Press, 1987) p. 169. It is as apparent in the UD as it is in “the welfare state [which] is an offspring of the total warfare of the industrial age” (B. Porter, *War and the rise of the state*. New York: The Free Press, 1994, p.192).
  7. Scarcity in connection with desire is crucial here. The economic concept of scarcity relative to ‘effective demand’ is not relevant. The UD does not hold that we have rights only to such things as we are willing and able to produce or pay for.

Utopia, that Nowhereland where there is enough of everything for everyone and where there are consequently no choices to be made, no costs to be borne, and where frustration is not to be feared?

Even in the richest states budgetary limitations often lead to sharp confrontations between pressure groups and vested interests in the various domains of social, economic and cultural life. That one prefers to call one's interests human rights does not change that fact. It merely creates the risk of an escalation of political rhetoric and passion, now that the flag of human rights flies over almost the whole arena of government policy. Each policy option can be interpreted at one and the same time as a measure to further some human right and as an indication of the neglect or even the violation of any number of other human rights. There is therefore at all times unlimited room for weighing various 'rights' and for setting and revising priorities. The political and administrative bodies to which this weighing of rights has been entrusted or that have succeeded in monopolising it, have ample opportunities for expanding their power and influence.

Nothing remains of the old idea that a right is worthy of respect in all circumstances except perhaps the most extreme emergency. The human rights of the UD are not and cannot be absolute, even in the most normal of circumstances – unless anything short of Utopia should count as an emergency.<sup>250</sup> By their very nature they are all susceptible to continuous weighing, negotiation and qualification. They are a politician's delight, for every human right translates into 'a right to more government intervention on its behalf.'

This is no less true for the ghosts of the natural rights that linger on in the first half of the UD than it is for the economic, social and cultural 'rights' in the rest of it. Of course we should not confuse the ghost and the real thing. For example, article 2 of the French Declaration of the Rights of Man and Citizen, clearly states what a person's natural rights *are*: liberty, property, freedom from arbitrary arrest and resistance to oppression.<sup>251</sup> In the UD, on the other hand, a person is not informed that his life, liberty, security of person, and property *are* his fundamental rights. He is told only that he has the right to life, liberty, security of person (art. 3) and property (art. 17).<sup>252</sup> He should not expect more. For it is obviously inconsistent to claim that everyone is entitled to the full realisation of the economic, social and cultural 'rights' and at the same time to claim that any person's fundamental rights are *his* life, liberty and property. The administration of the former requires the concentration of massive coercive powers of taxation and regulation in the hands of the state and so must presuppose that a person's life, liberty and property are *not* his rights. However, the inconsistency evaporates once we realise that the UD's 'rights to life, liberty, property' do not specify to *whose* life, liberty or property a person has a right. It does rule out that he has an exclusive right to his own life, liberty or property. It does not rule out

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8. That is a familiar fallacy. Thomas Hobbes used one version of it when he gave his expansive definition of war and correspondingly strict definition of peace (*Leviathan*, chapter 14). Equating even the remotest risk of conflict with the war of all against all, he argued that comfort and commodious living would only be possible under the strictest form of centralised absolutism. As Leibniz remarked, "Hobbes' fallacy lies in this, that he thinks things which can entail inconvenience should not be borne at all — which is contrary to the nature of human affairs." See Leibniz, "Caesarinus Fürstenerius", in Patrick Riley, *Leibniz, Political writings* (Cambridge University Press, Cambridge, 1988) p.119.
  9. See the text in note 4 above. "Freedom from arbitrary arrest" (*sûreté*) and "resistance to oppression" are arguably not genuine natural rights. They are reflections of the duty of any legitimate government to respect natural rights.
  10. The relegation of 'the right to property' to article 17, i.e. its separation from the rights to life, liberty and security of person, with which it had been linked traditionally, is certainly worthy of note.

that some or all others have an equal, or perhaps more pressing, claim on those things in order to enable them, say, to enjoy the arts or a paid holiday.

Thus, a person's life, liberty and property are thrown upon the enormous heap of desirable scarce resources to which all people are said to have a right. As such they too end up in the scales with which political authorities, administrators and experts are supposed to weigh the ingredients for their favoured policy-mix. Here we catch a first glimpse of the shadow of Hobbes behind the contemporary notion of human rights: The person who believes he has 'a right to everything' is likely to find out that there is no thing that is his right.

### *A Hobbesian Predicament*

The following thought-experiment will bring out the Hobbesian character of the UD's human rights. Imagine two people, the only survivors of a shipwreck, who find refuge on a small deserted island. They have with them nothing but their human rights, in particular their 'right to work' and all that it entails according to articles 23, 24 and 25 of the UD. One can imagine what will happen to them if they just sit there insisting on their 'right' of being employed by the other at a just and favourable wage, or else to an unemployment compensation high enough to allow them an existence worthy of their dignity. One can also imagine what will happen to them if, instead of just sitting there, they start attempting to enforce their human rights against one another. That would be their version of Hobbes' war of all against all. Finally, one can easily imagine what would happen if one of them won that war. Then Hobbes' solution for the incompatibility of their 'rights' would emerge. The winner could then arrange for himself a nice unemployment compensation (a.k.a. a tax on another's labour) to match his new-found dignity as a ruler, and keep the other man quiet by leaving him as much as is consistent with 'the organisation and the resources of their state'.

Starvation, universal war and the Leviathan State are indeed the only possible outcomes under a regime of human rights – and only the latter outcome is compatible with survival. Imagining a two-person-situation makes this conclusion as clear as daylight, but its validity does not depend on the numbers. Large numbers only serve to obscure the logic of the situation. They may induce the illusion that the ruler is simply 'out there', at no extra charge, protecting the human rights of his subjects – when he is fact continuously testing their ability to pay and endure while keeping the burden of taxation and regulation below the threshold of revolt.

Of course, the two men need not be so foolish as to insist in any way on their human rights. They may have enough sense to understand the natural laws of living together and settle for their natural rights, respect each other and each other's work (property) and try to agree on mutually advantageous exchanges. Indeed, they might be satisfied with the claim that for each of them his life, liberty and property are his only fundamental rights and that the only thing they have a right to is respect for their natural rights.

## **2. Rights in the Classical Tradition**

### *Claims and Rights*

The connection between the UD's notion of human rights and the political philosophy of Hobbes is far from fanciful. It rests on formal and material similarities that show both of them to be instances of the same concept of 'rights' – one that is incompatible with the concept of rights in the classical natural law tradition. As to their

form, the UD's human rights are 'rights to'.<sup>253</sup> As to their material content, they are 'rights to desirable things' – that is to say, to things that most people desire. Thus they appear to be specific forms of some generic right to the satisfaction of desire. As the UD does not attempt to identify a foundation for its validity, we have to presume that 'the right to the satisfaction of desire' is itself the fundamental human right. That, in a nutshell, seems to be the philosophy of the UD's human rights. It is also the kernel of Hobbes' purported emendation of the classical theory of natural rights, but it is no part of the classical natural law tradition.

Neither in the classical tradition nor in the normal business of law, can 'rights to' count as fundamental rights. They are claims rather than rights. In fact, to be 'rights to', they must be lawful claims, which logically presuppose some right as the ground for their validity. If you sell me your car, you have a right to payment of the price we agreed on. The reason is not that you have some generic 'right to money' or a 'right to payment'. The reason is that, once you have met your obligations under the contract, you have acquired ownership of the specified sum of what until then was my money. Consequently, if I refuse or neglect to pay, you have a lawful claim to it, because it is now your money. Similarly, the victim of theft has a 'right to' the stolen goods, or to adequate compensation, because they are his goods – not because he has some generic 'right to goods'.

As a general proposition, we may say that a person has a lawful claim to ('right to') respect for his rights.<sup>254</sup> Rights to specific performances or things are particular forms of the lawful claim to respect for one's rights. Thus, according to the classical theory of natural rights, I can say that I have a right to [respect for] my life, my liberty and my property, because those things are my rights – not because I have some generic right to life, liberty and property. Lawyers and judges spend a lot of time establishing the rights of the parties to determine which of them has a lawful claim against the other. They normally do this by looking at the facts and the history of the events leading up to the institution of proceedings, i.e. by a careful and objective distinction of the parties, their personal identity, words, works, actions, possessions and relations. Of course, when the normal business of the law is corrupted by legislative interference, the facts that in the absence of such interference would be relevant to determine the rights of the parties are often set aside. Claims are then accepted merely because they have a basis in what the legislative authority says the various parties have a 'right to'. However, in that case, lawyers and judges are no longer preoccupied with questions of law and justice, but with trying to figure out on whose side the authorities are.

### *Human Dignity and Human Nature*

The UD presents human rights as 'rights to', i.e. as lawful claims, but does not say anything about the rights that serve as the foundation of their validity. We have to make do with the references to 'human nature' and 'human dignity' in article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The text suggests that human dignity is something that all human beings possess, but this only serves as a reminder that the word 'dignity' is to be understood here in a special sense. It is obviously not true that all human beings have dignity in the ordinary sense of the word. There is daily proof of this in any newspaper or newscast, or, for those who find

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11. There are a few exceptions. See note 5 above.

12. See F. van Dun, *Het fundamenteel rechtsbeginsel: Een essay over de grondslagen van het recht.* (Antwerpen: Kluwer, 1983).

that sort of evidence too depressing, in almost any broadcast of the Jerry Springer Show.

The reference to ‘human dignity’ is a commonplace of the philosophy of law, but there the term does have a special technical meaning. It refers to the fact that people as such have rights that they are lawfully obliged to respect regardless of their opinions of each other’s personal dignity. However, the term does not specify those rights and it does not specify why people as such have them. Without an unambiguous reference to an objective foundation for fundamental rights, ‘human dignity’ is an empty shell.

The classical foundation, of course, was the fact that a human being is an *animal rationis capax*, a physical living being, distinguished from other forms of life by his rational faculties. Because of his rational faculties, a human being is not just a physical agent but a ‘moral agent’, capable of acting on the basis of reasons and of criticising and evaluating reasons for acting in the light of various goals and values. As such, a human being is a *natural person*, a free agent with a modicum of rational control over his own body, its actions and their outcomes – his life, liberty and property. These are his natural rights, i.e. the things that by nature are under the control of his rational faculties.<sup>255</sup> To this observation the classical theory of natural rights adds that one human person is just as much a human person as any other. There is no natural hierarchy of natural persons. In consequence, there is no natural hierarchy among one person’s natural rights and those of another. As Locke wrote in his *Second Treatise of Civil Government*, Chapter II (§4):

There being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection [...].

Hence it follows, “that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions” (*Ibid.* §6). Every person is to respect every other person and his natural rights: *No person has ‘a right to another’*. Thus, according to the classical theory, one person’s natural rights are limited and constrained by the natural rights of every other person. It is only because of this structural feature of the classical theory that natural rights can be seen as constituting a natural order or natural law of the human world.<sup>256</sup> It is an order or law of distinct and separate persons of the same species – or, to use the standard formula, a law of freedom and equality. Respect for this law is justice. There can be no doubt that Locke felt he was simply restating the foundations of law and justice as they had been accepted by a long tradition. He did so in the face of an attack by the proponents of an absolutist state who had begun to invoke either a divine right of kings (Filmer) or an unconditional covenant of submission (Hobbes).

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13. Rights, from the Latin *recta*, controlled things (from the verb *regere*: to lead, steer, manage, control).
  14. The etymologically prior meaning of ‘law’ is ‘order’ (Scandinavian *lag*, order, bond). Law is the social order or social bond that has its natural foundation in the plurality and diversity of distinct and separate persons. It is what the Romans called *ius*, the order of *iura*, which are bonds arising from solemn speech (*iurare*, to make a personal commitment to or covenant with another). See F. van Dun, The lawful and the legal (*Journal des Économistes et des Études Humaines*, 6, 1995).

### *Having Rights and Being a Person*

As we have seen, there is an echo of the classical foundation of rights in the second sentence of article 1 of the UD. It does make the obligatory reference to human rational and moral capacities. However, most of the human rights in the UD, and all of the human rights that are specific for the UD and its progeny of similar charters, have no particular relation to the rational nature of man. They have nothing to do with the 'dignity' of mankind as one among many other living species. On the contrary, they can be, and indeed have been, applied, with no more than a slightly different wording here and there, to animals, 'ecosystems' and other things. My first impression over thirty years ago, that the UD was little more than an adaptation from some charter for the wellbeing of animals, has not been dissipated by numerous subsequent readings of the document. The UD never goes further than the 'right to a decent treatment' that would be the central message of such a charter.<sup>257</sup>

Today it is apparently acceptable to talk about 'animal rights', and not just about some sort of perfectionist moral duty of kindness and care on the part of human beings in their dealings with animals. Would not the reason be that the current harvest of human rights no more presupposes that human beings are natural persons than that 'animal rights' presuppose that animals are persons? If, as the text of the UD suggests, 'the satisfaction of desire' is itself the fundamental human right, should we then not discard the reference to rationality and instead accept man's covetousness as the essence of his 'dignity'? But then 'human dignity' can no longer be distinguished from 'animal dignity'. After all, there is nothing particularly human about either desire or its satisfaction.

Like human beings, animals may feel pleasure and pain, satisfaction of desire and frustration. However, animals are not persons. It does not make sense to hold them morally responsible, inquire about the justice or injustice of their actions, insist on their good faith in contractual relations, or anything of the kind. Not being persons, they cannot have rights, except perhaps in some derivative or metaphorical sense.<sup>258</sup>

People who invoke 'animal rights' are really claiming the right to forcibly impose their own norms for dealing with animals on other human beings. The 'animals rights' are reflections of the moral duties implied in some perfectionist view of human morality held by these people. However, by calling these reflections 'rights', they present them as if they were objective principles of animal existence. Such is the rhetorical force of the word 'right'. The advocates of 'animal rights' make an adroit use of it in claiming that legal enforcement of their moral views is justified on the basis of a lawful obligation owed by all humans to the animals themselves.

Human rights policies too are presented as if they were lawful obligations owed by all governments to all human beings, independent of any morality or ideology of government. However, human rights make sense only as reflections of a particular ideology of government, one that holds that governments relate to their subjects as zookeepers to the animals under their care. They certainly do not reflect the duties of a constitutionally limited government committed to the rule of law and substantive due process. That its subjects are natural persons and as such have a lawful claim to respect for their life, liberty and property is of no relevance in the worldview of the UD. In that document, human beings typically appear as passive holders of 'rights to' various things. However, those things are not theirs until the proper authorities have decided on

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15. The only specifically human bias of the UD is in its affirmation of the right not to be prevented from taking part in political elections or applying for a job in the public sector.

