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Philosophy of Law and Legal Theory

Historical and Contemporary Perspectives - Theme “Justice Based on Truth”

Edited by
Marcel Senn

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Philosophy of Law and Legal Theory: Historical and Contemporary Perspectives—Theme 'Justice Based on Truth'

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About the Editor

Marcel Senn

Marcel Senn (born 1954) was a Professor of History of Law, Contemporary Legal History and Philosophy of Law at the University of Zurich from 1995 to 2019. He has published several books and various articles in his fields of expertise. He was the Dean of the Faculty of Law from 2008 to 2010, and he chaired the Swiss Association for Philosophy of Law and Social Philosophy from 2005 to 2009.

Preface to "Philosophy of Law and Legal Theory: Historical and Contemporary Perspectives—Theme 'Justice Based on Truth'"

This Special Issue of *Laws*, entitled "Philosophy of Law and Legal Theory: Historical and Contemporary Perspectives", provides a forum for the discussion of core issues in the philosophy of law and legal theory from both historical and contemporary perspectives. In this way, the editors hope to promote debates on fundamental questions concerning law from a scientific–theoretical perspective.

For the first edition of "Philosophy of Law and Legal Theory: Historical and Contemporary Perspectives", we are interested in the basic business of the philosophy of science to arrive at "true" and "certain" knowledge in order to be able to determine the "just" parameter of law. Only such cognition and such knowledge, which is informed about itself, can and may speak critically of the things that constitute our world. Thus, the philosophy of science is the necessary basis to a qualified philosophy of law. Not political power as such, but the power of the intellect and power based on honesty, which must anchor within us, will help to develop a justice based on truth, according to which, people can act correctly. Then, law has its own effective power, which is able to shape and direct human life in society and state, for the right, the good and the true is not equal to what appears useful or success-related.

Ronald Dworkin's classic modern philosophy of law is suitable for such a discourse, as it deals with all these questions of "correct" knowledge, the "truth" of foundations and "justice" in a clear and detailed manner and, in addition to aspects of practice, as it also deals with important pioneers in the history of the philosophy of law. It may therefore provide the frame of reference for the present discourse in the sense of discussing the core question of "Justice based on Truth".

Marcel Senn
Editor

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Editorial

Introduction to the Special Issue «Justice Based on Truth»

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1. Why Truth and Justice Still Matter

When I received a request from MDPI in 2021, in the midst of the COVID-19 pandemic, to guest-edit a new online journal of philosophy of law and legal theory, including the history of their disciplines, it was immediately clear to me that this offer could be a great opportunity for all of us working in the field of philosophy of law or legal theory to develop an organ to exchange knowledge through this, as well as further crises. For it has always been of great importance to the people who deal with the fundamental questions of life and who are interested in these topics that they are also able to exchange their ideas, especially across dividing borders, and to discuss the essential questions of society, law, and state in a well-founded and free manner.

Therefore, we should first have to deal with the central question of the entire philosophy of law, namely, the question of the relationship between justice and truth. The development of a just legal order presupposes that we have knowledge of the foundations on which we are judging. This means that we must first acquire certainty in the process of gaining knowledge in order to be able to make a well-founded determination of the facts. We must therefore concentrate on the core methodological problem of how to obtain and establish these bases with as much certainty as possible. This insight arose not least against the background that for some years now, at least in the Western world, talk of «alternative facts» has been rampant to the point of conspiracy anecdotes, which, philosophically speaking, is a fundamental evil. For only on a clear and clean basis of conditions and knowledge can a just order of law be built that applies equally to all people. Such questions require «epistemological analyses», for we humans ourselves are always the constructors of «realities» and «truths». This, in turn, means that we have incessantly worked to remain self-reflective and self-critical.

From a political perspective, however, the question is more about the preservation of power. How much power is available to enforce a truth that serves certain interests to ensure a legal order is on this basis. This is definitely a long-term concern of society and state too because stability also means a kind of security and peace. Yet, the problem with a political perspective is always that a certain elite wishes to secure its own power through it. It is precisely this combination of personal, political, and philosophical aspects that usually leads to an «ideological» perspective, which shall be established and secured by force, whenever necessary. This is usually associated with a high degree of destruction of the order of principles and rights. Therefore, only those people should be able to rise to a position of leadership who are truly capable of advancing humanity within society. That is why philosophers do not think in terms of political programs from the outset and do not claim to be responsible for political decisions.

Today, two years later, the crisis situation has escalated beyond pandemic proportions worldwide, and we are once again faced with the situation of spreading conflicts of brutal war-like proportions, saturated with unbelievable constructs and narratives and well-fed with claims to power, although this absurd view of reality can lead us all into the abyss.

In this context, there is also the fact that a lot of mischief is often conducted politically through the use of history as a legitimisation of a state system. Therefore, it is extremely

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important to put history itself on an analytical level, to clearly name all events, reasons, and effects of decisions and actions. Similar to philosophy, history is not a matter that politics can dispose of, which is why we as scholars must always critically question how narratives and their traditions are supported, what functions they currently fulfil and in whose favour, and who has shaped them. That is why representations of historical justifications must be carefully questioned and examined. This is the task of the conversation between philosophers and historians.

It seems to me all the more important to keep a clear and cool head and to continue to focus on what is essential, namely, that a just order of relations between people and between states must be based on the unconditional demand for true facts and knowledge. For all these reasons, the central question is why precisely true knowledge, true statements, and a just order are essential and absolutely decisive for relations between people and also states. That is why we assert here with well-considered reason that truth and justice is all-important today and will be tomorrow.[1]

2. A Word on Methodological Historical Scholarship

Since law is always a historical category, insofar as it arose under specific conditions of its time, a serious link to older models of a philosophy of law must first clarify and secure the foundations of this knowledge; only then, when we know what to compare with each other, can we refer to them from the present when it comes to the basic questions of a just legal order.

The central point of a truly historical argumentation is, in my view, that we must always also see the breaks, because it is precisely the breaks in history that show us where and why the ideological insinuations of continuities thrive because, as a rule, such continuities construct precisely those political legitimacy goals that cannot otherwise be achieved through elaborate performance. A good example of the formation of ideological continuities of a European self-development is the omission of Arab and Jewish scholars as mediators between antiquity and the Christian Middle Ages in Europe. The reason for this was and is that because factual development does not fit into the secularised self-understanding, which still defines itself from the Christian point of view alone, which also ultimately has a common cause with racial doctrines, specifically anti-Semitic and anti-Islamic views, when it fades out this crucial bridging (see Holenstein 2004, pp. 84, 73).[2] Another example in the same context is the function of legal positivism and Prof. Hans Kelsen's jurisprudential development in the decade of the Weimar Republic in Central Europe. That positivism was supposed to protect against the mischief of utilitarian and

[1] With good reason, we may then believe in the youth and their ideals of serious thinking and morality, if these youth have not been indoctrinated by the old. Then this youth also has the power to free the spirits that serve ideological interests from their shackles. That is why George Santayana, a philosopher of the early 20th century, born in Madrid, died in Rome, but who also lived in North America for many years and taught as a professor, and who presented a philosophy of the rationality of society and man, should be explicitly quoted here with his wise words about a globalised humanity (1905/06, pp. 41–46): «*Young men escape as soon as they can, at least in fancy, into the wide world; all prophets are homeless and all inspired artists; philosophers think out some communism or other, and monks put it in practice. There is indeed no more irrational ground for living together than that we have sprung from the same loins. They say blood is thicker than water; yet similar forces easily compete while dissimilar forces may perhaps cooperate. It is the end that is sacred, not the beginning. A common origin unites reasonable creatures only if it involves common thoughts and purposes; and these may bind together individuals of the most remote races and ages, when once they discovered one another. It is difficulties of access, ignorance, and material confinement that shut in the heart to its narrow loyalties; and perhaps greater mobility, science, and the mingling of nations will one day reorganise the moral world. It was a pure spokesman of the spirit who said that whosoever should do the will of his Father who was in heaven, the same was his brother and sister and mother*» (Santayana 1980).

[2] Prof. Elmar Holenstein contextualised this chain of tradition to European philosophy as follows: *What is called European philosophy cannot be understood without including the non-European environment* (Holenstein 2004, pp. 84, 73; Holenstein 2023, p. 217). Without knowledge of Islamic-Arabic and Jewish authors, the cultural flowering that has taken place in Europe since the High Middle Ages could not have been in this way, or as the well-known sociologist of law and religion, Max Weber, put it: *there is absolutely nothing in the field of thinking about the meaning of the world and of life that has not already been thought in Asia in one form or another* (Holenstein 2004, pp. 90–94). Elmar Holenstein, Philosophie-Atlas, Orte und Wege des Denkens, Zürich: Ammann-Verlag, 3. Auflage, 2004; free download: https://doi.org/10.3929/ethz-b-000359415, accessed on 22 April 2023.

naturalistic currents with racist and anti-Semitic views during this period, and which was the reason Kelsen lost his job as a law professor—like so many others—not only because he argued positivistically (against the political ideology of the day and in particular the NS regime), but because he himself was Jewish. Kelsen tried to ward off the fermenting and corrupting everyday influences of his time on the law through a system of norms that, if we judge this historically, should be pure or free of such value elements, which, indeed, increasingly began to threaten and undermine the stability of the rule of law in the 1930s (Senn 2017, p. 120f.). Such errors in traditional thinking are sometimes smuggled in—almost «hidden»—but this does not make them more harmless as they can favour the reversal of the roles of victim and perpetrator.

This means that we must always reflect on the peculiarities of historical developments, which have never proceeded in strict sequence, and which have always related to the events, thoughts, and conditions of their own time. Therefore, we have to work out the differences in the framework conditions between the world in which these were created and the world in which we live today and reflect on them in terms of their significance.

If we look at the development of philosophy and its history, we should see quite clearly that it is precisely through interregional and intercontinental comparison that the quality of philosophical statements increases, because a certain systematisation in the train of thought thereby takes place, as is necessary for the formation of every good science (Holenstein 2023, pp. 226–29). Additionally, this is why one cannot shape individual empirical facts into a general statement if there is not a certain qualified set of such facts that are critically evaluated beforehand. For if one works empirically, then one must also have a disclosed point of view, the tool for it (the methodology), and an implemented form of criticism to create the necessary transparency for one's own arguments. I believe that all those so-called traditions, continuities, or «eternal themes» could only be valuable if we also reflect on them permanently because without this reflection, they cannot develop further.

3. Dworkin as a Contemporary Reference Author

If we already have a legal philosopher of high quality, such as Ronald Dworkin as a contemporary (1931–2013) who searched for a just law in our time, then we also have a door opener with us who facilitates access to many stations in the search for a just law. This does not mean that we have to march in his footsteps, but that he is a companion with whom we can discuss and argue intellectually. So, Dworkin is our discussion partner, not a dogmatic teacher, as should be the case in philosophy.[3] Yet, he is also a master of his subject, a clear and critical thinker. Dworkin has written thought-provoking works, such as «Taking Rights seriously» (Dworkin 1977), and his last major work: «Justice for Hedgehogs» (Dworkin 2011). He worked in both the New and Old World of the West and therefore he knew the differences in the way law was dealt with in the West in both common and continental law.

Dworkin's core idea in the philosophy of law can be paraphrased as follows in relation to the relationship between truth and justice: Dworkin is concerned with the goal of a generally good conduct of life in a democratic constitutional state. In this way, he links the concerns of antiquity with those of modern times, and he rightly sees that this double goal cannot be helped by a simple, unreflective adherence to any premises, but that one must deal reflexively—as in a round of discussions—with the arguments of others that are put forward for or against. Only then do these form a reliable basis on which we can stand, develop intellectually, and shape our lives. If we strive for a just order, this expands our freedom as a whole because all human beings can then lead a good life. That is why I see

[3] «*... our conclusion ought to be that no philosopher from the past or from another cultural tradition can ever be so readily adapted to needs of the present. A good philosopher's writing is meant to challenge our individual minds in reading and understanding. It is not intended to be an authority on the basis of its thoughts, which, in the end, were created under circumstances not comparable to those of the present. Therefore, we have to be well educated so as to know how to deal with a current problem critically by ourselves, without relying on the advice of opinion-leaders and lobbying intelligencia. In my opinion, this is the only intellectual way in which we can show our respect to all of these great and profound philosophers*» (Senn 2014, p. 44).

in Dworkin and his work the clue of our time to discuss and develop new basic philosophical ideas.

Biographically, we have an interesting starting point with Dworkin, which made him an independent thinker, especially in the period from the mid-1960s to the edition of his philosophy of law in 2011 (before his death in 2013), since he cannot be assigned to any philosophical school or direction. However, there is no mistaking that we may always find it easier to subordinate someone to a school direction in order to understand them and their ideas at all, if we are not so good at understanding a work independently and on our own. What some may not understand or mislocate are the two facts that Dworkin was once a fellow of Lon Fuller at Harvard, and the same Dworkin was also the academic successor of the positivist philosopher Herbert Lionel Adolphus Hart at Oxford.[4] That is why, sometimes, such facts cause confusion or incomprehension. However, Dworkin does not belong to either of these factions. Dworkin was, however, a clear advocate of the basic principles of justice that have always governed legal theory and, in particular, the practice of law by lawyers and judges in the courts.

Thus, for Dworkin, there can be no question of an objectively given natural law, since such a concept always contains a preconceived opinion that is also subject to historical and analytical interpretation. According to his critical view of things, people who, like naturalistic scientists, claim that there is a pre-existent natural law are in this way members of a kind of priestly caste who defend something such as a divine law in the sense of a post-Scholastic perspective with a claim to validity. In any case, these people want to introduce a certain objectivism into a historical–cultural debate, but it is an inadmissible structuring element because it is like a stowaway or, as Nadja E. Nedzel puts it in her contribution, «a hidden structure». These people cannot themselves present a generally convincing argument for their own position in order to defend their point of view, they simply cling to a supposedly indisputable truth that is supposed to reveal itself. They function just like the people of that group, let us call them the everyday philosophers, who pretend to follow a purely empirical path and therefore call themselves pragmatists because they cannot see the unreflective premises on which they build their edifice of thought.

So, we have no other choice but to reflect, analyse, and critically discuss our methods and arguments, including all our thoughts and actions, without, at the same time, claiming that we are the only ones who know. Additionally, this is precisely what we must do, according to Dworkin, yet in a Socratic spirit, in order to work and progress as serious and authentic philosophers. For this reason that we must bring our full weight of argument to bear, but not with sophistical or pharisaical skill, not with formalistic or disingenuous skill, but from a humble view of honesty and authenticity that derives from the very fact that our thoughts, our words, and our actions are aligned.

That is why philosophy always requires contribution by an individual matching his personality with his thoughts and deeds. Philosophy does not propagate freedom in the

[4] Lon Fuller (1902–1978), an US-American jurist, who was since 1940 Professor of Law at Harvard University, engaged in 1958 as a representative of natural law, in the famous debate with Herbert Lionel Adolphus Hart (1907–1992), the Anglo-Saxon representative of legal positivism at Oxford University, Great Britain (Senn 2017, p. 187). Hart's article in the Harvard Law Review from 1958 was entitled with *"Positivism and the Separation of Law and Morals" (Hart 1958, Harvard Law Review.* ***71*** *(4): 593–629)*, the answer by Fuller read *"Positivism and Fidelity to Law—A Reply to Professor Hart" (Fuller 1958, Harvard Law Review.* ***71*** *(4): 630–72)*. Hart pleaded for a separation from morality and law, Fuller argued for morality as the [authentic] source of law's binding power. In fact, this debate between the Anglo-Saxon and North American runs through the entire tradition on legal philosophy in the 20th century, especially against the backdrop of the Second World War between Americans and the Nazi Germans. The key question was: what can effectively legitimate a law, make it binding and ultimately enforce it? The famous German Kantian philosopher of law, Gustav Radbruch (1878–1949), had commented on this in his first edition of the Philosophy of Law from 1914 until the third edition in 1932 (Radbruch 2003, p. 82 original german, transl. Senn): *"He who is able to enforce law proves that he is called upon to he is called upon to establish law. Conversely: whoever does not have power enough to protect each of the people against the other, has not the right to command him (Kant)."* Immediately after the war, Radbruch revised this position and professed his belief in natural law (Radbruch 1945, Fünf Minuten Rechtsphilosophie). It is true that he was never a legal positivist, but at the beginning a strict and then perhaps an open Kantian, who nevertheless increasingly turned to non-legitimised principles of law (Radbruch 1946, Gesetzliches Unrecht und übergesetzliches Recht), a position that a Fuller also subsequently represented to Hart.

sense of arbitrariness, it takes philosophers to task in the sense of ethical–moral responsibility to contribute to truth through their authenticity. This cannot be done in any other way than through a clear and unambiguous argumentation on the fundamental and clearly defined attitude of the philosopher as a human being. A philosopher must think clearly, argue logically, and be able to justify his claims in order to advance the cause of philosophy through better and more consistent as well as morally convincing arguments, according to Ronald Dworkin.

4. The Structure of the Special Issue «Justice Based on Truth»

There are eight contributions that we have accepted for publication. I have formed three sections:

1. Dworkin's epistemology of ethics and personal responsibility in the search for truth and justice;
2. Dworkin's philosophy of law in comparison with historically important authors such as Thomas, Spinoza, Leibniz, and Fuller;
3. Dworkin's theory in contemporary application and its possible development with a view to the future (Transitional Justice in Civil War and the perspective of traditional Chinese Moluë).

The first section introduces us to the specific reference of the legal philosophy of Ronald Dworkin (1931–2013). There are two reflections, one on the epistemology of the ethics of Dworkin's philosophy (by Matthias Mahlmann, which he reconstructs precisely), and on personal responsibility in the search for truth and justice (by Samra Ibric).

In the second rubric, we present historically significant, i.e., impactful, philosophies of law by four important authors of the past and compare them with Dworkin's theory of law. The four portraits of historical philosophers are Thomas Aquinas (by Kyle L. Smith, who connects Aquinas' philosophy to a topical issue, the so-called «fourth revolution», and the problem of the foundations of law in the age of «surveillance capitalism»), Baruch de Spinoza (by André Kistler), Georg Wilhelm Leibniz (by Matthias Armgardt), and Lon Fuller (by Nadia E. Nedzel). What these four have in common is the reference to the the natural law thinking, even if their understanding of natural law is based on different historical grounds in each case. We learn in the sense of the historical path of reflection in a step-by-step process, which is why Dworkin's legal thinking has great relevance and justification today.

In the third rubric, we look at a possible application of Dworkin's thinking, its relevance, and its limitations, to explain how Dworkin's theory can also contribute to the resolution of traumatic experiences and feelings of justice among people and groups of people in situations similar to those of war and civil war (by Helen Gyr on «transitional justice») and a development of Dworkins Philosophy by Harro von Senger, who argues from the Chinese tradition how space for truth and justice can be found by means of stratagems, who opens our mind for another cultural mindsetting.

On closer examination, these eight excellent contributions and the recourses on Dworkin as a whole ultimately guide us to our own thinking and argumentation.

5. Conclusions

Is clear thinking still assured and guaranteed in our time? Or are the sciences, especially philosophy, already so poisoned and politicised by the daily influence of programmatic assessments (e.g., via social media) that we can no longer think as independently as we would like and should clearly and logically; if we could, perhaps it is the fear of either not being strong enough or the warning against too autonomous thinking by politically authoritarian people that keeps us away from ourselves. Can we no longer perceive and feel ourselves as independent individuals? Or, in the end, do we even lack civil courage and commitment?

Since the Enlightenment, freedom of thoughts in the sense of the rational sciences with their methodological transparency and verifiability has been the basic concern of phi-

losophy. This basis must continue to exist, for a free society can only exist as long as it can rely on a scientifically sound basis of knowledge on free thought. «The crucial thing about science is not that it produces mere knowledge, but that it develops an awareness of how and under what conditions and for what purpose it produces this knowledge. [...] Today's tendency to administer knowledge by invoking an opinio communis is, however, reminiscent of the scholastic practice of creating a tower of knowledge order. The starting point of science, however, would be the formation of an adversarial awareness of problems on central questions of, for example, theology, ethics, law and society, for a theory never represents the whole, since reality is always more diverse than our means of access to explain it» (Senn 2022, p. 57).

However, a free society also requires an everlasting solidarity between the population groups of a state. Not only serious knowledge and the freedom of our thinking but also the social solidarity in societies is one of the fundaments of a good society and good state. Freedom, therefore, must be institutionally secured by a strict separation of powers between the executive, judiciary, and legislature. History teaches us that these organs have to be clearly separated and their officers must therefore be rotated and replaced in civil times. Necessarily, this society and this state have to be assisted by a critical civil discussion and free investigative journalism. One who advocated a philosophy of law and society in terms of transparent discourse was Ronald Dworkin, which is why I chose him as our reference author on the common theme that justice prevails in a world and a society or a state only when and where truth, and therefore intellectual vision and consolidated knowledge, guides us.

In such a spirit, our discussion here of the successful contributions of our authors has just begun. It must continue in an unbiased and critical manner. The problems of the epistemological foundation of truth and justice according to scientific and philosophical rules of morality and ethics must consequently be considered more closely. Only in this way can this discussion, which is independent of concrete political or economic goals but scientifically based, be guaranteed. Consequently, truth and justice remain the fundamental aims of legal and social philosophy for a longer period than just ours.

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Article

Truth, Ethics and Legal Thought—Some Lessons from Dworkin's *Justice for Hedgehogs* and Its Critique

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Abstract: This paper reconstructs some of the core elements of Dworkin's epistemology of ethics. To understand why, for Dworkin, questions of legal philosophy lead to moral epistemology, the main points of Dworkin's last restatement of his theoretical account of law are outlined. Against this background, the paper critically assesses the merits of Dworkin's criticism of current prominent forms of skepticism and what it teaches us about the epistemology of legal thought.

Keywords: legal epistemology; skepticism; error theory; cognitivism; non-cognitivism

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1. Introduction

Ethical principles direct human action. They are of central concern for individuals. Individuals adapt their behavior to the rules they think are morally obligatory. Finding the right course of action is an element of much soul-searching for many people. It is not a trivial sideline but is of great importance to the way many people live and how they interpret their personal lives. The same is true at the societal level. Ethical questions are a central concern for societies. Sometimes the ethical codes that a society implements are repressive and do not stand the test of critical scrutiny. But sometimes the morality of a society embodies, at least in certain parts, important aspects of ethical thinking supported by critical argument. In any case, the ethical rules that are regarded as being relevant in a society are of crucial practical significance as they shape the social interactions of individuals and the course of development of societies. They determine the way human beings live, the rights that are protected, the goods that they receive and the injustices that are inflicted upon them. The classical Kantian question "What shall we do?" is therefore both on the individual and the societal level a crucially important issue of human reflection for one's individual and social life.

The law enforces normative rules backed by powerful institutions. Law is to be distinguished from morality, but in any society the moral codes of public life and of the individual conscience influence the ways in which the law is shaped and conceptualized. Evidently, the law is of central importance to the life of an individual and to a society at large. By the means of law, a society defines the rules of social life that are important enough to be physically enforced and are to be applied by a complex institutional framework, not least by courts.

These considerations also hold at the international level even if one is well aware of the unbecoming realities of power politics. Political morality plays a prominent role in international affairs not only as an instrument of ideological argument, but sometimes also actually guiding the decision-making of political entities. Normative considerations have informed the evolution of international law in important respects. A prime example is the (albeit fragile) protection of human rights. This system of protection, with all its flaws, is certainly the product of some kind of moral reckoning of humanity after the cataclysm of the Nazi period and the Second World War.[1]

[1] Cf. on the history and theory of human rights, (Mahlmann 2023a).

These observations are truisms and lead to important questions: What epistemological status do moral judgments enjoy? Do moral judgments have a claim to truth, in whatever sense one interprets this controversial term? What about normative claims in legal arguments?

There is a huge and long-lasting debate regarding the proper methodology for interpreting legal norms. What is the result of the application of such methods? Are the results of legal interpretation legal truth, in some perhaps well-qualified sense? Or are they just pieces of political ideology couched in legalistic terms? What about the use of these methods themselves? Is there truth to be obtained through legal reflection on the right choice of method of legal interpretation?

These are substantial questions that will not be answered in the few remarks that follow. What will be the focus of attention instead is the underlying question about the truth-aptness of normative, particularly moral and ethical, judgments and the implications these findings may have for our understanding of the epistemology of law. There are many theories that deal with this particular problem. We will take a closer look at Ronald Dworkin's thoughts on these matters. They form not only a very influential but also a useful point of departure to understand some possible ways to address these difficult questions (Guest 2013, p. 159 ff). We will therefore first circumscribe more precisely the problem at issue. We will then reconstruct Dworkin's normative theory to gain a grasp of the normative claims he defends and why, from his point of view, the philosophy of law must include an account of the foundations of moral understanding. Then we will turn to questions of ethical and legal epistemology. What epistemological status do the elements of his normative theory have? As epistemological theory is unsurprisingly related to some questions of normative ontology, we will discuss this set of issues as well. We will then critically assess Dworkin's theory. Finally, we will develop some perspectives on the following question: What kind of insights can actually be gained on this in terms of practical philosophy and, in particular, the theory of law?

2. What Is the Problem?

An influential view in moral philosophy, metaethics and legal theory is that moral judgments and normative propositions in general have no cognitive content. What they actually express is less clear if one accepts this starting point. One classical view, expressed perhaps in its canonical form by David Hume, is that they are an expression of an emotion, a feeling of appraisal of a certain intention, act or state of affairs;[2] even though one has to add that a proper interpretation of Hume's theory most probably will lead to a rather complex picture. Another alternative is to state that moral judgments are in fact about nothing. They are vacuous, referring to imaginary entities—moral facts in the world—that do not exist. They are therefore entangled in errors (Mackie 1977). These kinds of theories not only have a long and impressive tradition, but they have also been proposed by very different thinkers, not least in the context of the attack of some analytical philosophers against any form of metaphysics (Carnap 1931, pp. 219–41). One can also find examples of this kind of approach in very recent theories inspired by the idea that a proper reconstruction of ethics has to use the tools of neuroscience (Greene 2013).

There is a strange ease with which some people acquiesce to these kinds of theories, as if nothing important were at stake. One can even observe a certain satisfaction in these people in their belief that they have unmasked the true essence of moral judgment and destroyed the rationalist pretentions of ethics and practical philosophy in general. This is surprising because evidently very much is at stake. The question is whether this

[2] (Hume 1978, p. 468 f.): "Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object".

central element of human individual and social life called ethics and the normative system based on its perceived content are actually the products of rationally controlled or at least rationally controllable—in traditional terminology 'reasonable'—thinking and deliberation. Given the huge consequences that ethical convictions and legal systems have for human life, it is evidently of great importance whether they are the products of critical thought or the expressions of certain emotions or preferences divorced from rational critique. There is much to say about these particular theories and the value of their attack on a cognitive conception of ethics and practical philosophy.[3] One way to approach the topic is to look at Dworkin's influential theory, which has prominently challenged this stance. It develops an alternative kind of theory of moral and ethical understanding and is very much worth considering.

3. The Ethics and Law of Authenticity and Respect

Dworkin developed over the course of his life a rich body of theoretical work.[4] Major elements of this are the analysis of norms, in particular the distinction between rules and principles (Dworkin 1977), his interpretative theory of law (Dworkin 1986) and his contributions to the theory of substantial normative questions, in particular the concept of justice as equality of resources (Dworkin 2000). At the end of his life, he added to these endeavors a reconstruction of ethics and law on the basis of the idea or concept of human dignity (Dworkin 2011). He outlines a far-reaching and ambitious project not just about the technical details of the philosophy of law but also a philosophical interpretation of human life that aims at providing guidance on how to live a life well. It is in this particular sense an *ethical* theory. 'Ethical' means here not a reflective theory of normative questions but a theory about the right way to live a human life—the right way to achieve human flourishing. The main thesis is that such a life lived well is not achievable without acting according to moral parameters. More precisely, the idea of human dignity is the lodestar for such a life. The respect for one's own dignity and the dignity of others is the true path to living a life that makes sense. The theory is thus "a creed; it proposes a way to live" (Dworkin 2011, p. 1).

In Dworkin's view, practical philosophy has a holistic nature.[5] It is about *eudaimonia*, a life lived well, or morality in the sense of the norms guiding our behavior toward others and a legitimate conception of law. Dworkin argues that a life lived well is not only a pleasant life full of sensual joys, but also a life that takes a course that is justified if one respects moral standards. To achieve these ends, the way one leads one's life is of central importance: "We value human lives well lived not for the completed narrative, as if fiction would do as well, but because they too embody a performance: a rising to the challenge of having a life to lead. The final value of our lives is adverbial, not adjectival. It is the value of the performance, not anything that is left when the performance is subtracted. It [is] the value of a brilliant dance or dive when the memories have faded and the ripples died away" (Dworkin 2011, p. 197).

Dworkin regards human dignity as the central foundation for such an ethical conception of human existence. Dignity, in his view, encompasses both obligatory respect for oneself and respect for others. Dworkin develops explicitly a theory that is based on Kant's leading ideas. Accordingly, he calls his own central ethical principle "Kant's principle" (Dworkin 2011, p. 19). The main point is that one can only respect oneself if one respects humanity as such. Dignity is the key to ethical, moral and legal understanding, but it is

[3] For a survey, cf. (Mahlmann 2023b).

[4] Cf. for an overview, (Guest 2013).

[5] (Waldron 2014, pp. 544–49, 545): "All through the book, what Dworkin does is to look for the implication of value A in the conditions that make it sensible, appropriate, or legitimate to pursue value B. If he can do this, then he can show that there is no version of B that can be sensibly pursued as something worth trading off against value A in the way that completely independent values might be traded off against one another. It is not a point about commensurability, about each of the contestant values embodying a given quantum of some underlying good such as utility. Dworkin is a holist not a monist. He seeks cohesion rather than reduction among our apparently disparate values".

also a tool to help us reach the unity of values[6] that Dworkin hopes to establish.[7] "A person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms. That is a template for a unification of ethics and morality" (Dworkin 2011, p. 19).

4. On Human Dignity and Its Consequences

4.1. The Concept of Dignity

Dworkin associates the concept of human dignity with two principles: "The first is a principle of self-respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses. Together the two principles offer a conception of human dignity: dignity requires self-respect and authenticity" (Dworkin 2011, p. 203 f).

How are we to connect self-respect and authenticity with the respect for other human beings?

The core is that self-respect points toward the necessity to respect other people as well. This is in Dworkin's view the core of Kant's argument: "This holds that a proper form of self-respect—the self-respect demanded by that first principle of dignity—entails a parallel respect for the lives of all human beings. If you are to respect yourself, you must treat their lives, too, as having an objective importance" (Dworkin 2011, p. 255). At the core of the argument is that it is inconsistent to respect oneself because of one's humanity but to not respect others who share the same human nature.[8]

4.2. Duties and Human Rights

Dworkin develops on this basis more concrete moral principles, particularly what kind of harm agents are not allowed to inflict on others and which obligations agents have to help others.[9] Political obligations also have their root in mutual respect. Dworkin argues that a political order does not respect the dignity of its members appropriately if there is no reciprocal obligation to accept common decisions, insofar as these decisions are based on certain procedural and material conditions. Democracy creates the problem that the majority can harm others, the minority or, of course, itself. In Dworkin's view, political obligations are therefore conditioned on the legitimacy of the public order as such that provides solutions to this problem. The roots of political legitimacy are manifold. Legitimacy is particularly dependent on the ability of citizens to protect themselves and to prevent themselves from turning into agents of dictatorship. Elements of these democratic legitimacy-creating preconditions are the need to fight injustice, to participate actively in the political process and perhaps even to take recourse to civil disobedience to assure the justification of political actions. A revolution can be justified, but only if the basic legitimacy of an order has been lost. Dworkin formulates a sharp critique of other kinds of duties derived from group or "tribal" obligations, as he calls these kinds of supposedly existing

[6] Interpreting Dworkin as establishing a "research program", (Raz 2016, p. 3 ff).

[7] Senn (2017, p. 90) underlines the humanistic, individualistic and universalist thrust of Dworkin's theory.

[8] Griffin has made a similar point, cf. (Griffin 2008, p. 135). An interesting question is whether the objective reason to value the life of another is sufficient to create obligations toward the other and rights on the other's side. On this matter in the context of the theory of human rights, cf. (Mahlmann 2023a, pp. 234 ff, 260 f). On this point, cf. (Waldron 2014, pp. 544–49, 547): "I may ask myself whether such an observer would regard any life pursued in this way as valuable; but it is a further point to think that any life lived in such a way (or in any satisfactory way) is valuable in a way that imposes constraints on the way that I live mine".

[9] A question is whether the whole of morality can really be inferred from this concept of dignity. Cf. for some criticism, (Kamm 2010, pp. 691, 694): "I think Dworkin's account of the relation of morality and ethics may underestimate our capacity simply to act for reasons (such as the importance of others) independent of the connection between their importance and our own importance. Indeed, some might say it is this capacity that is the source of our own dignity, though it need not be the source of the value of other entities". An example of this would be our duties toward animals.

duties to particular communities of people. Concretely, Dworkin directs his criticism against political nationalism.

In his discussion of legal institutions, Dworkin pays particular attention to subjective rights. Again, human dignity helps to calibrate an order of human rights—it provides a central yardstick to determine the content and scope of these rights. In Dworkin's view, these include the prohibition of torture, the prohibition of punishing the innocent, due process rules and the equal treatment of women. For Dworkin, this abstract yardstick of human dignity is of universal validity, even if there is the possibility of concretizing the content of human dignity in different social contexts.

4.3. Equality and Liberty

A further central element is equality. "Left-of-center politicians struggle, with at most moderate success, to achieve incremental gains for those at the bottom, and the best politics is politics that does not ask for more than the comfortable majority is willing to give. The gap between theory and politics is particularly great and depressing in racially or ethnically diverse communities; majorities continue to be reluctant to help poor people who are markedly different from them. It is nevertheless important to continue to trouble the comfortable with argument, especially when, as I believe is now the case, their selfishness impairs the legitimacy of the politics that makes them comfortable. At a minimum they must not be allowed to think that they have justification as well as selfishness on their side" (Dworkin 2011, p. 351). He refers to his theory of equality of resources as a tool to understand what equality demands (Dworkin 2000).

Freedom is another important element of this political morality. Dworkin is of the opinion that freedoms are initially limited to certain uses of liberty, namely those uses that are morally justifiable. On this basis, in Dworkin's view, one can find answers to questions about the limits of freedom of speech, property or religion.

4.4. Democracy

Dworkin also develops a particular concept of democracy. He distinguishes a majoritarian conception from a partnership version of democracy. The former is based on majority principles. A partnership conception of democracy focuses on political recognition. Differences of impact of citizen action are possible while realizing this kind of idea: "First, it must not signal or presuppose that some people are born to rule others. There must be no aristocracy of birth, which includes an aristocracy of gender, caste, race, or ethnicity, and there must be no aristocracy of wealth or talent. Second, it must be plausible to suppose that the constitutional arrangement that creates the difference in impact improves the legitimacy of the community" (Dworkin 2011, p. 392). On this basis, Dworkin also considers the question of judicial review and constitutional courts. He argues that these legal tools can be useful but, in certain contexts, they can become problems for democracy.

4.5. Law and Morality

Law is, from Dworkin's holistic perspective, a subchapter of moral thinking: "We now treat law as part of political morality" (Dworkin 2011, p. 405). A central property of law is its institutional dimension. Dworkin thinks that to interpret law as part of political morality does not erode the distinction between law as it is and law as it should be. To help us to avoid any such problems we can distinguish between prima facie valid law that is legitimately not applied because of moral reasons and law for which such reasons for nonapplication do not exist. Yet another case is law that violates basic principles of ethics to a degree such that it cannot be regarded as law anymore.[10] In Dworkin's view, debate about the concepts of law can lose sight of these basic distinctions: "The ancient jurisprudential problem of evil law is sadly close to a verbal dispute" (Dworkin 2011, p. 412).

[10] Cf. for an argument that admitting that law and justice can conflict, as Dworkin does, weakens, though does not refute, Dworkin's value holism (D. Smith 2012).

From this point of view, Dworkin answers the question as to whether the legitimacy of law is based on certain procedures and specific moral standards. The central example is the sovereignty of parliament and its limits: "The answer seems clear enough. Once, in Coke's time, the idea that individuals have rights as trumps over collective good—natural rights—was very widely accepted. In the nineteenth century a different political morality was dominant. Jeremy Bentham declared natural rights nonsense on stilts, and lawyers of that opinion created the idea of absolute parliamentary sovereignty. Now the wheel is turning again: utilitarianism is giving way once again to recognition of individual rights, now called human rights, and parliamentary sovereignty is no longer evidently just. The status of Parliament as lawgiver, among the most fundamental of legal issues, has once again become a deep question of political morality. Law is effectively integrated with morality: lawyers and judges are working political philosophers of a democratic state" (Dworkin 2011, p. 414).

All in all, reflection on law and legal practice appears to be an essential element of the ethical life of a society. "We must therefore do our best, within the constraints of interpretation, to make our country's fundamental law what our sense of justice would approve, not because we must sometimes compromise law and morality, but because that is exactly what the law, properly understood, itself requires" (Dworkin 2011, p. 415).

These theses lead obviously to a central question, namely: What epistemological status have these normative theoretical assumptions, which ultimately (given that law is part of morality) are foundational moral principles? Are they expressing truths, or could they at least express the truth if improved? This is an important question because Dworkin talks not only about technical questions of law and morality, but also about the way to live a good life in the deepest sense imaginable: "Remember, too, that the stakes are more than mortal. Without dignity our lives are only blinks of duration. But if we manage to lead a good life well, we create something more. We write a subscript to our mortality. We make our lives tiny diamonds in the cosmic sands" (Dworkin 2011, p. 423).