16. See, e.g., the rigorous conceptual analysis in A.R. White, *Rights* (Oxford: Oxford University Press, 1984).

the appropriate distribution. Indeed, the UD implies that governments, although elected by and from the human population, are on a higher level than their subjects. Consequently, the UD does not need to countenance natural rights if they stand in the way of the ‘moral perfection’ of government.<sup>259</sup>

Once the connection between ‘having rights’ and ‘being a person’ has been severed, almost anything may be said to have rights. Not surprisingly, the so-called rights revolution that gathered steam from the 1960s onwards, has led to a cancer-like growth of ‘rights’ not only of human beings and animals, but also of plants, landscapes, lakes, oceans, even the earth itself, historical monuments and other cultural artefacts. Moreover, in the field of specifically human rights, the ‘rights’ of individual human beings as such are now difficult to discern among the ‘rights’ of an ever-increasing number of abstract ‘aspect-persons’. Thus, the woman, the child, the homosexual, the labourer, the immigrant, the student, the patient, the consumer, the elderly, the handicapped, the victim, or any minority whatsoever, is said to have ‘special rights’, in particular the ‘right to positive discrimination’, which is the ‘right to privileged treatment’. Indeed, the common characteristic of all of these ‘rights’ is that they are supposedly of sufficient weight to override or trump anyone’s truly non-discriminatory natural rights as a person. Compared to the dignity of the woman, the child, the worker and so on, the dignity of the human being as such ranks near the bottom of the scale.

#### *Human Rights, Moral Perfectionism and Natural Law*

The reference in the previous section to perfectionist theories of morality may, perhaps, be understood as a support for Crombag’s thesis that human rights are a legacy of the classical theory of natural law. Much of what goes under the name of ‘natural law’ is indeed more concerned with the ethical idea of moral perfection than with the problem of order in the human world. No doubt, the Aristotelian-Thomistic ‘natural law theory’ belongs rather to moral philosophy (‘ethics’) than to the philosophy of law. However, it does not imply that it is right for governments to enforce moral perfection. As Thomas Aquinas put it:

[Because] law regards the common welfare [...] there is no virtue whose practice the law may not prescribe. [However,] human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concerned. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid. These are the vices that do harm to others, the vices *that would destroy human society* if they were not prohibited: murder, theft, and other vices of this kind, which the human law prohibits.<sup>260</sup>

The vices that destroy human society are actions of the kind that would be defined as violations of natural rights. Not contaminated by the modern intellectual vice of utopianism, classical natural law theory made a pragmatic distinction between moral and political life. The former is devoted to the perfection of virtue; the latter to the perfection of the *lex humana*, the purpose of which is to safeguard society even for those who are not likely to give much attention to the higher virtues. If the Thomist theory assumed, without justification, that there is some good that is the good of all,<sup>261</sup>

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17. A typical expression of this attitude is the statement on ‘affirmative action’ in a book by a former Chief Justice of the Supreme Court of West Virginia, R. Neely, *How the courts govern America* (New Haven, 1981) p.6.

18. Thomas Aquinas, *Summa Theologiae*, I-II, Qu. 96, Art. 3 and 2. Emphasis added.

19. However, it still implied that the good is to be realised in the actual life of a person. It did not commit the statistical fallacy that is evident in utilitarianism, with its ad hoc constructions of the

it also expressed grave doubts about the possibility of making men virtuous by means of politics and legislation.<sup>262</sup>

In making the distinction, the classical theory of natural law was probably not anticipating the basic assumption of today's neo-Aristotelian proponents of natural rights,<sup>263</sup> namely that the forms of human flourishing or of living 'a good life' are as diverse and manifold as the individual men and women themselves. On the basis of that assumption, the neo-Aristotelians conclude that only natural rights are suitable objects of legal enforcement, because enforcement by a few of a particular perfectionist morality is bound to sacrifice on the altar of moral arrogance the value of life for many.

The neo-Aristotelians would therefore not subscribe to the view that in principle there is no virtue whose practice the law may not prescribe. On the contrary, they insist that the difference between morality and politics is not, as Thomas would have it, merely a pragmatic matter, but is itself a matter of principle. Nevertheless, if given a choice, they would no doubt prefer the theologian's pragmatic distinction over the modern belief that those who want only the best for mankind should therefore be entitled to enforce their 'ideals' with all the powers that today's governments have at their disposal.

If all that Crombag is saying is that the modern preoccupation with human rights is drenched in the rhetoric of moral perfectionism, I would be the last to disagree. There is, however, no reason to take that fact as proof of his claim that human rights are a legacy of the classical theory of either natural law or natural rights. If anything, it is proof that human rights are derived from some perfectionist theory of the duties of a virtually omnipotent government, not from some idea of the moral perfection of human beings as such.

### 3. *Hobbes and Human Rights*

#### *Hobbes' Apostasy*

Hobbes' apostasy from traditional philosophy of law consisted in his rejection of man's rational nature as the foundation of a person's natural right. Instead of the things that are by nature under the control of his rational faculties, Hobbes identified as a man's rights those things over which he exerts controlling power of whatever kind, regardless of whether those things are other persons or not. In order to have a chance of getting away with this radically subversive move, Hobbes had to redefine almost all of the terms pertaining to law and justice. It would take more than two centuries before his legalistic revisions, suitable as they were for legitimising the expansion of state power, became the norm. By the time the UD was drafted, the Hobbesian concept of right had virtually obliterated its classical predecessor. The form and content of the UD's human rights are clear proofs of that fact.

There is no need to go into the details of Hobbes' theory except to recall his definition of man's natural right as the liberty to do everything he can – and Hobbes did

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'greatest good' based on de-personalised, anonymous data about wants – thus making the 'greatest good' into something completely extrinsic to every person.

20. Aristotle's comments on this in the final section of his *Ethics*. See also R. George, *Making men moral* (Oxford: Clarendon Press, 1993).
21. E.g., D.B. Rasmussen and D.J. den Uyl, *Liberty and nature: An Aristotelian defense of liberal order* (LaSalle, IL: Open Court, 1991) and D.B. Rasmussen and D.J. den Uyl, *Liberalism defended: The challenge of post-modernity* (Cheltenham: Elgar, 1997). Also E. Mack, Moral individualism and libertarian theory. In T. Machan and D.B. Rasmussen (Eds.), *Liberty for the 21st Century* (London: Rowan & Littlefield, 1995). See also F. van Dun, *Het fundamenteel rechtsbeginsel: Een essay over de grondslagen van het recht* (Antwerpen: Kluwer, 1983) for an early statement of this doctrine.

mean *everything* – if he believes it to be useful for his self-preservation. As Hobbes himself pointed out, this natural right<sup>264</sup> implies the “Right to every thing; even to one another’s body” (*Leviathan*, XIV). It is the ‘right’ to rule the world for one’s own benefit, even by killing, maiming, robbing, subjugating or controlling others by whatever means available. In plain language, it is the ‘right’ to commit any injustice that appears to further one’s own interests – or, as Thomas Aquinas might have said, a ‘right’ to destroy society.

It is no mystery why Hobbes chose to build his theory on that paradoxical ‘right’. He needed to do so to justify his intended conclusion that political absolutism is the only possible way out of the war of all against all. War would inevitably ensue if everybody took that ‘right’ seriously and tried to set himself up as the ruler of the world. From this Hobbes concluded that peace is only possible in a situation in which there is one ruler with sufficient power to make all resistance to his commands futile.

If, as Hobbes wanted us to believe, there is no objective difference between justice and injustice, then reason is of no avail in choosing either one. The fundamental choice for man is not between just and unjust acts. It is rather a choice between unorganised or competitive injustice and organised or monopolised injustice. It is a choice between a life that is ‘brutish, nasty and short’ under the unorganised satisfaction of wants by competing powers and a condition of ‘commodious living’ when the satisfaction of wants is organised or controlled by a monopoly of power. Hobbes was confident that every sensible person would agree that ‘the right to everything’ should be monopolised by a strong ruler or regime. He was also confident everybody would agree that to submit to such a regime was a dictate of reason.

Thus, political absolutism is justified as if by a contract in accordance with reason. Under this hypothetical contract, all of the subjects are supposed to identify completely with the regime, and to consider whatever it does as the execution of their own will.<sup>265</sup> The state, therefore, never can be a source of injustice, because “Whatsoever is done to a man, conformable to his own will signified to the doer, is not injury to him” (*Leviathan*, XV). The state is just by definition. However, it is also a fictitious legal person – but so are its subjects, now called ‘citizens’, who, having surrendered their natural independence, have become integral parts of the state and therefore unconditionally belong to it. A further consequence is that whatever belongs as ‘property’ to any citizen, ultimately belongs to the state, because without the power and protection of the state there would be no property.<sup>266</sup> In any case, considerations of justice in the state have to be based exclusively on its legal system, not on any natural law or the natural rights of natural persons.

The philosophical basis for this remarkable theory is Hobbes’ view of man. That was not the traditional view of man as a natural person, a physical, finite rational being with objective boundaries (defining his natural rights in the traditional understanding of

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22. In referring to ‘*ius naturale*’ Hobbes was playing a trick on Grotius’ rather unfortunate definition of ‘*ius*’ as a moral faculty or moral power (in his *De iure belli ac pacis*, 1625). According to Hobbes’ conventionalist ideas, a ‘*ius naturale*’ could then only be a faculty or power that was not constrained by anything except another natural power (or ‘external impediment’ as he called it) – as if adding the qualifier ‘*naturale*’ to ‘*ius*’ was the same as removing the qualifier ‘moral’ from ‘moral power’. However, a ‘*ius*’ is not a faculty or power. It is a bond specified by the terms of agreement among persons as to where they will draw the boundaries among themselves, as to how they will separate the ‘mine’ from the ‘thine’. As such, it is a moral constraint on what they can do. Likewise, a ‘*ius naturale*’ is a moral constraint be it one specified by the natural boundaries between any two persons. See note 15.

23. Thomas Hobbes, *Leviathan* (1651), Part I, chapter 16

24. *Leviathan*, Part II, chapter 29: “Every man has indeed a Propriety that excludes he Right of every other Subject; And he has it onely from the Sovereign Power [...]”

the term). In Hobbes' view, that physical or natural aspect of man was not relevant for the definition of his natural rights. What was relevant was the alleged fact that man has unlimited desires, especially an unlimited desire for power "that ceaseth only in Death."<sup>267</sup> In short, man is not what he is and does, but what he desires to be and to do. His 'right' is not his life, liberty or property, but the satisfaction of his desires.<sup>268</sup> This interpretation of the 'natural right' of human beings is the fundamental subversive element in Hobbes' theory. It would not show its full effects until a couple of centuries after Hobbes wrote his *Leviathan*. Nevertheless, it should be clear that from the beginning it implied an eminently 'economic' interpretation of the state as the essential organisation for the satisfaction of human wants and desires.<sup>269</sup>

### *A Hobbesian Legacy*

Until the end of the nineteenth century Hobbes' theory was little more than a curiosity in the history of ideas. However, at that time it resurfaced as a 'rational foundation' for the omnipotent state which many intellectuals then praised as an instrument of progress. Moreover, the celebration of war in all its forms — between classes, races, nations, religions, ideologies, cultures, new and old elites, even biological species — moved Hobbes' metaphor of universal war again to the core of political thought. At the same time, the republican notion of popular sovereignty, with its stress on 'the will of the people' (as manifested by the majority), began to displace the old idea of the rule of law.

Already in the late nineteenth century, Rudolph von Jhering promoted a utilitarian conception of the state that owed as much to Hobbes as to Bentham, as the basis for a new socio-political approach to jurisprudence.<sup>270</sup> In the United States, Roscoe Pound did the same thing. The sociological dimension originated in the idea that social conflicts are rooted in subjective factors (desires, needs, wants, interests) and have to be resolved at the level of those factors, rather than at the level of interpersonal relations as defined by objective natural rights. Pound concluded that there was a need for a sociological jurisprudence. It would have to focus on a new conception of justice. It would no longer refer to the skill of safeguarding the social order of free and equal persons by means of rules of law. Instead, it would stand for the skill of political legislators and administrators to produce a condition of 'social justice' by means of 'social engineering'. The condition of 'social justice' would be characterised by 'the satisfaction of everybody's wants so far as they are not outweighed by the wants of others'.<sup>271</sup> Pound was well aware of the incompatibility of 'social justice' and justice as such. The former, he noted, "is repugnant to the spirit of the common law." It would require a return to a regime of status, in which "rights belong and duties attach to a

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25. Ibid. Part I, chapter 10.

26. As Giovanni Pico della Mirandola, that archetypal Renaissance intellectual, wrote: "To [man] it is given to have what he wishes, to be what he wants." Garin (Ed.), *Giovanni Pico della Mirandola: De hominis dignitate* (Florence, 1942) p.106.

27. Hobbes was undoubtedly preoccupied with strictly political questions concerning the distribution of power in society. Nevertheless, he was well aware that for the sake of a stable regime some sort of welfare state would be required. See *Leviathan*, Part II, chapter 30: "And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for [...] by the Lawes of the Commonwealth [...]. But for such as have strong bodies [...]: they are to be forced to work; and to avoid the excuse of not finding employment, there ought to be such Lawes, as may encourage [...] Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour."

28. In R. von Jhering *Der Zweck im Recht* (1893) and also in R. von Jhering, *Der Kampf ums Recht* (1872).

29. R. Pound, Need of a sociological jurisprudence, (*Green Bag*, 19, 1907) at p. 612.

person of full age and natural capacity because of the position he occupies in society or the occupation in which he is engaged”:

When the standard is equality of freedom of action, all classes [...] are repugnant to the idea of justice. When the standard is equality in the satisfaction of wants, such classification and such return in part to the idea of status are inevitable.<sup>272</sup>

Pound may not have predicted the present explosion of ‘special rights’ for all sorts of classes, groups and categories, but he would not have been overly surprised by it either. As he well knew, social justice and the ‘rights’ it implies, are about little else than classification, grouping and categorisation.

Pound’s view was only a partial conversion to Hobbesian subjectivism. To him, the common law remained within the domain of justice. However, this domain was now narrowed down to what was left untouched by ‘social legislation’, aiming at a “socially acceptable economy of the satisfaction of everybody’s wants.” Where they were legally recognised, wants, desires and interests would supersede natural rights – which is to say that they had to become ‘rights’ with a higher legal standing than natural rights.

The legal realists, who did not accept Pound’s separation of the domain of law and the arena of political legislation, were far more radical converts. In their view, judges too should be social engineers, using whatever power at their disposal to enforce social justice. Judges should not be intimidated by ‘the ideology of property’ or by ‘traditional justice’. They should not shy away from intervening as rulers in the affairs of businesses, institutions, associations, and families.

In his discussion of monopoly grants (to railroads and other utilities), the American jurist, Brooks Adams, announced a principle that legal realists would apply subsequently to the institution of private ownership and to all rights of property and contract attached to it:

When the law confers upon any man or class of men an exclusive privilege to fix upon some object which is a matter of necessity *or even of desire* to others, it [...] subjects the purchaser to a servitude.<sup>273</sup>

Arguing that the rights of ownership and property are ‘exclusive’ rights, the realists concluded in Hobbesian fashion that they were all monopolies granted by the political power of the state. There is no such thing as ‘natural property’; property is always a creature of legislation. The realists also accepted Adams’ statement that servitude is a condition of unsatisfied or frustrated need or desire. They used it to indict private property as the single most important threat to ‘social justice’. To claim, as property for oneself, what another needed or desired was the height of injustice, because in doing so one violated the other’s fundamental right to full satisfaction, his right to be free from want and frustration.

The sociological turn in jurisprudence, beginning in the late nineteenth century and culminating in the period between the two world wars, was, in fact, a return to Hobbes’ subjectivist redefinition of ‘the natural right of man’. Hobbes had laid the foundations for the revolution in thinking about law and politics that finally erupted in an age of rampant authoritarianism and Big Government. One cannot begin to understand the human rights of the UD, if one fails to take that revolution into account.

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30. *Ibid.*, at p. 615.

31. <sup>273</sup>B. Adams, *Law under inequality: Monopoly*. In M. Bigelow (ed.), *Centralization and the law* (Boston: Little, Brown, 1906) emphasis added.

As we have seen in the thought experiment mentioned earlier, that people should act on their own initiative in trying to secure their right to the satisfaction of their wants can only lead to one of the familiar Hobbesian outcomes: universal war or the concentration of political power. The logic of this argument is clearly visible in the structure of the UD. In order to keep human rights from becoming a recipe for universal war, one should ‘socialise’ and transform them into mere reflections of the duty of government. The state should run the administration of human rights in accordance with the organisation and resources of the country. This requires a continuous weighing of interests and desires. It also requires a vast apparatus of politicians, bureaucrats, experts and agents to gather data, concoct and interpret the statistics that are the essential tools of policy-making, and implement the policies decided on. All of this is inevitable, because the things which the human rights are ‘rights to’, are inevitably scarce. Unlike a person’s natural rights, which recognise his standing as a producer or guardian of scarce resources, his human rights are claims to whatever might serve to satisfy his ‘dignity’, i.e. his covetousness. In the final analysis, they all translate into a right to the labour and productive services of the great multitude of nameless others who happen to find themselves under the same government. Each person’s human right is a ‘right’ to tax and regulate others, that must be taken away from him and administered by a powerful central authority to deprive it of its lethal character. Social justice – that is to say, taking human rights seriously – means statistics and political resource management.<sup>274</sup> It implies that a ‘right’ can have no more than a rhetorical significance until it is made into a legal privilege by effective policy:

Benefits in the form of a service have this [...] characteristic that the rights of the citizen cannot be precisely defined. The qualitative element is too great [...]. It follows that individual rights must be subordinated to national plans.<sup>275</sup>

Politics trumps rights. Coming from T.H. Marshall, these words were not meant to criticise the concepts of social justice and human rights. They merely illustrate how wholeheartedly their advocates have swallowed the political hook together with the subjectivist bait of the Hobbesian philosophy of ‘right’.

### *Concluding Remarks*

Unlike Crombag, I do not think human rights are ‘sympathetic, but naïve’. They are a sophisticated elaboration of the peculiar Hobbesian view of man. According to that view, a human being is not some definite, finite, physical ‘moral agent’, but merely an indefinite bundle of desires seeking satisfaction by all means available. Thus, a human being’s fundamental or natural right is not the physical integrity of his own being and works, but the satisfaction of his desires. Unfortunately, if human beings would try to satisfy their desires through individual initiative by all means available, the result would be war and destruction. For that reason – so the theory implies – they should choose to relinquish control over their own lives in order that their desires might be satisfied for them according to the priorities, policies and ‘national plans’ of a single authority. In this way, according to the theory, their desires can be satisfied more efficiently by all means available. Of course, the desires to be satisfied are then no longer their own desires, but only those that have been transformed by means of

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32. Statistical criteria of social justice have been skilfully used by a number of feminists complaining about the ‘under-representation’ of women in politics and other high-profile occupations. Spokespersons for a few other groups have followed their example.

33. T.H. Marshall, *Citizenship and social class* (Cambridge: Cambridge University Press, 1950) pp. 58-59.

statistics into suitable policy goals. None of this is without cost. If an army, as Robert Heinlein wrote, is “a permanent organisation for the destruction of life and property”, the modern state, with its myriad of privileged public and private institutions, is a permanent organisation for separating persons from their own life and property. The human beings themselves, to the extent that they are not members of the policy-making elite, must be treated as ‘national resources’ in order for the state to realise their human rights. As such, they are to be managed in the endeavour to equalise the satisfaction of wants in accordance with the organisation and resources of the state that claims authority over them.

It is indeed a sophisticated and, in its own way, fascinating view of human beings and their rights, but I have no sympathy for it. I cannot get myself to believe that covetousness, not the rational nature of man, is the distinguishing mark of ‘human dignity’. To believe that is to accept that one’s rights are as unlimited as one’s desires, and as such primary sources of conflict and disorder. No such belief is to be found anywhere in the classical tradition of law and rights. Human rights are not a legacy of the tradition’s representative theories of, say, Thomas Aquinas or John Locke. The UD’s human rights are at odds with any view that takes human beings and not just their desires seriously. Social justice is not a species of justice. It is as different from justice as equalising the satisfaction of wants is different from ordering interpersonal relations in accordance with freedom and equality.

## ***Personal Freedom versus Corporate Liberties***\*

### ***1. Introduction***

Are limited liability business corporations compatible with the free market, as libertarians understand it? Many libertarians think they are. Others are at least doubtful. And still others—I include myself<sup>276</sup> among them—deny that limited liability business corporations belong in a free market.<sup>277</sup> My purpose here is to spell out some of the reasons for that denial as well as to qualify it: I have no argument against large enterprises that issue limited liability shares or protect their managers with extensive vicarious liability arrangements. However, as we shall see, the compatibility problem of the corporation does not stem from these contemporary business practices.

There is no need here to consider the legal and political incentives and disincentives, such as tax and labour laws, accountancy requirements, jurisprudential doctrines, administrative practices and so on, that in various national legal systems may incline people to see the corporate form as advantageous or disadvantageous relative to other forms of business organisation. Such factors reflect various types of interventions by the state, its legislators, administrators and judges, which would be absent in a libertarian free market. Consequently, they are not germane to the logical question of the compatibility of business corporations with the principles of the free market. Of course, I must assume respect for personal property and freedom of contract as essential background conditions for assessing the libertarian legitimacy of the corporate form of business. However, I cannot assume that prevalent legal doctrines concerning, say, shareholders' rights and contracts between a corporation and suppliers of capital are accurate representations of the contracts that free persons would accept if they

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\* This text is based on the notes I had prepared for the Libertarian Alliance Conference, held at the National Liberal Club in London, 19-20 November 2005. I thank Chris Tame for inviting me to speak on the topic of corporate liability, and also the numerous participants who helped me with their questions and suggestions. Shortly before the conference was held, the *Journal of Libertarian Studies* published Piet-Hein van Eeghen's "The Corporation at Issue, Part I". I have incorporated some references to it in this text: it makes substantially (and often in greater detail) the same analytical points that I emphasise, although it does so from a somewhat different underlying political philosophy.

<sup>276</sup> See my "Is the Corporation a Free-Market Institution?" (*The Freeman: Ideas on Liberty*, March 2003, LIII, 3; also at <http://fee.org/pdf/the-freeman/feat7.pdf>.)

<sup>277</sup> The most notable libertarian apologist of the business corporation is Robert Hessen (see below in the text). Norman Barry also has produced vigorous defences of the business corporation in his *Business ethics* (Macmillan, London, 1998) and *Anglo-American capitalism and the ethics of business* (Business Roundtable, Wellington, New Zealand, 1999).

Gary North (<http://lewrockwell.com/north/north408.html>) and Stephan Kinsella (<http://blog.mises.org/blog/archives/004269.asp>) respond to anti-corporation arguments by Mike Rozeff (<http://lewrockwell.com/rozeff/rozeff28.html>) and Robert Murphy ([http://anti-state.com/article.php?article\\_id=415](http://anti-state.com/article.php?article_id=415)). Piet-Hein van Eeghen, "The Corporation at Issue, Part I" (*Journal of Libertarian Studies*, XIX, 3, Summer 2005), offers a critique of the corporation that is based on nineteenth century liberal ideas about the separation of the private and the public sector. Van Eeghen suggests that the corporate form is required for the state as the guardian of "the public interest" and other public sector providers of genuine "public goods" but that it should not be allowed in the private sector, at least without explicit authorisation (a charter) granted by the state. I am no fan of this 'political liberalism' or 'Rechtsstaat-ideology' (cf. my "Political Liberalism and The Formal Rechtsstaat" (<http://users.ugent.be/~frvandun/Texts/Articles/Godefridi.pdf>)). Thus, while I am largely in agreement with Van Eeghen's critique of the business corporation, I do not share the political philosophy that underlies his proposals for the reform of corporate law. I certainly do not accept Van Eeghen's statement that "the State has a *natural* right to corporate status" (p.54, emphasis added): no corporate entity is a part of the natural order of the human world; hence no corporate entity has any natural right.

wanted to attract or supply capital to a business undertaking. The same goes for legal doctrines concerning managerial responsibilities and contracts between a corporation and people who seek employment as corporate managers, officers, or other representative agents. There is no reason to assume that “judge-made law” in the libertarian context of a decentralised judicial system without monopoly or other privileges would settle on the same doctrines that it has developed in the legislation-driven nationalised court systems with which we are familiar.<sup>278</sup>

The question before us, then, is which features of the corporate form, as we know it today, are and which are not compatible with a regime of freedom and its institutionalisation of the principles of respect for personal property and freedom of contract. Of course, a logically coherent theory of personal freedom as a condition of order in human relations also must be a coherent theory of personal responsibility and liability. Otherwise, it would degenerate quickly into a ‘freedom to’ theory of do-what-you-want-and-let-the-chips-fall-where-they-may or a ‘freedom from’ theory of stop-everybody-else-from-doing-what-you-do-not-want-them-to-do. Either of these degenerate forms of the theory of freedom rules out the harmonisation of interests according to general principles of justice that is the most alluring aspect of the libertarian philosophy. One persistent criticism of the corporate form in the world of business is precisely that it is a source of disharmony: it exhibits an imbalance between the rights and responsibilities of corporate action<sup>279</sup>, which arguably is a cause of the emergence of large and interlocking command-and-control structures, managerial and technocratic conceptions of profit, and volatility and instability in markets.<sup>280</sup>

I begin with a short discussion of the corporate form (section 1). This form is not peculiar to incorporated business organisations. It is also a characteristic of political corporations (states) and of religious, charitable, and other non-profit corporations. I then present some libertarian misgivings about corporations in general and political and business corporations in particular (section 2). Next I turn to the logical question of compatibility and discuss briefly Robert Hessen’s arguments in defence of the corporate form. I show that they do not succeed (section 3). The crucial question ‘Who owns the corporation?’ is the subject of section 4. In the fifth and last section there are some general remarks on the relevance of the critique of the corporate form for libertarian theorising.

## *Section 1*

### *2. The corporate form*

In today’s non-libertarian legal culture corporations are organisations that enjoy a legal status as separate persons—as “persons in their own right”.<sup>281</sup> An organisation

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<sup>278</sup> Anglo-Saxon, especially American, interlocutors and correspondents have a tendency to use Common Law doctrines as a proxy for libertarian jurisprudence, thereby obfuscating the institutional context within which these doctrines were developed. I believe their view is without justification. Although various episodes in the development of the Common Law certainly illustrate that some magistrates of the state are unwilling to bow to the dictates of other agents of the state, the fact remains that Common Law judges are at least as jealous of their state-conferred corporate prerogatives and privileges as members of other “organs” or “powers” of the state.

<sup>279</sup> Van Eeghen, *op.cit.*, p.57 and the references given there.

<sup>280</sup> Van Eeghen, *op.cit.*, p.59-67.

<sup>281</sup> U.S. Supreme Court, *MONELL v. NEW YORK CITY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978) 436 U.S. 658, *MONELL ET AL. v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*, No. 75-1914. Argued November 2, 1977, Decided June 6, 1978, Brennan J.:

“[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all

that is not legally recognised by the state or any of its organs as a person separate from its owners, partners or members is not a corporation. This, as we shall see, is the heart of the matter. Libertarian apologists of the corporation tend to dismiss corporate personhood as an inconsequential epiphenomenon. The gist of their position is that, regardless of the legal doctrine of corporate personhood, people would still act within their libertarian rights in incorporating business organisations and that such free market corporations would not differ essentially from the corporations with which we are familiar.

Legal recognition of corporate personhood blurs the distinctions between natural or human persons and artificial persons in discussions of rights, responsibilities and liabilities. However, the differences are obvious enough. Unlike human persons corporations are not individuals. A corporation can be split up in two or more other corporate persons, and it can be merged with another to form a new corporate person. As it is not an individual (indivisible) entity or atom, it would not be methodologically sound to treat it as an essential or necessary denizen of the human world on a par with natural persons. Indeed, if one wishes to regard corporations as separate persons at all then one should say that they are not natural but artificial or conventional persons—human artefacts rather than human beings. Hence, corporations have the attribute of “perpetuity”: not being mortal they can continue to exist indefinitely, at least in principle, for as long as the legal system that recognises, and compels its subjects to recognise, them as persons continues to do so.

Unlike natural persons corporations are not self-representative, neither in word nor deed. They lack the capacities that define natural personhood, namely the capacities to act, think and speak for themselves. Natural persons must do those things for them. A corporation derives its person-like capacities from individual persons—but only from

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purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations “as such” were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809). By 1844, however, the Deveaux doctrine was unhesitatingly abandoned:

[A] corporation created by and doing business in a particular [436 U.S. 658, 688] state, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person. *Louisville R. Co. v.*

*Letson*, 2 How. 497, 558 (1844) (emphasis added), discussed in *Globe* 752.

And only two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations.”