5. Refuting Skepticism

5.1. Varieties of Skepticism

The main concern of Dworkin's epistemological thought is to refute varieties of skeptical arguments.[11] The basic distinction is between internal and external skepticism (Dworkin 2011, p. 3 ff). Internal skepticism doubts that any particular proposition of morality can be justified; it does not question, however, that propositions in morality are possible. A central example of such internal skepticism is the thesis that morality can only be revealed by God; however, as no God exists, no moral order is accessible to human beings. This is an example of what Dworkin calls global internal skepticism. There is also a partial, local internal skepticism. A central example of this kind of skepticism is cultural relativism, which argues that justified moral positions are only possible in relation to particular cultural backgrounds.

External skepticism, in contrast, denies that the project of moral justification makes any sense. Moral judgments with rational content are not possible in principle. Internal and external skepticism are further divided into error and status skepticism. Internal error skepticism maintains that morality is possible but a particular precondition of moral judgment does not exist. An example of this is the case just referred to, namely the assumption that morality is necessarily of divine origin, but that God, however, does not exist and that therefore moral justification is impossible. External error skepticism asserts that all moral judgments are false. There is no internal status skepticism because status skepticism deals with the nature of moral judgments. Status skeptics argue that it only seems that moral judgments are about moral insights, whereas in fact they express something very different, specifically the inner attitude of the agent. "Status skeptics

[11] Cf. (Guest 2013, p. 132 ff) on a variety of skeptical challenges to an "ordinary" view of the interpretation of law in court.

therefore do not say, as error skeptics do, that morality is a misconceived enterprise. They say it is a misunderstood enterprise" (Dworkin 2011, p. 32). External status skeptics are adherents of those theories in metaethics that deny in various ways that there is something like a content of morality that can be rationally reconstructed.[12]

5.2. Self-Contradictions of Skeptics

Dworkin's main concern is external status skepticism. This version of skepticism forms the real challenge because internal skepticism accepts in principle the possibility of normative arguments; it just doubts that there is, at the moment at least, a convincing theory justifying such normative arguments. Dworkin's argument highlights a central point that, in his view, is the main problem with status skepticism: It is self-contradictory. Every status skeptic, Dworkin argues, entangles herself necessarily through the very denial of any possible rational content of morality in moral argumentation. Dworkin provides the following example to illustrate his point: Four persons are discussing moral issues. Person A asserts that it is morally impermissible to terminate a pregnancy. Person B disagrees and argues that under certain circumstances an abortion is permissible—for example, for underaged mothers. Person C disagrees with both positions and asserts that abortion is neither forbidden nor obligatory; it is always permitted. That is so because abortion has no different status from cutting one's fingernails. Person D finally asserts that all three are wrong because abortion is neither permitted, nor obligatory, nor prohibited, because she is a status skeptic. From her perspective, these normative categories of being prohibited, obligatory or permitted have no sense at all. The point of Dworkin's argumentation is that the radical status skeptic D entangles herself by what she says against her intention in a moral argument. Her position is (implicitly) as normative as the position of those who argue like A, B and C, that there is a normative point to the matter: that abortion is always forbidden, that it is permissible under certain circumstances or that it is always permissible. This is so, according to Dworkin, because D's assertion ultimately has a normative consequence, namely that abortions are permissible. In fact, Dworkin says, the status skeptic agrees with C, as the upshot of D's argument is that abortion is allowed.

This is of crucial importance for Dworkin's argumentation. He thinks that normative arguments are unavoidable. This is what Dworkin calls "Hume's Principle", referring to Hume's distinction between facts and norms (Dworkin 2011, p. 44 ff). Nobody can avoid normative arguments because even the critique of the possibility of such argumentation in the end has normative consequences. Therefore, the true task is to engage with the interpretative project and to argue about what kinds of normative positions are actually justified: "External skepticism should disappear from the philosophical landscape. We should not regret its disappearance. We have enough to worry about without it. We want to live well and to behave decently; we want our communities to be fair and good and our laws to be wise and just. These are very difficult goals, in part because the issues at stake are complex and puzzling and in part because selfishness so often stands in the way. When we are told that whatever convictions we do struggle to reach cannot in any case be true or false, or objective, or part of what we know, or that they are just moves in a game of language, or just steam from the turbines of our emotions, or just experimental projects we should try on for size, to see how we get on, or just invitations to thoughts that we might find diverting or amusing or less boring than the ways we used to think, we should reply that these observations are all pointless distractions from the real challenges at hand" (Dworkin 2011, p. 68). As an alternative, one has to engage in the holistic project of determining the justified content of morality and law.

[12] A substantial number of approaches can be understood to fall under Dworkin's categories of external skepticism, cf. e.g., (Ayer 1948, p. 102 ff; Hare 1952, p. 163 ff; Mackie 1977, p. 15 ff; Blackburn 1984, p. 167 ff; Gibbard 1992, p. 126 ff).

6. Questions of Ontology

The epistemic questions lead to questions of moral ontology. Dworkin argues that ontological questions are irrelevant to the issue of justification. The debates of moral realists and nonrealists miss the real problem in his view. Moral realists assert that there are objective facts in the world which are the truth conditions for true moral propositions. Nonrealists deny the existence of such moral facts and therefore take morality as an expression of the subjective attitudes and preferences of individuals. Whatever the ontological stance may be, Dworkin argues, it is irrelevant to epistemological questions. The normative argumentation is independent from the question as to whether there are moral facts in the world or not.

Ontological questions have, in Dworkin's view, two dimensions: first, whether moral facts have causal effects on moral judgments; and second, whether the truth of a moral proposition is dependent on the existence or nonexistence of moral facts in the world. However, in Dworkin's view, neither is the case. There are no discernible causal effects of moral facts in the world. The thesis of the dependence of the truth of moral assertions on corresponding moral facts in the world is in itself not justified by the criterion of their correspondence with facts in the world. There is no epistemic fact in the world that verifies the thesis that the truth condition for the truth of moral assertions is the correspondence of these assertions with moral facts in the world. Morality, in Dworkin's view, is therefore an argumentative project independent from ontological facts.

7. Indeterminacy and Uncertainty

Dworkin distinguishes between indeterminacy and uncertainty. Indeterminacy means that certain moral dilemmas are ultimately unsolvable. Uncertainty, in contrast, means that certain concrete cases may be unclear without excluding the possibility that, in principle, a reasoned solution is possible. Dworkin does not deny the uncertainty of many questions of value, but he does deny the thesis that the indeterminacy of values makes the rational debate about values impossible. Therefore, agents cannot evade the need for moral argumentations and thus the responsibility to engage seriously and as keenly as they can with moral arguments. Nor, of course, can they evade finally facing the obligation to act accordingly. This responsibility is also connected to the idea of human dignity: "In brief: we try to act out of moral conviction in our dealing with other people because that is what our own self-respect requires. It requires this because we cannot consistently treat our own lives as objectively important unless we accept that everyone's life has the same objective importance. We can—and do—expect others to accept that fundamental principle of humanity. It is, we think, the basis of civilization" (Dworkin 2011, p. 112).

8. Concepts and Interpretation

Dworkin outlines a theory of interpretation that is based on a certain theory of concepts. In his view, there are three kinds of concepts: criterial concepts, natural-kind concepts and interpretive concepts (Dworkin 2011, p. 158 f). Criterial concepts are concepts with identifiable criteria for the right use of those concepts. Therefore, the same concept can be used by different users differently without implying a substantial difference of opinion if both simply use different application criteria. If somebody thinks, to use Dworkin's example, that a brochure is a book, while somebody else thinks that a brochure is not a book, then there is no substantial difference of opinion about the meaning of the concept "book" but simply different ways of using it. Natural-kind concepts are distinguished by the fixed nature of the designated entity in nature—for example, "lion" refers to a particular species of predator. The third kind of concept is of central importance to Dworkin's own theory. These are interpretative concepts. Overlooking the existence of such concepts has had a particularly negative influence on the philosophy of law, he argues. To discuss the content of interpretative concepts is different from discussing the content of criterial concepts. Here, in the case of interpretative concepts, there are real, substantial differences of opinion. One engages in debates with substantial content when questioning what concepts like dignity,

justice, freedom and so on actually mean. This conflict has to be solved in the framework of a normative interpretation of these concepts.

9. Is Dworkin Right?

Dworkin develops a far-reaching political theory that includes a theory of morality and law. The many questions that can be raised about the content of this theory cannot be addressed in the context of these remarks. The focus of attention is the epistemological theory that Dworkin proposes, which is the basis for the substantial content of his theories about politics and law that have been outlined above in a rough sketch and are understood as being part of morality.

9.1. The Normativity of External Status Skepticism

The first epistemological problem of some importance is whether the position of an external status skeptic is in fact self-contradictory. The point of Dworkin's argument is that the position of an external status skeptic formulates, against her will, a normative assertion concerning the permissibility, obligatory nature or prohibition of certain actions. The argument is that one cannot escape such statements, such that even if one maintains that any moral proposition has no content because there are no moral entities in the world and there is no other discernible, intrinsically normative content of such assertions, one is still necessarily entangled in normative assumptions. More precisely, Dworkin argues that in cases like the example he uses, one asserts the permissibility of an act because that is the only default position left—if it is not obligatory or prohibited, it must be permitted.

The problem is that Dworkin's argument presupposes the necessary existence of morality and thus the very entity whose existence the external status skeptic puts in doubt. This position of the external status skeptic does not imply a self-contradiction, as Dworkin maintains. The external skeptic does not necessarily have to assume that a particular action is permitted, prohibited or obligatory if she asserts that a normative evaluation of certain situations or intentions is impossible. She argues that a world without a moral status of action is not only imaginable, but in fact is the world we live in. When she asserts that there are no such normative categories, the consequence is simply that human beings can do a certain thing—can act in a certain manner—if they have the wish to do so and if they have the factual ability to do so because there are no obstacles to such action. In the case of Dworkin's example, a skeptic like D would argue that a person may or may not terminate a pregnancy depending on her own opinions if there are no external obstacles—including, of course, legal prohibitions—that prevent her from acting as she wishes. This does not imply that it is permitted in a normative sense, as this is exactly what has been put in question by her argument. The only thing an external status skeptic asserts is that it is in fact possible to act according to the particular motivation that this agent experiences and to terminate or not to terminate the pregnancy. There is an important difference between being *permitted* to do something and being *simply able* to do something. This difference can only be denied if one presupposes that necessarily a normative, deontic status is ascribed to an intention or action. However, this has to be shown—it cannot simply be presupposed by the argument.[13]

This, of course, does not mean that external status skepticism is right. In fact, it is not—it is profoundly flawed. Rather, it just means that the refutation of external skepticism must proceed in a different way than Dworkin envisages. How that may be done will be addressed after some other remarks about moral ontology intrinsically related to Dworkin's argument about epistemology.

[13] Michael Smith argues that Dworkin's account fails because external error skeptics only propose a philosophical thesis and do not imply a normative position, and because external status skeptics can hold (without contradiction) that moral beliefs are about desires related to nonmoral matters of fact, and moral truth is related to moral beliefs of this latter kind (M. Smith 2010, p. 509 ff).

9.2. The Relevance of Ontology

It is certainly true and a rather traditional insight of the theory of science that any scientific theory based on empirical data implies standards that are not derived from the empirical data themselves. This has been extensively discussed in the context of the limits of induction, but also in other contexts—for example, as to the assumption of the existence of rigid, permanent objects existing over time.[14] Therefore, Dworkin's assertion is entirely correct that any correspondence theory of moral truth—deriving the truth of a moral proposition from its correspondence with moral facts in the world—cannot itself be based on the correspondence with certain epistemic facts in the world (at least if one shies away from an infinite regress). Whether a correspondence theory of moral truth is plausible or whether other theories are preferable is of no concern to us here. The only important point is that such epistemological principles are not themselves based on something like "epistemic realism". They are simply specifications of the basic assumptions that enable human beings to develop systems of knowledge.

This observation does not imply, however, that questions of moral ontology are entirely irrelevant. It only means that the conditions for the truth of moral propositions are themselves not derivable from a correspondence theory of truth, at least not in the sense of a correspondence of epistemic principles with epistemic facts in the world.

There are good reasons to be skeptical about moral realism.[15] This does not mean, however, that one is forced to accept the idea that the content of morality is simply the expression of subjective preferences. There are other epistemic standards guiding our selection of nonreferential truths. We just discussed one example where such standards are relevant, namely the question of which truth conditions for moral propositions we are justified in applying. One way to answer this particularly difficult question is to engage in normative theorizing to understand better what standards are actually relevant for convincing normative arguments. One is therefore faced with the question that Dworkin identifies—and not surprisingly—as the main task of practical philosophy, namely to engage with the development of a substantial normative theory based on convincing arguments. However, this task is raised on different grounds than Dworkin identifies, being the double purpose of understanding better what is normatively justified and why this may be so.

10. Perspectives

How are we to move forward from this point of reflection?[16] The first element of a useful account of this epistemology of moral judgments is to remain aware that moral judgments have cognitive content. Noncognitivism is on the wrong track. Let us take an example: There is wide agreement that it is legitimate to guarantee the right to vote for both men and women and of course any other sexual identity, though there are repressive regimes that still deny this right to women. How do you argue for that simple proposition? The first element is, it seems, to ascertain a relation of equality between different persons, male and female, in certain relevant normative respects. Usually, the right to vote is based on the capacity for autonomous, responsible self-determination. The question, then, is whether there are any reasons to think that women have a lesser capacity for autonomous, responsible self-determination than men. This was the guiding assumption of discriminatory practices for millennia, in more recent times as in antiquity, expressed in excluding women from the right to vote. This factual assumption about the unequal capacity for autonomous, responsible self-determination is, of course, anthropological nonsense—men and women share the same capacities, here as in other cognitive respects. That this assumption is nonsense has not prevented generations of people from asserting its truth and defending patterns of discriminatory treatment of women on the ground that

[14] Cf. for a classical example (Russell 1959, p. 83 ff).
[15] For a different view, cf. e.g., (Enoch 2011).
[16] For a fuller argument, cf. (Mahlmann 2023a).

women have different cognitive abilities. If this argument loses its basis, as it has done in many countries around the world, it seems self-evident that this established relation of equality as far as the capacity for autonomous, responsible self-determination is concerned gives rise to the normative obligation to treat men and women in relation to the right to vote equally. There is no argument concerning the equal right to vote that maintains that men and women are equal in the relevant properties underlying political self-determination by democratic vote but that they still should be treated unequally. The principle of the equal treatment of equal persons in normatively relevant respects is taken to be self-evident. Of course, this principle could also be questioned, though in practice it is not. One can ask whether there are any reasons not to apply the principle to treat equally things that are in normatively relevant respects equal, but it is hard to come by any remotely plausible argument that this kind of principle should not guide our action.

It is useful to observe that the argument so far is full of cognitive content. The answer to the question as to whether there is a relation of equality between men and women regarding the factual reasons underlying the assigning of voting rights is based first on ascertaining empirical facts concretely as to whether women have the same capacity for autonomous, responsible self-determination as men or not. It is also based on ascertaining whether, given what we know about the capacities of men and women, there is a relation of equality between them in this respect. The ascertainment of such a relation of equality is clearly a cognitive act; it is not something that one *feels*, in any understandable sense of that term. It also seems to be a judgment with cognitive content to assert that things that are in normatively relevant respects equal should be treated equally. Again, this judgment is not a mental act that is usefully described in emotivist terms. Therefore, arguments about such matters (for example, about the properties of women and about what normative consequences are to be drawn from them) are not just exchanges of emotional attitudes, and this is actually one of the reasons for possible progress in moral affairs. Argument is possible and sometimes succeeds against such powerful foes like interests, habits, traditions and ideologies.

At some stage, it has to be admitted, one has to trust one's own judgments—for example, that what we know about the cognitive capacities of men and women leads, in fact, to the conclusion that the capacities, as far as autonomous, responsible self-determination is concerned, of men and women are equal. This is also the case for the normative conclusion that it is just to treat men and women equally because of their equal capacities to determine themselves, as far as the right to vote of men and women is concerned.

This observation should come as no surprise because it mirrors a general epistemological pattern. One has to trust that one's judgment is true at some stage in any form of human reflection, from the most mundane cases to the bases of complex scientific theories. If you consult a timetable on your smartphone to ascertain the time when the train to Bern leaves from Zürich, you can control your initial conclusion—that it leaves at eight o'clock—by looking again at the same timetable or by consulting another Internet source to see whether the information is confirmed; but in the end you have to trust your own judgment that you deciphered the signs you read in the timetable correctly, that you interpreted their meaning properly and that, in fact, the train leaves at eight o'clock. The same is true for a scientist who has to trust that she understood the meaning of the signs on her computer screen documenting some experimental data correctly, and—before submitting a paper with a theoretical interpretation of the data—that she got her calculations, equations and interpretations right. Normative reflection is, in certain respects, less of an epistemological outlier than some people think.

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Article

Ronald Dworkin: Seeking Truth and Justice through Responsibility

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Abstract: According to Dworkin, "truth" is an interpretative concept. Why? Moral judgements are often the subject of disagreement because they are often the result of divergent conceptual understandings. If, on the other hand, we want to interpret concepts correctly, we have to deal with the analysis of the underlying values we attach to these concepts. Dworkin understands the true as a matter of interpretation, which—and this is often misunderstood—is capable of producing a correct conception of the truth. The truth is thereby directly related to justice. Dworkin even ties his theory of interpretation to an objective truth that can only produce conclusive reasons for a specific advocacy of a particular position in an argument after responsible and intensive debate—in the sense of his two-stage theory. In fact, it turns out that Dworkin's search for and conception of an objective truth describes a (historical) process. We interpret what our ancestors have already interpreted and continue to understand (in a modified way). This reflexive responsibility is ours to bear; according to Dworkin, it is our responsibility to always stand up for truth through good arguments.

Keywords: truth; responsibility; moral objectivity; interpretation; values; legal reasoning; Ronald Dworkin

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1. Introduction

What guarantees us that our judgement is true? It is other good arguments that can be used to refute our judgement. Dworkin argues that "truth" must be understood as an interpretative concept. Only then can it be shown why one judgement is true while another is not. It is true that in philosophy it is disputed whether there are morally right or wrong judgements (Dworkin 2011, pp. 29–30). At the same time, however, no one will be able to claim that it is not reprehensible to torture a child. Rather, torturing a child is objectively wrong, our reason and moral sense tells us so, argues Dworkin (Dworkin 2011, p. 9). One can also take the example of genocide. Again, the prevailing view is that, say, the genocide in Bosnia was immoral and heinous. We hold these views, according to Dworkin, to be true not because it is our subjective opinion. Rather, we believe that genocide is intrinsically wrong, or has always been wrong, whether or not a convention holds it to be so, and even if no one else believes it to be so (Dworkin 1996, p. 92).

This article presents a brief account of Dworkin's understanding of truth. Starting from a conceptual classification (no. 2.1–2.2), the article is devoted to the interpretative method Dworkin argues in his justification of an objective moral truth (no. 2.3). Finally, the article also addresses the important role of responsibility in order to seek truth and places it in the context of law (no. 2.4). In this sense, this article aims to present Dworkin's arguments for an objective truth. A truth that exists and explains how things really are and which must be worked out through responsible interpretation.

2. Objectivity through Responsible Interpretation

2.1. Conceptual Understanding

In his book *Justice for Hedgehogs* (2011), Dworkin justifies why moral truths exist and are independent of physical or metaphysical arguments (Dworkin 2011, p. 26). Dworkin's

understanding of truth can be formulated as follows: a judgement is said to be true if good moral arguments can be made for its truth (Dworkin 2011, p. 26).

Disagreements are often rooted in a divergent understanding of terms.

There are three types of concepts, according to Dworkin: namely, the "criterion-dependent", the "natural" and the "interpretative" concepts (Dworkin 2011, pp. 158–60). Criterion-dependent concepts require existing criteria, such as an equilateral triangle. A triangle can only ever be said to be equilateral if the same criteria are always used. Disagreements about these kinds of terms are based in the use of different criteria and not in the opinions or judgements of individuals (Dworkin 2011, pp. 158, 159). Furthermore, terms can be referred to in a "natural way" because they occur in nature in the way that, for example, chemical compounds or animal species do (Dworkin 2011, p. 159).

Dworkin then includes all ethical, moral, political and normative concepts among the interpretative concepts. They are characterised precisely by the fact that, unlike criterion-dependent and natural concepts, they cannot fall back on a uniform review procedure to ensure their correct interpretation. Thus, disagreements are common in interpretative terms. Interpretive terms, in turn, are based on values, with values being the product of various theories of one's basic stance that have been drawn upon. So, for example, if there are disagreements about the term "freedom", they are based on a divergent value system. The problem is that a different pre-understanding exists, and reaching a consensus is difficult because there is no agreement on how to verify it (Dworkin 2011, pp. 7, 8, 159, 160).

Dworkin's theory is thus intended to contribute to the objective verification of a correct understanding of concepts, in the knowledge that there is only one correct understanding of concepts. For Dworkin—as in Greek thought—this endeavor is based on the striving for a successful way of life, which is directly related to ethical and moral questions. Because these require a moral judgement, it can only be argued on the same level (Dworkin 2011, pp. 195–97).

2.2. Why Values Matter

Values form the underlying denominator of interpretative concepts. Consequently, if we want to interpret concepts correctly, we have to deal with the analysis of the underlying values we attach to these concepts (Dworkin 2011, pp. 48, 49). For this purpose, let us consider the terms "morality" and "ethics". A moral judgement is about asking how one's life should be lived, while an ethical judgement asks how others should be treated. An action, however, presupposes both ethical and moral standpoints, since actions should be guided not only by one's own standards but also in relation to the consequences for others. A good conduct of life does not only take into account one's own life, but always also the just treatment towards other fellow human beings. What is considered a good way of life therefore depends on value judgements that can explain why one way of life is considered good and another is not (Dworkin 2011, pp. 18, 19). According to Dworkin, there is therefore always a moral background truth that demands this value truth, and which corresponds to the so-called "ordinary view" of moral judgements, which sets up the premise that there are morally right and morally wrong judgements (Dworkin 2011, pp. 26, 27). Here, he ties in with Hume's principle that scientific facts must be tied to value judgements (Dworkin 2011, p. 44). Dworkin describes the concept as follows: "This holds that no series of propositions about how the world is, as a matter of scientific or metaphysical fact, can provide a successful case on its own—without some value judgement hidden in the interstices—for any conclusion about what ought to be the case" (Dworkin 2011, p. 44). Whether a judgement is morally right or wrong depends on a morally justified argument, and two different scepticisms are encountered—an external and an internal one (Dworkin 2011, pp. 26, 30).

Internal scepticism, in Dworkin's view, is a moral position that cites a rationale based on morality, but nevertheless rejects morality on the basis of a false rationale. For example, internal sceptics claim that everything moral comes from God; however, if there were no God, the moral position would not be accessible to humans either. Dworkin calls this form

"global internal scepticism". In particular, it binds moral value judgements to presuppositions in the sense of an if–then argument. It differs from external scepticism in that the latter argues from an "Archimedean" standpoint and does not rely on morality to any extent, but seeks the truth independently of moral assumptions (Dworkin 2011, pp. 30–32). Internal skepticism does not threaten the objectivity of value because it stems from value itself; for this reason, it is internal to value and, to that extent, expresses a coherent hypothetical moral view. It merely rejects certain moral beliefs (Dworkin 2011, pp. 33–35). Whereas external skepticism, on the other hand, fundamentally doubts the truthfulness of normative statements. Thus, while internal scepticism seeks truth about moral judgements even about a morality, external scepticism resorts to scientific or metaphysical justifications (Dworkin 2011, pp. 30–32).

Dworkin rejects scientific or metaphysical reasoning in the context of moral truths, which is why his main criticism is on the external skepticism. According to him, a moral judgement must link to morality itself. In other words, a moral argument must hold even if no one else would agree that it is true. Moral value judgements are thus to be sought in morality itself. Objective value judgements are those that can constitute an objective truth independent of our personal experience, opinion or assumption of a reality (Dworkin 2011, pp. 37–39). This independence is correlated to truth itself and "[. . .] plays an important role in the more general thesis of this book [*Justice for Hedgehogs*]: that the various concepts and departments of value are interconnected and mutually supportive" (Dworkin 2011, p. 10).

Objectivity can be stated as follows: "Nothing could impeach our judgment that cruelty is wrong except a good moral argument that cruelty is not after all wrong" (Dworkin 2013a, p. 12). Whether an argument could be used that would justify acts of violence, Dworkin does not elaborate at this point. However, it is difficult to imagine that he would use one, since the prohibition of torture is one of the few mandatory provisions of international law, i.e. a prohibition that no state may disregard under any circumstances and acts of violence therefore would speak fundamentally against his theory of equal respect and dignity.

There is only one truth condition when a judgement can be called true, and only one form that allows a value judgement to be understood as true or untrue (Dworkin 2011, pp. 38, 39). This is a form of interpretation based on critical and moral responsibility. Consequently, the objectivity of an argument depends first on its general rational conclusiveness and on the most convincing moral justification (Dworkin 2011, p. 28).

2.3. The Underlying Method: Interpretation

Dworkin argues for an objective truth, a truth that, however, has to be worked out through interpretation and thus argumentation of values.

That there is an objective truth seems strange at first, because it is precisely this that causes much disagreement. Following Dworkin's argumentation, however, it would be more absurd if a judge, after imposing a prison sentence on someone, were to add that this was only her opinion and that there were nevertheless other opinions that were also correct. Such an attitude corresponds to the so-called "no-right answer", a view which is itself an interpretation and therefore cannot be independent of moral truth. The right interpretation must claim truth for its own interpretation (Dworkin 2011, pp. 90–92, 94, 95).

At the same time, Dworkin argues that his proposed interpretive approach does not yet constitute an absolute guarantee of truth: "But when we find our arguments adequate, after that kind of comprehensive reflection, we have earned the right to live by them. What stops us, then, from claiming that we are certain they are true? Only our sense, confirmed by wide experience, that better interpretive arguments may be found" (Dworkin 2011, p. 39).

Dworkin thus describes a process of thinking and understanding that is to be developed through intensive and committed argumentation as the task of philosophy. Truth must be constantly worked out and guaranteed by its representatives. Accordingly, truth cannot be fixed or prescribed. Rather, the search for truth is and remains a constant process,

which includes questioning, understanding as well as making mistakes. We can only attribute a truth value to propositions when they have been worked out in a responsible way. However, as a consequence of the foregoing, they must continue to be argued for consciously.

How can such a demanded responsibility be achieved? According to Dworkin, the underlying method is his interpretative model. In forming a moral judgement, one has to ask which arguments speak for and which against a certain view in the sense of a two-step principle. Dworkin describes this principle as follows and addresses the reader personally:

"You need an internally sceptical argument in two parts: positive claims about what would have to be true for our lives to have meaning, and then a negative case explaining why these conditions are not or cannot be met" (Dworkin 2011, p. 209).

With this procedure, according to Dworkin, we are urged to justify all considerations morally and thus to decide only for the one "right" judgement, as the judge mentioned before also has to do, because in the end it is not "her" judgement, but that of the legal system, which she had to put in relation to the concrete case to be judged. If this were not the case, we would be making a false and, in that sense, immoral judgement, which could be traced back to an error of external or internal scepticism and which, in that sense, would constitute a self-deception, insofar as recourse would be had to the judgements of others and thus no independent and consistent moral justification would be given (Dworkin 2011, pp. 100–102).

However, a moral judgement can only be recognised as correct if the result is also "convincing" (Dworkin 2011, pp. 100–2, 120, 121) after an intensive and responsible approach. In this way, Dworkin connects the factor of emotionality with the assessment of a correct judgement. This pre-understanding is based on Dworkin's preoccupation with the concept of belief. Faith, according to Dworkin, is the underlying denominator between theology, natural science and mathematics, but also that of values, even if faith can always be understood differently in terms of content. In the case of theology, there is belief in a supernatural power in the form of a god. Natural scientists and mathematicians, on the other hand, believe in the "irrefutability" of a final mathematical or scientific observation. In the case of values, belief refers to a judgement being "felt" as "good" or "bad" and this feeling is in turn based on some form of emotionality. All of these areas refer to a rationale as to why this is so, according to their own "sui generis" method (Dworkin 2013a, pp. 12–14).

The essential difference between these disciplines, according to Dworkin, is once again that in the fields of natural science and mathematics there is a fundamental agreement on the criteria according to which physical laws or mathematical formulae can be calculated, whereas this kind of agreement precisely does not exist in the fields of ethics, morality and theology. Rather, it can only be observed that there is disagreement about what, for example, is to be considered just or unjust (Dworkin 2013a, p. 13).

According to Dworkin, however, this disagreement is irrelevant because it is precisely not the unanimity of values that matters. First, there is an objective truth regarding morally right and wrong values, but it needs to be worked out. Secondly, such disagreement has existed for as long as humans have been communicating with each other and, as a result, cannot pose an existential threat to human coexistence (Dworkin 2013a, pp. 13, 14). Dworkin thus positions himself against consensus theory, according to which the view is that an adequate criterion of truth is consensus (Hartmann 2020, p. 129).

Rather, Dworkin can be assigned to the so-called construction theory, according to which true judgements can be founded step by step, like a construct (Scyrwinska 2015, p. 166). The constructive model is based on the opposite assumption, according to which moral principles do not exist independently of human beings, but must first be created by human beings, like a sculptor who only creates a construct through his own work. The constructive model is not built on an objective truth, in the sense of an externalist moral reasoning considered possible, but is subject to the assumption that human beings, because they are human beings, are assigned "responsibility" for their communal and their

own lives, and that they also form a correct judgement in a concrete case (Dworkin 2013b, pp. 195, 196). Therefore, Dworkin is not concerned with creating a truth independent of human capacity—because this is not possible at all—but with being able to generate truth universally and rationally independently of the individual capacities of subjects (Scyrwinska 2015, p. 166). The partially accessible subjective knowledge must be taken into account, but also checked, in order to objectify truth step by step. The situation is different with the so-called "natural model", according to which truth is merely recognised by people. This means that similar to the laws of physics, which are already given independently of humans, an objective reality exists (Dworkin 2013b, p. 196).

The essential difference between the natural and the constructive model is, thus, the attribution of responsibility, which shows why Dworkin argues for the constructive model. Adherents of the natural model follow an intuition that they "trust", according to which there is always a system behind everything that brings the entire set of principles into harmony, without, however, being able to understand this management more precisely. In the natural model, intuition represents the driving force and attributes a fact-like value to it, similar to an astronomer who has some key data about the origin of our solar system based on observations but who cannot yet explain the solar system itself. He trusts, however, that there must be an explanation, provided his observations are correctly recorded, even if he himself does not yet know the solution. The constructive model, on the other hand, is based on principles and not on intuitions. Principles represent beliefs which, according to Dworkin, are "sincerely" held. In contrast to the natural model, these convictions are not to be evaluated in a fact-like manner, but are only revealed through committed argumentation (Dworkin 2013b, pp. 197–99).

These processes can also be found in law. The judge who has to review a claim for damages which, for example, is based on the "right to privacy" but has not yet been recognised by any judge, is confronted with the challenge of how to decide in such a situation. According to Dworkin, the judge would first study precedents and work out what principles underlie the precedents. These precedents represent a form of intuition. Through the study of these cases, the underlying principles are to be ascertained, so that there is no mere reliance on making a correct judgement. Rather, the task consists precisely in examining one's "own" intuition factually and argumentatively in order to create an objective standard. The principles derived represent a kind of guideline for this, in order to be able to form a better judgement in difficult cases. This involves the search for principles of a "more respectable kind", which apply independently of traditional moral sentiments and which can correspond to general as well as case-related justice. These are principles of justice, fairness or equal respect (Dworkin 2013b, pp. 197, 198). Something similar can also be found in Rawls. Rawls calls this procedure the "reflective equilibrium", according to which the formation of judgement implies a constant recourse to original feelings and their examination; it is weighed back and forth until an equilibrium is reached, that is, until we can be satisfied with our judgement (Dworkin 2013b, pp. 190–92).

Dworkin goes on to say that in principle, both models, i.e. the natural and the constructive model, can be used to form judgements. However, the natural model, in which intuitions play the main role, is not suitable for community theories, but is better suited for private points of view, because it has the problem of having to include all subjective feelings or to exclude those that are not shared by many. This creates a lack of understanding among different individuals, which makes the natural model rather self-hindering. The constructive model, on the other hand, is about setting a public standard by grounding intuition in normative principles (Dworkin 2013b, p. 199). Dworkin consequently calls his process of judgemental reasoning "objective", but it is clear that this objective truth must first be constructed by a subject.

Objectivity in Dworkin's sense means that one cannot argue from a static procedure that only allows for general points of view, but that also takes into account subjective and controversial opinions that must first be weighed up and then clarified with general points of view. Only then, in a critical procedure, is it guaranteed to what extent the underlying

intuitions can appear permissible. It requires an interplay of both and their constant questioning in order to come closer to the truth in the sense of gaining knowledge, as Senn also states. Senn accurately describes this supposed dilemma as "two worlds" colliding and emphasises the danger of one-sided objectification, according to which everyone sees only "their own world" as the only correct one. Senn argues that there is a need for correlation and that feelings and mind cannot function in isolation from each other and are always interrelated. It is precisely this correlation that determines the understanding of things and their relationships to each other (Senn 2017, p. 144).

This is precisely because the responsibility of forming a correct judgement cannot be relinquished. What is required is a system of values that is structured in such a way that the substantive justifications of each individual concept can interlock and do not compete with each other. In this sense, the assumptions within the value system harmonise. Dworkin therefore calls his system "holistic" (Dworkin 2011, p. 193).

What he describes can also be found in the interpretation of law, in which the aim is to produce the best understanding of the law itself, namely that which generally corresponds to the sense of justice. Dworkin states that the correct understanding of law has always been coupled with the "moral" view:

"We must therefore do our best, within the constraints of interpretation, to make our country's fundamental law what our sense of justice would approve, not because we must sometimes compromise law with morality, but because that is exactly what the law, properly understood, itself requires" (Dworkin 2011, p. 415).

Thus, constitutions are not only to be interpreted historically, it is much more relevant to interpret them in such a way as to produce the most just form of government. Moral principles form an integral part of law, according to Dworkin (Dworkin 2011, pp. 413–15). Principles, such as the requirement of justice, fairness, respect for the person or some other moral dimension, are to be understood as basic normative principles of positivised law. In a legal system, there are not only codified rules, but also precisely these general (unwritten) principles. Although principles can also lead to either–or decisions similar to legal rules, they, unlike legal rules, must be weighed and weighted in their application on a case-by-case basis in the sense of both/and. Consequently, it is the duty of the practitioner of the law to have recourse to these principles, especially in those cases in which it is imperative to do so because the relevant legal norms are obviously contrary to the general sense of justice (Dworkin 2011, pp. 414, 415).

Dworkin assigns law to political morality, according to which both legal norms and principles are always legally binding. What is essential in the assignment of law to politics is that law is no longer understood as something abstract and formal, but that the proximity of law to political and thus social affairs is thereby emphasised. He calls his understanding an "integrated theory of law" and describes this integration concisely: "Law is effectively integrated with morality: lawyers and judges are working political philosophers of a democratic state" (Dworkin 2011, p. 415).

Law in the sense of "integrated legal theory" does not initially mean a complete disappearance of the opposing views of positivism and "interpretivism". According to Dworkin, however, this fundamentally changes the mode of argumentation. Traditional jurisprudence always argued from the wrong perspective. Instead of determining the content of law from popular discourses, the opposite approach was taken. It was not the controversies of the people that were considered as a guide, but the essence or concept of law as an abstract concept (Dworkin 2011, pp. 406, 407). With his proposed view of law as a component of political morality, however, the problem was no longer a "conceptual" one, but a "political" one. The practitioners of the law who proceed according to the two-system view, i.e., who understand law and morality as two independent systems, are always confronted with a balancing of interests, namely between the enforceability of the legislator's views and the guarantee of correct or just solutions. Law in the sense of political morality, on the other hand, solves this alleged conflict of goals. By applying

moral principles, the practitioner of law does not decide according to his own political convictions, but in the sense of the law itself (Dworkin 2011, pp. 409, 410).

2.4. Responsibility on Interpretation

From what has been said before, the aim of Dworkin's theory becomes apparent. It is to develop a value system of mutual support that justifies a certain attitude or interpretation that stands up to the judgement of justice. This justification is based on one's sense of responsibility.

Responsibility in Dworkin's sense means, first of all, to concern oneself intensively and conscientiously with a matter (Dworkin 2011, pp. 100–102). This understanding of the term is a generalisation of Kant's imperative, according to which we must make use of our own intellect; only then can we act rationally. The starting point is the striving for a successful, self-responsible way of life. It is about developing one's own sense of self and acting accordingly (Dworkin 2011, p. 210). According to Dworkin, every person has to make authentic decisions; only then do the true opportunity costs in a market become apparent. Dworkin understands authenticity as a way of life, "a way of being that you find suited to your situation, not one drawn mindlessly from convention or the expectations or demands of others" (Dworkin 2011, p. 210).

Taking responsibility for one's own actions means taking one's own life seriously. Dworkin thus includes self-respect in his concept of human dignity. Self-respect requires that we have respect for ourselves, as well as respect for the lives of others. For it is only through self-respect and respect for others that life is accorded a relationship to person(ality) and, in general, that human beings are accorded dignity. Self-respect, however, means in particular having confidence in one's own judgement and convictions, which should be independent of prejudices and attachments, so as not to experience any limitations in the process of forming judgements. Self-esteem and authenticity are thus correlated. Taken together, they form his conception of human dignity (Dworkin 2011, pp. 202–5). Self-respect and authenticity thus form elements of a general legal claim, which would be to respect the life of every individual. After all, this is what a society is about; accepting people as equals and perceiving the moral obligation that follows from this to guarantee good living conditions for all.

At this point, the differentiation between the argumentation of external and internal scepticism becomes clear once again. While their positions are based either on metaphysical arguments, or at best only on the opinions and ideas of others, or, as in the case of external scepticism, on scientific methods of reasoning, Dworkin's is about the moral method behind it. The holistic system given by Dworkin and the conceptions of internal and external scepticism presented differ, in my view, precisely in the attribution of responsibility. It can be argued that if it is assumed that value judgements are to be explained metaphysically, then there is a rejection of the attributed responsibility because it is obviously not within one's capacity to intervene. If, however, it is reasoned that all judgements made by humans are based on value judgements already made by others, and these ultimately on the moral position we take, we remain responsible for this reasoning ourselves, and subsequently also for how we judge and think. This, after all, is what moral judgement is all about. The critique of morality thus always follows from morality itself.

Each person has the responsibility to independently comprehend and justify his or her personal value system, always taking into account respect for other forms of life. However, personal responsibility must not be used to anchor responsibilities for a dignified life solely in the individual. Value concepts are not individual and responsibility is not a subjective perception of the task of making morally correct judgements, because value concepts are collectively anchored on the one hand and because society must give every person the same opportunity to also be able to exercise their responsibility on the other. The moral justification of a judgement lives from discussion, from the exchange of opinions and the assumption that opposing opinions must be considered in order to find and represent the best position. However, the individual can only enter into discourse with others when the

latter are also empowered to do so. This means that every person, because they have to live with dignity, must be guaranteed equal initial opportunities by the state, otherwise they will be cheated by society. This is precisely because no one can think and act on their own responsibility if they are not given a barrier-free choice for their decisions.

Responsibility is thus not an individual issue for Dworkin. Self-esteem and authenticity are not to be understood in such a way that I negotiate good living conditions only for myself; what is important is rather to create good living conditions for all in order to progress collectively. The state has to ensure good living conditions and is not only responsible for the functioning of the market, but always measures itself by the quality of the life of all. Dworkin thus aptly describes the necessary relationship between the self-responsible formation of opinion and the framework conditions needed for it (Cicero 2012).

Dworkin's demand is clear: a democratic understanding of the state does require a culture of argumentation (Dworkin 2006, pp. 4, 5). Dworkin argues in the Aristotelian sense that such a culture must be instilled. However, this presupposes fair framework conditions. It is no coincidence that he sees restructuring in the education sector and in political elections as absolutely necessary in order to create and maintain such a culture in the long term (Dworkin 2006, pp. 147–54). In the field of education, Dworkin considers it urgently necessary to introduce compulsory political subjects at the lower school level so that pupils can discuss socio–political processes in an argumentative manner (Dworkin 2006, pp. 147–49). With regard to the American electoral system, Dworkin argues for a stricter handling of political advertising in order to reduce the prevailing imbalance between financially strong and financially weak parties and individuals. Dworkin also proposes a maximum term limit of 15 years for the Supreme Court to protect citizens from possible arbitrariness through the political instrumentalisation of judges (Dworkin 2006, pp. 150–44; Ibric 2022, pp. 117–24).).

3. Conclusions

Dworkin ties his theory of interpretation to an objective truth that can only produce conclusive reasons for a specific representation of a position in an argument after responsible and intensive debate—in the sense of his two-stage theory.

Dworkin's understanding of objective truth describes a (historical) process. We interpret what our ancestors have already interpreted and thereby perpetuate it. According to Dworkin, truth does not have a descriptive nature, but can only be developed and maintained through the training of the mind. Spirit is not limited to the cognitive faculty, but includes both intellect and feeling, or in other words heart and mind.

Dworkin is not concerned with mere intuitions on which a judgement is based, but with convictions that can and must be represented in a sincere and argumentatively differentiated manner with a view to the personhood of each individual. According to Dworkin's theory, moral judgements can only be justified or invalidated by further moral judgements. Moreover, this judgement must also be convincing in terms of understanding. He also calls such convictions principles. We have to look for insights into why we live and how we have to shape life in the sense of a culture of reasoning such as a reasonable person with mind and heart must advocate. Such a culture does not ignore other people's experiences; indeed, this is not possible as they are often the starting point of a discussion. However, these experiences must not be used as a substitute for an objectifying approach and moral arguments.

Although people have a reflexive responsibility for their own actions, self-responsible actions must first be made possible. The state has the duty to create conditions that allow such a perception of personal responsibility. It is only on the basis of this that a basic social order can be developed that ensures non-discriminatory treatment of all people so that an honest discourse can be conducted.

To conclude with the words of Dworkin:

> "But remember, finally, the truth as well as its corruption. The justice we have imagined begins in what seems an unchallengeable proposition: that government

> must treat those under its dominion with equal concern and respect. That justice does not threaten-it expands-our liberty. It does not trade freedom for equality or the other way around. It does not cripple enterprise for the sake of cheats. It favors neither big nor small government but only just government. It is drawn from dignity and aims at dignity. It makes it easier and more likely for each of us to live a good life well. Remember, too, that the stakes are more than mortal. Without dignity our lives are only blinks of duration. But if we manage to lead a good life well, we create something more. We write a subscript to our mortality. We make our lives tiny diamonds in the cosmic sands". (Dworkin 2011, pp. 422, 423)

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Article

Thomas Aquinas, Ronald Dworkin, and the Fourth Revolution: The Foundations of Law in the Age of Surveillance Capitalism

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Abstract: Since the publication of Shoshana Zuboff's *The Age of Surveillance Capitalism*, the strategies of Surveillance Capitalists and appropriate responses to them have become common points of discussion across several fields. However, there is relatively little literature addressing challenges that Surveillance Capitalism raises for the foundations of law. This article outlines Surveillance Capitalism and then compares the views of Thomas Aquinas and Ronald Dworkin in four areas: truth and reality, reality and law, interpretation and social custom, and virtue and law; finally, it closes by asking whether the law alone can provide a sufficient response to Surveillance Capitalism. The overarching argument of the article is that, while Aquinas's view of the foundations of law accounts for and responds to the challenges of Surveillance Capitalism more effectively than Dworkin's, law alone cannot provide a sufficient response to this emerging phenomenon.

Keywords: surveillance capitalism; Shoshana Zuboff; Thomas Aquinas; Ronald Dworkin; truth; reality; virtue; technology; behaviorism; fourth revolution

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1. Introduction

In 1944, C. S. Lewis predicted the possibility that a new priesthood of scientists, the Conditioners, would seek to rewrite human nature in order to exert absolute or near absolute control over the world (Lewis [1944] 2001, pp. 56–73). He imagined that control would be exerted through the manipulation of human capacities, desires, and intentions. Over a decade later, in 1958, Hannah Arendt echoed Lewis's sentiment with a more precise target. Arendt worried that "the trouble with modern theories of behaviorism is not that they are wrong, but that they could become true, that they actually are the best possible conceptualization of certain obvious trends in modern society" (Arendt [1958] 2018, p. 322). Her concern, like Lewis's, was not that behaviorist theories were true in and of themselves, but that they might be made true through the capacities for control brought about in the modern age.

The rise of what Shoshana Zuboff calls Surveillance Capitalism, hereafter SC, has given life to the worries of Lewis and Arendt (Zuboff 2019a). It also helps to clarify the phenomenon that Haidt has described as a new Babel. This has been made possible by a confluence of technologies that allow for what Alex Pentland has described as reality mining, or the ability to create living labs by using a variety of devices to track the movement, communication, and behavior of large clusters of individuals (Pentland 2014).[1] Zuboff's work has garnered significant attention from ethicists, lawyers, and technologists.[2] Further, Zuboff claims that the only solution to the challenges of SC is in state law (Zuboff 2021). However, there has been comparatively little discussion about the relationship between SC and human nature or the moral foundations of the law. Further, I have not encountered any

[1] An article in *MIT Technology Review* about Pentland's work earlier introduced the term 'reality mining' (Greene 2008).

[2] For instance, see: (Amardakis 2020; Landwehr et al. 2021; Laniuk 2021).

work on SC from a Thomist perspective.[3] Finally, what Mark Greenberg dubs Dependence Views of law have received significant attention recently, and Ronald Dworkin's influential view is one of the most important of such views (Greenberg 2017). However, again, there has been little interaction between these views of law and SC. This article will take a small step towards filling that gap.

Zuboff's claim raises several related questions. First, what are the particular challenges of SC? Second, what would be required of a theory of law to successfully meet these challenges? Third, is law *alone* sufficient to meet these challenges? In Section 2 of this article, I will outline Zuboff's analysis of SC and clarify the specific challenges that it presents. In Section 3, I will compare the views of Thomas Aquinas and Ronald Dworkin on the relationship between reality and truth; reality and law; social custom, interpretation, and law; and virtue and law. There are, in the contemporary conversation, many approaches to reading Aquinas, and there is not space here to fully defend my interpretation as *the correct* interpretation of Aquinas, against all objections. In this section, I will argue that Aquinas's understanding of law gives it certain advantages in addressing the challenges raised by SC, while Dworkin's understanding of law suffers from comparative weaknesses. Given that the focus of this Special Issue is on the philosophical foundations of law, the theoretical discussion will be extensive. Finally, in the last section of the paper, I will suggest that on either of these views, current efforts to regulate data are insufficient to address the challenges that SC presents. Drawing on Aquinas's view, I suggest that law and policy could add efforts to support the inculcation of moral virtues in the populace at large, and ethics initiatives during the education of engineers and data scientists.

The selection of Aquinas and Dworkin may seem arbitrary. Why put these thinkers into conversation? First, while it would be the work of another article to defend this claim, I operate on the presumption that the challenges raised by SC can be more effectively addressed from a Dependence View than from alternative views of law. As I defend below, SC operates at the level of the social imaginary. To sum up, the challenges that I will illustrate below, SC erodes the very basis of human interaction with the world and society: truth, reason, and the virtue of civility. Because of this, the more distant a theory of law is from the metaphysical, epistemic, and anthropological foundations of these views, the more difficulty it will have in addressing SC. Dependence Theories, because they posit a fundamental connection between morality and law, in my view tend to be more attuned to these concerns.[4] Second, Aquinas and Dworkin both fit into the category of Dependence Theories of Law, and both are marked in significant ways by interaction with Aristotelian thought. This makes them natural and interesting conversation partners. Third, my methodology in this article is one of comparative retrieval. Aquinas was a medieval Christian thinker with classical roots while Dworkin was a post-Enlightenment thinker with a strong Kantian influence. Thus, specific attention will be paid to areas in which Aquinas and Dworkin differ and areas of Aquinas's thought that address specific weaknesses in Dworkin's view. SC serves to highlight several such areas.

There are three primary drawbacks to this methodology. First, Aquinas and Dworkin are separated by eight hundred years of historical development. Within the confines of this article, it is not possible to effectively address all of the relevant transitions that occurred during this period. Thus, while I will attempt to be sensitive to their different contexts, I will not be able to fully account for those differences. Second, and closely related, Aquinas and Dworkin stand on separate sides of the Enlightenment. The rise of individualism will, in particular, create notable tensions that I can recognize, but cannot fully address. Third, Dworkin's views may well highlight significant weaknesses in Aquinas' approach. Because my methodology focuses on retrieval, I cannot fully assess these weaknesses here.

[3] Outside of contributions from both classical and new natural law thinkers to the field of bioethics, there has been very little discussion of emerging technologies from a Thomist perspective, and particularly involving his theory of law.

[4] I am inspired by Greenberg's critique of the Standard Picture (Greenberg 2010). However, I do not attribute the details of my claim to him.

2. Surveillance Capitalism and the Fourth Revolution

In *The Age of Surveillance Capitalism*, Shoshana Zuboff identifies the emergence of a new model of capitalism that is organized around the collection and manipulation of a behavioral surplus. Behavioral surplus is data gathered from the remnants of regular human interactions monitored by the ubiquitous cookies, cameras, microphones, and other tools that litter our physical and digital worlds (Zuboff 2019a).[5] Data can be understood as a collection of data points, and a data point can be as simple as the click of a 'like' button, a login attempt at Starbucks, or an Amazon purchase. The acquisition of increasing amounts of behavioral surplus, using tools such as Google's search, Facebooks' 'like' button, and various methods of digital communication and payment, across multiple areas and levels of human life lead to what Zuboff calls economies of scale and economies of scope (Zuboff 2019a). Economies of scale refer to the breadth with which behavioral surplus can be accessed—millions of data points spread across thousands of websites are needed. Economies of scope refer to the depth at which behavioral surplus can be accessed—data points must be accessed not only from a user's active online interactions, but passively by monitoring the mundane aspects of their daily lives.

These economies rely on the increasing expansion of what Luciano Floridi describes as 'the infosphere' (Floridi 2008, 2014). The fourth revolution, or the digital revolution, has brought about what Mark Weiser called 'ubiquitous computing' (Weisser 1991). The goal of ubiquitous computing is to "infuse the real world with a universally networked apparatus of silent, 'calm,' and voracious computing" (Zuboff 2019a, p. 198). Information and communication technologies (ICTs) can be understood as "forces that change the essence of our world because they create and re-engineer whole realities that the user is then enabled to inhabit" (Floridi 2014, p. 97). They offer us a gateway into a virtual world constituted by the environment of networked machines and the information that they hold. This virtual world is one increasingly inhabited by humans for purposes of work, play, and social interaction (Floridi 2014). Consider, for instance, the chat features of Facebook or the roles that Ebscohost or Jstor play in academic research. This virtual world is accessed through specific gateways—a laptop or tablet for instance—and must be accessed intentionally. This creates a sharp distinction between online and offline interactions.

The explosion of networked devices, commonly called the Internet of Things (IoT) has increasingly blurred the lines between online and offline interactions. We can understand this as the enveloping of the real world within the virtual world. Envelopment is a process by which a technology with limited capacities encapsulates as space within itself in order to make that space suitable for the limitations of the technology. Think here of railroads. Trains have very limited capacities. They are a powerful means of transportation within the context of those limits, but the space of the railroad must be manipulated to make it suitable to the limitations of the train.[6] Similarly, the expansion of networked devices that monitor and record virtually every aspect of human life (think, for example, of digital assistants like Siri or Alexa, or of devices like the Fitbit or Apple iWatch) increasingly envelope the real world and allow SC to develop economies of scope. These economies of scale and of scope provide millions of datapoints on individual users that can be collected into meaningful, well-formed, and startlingly accurate profiles of both individual users and extended societies.[7]

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[5] Zuboff's entire work is an analysis of these three imperatives, their development, and their implications. However, the pages listed provide a concise and helpful summary of the operation of surveillance capitalism. Hal Varian outlines Google's strategy (Varian 2010, 2014a, 2014b).

[6] The idea here is Floridi's, but the example is my own. There is a deeper element of Floridi's argument. This concerns the fundamentally informational nature of reality itself and Floridi refers to it as informational structural realism. For the moment, I have set this to one side as it is a complex concept that is not strictly needed to understand ubiquitous computing. See (Floridi 2008).

[7] That the data are meaningful, well-formed, and accurate allows it to conform to Floridi's definition of information rather than simply a collection or heap of individual bits of data. See (Floridi 2003, 2007). Though it is outside the scope of this paper, Floridi's view is not without critics. See (Fetzer 2004). On the profiling of extended societies see (Pentland 2014).

From these profiles, meaningful predictions can be made about how individuals or social groups will respond to specific kinds of stimuli. The end of ubiquitous computing is "ubiquitous intervention, action, and control," (Zuboff 2019a, p. 292) and, as Zuboff argues, "the aim of this undertaking is not to impose behavioral norms, such as conformity or obedience, but rather to produce behavior that reliably, definitively, and certainly leads to desired commercial results" (Zuboff 2019a, p. 201). These results are achieved through what Spanish sociologist Manuel Castells calls persuasive power (Castells 2017).[8] However, SC thrives when it is able to simultaneously keep the attention of its users directed towards a particular SC platform, Google, Facebook, etc. while simultaneously distracting the user from the nature and implications of their interaction with that platform. Like a magician, SC platforms are designed to attract a user's interaction while distracting them from the impact of their interaction (Amardakis 2020).

This allows the mechanisms SC uses to modify behavior—tuning, herding, and conditioning—to operate at the level of the social imaginary. Social imaginary, a term coined by Charles Taylor, refers to a "contemporary lived understanding; that is, the way we naively take things to be .... The construal of the world we just live in, without ever being aware of it as a construal, or—for most of us—without ever even formulating it" (Taylor 2007, p. 30). This naïve view of the world is formed in significant ways by our daily practices, the narratives we imbibe, and the environments that we encounter (Smith 2009, 2012).

One good example of the use of tuning to modify the human social imaginary is the use of nudges. The nudge, introduced by Richard Thaler and Cass Sunstein, is "any aspect of a choice architecture that alters people's behavior in a predictable way" (Thaler and Sunstein 2008, p. 6). This assumes that design is never neutral and always involves the subtle manipulation of the possibilities of choice, or choice architecture, within an environment (Thaler and Sunstein 2008). Consider, for instance, how the design of a classroom directs attention towards the teacher, or placing salad first in a cafeteria line encourages patrons to healthier eating. Early experiments at Facebook showed that small manipulations in the design of the online environment had a significant impact on the practices of users (Bond et al. 2012).[9] Further, as Evgeny Morozov has pointed out, SC organizations often present themselves—and are often accepted—as offering objective truths about the world (Morozov 2013; Amardakis 2020).

Alex Pentland further exemplifies this kind of tuning as a part of broader, Skinnerian-style conditioning in his discussion of the manipulation of the eToro community (Pentland 2014), and later extends this to the manipulation of large social populations (Zuboff 2019a). While Pentland argues for the use of tuning and conditioning techniques to create a utopian society, Zuboff argues that the driving goal behind it is "the instrumentation and instrumentalization of behavior for the purposes of modification, prediction, monetization, and control" to the end of accruing power and resources to SC organizations (Zuboff 2019a).

The impact of Facebook on the polarization of American politics offers a helpful example of this dynamic. Facebook keeps user attention, in part, by giving the user more of what they have already sought out. While early investigations argued that Facebook created echo-chambers by providing individuals with easy access to others who share their political opinions, more recent studies have emphasized the affective impact on the formation of tribal social identity groups (Törnberg et al. 2021). Facebook does not *cause* polarization per se (Piore 2018). However, it does provide a social environment that subtly encourages rather than discourages the formation of tribal identity groups.

In this summary of Surveillance Capitalism, I have illustrated three elements of SC that challenge the foundation of a standard view of law. First, SC operates by attracting continual user attention and, through that attention, both extracts behavioral surplus and

[8] Yevhen Laniuk claims that it is not persuasive power. He argues that SC does not attempt to change its subjects. However, he accepts that SC does attempt to modify its subjects, and it is unclear what modification is if it is not change (Laniuk 2021).

[9] For discussion see (Zuboff 2019a, pp. 298–304).

shapes user environments in ways that result in predictable behavior. Second, SC exerts power by profiling individuals in order to predict and modify the behavior of individuals and social groups through manipulating the social imaginary. I have argued elsewhere that the social imaginary can be understood as providing the first principles for higher reasoning (Smith 2022). On this account, SC does not only claim to provide an objectively true picture of the world to users (Morozov 2013, p. 143; Amardakis 2020, p. 71), it *becomes* the ground of a user's understanding of 'truth.' Third, because the goal of SC is to increase its share of user attention in order to accrue resources and power, it has no investment in bringing about a stable society. Thus, while some authors suggest that tuning, herding, and conditioning can be used to bring about a utopia, the result has been a steady dissolution of the social bonds that ground civil discourse. In sum, SC challenges the foundations of law by eroding the ontological, epistemic, and anthropological basis of that foundation: truth, reason, and the virtue of civility.

3. Surveillance Capitalism and the First Principles of the Law

In order to address these challenges from the perspective of law, it will be helpful to compare how two prominent theories of law would articulate three important aspects of the first principles of law. A first principle, as I use the term here, is 'the point at which one begins' or 'the most foundational element' of a thing. For example, in Christian theology, God is the first principle of all created things. In Foundationalist Epistemology, properly basic beliefs are the first principles of other beliefs. The first principles of law are, then, a reference to the proper foundations of legal reasoning, and distinct theories of law may identify different first principles of law. A discussion of these principles engenders at least three questions. First, how is law related to reality and truth? Second, how is the law related to socio-cultural custom? Third, who makes the law and does their moral character matter? Answering these questions will help us to understand how each of these theories might respond to the elements of SC that have been illustrated in the previous section.

3.1. Reality and Truth

In his late work, *Justice for Hedgehogs*, Ronald Dworkin draws a sharp distinction between scientific truth and interpretive truth. Scientific truth corresponds to realities in the world and thus depends upon external realities for its justification (Dworkin 2011, p. 121). Interpretive truth must be shown through argument to cohere within an existing network of other rationally coherent beliefs, but it does not presume any external physical or metaphysical reality upon which it depends (Dworkin 2011, pp. 116–17). This distinction relies on an equally sharp distinction between criterial and interpretive concepts. A criterial concept is a concept that finds thick agreement within the context of a society because it corresponds with some accessible reality (Dworkin 2011, pp. 158–59). For instance, the term 'fork' refers to a particular type of pronged eating utensil while the term 'spoon' refers to a different type of eating utensil. A key feature of criterial concepts is that they correspond to specific and identifiable, but not necessarily precise, realities in the world (Dworkin 2011, p. 158). Thus, 'fork' might be a more precise criterial concept while 'baldness' is an inherently vague criterial concept. Natural–Kind concepts are equivalent to criterial concepts in that they are subject to verification in reality; but Dworkin connects them to experimental verification rather than common agreement (Dworkin 2011, pp. 159–60). For my purposes here, the distinction is minimal and when I use 'criterial concepts' below, the reader should understand natural–kind concepts to be included. Vagueness may result in spurious or verbal disagreement, but neither 'fork' nor 'baldness' is open to deep disagreement. Individuals may disagree about what counts as 'bald' in specific instances, but they do not disagree about what baldness is. Criterial concepts also remain context-dependent. For instance, 'fork' can also refer to a specific kind of musical tool, a tuning fork. However, when the term is used in context it is clear whether one is referring to a tuning fork or an eating fork. Thus, a criterial concept can be taken to provide a clear, accurate, and complete account of the object in question. On Dworkin's account, criterial concepts ground scientific truth claims

that are value free and thus can potentially be taken to correspond with reality—presuming that correspondence can be sufficiently well explained (Dworkin 2011, pp. 174–75).

An interpretive concept, on the other hand, is one that finds thin agreement within and possibly across societies, but not thick agreement. For instance, humility might be commonly taken to refer to 'a right view of oneself.' Jonathan Edwards, Thomas Aquinas, and Kongzi would all agree with this claim. However, Edwards, Aquinas, and Kongzi would disagree on what counts as 'a right view of oneself' (Aquinas 2012c, p. 161; Edwards [1894] 2011, p. 264; Kongzi 2003, ch. 1. sct. 10, ch. 3 sct. 7, ch. 4 sct. 13, ch. 9 sct. 4, ch. 12 sct. 1).[10] Thus, humility is agreed upon as significant for understanding and holding a right view of oneself, but it is conceptually open to interpretation such that disagreements about what it means to be humble are not merely spurious or verbal. They can be meaningful in a way that disagreements over what counts as a baldness cannot be. Truth in interpretive concepts is a matter of holding sufficiently justifying reasons for believing that one's understanding of an interpretive concept (1) fits within ones overarching structure of beliefs, (2) fits the practice that the concept claims to interpret, and (3) illustrates the value of that practice. Interpretive concepts are normative in a way that criterial concepts are not (Bustamante 2019, p. 10). Dworkin argues that attempts to codify 'truth' as correspondence, coherence, or pragmatic success as such are insufficient because none of these theories can successfully account for everything to which we want to apply the term 'truth.' However, each of these models of truth may have some domain specific value (Dworkin 2011, pp. 175–78). For Dworkin, correspondence models of truth find their domain value in scientific truth. Coherence models, on the other hand, find their domain value in interpretive truth.

Aquinas distinguishes between at least two kinds of truth: speculative and practical. Speculative "truth is in the intellect in so far as it is conformed to the object understood" and may be defined as "the equation of thought and thing" (Aquinas 2012a, q. 6 a. 1). Practical truth, on the other hand, "depends on the conformity with right appetite" (Aquinas 2012b, q. 57 a. 5 ad. 3).[11] Unlike Dworkin, Aquinas begins with the assumption that realities are ontologically deep. Aquinas claims that "no philosopher can completely investigate the essence of even one fly" (Aquinas, forthcominge, *Prologue*)). For a thing to be ontologically deep is for it to have an essential nature that contains more than can be known by a limited knower. Aquinas does not base his claim on the infinite nature of the fly, but on the limitations of the human intellect. These realities may be entities (actual or mental), objects, or relations between entities and objects. Considering the contemporary discussion surrounding truth-falsifiers, we may wish to add real absences to this list. To my knowledge, Aquinas never addresses this issue, though an Aristotelian framework is equipped to handle it (Priest 2009). Unlike later essentialism, for Aquinas the essential nature of a thing is individualized. The essence of any individual thing, for Aquinas, includes both the material and formal components that are necessary to make that thing the specific thing that it is (Brower 2014, pp. 18–21, pp. 269–75).[12]

"The true resides in things and in the intellect" applies to speculative truth, and it is properly understood as the degree to which the concept in the intellect emulates the reality upon which it depends (Aquinas 2012a, q. 16 a.3 ad. 1). Perception and concept formation requires that a concept depends upon and to some degree emulates some reality in the

[10] Kongzi does not give a developed or clear theory of humility or pride in the way that Aquinas or Aristotle do, nor is his thick view of humility as easily encapsulated as Edwards. However, several scholars have articulated his view of humility in comparison to alternative views (Rushing 2013; Klancer 2012; Li 2016).

[11] There are a variety of attempts to interpret Aquinas's view of truth. Timothy Pawl argues that Aquinas holds a version of Truthmaker theory (Pawl 2016). J. Budzizewski argues that he holds a more general correspondence theory. John Milbank argues that Aquinas holds a more extreme participatory view of truth than I have defended (Budzizewski 2014, pp. 119–21). I think the participatory theory of truth that I offer here encompasses the heart of Budzizewski's view while more clearly grounding truth in the concept of participation, defended by John Milbank, and distinguishing between speculative and practical understandings of truth (Milbank and Pickstock 2001).

[12] For a more generally Aristotelian articulation of a similar view see (Inman 2022).

world. Aquinas famously argues that "nothing is in the intellect unless it has first been in the senses" (Aquinas, forthcomingg, q. 3 a. 2 ad. 19). This is literally the case for Aquinas's view of perception. As Anthony Lisska has persuasively argued, Aquinas's understanding of perception depends upon the transmission of forms such as color, texture, shape, size, or volume from an object into the human cognitive apparatus. These forms are collated to form a coherent object, and this object is interpreted and developed into a phantasia (Lisska 2019). There is a significant amount of debate surrounding the details of this process, but the key point for our purposes is that aspects of the formal nature of the object are actually transmitted to the cognitive apparatus of the perceiver. This point is widely agreed upon. The creation of an intuitive concept is caused by the transmission of forms from objects into the human intellect. Again, the details of this process are debated, but Theresa Scarpelli Cory provides a very good argument that the phantasia is transformed by the mind into the kind of thing that can cause an intelligible form to come about (Cory 2015, 2017). As we shall see later, this is not simply a passive reception of form, but an active acquisition of forms and reconstruction of the substance as a concept. The key point, however, is that the concept is grounded in the formal nature of the object of sensation, perception, and intellection. The work of speculative reason is to investigate these intuitive concepts so that they might be more clearly and completely understood, and the work of speculative reason ends in a more precise intuitive concept (Aquinas, forthcomingg, q. 15 a. 1; Smith 2022, pp. 161–69). Aquinas holds that this is as much the case for more complex and esoteric value concepts, such as justice or goodness, as it is for concepts of sensible entities such as cats and lions. All human concepts are built up from the foundation of sensory experience of the world, and these concepts are true to the degree that they successfully emulate the formal nature of real entities, objects, and relations (adding absences) of that world (Aquinas, forthcomingb, bk. 1 l. 20; Aquinas, forthcomingc).

There are four key points to note. First, Aquinas's approach to truth does not assume that truth is binary. Concepts are true to the degree that the concept emulates the reality. This allows us to understand concepts as more or less true rather than simply true or false. Second, for Aquinas, sensation, perception, and intellection are grounded in the formal nature of real entities, objects, and relations (adding absences). Phantasia and concepts emulate this formal nature, though they do not do so completely or perfectly, and thus their truth is dependent upon the formal nature of these things. Third, while Aquinas believes that things have essential natures and that these essential natures are knowable,[13] he does not believe that humans can achieve a complete knowledge of the essential nature of an object. This leaves human concepts inherently incomplete.[14] Fourth, Aquinas distinguishes between distinct kinds of truth by distinguishing between the goal of the reason in pursuing that kind of truth. The goal of the speculative reason is to develop a deeper and more precise intuitive understanding of the reality in question. The goal of the practical reason is to guide the appetites of the individual towards actions that result in what is actually good for the individual and the community.

Dworkin's distinction between criterial and interpretive concepts attempts to divide kinds of truth depending on their content and nature. Value-dependent concepts are interpretive, and truth depends on having sufficient reason to accept that the concept fits into the overarching structure of concepts within a tradition of thought. Value-independent concepts are criterial, and truth depends on whether the concept accords with the reality

[13] I do not have space here to defend the concept of essences as such. However, for a recent defense of a generally Aristotelian concept of essence see (Oderberg 2007).

[14] One immediate objection to the view that I have laid out here will come from Aquinas's claim that speculative truth is the same for all, even if it is not equally known to all (Aquinas 2012b, q. 94 a. 4). However, the example that Aquinas gives is the truth of a mathematical necessity: the three angles of any triangle will be equal to two right angles. Given this, Aquinas seems to be restricting speculative truth here to logically necessary propositions which can be known with absolute certainty. However, Aquinas also claims that propositions are the products of reason (Aquinas 2012c, q. 47 a. 2 ad. 3). This creates a clear divide between concepts, which are the focus of the discussion of speculative truth in view here, and the focus of Aquinas's claim that speculative truth is the same for all.

being picked out. For Aquinas, on the other hand, the formation of any concept involves both a reception of the accidental aspects of a thing through the senses and an active consideration and interpretation of that thing, both as a particular thing and in regard to its universal qualities (Aquinas 2012a, q. 85 a. 2). The concept is not the object of the reason, it is the means by which the reason interacts with realities in the world (Aquinas, forthcomingf, q. 14). Further, for Aquinas, because all human concepts are inherently incomplete, they are both subject to change, a claim that Dworkin can accept even for criterial concepts (Dworkin 2011, pp. 164–66), but also subject to substantive disagreement. This is especially true between traditions of thought.[15]

Dworkin's view of scientific truth and criterial concepts are too closely tied to specific traditional understandings of reality to effectively accommodate alternative traditions (Doppelt 2011). To gloss his view, scientific truth depends on the degree to which criterial concepts identify the realities that they propose to describe. Interpretive, and moral, truth depends on the degree to which the process of interpretive reasoning fits within the web of beliefs already held by the individual and explains the value of the practices in which they engage. Criterial concepts are, in Aquinas's terms, self-evident. However, an individual's sense that a term is self-evident arises from that individual's inculcation in a particular tradition of thought. This leaves Dworkin's criterial concepts value-laden and tradition dependent in ways that he does not evidently recognize. However, what is the viable alternative? Instrumentalism in the sciences argues that scientific truth does not describe nor depend upon the reality that it attempts to describe, but upon the predictive power that its concepts provide. This amounts to something like relativism in the sciences. This approach is popular among some, and it serves to unify views of scientific and interpretive truth. Scientific truth just is interpretive truth. However, it does not ground predictive claims in demonstrable realities, and it does not explain how interpretive claims could be grounded in reality. Similarly, Dworkin's view of interpretive concepts is not tied tightly enough to reality. Interpretive concepts are always 'up for discussion' and truth is simply a reasoned fit with one's beliefs and efficacy in achieving the purpose of the practice under consideration. A more plausible alternative is the Critical Realism promoted by Roy Bhaskar and Christian Smith, among others (Bhaskar 2008; Smith 2010). On this view, as on Aquinas's, things have ontological depth which both grounds the capacity to form knowledge about those things and also grounds a limited array of alternative interpretations of those things. Humans are capable of evaluating these interpretations, and some interpretations will clearly be better or worse than others, but fundamentally different interpretations may be equally plausible accounts of the thing in question because both pick out salient features of the reality of that thing. Scientific truth, on both Aquinas's and a Critical Realist view, is a bit more interpretive than Dworkin allows, but interpretive truth is a bit less interpretive. On both views, scientific and interpretive truths are both grounded in real things and dependent upon human interpretation.

3.2. Reality and Law

How, then, does truth relate to morality and law? For Dworkin, Hume's principle is paramount. Dworkin's version of Hume's principle is that "no amount of empirical discovery about the state of this world . . . can establish any conclusions about what ought to be without a further premise or assumption about what ought to be" (Dworkin 2011, p. 17). Dworkin argues that this principle does not support moral skepticism, but instead should be taken to support a strong view of the independence of morality (Dworkin 2011, p. 17). His primary target is a causal impact theory which holds that moral facts existing in the world "cause people to form moral convictions" such that true moral convictions are those that match moral facts (Dworkin 2011, p. 69), and the accompanying causal dependence hypothesis that apart from a causal impact theory there can be no coherent or meaningful

[15] A good example of this in Aquinas is his discussion of Augustine's view of God and change in (Aquinas 2012a, q. 9 a. 1 ad 1). One contemporary example is the attempt to unify Western and Chinese Traditional Medicine.

concept of moral truth (Dworkin 2011, p. 70). While his primary target is limited, Dworkin's account of moral independence suggests that there can be no meta-ethical discussion that does not explicitly or implicitly depend upon some ethically normative claim such that all meta-ethical discussions are in fact ethically normative discussions (Orsi 2020). It also suggests that ethically normative discussions involve interpretive concepts that are value dependent in such a way that they are effectively immune to the arbitration of empirical demonstration (Dworkin 2011, pp. 21 and 221).

Aquinas believes that the cosmos is an ordered system that is emanated from and participates in the rationally ordered mind of its creator (Aquinas 2012a, q. 45 a. 1, 2012b, q. 93 a. 3 ad. 5). While the terms 'emanation' and 'participation' may be contested through the history of philosophical thought, the key point for our purposes is that Aquinas believes that all things are, are what they are, and are fundamentally oriented towards certain kinds of ends by dint of their continual dependence upon the creator. Particularly important is that things are both the kinds of things they are (form) and the specific things they are (essence) because they express and reproduce exemplars in the divine mind (Aquinas 2012d, q. 4 a. 41 ad. 3).[16] While Aquinas did not conceive of the gravitational force that is fundamental to modern physics, the law of gravity provides a helpful illustration of his perspective. We might imagine that the planet Jupiter is a particular kind of thing: a celestial body that orbits a star, has sufficient mass to produce sufficient gravity to maintain a spherical shape, and dominates the area around its orbit.[17] Further, Jupiter is a specific example of that kind of thing with a wide array of particular aspects, size, composition, location, etc. that make it unique. The key point, for our purposes, is that God has invested Jupiter, and all other things, with an orderly nature that leads to regular and predictable behavior.

In the same way, all existing reality is set in order by a divine mind that invests in things basic inclinations that to varying degrees determine their actions. Aquinas takes this to be true of both inanimate and animate objects. For instance, the law of gravity requires that bodies of appropriate mass are inclined toward one another in regular and predictable ways. If the moon breaks Earth's orbit and begins hurtling towards Jupiter, it is a sign that something has fundamentally changed in our solar system—perhaps the presence of a new star or black hole. Similarly, trees also have a predictable and orderly nature that allows us to ascertain the overall health of the tree and its immediate surroundings. For instance, Trees of all kinds grow root systems, and these roots have a variety of effects on the tree itself and the surrounding environment. Root systems provide anchorage for a tree that allows it to stand upright, they also gather nutrients and water from the ground and can help prevent soil erosion in the surrounding environment (Hairiah et al. 2020; Ryan et al. 2016). If a tree does not grow roots, it is a sign that something is gravely wrong with the tree.

These laws of nature can also be understood as a kind of ontological normativity. Dworkin does not give significant attention to any form of normativity outside of ethical normativity. However, we can and do speak of various kinds of normativity such as prudential or epistemic normativity (Orsi 2020, p. 437). In these terms, we can say that Aquinas took all normativity to be ultimately grounded in what we can call ontological normativity. Ontologically normative claims describe things "as they are and ought to be" and can be understood as descriptive ought statements that articulate the inherent orderliness of the cosmos and the interactions of the powers and possibilities inherent in things within that cosmos (McCall 2009; Tierney 1997). The historian of science Joseph Needham once argued that the reason that the western world developed the scientific method while China did not was precisely because this concept of ontological normativity grounded an expectation of the predictability of the natural world (Needham [1956] 1991,

[16] There has been a great deal of discussion lately of the concept of divine ideas. For a good overview of the views and problems see (Gould 2014).

[17] I borrow the definition of a planet voted for by the 2006 General Assembly of the International Astronomical Union.

pp. 519–42).[18] What is significant here is that both classical natural law theory and the idea of laws of nature are grounded in the belief that the cosmos is an ordered and predictable system. Further, neither Aquinas nor modern scientific theories take this ordered system to be the result of divine fiat. For Aquinas, ontological norms are grounded in the essential natures of specific objects and the ways those natures interact. Law is grounded in and descriptive of, substances; substances are not defined or determined by law. These specific natures are, in turn, grounded in God's creation which is an expression of his infinite and ordered being. Simply put, in Aquinas's view, Jupiter does not orbit the sun because God commands it to orbit the sun. Jupiter orbits the sun because God created and maintains a universe with fundamental forces such as the gravitational force that allows Jupiter to form and causes it to orbit the sun. The claim that there are ontological norms, while not expressed in these terms, is as fundamental to the scientific method as it is to Aquinas's ethics.