In 118 U.S. 394 (1886) *COUNTY OF SANTA CLARA v. SOUTHERN PACIFIC RAILROAD CO.* the Supreme Court reputedly granted Fourteenth Amendment rights to corporations. However, as David Korten writes in *The Post-Corporate World, Life After Capitalism* (Berrett-Koehler Publishers; 2000), pp.185-6: “[f]ar more remarkable...is that the doctrine of corporate personhood, which subsequently became a cornerstone of corporate law, was introduced into this 1886 decision without argument. According to the official case record, Supreme Court Justice Morrison Remick Waite simply pronounced before the beginning of argument in the case of *Santa Clara County v. Southern Pacific Railroad Company* that

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

The court reporter duly entered into the summary record of the Court's findings that

The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteen Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.”

Apparently, the American doctrine of corporate personhood developed on the basis of an informal remark by a judge that the court recorder then inserted in his summary notes. On this incident, see the entertaining narrative in Thom Hartmann, *Unequal Protection*, Rodale, 2002, chapter 6.

individuals that legitimately occupy one or another pre-defined corporate position, say Member of the Board, Chief Executive Officer, Treasurer, Manager, Shareholder, or Employee.<sup>282</sup> From this the corporate attribute of separate or “limited” liability follows immediately: because the corporation and the individuals that represent it are regarded as separate persons, the individuals are not to be held liable for the actions and debts of the corporation and the corporation is not to be held liable for the actions or debts of the individuals. However, again because they are regarded as separate persons, those individuals may have contracts with the corporation that rearrange their respective liabilities. Moreover, the legal system that gives the corporation its separate personhood may well stipulate, by means of legislation, or come to accept, through its judge-made law, that in some situations the corporate veil should be lifted to redirect liability from the corporation to one or more of its individual agents. However, legislation and judge-made law equally well may make the corporate veil even more opaque by extending corporate liability far beyond the range determined in the explicit or implicit contracts between the corporation and its agents. Because the degree of opaqueness of the corporate veil may vary from one legal system to another, it may be possible to argue, say, that in the Anglo-American legal system corporations are more compatible with the requirements of a free market than they are in the German or the Japanese legal system. However, the question of this paper is whether the corporate form itself is compatible with the laws of personal freedom.

Although as a rule the occupants of corporate positions are natural persons, in some cases they may be other corporate persons. For example, one corporation can be a (or even the only) shareholder of another. It is probably not practical but it certainly is conceivable that one corporation hires another to act as its CEO or Financial Manager. Corporate positions are not nature-given; they are defined by legal rules, some of which originate with or within the corporation, others with or within the political corporation known as the state. Of course, within a libertarian free market, state-imposed rules would be absent, as only general principles of the law of freedom<sup>283</sup> would be lawful constraints on contractual arrangements and the regulatory powers of organisations that were created by contract.

As artificial persons, corporations enjoy most but not all of the legal rights, and have most but not all of the obligations<sup>284</sup> that natural persons have as citizens, including many so-called human rights. That is why corporations are called legal persons. Thus, they legally can sue and be sued; own property; buy and sell and generally enter into contracts with natural persons or other corporations; form associations; publish opinions; and the like. In many countries, recent developments on the legal front have

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<sup>282</sup> These corporate positions also are discussed as if they were persons—again, artificial persons, with rights, duties and obligations listed in or inferred from the rules that define the corporation. Thus, a corporation is an artificial person and at the same time an order of artificial persons. In this respect it is like a state, which is also an artificial person and an order of artificial persons, for example, ministers, magistrates, civil servants, and citizens. A citizen is a legal person—or, to put it more exactly, it is a legally defined position in the state that is defined by the legal system of that state. Historically, the position of a citizen is reserved for natural human persons. Other legally defined positions, such as that of a corporation, historically are reserved for organisations or organised groups. However, some legal systems allow that a single individual occupies the position of a corporation. Some comments on one-man corporations follow in the text.

<sup>283</sup> For a discussion of these, see my *Het fundamenteel rechtsbeginsel*, Antwerp, 1983. For a bare-bones version of the underlying logic, see e.g. ‘Natural Law: A Logical Analysis’ ([http://www.units.it/~etica/2003\\_2/vandun.htm](http://www.units.it/~etica/2003_2/vandun.htm)).

<sup>284</sup> For example, on the one hand, they generally do not have the right to adopt children, to vote or to hold political office in the legislative, executive or judiciary branches of national and local governments or their subdivisions; and they typically must keep more records for government inspection than natural persons. On the other hand, they have no legal duty to serve in the armed forces or to attend school for a number of years.

seriously weakened the erstwhile dogma that corporations cannot commit crimes or intentional torts, thereby making corporations even more like individual persons than they were supposed to be only a few decades ago.<sup>285</sup>

Artificial personhood is not objectionable in itself. It goes without saying that individuals contracting with one another to set up an organisation have the libertarian right to endow it with fictional personhood. However, it also goes without saying that, according to libertarian principles, such a contractually created artificial person cannot diminish in any way the rights or increase the lawful liabilities of persons who were not parties to the contract. In short, the right to create an organisation and endow it with fictional personhood does not imply the right to create a *separate* person with full or nearly full standing in the law as a person ‘in its own right’. This point will be taken up in section 3.

Like other organisations and associations, a corporation is a tool by means of which human agents seek to attain their goals, yet it also is a person in its own right, separate from the natural persons without whose actions and decisions it would be no more than a piece of paper. Consequently, where there are corporations, we confront not only other people and their organisations and associations, but also *personified incorporated tools* that serve as masks or shields behind which people can act without putting their own responsibility and liability on the line. Moreover, although they are thought of as separate persons, different corporations often mask and shield the same men.

As noted before, because a corporation and the individuals that occupy representative positions in it are regarded as separate persons, their liabilities also are regarded as separate. In this connection it is customary to speak of the limited liability corporation. However, we should not misunderstand that notion. As separate persons, corporations are *fully* liable for their actions: for just like natural persons they are liable to the full worth of their assets. To the extent that limited liability is considered a problem, it does not arise from the difference between natural and corporate persons. It arises from the difference between incorporated and unincorporated tools, organisations and associations. Its cause is the fact that corporate liability as a rule does not extend to the wealth of the natural persons that actually are responsible for the corporation, its actions and the behaviour of the assets that it controls—a privilege not available to those responsible for other organisations and associations. In short, incorporation allows some individuals to limit their liability *unilaterally*. It allows them unilaterally to impose risks on others for which they otherwise would be personally liable. That is why corporations deserve carefully scrutiny by anyone who professes a concern for the freedom of human persons.

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<sup>285</sup> Because corporations are artificial persons, what they are and what they can do cannot be ascertained empirically. It must be determined on the basis of a legal evaluation of their statutes: they can do only what legally is deemed relevant for achieving the purpose for which they were created—and both the purpose and the ways of attaining it must be recognised as legitimate by the legal system under which they were created. Hence an organisation like “Murder, Inc.” (as in the 1951 Humphrey Bogart film *The Enforcer*) would not be a corporation, no matter how closely its structure mimicked that of a legitimate corporation. For a long time the artificial nature of the corporation was held to mean that a corporation *by definition* could not commit crimes or intentional torts; hence only individual agents of the corporation should be held answerable for corporate crimes or torts. However, this restriction has been weakened considerably, in part to give the often numerous victims of a corporate action a chance to recover compensation for damages from the corporation itself.

## Section 2

### ***3. Libertarian misgivings about the corporate form***

Obviously, a critique of the corporate form per se cannot be directed solely against business corporations. That is because not only business organisations can be cloaked in corporate garments but also political, religious, charitable, recreational and other organisations. On the one hand, in sympathy with the young Edmund Burke's exclamation "The thing! The thing itself is the abuse!", most libertarians oppose the political corporation of the state, although so-called minarchist libertarians, like many classical liberals and conservatives, exempt some historical or merely hypothetical states from criticism. On the other hand, most libertarians seem to defend the business corporation as a purely voluntary ("contractual") organisation, although at least those among them who are sympathetic to Austrian economics rarely, perhaps never, use theoretical arguments about the free market process that essentially rely on the corporate form of business organisation.<sup>286</sup> About non-profit corporations (and "foundations" and "trusts") opinions appear to be much more diverse: some see them only as lawful because voluntary associations while others see them as potentially dangerous concentrations of ideological power that might be used to subvert the order of the free market<sup>287</sup>.

If the corporate form were merely a lawyer's name for a lawfully constituted contractual association of individuals then the wide range of opinion noted in the previous paragraph would be understandable: there is nothing wrong with the corporate form per se but one may like some corporations and what they do less than others, or not at all. However, if the critics are right and the corporate form constitutes a separate person then corporate persons, no matter what their field of activity is or what they do, exist to the detriment of some natural persons and their natural rights precisely because they give a legally embedded advantage to other natural persons. This obviously is or should be a problem especially for the Rothbardian wing of libertarianism, which is outspoken in its support of natural law and natural rights as the foundations for a coherent philosophy of freedom.<sup>288</sup> As a natural law libertarian, I have to ask myself whether there is a natural right to incorporate. I don't think there is but let us see.

### ***4. Libertarian opposition to the political corporation known as the state***

Libertarian opposition to political corporations (states) need no documentation here. However, I believe that an excessive focus on physical violence has led many libertarians to embrace a quasi-behaviouristic political theory: What's wrong with the state, they say, is that it is an organisation of the means of aggression for the purpose of forcing *non-consenting* people to obey and submit. In this approach, the state's lawfulness turns on whether or not people consent to its rule over them. Consideration of the state's corporate structure accordingly falls by the wayside. Hence, because

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<sup>286</sup> Austrian economic analysis usually starts with 'Crusoe economics' and from there moves to ever-more complex interpersonal settings. See M.N. Rothbard, *Man, Economy and State, The Scholar's Edition*, Ludwig von Mises Institute, Auburn, Alabama 2004. It is an analysis of human action, with a consistent stress on subjective valuation and opinion, which are functions of an individual mind, something that a corporation does not have. See L. Mises, *Human Action, A Treatise on Economic, The Scholar's Edition* (Ludwig von Mises Institute, Auburn, Alabama 1998).

<sup>287</sup> Obvious examples would be the plethora of corporations (such as *Greenpeace*) in the environmentalist movement.

<sup>288</sup> M.N. Rothbard, *The Ethics of Liberty* (Humanities Press Inc., Atlantic Highlands, N.J. 1982).

business and religious and charitable corporations are not essentially preoccupied with violent coercion, their corporate structures are left off the hook.

One problem with this behaviourist approach is that it is weakened by the so-called social contract theory of the state, which implies that the state exists with the consent of the governed—or, to quote Ayn Rand, that it enjoys the sanction of the victim. Now, it is easy to make fun of literal versions of the social contract theory; but the consent of the governed should not be taken lightly. With very few exceptions, most people nowadays consent to being governed by the state, however much they may dislike and want to change or replace particular policies or politicians. They consent because they honestly believe that there is no serious or realistic alternative for *the* state. While they occasionally can and do move from one state to another they cannot move to a non-state. Moreover, they cannot even imagine that one would want to move to a non-state—hence their ostensible consent to the state as an institution, which does not necessarily imply consent to its contingent realisation.

That type of consent does not weaken the philosophical libertarian critique of the state but it does undermine the behaviouristic (and ultimately Hobbesian<sup>289</sup>) approach that relies on mere behavioural signs of consent. No matter how explicit they may be, such signs rightly do not carry much weight in a libertarian critique of the state because by themselves they do not reveal the extent to which they are the result of training, indoctrination, or programming. A robot can be programmed to display consent; unfortunately, to some extent people too can be programmed to do so. Certainly in an age of state-controlled education and massive exposure to regime-friendly propaganda consent is likely to be mass fabricated—a corporate artefact. Think of the state's legitimacy as the Stockholm syndrome writ large: Aren't you grateful that those with the power to ruin or even kill you let you live in relative comfort? Shouldn't you return their trust?

In contrast, from the point of view of natural law or justice-based libertarianism, the question of lawfulness cannot be settled by noting mere expressions of consent. It must be settled with reference to a standard of *free, informed, and rationally justifiable consent*.<sup>290</sup> However, there is not a shred of evidence that according to such a standard one should deny rational consent to the state *only* on the ground and to the extent that it

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<sup>289</sup> “[T]his Dominion is then acquired to the Victor, when the Vanquished, to avoyd the present stroke of death, covenanteth either in expresse words, or by other sufficient signes of the Will, that so long as his life, and the liberty of his body is assured him, the Victor shall have the use thereof, at his pleasure. And after such Covenant made, the Vanquished is a Servant, and not before: for by the word Servant [...is meant...] one, that being taken, hath corporall liberty allowed him; and upon promise not to run away, nor to do violence to his Master, is trusted by him.” (Hobbes, *Leviathan*, Chapter 20)

<sup>290</sup> “Will this free and informed consent be aggregated somehow by majority rule? If that's not possible rationally, then it is no way to settle legitimacy.” (Remark by Mike Rozeff, in private correspondence) The standard of free, informed and rationally justified consent has nothing to do with majority rule or any other manner of collective or corporate decision-making, which is not an endogenous feature of a libertarian world. It is a standard that can be invoked in an argument between two natural persons, if need be in front of a judge (I do *not* mean a magistrate of the state), either to prove or to disprove that a person lawfully consented to an action by another. (Hence my dialectical or dialogue-based foundation of libertarian principles in *Het fundamenteel rechtsbeginsel*, op.cit in note 283 above, which is similar in spirit to H.-H. Hoppe's idea of “the primacy of argumentation”, in his *A Theory of Socialism and Capitalism*, 1989, and *The Economics and Ethics of Private Property*, 1993, both published by Kluwer Academic Publishers, Boston.) The conditions of lawful consent obviously will vary with the circumstances. Buying a box of cookies is not the same as signing an open-ended labour contract, a fortiori an open-ended ‘social contract’. Consent given in a environment saturated with propaganda and more or less subtle intimidation is not a paradigm of free, rational consent. One of the tasks of a court of justice is to create an environment in which factors such as propaganda, intimidation and even the weight of public opinion are held at bay. Politicised justice notoriously fails in that respect.

is an aggressive organisation.<sup>291</sup> A theory of free, informed and rationally justifiable consent also must look at the question whether *artificial persons* of any kind, not just states, ever should be considered persons ‘in their own right’, on a par with natural persons. Ultimately, libertarianism stands for the freedom of individual natural human persons, not for the liberties of artificial, corporate persons under one or another legal convention.

### ***5. Libertarian misgivings about the corporate form of business***

My focus here is on the business corporation (as a general type, regardless of differences in various national legal systems). However, it must be noted that historically corporations were political and religious organisations and then privileged ‘public-private partnerships’ before they made their appearance as denizens of the so-called private sector of a national and still later of a thoroughly politicised ‘global’ international economy. Libertarians have more than enough reasons to be wary of corporations, even if they shun critiques that are based primarily on widely publicised scandals and allegations of corporate misconduct.