In Aquinas's view, the more sentient a creature is, the more capable it is of directing its own actions. It is ontologically normative for animals to seek food. However, some animals have displayed a willingness to starve themselves in unfavorable circumstances, such as captivity or high stress environments. Animals have also displayed a form of learned helplessness, allowing themselves to starve because of the perceived (but not actual) inaccessibility of food, in laboratory experiments (Preti 2005, 2007). While the moon cannot decide to break the earth's orbit, an animal can decide to act in ways contrary to what is ontologically normative for it. Aquinas believes that humans also have an array of natural inclinations that have been the topic of much discussion and have a much stronger capacity than animals to act in ways that go against these natural inclinations (Aquinas 2012b, q. 94 a. 2; 2012a, q. 81 a. 3).[19] Apart from Thomists, universal human nature or common human needs, inclinations, or capacities have seen significant interest, at least since Donald Brown's *Human Universals* was published in 1991 (Brown 1991). Brown identifies human universals across several domains, including culture, language, social relations, behavior, and cognition (Brown 2004). David Wong identifies universal human needs and uses them to ground moral judgment in his pluralistic relativism (Wong 2006). Given this, the claim that there is some kind of universal human nature, while it may seem implausible in some circles, has significant support both across fields and across traditions in the contemporary conversation.

However, Aquinas does not merely claim that humans have a common nature. Natural inclinations are teleological in nature—each is aimed at its appropriate end (Jensen 2019). Traditional interpreters of Aquinas will generally agree that "nature is in some way normative" (Lacki 2008, p. 41). This claim is stronger than Wong's claim that there are universal human needs because it attempts to describe a *proper* functioning of specific human powers such as cognition, a desire to overcome challenges, and the capacity to sense, perceive, and interact with the world in greater depth. Again, though, the contemporary conversation engages with the concept of end or proper functioning as well. Amartya Sen and Martha Nussbaum ground their theory of human capabilities on a concept of functioning that involves both universality and claims about proper functioning (Nussbaum and Sen 2004; Nussbaum 2011; Sen 1992). The teleology of living systems, including human systems, is also a lively discussion in contemporary biology (Allen and Neal 2020). For

[18] However, there are important arguments against the idea that the Chinese did not develop a meaningful concept of a regularly ordered or lawful world, for one example see (Sivin 1982).

[19] This article has been the subject of much debate in and around New Natural Law Theory. Aquinas lists five natural human inclinations: preservation, sexual intercourse, education of family, the pursuit of truth, and social interaction. John Finnis draws from it a list of seven basic goods: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion (Finnis 2011). Jonathan Crowe expands this to nine basic goods: life, health, pleasure, friendship, play, appreciation, understanding, meaning, and reasonableness (Crowe 2019). The position assumed here is that Aquinas's list is not intended to be complete. First, as Steven Jensen points out, it echoes the distinction between the inclinations of different powers of the soul. Second, Aquinas mentions other inclinations at various points that are not included in this list (Jensen 2019).

Aquinas, these natural inclinations serve as one set of general first principles for moral reasoning. Natural inclinations serve as general first principles because they can be satisfied in a variety of ways, some appropriate and some inappropriate. However, even limited to appropriate modes of satisfaction, there may be many appropriate ways to satisfy a particular inclination (toward hunger for instance) (Aquinas 2012b, q. 94 a. 4).

Aquinas's view offers several advantages over Dworkin's in responding to the challenges SC raises. SC operates at the level of the social imaginary and seeks to control human behavior by modifying the presuppositions, desires, and pre-theoretical beliefs of users. However, as James K. A. Smith argues, interpretation is grounded in the social imaginary (Smith 2010, 2013). In Dworkin's terms, if interpretive truth is not grounded in some way in scientific truth, then it is defined by the social imaginary. As above, this is a weakness of Dworkin's view. Aquinas's theory offers two primary benefits. First, it grounds moral reasoning in external reality. This external reality does not determine the content of moral reasoning, nor is it best understood as providing ethically normative propositions. However, it does provide a point of contact between the reasoning subject(s) and the reality in which that subject(s) reasons. Second, it grounds the natures of existing things in a higher reality, and this provides grounding to the array of actual powers and possibilities from which valid human value judgments arise (Inman 2022).

One immediate objection to Aquinas's view is that it is decidedly Christian and cannot work in a contemporary society. One possible response to this concern would be to rework Aquinas's view into a secular argument.[20] However, as is evident from the above, Aquinas's philosophy is deeply integrated with his theological beliefs, and attempts to separate them lose valuable components in the process. An alternative approach would be to accept Aquinas's view as one possible view to be compared with alternative religious and secular theories. Aquinas's approach highlights weaknesses in Dworkin's distinction between scientific and interpretive truth and in his distinction between criterial and interpretive concepts. Dworkin's theory may well also highlight weaknesses in Aquinas's approach. Aquinas's approach might also be fruitfully compared with the thought of Zhu Xi and other Neo-Confucian thinkers. For instance, Philip Ivanhoe compares the ontology of the Neo-Confucians to the great chain of being in the Medieval tradition of which Aquinas is a part (Ivanhoe 2017, pp. 13–17). Aquinas's view has also been compared to Islamic and Jewish approaches to Natural Law (Emon et al. 2014). Such comparisons, while not the work of the current project, would serve to illuminate strengths and weaknesses in each view and highlight points of commonality between them to inform and guide contemporary theorists. This approach also serves to advance the dialogue between philosophers of various religious traditions and those who do not accept any religious tradition. Finally, it has the advantage of engaging all voices relevant to the conversation equally rather than quashing some for the sake of preserving a preferred tradition of rationality or promoting a faux peace that equates to silent dissent.[21]

3.3. Law, Interpretation, and Socio-Cultural Custom

At this point in the discussion, let us return to Hume's principle. Hume's principle demands that regardless of how many empirical facts are discovered, no set of empirical facts is sufficient in itself to determine ethically normative claims. Any set of empirically verifiable facts relies on an implicit or explicit moral argument to justify a claim to moral truth. Dworkin uses Hume's principle to ground his argument for the metaphysical independence of value, which is one of the two core arguments of *Justice for Hedgehogs* (Dworkin 2011, p. 9; Bustamante 2019, p. 19). Dworkin opposes the metaphysical independence of value to two hypotheses: the causal impact hypothesis and the causal dependence hypothesis explained above. The metaphysical independence of value denies that "'mind-

[20] John Finnis does something of this kind in his *Natural Law and Natural Rights* (Finnis 2011).

[21] I cannot, herein, make the argument for this position fully. However, Jean Beth Elshtain has made the argument quite well (Elshtain 2000). I have also made this argument previously (Smith, forthcoming).

independent' moral truth takes [us] outside morality into" a consideration of metaphysical entities that are in some sense half moral and half nonmoral (Dworkin 2011, pp. 8–9). Dworkin rejects the causal efficacy of such moral facts, though he never clearly rejects their existence (Dworkin 2011, pp. 438–39, n. 3). Dworkin makes this argument as a response to moral skepticism, and this is significant in understanding his overarching point. It is not the case that true moral beliefs could be caused by discovering true moral facts about the world, such as 'torture is wrong' (Dworkin 2011, p. 53). It is also the case that no argument against the existence of moral facts could successfully refute claims about moral truth (Dworkin 2011, p. 67). In Dworkin's view, interpretive arguments are "interpretive . . . all the way down" because the only thing that can cause a true interpretive belief is a set of reasons that causes that belief to cohere with existing beliefs and explain existing practices in a way that is sufficient to give them value (Dworkin 2011, p. 131). Moral truth, like any other interpretive truth, is simply not the kind of thing that can be received from the world through the senses.

On this account, moral epistemology is not best approached through a discussion of the accuracy of one's moral beliefs, but through a discussion of the concept of moral responsibility. Moral responsibility refers to "the degree that our various concrete interpretations achieve an overall integrity so that each supports the others in a network of value that we embrace authentically" (Dworkin 2011, p. 101). Moral responsibility is grounded, in turn, in the principle of humanity: "we cannot adequately respect our own humanity unless we respect humanity in others" (Dworkin 2011, p. 14). Dworkin draws on Immanuel Kant, both in his principle of equal concern and respect and in his principle of humanity. Following Kant as well, Luke McInnis glosses the meaning of humanity as "an individual's capacity to set, revise, and pursue ends through reason, and to systematize different ends into a rational order forming an idea of one's happiness as a whole" (McInnis 2015, p. 51). Thus, in order to be responsible, any moral reasoning must exemplify two principles that Dworkin takes to show that the reasoning individual is attempting to account meaningfully for the humanity of others. These two principles ground a sense of human dignity by ensuring that the humanity of others is at the center of moral consideration. These principles are self-respect and authenticity. Self-respect requires an individual that "accept[s] that it is a matter of importance that his life is a successful [moral] performance," and authenticity requires him "to create [his] life through a coherent narrative or style that he himself endorses" (Dworkin 2011, p. 203).

Dworkin acknowledges the existence of unreflective interpretive values—what Taylor would call the social imaginary—but he assumes that our moral opinions arise through an unreflective interpretation of our abstract concepts. This, he argues, allows for significant—even radical—moral disagreement. In the face of radical moral disagreement, I may not accept that the views of my opponent are true, but I can recognize that he or she reasoned responsibly in reaching them (Dworkin 2011, p. 100). He further argues that the law is a subset of political morality (Dworkin 2011, p. 405), and that the content of the law is "the community's accepted practices [and] also the principles that provide the best moral justification for those practices" (Dworkin 2011, p. 402). Dworkin's approach does not effectively account for the influence that the social imaginary has upon the beliefs and practices of the community. Dworkin is clearly concerned with the place of convention in our moral and social practices (Dworkin 2011, pp. 314–24). He allows that interpretive judgments "must take into account prevailing ideas within the political community" (Dworkin 2011, p. 322). However, he also assumes that conventional beliefs are relatively transparent, that they build on and specify more basic concepts of dignity and responsibility, and that they can be subjected to various independent testing (Dworkin 2011, pp. 314–15). These assumptions do not take sufficient account of the foundational role that social imaginary plays in human concept formation and reasoning. If the social imaginary delimits the horizon of my reasoning, then it will be more opaque and less accessible to independent testing than Dworkin allows. This becomes highly problematic in the face of SC, which has both the means and the intent to manipulate the social imaginary at the

scale of entire populations. Growing divisions within American and European nations are driven not by reasoned argument, but by their embeddedness in new and divergent social imaginaries. As Zuboff argues, these are the work of SC.

As shown above, Aquinas believes that good moral reasoning is grounded in, but not simply caused by, the reception of forms from real entities and objects that allow the individual to reconstruct the formal nature of real relations and absences in the world. This, in turn, allows the individual to recognize ontological norms within those entities, objects, and relations. However, he also recognizes the impact of the conditions of belief on human moral reasoning and he describes this using the term 'custom.' Aquinas uses the term 'custom' in two important ways: first to describe the influence of society on individual cognition much like Taylor's social imaginary. Every individual operates within a social imaginary that shapes that individual's perception and understanding of the world at a pre-theoretical level that serves as the horizon of the individual's theoretical perspectives.[22] In humans, natural inclinations are inherently general and require more specific direction. This direction is provided by the social customs of a society. Social customs shape the social imaginaries of children in a variety of significant ways.[23] The natural inclination to take in sustenance may direct me to seek out food, but it is my embeddedness in a particular culture that leads me to open a bag of chips, pick an orange, slice some cheese, or dig into a bowl of kimchi. Similarly, custom provides many of the specific principles that ground moral reasoning. Aquinas recognizes this and argues that "custom, especially if it dates from our childhood, acquires the force of nature" (Aquinas 2012d, bk. 1 ch. 11, forthcominga, bk. 3 l. 15 sct. 549). Used in this sense, custom describes the conditions of belief and practice that set the horizon within which an individual will seek to pursue his or her natural inclinations.

Second, Aquinas also uses custom to describe something akin to what Jonathan Crowe calls emergent law (Crowe 2019). Emergent law is "a set of customary legal standards that emerge as a form of spontaneous order." Crowe's initial model is the price system in a capitalist economy.[24] However, he argues that "social interaction . . . holds the potential to produce normative consensus in roughly the same way economic markets produce agreement on prices" (Crowe 2019, p. 122). Emergent law bears the force of law not because it is mandated or coercively enforced, but because it becomes internally normative for the members of a society. Emergent law arises spontaneously from the actions and attitudes of individuals within the society and the ways that they customarily interact, and in turn it shapes the social meanings, values, and practical norms that provide common ground within that culture.[25] Emergent law includes at least a set of customary social value judgements, normative assumptions, and social behavior expectations that are taken as given within the context of that particular society. If Taylor's social imaginary effectively describes the internal aspect of the conditions of belief on an individual, Crowe's emergent law effectively describes the external aspect of the conditions of belief within a community. When both are understood together, custom is expressed as much in social etiquette, such as stopping at an intersection even if the light is out, as it is in moral reasoning, and at the level of emergent law it may become difficult to distinguish the two (Olberding 2016). Aquinas draws an important link between these two senses of custom and human natural inclinations.

Taken in the first sense, the customs of society serve as part of the matter of any moral act. This matter is informed by reason. Aquinas believes that perception and immediate evaluation ground desire. However, perception is two-fold. As above, there is a reception

[22] This is not the place for a full comparison of Aquinas and Taylor. However, it is notable that Taylor uses the term 'social imaginary' to refer to more, though not less, than what I describe here.

[23] This is one reason that SC is predictably more dangerous for children than for adults (Mertzani and Pitt 2022).

[24] He draws here on both Frederick Hayek and Adam Smith. There is a tension between Crowe's emergent law and Taylor's social imaginary that I can do little more than acknowledge here. I draw on these together because the tension between them reflects a real tension between the individual and the community that is implicit in Aquinas's understanding of custom.

[25] Here I borrow slightly from Manuel Vargas's idea of normative culture (Vargas 2020).

of sensible forms into the senses. This grounds perception in the realities perceived. In another sense, there is an active interpretation by the reason that transforms the sensed thing into a recognizable object such as a person, fork, or cat (Smith 2022, pp. 153–61). Because humans are taught from childhood to recognize specific kinds of things, custom shapes the perception and immediate evaluation of those things (White 2002). Desire arises when objects of perception are evaluated as desirable in some way, and this desire is the passive element in a moral act (Aquinas 2012b, 18.2.3). Reason is the active power in a moral act that serves as the form of the act and determines the kind of act it is (Aquinas 2012b, q. 18 a. 10; Rhonheimer 2008b, pp. 58–62). Thus, while custom helps to shape our desires, it is reason that informs and ultimately directs them. Custom, taken in the first sense, influences both human cognition and human behavior. It influences human cognition because concepts are shaped, in part, by our social experience of the world.[26] It influences human behavior because social practices become habits and acquire the force of nature through repetition (Aquinas, forthcomingb, bk. 2 l. 20).[27] The impact of custom on human cognition and human behavior can be either beneficial or detrimental to human moral formation, depending on the quality of the customs imbibed (Aquinas 2012b, q. 51 a. 2, q. 52 a. 1). In this sense, custom influences, but does not determine, the formation of all human concepts and all human actions.

Taken in the first and second senses, custom serves as a foundation for law. Aquinas claims that "custom has the force of a law, abolishes law, and is the interpreter of law" (Aquinas 2012b, q. 97 a .3). He prefaces this claim by arguing that repeated actions, which create custom, can both obtain the force of law and in fact change the promulgated law. Further, he claims that this is because repeated external actions "seem to proceed from a deliberate judgment of reason" (Aquinas 2012b, q. 97 a. 3). Just as custom influences desire, and thus forms part of the matter that is informed by reason, custom influences deliberate and consistent social practice and thus forms part of the conditions from which promulgated law develops. Aquinas's claim is that because of the very nature of promulgated law, no human law can escape the influence of custom, nor should it attempt to do so.

This limits what the law can require and leads to a stable legal and social environment. Aquinas follows Isidore of Seville, arguing that a law "should be just, possible to nature, according to the customs of the country, [and] adapted to place and time" (Aquinas 2012b, q. 95 a. 3).[28] Associating law with custom reasonably limits the force of law such that human law cannot command every virtue or condemn every vice (Aquinas 2012b, q. 96 a. 2–3), this is because any law should both guide its populace toward virtue and be possible "according to the customs of the country" (Aquinas 2012b, q. 95 a. 1, q. 96 a. 3). Aquinas points out that laws that are too stringent will destroy real social goods, such as freedom, and that laws that are too onerous will be rejected by the populace (Aquinas 2012b, q. 95 a. 1, q. 96 a. 2–3). So, using custom to limit law founds the law in the current state of the people. It also gives stability to the law. Any change in the law must provide sufficient benefit in guiding the populace toward virtue to compensate for the damage done to social stability (Aquinas 2012b, q. 97 a. 2).

At this point, a notable difference between Dworkin and Aquinas is evident. As shown above, for Aquinas, moral reasoning and moral truth are grounded in real entities, objects, and relations (adding absences) in the world. There may be a process of interpretation involved, and this process is certainly informed by cultural custom. This may allow for a limited variety of correct answers, but this process is part of how humans enter into moral reality as it actually exists in the messiness of the world. For Dworkin, moral truth is grounded in proper principles of moral reasoning rather than in an external reality. Moral reasoning begins from certain principles because they are inherently correct and, while I have not explored this point deeply here, there is a single correct answer to any

[26] For further discussion of this see (Smith 2022, pp. 153–60).
[27] For discussion see (Smith 2022, pp. 211–23).
[28] Aquinas follows (Isidore 2006, bk. 5 s. 3).

specific moral question (Dworkin 2011, pp. 94–95, p. 418).[29] While Dworkin allows that cultural conventions have some influence, he does not take them to be a foundation of moral reasoning, and this keeps him from accounting for their formative power. This does not suggest that Dworkin cannot give custom a significant place in deciding legal questions, but this comes into play in the practice of legal interpretation rather than in the foundation of moral concepts such as dignity, responsibility, integrity, or authenticity.

3.4. Law, Ends, and Virtue

Dworkin believes that the law is end-oriented. The end of the law—what determines whether a government is just—is the extent to which that government treats "each person in their power with equal concern and respect" (Dworkin 2011, p. 321). The degree to which any community displays equal concern and respect for the humanity—remember that humanity is an individual's capacity to rationally self-will—of each of its citizens is what determines whether that government has "the moral power to create and enforce obligations" (Dworkin 2011, p. 330). Dworkin draws on this end in a variety of ways. For instance, he argues that higher taxation is justifiable because it succeeds in showing equal concern and respect for all (Dworkin 2011, p. 375). This is, in turn, best pursued by conceiving of the political community as a 'collective agent' (McInnis 2015, p. 66). Dworkin believes that a community is fundamentally a collection of individuals, but that political morality is best understood and discussed when we imagine that collection of individuals as a single agent and assess its actions as such (Dworkin 2011, pp. 327–28). The moral assessment of the actions of this agent are broadly understood as a matter of political morality. Ultimately, law is a branch of political morality that defines a set of rights which are "properly enforceable on demand through adjudicative and coercive institutions without need for further legislation or other lawmaking activity" (Dworkin 2011, p. 407).

Dworkin also sees virtue as related to morality and law. He specifically discusses moral responsibility as a virtue (Dworkin 2011, pp. 103–13), and he mentions, or engages, other virtues as well (Dworkin 2011, pp. 176–77). Dworkin does not clearly spell out, at least in *Justice for Hedgehogs*, how he understands virtue, though he suggests that Plato and Aristotle both follow his interpretive method in their own virtue ethics (Dworkin 2011, pp. 185–8, p. 457 n. 33). Luke McInnis, on the other hand, argues that a Kantian understanding of virtue is implicit in Dworkin's thought (McInnis 2015, p. 65). The central virtue that Dworkin identifies–moral responsibility–supports this claim. He says that "morally responsible people act in a principled rather than an unprincipled way; they act out of rather than in spite of their convictions" (Dworkin 2011, p. 103). In a Kantian approach, virtue is best understood as an individual's disposition to act from moral principle. This, in turn, represents the good will of the agent (McInnis 2015, pp. 64–65). McInnis's reading is further supported by Dworkin's claims that moral responsibility is always a work in progress, and that to achieve full moral responsibility "would be the achievement of Kant's man of perfectly good will" (Dworkin 2011, pp. 109 and 117). On Dworkin's account, as shown above, moral truth is grounded in interpretive moral reasoning that takes too little account of the shaping impact of the individual's social imaginary and cultural context. The central virtue that Dworkin identifies is first based on a disposition to do that which one's convictions require, and this is dependent upon one's rational interpretation of moral duty to act with due regard to the humanity of others. Finally, the law is the 'on demand enforceable' aspect of public morality that allows individuals within a society to seek to enforce this moral duty when it is lacking in other individuals or in the institutions of the society.

Aquinas agrees that law is end oriented. However, he argues that the goal of the law is to bring about the common good which is best understood as a community of virtue.

[29] This claim is much more deeply explored by (Sinclair 2002–2003). However, Sinclair's discussion relies on Dworkin's ideal judge, Hercules, from *Law's Empire* (Dworkin 1986). While Dworkin retains a version of the right answer thesis in *Justice for Hedgehogs*, Hercules is notably absent from the later work.

First, the explicit goal of law is to bring about the common good.[30] Aquinas includes this as part of his definition of law: law is "an ordinance of reason for the common good, made by him [or them] who has care of the community, and promulgated" (Aquinas 2012b, q. 90 a. 4). A brief series of definitions will help to clarify why Aquinas's understanding of the common good is best understood as a community of virtue. Aquinas claims that the common good is the bliss or happiness of the community as a whole (Aquinas 2012b, q. 3, q. 90 a. 2). Happiness is the proper functioning of the human person internally and the society externally, and proper functioning is functioning in such a way that the natural inclinations can appropriately achieve their proper ends (Aquinas 2012b, q. 2 a. 7, q. 3 a. 1). Unlike Dworkin, Aquinas also holds that a virtue is the perfection of some particular power of the individual, and to be virtuous (overall) is for the individual to function properly so as to consistently achieve the proper ends of their natural inclinations (Aquinas 2012b, q. 55 a. 1, forthcominga, bk. 2 l. 6 sct. 307ff). Given this, the common good is best understood as the communal pursuit of virtue and the goal of the law is to move the society towards virtue (Aquinas 2012b, q. 95 a. 1, forthcomingd, q. 2, 2018, bk. 2 ch. 4).

Moral truth, for Aquinas, "depends on conformity with right appetite." Moreover, the conformity with right appetites involves the individual willing to do things that are actually good for him or her within their social context. We can take this to further specify how the law functions to achieve its goal. The function of the law is to encourage appropriate appetites among the people who follow it. To follow the reasoning thus far: The goal of the law is the common good which is best understood as a community of virtue in which individuals work together to conform their appetites towards those things that actually aid them in achieving the natural ends of their powers or capacities. It is notable in this discussion that Aquinas does not assume that discrete individuals come together to make up a community, as Dworkin does. However, he also does not ignore the role of the individual. For Aquinas, as Taylor argues was the case for many early societies, the individual is enabled to become an individual through immersion within the society (Taylor 2007, pp. 157–58). In this view, humans do not know themselves as individuals first and then come to choose a society to which they can commit themselves. Rather, humans are embedded in a society that develops, shapes, and forms their social imaginary, sense of self, identity, and ultimately become individuals as they mature in this society. Though making a full argument for this is outside the bounds of this project, James K. A. Smith has argued persuasively that this embeddedness of the self is no less true today than it was in early human cultures (Smith 2009, 2012). Rather than escaping this embedded development we have simply hidden, ignored, and denied its influence.

Because the common good involves everyone working together to develop the right appetites, it is something that, properly speaking, can only be brought about by the people—the community as a whole. Aquinas thinks it best that a few wise people frame the laws to encourage virtue without discouraging the populace (Aquinas 2012b, q. 95 a. 1 ad. 2). While a full analysis of Aquinas's understanding of wisdom cannot be offered here, a few principles that arise from such an analysis can be. To be wise, an individual must (1) be sufficiently intelligent and experienced to easily grasp the complexities involved in the organization of the community and the problems facing it (Aquinas 2012b, q. 94 a. 2, q. 100 a. 1, 2012c, q. 9 a. 2). (2) Exemplify the moral virtues in his or her own personal life so that he or she can act as an exemplar to citizens (Aquinas 2012b, q. 102 a. 1, 2012c, q. 46 a. 1, q. 47 a. 7, q. 95 a. 5). (3) Act to promote the good of the whole community rather than seeking his or her own gain (Aquinas 2012b, q. 90 a. 3, 2012c, q. 30 a. 2, 2018).[31]

Aquinas's account of the relationship between virtue and law highlights three important points: (1) there is no single correct answer to a given moral situation, (2) the goal of the law is to enable a virtuous life, and (3) law should be made by the virtuous. First, like

[30] Common good is a topic that has seen much discussion lately into which I cannot enter here (Crowe 2019; Duke 2016; Finnis 2011; Murphy 2006).

[31] Nathaniel A. Moats has recently published an interesting article on the response to the COVID pandemic in the United States that emphasizes this final point (Moats 2022).

Aquinas's understanding of the formation of concepts, his understanding of virtue and law does not assume that there is one right answer to any given moral situation. This is because virtue, for Aquinas, is not a fixed disposition to act in a manner that reflects one's principles. This *is* present in Aquinas's thought, but it appears in his discussion of the function of conscience, and he is clear that acting in line with wrongly held principles does not excuse one from wrongdoing (Aquinas 2012b, q. 19 a. 5–6). Aquinas's understanding of virtue, however, takes account of an essential facet of moral action that Dworkin's does not—the role of the acting subject. Aquinas's view of practical truth is grounded in the reality of the acting subject and human limitations in a way that Dworkin's view does not replicate. Put simply, Aquinas's view considers both what an ideal response to the moral situation might be and what kind of response the acting agent is capable of performing. The same actions on a battlefield from a trained soldier and a home maker would not be considered courageous. In fact, if the home maker tried to act as though he or she were a trained soldier, this would be reckless. This is because the soldier has skills and abilities that the home maker does not, and the home maker has responsibilities that the soldier does not. When put in the same moral situation, the soldier and the home maker have relevant differences that will demand different kinds of actions in response to the moral situation. This does not mean that there is no wrong action—in fact there may be a wide variety of actions that would be morally wrong for both the soldier and the home maker. However, it does mean that there are a variety of possible morally right actions rather than a single right answer.

Second, in Aquinas's view law is subordinated to virtue. As seen earlier, ontological norms—natural laws or laws of nature—arise out of the nature of things which, in turn, are grounded in the infinite and orderly divine being. Moral laws arise out of the natural inclinations of the lower powers and are properly specified and ordered by human reason to direct those powers towards their proper ends. Human laws, in turn, arise out of the natural inclination of the society as a whole to pursue a common life that allows the members of that society to best achieve their proper ends. Aquinas claims that "man has a natural aptitude for virtue, but the perfection of virtue must be acquired by man by means of some kind of training" (Aquinas 2012b, q. 95 a. 1). The function of human law is to train the members of a society to live virtuously by both pointing individuals towards their proper ends and restraining them from developing vicious habits. However, the capacity to do so depends on individuals who have already learned to live virtuously within the context of their community.

This brings us to the third significant point of Aquinas's account. As shown above, custom is a significant foundation of the law both because it provides stability and because making law in accordance with custom prevents lawmakers from requiring too much and thus destroying relevant human goods. Laws must point the populace towards a life of virtue without destroying their capacity to direct their own way of life to a significant degree and without breaking so harshly with the established order that the stability of the society falls apart. Aquinas requires that wise lawmakers understand and consider the way that laws will impact the populace and the degree to which they will actually *be able* to achieve the common good—even if they are otherwise morally appropriate laws. Aquinas also recognizes that good human laws arise from virtuous reasoning. He holds to a version of the unity of the virtues, and while Aquinas may mean more than this, Daniel C. Russell has argued that the unity of the virtues can be understood to require at least an interdependence between the virtues (Russell 2021). Thus, one cannot engage in virtuous practical reasoning without also maintaining a virtuous standard of life.[32] Because of this, it is incumbent that lawmakers be morally virtuous individuals.

Finally, it is notable that Aquinas's account clarifies why and how a virtuous individual can attend to and correct for the influence of custom in both speculative and practical

[32] It is notable that Aquinas does not claim that the same holds for speculative reasoning. Thus, on his account, an individual might be an excellent scientist and a morally vicious person, but one could not be an excellent lawmaker and a morally vicious individual.

reasoning. As shown above, Dworkin assumes that this is a relatively simple process. Aquinas does not. Examining and addressing the influence of custom on our concepts, beliefs, and behaviors requires focused intention, extended attention, and that potential challenges to our customary views be raised to our awareness either by practical experience or through the influence of others. Aquinas defends an array of intellectual virtues that operate alongside the moral virtues and that necessarily involve habits of focused intention, extended attention, and the seeking out of challenges to one's customary views (Aquinas 2012b, q. 57–58, 2012c, q. 47). One potential challenge to Aquinas's approach is the cultural subjectivity imposed by accepting custom as a foundation of either law or virtue. Virtue ethics provides a good example as virtue concepts tend to be thick concepts and this leads to disagreement across cultures (Floridi 2010). However, steps have already been taken to develop a globalist virtue ethic particularly suited to the technological and global society (Vallor 2016). Further, Shannon Vallor highlights the fact that Aquinas's assumption is both common to classical virtue traditions in Buddhism and Ruism, and an essential component of her technosocial virtue ethic as well. Following the classic traditions, a contemporary virtue ethic, and we will add here a contemporary approach to the life of the legislator, must "[presuppose] my ability and intentional choice to habitually reflect upon and *attend* to my own moral development" along with my willingness to actively pursue it (Vallor 2016, p. 199).

SCs approach to behavioral modification teaches us not to reflect and attend. As shown above, it disperses our capacity for deep attention and meaningful reflection in order to make us more pliable for tuning, herding, and conditioning techniques (Amardakis 2020; Vallor 2016; Zuboff 2019a). Further, it does so at the level of custom, by shaping social practices and individual assumptions about what is desirable and appropriate. A theory that assumes that custom arises from abstract ideas that are relatively transparent and easily evaluated and modified by reason will face significant challenges in addressing this. A theory that presumes that custom is relatively opaque to reason, is part and parcel of the formation of human concepts, moral reasoning, and laws, and that challenges must be intentionally sought out and given attention has better resources to address this challenge. While, as Zuboff and others have argued, law is one important part of the contemporary response to SC (Zuboff 2021), it requires both virtuous leaders and a virtuous populace who are engaged together in the project of bringing about a meaningful technological future that encourages and guides us to living well.

Vallor asks her readers to consider a key question: who are the moral exemplars of the technological society? Who are the sages that are equipped to lead human societies into a technological future? Do we trust Mark Zuckerberg, Alex Pentland, Hal Varian, and others who have shaped the SC model to be these sages? Recognizing virtue as both a foundation and primary goal of the law raises these key questions. Shoshana Zuboff, similarly, asks us to consider three essential questions: who knows? Who knows who knows? And who decides who knows? This epistemic divide requires us to more closely consider not only what the foundation of the law is, but also who we trust to formulate law.

3.5. Law and Surveillance Capitalism Summarized

SC presents a significant challenge to contemporary legal and social institutions. As shown in Section 2, this is because it draws upon advances in information and communication technologies to establish a world of ubiquitous computing in which massive amounts of data can be extracted and correlated to build meaningful, well-formed, and relatively true profiles of an ever-increasing number of individuals. These profiles can then be used to predict the future actions of those individuals. Further, the end goal of this model is perfect prediction, which requires control over the behavior of its subjects. Thus, strategies of tuning, herding, and conditioning are employed to modify the behavior of those subjects at the level of the social imaginary and emergent law. Incumbent in the operation of these strategies is the theft of attention and the guidance of intention toward goals suitable to achieving the end of SC. The end of this modification is to create economic gain and

resources of instrumental power for those who own and operate the apparatus of SC. In Section 3, we have examined Ronald Dworkin and Thomas Aquinas's views of concept formation, moral reasoning, and law and considered how they might be able to respond to the challenges raised by SC.

First, recognizing that all truth must be grounded in real entities, objects, relations, and absences provides one part of a response to SC. Recognizing that custom is an unavoidable element in concept formation, moral reasoning, and legislation is a second part of that response. The custom of the society provides the contextual horizon in which reasoning subjects function. This is true regardless of the society, and thus in one sense SC has simply taken over a model of social and behavioral formation developed in the west by Christianity and in the far East largely by Ruism). Taylor provides a lengthy and informative discussion of the development of the 'drive to Reform' in late Medieval and Early Modern Europe (Taylor 2007, pp. 25–218). The desire to remake society into an ideal image, however, is common to many religions and to secular movements. The impulse towards re-formation is not simply a religious drive, but one of several approaches to moral and social formation overall (Ivanhoe 2000; Van Norden 2007, pp. 43–59).[33] Moreover, as Sunstein and Thaler argue, any attempt to provide an organized architecture to a situation or experience will have a shaping impact on those who participate in it (Thaler and Sunstein 2008). The challenge of SC is not *that* it is shaping custom; the challenge of SC is the way, the reasons for which, and the degree to which it is shaping custom.

In the second and third sections of part two, I have compared Dworkin and Aquinas's views of the relation of law to reality and the relation of law to custom. The problems in Dworkin's distinction between scientific and interpretive truths and between criterial and interpretive facts were highlighted. Dworkin and Aquinas differ in significant ways in their view of the relationship between reality and human concepts, and thus in their views of the relationship between reality and justice and reality and law. Aquinas believes that moral truth is grounded in and dependent upon real entities, objects, and relations (adding real absences as well). While moral truths cannot simply be caused by or deduced from metaphysical or physical truths, Aquinas recognizes two points in which moral reasoning is grounded in reality. First, moral reasoning informs and directs existing ontological norms common to all human persons. It is noteworthy that Aquinas believes the practical reason, like all other human powers, has its own inclinations and ends. For Aquinas, the natural inclination of the practical reason is to set the lower powers in order, and its natural end is to do so in the way that best enables the lower powers to achieve their own natural ends (Aquinas 2012b, q. 74 a. 5). On this view, while there is an interpretive aspect to moral truth, it is not simply interpretive, but is grounded in the real aspects of particular situations and the responses that best direct an acting individual towards proper ends within that context. Second, moral reasoning is dependent upon desires that arise from actual objects of sensation that are perceived to be desirable in some way. Because moral reasoning is grounded in reality, empirical discoveries about reality shape and inform good moral reasoning. Moral reasoning that gets reality deeply wrong or that ignores relevant and verifiable aspects of reality is simply poor moral reasoning. As shown above, these are points that Dworkin's account does not effectively replicate.

However, Dworkin and Aquinas can both agree that "practical reason possesses its own and in this sense autonomous point of departure; practical judgments are not derivations from . . . theoretical judgments, which means . . . that ethics is not simply to be deduced from metaphysical premises" (Rhonheimer 2008c, p. 111).[34] No particles such as Dworkin's facetious morons cause true moral beliefs and moral reasoning is interpretive in an important sense. Practical reason deals with issues that depend not only upon necessary

[33] Ivanhoe focuses on articulating these models of moral formation in the context of East Asian traditions. However, Van Norden has a more explicit and developed discussion applying them to Western philosophical traditions as well.

[34] This is a point of contention among scholars of Aquinas. However, Martin Rhonheimer has argued this view consistently (Rhonheimer 2000, 2008a, 2010). For a critique of Rhonheimer's view see (Levering 2008).

truths, such as that humans must eat to remain alive, but on contingent situations and the infinite variety of possibilities that can arise within them. Aquinas says, "as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all" (Aquinas 2012b, q. 94 a. 4). Practical truth is context dependent in a way in which speculative truth is not. An unavoidable part of that context is custom, which includes aspects of both the social imaginary of the individual and the emergent law of the society. Because custom is part of the initial formation of human concepts, the natural inclinations are shaped and specified by custom before they are informed by reason (Smith 2022). Aquinas uses an analogy of the relationship between matter and form to describe this. James K. A. Smith, among others, has developed this argument in greater depth and in a contemporary context. However, custom does not—as SCs behaviorist model assumes—simply determine human behavior. This is because reason *does* inform human actions, both reflectively after the fact and—as I have defended elsewhere—in the moment through intention, attention, and awareness of the ways that custom is shaping individual actions (Smith 2022). Neither Dworkin nor Aquinas agree with SCs behaviorist model, and both would agree that because humans have the capacity to recognize and actively assess the formative influences that operate upon them, recognizing the level and the ways in which SC seeks to shape both the individual social imaginary and human society helps us to address SC at its root. However, while this is possible, custom is neither transparent nor easily accessible to rational reflection, and theories that assume this will struggle to effectively address SCs approach to behavioral modification. Further, while legislation is one important aspect of a response to SC, this legislation is not sufficient alone, it must be accompanied by a number of other factors as well. This claim will be explored in greater detail in the third section of the paper.

Finally, the relationship between virtue and law was addressed. While Dworkin assumes that law is foundational to virtue, and the primary virtue that he addresses is simply a disposition to fulfill one's recognized duties with integrity, Aquinas argues that virtue is foundational to law. Both are creatures of their time, but in this point Aquinas's argument rings true. Substance is prior to law. Human law should both arise from virtuous reasoning, and point the populace back toward virtue, within the confines of custom, in order to achieve the common good that is a community of virtue. Accepting Aquinas's account allows us to recognize that there may be a range of morally good responses to any moral situation. This does not suggest that all responses are morally good, nor does it suggest that all good responses are morally equivalent—they may be weighed and measured—but it does take account of the character of the acting subject within that situation. Aquinas's account also allows us to recognize the importance of pursuing virtue individually and of pursuing a virtuous community, as well as the role of the community in shaping the character of the individual. It is important to maintain a balance in this case between the good of the community and the good of the individual but recognizing that individuals do not arise autonomously, and are not essentially self-shaping, helps us to understand and articulate the level at which SC operates. It also emphasizes the importance of intention, attention, and the awareness of alternatives in challenging the kinds of modification that SC utilizes to achieve its ends. Finally, Aquinas's account argues that the character of legislators is significant. Because the goal of law is to train individuals in virtue, and because the virtues are at least interdependent with one another, morally vicious legislators cannot make truly good laws. They can certainly make laws that are effective at achieving certain ends. However, Aquinas's account asks us to distinguish between what is effective at achieving instrumental goals and what actually guides humans as individuals and human communities as a whole towards the ends that have been set in place for them by God.