#### *The history of corporations*

Libertarian misgivings about business corporations are motivated in part precisely by a consideration of the role of corporations in history, in particular their links to governments<sup>292</sup> and the financial and monetary systems sustained by central banks, which surely are early instances of corporations that straddle the border between economics and politics.<sup>293</sup> Although in medieval times there was nothing comparable to the modern state, there were many lords with more or less purely proprietary (“territorial”) rights of rule but also lots of corporate entities—cities, universities, guilds, monasteries, and of course the Church, the universal corporation of Christendom—that de facto or by grant from an overlord enjoyed such eminently political rights as having reserved areas of jurisdiction, keeping their own armed forces, and taxing and regulating the lives and work of their subjects. Because of the great multitude of such entities and the fact that in many cases their jurisdiction did not amount to a territorial monopoly, their mutual jealousies regarding their prerogatives were significant factors in averting the emergence of large centralised and territorially integrated systems of rule. In that sense they were constitutional safeguards of freedom in the medieval world, which is not to say that they paid as much attention to the personal freedom of their subjects as they did to their own corporate liberties. However, they gradually lost their liberties to the state, but that state was itself a giant territorial corporation.

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<sup>291</sup> Consequently, the so-called “non-aggression rule (or axiom)” does not provide a sufficient foundation for a libertarian political philosophy or a libertarian legal theory. See my “Against Libertarian Legalism” (*Journal of Libertarian Studies*, XVII, 3, Summer 2003, 63-90) and “Natural Law and the Jurisprudence of Freedom” (*Journal of Libertarian Studies*, XVIII, 2, Spring 2004, 31-54)

<sup>292</sup> Already in Roman times, tax-farming corporations were in operation to run the predatory Republic’s and Empire’s system of provinces. (Charles Adams, *For Good and Evil*, Madison Books, Lanham, MD, 1993, Chapter 8) In the Age of Absolutism they were revived in France on a large scale (*Ibid.*, chapter 21) and probably were factors in creating the phenomenon of permanent public debt: money raised by corporations that were unsuccessful in securing the tax-farming contract might be loaned to the king or other grandees and corporate entities (cities, trading companies) rather than returned to the contributors.

<sup>293</sup> It should be worthwhile to consider whether fractional reserve banking could have become the norm in banking if limited liability corporations had not existed. See Vera C. Smith’s *The Rationale of Central Banking and the Free Banking Alternative* (1936, LibertyPress, Indianapolis 1990) for indispensable background.

Despite the fact that some kings may have pretended otherwise, neither the territory nor the population of the realm was the king's personal property. The state was not "the realm of the king"; on the contrary, the king was "the king of the realm", occupying the majestic office in its corporate structure. Placed above all individual persons and corporate entities in the realm, he nevertheless was subject to the whole of it—and that whole was the corporate person of the state itself. Consequently, the king had *imperium* (the right to command) but not *dominium* (ownership). Thus, the king was supposed to rule in the public—that is to say, the state corporation's—interest, which was neither his own personal interest nor the common interest of the subjects or any group or class among them.<sup>294</sup> However, as the governor and sole representative of the state, he was the one who should determine which particular interest was at any time the public interest. Already in the seventeenth century, the era of European state building, mercantile corporations, such as the Dutch and the English East India Companies, became the primary conduits for exporting the then new European political model of governance all over the globe.

Eventually, the kings lost their majestic position to corporate bodies representing ever-larger classes of the population, but the nature and the means at the disposal of the position itself did not change much. The public interest, the interest of the political corporation itself ("the whole"), still is the preferred pretext for restricting the freedom and natural rights of individuals. Strictly speaking, these individuals are not even "the parts" of the corporation but merely people who happen to occupy one or another position within the legal system of the corporation.<sup>295</sup>

Halfway through the nineteenth century Western states began to re-invent themselves as democratic corporations. At about the same time, general incorporation laws enabling the formation of business corporations were adopted widely<sup>296</sup>, but it was not until the last quarter of the century, that large fully private business corporations began to make their mark in economic and political life and to flex their muscles as policy-makers rather than policy-takers. Since then the mutual involvement of political and business corporations does not seem to have abated.<sup>297</sup>

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<sup>294</sup> Compare Jean-Jacques Rousseau's distinction (in *On the Social Contract*, 1762) between the General Will and the Will of All. It is a translation in the terminology of the political philosophy of voluntarism of the distinction between the concepts of public interest of the corporation and the common interest of the people who at any time happen to be involved in it. Although both 'public interest' and 'general will' are used primarily in connection with political corporations, it is obvious that they apply to every corporation (because of the conception of the corporation as a separate person or entity with an interest of its own).

<sup>295</sup> The Citizen (a legal position within the state) is part of the state. Hence it is true *by definition* that a citizen cannot but, and therefore should, obey the legal rules of the state: the state's legal system defines what a citizen is, can do, or wants. However, since human persons are not parts of any state, it is an open question which if any legal rules *they* should obey, even if they happen to find themselves in the position of a citizen of a state.

<sup>296</sup> When as a student I was introduced to the legal regime of business corporations ("anonymous societies" or *sociétés anonymes* as they are known here) my teacher, Professor Jean Limpens, mentioned that the corporation was instituted as a shareholders' democracy after the model of the modern democratic state. Interestingly, the model was not a shareholders' co-operative or the formation of a pool of common property. While these alternatives logically place the origin of the organisation in a contract *among shareholders*, the corporate alternative presupposes a contract *between the shareholders and the corporation*. It is the corporation that issues shares, not a group of shareholders.

<sup>297</sup> M.N. Rothbard's many historical works that explore the interplay between corporate and political power in American history are primary libertarian sources of this sort of critique: e.g. the essays "The Hoover Myth" and "War Collectivism in World War I", in R. Radosh & M.N. Rothbard (eds), *A New History of Leviathan* (E.P.Dutton, New York 1972); and "Wall Street, Banks, and American Foreign Policy" (Rothbard-Rockwell Report, Center for Libertarian Studies 1995). Also a.o. Butler Shaffer, *In Restraint of Trade: The Business Campaign Against Competition, 1918-1938*, Bucknell University Press, 1997; Paul H. Weaver, *Suicidal Corporation*, Touchstone Books; Reprint edition, 1989.

One may be tempted to see the adoption of general incorporation laws as the watershed between a regime under which corporate charters were privileges granted by the state and a regime that places corporations fully within the sphere of personal freedom and freedom of contract. I believe that view involves a logical mistake. There is a difference between abolishing a privilege and making it universally available, if the privilege<sup>298</sup> concerns an exception to general principles of law. Oligarchy—or aristocracy, in the modern sense of the word—presupposes that certain individuals or families have the privilege to rule and live at the expense of others. Democracy, as we know it today, presupposes that every citizen enjoys that privilege.<sup>299</sup> In that sense, modern democracy implies universalisation of aristocratic privilege. That, as we well know, does not make it a guarantee of personal freedom. And it does not turn the alleged right to rule others and to live at their expense into a principle of law. Similarly, if incorporation once was a privilege reserved for a few then general incorporation laws by themselves do not ensure the compatibility of the corporate form with the laws of freedom. True, the relative *value* of a privilege to an individual may diminish as the number of people who enjoy it increases, but conceptually the nature of a privilege does not depend on its value to any particular person or group.

### *Structural analogies with the State*

There is a structural resemblance between business corporations and the organisation of politics (the State) and religion (the Church) in the West, which is fairly obvious in the case of business corporations with dispersed shareholding. They all are large, in some cases enormously large, organisations involving lengthy chains of principal-agent relationships.<sup>300</sup> These are difficult to monitor for outsiders and for those for whose sake the organisations nominally exist: citizens in the one case, believers in the other, and shareholders in the third. This dilutes the link not only between decision and action but also between these and personal responsibility and liability. Hence, they create an environment in which so-called stakeholder-groups can flourish.<sup>301</sup> Moreover, allocations of means and resources are largely dependent on budgets rather than on pricing—and this means that power relations, connections, influence, pressure, and coalitions built around the career-interests of individuals and groups within the organisation play an important role in the distribution of burdens and benefits. Admittedly, these are phenomena that pertain to all large organisations, not

<sup>298</sup> 'Privilege' is ambiguous: it may mean a legal status reserved for one or a few men, or it may mean a legal status that is not available under general principles of law. In most cases, a monopoly is a legal privilege in the first sense: it denies all people, with the exception of a few, to engage in a lawful activity. The political right to vote on other persons' lives and affairs is a privilege in the second sense.

<sup>299</sup> See my "Hobbesian Democracy" (<http://users.ugent.be/~frvandun/Texts/Articles/Hobbesian%20democracy.pdf>).

<sup>300</sup> In one-man corporations and in close (or few-men) corporations, the shareholders do not face insuperable problems of monitoring the management. To say "the operations of the corporate officers consist merely in the loyal execution of the tasks entrusted to them by their bosses, the shareholders" (Mises, *Human Action*, op. cit. p.703) makes sense with respect to such closely held corporations but not with respect to large, publicly held corporations. (See also note 312 below.) Ironically, Robert Hessen's "In Defense of the Corporation" insists that closely held corporations are unjust and should not be allowed in a free society! (See below in the text.)

<sup>301</sup> If it were not for the large discretionary powers of corporate management, stakeholders' claims readily would be identified as attempts to divert money away from those who have title to it to those making the claims. However, managerial discretion implies the possibility of 'buying goodwill for the corporation' from one group or another and to present this as 'normal business practice'. Thus, managers may raise their social standing and political profile by encouraging stakeholder activity at the same time that they strengthen their bargaining position relative to shareholders: the stakeholders' allegiance is to the management, not to the shareholders, and the management can use it to intimidate the shareholders into accepting or formalising even larger areas of managerial discretion.

just corporations. However, if incorporation removes some of the obstacles to the enlargement of an organisation—and there are good theoretical and empirical reasons for saying that it does<sup>302</sup>—then incorporation certainly exacerbates those problems.

However, not only size is a problem where monitoring is concerned; there also is a problem with monitoring what a corporation is supposed to do. Today's corporations generally are free from the 'single purpose' requirement that formerly had characterised most corporations other than the state, which always has pursued an abstract goal, Power or Control, by any available means. Abstract models in economic analysis notwithstanding, with regard to monitoring there is a difference between a single-purpose corporation (such as one that is formed to build a bridge in a particular spot or even one that is formed to build bridges wherever it has the opportunity) and a general-purpose corporation that is formed to make a profit no matter in what line of business. Subject of course to national regulations, modern business corporations are rather like states in that their abstract purpose, Profit, imposes virtually no restrictions on the sort of activities they might want to undertake. This, too, is an aspect of their being regarded as persons in their own right. Whereas a single-purpose corporation has an incentive to improve its products and services and still return a profit, a general-purpose corporation has an incentive to switch from one activity to another merely because the one currently looks more profitable than the other.<sup>303</sup> Not surprisingly, the general-purpose corporation is much less likely to be run by entrepreneurial engineers and technicians and funded by knowledgeable capitalists than single-purpose corporations such as the manufacturing corporations that dominated the corporate scene of the nineteenth century before 1890, when the "corporate revolution" really took off.<sup>304</sup> It is more likely to be run by MBA's, accountants, and lawyers, and financed by managers of funds with no particular interest in or knowledge of its concrete activities.

Of course, there are obvious differences between political corporations and business corporations. For example, shareholders can sell their shares but citizens cannot sell their citizen rights—not on an open legal market anyway. Moreover, the government, the management of the political corporation or state, can increase taxes on some or all categories of citizens to pay the debts of the state. Business corporations do not have the power to tax shareholders, which is not to say that there are no ways in which the management can induce the shareholders to shoulder the burden of the corporation's debts.

Important as they are, these differences nevertheless should not obscure the structural similarities that are consequences of the corporate form itself, regardless of the political or business nature of the corporation. For example, the holders of the national debt have no direct claims against the citizens or the ruling politicians. Neither

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<sup>302</sup> Historically, as far as size is concerned, the giant corporation is unmatched by any other form of business. Theoretically, the limited liability corporation has a unique advantage for entrepreneurs and investors in that it is able to externalise some of the risks of manufacturing, mining, transport and financial activities, especially in the context of the corporate economy where one limited liability corporation's risks are 'insured' by other limited liability corporations (banks, insurance and re-insurance companies, and ultimately governments and central banks—the so-called 'too big to fail' phenomenon).

<sup>303</sup> F.A. Hayek, "The Corporation in a Democratic Society", in his *Studies in Philosophy, Politics, and Economics* (Simon & Schuster, New York 1967), writes: "[I]f we want effectively to limit the powers of corporations to where they are beneficial, we shall have to confine them...to one specific goal, that of the profitable use of the capital entrusted to the management by the stockholders." (p.300) However, in terms of human actions and actual organisations of productive activities (involving human labour and physical means of productions) this hardly counts as a "specific goal" on a par with, say, "the profitable use of the specific means of production that the shareholders agreed to pay for".

<sup>304</sup> Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916* (University of Cambridge Press, 1988).

do the holders of corporate debt have a direct claim against the shareholders and the managers of a corporation.

The most important structural similarity between political corporations and business corporations is the fact that, whereas in all organisations actions by officers and agents are covered to some extent by the doctrine of *respondeat superior* ('I was only doing my job; talk to my superior'), only in corporations does the chain of vicarious responsibility terminate with an artificial person, the corporation itself, which represents individual persons that are to remain anonymous (citizens, believers, shareholders). Thus, within the corporation, be it political, religious, commercial, for-profit or non-profit, the rule for the ultimate superior, the nominally sovereign authority of the corporation, is *ne respondeat*.<sup>305</sup> Responsibility evaporates at the top of the hierarchy. For the chief officers of the corporation, the model is 'political responsibility': they may lose their position ('have to resign'), usually without being held personally liable for the consequences of what they directed the corporation to do. And that presupposes that those leaders hold a position in the corporation. In some cases, the real movers and shakers are formally outside the corporation, while the nominal leaders are no more than their stooges or front men.

### *Corporate culture and corporate man*

Other but related libertarian misgivings stem from the contemplation of what we may call cultural aspects of the corporate economy. Whatever the differences between business corporations and political corporations may be, both types of corporation tend to breed a bureaucratic culture<sup>306</sup> that cannot but affect the outlook on life of a great number of people. Both are structures that force human relationships to be ordered according to a fixed system of vertically arranged positions and constrained by position-specific rules.