4. Law, Virtue, and Technology: Components of a Response to Surveillance Capitalism

In analyzing Aquinas, I have argued that there are significant points of similarity between Dworkin and Aquinas, especially in their view of the relationship between law

and political morality and in their view of the importance of interpretation in moral reasoning. However, the analysis of Aquinas suggests three foundations of moral and legal reasoning that Dworkin does not account for: (1) they are grounded in the ontological norms which, in turn, reflect a divine mind. I suggested that Aquinas's explicitly Christian view serves as one account of ultimate grounding that can be compared and contrasted with other accounts in the contemporary conversation. (2) The customs of the society which serve as the horizon of moral reasoning and legislation for members of that society. (3) Virtue—both as a source (the virtue of lawmakers) and as a goal (guiding the society toward a community of virtue). However, there is a further significant question that I will briefly consider in the final pages of this article. Can law alone provide a sufficient response to SC?

C. S. Lewis and Hannah Arendt feared that the technological age would bring about a world in which human nature would be fundamentally altered through behaviorist methods. As Zuboff points out, it seems reasonable to suggest that SC is currently in the process of making this fear a global reality. However, from a Thomist perspective, this must be more carefully nuanced. Nature and custom are distinct. Human nature and the natural inclinations that arise from it are, in Aquinas's view, hard-wired into human beings. They are not the kinds of things that can change—at least, not while the individual remains human (Aquinas 2012b, q. 94 a. 6). However, they are shaped and informed by custom and, as we have seen, Aquinas believes that custom can and does acquire the force of nature (Aquinas 2012d, bk. 1 ch. 11 sct. 1).

Zuboff suggests that to effectively address SC, it is necessary to cut off its head by legally regulating access to and the use of information in various ways. However, while regulation is certainly part of a concrete response to SC, given the challenges that SC poses to the foundations of law, we should consider the impact of these challenges on this kind of regulation. Several localities in the US, China, and Europe have passed regulations intended to do just this. Perhaps the most wide-ranging and significant of these is Europe's General Data Protection Regulation (GDPR). These regulations have several common approaches to regulating access and use of information. One common approach is to regulate the kind of data that can be collected—for instance, no data about an individual's political affiliation can be collected. A second way is to require that individuals are informed *about* the data that are being collected, how it could be used, and given the opportunity to opt-out. A third is to regulate how information derived from a data surplus can be used—for instance, an individual's information cannot be used to target political ads towards that individual.[35]

As is often the case, this may be too little too late. Luciano Floridi once suggested that when it comes to technology, we tend to innovate, then attempt to regulate, and finally reflect and understand (Floridi 2010). This may be true in other areas as well, but Floridi is certainly correct here. Several difficulties arise from these attempts to regulate information flow. First, it is unclear how effective it will be to regulate the kind of data that can be collected about an individual. The machine learning techniques used to develop algorithmic modeling show an incredible capacity to draw conclusions from patterns of behavior rather than from individual expressions of position. Many laws still operate on the assumption that individuals can effectively determine what is worth sharing and what is not (Taylor and Purtova 2019). However, it is very likely that, for instance, my political or religious affiliation can be ascertained through the places I go, the things I buy, the books I read, the people I chat with, etc. (Christian 2020).[36] Further, SC has already normalized a variety of tracking methods that are used to collect such data, and some of the services upon which many people depend (GPS for instance) require collecting such data. Given this, it is not clear that current restrictions will keep SC profiling from identifying information

[35] This seems increasingly significant following the Cambridge Analytica scandal in the 2016 United States election.

[36] Brian Christian has shown how various kinds of machine learning tools can reach conclusions that are both accurate and surprising, from apparently unrelated data. This phenomenon is well-represented in literature on Machine Learning and bias.

that an individual wants to keep private, and restrictions that are sufficient may involve significant adjustments to services that many people take for granted.

Second, there are two significant problems with the idea that informing an individual is sufficient to protect individuals. On the one hand, we live in a culture in which ignoring such disclosures has already been normalized. This is understandable. As Zuboff notes, one company concluded that to sufficiently understand the privacy considerations in installing a NEST thermostat an individual would need to review 1100 pages of privacy policies (Zuboff 2019b). A 2016 study on social media use found that most participants did not review privacy policies at all, and for those who did, the average time of the review was fourteen seconds (Obar and Oeldorf-Hirsch 2018; Zuboff 2019a, p. 236). Even if shorter policies are required by law, in order for these to achieve the desired effect new habits must be intentionally engendered in the populace in order to address the existing habit of ignoring privacy policies. Law must be supported by changes in human behavior (Swisher 2020). On the other hand, for laws that continue to rely on individual awareness and rights as a tool to address privacy issues, it remains the case that many people are simply not aware of the variety of ways that data processing might impact them (Taylor and Purtova 2019).

Third, a more promising avenue is to regulate the ways that data can be used. One technical challenge to such legislation is that there are distinct kinds of AI algorithms (Christian 2020). In the case of some of the most advanced algorithms, neural nets, how conclusions are reached is generally opaque. In the case of predictions rendered by neural nets it may not be evident how an AI system reached the conclusions that it provided or what data were relevant to those conclusions (Christian 2020). Thus, while it may be plausible to ban all political advertising using the kinds of predictions provided by SC, it may not be possible to restrict advertising based on predictions made using certain kinds of data. This kind of legislation would have to tread carefully in order to be effective without causing significant disruption to the lifestyles of first-world citizens. It is, of course, plausible to conclude that legislation should cause significant disruption to the lifestyle of first-world citizens, but that is not the argument of this paper and would have to be made separately. Further, the development of new AI technologies could mitigate these problems. As Cory Doctorow has argued, attempts to legislate privacy issues need to be supported by advances in technology (Doctorow 2020, 2021).

Given this, it is plausible to ask whether SC has already taken control? Science Fiction has no shortage of stories in which civil governments are replaced by corporate monopolies. Is this the future to which the human race is now fated? I do not think that it is. However, to avoid this fate will require an adjustment in our strategy. Zuboff is correct that the primary raw resource of SC is data and moves to limit its supply are important. She is also correct that privacy is a public (perhaps common) good and should be protected as such. However, given the challenges raised above, this will be challenging and will likely be less effective than desired.

In Section 2, I showed that SC operates at the level of the social imaginary, and its impact at this level is significant because of the methods it uses to separate intention and awareness. This in turn allows SC to create distance between the conceptualized world of the user and the real world. Dworkin's distinction between scientific and interpretive truth reinforces this divorce. On this view, truth about the things that matter most to us are not matters of reality anyway, and thus the conceptualized world of the user does not need to be anchored in known and demonstrable realities. The separation also allows SC to manipulate the goals and desires of the user to bring about a new social imaginary in which the ultimate concern of the user aligns with the instrumental ends of the SC entity. Dworkin's approach fails to account effectively for the role of the acting subject, and this is of crucial importance in addressing SC. The potential of law to directly mitigate SC is limited in a variety of ways. However, Aquinas would argue that the primary role of the law is not to protect people from SC, but to help shape them into the kind of community that can successfully resist SC.

There are two sides to this. On the one hand, the law could support work to develop the populace into a community of intellectual virtue—to awaken those that SC would keep asleep as it were—that is better able to recognize and resist the kind of manipulation employed by SC. The development of practical wisdom will be important in this endeavor. Practical wisdom is the virtue responsible for both reflective assessment on, and in-the-moment guidance of, the relationship between an individual's actions, proximate ends, and ultimate ends (Russell 2009; Smith, forthcoming). While there is much discussion among philosophers and psychologists about the exact nature and function of practical wisdom, it is widely recognized as a key component for connecting intellectual and moral virtues (Lapsley and Chaloner 2020; Kristjansson et al. 2020).[37] Lapsley connects practical wisdom with existing work on developing metacognitive capacities and moral identity through education.

On the other hand, the law could encourage and support programs aimed at developing intellectual and moral virtues in the computing and data professions. Qin Zhu points out that, while some accrediting boards do include ethics as an element of their requirements for engineering programs, this requirement is generally vague, and most engineering programs have little more than a token ethics content. Further, this content is focused on transmitting generalized rules rather than forming the moral character or moral identity of members of these professions (Zhu 2021). Professional Ethical Codes such as that of the Data Science Association or the Association of Data Scientists also exemplify this trend. Other professional organizations, such as the Association of Computing Machinery provide more robust statement of ethics that includes some emphasis on the development of metacognition and moral character (Gotterbarn et al. 2018), but there is significant room to develop these emphases. Further, at least in the United States, there is no clear requirement for continuing moral education for Engineering professionals (Zhu 2021).

Given the theoretical focus of this article, there is not enough room to develop these suggestions in greater detail. However, legislative and policy initiatives designed to respond to the development of SC should not only focus on controlling the acquisition and use of data by SC entities. It should also focus on upbuilding the moral character and intellectual virtues of both the general populace and the community of data professionals in order to mitigate the potential impact of SC.

5. Conclusions

In this article, I have summarized what Surveillance Capitalism is, how it operates, and the challenges that it presents to attempt to regulate it through the law. SC seeks to rewrite the emergent law and social imaginaries of human society and individuals. Surveillance Capitalism does this by gathering increasing amounts of behavioral data that can be used to build well-formed, meaningful, and accurate profiles of individuals, and in turn of entire communities. It uses these profiles to effectively employ behavioral modification techniques on a massive scale in order to accumulate even greater access to behavioral data resources and instrumentarian power.

I compared the views of Ronald Dworkin and Thomas Aquinas on the relationship between truth and reality, the relationship between reality and law, the relationship between law and custom, and the relationship between law and virtue. From this comparison, I articulated three foundations of moral and legal reasoning: (1) they are grounded in ontological norms, (2) they operate within the horizon of custom, which can be analyzed through the concepts of social imaginary and emergent law, and (3) they rely upon virtuous exemplars in their formation and aim at virtue in their application. Because SC operates at the level of social imaginary and emergent law, our approach to moral and legal reasoning must both ground itself in the real world and simultaneously account for the influence of social custom in our understanding of and interaction with that world. Because SC operates, in part, by modifying behaviors to suit the needs of the owners and operators of

[37] For concerns about the focus on practical wisdom see (Lapsley 2019).

instrumentarian power, legal responses to SC must account for the role that law plays in forming a community of virtue that can more effectively resist such behavioral modification.

Finally, I raised the question of whether any understanding of the law could provide a sufficient response to SC, and argued that the law cannot, in and of itself, provide a sufficient response. I argued that attempts to regulate access to and use of data, while important, are not sufficient to address the challenges posed by SC. Law and policy, personal habits, and technology have all been suggested as the solution to the challenge presented by SC. Each of these provides an important element. However, I suggested that law and policy could not only address the regulation of data, but also encourage and support the moral development of both the general populace and the data engineering and science community. I do not believe that the human race is destined to be dominated by SC. In fact, I suggest that, in the long view, it will be little more than an important footnote. However, whether this comes to pass will be determined by the decisions that we make today as a global community.

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Article

Truth and Justice in Spinoza's *Theological–Political Treatise* and the *Ethics*

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Abstract: Spinoza's philosophy argues for the freedom of individuals as singular beings in the state. This freedom is not perfect yet immanent. Freedom—according to the *Ethics*—is a consequence of true knowledge and virtue, which must be able to develop and can only be realised gradually. The state and the laws establish the framework that makes this freedom possible. Freedom and true knowledge are basic concepts of the metaphysical system. Justice, however, appears as a legal and political concept in Spinoza's thought, which the philosopher did not discuss in depth. Nevertheless, the concept of justice has a specific significance in the philosophical context in which it occurs in the *TTP*—especially in the wisdom of *King Solomon*—and in the *Ethics*. Justice, on the one hand, strengthens harmony, security, and freedom. On the other hand, the *freedom to philosophise* forms a condition for justice to develop according to reason. The knowledge that justice has a importance in Spinoza's thought is consistent with the complexity of his philosophy and makes its understanding more complete.

Keywords: truth; justice; Spinoza; freedom; immanence; normativity; history of philosophy of law and society

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1. Introduction

Baruch (Benedictus) de Spinoza (1632–1677) is one of the most important philosophers in the history of philosophy. Spinoza develops the conception of the immanence of freedom in the *Ethics Demonstrated in Geometric Order* (*Ethica more geometrico demonstrata*, hereafter *Ethics*). God or the substance has perfect freedom. In contrast, human freedom is neither perfect nor can it be presupposed. Freedom consists in a life that flows from true knowledge and virtue and is guided by reason. In the transcendental conception of Immanuel Kant (1724–1804), freedom and morality are presupposed as normative concepts, embracing autonomy and moral imperatives a priori in the noumenal world, which is distinguished from the phenomenal world. In Spinoza's view, human beings—as modi of God or the substance—are an integral part of nature. Thus, freedom must be developed and explained with regard to natural and historical conditions and a conception of causality, in which experience is explained from its causes. In this sense, freedom and true knowledge are basic concepts in Spinoza's work.[1]

Spinoza's conception of the immanence of freedom in the *Ethics* forms the basis for his political philosophy (Spinoza [1677] 1988, E 4p37s1 and E 4p37s2) present in the *Theological–Political Treatise* (*Tractatus Theologico–Politicus*, hereafter *TTP*) as well as the *Political Treatise* (*Tractatus Politicus*, hereafter *TP*). Freedom is only possible in a state where common laws exist. In Spinoza's account of the state, laws are therefore essential. The philosopher does not discuss the concept of justice in depth. However, viewed from the background of his core philosophical concepts, justice has an importance in his philosophical thought.

[1] For Spinoza's philosophy of the immanence of freedom, see Section 2. For Kant's transcendental conception of freedom and human nature, see (Kant [1781] 1998, B vii–B xliv); (Kant [1785] 1996, AK 4:446–4:449, AK 4:453–4:455); (Kant [1797] 1996, AK 6:221–6:222, AK 6:417–6:419). English translations of Spinoza's work are from Curley.

In Spinoza's historical text, which forms the basis for this interpretation, the concept of justice occurs in a significant place in the *TTP*, especially in the wisdom of *King Solomon*. In the *Ethics*, the concept of justice occurs in the context of *E 4p37*, *E 4p41* and *E 4p45* in a little noticed but substantial passage on the relationship between harmony and love as well as discord and hatred. A more nuanced meaning of justice comes to the fore in these passages.[2]

Ronald Dworkin (1931–2013) develops a normative philosophy of justice in *Justice for Hedgehogs*, which refers to Aristotle, Plato, David Hume (1711–1776) and Kant.[3] Dworkin defends the "unity of value" and—in contrast to Spinoza's conception in the *Ethics*—the "metaphysical independence of value" in moral theory or moral epistemology.[4] Dworkin's basic principle is to live well in an ethical sense and include other individuals in actions in a moral sense.[5] However, the philosophies of Spinoza and Dworkin have parallels with regard to the concepts of freedom, justice and democracy. They not only share the principles of freedom, justice and a *cooperative* or "*partnership-based*" conception of democracy in general but, more specifically, a conception of freedom and justice that is not perfect but is to be understood from intellectual, ethical, or moral and political foundations, which are crucial for the understanding of these conceptions.[6]

Furthermore, Spinoza and Dworkin have in common that they both argue against *scepticism* and assume truth as a possibility for knowledge. For Spinoza, the intelligibility of nature and human existence forms the basis of true knowledge and is founded in God or the substance. True knowledge as well as "blessedness", i.e., the love and knowledge of God, is central (Spinoza [1677] 1988, E 5p24, E 5p33, E 5p42).[7] Dworkin, on the other hand, discusses a moral theory of knowledge or moral epistemology. According to the "metaphysical independence of value", the truth of moral concepts can only be attained through moral interpretation (Dworkin 2011, pp. 9–11). The interpretation of moral concepts is supported by "responsibility", which includes intellectual and argumentative "integrity". The truth of moral concepts is given when the various concepts are integrated into a coherent "network", which holds them together (Dworkin 2011, pp. 99–102; here p. 101).

The method in the present article consists of a philological, historical, and systematic interpretation of Spinoza's *TTP* and the *Ethics*. The philosophical concept of justice is discussed in the semantic context of the individual historical works as well as in the connection between the *TTP* and the *Ethics*. The goal consists not in the analysis of justice as a philosophical concept as such but in the discussion of the significance of justice by situating it in the context of the *TTP* and the *Ethics*. The argumentation reflects the

[2] In Spinoza's reception history, his conception of freedom and democracy, on the one hand, and the metaphysical conception of law as power (potentia), on the other hand, are the signature of the ground-breaking *discovery* of Spinoza's political philosophy—in the *TTP*, the *Ethics* and the *TP*—in different academic and political, yet connected, perspectives in the Spinoza studies of Matheron (1969); Moreau (1994); Balibar (1984); Walther (2003, 2011); or Negri (1981). However, the concept of justice is not central in this scholarship and has only a peripheral presence in its contrasting interpretations and discourses. This situation is still prevalent in more recent studies such as from Della Rocca (2008), James (2012) and Steinberg (2018). The early study of Belaief (1971) is an exception.

[3] For the importance of Hume and Kant, see Dworkin (2011, pp. 17, 19). For Aristotle and Plato, see (Dworkin 2011, pp. 15–16, 184–88). For a comparative perspective on the history of philosophy of law, see Senn (2017). For a comparative perspective on Dworkin and Aristotle, see Ibric (2022).

[4] The "unity of value" is the basic principle of *Justice for Hedgehogs*. It stands for the "indivisibility" of freedom, justice and dignity in moral theory, ethics, and politics. See Dworkin (2011), pp. 1–6, 423. Independence means that "Morality is an independent domain of thought". Dworkin (2011), p. 99. "These theories [e.g., of moral knowledge, responsibility, moral truth] are drawn from within morality [. . .]. That is what independence means in moral philosophy." Dworkin (2011, pp. 9–11; here p. 10).

[5] For the difference between ethics and moral theory, see, Dworkin (2011), pp. 1–2, 13–15, 191.

[6] For this comparative perspective, see (Dworkin 2011, pp. 4–5, 423). For Spinoza, see Section 2.

[7] For Spinoza's epistemology and the classes of knowledge of imagination, rational, and intuitive knowledge, see Spinoza (Spinoza [1677] 1988, E 2p40s2). Truth basically consists in adequate knowledge, i.e., conceptual thinking that produces adequate ideas. See (Spinoza [1677] 1988, E 1ax6, E 2d4, E 2p11c). For the epistemological concept of Spinoza, see (Renz 2018; 2022, pp. 149–57). For the history of scepticism in the 17th century, see Popkin (2003).

contextual places in which the concept of justice is situated in the two works, based on a close reading of the text.[8]

The article is structured as follows: The basic concept of Spinoza's philosophy as the immanence of freedom is presented in Section 2. Section 3 represents the main part of this article, placing the concept of justice in the historical and philosophical context of the *TTP* and the *Ethics*. Accordingly, in Section 3.1, the concepts of law and justice in Spinoza are addressed. The notion of justice in the universal ethics in the fourth chapter of the *TTP* and especially in the wisdom of *King Solomon* is discussed in Section 3.2. In Section 3.3, the concept of justice is discussed in the political context of harmony and love as well as discord and hatred in the fourth part of the *Ethics*. In Section 3.4, the connection of freedom, true knowledge, and justice is addressed with regard to the practical significance of libertas philosophandi in the *TTP*, which is related to the development of harmony according to *E 4p35* and *E 4p37*. Finally, in Section 4, this cycle of freedom, truth and justice is highlighted.

2. The Basic Concept of Spinoza's Philosophy: The Immanence of Freedom

Spinoza began with the writing of the *Ethics* in the early 1660s in the *Republic of the Seven United Provinces* during the stateholderless era of *True Freedom* under the reign of Johan de Witt (1625–1672), which lasted from 1651 to 1672. Johan de Witt asserted the power of the provinces, first and foremost Holland, against the House of Orange, which had provided the stateholder since the revolt against Spain. This political constellation and flourishing trade prompted the Republican government to adopt a calculated tolerance of religion, which was met with fierce opposition from the Calvinist church. The Republic also showed a moderately tolerant attitude toward the new philosophy of René Descartes (1596–1650), which was equally opposed by Reformed theology. Against this background, Spinoza put aside the work on the *Ethics* in 1965 to write the *TTP*, in which he addressed this conflict.[9]

In the *TTP*, Spinoza advocates the *freedom to philosophise* (libertas philosophandi), i.e., the freedom of thought and expression, in a democratic republic. Accordingly, Spinoza argues in the *TTP* "that the Republic can grant freedom of philosophizing without harming its peace or piety, and cannot deny it without destroying its peace and piety" (Spinoza [1670] 2016, TTP Title).[10] Spinoza consequently separates theology from philosophy (Spinoza [1670] 2016, TTP 14). He develops a historical-critical hermeneutics for the interpretation of the Bible, distinguishing its *true meaning* from philosophical *truth* (Spinoza [1670] 2016, TTP 7.6–7+7.14–17). The true meaning of the Bible, according to Spinoza, lies in the core message of a *universal religion*, which consists of obedience to God, loving-kindness,

[8] The concept of justice in Spinoza is the topic of some recent studies. Santos Campos (2016) elaborates the "*immanence of justice as equality*". This concept articulates a broad understanding of suum cuique, which is related to metaphysical, ethical, political, or legal concepts of equality (pp. 127–43; here, p. 140). Lord (2018) develops a concept of "*geometrical equality*" in the philosophy of Spinoza as an expression of *ratio* in its dimensions as reason, relation, and proportion. Despite the formal nature of such a concept, in the state, it is—in perspective—linked with an "*equality of flourishing*" (pp. 61–73; here, pp. 69, 72). Olsthoorn (2016), however, interprets the concept of justice in Spinoza as a purely legalistic concept (pp. 21–22, 25, 31, 35–36). Finally, Sharp (2005) discusses the concept justice in its affective and economical dimensions as an integral part of Spinoza's ethics and politics of affective transformation and freedom. "Institutions of justice [. . .] aim to constitute a milieu in which beings can develop and cultivate an *animi constantia*, a constant and therefore more self-determined mind, acting out of joyful passions" (pp. 114–15; here p. 122). Emphasis added by the author.

[9] For the life of Spinoza, see (Meinsma [1896] 2011; Freudenthal and Walther [1899] 2006; Nadler 2018). For the history of the Dutch Republic in the context of early modern Europe, see (Israel 1995; Frijhoff and Spies 2004; Prak 2023; Senn 2007, chps. 8–9). Spinoza developed his philosophy against the background of humanism, scholasticism, stoicism as well as the new rationalist philosophies of Descartes and Thomas Hobbes' (1588–1679). Spinoza did critically reflect Hobbes' theory of natural law and social contract in the *TTP*. Yet, Spinoza's conception of human freedom, natural law and hence the significance of the social contract—mostly absent in the *TP*—is profoundly different because of his metaphysical and ethical conception. For the differences between Hobbes and Spinoza, see (Matheron 1969, pp. 290–300, 306, 307–314; 1984; Moreau 1994, pp. 407–12; Walther 2003, 2011; Lazzeri 1998; Senn 2017, pp. 82, 85–92; Steinberg 2018, pp. 46–51, 61–63, 216).

[10] For the concept of democracy in Spinoza, see (Spinoza [1670] 2016, TTP 16.25, TTP 16.33, TTP 20.38; Spinoza [1677] 2016, TP 11).

and justice (Spinoza [1670] 2016, TTP 13.9). Philosophy, on the other hand, refers to the *universal history of nature* (Spinoza [1670] 2016, TTP 15.25). Thus, philosophical truth results from the knowledge of reality, i.e., from the individual *natural light* (Spinoza [1670] 2016, TTP 1.2–6, TTP 7.94).

In the *Ethics*, Spinoza develops the concept of freedom within the framework of his metaphysics and epistemology. According to the *Ethics*, God or the substance is the cause of itself and has perfect power (potentia). Accordingly, God or the substance has perfect freedom. Man, as a mode of substance (natura naturans), forms a part of nature (natura naturata), i.e., of the empirical reality in which he stands, and which shapes the conditions of his natural and historical existence.[11] In the fourth part of the *Ethics*, Spinoza develops a "model of human nature" that is consistent with "true freedom" (Spinoza [1677] 1988, E 4 Preface+E 4p73s), which is opposed to the "bondage" by the affects. This freedom cannot be presupposed and cannot be perfect. Man is codetermined by his body and mind, through which he is closely interwoven with the environment through his affects. The essence of man lies in the striving or desire to preserve himself (Spinoza [1677] 1988, E 3p6–7), which is realised only in a life on the basis of true knowledge (Spinoza [1677] 1988, E 4p18s and E 4p24dd). Accordingly, human freedom stems from true knowledge and can only develop through virtue, i.e., acting on the basis of reason, that is consistent with power (potentia) (Spinoza [1677] 1988, E 4p67–73).[12]

For a state, according to Spinoza, harmony (concordia), peace and security are crucial. Freedom and justice cannot be presupposed in the state as true knowledge and virtue must be developed by individuals. Furthermore, freedom, justice, and normativity are only possible in the state according to the *TTP*, the *Ethics* and the *TP*: "So the end of the Republic is really freedom" (Spinoza [1670] 2016, TTP 20.12). Freedom is a freedom of individuals that must be granted to them as singular beings in the state. At the same time, this freedom enables citizens to develop rational forms of living together out of *agreement* (Spinoza [1677] 1988, E 4p35). In this context, the freedom that belongs to human beings according to natural law is realised, even if the state cannot be conceived from this freedom. From this perspective, Spinoza develops the concept of natural law in the *TTP*, the *Ethics* and the *TP*.

In the *TTP*, Spinoza's conception of natural law is oriented towards the freedom of men as equal individuals in a democracy.[13] In Spinoza' view, natural law consists of men's striving to preserve themselves, i.e., to realise their specific human nature. In other words, natural law is an expression of human nature, which comprises affects *and* reason. The philosopher underlines this crucial point in the *TP*: "Whether a man is wise or ignorant, he's a part of nature" (Spinoza [1677] 2016, TP 2.5). It is from this perspective of freedom and the *potential* development of reason that Spinoza's main thesis on natural law is to be placed: an individual's right reaches as far as his power reaches (Spinoza [1670] 2016, TTP 16.2–6; Spinoza [1677] 1988, E 4p37s2; (Spinoza [1677] 2016, TP 2.4). In the—purely hypothetical—state of nature, however, individuals have no stable power and consequently no actual right. According to Spinoza, natural rights effectively exist only in the state in which there are common laws (Spinoza [1677] 2016, TP 2.15).[14] Accordingly, natural law remains in the state and forms the basis and limitation for the power and the right of the sovereign (Spinoza [1670] 2016, TTP 17.1–4; Spinoza [1677] 2016, TP 4.4–5). Natural law does not contain normativity in Spinoza. Normativity emerges from an inner development

[11] For the metaphysics in the first part of the *Ethics*, see Schnepf (1996). For a recent discussion, see Melamed (2022). See (Spinoza [1677] 1988, E 1d3+E 1d6+E 1d7; E 1p11; E 1p15; E 1p28+E 1p29s).

[12] For the importance of experience in Spinoza, see (Moreau 1994; Bartuschat 1992; Renz 2018, pp. 1–13, 94–107). For virtue as power, see (Spinoza [1677] 1988, E 4d8, E 4p20d, E 4p24, E 4ap3+E 4ap6).

[13] For this understanding, see (Spinoza [1670] 2016, TTP Preface §29). "To demonstrate these conclusions, I begin [. . .] with the natural right of each person, which extends as far as each person's desire and power extend. *By the right of nature no one is bound to live according to another person's mentality, but each one is the defender of his own freedom.*" (Emphasis added by the author) See (Spinoza [1670] 2016, TTP 16.36+TTP 16.55+TTP 20.38).

[14] For differences and parallels between Aristotle and Spinoza, see Manzini (2009).

of the state and society since justice must be brought forth by the individuals in an actual process, which can have different historical forms and can be less or more reflected.[15]

3. The Concept of Justice in the *TTP* and the *Ethics*: Significance and Perspectives

3.1. "For the Laws Are the Soul of the State": Justice as a Legal and Political Concept

In a democratic republic, according to Spinoza, freedom, harmony, and security are central. Justice can only exist in the state, that is, where people have established common laws (Spinoza [1670] 2016, TTP 16.42; Spinoza [1677] 1988, E 4p37s2; Spinoza [1677] 2016, TP 2.23). In a state, the sovereign determines by laws what is just and unjust. Simultaneously, laws articulate natural law by giving it a stable form. Laws have a central importance in the *TTP*, in *E 4p37s2* and in the political theory of the *TP*. Accordingly Spinoza concisely states: "For the laws are the soul of the state" (Spinoza [1677] 2016, TP 10.9). In the *TTP*, Spinoza describes: "By *private civil right* we can understand nothing but the freedom each person has to preserve himself in his state, which is determined by the edicts of the supreme 'power and is defended only by its authority" (Spinoza [1670] 2016, TTP 16.40). The centrality of laws to the realisation of harmony, stability, and individual freedom, brings justice into focus.

Spinoza does not delve into the concept of justice in the *TTP*, the *Ethics* and the *TP*. He uses for the concept of justice the Roman legal definition of *Justinian*, which was transmitted and common in the Dutch Republic: "*Justice* is a constancy of mind in apportioning to each person what belongs to him according to civil law" (Spinoza [1670] 2016, TTP 16.42).[16] In the state, justice acquires a normative form in which the natural law, i.e., the freedom and equality of human beings, is—potentially—reflected.[17] With regard to injustice, Spinoza states: "*Injustice* is taking away from someone, under the pretext of right, what belongs to him according to the true interpretation of the laws. Justice and injustice are also called equity and inequity because those who are established to settle disputes are bound to have no regard for persons, but to treat everyone as equals, and to defend the right of each person equally, without envying the rich, or disdaining the poor" (Spinoza [1670] 2016, TTP 16.42).

Spinoza develops the concept of the state and freedom on the basis of metaphysics and epistemology, which is completed by an *historical* and—in modern terms—*psychological* and *sociological* or *politological* perspective on the law and hence the concept of justice. The natural law of an individual human being, i.e., his power to preserve himself, acquires a stable form only in the state. Natural law corresponds to human nature in its affects and intellectual forms of expression. Spinoza, therefore, holds that the laws, which are at the center of the state, must be related to the affects and reason, i.e., the psychological and intellectual dimensions of human nature. Hence, the actions of the sovereign and the laws must be attuned to and respectful of human nature (Spinoza [1670] 2016, TTP 17.1–4; Spinoza [1677] 2016, TP 4.4–5). From this empirical perspective, Spinoza develops a realistic theoretical understanding with regard to the functional conditions of the stability of the state.

3.2. Justice in the "Universal Ethics" of the TTP: The Wisdom of King Solomon

The first 15 chapters of the *TTP* are devoted to the interpretation of the Bible. Spinoza develops a historical–critical hermeneutics of the Bible in chapter 7 of the *TTP*, through which he separates theology from philosophy. The core content of the Scripture is the *universal religion* that corresponds to its *true meaning*. The universal religion consists in love and obedience towards God, loving-kindness, and justice (Spinoza [1670] 2016, TTP 13.29). Therefore, justice has a practical significance for religion and piety. In a philosophical sense,

[15] For Spinoza's account of natural law, see (Matheron 1969, 1984; Moreau 1994; Walther 2003, 2011) For recent studies, see (Della Rocca 2008, chp. 6; James 2012; Steinberg 2018.)

[16] See Justinian, Institutions, I.I.I: "Justitia est constans et perpetua voluntas ius suum cuique tribuens." For the reception of Roman Law in the Dutch Republic, see Straumann (2015).

[17] For the connection of democracy and natural law, see (Spinoza [1670] 2016, TTP 16.36).

however, justice appears in the fourth chapter of the *TTP*, which is dedicated to the *divine law*. The conception of justice has central importance in the context of a "*universal Ethics*" that Spinoza discusses with regard to the wisdom of *King Solomon* (Spinoza [1670] 2016, TTP 4.13.[18])

In the fourth chapter of the *TTP*, which is dedicated to the divine law, Spinoza analyses the concept of law in general. He distinguishes the universal natural law, human law and natural divine law according to their respective purposes. Human law basically means "a principle of living man prescribes to himself or to others for some end" (Spinoza [1670] 2016, TTP 4.5): "By human law I understand a principle of living which serves only to protect life and the republic; by a divine law, one which aims only at the supreme good, i.e., the true knowledge and love of God" (Spinoza [1670] 2016, TTP 4.9). Since people seldom recognize the purpose of legislation, law is most often understood as the "principle of living prescribed to men by the command of others" (Spinoza [1670] 2016, TTP 4.6–7): "But the person who gives to each his due because he knows the true reason for the laws and their necessity, that person acts from a constant heart, and by his own decision, not that of another. So he deserves to be called just" (Spinoza [1670] 2016, TTP 4.5).

Spinoza's account of *King Solomon's wisdom* in the fourth chapter of the *TTP* states a correlation of ethics and politics. The divine law has, as its purpose, the true knowledge and love of God. The means to realise this end constitute a "universal Ethics" that includes the "foundations of the best republic and the principle of living among men" (Spinoza [1670] 2016, TTP 4.13). The political and ethical significance of justice in the state is evident in the philosophical wisdom of *Solomon*, whose teachings include—according to Spinoza—the "true Ethics and Politics" (Spinoza [1670] 2016, TTP 4.45). Thus, *Solomon* based his speeches on reason, that is, on *natural light* (Spinoza [1670] 2016, TTP 4.40). In his proverbs, he calls the human mind the source of life and wisdom: "*Understanding is a fountain of life*", "*The Law of the wise (is) the fountain of life*" (Spinoza [1670] 2016, TTP 4.41) and "*God grants wisdom*" (Spinoza [1670] 2016, TTP 4.43). Wisdom i.e., the true knowledge and love of God, is also relevant to the state, the laws, and their interpretation (Spinoza [1670] 2016, TTP 4.45).

In the *Ethics*, Spinoza develops the correlation between ethics and politics alluded to in the *TTP*. The state is based on laws that are adjusted to the fact that human beings do not live according to the guidance of reason but are mainly determined by the affects. Hence, human beings do not obey out of true knowledge, but out of fear and hope (Spinoza [1677] 1988, E 4p37s2). Freedom and reason, however, can only develop in the state and take the forms of religion, morality or decency and friendship (Spinoza [1677] 1988, E 4p37s1). The ethical and political dimensions are linked in perspective and are mutually dependent. "No life, then, is rational without understanding" (Spinoza [1677] 1988, E 4ap5).

3.3. The Concept of Justice in the Ethics: Between Harmony and Discord, Love and Hatred

Spinoza addresses the state in the *Ethics* in E 4p37s1 and E 4p37s2. Freedom and true knowledge cannot be presupposed in a state, even though reason is the essence of human nature:[19] "*Only insofar as men live according to the guidance of reason, must they always agree in nature*" (Spinoza [1677] 1988, E 4p35). The state forms the background of a comparative perspective with regard to reason and affects: "*Things which are of assistance to the common Society of men, or which bring it about that men live harmoniously, are useful; those, on the other hand, are evil which bring discord to the State*" (Spinoza [1677] 1988, E 4p40). Thus, Spinoza discusses which affects are consistent with reason. The affects of joy and love are good insofar as they come from true knowledge, but considered as an affect, they can be excessive. In contrast, the affect of cheerfulness, which is a mild form of joy, is always good (Spinoza [1677] 1988, E 4pp41–44).

The concept of justice occurs in context in the fourth part of the *Ethics* in a place that is little noted but significant. Spinoza focuses on the affect of hatred in *E 4p45* and

[18] For the *TTP*, see (Matheron 1971; Laux 1993; Verbeek 2003; James 2012). Emphasis added by the author.
[19] See also (Spinoza [1677] 1988, E 3p6–7+E 4p18s+E 4p24d).

makes a decisive assessment: "*Hate can never be good*" (Spinoza [1677] 1988, E 4p45). The reason for this, which Spinoza gives in the demonstration of this proposition, is clear: "We strive to destroy the man we hate, [. . .], i.e., [. . .] we strive for something that is evil" (Spinoza [1677] 1988, E 4p45d).[20] In this context, Spinoza declares that in a state, actions which result from hatred are in violation of justice: "*Whatever we want because we have been affected with hate is dishonorable; and [if we live] in a State, it is unjust*" (Spinoza [1677] 1988, E 4p45c2).[21] The passage indicates that justice has a deeper, more nuanced meaning in Spinoza's thought, i.e., with regard to the conception of laws and political practice, than his definition suggests.[22]

Harmony (concordia) in the *Ethics* is linked with justice, i.e., laws that are based on reasonable forms of practice, i.e., which are truth-oriented: "The things that beget harmony are those which are related to justice, fairness, and being honorable. For men find it difficult to bear, not only what *is* unjust and unfair, but also what is *thought* dishonorable, *or* that someone rejects the accepted practices of the state. But especially necessary to bring people together in love, are the things which concern Religion and Morality" (Spinoza [1677] 1988, E 4ap15). "Harmony is also commonly born out of Fear, but then it is without trust" (Spinoza [1677] 1988, E 4ap16).[23] Discord, on the other hand, is linked with injustice and hatred, which are—at the same time—opposed to reason, i.e., actions based on true knowledge.

In summary, according to Spinoza, justice exists only in the state. Justice represents what is just or unjust according to common consent. *For justice must be brought about by human beings*. Spinoza does not normatively justify the emergence and foundation of the state—which is a natural and historical process—but explains it from its immanent causes in terms of a philosophical rationalist *and* empirical basis in a rather *psychological* or *sociological* language. However, Spinoza also clearly states, with respect to the context of *E 4p37s1* and *E 4p37s2*, that freedom and reason, which cannot be presupposed, strengthen harmony and security and have a corresponding effect on the common consent of what justice is.

3.4. Freedom, True Knowledge, and Justice: The Practical Significance of Libertas Philosophandi

According to Spinoza, freedom to philosophise (libertas philosophandi) in chapter 20 of the *TTP* is a prerequisite for man to preserve himself as an individual and to develop his reason (Spinoza [1670] 2016, TTP 20.1–3). The political concept of freedom of thought and expression concerns political legislation, religion, science or art (Spinoza [1670] 2016, TTP 20.15, TTP 20.26, TTP 20.46).[24] The freedom to philosophise is to be granted because it corresponds to human nature and cannot be restricted without endangering peace and security in the state; on the other hand, because it is a virtue, it strengthens peace and freedom. Consequently, this communicative freedom, according to the *TTP*, is necessary

[20] See also (Spinoza [1677] 1988, E 4p45c1): "Envy, Mockery, Disdain, Anger, Vengeance, and the rest of the affects which are related to Hate or arise from it, are evil.".

[21] Emphasis added by the author.

[22] For the concept of justice, see Section 3.1.

[23] See also (Spinoza [1677] 1988, E 4p47): "*Affects of Hope and Fear cannot be good of themselves.*" Steinberg (2018) develops a historical and psychological interpretation of Spinoza's political philosophy. He develops an understanding of Spinoza in the line of *civic humanism* and *dynamic realism*. Steinberg's interpretation of the continuity of ethics and politics corresponds with a perspective of the immanent development of ethics and politics. Justice is not at the center of his interpretation (p. 54), but laws are linked with the affective and intellectual empowerment of individuals: "The laws of a good state conduce to the power or welfare of all citizens, and so function as surrogates of reason." (p. 73). "Spinoza defends them [civil liberties] just insofar as they conduce to the aims of peace, security, and empowerment." (p. 161) "Spinoza advances a complex, psychologically-rich analysis of the relationship between civic participation and empowerment." (p. 165). For the crucial role of experience, passions, and individuality, see (Moreau 1994).

[24] See (Spinoza [1670] 2016, TTP 20.16). "We see, then, how everyone can say and teach what he thinks, without detriment to the right and authority of the supreme 'powers, i.e., without detriment to the Republic's peace: viz. if he leaves to them the decision about what's to be done, and does nothing contrary to their decree (even if he must often act contrary to what he judges—and openly says—is good). He can do this without harm to justice and piety. Indeed, he must do this if he wants to show himself to be just and pious.".

for interindividual agreement to develop in accordance with reason. This freedom has a discursive character, which can be linked to the communicative conception of reason in the *Ethics*, which is an aspect of the foundation of the state (Spinoza [1677] 1988, E 4pp35–37).[25]

True knowledge is not only relevant to individual virtue but also to the state and law itself. Spinoza discusses the political significance of freedom to philosophise in the *TTP* in depth. He emphasizes the discursive character of freedom, especially with regard to legislation: "For example, if someone shows that a law is contrary to sound reason, and therefore thinks it ought to be repealed, if at the same time he submits his opinion to the judgment of the supreme 'power (to whom alone it belongs to make and repeal laws), and in the meantime does nothing contrary to what that law prescribes, he truly deserves well of the republic, as one of its best citizens" (Spinoza [1670] 2016, TTP 20.15). Freedom is a prerequisite for the development of true knowledge, i.e., reason, which in its discursive form influences laws and justice.[26]

Freedom to philosophise, i.e., a free development of thought and expression, is, according to Spinoza, a virtue that is important for the stability of the state, although the philosopher admits that such a freedom can sometimes give rise to certain grievances (Spinoza [1670] 2016, TTP 20.24). However, "*freedom of judgment [. . .] is undoubtedly a virtue*" (Spinoza [1670] 2016, TTP 20.25).[27] In this respect, freedom promotes loyalty and fidelity in the state. To restrict the freedom of judgment, primarily harms the loyalty in the state because men cannot develop this virtue, thus weakening harmony (Spinoza [1670] 2016, TTP 20.34–38): "But suppose this freedom could be suppressed, and men so kept in check that they didn't dare to mutter anything except what the supreme 'powers prescribe. This would surely never happen in such a way that they didn't even think anything except what the supreme 'powers wanted them to. So the necessary consequence would be that every day men would think one thing and say something else. The result? The good faith especially necessary in a Republic would be corrupted" (Spinoza [1670] 2016, TTP 20.27).

In this sense, the *TTP* and the *Ethics* have a common foundation of a philosophy that embraces the conception of an immanence of freedom. Spinoza states consequently in the *TP*, in which he discusses harmony and security with the background of the stability of political institutions: "Peace isn't the privation of war, but a virtue which arises from strength of mind" (Spinoza [1677] 2016, TP 5.4). "When we say, then, that the best state is one where men pass their lives harmoniously, I mean that they pass *human* life, one defined not merely by the circulation of the blood, and other things common to all animals, but mostly by reason, the true virtue and life of the Mind" (Spinoza [1677] 2016, TP 5.5). Consequently, freedom, true knowledge, and justice are interrelated. Freedom has an impact on laws and, consequently, on justice, which is committed to a discursive form of establishing truth.

4. Conclusions: The *Cycle* of Freedom, True Knowledge, and Justice

In Spinoza's political philosophy, a cycle of freedom, true knowledge, and justice comes to the fore, which is based on the reciprocal significance of these concepts. Justice, on

[25] For the historical background of a participatory political culture in the Dutch Republic during the 17th century, see (Frijhoff and Spies 2004, p. 83, 220–27; Lærke 2021; Helmers 2018; Secretan 2018). For a comparison between Spinoza's position and the modern discourse ethics of Jürgen Habermas, see (Senn 1993; Lærke 2021, pp. 235, 238–40).

[26] In James (2012), the *Ethics* appears as the foundation for the project of the *TTP*: "For him [Spinoza], striving to create ways of life that are genuinely empowering [. . .] is an immediate and practical project". (p. 2). James articulates a correlation of the political character of justice and morality with regard to the "Life in a Republic" and highlights the crucial role of the sovereign, which determines normativity: "It may seem that this yields only an impoverished morality [. . .]. But this underestimates the force of normative standards that sovereignty makes possible. Once in circulation, they acquire a life of their own and enabling subjects, as well as sovereigns, to justify their beliefs and actions in moral terms. [. . .] Moral discourse enters into the balance of power between sovereigns and subjects [. . .]. The state does not simply redistribute power that already existed in the state of nature. It also creates new powers, including those of morality and religion." (pp. 233–48; here, pp. 247–48).

[27] Emphasis added by the author.

the one hand, articulates freedom and equality, which man has according to natural law, but which cannot be realised in the state of nature. Freedom of thought and expression, on the other hand, forms a condition for justice to develop according to reason. Spinoza's account of the *immanence of freedom and justice* relies not on normative presumptions. Freedom and justice cannot be presupposed but can emerge by the fact that the laws correspond to a discursive concept of truth, which can only be developed by individuals together with other individuals, creating reasonable connections in the complex structure of society.

Spinoza and Dworkin have in common that they develop freedom and justice from a philosophical conception of *truth*. Dworkin demonstrates this unity with respect to liberty, justice, and dignity in *Justice for Hedgehogs*: "*That justice does not threaten—it expands—our liberty. [. . .] It makes it easier and more likely for each of us to live a good life well*. [. . .] Without dignity our lives are only blinks of duration. But if we manage to lead a good life well, we create something more. [. . .] We make our lives tiny diamonds in the cosmic sands" (Dworkin 2011, p. 423).[28] Spinoza wrote in parallel in the *Ethics*: "*A man who is guided by reason is more free in a state*" (Spinoza [1677] 1988, E 4p73).[29] For Spinoza, freedom is to be understood in the context of an ethical theory that explains man's virtue as an expression of life: "Blessedness is not the reward of virtue, but virtue itself" (Spinoza [1677] 1988, E 5p42). In this sense, a life of true knowledge, through which man develops his freedom and power (potentia), includes a condition or effect comparable to dignity:[30] "And of course, what is found so rarely must be hard. [. . .] But all things excellent are as difficult as they are rare" (Spinoza [1677] 1988, E 5p42s).

The cycle of freedom, true knowledge, and justice can gradually develop with the result that the laws of a state increasingly *respect* the development of individual freedom. Accordingly, the passages discussed reveal a concept of justice, which has a more important ethical and political significance than Spinoza's use of the Roman legal definition suggests: "*Justice* is a constancy of mind in apportioning to each person what belongs to him according to civil law".[31] The fourth chapter of the *TTP* and the wisdom of *King Solomon*, as well as the fourth part of the *Ethics* with *Propositions* 37, 41 and 45 show that justice has a significance in the context of Spinoza's thought, even if he did not discuss the concept in depth: "Whatever we want because we have been affected with hate is dishonorable; and [if we live] in a State, it is unjust."[32] Justice is consistent with harmony (concordia) and love. Injustice coincides with discord and hate. This insight is appropriate to the complexity of Spinoza's thought. It makes the understanding of his philosophy more differentiated and complete.

Spinoza's philosophy in the *TTP* and the *Ethics* is conceptualised from the immanent development and logic of human existence, always from the aspect of its causal foundations and hence explainability of its preconditions and thus realistic perspectives. Here, it can be seen that justice can have a deeper meaning in Spinoza and is consistent with love, true knowledge, and virtue. Justice—in this broader sense—is opposed to hatred. This understanding of justice, however, is not based on a normative conception of natural law and the state. In an immanent perspective that develops natural law and the state on the conceptual basis that man is a part of nature and is subject to affects, the essence of man—freedom, true knowledge, and virtue— must be able to develop and cannot be presupposed. In this sense, it is a realistic conception but a conception of essential human freedom.

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[28] Emphasis added by the author.
[29] Emphasis added by the author.
[30] See (Spinoza [1677] 1988), E 4app3+5+15. For virtue as power, see (Spinoza [1677] 1988, E 3p6–7+E 4d8+E 4p20d+E 4p24+E 4ap3+E 4ap6).
[31] See Section 3.1. Here, see (Spinoza [1670] 2016, TTP 16.42).
[32] See Section 3.3. Here, see (Spinoza [1677] 1988, E 4p45c2).

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Article

Justice and Truth: A Leibnizian Perspective on Modern Jurisprudence

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Abstract: The purpose of this essay is to outline the significance of Leibniz's philosophy of law for the present. The essay traces the main features of Leibniz's theory and points out what further developments of his approach are pending today. Finally, it shows how similar Leibniz's basic convictions are to those of Ronald Dworkin.

Keywords: Leibniz's Legal Philosophy; Dworkin; justice; truth

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1. Introduction

Leibniz's philosophy of law is still largely unknown among lawyers today. This is not least due to the fact that he did not write a summarizing work on this subject. His jurisprudence must be painstakingly reconstructed from some published works, countless unpublished drafts, and fragments written in Latin or sometimes in French. This paper may serve to illustrate some impulses of his jurisprudence for the present.

As is well known among Leibniz researchers, justice and truth are very important pillars of his philosophy. He defended both concepts against Hobbes's skepticism, according to which justice and truth are arbitrary and depend on the will of man. Against Hobbes's voluntaristic and super-nominalistic standpoint, Leibniz advocated a strict rationalism according to which neither justice nor truth depend on the will of man nor even on the will of God (Armgardt 2019). On this basis Leibniz developed his theory of law, which he, unfortunately, never summarized in a book or essay. After all, as a very young man he wrote several drafts under the title *Elementa Juris Naturalis* (A VI 1, 481–485), but they cannot be considered a summary of his entire legal thought. Nevertheless, the main features of his legal thinking can be gleaned from his published and unpublished writings (for a short summary, Armgardt and Sartor 2019). Since Leibniz's philosophy of law has received little attention, especially from lawyers, this paper may serve to illustrate the impulses of his jurisprudence for the present. Moreover, we give some hints on how these impulses can be used for the further development of modern legal theory.

2. The Strict Distinction between Positive Laws and Natural Law

As Leibniz pointed out, especially in his *Méditations sur la notion commune de la justice* (Mollat 1893, pp. 41–70) written in 1703, a strict distinction must be made between natural law (*droit*) and positive laws (*loi*). Natural law cannot be unjust; this would be a contradiction in itself because only positive laws can be unjust. Natural law is not based on will, either human or divine, positive laws, however, are based on the will of the legislator. The former is completely independent of any power, whereas the latter depends on the legislative and executive power of the sovereign. According to Leibniz, the mixing of these two levels was a main reason for the confusion in the jurisprudence of his time (Armgardt 2015a). The strict distinction between natural law and positive laws is still of utmost importance today. Even in a democratic context, majority cannot substitute for rightness because the majority can support unjust decisions. Without the assumption of natural law, or at least an intuition of justice, there is no solid basis for critiquing existing

law. The difficulty of recognizing natural law or elucidating the intuitions of natural law does not change this. It follows, of course, that the accurate exploration and elucidation of our intuitions about justice are an exceedingly important task of jurisprudence. For Leibniz, this was perfectly clear, and to this day, nothing has changed. In the following, approaches to solving this difficult task will be shown on the basis of Leibniz's philosophy of law and with the inclusion of modern legal theory.

3. Leibniz's Three-Stage Model as Defeasible Reasoning

As Busche, in particular, has elaborated, Leibniz used a three-stage model (Busche 2003). The three levels of strict law (*jus strictum*), equity (*aequitas*), and piety (*pietas*) form a hierarchy, which is characterized by the fact that the next level can correct the previous level(s). From today's point of view, one would speak of defeasible reasoning. The three-stage model was not invented by Leibniz, but it was profoundly developed by him in terms of content. First, Leibniz paralleled the three stages with the three Roman legal principles: *neminem laedere, suum cuique tribuere*, and *honeste vivere*. In a second step, he related the three stages with the Aristotelian doctrine of justice: *jus strictum* corresponds to the Aristotelian *justitia commutativa*, equity to *justitia distributiva*, and piety to *justitia universalis* (A IV 5, 61 f.). However, he went far beyond these historical harmonizations. Recent research has revealed the progress Leibniz made in concretizing these stages. In the following, these results will be related to modern legal theory.

3.1. Jus Strictum and Legal Logic

On the level of *jus strictum*, Leibniz developed approaches to an analytical philosophy of law. He saw clearly that the classical Roman jurists had applied Stoic propositional logic to law. In particular, Leibniz elaborated on this in his theory of conditions (Armgardt 2014). In the *Elementa Juris Naturalis*, he developed approaches to a deontic logic (Kalinowski and Gardies 1974). He also produced considerable analytic work in the field of legal presumptions (Armgardt 2015b). In addition, he wrote considerable studies on the development of a conceptual logic (Lenzen 2004). Leibniz can thus be regarded as the father of modern legal logic and computational legal theory.

On this basis, it is today necessary to develop powerful logical theories for legal norms, legal concepts, legal argumentation, and questions of evidence. As Leibniz foresaw, modern logic has taken off and made huge leaps. Especially in the field of modal logic, his idea of possible worlds has gained great influence, although one has to be careful with a direct transfer of his thought into a modern possible-worlds-semantics (Adams 1994, pp. 46–50). Neither did Leibniz hold Lewis's view that all possible worlds (outside the mind of God) exist, nor did he hold the view of a transworld identity as Kripke did (a more differentiated analysis can be found in Adams 1994, pp. 71–74).

Counterfactual reasoning is essential to jurisprudence. One needs counterfactual structures, especially in causality, damages, and legal conditions. Therefore, the development of logics for legal counterfactuals is necessary. Counterfactual logics are inconceivable without a semantics of possible worlds. Therefore, there is a close connection between Leibnizian logic and the latest developments in the field of computational legal theory.

On the basis of a possible-worlds-semantics, logical investigations of legal conditions using STIT-logic (Armgardt et al. 2018) and of causality using iterative counterfactual conditionals (Andreas et al. 2023) have recently been developed. Furthermore, the work of Rahman on the application of constructive type theory to the elaboration of Leibniz's theory of conditions deserves mention (Rahman 2015). These studies may well be regarded as the further development of Leibniz's ideas on strict law. There is still much to be done in this realm. We are only at the beginning of an enormous development. As Leibniz clearly foresaw, the logical tools for analyzing law are yet to be developed. Even today, it is by no means sufficient to use existing logics.

Leibniz saw that a purely conceptual derivation of law cannot lead to perfect legal solutions. The need for the correction of *jus strictum* was clearly before his eyes. For him,

legal rules were always only presumptions that could be refuted. Leibniz said this explicitly in *de legum interpretatione* (A VI 4 C, 2791). Therefore, he developed *aequitas* and *pietas* as modes of correction. In modern terms, the Leibnizian system is characterized by defeasible reasoning. In this way, he, already at the outset, countered the criticism of any form of conceptual jurisprudence (Begriffsjurisprudenz).

3.2. Correction of Jus Strictum by Equity

According to Leibniz, every result found on the level of *jus strictum* must be checked for its correctness on the basis of *aequitas*. If the result corresponds to *aequitas*, it is confirmed; otherwise, the result is corrected as equity requires. According to Leibniz, *aequitas* thus has the character of meta-law. The view that equity is meta-law is distinctly modern and is advocated today, for example, by Henry E. Smith for the common law (Smith 2021).

If we keep in mind that Leibniz was fighting Hobbes' voluntarism, it is obvious that Leibniz had the problem of clearly defining equity. It is, therefore, not surprising that Leibniz made great efforts in this regard.

In the introduction to the *Codex juris gentium diplomaticus*, Leibniz defined justice as charity of the wise: *justitia est caritas sapientis* (Riley 1996; Johns 2013, p. 112). According to Leibniz, charity is part of equity (A IV 5, 61 f.). Charity or benevolence is, for him, the only structurally conceivable way to resolve the contradiction between egoism and altruism (Goldenbaum 2009). With Hobbes and against Grotius, Leibniz takes natural self-interest from the instinct of self-preservation as the basis of his theory of motivation (Busche 2003, 91 fn. 5). Because of this realistic basic assumption, balancing egoism and altruism posed a serious problem for him. His solution was charity or love. Leibniz defines charity as follows: to love is to seek one's own happiness in the happiness of others. Leibniz wrote to Claude Nicaise (19 August 1697):

> [I]t is evident from the notion of love... how we seek at the same time our good for ourselves and the good of the beloved object for itself, when the good of this object is immediately, finally and in itself our end, our pleasure, and our good. (A II 3, 369; translation by Brown 2018, p. 633)

Brown rightly calls this "disinterested love" (Brown 2018, pp. 631–37). It is clear that Leibniz did not want to fundamentally separate law and morality. For him, law is merely the enforceable part of morality. Against Locke, Leibniz assumed that there are innate ideas whereby legal intuitions are additionally assigned the character of innate moral reflexes (Nouveaux Essais, I 2 §§ 1–2).

In the *Elementa Juris Naturalis* we find a precisely elaborated system of equity. Based on the concepts of *innoxia utilitas*, *cautio damni infecti*, and the gradation of need according to necessity (*necessitas*), usefulness (*utilitas*), and superfluity (*superfluitas*), Leibniz developed clear rules that can easily be formalized (Armgardt 2022a). At this point, Leibniz succeeded in making a tremendous advance, for before him, one searches, largely in vain, for a definition or substantive elaboration of equity.

This development also opens the way to the protection of the needy in the Leibnizian sense. To what extent moral and philosophical considerations should find their way into legal systems is an important and pressing question today. In the *Elementa Juris Naturalis*, Leibniz, at any rate, granted the needy enforceable claims for emergencies, even if the other side thereby loses something useful (Armgardt 2022a; Busche 2021).

Corrections of rules by way of weighing and balancing interests, and taking into account values, are also a subject of today's legal logic. It is perfectly clear that legislative rules can never be perfect. However, in order to avoid arbitrariness, the precise formal notation of the requirements for the correction of legislative rules requires the development of new logics. Initial proposals have recently been developed in this regard (Sartor 2018; Armgardt 2022b). The objection that this higher level of legal reasoning is not amenable to logical modeling thus proves to be untenable. Leibniz's strictly rationalist approach can also be followed at this level.

3.3. Piety—The Highest Level of Justice

Leibniz does not stop at the principle of charity. On the level of *pietas*, he adds the legal relationship of man to God. At the end of the Monadology, he describes this relationship as something that actually exists independently of belief or unbelief (Monadology, §§ 84–90). Consequently, natural law is something that exists and is self-executing because God has contingently inscribed it in the order of the world (Monadology, § 89). Even if the consequences of evil do not show themselves immediately, they inevitably follow later in the beyond.

This means that natural law exists. It is by no means only an ideal ought, but it is in force. Natural law is what counts, not positive laws, which can be unjust. Positive laws are mere fictions. Insofar as they are just, they receive existence through the natural law they represent. If we do not want to dismiss justice as a mere dream, as Kelsen did, this is the only way left to us. Leibniz saw this with all clarity. As a jurist active in practice, he was realist enough to see that not every evil can be apprehended and punished during the lifetime of the offender. Nothing has changed since.

Whoever denies its eschatological dimension reduces justice to a mere pale fiction without any real content. That reduction would not be appropriate. Just like truth, justice must be defended as something that exists and is in force.

4. Inalienable Rights of the Individual as the Model's Practical Consequences

In 1703, Leibniz gave a lecture on the concept of justice to George August, Elector of Hanover and later King of England, which he wrote down but did not publish. In these *Méditations*, Leibniz uses his three-stage model of justice to show that slavery is unjust. He argues there as follows: even if slavery were permissible according to *jus strictum* (he leaves this question open), strong restrictions would follow due to *aequitas*, i.e., the master must provide for the happiness of his slave. Due to the correction on the level of *pietas*, however, slavery presents itself as standing against the right of God and, thus, as impermissible. The property of the rational soul is entitled to the human being according to divine right, because they are naturally and inalienably free. Since the body is the property of the soul, it is inalienable, as is the soul (Mollat 1893, p. 68; for a philosophical analysis: Jorati 2019). Cassirer was one of the first who appreciated Leibniz in view of the development of inalienable human rights (Cassirer 1929, pp. 13–15).

Leibniz develops, on the level of piety, the concept of universal, inalienable human rights to delegitimize slavery. There are, of course, antecedents for this thinking in late scholastic moral philosophy. Today, slavery has been abolished. However, there are dependencies similar to slavery. In this regard, *pietas* also points in the right direction.

The example of slavery shows how disruptions can occur at the level of *jus strictum*. Human legislation or customary law can create legal institutions that exist as positive laws but which can (and must) be delegitimized by *aequitas* and *pietas*. At this point, it becomes clear that Leibniz was not only concerned with an ideal legal system where something like slavery would not occur but also with influencing the positive laws in force.

Another example that demonstrates the interplay of *jus strictum* and *aequitas* is the question of the right of resistance against the state. Unlike Hobbes, Leibniz advocates a right of resistance in exceptional cases, which he derives from *aequitas* and corrects *jus strictum*. The prerequisite for the right of resistance is that it is the goal of a government to deliberately destroy the welfare of the community (Armgardt 2020, pp. 159–62).

5. Conclusions: Protection of the Individual's Freedom and Responsibility

For Leibniz, the development of individual human rights is based on the idea that divine creation places immeasurable value on the individual. This finds its origin, above all, in the idea that every human being was created in God's image (*imago dei*), as Gen. 1,26 states. Julia Borcherding's forthcoming dissertation will show the influence of this doctrine on Leibniz's concept of justice. In contrast to Spinoza's strict necessity, Leibniz developed his monadology to capture the value, freedom, and uniqueness of each individual (for a

short introduction to monads, Schepers 2016). Each monad, especially the rational monads, expresses the entire world from a unique perspective (even more, it constitutes the world from within by way of perception) and is therefore irreplaceable (Schepers 2016, p. 24). Against this background, all legal and political concepts that disregard the individual are out of the question. The principle of charity, to which all human beings are committed, ensures that the legal order does not disintegrate into egoistic particular interests and thereby destroys itself.

According to Leibniz, harmony is unity in diversity. This balance alone leads to perfect order. It is clear that the world is currently far from such harmony. By the way, things did not look much better during Leibniz's lifetime. However, this very fact shows the necessity of dealing with Leibniz's philosophy today.

6. Truth, Evidence, Presumptions, Conjectures, Probability

From a logical perspective, Leibniz advocated a conceptual containment theory of truth (Adams 1994, pp. 57–71). From the practical point of view of the lawyer, however, the question of the proof of facts, the burden of proof, and presumptions are much more relevant. Leibniz has developed approaches to an analytical legal theory of evidence that can also provide inspiration for this important field from today's perspective (Armgardt 2015b). Leibniz repeatedly spoke of how important it would be to develop a logic of probability in order to, in uncertain situations, make as few mistakes as possible. Unfortunately, he did not realize this project. However, we have some valuable advice from him on presumptions and conjectures. Especially in the writing *de legum interpretatione* there are very stimulating explanations on this topic (A VI 4 C, 2789-90). The core idea for conjectures, which Leibniz takes from Roman law, is that, in cases of doubt, one should assume what is easier (*facilius*) to happen, i.e., that which in its genus involves fewer requisites or smaller ones (A VI 4 C, 2789-90; an analysis is found in Armgardt 2015b, p. 66). While, in the case of conjectures, positive facts have to be proved, the case of presumptions is easier: if a presumption disputes in favor of a party, its result has to be accepted, unless an *impedimentum*, i.e., a negative fact, stands in the way. This idea can be expressed using constructive type theory or defeasible inferences (Armgardt 2015b, pp. 64–65). Again, we find extremely interesting approaches to an analytic theory of proof that are worthy of further development. The development of a legal theory of proof with the help of Bayesian conditional probabilities is also likely to correspond to Leibniz's program.

With regard to proof, Leibniz strictly distinguished between necessary and contingent truths. While necessary truths can be proved in a finite number of steps, the proof of contingent truths requires an infinite analysis (McDonough 2018, p. 94). Since the latter is generally inaccessible to the human mind, presumptions and conjectures play an extremely important role in legal reasoning that generally deals with contingent truths.

7. Conclusions: Analytic Jurisprudence and Natural Law Need Each Other

Leibniz developed profound theoretical approaches to both the development of law and the problem of fact-finding from which modern jurisprudence can draw valuable inspiration. Since Leibniz's writings have remained largely hidden until modern times, they can only have an effect today. They deserve this effect.

The study of Leibniz's jurisprudence shows that analytical jurisprudence and natural law are by no means mutually exclusive. On the contrary, for Leibniz, logical analysis serves the deeper understanding of natural law. It was not without reason that he accused Pufendorf of having created only a more or less incoherent collection of natural law principles instead of a system of natural law (Armgardt 2015a, pp. 16–20).

Without a doubt, Leibniz had in mind something like an axiomatic foundation of natural law from which individual legal principles could be derived (Brewer 2013, p. 201). Instead of axioms, however, he chose definitions and theorems formed from them as a starting point for *jus strictum* (e.g., the 160 definitions in *De Conditionibus*, A VI 1, 102–110). His great plan of inventing a *characteristica universalis* to achieve certainty in all fields of

inquiry (Antognazza 2009, p. 528 referring to his letter to Biber) is closely related to his countless drafts on legal definitions.

Whether the methodological tools available in his time would have allowed him to achieve this goal might be doubtful from today's perspective. Nevertheless, this does not mean that Leibniz was on the wrong path. Especially in the field of conceptual logic, he succeeded in making substantial progress (e.g., Lenzen 1990, pp. 28–83).

Since the great upswing of logic during the last 150 years, Leibniz's goal does not seem to be as far away as it was during his lifetime. Therefore, modern basic research in legal logic may be regarded as the pursuit of Leibniz's grand plan of an analytical science of natural law.

As for the limits of logic and legal conceptual analysis, it is important to see that Leibniz clearly did not believe in getting by with only one level of thought. His multi-level approach (*jus strictum*, *aequitas*, *pietas*) suggests that he was obviously aware of the inherent limitations of single-layered analyses. Viewing legal rules as defeasible and allowing corrections at meta-levels are very modern ideas (e.g., Smith 2021). The important question of exactly what concept of defeasibility Leibniz had in mind must be left open here.

8. Leibniz and Dworkin

Finally, Leibniz's philosophy of law shall be briefly compared with that of Ronald Dworkin. Perhaps the most important of Dworkin's principles is his firm rejection of positivism, as represented by Herbert Hart, for example. Dworkin's assumption of the existence of objective truth about values and the idea that "morality is not made by anyone" (Dworkin 2011, pp. 24 and 400–1) is very much in line with Leibniz's philosophy of law. Leibniz would also have agreed with Dworkin's view that law is "not a rival system of rules that might conflict with morality, but as such a branch of morality" (Dworkin 2011, p. 5). Dworkin's notion that laws can be unjust is obviously consistent with Leibniz's view (Dworkin 2011, p. 411 for Nazi laws).

Both Leibniz and Dworkin stand unreservedly for the suprapositive validity of universal and inalienable human rights. However, their justification differs significantly. Even if, for Leibniz, natural law, in contrast to positive laws, is completely independent of the will of men and even of the will of God, it still belongs to the realm of necessary truths, which have their basis in God's mind. Without the mind of God, there would literally be nothing at all, neither the necessary nor the contingent truths. Dworkin sees this differently: for him, law is independent not only of God's will but also of his existence (Dworkin 2013, pp. 1–44).

Both Leibniz and Dworkin approach the problem of hard cases in a very similar way. In contrast to Hart and Raz, Dworkin believes that, in law, there is always a uniquely correct decision (Ben Menahem 1993, p. 198). Ben Menahem has pointed out that Leibniz sees it the same way, which we can understand from Leibniz's doctoral thesis about perplex cases in law (*Disputatio inauguralis de casibus perplexis in iure*) published in 1666 (Ben Menahem 1993, p. 198). However, Ben Menahem is not to be followed insofar as he puts young Leibniz in the proximity of the modern positivists (Ben Menahem 1993, pp. 214–15). As Artosi, Pieri, and Sartor have shown, natural law plays a decisive role in the justification of law from the beginning (Artosi et al. 2013, pp. XX–XXIX and 120). Above all, this can be seen in the legal theory of the *Nova methodus discendae docendaeque Jurisprudentiae* from 1667. There Leibniz describes *aequitas* and *pietas* as necessary corrective mechanisms for *jus strictum* (Busche 2003, pp. LIX-CI). Meder speaks of a mutual interpenetration of the three levels (Meder 2018, p. 193). Hence, Leibniz is much closer to Dworkin and much further away from Hart than Ben Menahem thinks. From the very beginning, Leibniz developed an integral theory of law: moral philosophy and religion do not stand outside law but can and must, in case of conflict, correct *jus strictum* by way of equity and piety as part of the law. According to Leibniz, there are several levels of law that are hierarchical.

Another important aspect is their attitude toward utilitarianism. Dworkin clearly opposed utilitarianism (Dworkin 2013, p. 143). Since utilitarianism emerged only after Leibniz's death, Leibniz's view on the subject must be carefully reconstructed. Riley came

to the conclusion that Leibniz would have rejected utilitarianism (Riley 1996, pp. 160–62). Notwithstanding the importance of self-interest that Leibniz, like Hobbes, assumed (Busche 2003, pp. 91 and 434 fn. 5), Riley emphasizes that self-interest is held in check by *caritas sapientis* as the definition of the concept of justice (Riley 1996, pp. 160–62). Indeed, the idea of a "pleasure of malevolence" found in Bentham is not compatible with Leibniz's definition of justice (Riley 1996, p. 161). Even if Leibniz always had the utility of a thing in mind, one will hardly be able to classify him as a utilitarian.

Differences between the two philosophers can be identified less in their basic assumptions than in the way law is to be derived from them. Here, the precision of Leibniz's thinking and the application of formal logic to law are of decisive importance. While Dworkin rejected a conceptual jurisprudence or *Begriffsjurisprudenz* (Dworkin 2011, p. 143), Leibniz's incredibly extensive and intensive definitional studies of law show that he wanted to develop a conceptual jurisprudence and one that really deserves the name (c.f., for instance, the countless definitions in his essay on legal conditions *De Conditionibus*, A VI 1, 99–150). However, it was quite clear to Leibniz that *jus strictum* derived from definitions alone is in need of correction: if the result does not correspond to equity or piety, it must be corrected by them.

The "calculus of concern" developed by Dworkin is very reminiscent of Leibniz's remarks on equity (Dworkin 2013, p. 271). According to Dworkin, three main factors must be taken into account: "the harm threatened to a victim, the cost a rescuer would incur, and the degree of confrontation between victim and potential rescuer" (Dworkin 2013, p. 275). Leibniz develops his doctrine of equity from the idea of *innoxia utilitas* (harmless utility). According to this doctrine, I am required to help someone if he is threatened with harm that I can avert if the assistance is harmless to me (Armgardt 2022a, pp. 90–96). This moral and philosophical concept was very well known in Leibniz's time. From this concept, Leibniz developed the following categories of neediness by generalization: necessity (*necessitas*), usefulness (*utilitas*), superfluity (*superfluitas*), and harmfulness (*damnum*). Whenever the plaintiff could claim a higher category than the defendant, he prevailed legally against the latter on the basis of equity. This can easily be formalized into a calculus of equity (Armgardt 2022a, pp. 92–96). The similarity to the harm and cost categories developed by Dworkin is obvious.

It should be noted that Leibniz stood in the tradition of Roman law, from which modern civil law has developed, while Dworkin worked in the common law tradition. Overcoming this division may be one of the most important tasks of contemporary legal theory. The similarity between Leibniz's and Dworkin's legal theories indicates that the legal rationality behind the two major legal traditions is very similar. In this regard, Leibniz's method can certainly provide valuable help.

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Article

Fuller, Dworkin, Scientism, and Liberty: The Dichotomy between Continental and Common Law Traditions and Their Consequences

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Abstract: Dworkin's and other analytic/positivist philosophers' theoretical approach to law leads inexorably to politicization, totalitarianism, less justice, less trust in government, and less truth. A more practical approach is Fuller's, which is based on experience of human behavior and an analysis of what has worked in the past. That is also the approach traditionally used in the common law system. This article uses a comparative study of the two Western traditions, their history, and their most prominent legal philosophers to explicate how and why Dworkin's and Fuller's approaches are consistent and inconsistent with those traditions, followed by a comparative analysis of the results obtained by prominent international NGOs. Dworkin's approach, which grows out of analytic philosophy, is unworkable because like all scientistic theories, it treats human beings mechanistically, de-emphasizing personal responsibility, ignoring the need for individual incentive, and it assumes an all-encompassing, all-powerful government of experts to make legal decisions for a collectivity. Under Fuller's common law approach, the proper role of law is to manage conflict, as it cannot be prevented and cannot always be resolved, thus building the public's trust in government as unbiased and apolitical as possible. This concept of the rule of law places law above government, minimizes politicization, incentivizes personal responsibility, individual incentive, and entrepreneurship, and is the only true common good among men.

Keywords: rule of law; *rechtsstaat*; positivism; politicization; custom; common good; Dworkin; Fuller; justice; analytic philosophy

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1. Introduction

Recently I visited the top of France's Cap d'Antibes, enjoying the expansive view from Italy to Cannes, and struck up a conversation with three other people: a local French couple and a Spanish tourist. Within five minutes we agreed that government in both Europe and the U.S. is overgrown, inept, intrusive, and often corrupt. If even the 'man (or woman) on the street' is concerned, the issue, then, among most lawyers and philosophers of law must be how to improve law and government. The Chair of the World Justice Project, William Hubbard, has indicated that the rule of law has deteriorated in 74% of countries worldwide (Hubbard 2022). Professor Senn has identified a societal lack of truth-telling and governmental failure to stop such falsehoods and provide justice as a fundamental problem—so where to begin to improve law, government, and humanity?

The controversial argument pressed by this article has three components. First, there is no final answer, no perfect approach, and one cannot study law without also considering its cultural context. Because law and government are social constructs and social institutions created by man, and are as mutable, fallible, and varied as man's habits, they cannot be accurately explained by science or the scientific method, and they do not share any underlying, hidden structure as posited by Dworkin or others in analytic philosophy or its antecedent positivist tradition. Second, modern western legal philosophy has two diverging views, that of Dworkin and the Continentalists and that of the common law tradition as exemplified by Lon Fuller's work. The nature of law (as with all human

institutions) is more accurately studied inductively, through history, custom, and culture than through efforts to develop overarching theories and hidden structures. Consequently, the third part of the argument is that as those concerned with an accurate and practical description of the nature of law, we should step away from that scientistic, positivistic view and examine what can be learned inductively from both traditions.

Lawyers tend to think that all such problems can be solved by law just as a man with a hammer sees everything as a nail. However, as a practical matter, we must recognize the limitations of law: it cannot force men to do good nor can it stop them from doing bad. It can only deter, punish, or reward. As James Madison profoundly quipped,

> "If men were angels, no government would be necessary. If angels were to govern men, neither eternal nor internal controls on government would be necessary." In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself."[1]

While Madison was referring to tyrannical acts by governments, in the modern age, continually expanding governments and ever-increasing legislation have decreased respect for both law and government. Alliances between big tech/business and big government (known as crony capitalism) have exacerbated the problem. Enlarging law or government to improve society is not likely to either improve society or create more justice. Experience proves that the opposite is the case: all-encompassing government encourages rent-seeking, falsification, and thwarts individual creativity and entrepreneurship. An assumption that government's role is to protect peace and not promote any agenda (i.e., that government should be a civil association and thus law should be non-instrumental) helps limit the politicization of government, thus encouraging truth and justice.