Consider the sort of life a man has when he is surrounded on all sides by corporate structures. It is likely to be centred on his position and career in the organisation for which he works or the political society in which he lives. Thus, competition for him primarily means rivalry in securing one or another position for himself or his friends within the organisation. He adjusts to the command-and-obey or team player mentality that it requires. His environment is defined immediately by the regulations and policies that his superiors have imposed and only remotely, if at all, by the general principles of law and morality. Thus he gets accustomed to utilitarian rather than moral thinking.<sup>307</sup> In the extreme case, he may identify himself completely with his position in the

<sup>305</sup> Van Eeghen (see note 277) notes that "[w]hile management is the agent for shareholders..., it is also the agent for the corporation itself" (p.53) However, whereas in the one case the shareholders have at least the theoretical possibility of holding the managers answerable, in the other case the management is to some [possibly large] extent answerable to the corporation as represented by the management itself. It is like a ventriloquist answering the questions put to him by his dummy.

<sup>306</sup> Mises, *Bureaucracy*, Center for Future Education, Cedar Falls, 1983 (1944) explores the differences between political and commercial bureaucracies with reference to the market's discipline of profit-and-loss accounting.

<sup>307</sup> Utilitarianism 'works' in closed universes where permissible moves in any situation are finite and known, have a rather well defined set of consequences attached to them, and can be ranked according to a predefined utility function ("measures of success"). If that is the case then one can calculate 'the best move' or something close to it—as for example a chess computer does in the fully rule-defined world of a game of chess. Corporations in particular, and formal organisations in general, lend themselves easily to utilitarian ("impersonal") decision-making because the decisions generally are made by managers acting to deploy assets assigned to them within a formal system of rules and given utility functions—as chess players deploy their pieces according to the rules and pre-defined utility functions of the game. See also Van Eeghen, *op. cit.*, p.64-67. In more personal settings and probably nowhere more than in raising and educating one's children such a utilitarian approach would be highly inappropriate, if not totally unworkable.

organisation, internalising its rules and regulations, its policies and goals, as if he would be merely faceless human matter (an undefined human resource) if the organisation had not stamped its form and purpose on him.<sup>308</sup> The political equivalent of corporate man is of course the fully socialised man, whose principles of action are derived not from his own reason, opinions and values, but from the legal rules and politically correct opinions imparted to him by the societal regime.

Then there was the so-called managerial revolution.<sup>309</sup> It was a phenomenon of the rise and widespread adoption of the corporate form in society, not just in politics but also in the organisation of business and non-profit activities. In corporate systems an anonymous base of members, shareholders, or voters elects representatives that either assume the managerial tasks themselves or elect or appoint managers. Thus, the corporate economy, like the corporate political society in which it is embedded, is rife with principal-agent problems and manifold opportunities for shirking, free riding and passing the buck that need to be addressed by close and often intrusive surveillance and elaborate procedures of control, evaluation and intervention.

### *Corporate wealth*

Consider also the nature of wealth and property in today's corporate economy. In his *Democracy: The God That Failed*<sup>310</sup> Hans-Hermann Hoppe developed an argument in political economy that was based on the distinction between property managed by or under the direct control of a real owner and property managed by managers controlled, if at all, by an abstraction, The People, The Nation, or The Community—an abstraction that is represented by corporate structures of collective and ultimately anonymous decision-making (electoral statistics). While Hoppe used that distinction to theorise about the long-run effects of monarchy and democracy,<sup>311</sup> it also applies rather directly to modern business corporations, controlled as they are by another abstraction, The Market, which is represented by transaction statistics produced by corporations (“stock exchanges”) that organise the sale of shares and quote stock prices.

People who are dissatisfied with citizenship in one state can vote with their feet to move to another political corporation, but not to move out of the system of political corporations altogether. Just so, people dissatisfied with a business corporation whose shareholders and creditors they are can vote with their wallet to move to another corporation, buying its shares or bonds or depositing their money in its vaults. However, under present conditions, this merely means that control of the means of production will shift from one corporation to another.<sup>312</sup>

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<sup>308</sup> These cultural and psychological aspects of corporate structures figure prominently in the writings of libertarian author Butler Shaffer (see in particular his *Calculated Chaos*, Alchemy Books, San Francisco, 1985). In contrast, some people claim that the Organisation Man is dead. However, that claim merely may reflect the efficacy of advanced ego-massaging techniques of modern *human resources management* that, in the interest of corporate efficiency, seek to convince employees that the corporation has their happiness at heart. Alternatively, the claim may reflect the degree to which Organisation Man's counterpart (non-organisation man) has disappeared from public perception. In the political sphere, nationalism (the internalisation of one's role as a citizen and the identification with the nation-state) had shown already in the nineteenth century how readily people let themselves be mobilised for corporate goals.

<sup>309</sup> Alfred D. Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Belknap Press of Harvard University Press, Cambridge Mass. 1977); also of course James Burnham, *Managerial Revolution* (Penguin Books, New York 1941).

<sup>310</sup> Transaction Publishers, New Brunswick, NJ, 2001

<sup>311</sup> Although Monarchy and Democracy are systems of political rule—both ultimately rest on the power to aggress with impunity—the significant differences between them, to which Hoppe draws attention, derive from formal differences of organisation. Democracy's *corporate* structure bears the brunt of his critique.

<sup>312</sup> Admittedly, the market for shares to some extent may force corporations to be more efficient (in some sense of that term) than governments. However, the argument here is not about efficiency but about

For most individuals, wealth consists mostly of claims and derivatives of claims against political and business corporations. Stock, bonds, all sorts of credit-instruments and derivatives, and entitlements are basically paper claims against corporate entities, economic and political, whose leaders and members are not fully liable for the entities' actions. In many cases, they are not even direct claims. Often, indeed, individuals are connected to the corporate economy by way of having subscribed to a fund that invests in corporate shares, bonds or derivatives. Those funds typically are 'products' produced by corporations. Although the individual may believe that he invests in shares, he gets no control-rights whatsoever.

'Paper wealth'—for many people the only wealth they own—is to a large extent a phenomenon of the corporate economy. It is property the value of which depends on how corporate managers use real property bought with other people's money. It is property of immaterial things that may have value without having substance. Consider, for example a person's pension entitlement. Although 'bought' with the acceptance of lower wages or higher taxes, it often is merely an unfunded liability of one or another corporation that may dispose of it by going bankrupt or reforming or ditching its 'social security system'. It is subject to manipulation—it can be inflated or deflated by decisions of non-owners (managers, politicians) as they repackage and recombine claims to suit their purposes.

Often, such claims appear safe only because the corporations in turn hold claims against other corporations or are reputed to have ready access to credit from still other corporations. Corporate wealth is intimately connected to the credit-industry. Compare your personal credit line with that of even a small corporate actor. Then remember that credit enables the debtor to buy real resources. A great preponderance of the means of production, capital goods and primary factors (land, natural resources) are 'owned' by corporations, and controlled by their managers, whose main concern may be to keep their jobs and positions, that is to say to prove more attractive to the voters or shareholders than the competition.<sup>313</sup> In terms of perception and action, most individuals are at a great and often insuperable distance from the material embodiments of what they nevertheless think of as 'their wealth.'

One can argue of course that people are 'free' to buy or not to buy shares or corporate debt; that they are not compelled to take part in the corporate economy; and that by taking part they consent to it. However, this sounds very much like the argument that by not emigrating people consent to the conditions imposed on them by the state in which they happen to live. It is no argument to the effect that the corporate economy, as we know it, is at bottom no more than a consequence of the universal

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compatibility with libertarian principles. Even so, it is somewhat surprising to hear an Austrian economist refer to "the role that the capital and money market, the stock and bond exchange, which a pertinent idiom simply calls the 'market', plays in the direction of corporate business" (Mises, *Human Action*, op. cit. p.303). In the long run that role may be decisive, indeed. The remark is reminiscent of Hume's celebrated dictum that government always rests on opinion, which also implies that in the long run 'the market of opinions' directs the operations of government. An Austrian economist, however, should not posit an instantaneous adjustment of corporate or managerial action to "the market" or the wishes of the shareholders anymore than a political theorist should assume that government and public opinion never are out of sync. In the polity as in the economy, all the exciting things happen "in the mean time", before perfect adjustment is reached (if it ever is).

<sup>313</sup> This reference to competition does not magically transform politics into a libertarian free market device. Is it different with the corporate economy? Is the market for corporate control a free market? Or is it a market that exists only because the corporate economy has received, a long time ago, a legal fiat from the state? There have been spirited defences of the market for corporate control, by mainstream economists such as H.G. Manne and by libertarian theorists such as Norman Barry. However, their arguments appear to presuppose that Anglo-American notions of 'the private sector' provide a sound theoretical benchmark of institutionalised freedom (as regards property rights and contracts).

respect for personal freedom. In any case, from the fact that people are ‘free to choose’ among alternatives open to them it does not follow that these alternatives are the result of, or are compatible with, a regime of personal freedom.

None of the aspects of our corporate world mentioned in this section bodes well for a libertarian culture of personal freedom. However, without dismissing them as unimportant, I shall say no more about them here. At best, they build a case against corporate capitalism that is based on circumstantial evidence. The most direct confrontation of opinions about the libertarian status of business corporations concerns their separate—or, as it usually is called, limited—liability, not only for contractual but also for non-contractual debts. This feature of the corporate form seems to place it outside the pale of the libertarian worldview. Indeed, one way to characterise the libertarian position is by saying that full and undiluted ownership and full and undiluted liability are two sides of the same coin. How does the limited liability business corporation fit in that equation?

### Section 3

#### **6. Robert Hessen’s defence of the business corporation**

Libertarian or free-market oriented defenders of the business corporation generally follow the argument that was mapped out so skilfully by Robert Hessen<sup>314</sup> some 25 years ago in his brilliant little book in defence of the corporation. Let me address the question of the libertarian credentials of the business corporation by way of a short discussion of his argument.<sup>315</sup> In his prologue, he wrote that his purpose was

to demonstrate the legitimacy of the corporate form—which means its compatibility with the principles of capitalism: individual rights, private property, freedom of contract, and voluntary peaceful cooperation.<sup>316</sup>

Obviously, if that was the book’s purpose then we may suppose that at least Hessen himself thought that he had succeeded in proving the libertarian capitalist credentials of the existing corporate form. I do not think he succeeded. Consequently, I cannot agree with libertarians who point to Hessen’s book to justify complacency about the presence and the role of business corporations in the modern world.

The gist of Hessen’s argument is that every feature of the corporation can be accounted for in terms of lawful contracts. Hence, the corporation is no more than a web of contracts, a lawful construct under the principle of freedom of contract. This is what Hessen calls the inherence theory of the corporation,

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<sup>314</sup> Robert Hessen, *In Defense of the Corporation*, Hoover Institution Press, Stanford CA, 1979, 133p. The second part of Van Eeghen’s paper “The Corporation at Issue” (forthcoming in the *Journal of Libertarian Studies*) is a hard-hitting point-by-point critique of Hessen’s book.

<sup>315</sup> Hessen wrote his book in response to Ralph Nader’s (and others’) criticisms of the corporate capitalist economy and more specifically to refute the cogency of Nader’s proposals for changing American corporate law. The basic argument of Nader and others was that since corporations are creatures of the State, the State has a right and a duty to regulate them in the public interest. Obviously, this argument cuts no libertarian ice. Similarly, the argument (e.g. in Thom Hartmann, *Unequal Protection*, Rodale 2002) that since it is folly to regard natural and artificial persons as “equal persons”, the state should create a different legal regime for each class of persons, is not relevant either, as it assumes the state’s right to legislate what any person may or should do. It should be clear that defending the existing corporate form against Naderite attacks is not exactly the same thing as proving that it is compatible with libertarian principles or the principles of capitalism (as Hessen preferred to call them). In any case, I am not here questioning the validity of Hessen’s refutation of Nader’s claims and proposals.

<sup>316</sup> Hessen, *op.cit.*, p.xvii.

the idea that men have a natural right to form a corporation by contract for their own benefit, welfare, and mutual self-interest. It is the only theory of corporations that is faithful to the facts and philosophically consistent with the moral and legal principles of a free society.<sup>317</sup>

Quite so! *If* a corporation is merely a nexus of lawful contracts then it does not constitute a special problem for a libertarian. However, Hessen did not offer convincing proof that corporations-as-they-exist are mere contractual arrangements that would be lawful *under a regime of respect for natural rights*. Perhaps he did prove that they are mere contractual arrangements *within the existing American legal system*—but surely it takes a leap of faith to assume that the legal status of U.S. Citizens is a carbon copy of the natural rights of man. If the legal context within which men make contracts does not conform to the requirements of natural law and natural rights, then we cannot simply assume that their contracts, no matter how ‘freely’ made, conform to those requirements.

Indeed, Hessen’s argument itself involves the concession that the corporate form, as it is understood today, contains at least one element that is not compatible with his “principles of capitalism”: the idea that the corporation is a separate entity, a separate legal person. As Hessen puts it, “the entity concept serves no *valid* purpose.”<sup>318</sup>

This concession would not affect his argument *if* the separate person notion were absolutely inconsequential; *if* it in no way affected people’s decision whether to give an organisation a corporate or another form. However, that is unlikely. The outstanding feature of the corporate form is precisely that it is a separate person. The corporation builders and their armies of lawyers<sup>319</sup> have put up a mighty fight to secure that feature as a fixture of modern legal systems.

If ‘corporate personhood’ is not inconsequential then Hessen’s concession destroys his argument as a libertarian defence of the corporation as it exists. It then comes down to a proposal to *reform* the law of corporations. And Hessen does propose a reform. It is on page 20 of his book (where it is inserted inconspicuously in a discussion of vicarious liability):

The proper principle of liability should be that whoever controls a business, *regardless of its legal form* [emphasis in the original], should be personally liable for the torts of agents and employees. Thus, in partnerships, vicarious liability would fall upon the general partners only, while in corporations, the officers would be liable (whether they are owner-investors or hired managers). ...

The current rule that shareholders are not personally liable for corporate torts because [the corporation] is an entity distinct from [them] has permitted and condoned an injustice: the use of the so-called one-man corporation and the close corporation... The use of [these constructs] has unfairly thrust the burden of accidents and injuries upon the hapless victims.

Although Hessen’s argument seems to be that corporations can be defended without mentioning the separate person doctrine (given that it ‘serves no valid purpose’), we see that he himself conceded that the doctrine does make a difference. He explicitly

<sup>317</sup> Hessen, p.22

<sup>318</sup> Hessen, p. 22, emphasis added—FvD

<sup>319</sup> In a case decided in 1854, Abraham Lincoln, acting as attorney for the Illinois Central Railroad Company, unsuccessfully argued that the railroad, as “a person”, should have the protection of the “uniform taxation” clause of the 1847 Illinois State Constitution. (Thom Hartmann, *op.cit.* p.85)

noted that separate person corporate capitalism permits and condones unjust and unfair outcomes in the form of one-man and close corporations, which would not be there if corporations were mere contractual arrangements *within a legal system defined by the principles of capitalism*. Thus, he admitted that separate person corporations are not compatible with libertarian principles.