2. Material and Methods

This article uses research and inductive insight into the works of a wide number of scholars and historians over time. Inductive reasoning/explication is an alternative to deduction from first principles: one can use research into past practice to determine habits, customs, and principles that carry forward, and indeed this remains a major part of the legal analysis of common law—as Hume indicated, philosophy and history are deeply related (Livingston 1985, pp. 5, 22, 247–51; Hume 1756, p. 30). One can trace through history themes and cultural insights present in the legal institutions of both common law and civil law, going back to the beginning of recorded history. Moreover, those themes have remained the same over centuries: there is no rupture between the past and the present—the past life of institutions shapes their current character. "*[C]ar il n'existe pas de rupture entre le passé et le present: la vie passée des institutions a façonné leurs characters actuels.*" (Thireau 2009, p. 11) ("Because there is no break between the past and the present: the past life of institutions shapes their modern character."(trans. author).This type of research can be described as explication (Capaldi 1987, pp. 233–48), and is the methodology used by Lon Fuller, Friedrich Hayek, and Bruno Leoni in modern times, and it is the approach adopted here.

In contrast, exploration is an attempt to follow the implications of a hypothetical model (a theory) in order to understand what might be hidden underneath our ordinary understanding. This research method, though successful in hard science such as physics, proves disastrous in the study of human institutions for several reasons: (1) we cannot step outside of ourselves to study ourselves; (2) human institutions develop and change over time; and (3) (most important) all such attempts begin with and are colored by the researcher's political bent and assumptions or prejudices about the foundational nature of the institution studied. As will be discussed, hidden structure theories, such as those put forth by Kelsen, Rawls, Hart, Dworkin, and Unger cannot be verified and inexorably lead to nihilism.

[1] The Federalist No. 51 (Madison 1788c).

As shall be shown preliminarily through a necessarily abbreviated discussion of 1000 years of history, the Continental legal tradition regards law as something designed and created by governmental elites (i.e., by legislatures and bureaucracies), that is imposed on man by government in order to improve society, and it is properly grounded in deductive logic and (since the French Enlightenment Project) the scientific method/exploration.

In contrast, the common law traditionally regards law as developed over generations by a judicial custom of explication since supplemented by deductive logic and legislation produced by popular government, but legislation is assumed to be consistent with the common law and is itself interpreted by judicial explication. Common law traditionally perceives the purpose of law as a set of principles designed to protect peace; it holds that governmental power must be limited, and it posits that law should be non-instrumental (i.e., it is not aimed at improving society), but is aimed only at the practical management of conflict, that truth is most likely to be shown when adversaries battle each other before a disinterested judge, and that societal improvement is generated by cultural change and popular consensus that change is necessary, not from experts.

The two historical explications include detailed explanations of what their major legal philosophers have said about them, followed by a Discussion that compares them and a Conclusion. Some legal philosophers (Hart and Dworkin) who were educated in the common law tradition have adopted concepts that developed out of the positivist/analytical/continental movement of the 19th and 20th centuries. It is the author's thesis that the original common law legal approach as described by Lon Fuller is the one actually used in the Anglosphere and this is a more productive way to approach the study of how and why a particular legal system works—and where it fails; and the hidden structure methodology of Rawls, Hart, and Dworkin has led inexorably to less public trust in the law and a less civil society.

3. The Continental Tradition

3.1. History from Ancient Greece through the Eighteenth Century

The Greek philosophers Plato, Socrates, and Aristotle set the foundation for much of Western thought. To them, law was a general feature of the universe, the laws of physics and the laws of human society were both immutable, and ethics, politics, and religion were all one. Aristotle posited that every concept and every entity has a telos: a specific place in a deductive order or a specific role in society, that telos is immutable, and the state is at the top of that order. The state's telos, according to Aristotle, was to aim for the highest social good by imposing strict religious, social, and political discipline. Plato's view was somewhat different. He believed that an ideal society is never reachable in this world, but ethical ideals would help a polity choose between leaders. Thus, for him, the ethical defined the political.

Rome's conception of law was somewhat more developed and more nuanced. As Rome was falling, Christian Emperor Justinian in the Eastern Empire compiled his *Corpus Juris Civilis*, which stipulated that the emperor was the law. The last Roman emperors incorporated the Catholic church into Rome's bureaucratic machinery, and the Church developed legal institutions. As the Church's influence grew, it became the primary source of literate clergy, who rediscovered and translated Greek and Roman texts: Aquinas defined law as "an ordinance of reason for the common good, promulgated by the one who is in charge of the community." (Lesaffer 2009, p. 152). Aquinas adopted Aristotle's teleology and the belief that governmental elites should create law and that law should be grounded in syllogism and deductive reasoning. In contrast with Aquinas, Augustine of Hippo rationalized Christianity using Plato but separated between the City of God and the City of Man by arguing that the ethical must be detached from the political and the spiritual.

Charlemagne conquered western Europe, converted large populations to Christianity, and founded feudalism. With its growth, the tribal law-making assemblies of the Germanic tribes that had themselves conquered Rome disappeared, as did their conception that the law was something immutable and possessed by the people. Different localities had differ-

ent legal customs until Roman law provided some common ground among Continental societies. At the beginning of the twelfth century, the University of Bologna started teaching both canon law and Justinian's Digest, creating both church ('canon') and 'secular' lawyers. Roman-law-trained lawyers became much in demand (for complicated reasons), and more universities followed suit, training young men in a tradition that created a myth of kingship. The myth of kingship gave kings the powers to tax, mint money, conscript labor, and mete out justice. Kings needed centralized, bureaucratic governments to administer these powers, and thousands of young men saw the study of law as a pathway to economic stability. Roman law (*ius commune*) spread quickly (though unevenly) across the continent through these young, new bureaucrats. However, the Corpus Juris Civilis was already incomplete, archaic, and turgid when rediscovered in the twelfth century. To update and clarify it, glossators wrote explanations in the text's margins. That gloss quickly became bulky and unworkable.

In the thirteenth to fifteenth centuries, three events dramatically changed European law and society: Spain's conquering of the Western Hemisphere, the invention of the printing press, and the replacement of the glossators by humanists. As the Spanish conquest encouraged feudalism to be replaced by mercantilism, humanists such as Sir Thomas More and Erasmus spread their belief that a literate society would be better able to engage in civic life. They also developed two concepts: 1. the state as an entity independent from the church, and 2. the concept that there must be some sovereign entity that had the final word from which there would be no appeal. Sir Thomas More's *Utopia* (More 1516) was published in the Netherlands by his friend Erasmus and was widely read on the Continent (but not in England). In addition to criticizing feudalism, *Utopia* created a fictional state with no lawyers, no private ownership, and religious toleration. In *Utopia*, lawyers were unnecessary because laws were simple, and all social gatherings were public, pressuring participants to behave well. Furthermore, as all (men and women) were well-educated, there was no need for private ownership.

Context and background are necessary for assessing the role of government and law, and as shall be seen, the context in which the humanists were writing differed from that in England. More's *Utopia* did not accurately reflect the living conditions, customs, or law applicable to ordinary continental peasants, the largest population segment, who were organized into farm-based family households. Those farms' primary function was to provide for the family's subsistence needs.[2] A central feature of continental farms was that ownership was not individualized; the children were both farm workers and heirs to the farm, which was handed down from generation. So, an individual was only a temporary manager of the land that belonged to the family, even though it might have appeared on the surface that the eldest male was the owner (Macfarlane 1978, pp. 131–32). Women in marriage and younger male children were geographically immobile—they generally lived out their lives in the same village in which they were born or a neighboring one. Generally, the authority pattern within these households was patriarchal, and that authority was absolute.

Furthermore, women generally held a lower status than men and did not have any property rights if there were any living male family members. The gap between the peasantry and other social groups was very pronounced, and there was little, if any, mobility among them. In Eastern Europe, this pattern lasted into the nineteenth century.

While Thomas More was designing *Utopia*, Erasmus redefined the relationship between the individual and religion, arguing that because literacy was now widespread and the Catholic church's piety untrustworthy, individuals should themselves read the sacred texts and take individual responsibility for following Christ's example. Erasmus's work was a preview of the Protestant Reformation and the religious wars in much of Europe

[2] (Macfarlane 1978, pp. 15–27). Macfarlane is describing eastern European peasantry (which lasted into the nineteenth century and consequently about which more is known than was recorded about western European peasantry) out of a well-reasoned belief that it was quite similar to that what which would have been found in western continental Europe.

during the sixteenth and seventeenth centuries, so much so that it was said that "Erasmus laid the eggs that Luther hatched." The result was that the Catholic church's power was weakened while European kings now claimed both divine ordination and absolute authority. While previously the power to make law was divided with the Church, now kings claimed that power, as when Louis XIV declared "*L'état, c'est Moi*." (In fact, kings never actually had absolute authority because their powers were limited by both their ministers and their pocketbooks, but they nevertheless claimed such authority. (Bouwsma 1988; Mettam 1991)) The Reformation and the rise of individualism necessitated a new view of the law.

The Natural Law movement initially divided law into three categories: 1. God's eternal law; 2. Natural law (principles implanted by God into men's minds and accessible to reason; and 3. Human law, which was derived from natural law (Pagden 2011). Descartes, licensed in canon and *ius commune* law before abandoning it, founded seventeenth-century rationalism in his work *Discours de la Methode* (see Descartes 1637) (A Discourse on Method). Descartes argued that the only proper and reliable method of attaining knowledge is deduction from first principles, and this approach became fundamental to all hard science as well as continental law (Hernàndez Marcos 2009, pp. 70–71). Natural law scholars Grotius and Pufendorf followed suit. Grotius, rejecting both *ius commune* and canon law, defined natural law as the rule and dictate of right reason, with the source of right reason ultimately being God, thus further separating the law of man from the law of God, while still endorsing kings' (and thus governments') absolute power (Grotius [1738] 1950, p. 250). Pufendorf pushed for the scientification of law and transformed natural law theory into an academic subject, arguing that human conduct can be governed by formal rationality and that private law should be organized into a rational, secularized system.

Though politics and law were one and the same before the seventeenth century, because of influential thinkers such as Descartes, Grotius, and Pufendorf, by the eighteenth century, the theoretical science of public law was based on deductive reasoning. It was now separate from the practice of politics (i.e., ways of making government effective) (Nedzel 2020, p. 62). In *Les Lois Civiles Dans Leur Ordre Natural* (1689), Domat [1689] (Domat [1689] 1850) formulated the pattern for most Civil Codes with sections on family law, property law, and obligations. His work tied Roman law, Christianity, and deductive logic together; for both Domat and Pothier, law was still a science built from centuries of experience. The French Enlightenment brought changes not so much to the substance of law (e.g., Napoleon's Code tied together the Roman heritage plus customary (local) law (Batiza 1984)), but it brought significant changes to the conception of law and the understanding of what constitutes a well-structured government—i.e., it led to the rise of democratic, constitutional republics.

The Enlightenment saw itself as presenting a new, clear vision of man and his relationship to the world, transferring belief in religion to faith in the new scientific reasoning. Enlightenment writings included constant metaphors to light or science. Instead of God, whatever question one had, nature and Cartesian reasoning would reveal the answer and lead to a more perfect society (Becker 1932, p. 53) To the French Enlightenment, preexisting legal systems were both irrational and dysfunctional because they lacked a unitary structure that could guarantee a uniform and equal administration of the law. The Philosophes saw chaos, dysfunction, and corruption in the multiplicity of administrative authorities (feudal, military, ecclesiastical, fiscal, local, royal) and in the judicial system. French courts' jurisdiction overlapped, causing contradictory decisions; they lacked a consistent procedure and legal authority. Judges were not held accountable for their decisions, and corruption in the judiciary was widespread. The Enlightenment view became that the proper judicial function was a mere mechanical application of appropriate law to given facts, not requiring any stated explanation of why or how the law applied or whether the purpose of the law would be accomplished by applying it.[3] This mechanistic view of how judicial decisions are

[3] Nedzel (2020) at p. 64 and sources cited therein.

reached remains in civilian jurisdictions to varying extents—less so in Switzerland (because of its federal structure) and Germany—nevertheless, civilian judges are generally accorded a status similar to that of civil servants, not the exalted status they enjoy in common law jurisdictions. Civilian trial procedure remains judge-driven rather than adversarial.

Enlightenment thinkers on both sides of the English Channel endorsed what became the driving ideas of liberal culture: individual rights, the rule of law, republican (limited) government, toleration, and a free market economy (Capaldi 1998, pp. 349–51). However, they had two distinct and competing views of human nature. On the Continent, as initially posited by Helvétius and then endorsed by Bentham, the alleged essential truth about human psychology is that every individual is by nature governed by rational self-interest, and his or her response to environmental stimuli is to maximize pleasure and minimize pain. The Scottish Enlightenment, however, posited that enlightened self-interest implies that human beings can manage their own affairs without government interference and are responsible for their actions and the consequences thereof; thus, they posited a society of free competition and trust in the reason of the common man. Voltaire and the French Philosophes similarly adopted Locke's view that man should conquer nature but rejected the Scottish enlightened self-interest and instead supported a social technology that could solve all social and political problems. They eschewed limited government and, in its place, conceived of the following five political views:

1. Human beings are basically good, and the goal of human existence is happiness in this life (not in heaven);
2. The institutional practices most compatible with human happiness include the liberal culture of individual rights, market economies, the rule of law, and tolerance;
3. Human beings should be understood mechanistically: evil behavior is exclusively the result of external forces and the environment;
4. Social technology can control external forces and create a utopia;
5. Society is a hierarchical structure best served by a powerful and authoritarian state supervised by experts.

In place of absolute monarchy and its dysfunctional institutions, French Enlightenment thinkers proposed not just the liberty, equality, and fraternity of a democracy, but also the belief that human existence had a common destiny and therefore it was necessary that everyone be involved in politics. The *Philosophes* adopted (or thought they adopted) many of Rousseau's ideas: Law should be legislated in accord with Rousseau's *Volonté Generale*, the General Will, which he defined as the unanimous decision that people would reach if they properly ascertained the common good (Rousseau 1762, p. 24). Freedom, for Rousseau, was ridding oneself of considerations, interests, preferences, and prejudices, whether personal or collective, which obscure the objectively true and good. "The general will ultimately become a question of enlightenment and morality, a drive to create harmony and unanimity, so that the whole aim of political life was to educate and prepare men to will the general will without any sense of constraint. Human egotism must be rooted out, and human nature changed."

Rousseau believed that man must be forced (by the state) to regard himself not as a unique individual responsible only for himself, but as a being who functions in harmony with society (Talmon [1952] 2021, pp. 38–42, 48). Ideally, individuals join together through a tacit social contract, submitting themselves to the authority of the general will in a society of equals (Rousseau 1762). The state, when it has succeeded in disciplining mankind to comply with the general will, will have achieved its purpose. He argued that a government's duties included protecting its people, preventing the extreme inequality of fortunes by shielding citizens from becoming poor, keeping plenty within the reach of individuals, and remaining vigilant in restoring or maintaining patriotism and good morals (Rousseau 1755, p. 18). The existing laws, as Rousseau saw them, were an instrument the rich used to exploit the poor (Talmon [1952] 2021, p. 51). Rousseau's sovereign was the externalized general will; to become a reality, it must be willed by the people and if the people do not will it, then

they must be made to do so. (Though he never fully explained *Volonté Generale*) (Capaldi and Lloyd 2016, pp. 19–23).

Rousseau was very uncomfortable with personal property and the Scottish Enlightenment's belief in the free market (though that discomfort did not manifest in the early French republics), famously stating that "[t]he first man who, having enclosed a piece of ground, bethought himself of saying *This is mine*, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not anyone have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor." (Rousseau 1755, p. 161).

Rousseau was also very concerned with inequality and believed that all forms of government (monarchy, aristocracy, democracy), were products of the differing levels of inequality in their societies and would lead to ever worse levels of inequality until overthrown by a revolution and the emergence of new leaders (Rousseau 1755, pp. 181–86). One can understand his concern, given the rigid class distinctions among France's three estates (aristocracy, clergy, and everyone else). A member of the third estate himself, one can understand the anger underlying the following quote attributed to both Rousseau's friend Diderot and Jean Meslier's *Testament* (1725): "Man will never be free until the last king is strangled with the entrails of the last priest."

The *Philosophes* generally held that legislation must then be enforced by the state and (simply) applied by the judiciary in accord with their understanding of Montesquieu's separation of powers. They also saw history as both universal and progressive. The 1789 *Declaration of the Rights of Man* shows the Enlightenment values of equality, liberty, property, security in one's person, and so on, rights that had not previously been recognized or enforced in France, but it was not clear that it was part of foundational law, because it was not legislated. It announces that "Men are born free and equal in rights. Social distinctions may be based only on common utility," starting with liberty, but focusing on equality and the expurgation of class distinction and less on liberty, consistent with Rousseau's *Social Contract*. In contrast, the 1776 *U.S. Declaration of Independence* starts with equality but quickly focuses on liberty: "All men are created equal," and the purpose of government is to protect the individual right to "life, liberty, and the pursuit of happiness."

In 1789, when Louis XVI summoned the Estates General in an effort to avert an economic crisis, many of the representatives of the third estate left the (unsuccessful) meeting to gather on the Tennis Court, and so the Revolution began. At first, a constitutional monarchy was created with law-making power transferred from the king to the legislative body with the King having a constitutional veto. However, the poorest were still disenfranchised in the bourgeois effort to create a balance between a new society and stability, and so finding that the Revolutionary purpose had not been fulfilled, the *sans-culottes* expelled the Girondists, leading to the Jacobin take-over and the reign of terror (Talmon [1952] 2021, pp. 78–79). The theory that drove Jacobinism was that the Revolution opened the way to a natural rational and final order of things; Robespierre was convinced that the people's will, if allowed complete expression, would prove identical with the true general will, a true, absolute, and universal morality. To Robespierre, the British system with its separation of powers was a fraud and a plot against the people. The Revolutionary aim was to extirpate tyranny altogether and let the people rule, "Let the people speak, for their voice is the voice of God, the voice of reason and of the general interest!" (Talmon [1952] 2021, p. 105). To the Jacobins, the general will was realizable only in the collective experience, and mere acquiescence was vicious egotism: "The factions are the most terrible poison of the body politic, they put the life of the citizens in peril . . . ; it is force that makes law . . . . In dividing the people the factious put party fury in place of liberty." (Talmon [1952] 2021, p. 116, quoting St. Juste)

The Jacobin constitution of 1793 guaranteed "to all Frenchmen equality, liberty, security, property, the public debt, free exercise of religion, general instruction, public assistance, absolute liberty of the press, the right of petition, the right to hold popular assemblies, and

the enjoyment of all the rights of man." (Capaldi and Lloyd 2016, pp. 61–62). However, it was never instantiated. Its democratic perfectionism with regard to plebiscitary approval of Legislated law and the people's right to resist oppression lead directly to anarchism and inverted totalitarianism based on a fanatical belief that there could be no more than one legitimate popular will. (Talmon [1952] 2021, p. 104). No dissent from the Republican government's view could be tolerated: not only traitors, but also the indifferent and the passive must be punished. (Talmon [1952] 2021, p. 114). Robespierre decided that the aim of his revolutionary government was to found a constitutional regime, but that could be established only in conditions of peace. As that did not exist at the time, France should be governed by Committee, and thus was created the anachronistically entitled the Committee of Public Safety (*Comité de Salut Public*) and the Terror began. (Talmon [1952] 2021, pp. 118–27). The instability ended only with Napoleon's rise, but the theories remained that the purpose of government is to improve people, and that law is created top-down by the government.

After the French Revolution, legislation became the primary source of law, as that was the closest method possible to replicate a general will. The Enlightenment (and of course Napoleon) led to the proliferation of Civil Codes, designed to be a body of private law logically and rationally organized and universal in nature, so it was portable. France's Civil Code was based on a combination of local customary law and Roman law, but different countries developed similar Codes. The codification movement was heavily influenced by the ideas of the times, initially those of Jeremy Bentham. They were adopted by legislatures and replaced all previous laws. As they and other legislated laws were the solemn expression of the legislated will, they could not be changed or avoided other than by the legislature itself. No independent review was necessary or allowed, as they represented the General Will.

While many things changed because of the Enlightenment and some things have changed since the Enlightenment, concepts that have persisted in the Civilian Tradition include the focus on rationality and a scientific approach to law, the concept that legislated law is the expression of the people's (general) will and a collective good, and the belief that the purpose of government and law is to control and improve society.

3.2. The Rise and Fall of Rechtsstaat

Rechtsstaat or *L'État de Droit*, which is most accurately be translated as *Rule Through Law*, describes the relationship between the state and humankind in the Civilian Tradition. Immanuel Kant, though he did not use the term, is regarded as the spiritual father of the concept as he defined the state as the union of a multitude of men under laws that are grounded in reason and which protect equality, freedom for all, and individual autonomy (Heuschling 2002; see Kant's Social and Political Philosophy 2022). Kant's conception was that man should never be treated merely as a means to an end, and the government's powers should be limited so as not to interfere with individual freedom—i.e., what is now described as negative rights. However, the concept as popularized by Robert von Mohl in 1844 differed: Von Mohl believed that the state should comply with the law and the state's purpose was to promote an individual's complete development. Under this conception, governmental authority had no specific limitations, and its primary purpose was to serve the people's interest by promoting positive, listed rights. Von Mohl's vision was in turn superseded by Georg Jellinek and R. von Jhering, who founded *rechtsstaat* on three concepts: the state must limit its own powers, rights were subjective in that the state established them by means of its authority (they are not inalienable to the individual), and the state has primary status. Individual rights were neither of a pre-political origin, nor of a religious nature, nor based on any universal natural law.

Jhering, like many legal scholars of the late eighteenth and early nineteenth century, was influenced by the utilitarian movement, founded by eighteenth-century philosopher Jeremy Bentham (DiFilipo 1972). Despite being English, Bentham endorsed the Continental, specifically French, intellectual tradition. A long-standing critic of Blackstone and English

judge-made law, Bentham strongly supported the codification movement because he believed that a Code would make law complete, internally consistent, simple enough for a common man to understand, and universal, a goal consistent with that of the Philosophes. However, he is primarily known as the founder of utilitarianism and positivism. The utilitarian principle is that an action is right insofar as it promotes happiness, and the greatest happiness of the greatest number should be the guiding principle of conduct (The History of Utilitarianism 2014). Bentham sharply criticized natural law as fiction because he argued that it blurred the distinction between law as it is and law as it ought to be (Hart 1958).

Jhering, known as the "German Bentham" (Von Jhering [1913] 2009, pp. xix–xxii, 33, 409) assumed that law is and should be instrumental, even titling his work to that effect—in translation, "Law as a Means to an End." Jhering's work, like Bentham's, was grounded in utility, but he rejected both Locke's (and Blackstone's) consent theory of law and what he saw as Bentham's individualism, arguing instead that his own views were based on psychology, that the state does and should use a system of punishment, reward, and coercion to improve society, and that man owes duties to the state. The Continental attitude toward Anglospheric law, at the turn of the 20th Century was that the Lockean consent theory of government was "wabble."

In addition to the consent theory being "wabble," the Vienna Circle in their 1929 *Postivist Manifesto* explicitly asserted that a scientific world view should influence the forms of personal and public life, in education, upbringing, architecture, and the shaping of both economic and social life (Sarkar 1996; Discussed in Nedzel and Capaldi 2019, p. 169). For positivists, normative statements (statements of morality) are not empirically true. At best, they are expressions of subjective preferences. Thus, all traditional sources of moral authority are illegitimate, including Christianity and its theology of natural law because statements about God or religion are neither empirically true nor empirically false and therefore can be dismissed. Even secular versions of natural law theory presume some sort of universal human telos can be dismissed because they cannot be empirically proven.

Positivism spread among German theorists, but there was no agreed-upon understanding of it, until Hans Kelsen, who had studied Jellinek's work, denounced both post-natural law theories and *rechtsstaat* as shams and political values that would eradicate the science of law—and indeed, by the time of the Weimar Republic, *rechtsstaat* was so formalized and denatured by positivist theory that one could accurately have described it as a magic box out of which a jurist could produce anything wanted (Heuschling 2002, p. 154). In 1934, Kelsen first published his *Pure Theory of Law*, wherein he tried to explain the universal nature of law objectively. In it, Kelsen described law universally as a science (though distinct from physical science) based on a pyramid of norms (not moral principles), culminating at the top in a hypothetical norm that he termed a *Grundnorm*. As Kelsen described it, a *Grundnorm* is a foundational postulate that is assumed, an epistemological choice that provides an understanding of the legality of a state's constitution and therefore of its entire legal order. Thus, Kelsen's work was an attempt to deduce the law's universal hidden structure, paralleling the kind of explication that is used in nuclear physics and other hard sciences. Every legal system has its one basic norm, according to Kelsen (Raz 1974). Kelsen's structure, in which an inferior norm cannot contradict a superior norm, means that if an inferior norm (or law) contradicts a superior norm, then the inferior norm must be corrected or removed.

During the time Kelsen started writing and before he was removed from his professorship at the University of Cologne by the Nazis in 1933, the Weimar Republic (1918–1933) governed Germany problematically: stiff reparation payments following the First World War led to hyperinflation along with high unemployment and social and political unrest.[4] Moreover, the constitution had serious weaknesses. It did not ban political parties whose aim was to overturn the constitution; it listed a number of rights, but they were expressed

[4] "The Weimar Republic" and "Article 48" in the Holocaust Encyclopedia (U.S. Holocaust Memorial Museum) at https://encyclopedia.ushmm.org/content/en/article/the-weimar-republic (accessed on 25 September 2022)

in terms of principles, not inviolable rights that the government was obligated to enforce, and it set the bar for a no-confidence vote very low, which led to frequent dissolutions. The provision that proved disastrous, however, was Article 48 which gave the president the power to take any step necessary to restore order and defend the German people. The public's political and economic dissatisfaction led to the rise of the National Socialist German Workers' Party (the Nazi party), which then used Article 48 to establish Adolf Hitler's dictatorship.

While the horrors of World War 2 led to the fall of the Nazi party and a world-wide concern that future republics be insulated against genocidal dictators, legal positivism remained prominent. As H.L.A. Hart, influenced by Kelsen, described legal positivism: (1) laws are commands made by and enforced by human beings (a rejection of natural law); (2) law and morality—the *is* and the *ought*—are not necessarily related; (3) the study of law and its (hidden) structure (i.e., the theory of law) differs from the study of the history or sociology of law or the study of the function, aims, or moral value of law; (4) a functional legal system is one where correct decisions are deduced from predetermined legal rules; and (5) unlike law, moral judgements cannot be established or defended by rational argument (Hart 1958, pp. 601–2). The political dimension, not the moral dimension, is the basis of law.

3.3. Post-World War 2, Rechsstaat Is Reborn, as Is Legal Philosophy—Or Is It?

After World War 2, Germany reinvented itself, including specific values in its foundational documents, foundational principles that had not previously been stated. Kelsen's work convinced a number of law makers that a judicial review of legislation was necessary to make sure that new legislation was within constitutional boundaries, and that in fact such review was authorized by the innate deductive structure of law. In fact, Kelsen included a form of judicial review in the constitutions he drafted for Austria and Czechoslovakia before Hitler took power (Wolfe 1994). After World War 2, a number of countries similarly created constitutional courts and looked for other ways to instill limitations on governmental power. Germany's federal constitutional court held that the new German Fundamental Law (*Grundgestez für die Bundesrepublik Deutschland*) included *rechtsstaat*, which is now defined as including two components: 1). A formal *rechtsstaat* which focuses on guarantees of legal supremacy and checks on state power, and the substantive *rechtsstaat*, which guarantees fundamental values such as basic rights (Heuschling 2002, p. 154). The concept of self-limitation as well as the concept that it is the government, a political entity, that grants individual rights, as developed under Jhering, has been eliminated, with the intent to return to the concept as originally developed by Kant.

However, tension between the Fundamental Law's socialist values as stated in Arts 20 and 28 of the Basic Law and individual liberties remains. Article I mandates that while the state must protect human dignity and human rights, a citizen owes duties to government and society, duties that implicitly limit individual liberty. The Fundamental Law requires that the state provide social welfare benefits to remedy social inequality and "balance or correct the unfortunate effects of a market economy." It also provides that individuals are both dependent on and committed to the community; thus, while the state must guarantee and nurture an individual's dignity, that is within the constraints of social solidarity and responsibility. Thus, these concepts show an inheritance from Rousseau's (and Marx's) discomfort with market economies, as well as a continued acceptance of a version of his General Will and its manifestation as being expressed in legislation. Law is still assumed to be something developed by the government and governmental experts and which should be part of a coherent, deductively organized system.

3.4. Post-World War 2 Positivism—Kelsen to Hart

By the late 19th century, positivism and the progressive movement were influencing American jurists. Realists such as Oliver Wendell Holmes, Jr. seemingly rejected positivism, arguing that "the life of the law has not been logic: it has been experience" (Holmes 1881),

but they nevertheless unquestioningly accepted legislative supremacy, a view that reflects positivism more than it does the common law tradition that typically looked on legislation with suspicion and interpreted it narrowly.[5] Post-World War 2, as will be discussed in Part 3.2, Lon Fuller rejected legal positivism as providing a mechanistic and formalistic vision of legal reasoning, and that the positivist insistence on the distinction between *is* and *ought* shows an indifference to the moral status of law, both of which led to Germany's missteps. However, Oxford Don H. L. A. Hart (1907–1992) rigorously rejected this argument in a long series of famous debates with Fuller, a Harvard law professor, whom he (mistakenly) assumed was promoting traditional natural law.

Hart's positivist theory of law had little in common with the Lockean view. Instead, using exploration to hypothesize the hidden structure of law, Hart's position reflects the Enlightenment Project's view of the relationships among law, government, and society:

1. Human beings are basically good, and their ultimate goal is happiness in this life;
2. The goal of legal philosophy is to derive institutional practices that are most compatible with liberal culture;
3. Human beings are to be understood mechanistically, i.e., evil is exclusively the result of a corrupting environment;
4. Social technology can create a utopia by controlling that environment;
5. Society is best served by a powerful, authoritarian state run by experts (Capaldi 1998, p. 351).

Hart's best-known work, the *Concept of Law* (Hart [1961] 2012), combined Kelsen's theories and views with Jeremy Bentham's, thus continuing the expansion of legal positivism. Though Hart's and Kelsen's theories differ somewhat about the nature of law, they both developed theories about a universal hidden structure of law. While Kelsen insisted that positive law theory should be limited to jurisprudence itself, Hart expanded it to incorporate ideas from philosophy and sociology (Culver 2001). H.L.A. Hart studied classics at Oxford, became a barrister, and practiced for 8 years before World War 2 during which he served with British military intelligence and became interested in philosophy through ties at Oxford. After the war he accepted a teaching fellowship in philosophy at Oxford, and from there was elected Professor of Jurisprudence and given a fellowship at University College, where he wrote *The Concept of Law*. Unlike Kelsen, he did not posit a structured pyramid of law, wherein every law has a place. His theory about the hidden structure of law and legal positivism was simpler but still structured: he posited that there is a distinction between primary and secondary legal rules present in every legal system. Primary rules govern conduct, while secondary rules govern procedural methods by which primary rules are enforced (Hart [1961] 2012). Hart posited that there are only three secondary rules: (1) a "Rule of Recognition"—the rule by which any member of a society may discover what the primary rules are and be assured that they are legitimate (echoes of Kelsen's *Grundnorm*); (2) The Rule of Change—the rule by which existing primary rules might be created, amended, or deleted; and (3) The Rule of Adjudication—the rule by which a society determines when a rule has been violated and allocates a remedy. He divided primary rules into two kinds: rules that delineate duties, and rules that grant powers.

Hart still adhered to the positivist view that that law may, but does not necessarily, adhere to conventional morality (Hart [1961] 2012, pp. 185–86). Writing during the upheaval of the 1960s and its conflicts between individual freedom and legislation aimed at wealth redistribution or freedom of expression and concerns about maintaining public standards of decency, Hart argued a distinction between the existence of legal or constitutional liberty and its value to individuals (Hart 1955, p. 53). So, under this view, a law securing freedom of the press that is written so as to be universal does not have a universal effect because it is meaningful only to those who are literate or who have access to books and newspapers, or who have the time to read them (MacCormick 2008, pp. 21–22). Those who own or control newspapers and publishing houses or the media have even more access to this freedom.

[5] See discussion of legislative supremacy infra lines 1271–1276.

Thus, Hart was arguing that classical liberalism should be revised by superimposing on it a social democratic strategy aimed at narrowing the inequalities in the actualization of liberty—very much a socio-democratic viewpoint, one that implies that the purpose of law and government is to improve society and is therefore consistent with the civilian tradition. Consistent with the positivist tradition, he separates law from morality, saying that any morality in law is brought in through politics because morality is subjective and cannot be scientifically derived, therefore it should be left to politics and excluded from any exploration of a legal system.

3.5. Analytic Philosophy, Rawls, and Dworkin

As the 1960s faded into the 1970s, positivism was replaced by analytic philosophy, a related view, as exemplified in Rawls' and Dworkin's writings about the philosophy of law. This view recognizes norms as substantive entities instead of political chimera, but those norms cannot be factually established, and the hidden structure of norms cannot be separated from substantive political views (Capaldi 1998, pp. 367–72). For example, John Rawls (1921–2002) in "A Theory of Justice" (1971) explored the alleged hidden structure behind justice in an effort to modify people's preconception of what it means, calling his method "reflective equilibrium." (Rawls 1971, pp. 46–53). Rather than explicating common experiences that individuals describe as "just" or "unjust," he leaves meaning and definition questions aside to develop a "substantive" theory, starting from a hypothetical neutral position that he describes as "behind a veil of ignorance."

Rawls was aware of the divide between Locke and Rousseau and brought normative thinking back from its positivist exile (Capaldi and Lloyd 2016, pp. 172–75). According to Rawls, no one deserves what they have regardless of how they acquired it (thus dismissing Locke) because we are all entirely products of the genetic lottery and historically accidental family circumstances into which we were born, thus the resentment children feel (and which Rousseau discusses in *Emile*) is justified (Rawls 1971, p. 540). As that is the case, we must have some form of redistribution because otherwise the powerful will always impose on the weak. So, starting with Rousseau's assumption that no social order is legitimate unless founded on an original unanimous consent to procedure, Rawls postulated his hypothetical original position in which individuals, entering society naked and giving up all claims to previous property and advantages, choose principles of justice from "behind a veil of ignorance." He posits that everyone's well-being is dependent on cooperation without which no one could have a satisfactory life.

Rawls claimed his work was informed by Kant's, but his view of individualism differs significantly from Kant's. Rawls, like Kant, argues for the primacy of liberty in his two principles of justice. However, Kant argued not only for fundamental human autonomy, but he also argued that redistribution treats persons as a means for the good of others (rather than as an end in themselves), and he argued against determinism and the view that justice was in any way concerned with self-fulfillment (Capaldi 1998, pp. 369–72). Rawls contends that the most important primary good is self -esteem and that self-esteem depends on our seeing ourselves through the eyes of others, which is the exact opposite of Kant's view of individualism and personal autonomy.

Rawls further posits that there is a pre-determined understanding of what is good for society, and that is justice, which is purely procedural to "nullify effects of special contingencies" that often encourage people to exploit others for their own advantage, thus causing discord. The further implication of Rawls' view is that all individuals, under the appropriate conditions, will make choices that lead to a cooperative and peaceful society—in essence, he restated Rousseau's General Will. He developed two principles of justice: (1) each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all, and (2) social and economic inequalities are to be to the greatest benefit of the "least advantaged." The latter he describes as the Difference Principle, which is a substantive end to be achieved by eliminating diversity (Capaldi 1998, pp. 369–72), and which is a response to socialist

concerns about equality. In other words, for both Hart and Rawls, the government's role is to "equalize" inequalities in liberty and redistribute wealth to help the downtrodden.

Modern French economist Thomas Piketty in his 2014 highly influential book, *Capital in the Twenty-First Century* supported Rawls' "difference principle." He starts his book with a quote from the French 1789 *Declaration*: "Social distinctions can be based only on common utility," that the purpose of the *Declaration* was to achieve a just social order, and he argues that high degrees of inequality are unjustifiable, quoting Rawls' in a footnote (Piketty 2014, p. 631, fn. 21): "Social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular the least advantaged members of society." Thus, though Rawls intended to prioritize liberty, ultimately, he (like Piketty) believes that justice lies in remedying societal inequalities.

Dworkin justifiably argues that Rawls never established the priority of liberty, and that "damage to self-respect that comes from seeing others better off in the social structure is such a malign influence on personality that people at the bottom can't really be better off overall, even if they're materially better off."[6] As Robert Nozick says, implementing Rawls' theory would require continuous governmental interference in the lives of individuals, and is thus counter to the very liberty Rawls claims to support.

Ronald Dworkin (1931–2015) is the next and best known of the Analytic (legal) Philosophers. He graduated from Harvard summa cum laude in philosophy in 1953 and was granted a Rhodes scholarship. Hart read his final exams and found them extremely impressive. Dworkin then returned to Harvard for law school, graduating in 1957, and clerked for the famous progressivist judge Learned Hand on the United States Second Circuit Court of Appeal. He worked for a major law firm in New York City for a few years, and joined Yale's law faculty in 1962, leaving it in 1969 when Hart named him as his successor at Oxford.

Dworkin began his tenure at Oxford by criticizing Hart's work. In *Taking Rights Seriously*, Dworkin rejected legal positivism (Dworkin 1977, pp. 9, 22; see also Dworkin 1986, pp. 34–35, 109, 431 n. 2). He argued that Hart's positivist theory does not consider the quandaries that judges face (Dworkin 1977, p. 22). This first work of Dworkin's claims to set forth a general theory of law. It does not do that but instead discusses and rejects various formulations of positivism, distinguishing among concepts such as "normative" rules and social rules, and it discusses the various ways courts should approach hard cases, using a fictional judge, Judge Hercules, to demonstrate. (His doing so is a clear parody of Lon Fuller's fable of King Rex, whom Fuller used to illustrate eight minimal conditions rules must meet in order to count as law (Fuller 1969). Dworkin roots law in morality, but it is abstract morality as determined by judges (Hercules) informed by integrity instead of custom, precedent, and other such standards. For Dworkin, a true theory of law is a theory of how cases ought to be decided, beginning with an abstract ideal about the conditions under which governments may use coercive force.[7] The norms are still detached from past practice; thus for Dworkin, the law ultimately remains "what the judge says it is."