In short, the corporate form that Hessen defends, excludes the idea that the corporation is a separate entity. It leaves no room for the notion of corporate liability but seems to equate the corporation with a partnership of ‘officers of the corporation’, at least for the purpose of dealing with non-contractual liability. That may seem like a nice thought but not like an accurate description of corporate realities, now or on the eve of the Reagan era, when Hessen wrote his book. Moreover, as we shall see, it does not square well with Hessen’s freedom of contract doctrine.

### *The one-person corporation*

We can agree with Hessen that the one-person corporation is an abomination of the principles of libertarian capitalism. However, is the abomination, as he suggests, a consequence of the one-man aspect—or is it a consequence of the corporate aspect?

If one doubts that the one-person corporation is incompatible with libertarian principles, one may conduct the following thought-experiment.

Imagine the world in a condition that is in accordance with your own version of libertarianism. Now, imagine that I appear in that world. To your surprise I have the letters llp tattooed on my forehead. Yes, I am a limited liability person! What does that mean? Well, it means that there is plain old natural me, the private Frank, if you will, and then there is the public Frank, an artificial person that I have created.<sup>320</sup> I have endowed my public persona with assets worth 1000 grams of gold and have contracts with it that stipulate that I will act as its chief manager and its sole shareholder. Moreover, I have promulgated to the world that, unless I decide otherwise, all my actions should be ascribed and accounted to my public self: I interact with the outside world only through the medium of my public self, except in those cases where I decide to act as a private person. Consequently, I have publicly limited my liability for all debts, contractual and non-contractual, to the worth of my public persona’s assets (1000 grams of gold initially).

This operation does not harm my public persona with creditors. If my public persona goes to a bank and asks for a loan and the bank tells it that its public assets are not sufficient to establish its creditworthiness then my private person can step forward and agree to make some of my private personal wealth available as collateral for the loan. Of course, I can do something like that in all contractual relationships.

However, unless I decide otherwise, my liability for torts and damages arising outside any contractual relation is limited to the assets currently owned by my public persona, even though it cannot do anything without my personal intercession or involvement. That is because my public persona contractually has assumed vicarious liability for torts arising from my actions as its manager. Surely, Hessen is right to denounce this construction but what ground does he have to denounce it only in the case of the one-man corporation?

As noted above, my public persona is not harmed by the fact that other market participants may interpret its limited assets as insufficient creditworthiness. If they insist, I can always personally guarantee its debts. However, a more important question is whether my creation has not harmed or done injustice to others. Hessen says it does

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<sup>320</sup> Obviously, nothing in the corporate form precludes me from creating as many public personae as I want. However, for the sake of simplicity, let us assume that there is only one incorporated Frank.

but only because mine is a one-man corporation. If we abstract from this purely numerical aspect, his argument must be that my corporate form does not do harm or injustice. Other libertarians apparently agree. Here is what Rothbard had to say:

On the purely free market, ... men [creating a limited liability corporation] would simply announce to their creditors that their liability is limited to the capital specifically invested in the corporation, and that beyond this their personal funds are not liable for debts, as they would be under a partnership arrangement. It then rests with the sellers and lenders to this corporation to decide whether or not they will transact business with it. If they do, then they proceed at their own risk.<sup>321</sup>

This is weird, to say the least. Everybody seems to agree that the default position is that my liability is “unlimited”. Everybody also seems to agree that I always can limit my liability contractually, if the other parties to the contract agree to the limitation. I can limit my liability if I am willing to pay the price the other parties ask for bearing more of the risk involved in the deal than they otherwise would have to bear. However, according to Hessen and Rothbard, if I unilaterally have assumed the corporate form, the default position is reversed: no additional or special contract is needed to limit my liability; on the contrary, it now falls to the other party to take steps to undo the limitation and pay the price (or at least incur the transaction costs) for getting me to agree to increase my liability.

To see the consequences of this stance, imagine a world in which incorporation was an original, natural right of every person, with everybody’s liability limited *de iure naturale* to zero (or to whatever he or she announces, or perhaps to, say, the value of a week’s work). Alternatively, imagine a world in which everybody had a natural right to incorporate himself merely by announcing “I am a corporation.” Incorporation then most certainly would not be a privilege but one may well ask in what manner such a world would meet the requirements of justice. Would it not be somewhat like a world in which everyone has a natural right to steal from everybody except those who have paid him to respect their property?<sup>322</sup>

If everybody has a natural right to incorporate then the question arises: Why don’t we all incorporate? What is the point of remaining unincorporated? The usual answer (again derived from Hessen) is that incorporation implies costs that may well offset its advantages or benefits. Now this happens to be true but as an argument regarding the question of the compatibility of the corporation with libertarian free market capitalism it is beside the point. What are these costs of incorporation? More onerous publication requirements are often cited as obvious examples. Another example is the increased likelihood to be singled out as a ‘deep pocket’ by a judicial system derailed by a pervasive culture of litigation and a commitment to satisfy individual plaintiffs merely because they are perceived to be less wealthy than the corporate defendants. However,

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<sup>321</sup> M.N. Rothbard, *Man, Economy and State, The Scholar’s Edition*, Ludwig von Mises Institute 2004, p.1144.

<sup>322</sup> There is an obvious Coasian flavour to the argument, which one certainly would not expect from Rothbard and Rothbardians like Walter Block, who on several occasions has given a most scathing account of the Coasian approach yet dismisses the critique of the corporation as “know-nothing-ism” with a mere reference to the Hessen-Rothbard position (W. Block, “Henry Simons is not a Supporter of Free Enterprise”, *The Journal of Libertarian Studies*, XVI, 4, Fall 2002, p.28, note 75). For Block’s critiques of the Coasian theorem and the approach to the study of law and economics it has inspired, see his “Coase and Demsetz on Private Property Rights”, *Journal of Libertarian Studies*, I, Spring 1977, 111-115; “Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz”, *Review of Austrian Economics*, VIII, 2, 1995, 61; “Private Property Rights, Erroneous Interpretations, Morality, and Economics: Reply to Demsetz”, *Quarterly Journal of Austrian Economics*, III, Spring 2000, 63-78

such costs do not arise from the requirements of free market exchanges but from government regulations and a court system that has abandoned the quest for justice in an effort to turn itself into a mechanism for redistributing wealth. In a truly free market, supported by courts that recognise its principles, only the negligible costs of making the announcement that one is a corporation could offset the benefit of no or limited liability! Thus, there does not seem to be any point in remaining unincorporated, if, as Hessen alleges, incorporation is a natural right. Clearly, the unilateral assumption of the corporate form is not as innocuous as Hessen and Rothbard imply.

It is a safe bet that you will not accept my dual appearance, as a private person hiding behind the corporate veil of my public persona, as a lawful feature of your libertarian world. Note, however, that I have not done violence to or aggressed against anyone in creating and publicising the one-man corporation that is my public persona. Therefore, if you believe that any action that is not an aggression is legal in your libertarian world, and if you assume that the risk of harm created by your legal actions falls entirely on those who eventually suffer the harm<sup>323</sup> (yourself or others), then you logically are committed to accept the libertarian legitimacy of self-declared limited liability persons, that is to say one-man corporations. Indeed, you are committed to accept the legitimacy of the form of the separate-person corporation itself. As a separate entity, the artificial person of the corporation remains what it is no matter how few or how many persons hide behind its corporate veil.<sup>324</sup> If the one-man corporation is illegitimate then so is the any-number-of-men corporation. If the latter is not illegitimate then neither is the former sort of corporation.

#### *Shifting the argument*

Here, then, is where I must part company with Robert Hessen. He assumes that he can single out the one-man corporation and the few-men or close corporation for their incompatibility with the principles of capitalism and leave the larger corporations in full possession of the corporate playing field. However, to reach that conclusion he must shift his line of argument:

Regardless of one's view about limited liability for torts, the whole issue is irrelevant to giant corporations, which either carry substantial liability insurance or possess sizable net assets from which claims can be paid. (p.21)

Obviously, this is an irrelevant argument. It may have pragmatic value, but remember that Hessen was arguing for the compatibility of the corporate form with *the principles of capitalism*. In any case, his argument now relies on the distinction between corporations with sufficient insurance or assets and corporations that have neither of these. Conceptually and perhaps also empirically, it has nothing to do with the distinction between one-man and close corporations, on the one hand, and giant corporations, on the other hand.

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<sup>323</sup> This seems to be the position defended by Walter Block ("Towards a Libertarian Theory of Blackmail", *Journal of Libertarian Studies*, XV, 2, Spring 2001, 55-88). However, I cannot recall having seen any more developed statement of his position on limited liability corporations than his jibes against H.C. Simons' critique of the corporate form ("Henry Simons is Not a Supporter of Free Enterprise", *Journal of Libertarian Studies*, XVI, 4, Fall 2002, p. 3-36, especially 27-28)

<sup>324</sup> Logically, at least, there may be an artificial person, a corporation, even if there is no real or natural person pulling its strings. Such a corporation would be totally inert, because an artificial person is not capable of acting or thinking on its own or speaking for itself, but inertness does not entail non-existence.

Moreover, speaking empirically, liability insurance for corporations overwhelmingly is supplied by other corporations.<sup>325</sup> The attempt to prove that one corporation is compatible with free market principles by *assuming* that other corporations are compatible with those principles obviously goes nowhere.<sup>326</sup> As for assets, a service corporation that is housed in rented space may be a corporate giant and yet have no more saleable assets than a few tons of office furniture and equipment, a customer database and a couple of trademarks.

In the real world, of course, one-man corporations and few-men corporations *should* be relatively harmless. To the extent that the legal rules they have to apply and the judicial traditions in which they have been indoctrinated permit it, judges will not hesitate to tear apart the corporate veil in search of the real decision-makers and agents (the shareholders or managers of the one-man or few-men corporation). The injustice of permitting a few known individuals unilaterally to limit their own liability is too obvious for judges to stand by in idleness, unless they are legally bound, as magistrates of the state, to respect the legal form in defiance of requirements of justice. In large corporations, the corporate veil is far more effective because there is little personal contact between shareholders and managers so that the latter more easily can invoke their status as employees to use the doctrine of vicarious liability to their advantage—to shift responsibility upward to higher management and ultimately to the corporation itself (the shareholders remaining out of bounds as far as liability claims are concerned).<sup>327</sup>

Robert Hessen could state justifiably that corporations are compatible with libertarian principles of capitalism, *provided that we do not think of organisations as entities or persons in their own right and to the extent that they merely are contractual arrangements*. However, he went astray in believing that the mere fact that a creditor can insist on a contractual stipulation to the effect that the self-announced limits of a corporation's liability should be raised or lifted completely obviates all concerns of justice. He also went astray in believing that questions concerning limited liability for non-contractual debts could be dismissed with a glib reference to sufficient insurance or assets or to the assumption that officers of the corporation are liable regardless of what their contract with the corporation stipulates. Let us elaborate a bit on this last point.

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<sup>325</sup> Even Lloyd's of London now counts among its members more limited liability corporations than "Names" (individuals with unlimited liability) and is expected to become an exclusive preserve for limited liability corporate insurers in the near future. See [http://en.wikipedia.org/wiki/Lloyd's\\_of\\_London](http://en.wikipedia.org/wiki/Lloyd's_of_London) and the article "Lloyd's of London: Insuring for the Future?" in *The Economist*, September 16th, 2004.

<sup>326</sup> Under present conditions insurance companies are very much intertwined with other financial corporations, banks, and ultimately the really big players in the field, central banks and governments (which justify most if not all of their activities with the claim that they are the insurers-of-the-last-resort). Hence, if, for the reasons adduced in this text, limited liability corporations are outside the pale of the free market then so are limited liability insurance corporations. Consequently, contracting away one's liability to a limited liability insurer does not appear entirely kosher. 'The free market' refers to people acting according to the principles of libertarian capitalism, which do not permit any one of them to limit his liability unilaterally.

I am inclined to believe that limited liability insurers tend to exacerbate the well-known problems of the insurance industry, for example moral hazard and asymmetrical information about the composition of the insurer's risk pool. However, I shall not develop my reasons for that belief here.

<sup>327</sup> Note again the similarity with the political organisation of the state: its officers and managers (civil servants and politicians) refer to higher authorities and these ultimately refer to the voters (citizens) who remain anonymous and beyond the reach of liability claims.

## Section 4

### 7. *Shareholders, managers, and owners*

It should be clear that the problem of the limited liability corporation is not the fact that the liability of managers is limited. Managers typically are linked by contract to the corporation that employs them. Under the doctrine of freedom of contract, their contracts can stipulate any distribution of liability between the employer (the corporation) and the employee. To attract managers, a corporation generally will offer the protection of its own vicarious liability for many of the risks associated with the manager's role and function within the corporation. There is no reason why these contracts should not touch on liability for torts. Hence, Hessen's recommendation that 'in corporations, the officers would be liable (whether they are owner-investors or hired managers)' for torts goes against the grain of his own inherence or freedom of contract theory of corporations.

It also should be clear that the problem of the limited liability corporation is not the fact that the liability of shareholders is limited. That limitation of liability too is entirely contractual. You buy the shares in return for the prospect of sharing in the profits of the corporation, of being able to sell your shares to anyone who might want to buy them, and to get a share of the positive residual value of the corporation if it ever should be dissolved. However, you do so on the understanding that you in no way will be held accountable or liable for any action undertaken by the corporation. In that sense, shareholders do not have liability at all. Issuing shares is a way to raise capital. To make the buying of shares more attractive, a corporation may throw in other sorts of goodies, for example voting rights in the shareholders' general assembly and lavish receptions when it meets. However, these extras do not change the fact that the sale of such shares is purely a matter of contract. One cannot suggest therefore that shareholders should be held fully liable for the corporation's acts of commission or omission without violating the principle of freedom of contract.

Accepting the validity of Hessen's argument, Stephan Kinsella<sup>328</sup> asks: "[D]oes respecting corporate status violate anyone's rights?" He obviously expects us to answer in the negative, his argument being that corporate law does not (or should not) allow the doctrine of vicarious liability to divert liability for torts from the actual managers or employees of a corporation to the corporation itself. However, that diversion is the very point of corporate personhood as far as liability is concerned, even if there are defences in cases of actions outside the scope of 'normal business practices' (crimes, abuse of authority, conduct unrelated to corporate action or policy, and the like<sup>329</sup>). To hold the managers or employees personally responsible and liable for *all* non-contractual debts that may result from the execution of their corporate tasks, *even when there is no contract in which they explicitly have assumed the risk of full liability*, would be blatantly unjust—unless one assumed either that the corporation's 'normal business practices' carry no risk whatsoever of accidents or mishaps (which is absurd) or that the managers are (or own) the corporation. The latter assumption obviously contradicts Kinsella's position that *the shareholders* own the corporation. However, he also holds that shareholders are not liable for corporate debts of any kind. Hence, the result is that the corporate status implies externalising liability (without contractual sanction): either from the shareholders to the managers and employees, as Kinsella would have it, or from the corporation to [some of] those who otherwise would have

<sup>328</sup> See his blog referred to above, note 277.

<sup>329</sup> However, consider the legal developments referred to in note 285 above.

enforceable claims against it. Thus, the answer to Kinsella's question is: "Yes, respecting corporate status does violate the rights of persons."

### 8. *Who owns the corporation?*

From the contractual limitation of shareholders and managers' liability, there follow two important corollaries:

First, neither the shareholders nor the managers fit the libertarian position that ownership and liability are two sides of the same coin. Hence, the pat answer that 'the shareholders or the management own the corporation' will not do.<sup>330</sup> They have a perfect alibi: they are linked to the corporation by contracts of sale or employment that, as a rule, strictly limit their liability for what the corporation does.

Hence, if shareholders and managers were the only possible candidates for the owner's position then we should say either that *nobody owns the corporation* or that *it owns itself*. Both of these possibilities are anathema from the libertarian point of view, if they are not entirely illogical.<sup>331</sup>

Second corollary: unless the corporation's liability was limited before it began to issue shares or hire managers, it remains as fully liable after it started to do so as it was before! Hence the question: Was the corporation's original liability limited to its legal assets or did it extend to the assets of its owners? Let us consider the alternatives:

On the one hand, if the corporation's original liability included the assets of its owners before the sale of shares or the hiring of managers then it continues to do so afterwards. Indeed, *ex hypothesi*, both types of contract explicitly rule out that the shareholders or the managers take over full liability from the owners of the corporation. Therefore, full liability remains with the owners. Consequently, the whole idea of the limited liability corporation is an oxymoron.

On the other hand, if the corporation's original liability did *not* include the assets of its owners then the question is: How did the owners acquire the benefit of owning a corporation through which they can act without creating any liability for themselves? Here, the answer must be: ultimately from the *founders of the corporation*, its original owners, for they were the people who created that particular corporation, drew up its constitution, and gave it the features and attributes it has.

However, as we saw in section 3 above, under libertarian capitalist principles the founders, who are natural persons, cannot limit their own liability by mere fiat. Indeed, from the founders' point of view, the corporate form is no more than a device, a tool, a means for achieving their ends. Now, the creator of a tool is at once its owner and also the one who is liable for its use *to the extent that no one else voluntarily has accepted to bear the risk of liability for him*. The fact that he then sells shares or hires managers, does not diminish his liability for torts one bit. That liability remains with him until he disposes of his property. It also does not diminish his liability for contractual debts except in cases where his contractors have agreed to a limitation of his liability.

Once we draw attention to the owners, and in particular the founders, of a corporation, we clearly can see the anomaly presented by prevalent notions of the corporation. If natural persons can endow one kind of tool, namely an organisation of

<sup>330</sup> Piet-Hein van Eeghen makes this point with impeccable clarity, in the article referred to in note 277 above, p.52-54 and p.57-58.

<sup>331</sup> Note that under the American doctrine of corporate personhood (see note 281 above), the Fourteenth Amendment, which offers equal protection to all persons, strictly speaking covers corporations. If we accept that doctrine then we must logically conclude that no one legitimately can own a corporation, because no one legitimately can own another separate person. Consequently, the corporation must be a self-owning person—which is absurd, at least from a libertarian point of view.

their own creation, with separate artificial personhood then why should they not be able to endow any other tool, say a hammer, a car or an oilrig, with the same? If they could do that then they could tell anyone who was harmed by their use of a hammer ‘to go and sue the hammer!’ Thus, if someone accidentally were to hit you with an incorporated hammer then, no matter how much damage you suffered, you would be entitled only to seize the hammer and sell it for what it’s worth.<sup>332</sup> Obviously, that would be absurd—but then so is the idea that those who use the corporate form can escape personal liability by pretending that their corporation itself is liable.<sup>333</sup>

The conclusion must be that human persons cannot by their own right create a limited liability corporation *under natural law* (the law of natural persons). If socio-empirically it seems that they nevertheless have that ability then the explanation must be that it derives from an *artificial law* (the law of artificial persons)—the positive law, enacted by the legislature or developed by the monopolistic judicial system of a political corporation that will not hear an appeal to natural law.

Actual positive law does not recognise the owners of a business corporation, or, if it does, illogically conflates the owners with those who happen to occupy contractually the statutory corporate positions known as Shareholders or Managers. It has no serious interest in answering the question ‘Who owns the corporation?’ Yet that is the libertarian question *par excellence*.

Obviously, then, a libertarian view of the corporation must consider its owners as well as its shareholders and managers; and it must consider the transfer of ownership as something distinct from the transfer of shares or the selection of a management team. However, if, as well might happen in some cases, the transfer of shares is in effect a transfer of ownership of the corporation itself then these shares cannot be ‘limited’ or ‘no liability’ shares. Thus, it would be necessary to distinguish at least between owners-shareholders and shareholders that are merely suppliers of capital to the owners. It will not do to refer to shareholders as ‘the owners of the corporation’ in all cases, except those where their liability for the debts of the corporation comes into play.

Of course, the separation of ownership and shareholding would have far-reaching consequences. For one thing, it is likely that corporate statutes (drawn up by the founders) would restrict the powers of the assembly of mere shareholders in matters such as choosing managers and acquiring particularly risky assets: the owners at least would reserve a veto right for themselves. It is also likely that owners would be more careful in circumscribing the actions of managers that will be covered by the owners’ vicarious liability. Moreover, large undertakings probably would take the form of contractual cooperation or cartels rather than accumulations of corporate property.<sup>334</sup>

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<sup>332</sup> It is beside the point to insist that the courts will (or should) not permit this. *If* one legitimately could incorporate a tool or organisation and endow it with a constitution that makes it vicariously liable for actions done with it, then a court would have to accept the arrangement. It would be inconsistent to want to have your cake (the natural right to incorporate merely by announcing the existence of a corporation) and eat it too (the natural right to incorporate should count for nothing in cases where it leads to undesirable consequences).

<sup>333</sup> There would be no absurdity, of course, if we were to embrace that stalwart of social (and socialist) metaphysics, namely that certain social organisations by their very artificial or conventional or traditional nature are persons and that their so-called personal rights ultimately supersede the rights of natural human persons. However, at least from a libertarian point of view, that would be a clear *reductio ad absurdum* of the whole idea of corporations as separate persons.

<sup>334</sup> Interestingly, the great impetus for incorporation, at least in the United States, seems to have come from the courts’ animosity against business pools and other forms of contractual cooperation that were deemed ‘in restraint of trade’. Corporations provided businessmen with an alternative cooperative scheme that made it possible for them to coordinate activities on a large scale without running afoul of the courts’ prejudices. The corporate form permitted them to do by rearranging property relations what they could not do by mutual agreement among otherwise independent partners. See W.G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton University Press, 1999), especially chapter

Most important of all, the separation of ownership and shareholding would focus attention on the real owners and thus permit one to cut through the cloudy issues of liability that always have surrounded the corporation.

## Section 5

### 9. Concluding remarks

#### *A short note on natural law and artificial law*

Natural law or justice-based libertarianism does not countenance the possibility that one natural person owns another innocent natural person<sup>335</sup> or the possibility that one artificial person owns another person, natural or artificial. It does not object to natural persons being the owners of artificial persons. Ownership is an attribute of natural, human persons. Here the difference between the natural law approach and the artificial or positive law approach is crucial. In artificial, 'positive' law the distinction between natural and artificial persons deliberately is kept unresolved. Indeed, when push comes to shove, certain artificial persons (the state in the first place) often get preferential treatment over other persons.

The positive law approach wallows in intellectual bluff: legal fictions that condone the use of arbitrary cut-off points and definitional stops to decide an argument one way or another. It directs its practitioners to cut off the search for responsibility and liability as soon as it encounters a person, whether that is a natural or an artificial person, such as a corporation. However, to avoid the most egregious injustices it occasionally will allow people to set the fiction aside and pierce the corporate veil. On other occasions, it will hold the corporation liable for no other reasons than that its pockets are deeper than those of the culpable managers or employees.

The natural law approach, in contrast, goes step by step through the whole network of relationships that constitute an organisation and the actions and decisions of the natural persons that brought it to its present shape. The natural law approach follows the evidence as far as it goes. In the case that is of interest here, it goes back to the natural persons who founded the organisation, its original owners, and from there forward again to those who succeeded them as owners (as buyers or heirs). If we find the original owners and can discover the succession of owners to the present then we also have identified the natural persons that are fully and personally liable for the debts of the organisation. The trouble is that in a legal system based on fictions there is no tradition of following the trail of ownership either of political or of business corporations.

Note that the natural law approach considers the organisation without assuming that it is something different from the organising agents and their actions. It does not look at the organisation as if it were a corporation. On the contrary, it looks at a corporation as

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7: "[Businessmen and their lawyers] eventually found that the corporation offered a set of property relations that the government itself had created to supersede the limitations of individual ownership. [...] It was only when other means of organizing their industries were prohibited that they began to use corporate structures in a way that ironically reflected the original conception of corporations as supracompetitive, socially owned, financially capitalized, large scale enterprises." (Roy, p.191-192)

<sup>335</sup> This raises the issue of 'voluntary slavery'. Without going into details, just for the record, I believe the logic of law and justice entails the proposition that there is no lawful way in which one man can own another innocent man. In other words, owning another man implies that he is not innocent (he must be a criminal) or that the action that effectuated the transfer of ownership was itself criminal and therefore unlawful. See theorem NJ4 on p. 27 of my 'The Logic of Law', which can be consulted at [users.ugent.be/~frvandun/Texts/Articles/LogicOfLaw.djvu](http://users.ugent.be/~frvandun/Texts/Articles/LogicOfLaw.djvu).

no more than one of the things people do—a game people play. Thus, it has no need to ponder whether or not to pierce the corporate veil. Whether the organisation is called a corporation or not, the natural law approach always sees human persons doing things, making contracts, re-arranging property.

*Libertarian anarchism and the limited liability corporation*

So far, I have not distinguished between various strands of libertarianism. A so-called minarchist libertarian might shrug off my remarks. For all his talk about free markets and free persons, he always keeps a supposedly utterly benign armed monopoly corporation up his theoretical sleeve with which to ‘solve’ the problems that, in his view, people cannot solve while acting according to the principles of libertarian capitalism. Thus, whatever qualms we may have regarding business corporations the minarchist can dismiss with the assurance that his government will see to it that nothing objectionable happens or goes unpunished. The same is true for many conservatives and adherents of the nineteenth century form of the *Rechtsstaat*.

For a libertarian anarchist the implications of this discussion are radically different. For him to accept limited liability corporations is to accept that corporations might just as well concentrate on acquiring land and delivering protection services, including armed protection, and judiciary and enforcement services as on marketing sweets, soft drinks, or aspirin. In short, he must countenance the possibility that the whole of the political infrastructure of his libertarian world becomes the preserve of one or a few giant corporations.<sup>336</sup> He can hardly afford to ignore the implications of such an eventuality. I have no crystal ball but I don’t think it would be stretching the imagination to expect that such a world should offer opportunities for amassing military and political power that some entrepreneurs will not pass by.

The form of the limited liability corporation makes possible, if it does not encourage, the concentration of large personal power for those who hide behind the veil of a great many corporations, which they can at the first opportunity amalgamate into one corporate giant—especially, of course, if there is no jealous power-monopolist (the state) to hold them in check. It is one thing to envisage arms and the enforcement of law and justice in a world where responsibility and liability are restrictions on the actions and power of proprietary firms or partnerships. To envisage them in a world where they are not is something else. The gulf between anarcho-capitalism and anarcho-corporate-capitalism is wide and deep.

Outside the Rothbardian anarchist wing of libertarianism, which puts justice above “the myth of efficiency”<sup>337</sup>, many people advocate free market capitalism primarily as “an incredible bread machine” and free market corporate capitalism as the most advanced version of that machine. Thus, one sometimes hears the argument that a world without corporations—at least one without corporate capitalism—would be immensely poorer than the world as we know it. However, I cannot see how throwing a corporate veil over business organisations can do anything more than create unnecessary uncertainties, partly managed and partly random redistributions of wealth, and arbitrary allocations of liability for harm. It may be true that the capabilities of limited liability corporations to raise huge amounts of capital are essential in explaining some of the technological wonders of our age. Nevertheless, we should remember

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<sup>336</sup> Another threat comes from non-profit corporations that are ideological opponents of personal property-based freedom and free markets.

<sup>337</sup> M.N. Rothbard, “The Myth of Efficiency”, reprinted in the collection Murray N. Rothbard, *The Logic of Action, Volume I: Method, Money, and the Austrian School* (Edward Elgar, Gloucester, UK, 1997), 266-273.

Bastiat's warning about "what is seen and what is not seen." That the potential of unincorporated capitalism was not realised, does not mean it must be negligible in comparison with the realisations of corporate capitalism.

*Personal freedom and corporate liberties*

If corporations never had been endowed with a separate, artificial personality, would they have become as prominent in the world's economy as they are today? I believe that having the status of a separate person is indeed the most relevant feature of the corporate form, as we know it, and that without it corporations, reduced to mere contractual arrangements, would not have achieved the pre-eminence they now enjoy. I grant that there are many corporations out there for which the corporate form is not all that important. However, that leaves potentially many corporations for which it is important—and many individuals that would not have achieved central positions in the corporate economy, if they had not had the opportunity to hide behind several corporate veils at once.

Would a system of law, under the principles of personal freedom for all, protection of property and freedom of contract and association, permit associations that cover questions of liability with a corporate veil? Would it permit such a veil to obfuscate the liabilities of those who do and decide—to the detriment of whoever happens to be in the wrong place when the chips fall? I doubt it. As an ownerless or self-owning construction, the corporation is something that cannot exist on a free market, if the idea of a free market is derived from real people and their rights and corresponding responsibilities. Thus, corporations evidently exist because of legal privileges, deviations from the law that applies to other forms of associations that do not attenuate or diminish personal responsibility and liability.

A final thought: because modern economic culture is well-adjusted to separate-person limited liability corporations, the idea that the struggle for personal freedom must be directed not only against the political corporations we know as states but also against powerful economic corporations certainly is frightening. It unhinges a lot of the clichés about the private sector that many libertarians accept all too uncritically. But then I never thought of libertarianism as a defence of the private sector. It is a defence of freedom for human persons, not of the legal positions that our rulers and their appointed judges so graciously reserve for 'private activity'.



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