In *Law's Empire*, his next work still focused on Anglo-American judge-made law, Dworkin again rejects the common law argument that judicial decisions must be grounded in prior reasoning, arguing that judicial "reinterpretation" of prior reasoning cannot be (scientifically) verified as being drawn from prior practice[8]—despite the common law habit of including a multiplicity of citations, all of which a reviewing court checks to verify that they accurately represent established law!

In place of Hart's theory, Dworkin claimed that the controversy is really about morality (Ibid., p. ix). Consistent with positivism, he posits that law and morality are not synony-

[6] Dworkin quoted in (Magee 1982, p. 223).

[7] "Legal Positivism" (Stanford Encyclopedia of Philosophy Plato.stanford.edu, https://plato.stanford.edu/entries/legal-positivism, accessed on 24 September 2022).

[8] (Dworkin 1986, p. 6). Actually, at American common law, under professional rules and penalty of censure, all judges must cite the exact precedent on which they are basing their decision, and those citations are checked for accuracy by reviewing judges and their law clerks, who are themselves also attorneys. So, contrary to Dworkin's assertion, judges' reasoning not only *can*, but also *is* habitually confirmed as being drawn from precedent.

mous, in part because what people posit as moral is at times immoral, so in truth he is modifying positivism, not rejecting it. Dworkin focuses on two principles of political integrity in describing the proper way to make and view authoritative law: a legislative principle which requires that lawmakers make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be interpreted as coherent to the greatest extent possible (Ibid., pp. 176–77). He argues that this "integrity" would not be needed in a utopian state, but because government officials do not always do what is just and fair, integrity can require us to support legislation that might be inappropriate in a perfectly just and fair society and to recognize rights we do not believe people would need to have guaranteed in a utopia. Thus, like Hart, he justifies legislation that "puts a foot on the scale" in order to realize what he postulates as fair and equal liberty.

Using his "law as integrity" theory, Dworkin posits that judges should assume that the law is structured by a coherent set of principles about justice and fairness, and that they should enforce these two principles in every case that comes before them (Ibid., p. 243). Thus, both Dworkin and Hart, in keeping with civilian tradition, regard government (and law) as institutions that should be used for what some governmental entity perceives as the betterment of society, i.e., an enterprise association (in Oakeshott's terms).

The next question, therefore, concerns the nature of justice and fairness according to Dworkin. Dworkin emphasizes that he sees the underlying principle of Western law to be a "right to equal concern and respect," which supersedes the "so-called right to liberty." (Dworkin 1977, pp. 180–83, 272–78). Following up on the meaning of phrase, does equal concern and respect refer to equality before the law or economic equality, according to Dworkin? (Nedzel 2020, pp. 138–39). Does it refer to law as instrumental or non-instrumental? On these issues, Dworkin is initially ambiguous. At first, in *Taking Rights Seriously*, he seems to refer primarily to equality before the law: "the doctrine of precedent serves equality of treatment before the law."(Dworkin 1977, p. 37) However, when talking about rights, he accepts collective goals such as economic redistribution, consistent with his criticism of Rawls: "a community may aim at a distribution such that maximum wealth is no more than double minimum wealth;" and "[g]overnment must, of course, be rational and fair; it must make decisions that overall serve a justifiable mix of collective goals . . . ." This acceptance of instrumental, collective law—particularly when he discusses his rejection of the implied-consent view of government—shows Dworkin's view of law as something aimed at improving society and thus in line with traditional civilian thought (and oriented towards socialism): "our aim . . . is to develop a theory that unites our convictions and can serve as a program for public action." (Ibid., p. 175).

Dworkin's views are also consistent with Germany's view that citizens have political obligations: "Integrity . . . insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity, therefore, fuses citizens' moral and political lives . . . ." (Dworkin 1986, p. 189). In order to take rights seriously, we must first have a deep theory of "human dignity" and "political equality." Over time, Dworkin clarified his belief that a legal system must reflect a community's "particular overriding goal," and that this collective goal (echoes of Kelsen's *Grundnorm*) trumps individual liberty. Moreover, he makes clear his preference for a government focused on equality qua economic equality/redistribution in his last work, *Sovereign Virtue*:

> Equal concern is the sovereign virtue of political community—without it, government is only tyranny—and when a nation's wealth is very unequally distributed, as is the wealth of even very prosperous nations now is, then its equal concern is suspect. For the distribution of wealth is the product of a legal order: a citizen's wealth massively depends on which laws his community has enacted—not only its laws governing ownership, theft, contract, and tort, but its welfare law, tax law, labor law, civil rights law, environmental regulation, law, and laws of practically everything else. (Dworkin 2000, p. 1)

Although Anglo-American educated, Dworkin's beliefs are consistent with the "hidden structure" approach that developed in the Civilian legal system and more specifically with analytic philosophy. While he does not discuss a deductive system of legal principles, he believes that the differentiation between law and everyday morality is important. Moreover, he believes that an overarching theory of law is important and that the proper purpose of law (and government) is to improve lives, with an emphasis on economic (as well as political) equality—a concept still consistent with the Ancient Greek's understanding of law as an instrument to improve mankind. Finally, without any explicit reference to Kelsen, he *de facto* posits that equality should be the *grundnorm* of every legal system with integrity and imbues his views with his underlying socialistic political bent.

In sum, the Civilian Tradition believes strongly that law should be drafted by experts and adopted, interpreted, and enforced by experts, that the purpose of law is to improve society, and that government creates law. Since the Second World War, the civilian tradition has focused on government's purpose being to enforce rights and remedy inequities of various kinds and has recognized that the government's power should be limited. In the period following the War, positivism first reached its heyday under such thinkers as Kelsen and Hart, to be replaced by a related concept driven by analytic philosophy, as exemplified in Rawls' and Dworkin's work. Positivism and Analytic Philosophy have been developed and adopted by legal philosophers on both sides of the Atlantic. Regardless, these two approaches both rely on the creation of scientistic theories and exploration, not on explication. Both approaches invariably end up finding that the ultimate value or *grundnorm* of Western legal society is equality, and the kind of equality that such thinking easily and usually resorts to as the proper aim of a legal system is to remedy economic inequality, as it is quantifiable and verifiable. However, as neither approach can be verified as true, the logical extension of both is the nihilism that characterizes Critical Legal Studies and Critical Race Theory, the next approach developed in and taught by the legal academy.

3.6. Critical Legal Studies/Critical Race Theory/Critical Feminist Theory/etc.

Critical Legal Studies is a logical reaction to scientistic thought such as Dworkin's and was the next movement to gain popularity. It is probably at its peak now in American law schools and elsewhere. In 1977 a group of academics gathered at Harvard Law School to denounce the theoretical underpinnings of American jurisprudence, objecting to Legal Realism, Formalism, Liberalism, "and everything else." Their commitment is to shaping a society based on some "substantive vision of the human personality, absent the hidden interests and class domination of legal institutions." Thus, the CLS movement considers all legal institutions and legal concepts to be illegitimate, having been promulgated by those in power against minorities of all kinds. Its most well-known advocate, Roberto Mangabiera Unger, acknowledges the wide diversity of thinking encompassed by the CLS movement, but states that what is shared in common is that all CLS views challenge society to consider the validity of its own institutions and reconsider the past "ultimate answers" upon which those institutions are based (Turley 1987).

As one might expect, the most direct philosophical antecedent of the CLS movement is critical Marxism founded by the Frankfurt School as an alternative to scientific Marxism: critical Marxism abandoned the scientific Marxist belief that socialism would develop gradually as capitalism inevitably fell. Critical Marxists such as Lukacs, Gramsci, and Sartre argued that a revolutionary consciousness can be achieved without waiting for Marx's theoretical incremental collapse.

A dominant theme running throughout CLS scholarship is the belief that legal autonomy is impossible, and ALL legal concepts are the result of exploitative dominance by those in power, and thus that it is all illegitimate. With regard to the positivist/realist/analytic philosophy view that law should become more "scientific," CLS proponents claim that the attempt to move away from what Hart/Dworkin viewed as the inherent bias of judges to a data-oriented, scientific approach using "objective" experts was simply a substitution of "technocratic consciousness . . . to defend the status quo without basing its policy choices

on some utopian vision of the good and just life." They similarly reject with disdain the formalistic, common law view that law as developed over time is fair and impartial and void of politicization, and they reject the classical liberal belief that neutral adjudication is essential in order to protect individual liberty against majoritarian power, charging that this is based on a false vision of "human sociability": the very act of legal interpretation is necessarily contextual and thus value-laden, thus it operates to resist any social change that would alter society's hierarchical structure.

Critical Race Theory is a version of CLS focused on using race and experiences of race to explain social, political, and legal structures and power distribution. Proponents of CRT argue that racism and disparate racial outcomes (such as the high rate of incarceration among African-Americans in the United States) are caused by complex, changing, and often subtle social and institutional dynamics rather than explicit and intentional prejudice on the part of individuals.

They hold that classical liberalism is incapable of addressing fundamental problems of injustice in American society despite the civil rights legislation and judicial decisions in the 1950s and 60s because its emphasis on the equitable treatment of all races under the law renders it capable of recognizing only the most overt and obvious racist practices, not those that are relatively indirect, subtle, or systemic (Encyclopedia Britannica n.d.). CRT proponents are dedicated to applying their understanding of the institutional nature of racism to the goal of eliminating all race-based and other unjust hierarchies, but do not agree on how to do this other than publicizing their claims of racism, nor do they have a vision of what the ultimate result should be.

They begin with the self-evident statement that race is a social construct with no biological basis, but then posit that racism is the ordinary experience of most people of color, an unproven claim. They argue as proof of the institutionality of racism that people of color are on average more likely to be denied loans or jobs than similarly qualified white people, that they are more likely to be unjustly suspected of criminal behavior by police and more likely to be victims of police brutality, are generally imprisoned more often and for longer periods, that they continue to live in impoverished neighborhoods, that predominantly Black and Hispanic neighborhoods receive fewer and inferior public services, including a lack of quality education and inferior medical care.

Supporters of the CRT movement further claim that legal advances apparently intended for people of color tend to serve the interests of dominant white groups instead. As initially argued by Harvard's Derrick Bell, the U.S. Supreme Court's landmark Civil Rights decision, Brown v. Board of Education (1954) was not actually aimed at eliminating segregation in the United States but was in fact was the product of a secret agreement between the U.S. Department of Justice and the U.S. State Department to improve the country's global image, a product of what CRT proponents call "interest convergence." In addition to "interest convergence" evidencing institutional racism, CRT supporters claim that minority groups undergo "differential racialization",i.e., they are periodically stereotyped depending on the interests or convenience of white Americans. Thus, before the 1960s civil rights protests, they were stereotyped as simpleminded and content with segregation; afterwards, they were viewed as natural-born criminals or leeches living off social welfare programs. Like the Jacobin's belief that dissenters should be sent to the Guillotine, CRT supporters believe that nonbelievers are racists and enemies and so no conversation with them is necessary and they can be "cancelled," i.e., excluded from any interaction (Krasne 2020). CRT concepts are interwoven throughout the thinking and actions of the Black Lives Matter and ANTIFA Movements, which led to a great deal of violence in 2014–2019.[9]

CRT is highly influential in American law schools and universities but at the same time is facing strong societal criticism. Critics argue that it is not based on fact, that

[9] (Onwuachi-Willig 2022). Ultimately, it has been shown that the founders of the BLM movement corruptly used the money they were given to purchase mansions for themselves, not to advance their movement.

it is dividing the United States into groups of oppressors and victims, thus increasing rather than decreasing racism; that it is infecting everything from politics and education to the workplace and the military; and that its skeptical and incoherent attitude towards objectivity and truth is nihilistic, dysfunctional, and destabilizing.

One can also argue that CRT assumes the existence of that which it attempts to prove, such things as systemic racism, white privilege, and selective police brutality even in the face of statistics that disprove those claims. For example, award-winning Harvard Professor of Economics Roland Fryer, J.R., who is himself Black and grew up in a poor urban environment, faced a firestorm of criticism for publishing a working paper in which he related statistics that surprised even himself concerning the use of force interactions between people of color and police. His controversial study showed that while Black and Hispanic people were 50% more likely to have interactions with police involving non-lethal, non-shooting use of force than were White people; however, Blacks were 27.4% LESS likely to be shot at by police, thus he concluded that he found no evidence of racial discrimination in officer-involved shootings, implicitly questioning the CRT/BLM demand to defund police. Later that same year he was apparently "cancelled": Harvard determined that he had fostered a sexually hostile work environment in his lab based on some off-hand remarks he made, suspended him without pay for 2 years, closed his lab, and barred him from teaching or supervising students (Casselman and Tankersley 2019). Since then, he has not followed up on the Use-of-Force research, nor has anyone else. Given the firestorm he faced, it is not surprising that no one else is willing to risk their academic career on such potentially politically unpopular research.

Heather MacDonald, a respected conservative commentator, attorney, and author, in her study of the BLM movement, similarly challenges the resulting crusade against law enforcement. Her research found that lies about what happened in some of these incidents are widespread and uncorrected by the media (e.g., Michael Brown was not gunned down in cold blood in Ferguson, Missouri); and that as a result of the BLM movement, officers no longer patrol assiduously, and criminals have become emboldened. Furthermore, she asserts that criminogenic environments in Chicago and Philadelphia show that black crime is not, in fact, the result of poverty and inequality; and the mass-incarceration disproportionality is actually the result of widespread Black-on-Black violence, not racism (MacDonald 2016).

Whether based on truth or not, possibly the best way to test the value of the CRT approach is to see whether its methods and mandated legal changes work. Most recently, in 2020 New York State instituted a "no cash bail" and immediate release policy for a number of listed crimes (including manslaughter, criminally negligent homicide, making terroristic threats, arson, criminal possession of a gun, grand larceny, criminal possession/sale of a controlled substance, resisting arrest, hindering prosecution, etc.), in the belief that minorities were being disproportionately charged (Quinn 2022). Since that time, because of a rash of high-profile crimes in subway stations and tourist hubs, three quarters of New Yorkers identify crime as a very serious problem, although most crime still occurs in poorer neighborhoods, overall numbers may actually be lower than twenty years ago and gun crimes have decreased. Nevertheless, overall crime went up 59% in the spring of 2022, with crimes on the transit (i.e., subway and train) system soaring by 73% (Akinnib and Wahid 2022; Eyewitness News 2022). Crimes for which judges were no longer allowed to set bail increased by double digits in the first $2\frac{1}{2}$ months after the reform took effect, 69.7% of the defendants arraigned on felony charges who were so released had a prior conviction or a pending case, and 30% of those same defendants were rearrested while their case was pending. The overwhelming majority of the victims of crime in NYC are Black and Hispanic, and the crime wave affects their neighborhoods disproportionately. Thus, these CRT/BLM-driven changes (and others like them in other cities) are of questionable efficacy.

Other CLS-driven changes that have proven controversial include the teaching of CRT and a cultural redefinition of gender from male and female to a host of created alternatives (despite the biological reality of only two distinct sexes) from kindergarten through high

school using new school policies, practices, and curricula (Ingraham 2021). Some states have passed laws against these curricula (e.g., Florida, Tennessee), others have adopted them (e.g., California), some parents have sued school districts (Virginia, Tennessee), and some parents have vociferously objected in school board meetings. For example, white parents in Virginia objected to the following excerpt from teaching materials, arguing that it incorporates CRT and discriminates against white people (Dorman 2021): "Since white people are in a state of privilege with regards to Racial issues (meaning they can choose not to think about racial issues that don't affect them), they may respond to the whole discussion of Race with discomfort." Black parents have objected to CRT materials as well. The following is a partial transcript of what parent Kayla Dunn of Idaho stated in addressing her school board:

> I represent myself, my family, I have 5 children ages 2–15 years of age. And I have sat to listen to all the CRT hearings, and I just thought it was time for me to speak up as a woman of color. And so, I thank you so much for the opportunity to speak to all of you today and to make my voice and my family's voice heard because it is very important that you get the other side of this, another perspective. I am here to let everyone know, especially those who are perpetuating the lie that I am oppressed. That I can speak for myself, that I can walk, that I can talk, I can read, I can swim, we are not all the same.
>
> Despite what Joe Biden says, I also understand how to operate computers, in fact my children built their own computers. And I also want to let everyone know that we are also very capable of inventing, that Blacks can build, that we can become Supreme Court justices, that we can lead armies, that we can break Olympic world records, that we can become NASA mathematicians, and can become pivotal to sending the first American astronauts into space, that we can also become the President of the United States for two terms. That's what Blacks can do, and we are not oppressed. We can do all of this because we live in an incredible country, America, that offers . . . limitless possibilities for all people whom are willing to dream and work hard. That is why I LOVE this country and that is why I oppose Critical Race Theory and anything that resembles it.
>
> The single biggest obstacle to success for any person is the limitations they place on themselves. It is also the mental insultment (sic) perpetuated by an infectious political party. I believe in higher education, and I believe that representation matters. Studies show time and time again that higher education equates to higher income. Dumbing down education isn't the answer. And you know what else isn't the answer? Telling Black people that they are inferior by suggesting they are oppressed simply because of their skin color. THAT is discrimination and THAT is racist . . . .. Imagine how awkward . . . that first day would be when a black child walks into a school that is teaching CRT and they don't know if their relationships are authentic or out of pure pity. Imagine how that must feel.[10] . . . I believe that CRT is the new Jim Crow . . . .

In addition to CRT materials, under pressure by CLS-LGTQ thinkers, schools have embraced and, in some cases, actively promoted student questioning and then self-selecting their gender based upon how they feel, using a "gender unicorn" to teach the youngest children, in addition to sexually explicit books discussing sodomy, etc. The American Bar Association argues that such education is a path to better public health because in the past transgender students have been stigmatized and discriminated against (Bittker 2022). The Analytic Philosophy/CLS approach seems to lead to frustrating and sometimes

[10] (Here's Why This Idaho Mother Opposes Critical Race Theory 2021). YouTube has other videos of parents' similar objections, as Google's algorithms seem to be hiding them, they are more easily found by searching YouTube itself.

nonsensical conclusions, but there is another tradition that may provide an alternative and more productive solution, enabling truth-finding and hence justice.

What Kelsen, Hart, Rawls, Dworkin, CLS, and CRT all share is a reliance on exploration: a belief that law and every social practice is to be explained by reference to an initially hidden structure. The belief that this is the correct method of analysis relies on an assumption that social phenomena can be (and should be) explained in the same way we explain physical sciences. This is scientism, and positivism is just one type of scientism. Dworkin rejects positivism, but simply substitutes another hidden-structure theory to explain a universal legal system; thus, he is not rejecting scientism.

All of these thinkers engage in an allegedly social scientific analysis of the social world, promising that once we have access to the initially hidden structure, we can engage in a form of social technology and improve society. The aimed-for social technology is often a form of socialism involving the redistribution of wealth, but especially in view of the CLS-CRT-Fluid-Gender movement, the real problem of hidden structure thinking is that it gives free license for anyone to plug in any political agenda as the purported hidden structure. There is no way to choose among the various hidden structure hypotheses (Rawl, Hart, Dworkin, Unger), no way to verify the truth of what was allegedly hidden. This encourages each new theorist to delegitimate the others by crafting a different hidden structure thesis about the motives and agendas of his or her opponents (Capaldi 1995). **The result is an end to civil discourse, seen (tragically) most especially in the United States, as in the "canceling" of scholars who have presented unpopular views or presented research inconsistent with politically correct views.**

4. The Common Law Tradition

While Dworkin's influence has been felt widely in both Europe and the United States since the 1980s and CLS is spreading, these are not the traditional understandings that common law has had of itself, nor are they the current understanding habitually displayed among judges, attorneys, and the populace in the Anglosphere—and a number of things that can be learned by studying that tradition. This section details the growth and development of the common law from within the context of its culture.

4.1. English History

As with the Civil Law Tradition, the values and assumptions inherent in common law can be traced back hundreds if not a thousand years. In contrast with the civilian tradition, one basic assumption is that governmental powers are and should be limited and are checked by various methods, including by law and by the populace itself. Another is that law is supreme, above government, and it should not be instrumental—in the language developed by philosopher Michael Oakeshott, a government should be a civil association rather than an enterprise association: its proper purpose is to maintain peace, not improve society (Oakeshott [1983] 1999). The common law conception of the rule of law ("and not of men") and hence justice, like the civil law, developed over a long period of time.

Many cultures, such as China's, Russia's, and others still have a top-down pyramidical social structure wherein the lower echelons exist to serve those in the upper echelons, thus discouraging creativity, individuality, and competition (Znawenski 2012). Through the study of linguistic roots, the unique Western focus on creativity and individuality has been traced back to the Indo-European aristocratic egalitarian and warlike culture that spread from the Ukrainian Steppes starting in the fourth millennium to central and western Europe, the Near East, and India (Duchesne 2012). The last such migration was of the "Germanic barbarians" who dislodged the western Roman Empire, conquering the Continent, and then adopted the top-down, centralized, and collective social view and theory-oriented thought prevalent in the pre-existing Roman and Catholic cultures of southern and eastern Europe, thus sublimating the original Indo-European ethos.

In contrast with southern and eastern Europe, however, the Angles and Saxons who conquered England maintained a less-diluted form of the original Germanic ethos, which

rooted its norms in prior practice rather than philosophical or theological theories and first fought to safeguard their personal autonomy, then did so through institutions such as Parliament and the King's Courts, in such documents as the Magna Carta, and finally through a web of contractual relations among a wide variety of groups. Over time, the ethos inherent in the Indo-European culture led to the full expression of individual potential, channeled into a wide variety of economic, scientific, creative, and political pursuits all over Europe, but particularly in England where there was traditionally less focus on collective society and more on individualism.

Roman historian Tacitus contrasted the tyranny of the Roman Empire with the liberty he saw in the Germanic Tribes that ultimately settled in England: while chiefs could decide minor matters themselves, if a matter was important, it would be debated publicly and collectively in a "Husting" or governing assembly of the free people of the community (Nedzel 2020, p. 16). If they approved of a king's proposal, they would brandish their spears; if they disapproved, they would reject it with murmurs, and if they were really unhappy with a king, they would depose him. Law for them was a common possession of the tribe, perpetuated by word of mouth, and so ingrained as to have become regarded as permanent and unchangeable—unless modified in a husting. These habits of the Germanic tribes were gradually abandoned on the continent after Charlemagne created the Holy Roman Empire but remained in England because it was isolated. In short, the Germanic Tribes maintained their original non-Greco-Roman culture only in England.

William of Normandy conquered England in 1066, but instead of making it part of France (which would have relegated him to the status of a Duke), he preserved its identity as a separate kingdom. First, doing so gave him the status of a king instead of a mere duke; second, it produced more income that way (the Anglo-Saxon tax collection system was better developed than its Norman counterpart), and finally, the Anglo-Saxons were more likely to accept his rule. In order to maintain peace and reduce the likelihood of rebellion, William I formally promised to uphold existing Anglo-Saxon laws and customs, though there were significant changes: he introduced a split society with Normans (a dominant minority) imposing some new rules, a new language, and special feudal courts for the French ruling class and ecclesiastical courts in addition to the existing system of courts.

Over time, the two traditions became amalgamated into one, but the English maintained the tradition of periodically requiring that a king agree (sometimes in writing) to certain concessions before being allowed to rule and they continued the tradition of deposing (and usually killing) kings who ruled badly. At least eight English kings succumbed to this "English Disease," as the French described it, between 1087 and 1688, but research discloses few continental kings deposed or murdered during that period.[11] Under the English version of feudalism, even if the king was sometimes regarded as a divinely ordained ruler, he was also expected to follow English law and when he abused his powers, his barons (and others) united and rose up against him. His powers were further circumscribed by the common law that began to develop under Henry II, by three foundational documents that Kings were forced to sign in order to be allowed to rule (the Charter of Liberties, the Magna Carta, and the Petition of Rights), and eventually by Parliament which alone had the power to create new taxes after Edward I created the House of Commons in 1295 (Nedzel 2020, p. 20). On the surface, both England and the Continent eventually did away with absolutist monarchs. However, the continent maintained some form of the notion that the nation was an enterprise association wherein a dominant government's role is to improve society whereas the English have always generally understood themselves to be individuals and the government to be a civil association with no goal other than protecting peace.

Not only were English attitudes towards rulers different from continental attitudes, but so were the attitudes and habits of the English populace. The liberty Tacitus saw continued through the feudal period and developed into individualism. Historian Alan Macfarlane's

[11] Nedzel (2020, pp. 20–21): two French kings (killed by Catholic zealots) one Polish king (killed by a family member) and one Dutch 'king' (William the Silent, 1584, killed for his religious toleration).

research found that the peasant society that existed between Norman Conquest and the industrial revolution of the eighteenth century was very different from that of continental serfs. The English peasants were wealthier, independent, and individualistic as a result of a very different economy, social structure, laws, and political system (Macfarlane 1978, p. 175). Continental visitors to England from the middle of the sixteenth century remarked on their wealth, arrogance, lack of subservience, and that English peasants were "impatient of anything like slavery." (Macfarlane 1978, pp. 173–88). As early as the thirteenth century, there were innumerable licenses to sell and transfer land, indicating a considerable market in freehold properties. Single women could make a will, own property, and enter contracts, and they generally left the family home at adulthood and made their own way in the world, something unknown in continental peasant societies (Macfarlane 1978, p. 131).

The scope of English law was much less intrusive than that of the civilian tradition. For example, in contrast with continental European restraints on inheritance (France still has forced heirship), English men and women could and did (in great numbers) make wills and leave their property to family or other persons as they pleased. Thus, as early as the thirteenth century, children had no automatic inheritance rights and could be left penniless. In explanation, Jurist Henry de Bracton (1210–1268) argued "a citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives." (Macfarlane 1978, p. 103). In addition to having a narrower scope of the law and valuing entrepreneurship, Bracton's work showed the English assumption that a king's authority was limited and that he was himself inferior to the law—in contrast to Justinian's Digest's underlying assumptions. Bracton stated that "the king must not be under man but under God and under the Law, because the Law makes the King . . . for there is no Rex where will rules rather than Lex." Furthermore, "if the king should be without a bridle, that is without the law, they ought to put a bridle on him." (Bracton 1569). Bracton may have adopted some of the deductive thought underlying the continental *ius commune*, but he kept the English attitude toward individualism and limited government. That same cultural inheritance shows up again, in even stronger form, in William of Ockham's and Hobbes' philosophy and later in jurist Sir Edward Coke's decisions and legislation.

The work of fourteenth century English theologian and philosopher William of Ockham again demonstrates English antipathy to theory and abstractions, the early existence of English individualism, and the common law view that governmental authority is limited. Ockham argued against the Catholic adoption of Greek abstractions, arguing that whatever knowledge we have of the world is of singular individual things and persons, but not of abstractions such as "telos." He rejected Plato and Aristotle's philosophy, reasoning that it was inconsistent with Christian theology because it contradicted the free will given by God. Ockham's philosophy was inconsistent with Thomistic natural law and included the right to consent to rules and rulers, the right to self-preservation, and the right to private property, as well as a right to private conscience. He was ultimately excommunicated by the Catholic Church because of his views (Seidenthorp 2014, pp. 309–13; discussed in Nedzel and Capaldi 2019, pp. 64–68), but they were consistent with English culture and habit.

Thomas Hobbes (1588–1679) picked up on Ockham's thoughts concerning the implicit consent of the governed and individualism. During the sixteenth and seventeenth centuries of Hobbes' life, much of Western Europe was awash in religious wars between Protestants and Catholics. Many know of Hobbes' *Leviathan* (Hobbes [1651] 2002, I, xiii. 9) only the quote that without government (i.e., "in the state of nature") life would be "solitary, poor, nasty, brutish, and short," but in fact it masterfully explained Ockham's theory of the social contract as an unspoken, implicit agreement not to interfere with each other's liberty. Other concepts that Hobbes introduced and which became fundamental to liberal thought include the natural equality of all men and the artificial character of the political order, that all legitimate political power must be grounded in the consent of the people, and the understanding of negative rights—that people should be free to do whatever the law does not explicitly forbid (the inverse of the Ancient Greek view) (Manent [1987] 1994, pp. 20–38;

See also Nedzel (2020, pp. 32–33). Hobbes' philosophical insights concerning the limits of reason, science, and religion similarly show the singularly English outlook that values custom and experience (inductive reasoning) over theory. His view was that deductive logic although valuable is incomplete and philosophy must include not just the rational study of the universal, but also the study of causes, and it must include experience.[12] According to Hobbes, we use the ability to recall the past and derive universal truths from experience: "[Out] of our conceptions of the past, we make a future." (Oakeshott [1946] 2000, quoting *Leviathan*). However, because experience is ever-changing, there is no eternal, unchanging, or universal truth and therefore all knowledge is conditional.

In terms of cultural context consistent with Ockham's and Hobbes' views, both Sir Thomas Smith (writing in 1565) and De Tocqueville (writing about the United States in 1835–1840) (De Tocqueville [1835–1840] 2010, pp. 1089–29) noticed the high level of social mobility in both England and the United States. Smith commented that England was a land filled with men who of their own free will agreed to live together, an association of equals based on contract (implicit agreement, not written contract) instead of a kingdom of subjects ruled by a superior monarch (Seidenthorp 2014, pp. 176–78). Sir John Fortescue, writing the century before, noted that the rural inhabitants of continental Europe (particularly France) lived in great poverty likely because they were taxed heavily and regularly assaulted and beggared by royal troops. In contrast, English peasants were an association of free men, held together by mutual contracts (implicit agreement) and protected by the common law, trial by jury, and the absence of heavy taxation and torture (Seidenthorp 2014, pp. 180–83). Fortescue believed that these differences between England and Continental Europe dated back to the ancient Britons and were a result of a combination of England's natural fertility, its limited monarchy, and the common law. Certainly, his observations were consistent with what Alan Macfarlane concluded four centuries later. Fortescue believed there had been no basic sociological changes in the customs in the preceding thousand years or more—and looking back to Tacitus, Bracton, and Ockham, he was likely right.

4.2. The Development of English Legal Institutions and the Rule of Law

From the twelfth to the eighteenth centuries, law and government developed very differently in England because of the periodic and consistent rejection of continental concepts of law and government by entrepreneurial rulers and ruling bodies in addition to philosophers such as Ockham and Hobbes. As discussed above, William the Conqueror agreed to continuing Anglo-Saxon legal customs, though he created separate feudal courts for the nobility. Those of his successors who flouted this tradition and abused their powers often lost both their thrones and their lives, as described earlier. Other successors, however, built on and developed the tradition of limited government, the rule of law, and justice.

4.2.1. Henry I, Edward I, and Henry II

William the Conqueror's son, William II (1060–1100), succeeded his father, but caused problems by violating barons' property rights, oppressing the church, and allowing his soldiers to pillage villages. He was killed by an arrow allegedly fired by one of his own men. His brother and successor, Henry I (1068–1135) was allowed to ascend the throne after signing the Charter of Liberties which formally limited his power over both barons and church officials, and which remains one of England's foundational documents. Henry I also promised to establish peace across England (Hollister 2003). Henry I expanded the royal justice system, strengthened local government, and sternly punished those who violated the king's peace, thus earning the soubriquet "the Lion of Justice." (Green 2009, pp. 242–43). His successor, Henry II, was one of England's most formative rulers, the one who founded both the King's Bench and the Court of Common Pleas as well as the common law with its record keeping, adversarial procedure, and jury system. Because of his quarrel with

[12] After all, Hobbes was Francis Bacon's secretary, and Bacon reformed the scientific method, emphasizing the need to use observation and inductive analysis, in his 1620 work, *Novum Organum*.

his former friend, Archbishop Becket, over separation of church and state property, Henry II also started the English tradition of training attorneys by apprenticeship rather than at universities, rejecting the teaching of the *ius commune* and thus founding English common law. Two of his monumental changes led to the widespread adoption of the jury trial (which had previously been used primarily in Anglo-Saxon courts): (1) royal recognition of the jury as an effective and enforceable fact-finder (a vast improvement over trial by combat or ordeal, commonly used in Europe at the time); and (2) making jury trials available to ordinary people (Plucknett 1956; Landsman 1983). The habit of systematically recording written decisions led to both the Inns of Court wherein apprentices studied them and the habit of judges of researching recorded decisions to determine pre-existing custom and precedent for later decisions (Berman and Reid 1996; Zywicki 2003).

Henry II was an excellent king, but his successor's (John's) foibles led to the Magna Carta, the second of England's three foundational documents. King John had appropriated close family incomes (both his mother's and his sister's), killed (rather than ransoming) hostages, and stole his bride from a French baron, causing a war with Phillip II of France. (He probably would have benefitted from reading the Iliad). He lost both the war and Normandy, and when he demanded that his barons pay additional scutage so that he could challenge Phillip a second time, they refused, forcing him to sign the Magna Carta in 1215 in order to retain his throne. Civil war broke out nevertheless, and John died in 1216 in the fight to retain his throne.

What is generally unknown about the Magna Carta was that it simply restated both pre-existing limits on the crown's power and pre-existing liberties developed by the court system. Among the traditional liberties were the explicit statement that no freeman could be punished except through legal means, the right to obtain a writ of habeas corpus (a demand issued by the Crown) if unlawfully imprisoned, and the right to a jury trial if accused of a crime. The limitations on the king's power included not being allowed to levy taxes without Parliament's approval, not being allowed to delay or refuse justice, and the principle that no one—not even the king—would be allowed to take the law into his own hands (McKechnie 1914). The Magna Carta was confirmed by at least 30 kings after John, each was a solemn assurance that the king would act with regard for the welfare of all subjects and an acknowledgement that the king (as well as his subjects) was subject to the law. While the long progression of kings might not always have kept their promises, the important point is that the English legal system repeatedly reiterated limitations on governmental power.

4.2.2. Sir Edward Coke (1552–1634)

Coke was a contemporary of Hobbes, had an amazing career as a barrister, and left several lasting marks on English legal history and its assumption that government should be a civil association with limited powers. Early on, Coke informed James I that he would have to obey the common law. Having been a prominent prosecutor of the Star Chamber under Elizabeth I, Coke was made Chief Justice of the Court of Common Pleas when James I ascended the throne. In 1607, a barrister was arrested by the archbishop, convicted, and imprisoned for violating the king's authority in defending two Puritans accused of violating Anglican Church law by the Star Chamber. When the King's Court reversed that conviction and James I tried to reinstate it, the question was sent to Parliament to determine if the king had the power to withdraw a case from the King's Court. Parliament asked for Coke's opinion, and Coke held that in accord with common law, "the king in his own person cannot adjudge any case," based on prior law and custom, and Parliament agreed. James I was furious. He believed himself to be an absolute monarch. However, having ascended the throne from Scotland, he was new to England and its ways and demanded that Coke explain himself. Coke stated that under English law and custom, the king may decide an issue only where there is no pre-existing common law principle in place. Where law is already in place, the king cannot sit as judge. James I responded that he, as king, had the prerogative of calling judges to account and that he would always protect the

common law. Coke countered that it was the common law that protected the king, not the other way around. James I accused him of treason, but Coke (though he fell flat on the floor and humbly begged the king's forgiveness) quoted Bracton. James I ultimately relented—undoubtedly because Coke had Parliament's backing and James I was aware of the English Disease.

Coke (and Parliament) continued to be a thorn in James I's side. In 1610, James I overspent his income and tried to raise funds by proclaiming new crimes. In the resulting Case on Proclamations, the Privy Council (of which Coke was a member) answered that the king could neither change the common law nor create new crimes by proclamation without Parliament's approval. Still needing money for military expenses, James I asked Parliament for a substantial subsidy. Parliament approved a yearly allowance of 200,000 pounds; in exchange, James grudgingly agreed to give up the power to collect customs duties and other income sources.

Later that same year, in Dr. Bonham's Case, Coke founded judicial review and stated that the common law limited the power of both Parliament and governmental agencies. When Dr. Bonham, a Cambridge graduate, practiced medicine in London without a license, the Royal College of Physicians had him arrested and imprisoned. Coke found for Bonham on false imprisonment because the statute granted the College the power to arrest someone who had committed malpractice, but it did not give the College the power to arrest someone for practicing without a license and had thus exceeded its authority (Stoner 1992, pp. 48–52). As was observed in Parliament in 1610, "the parliament hath his power and authority from the common law, and not the common law from the parliament, And therefore the common law is of more force and strength than the parliament." In other words, Coke found that the College had violated due process and separation of powers requirements by acting as both prosecutor and judge, and that Parliament, like the King, had limited powers and was under the common law.

James I transferred Coke from the Common Pleas court to the King's Bench in 1612, believing that he would cause less trouble there as the purpose of that court was to protect the king's prerogative and possessions. Coke, however, managed to narrow the definition of treason, a remedy English Kings had previously used to rid themselves of difficult subjects. In 1616, however, because Coke mishandled a case involving adultery and poisoning among the nobility and antagonized nearly every lord in the Privy Council, James I had an excuse to permanently bar him from the bench, but that did not stop Coke. Subsequently elected to Parliament in 1621, he lobbied to have the King's power to grant monopolies limited, for which James I sent him to the Tower for several months (but eventually released him). James I died in 1625, to be succeeded by his son, Charles I. Parliament passed Coke's Statute of Monopolies in 1626.

Like his father, James I, Charles I was also raised in Scotland and believed in the divine and absolute right of kings. He repeatedly angered his subjects in both England and Scotland and breached the common law, as a result of which Coke authored and was instrumental in passing the Petition of Right in 1628, to which Charles was forced to assent as a precondition of any future tax grants. Now on a par with the Magna Carta and the Charter of Liberties, the Petition of Right reiterated no taxation without Parliament's consent, no imprisonment without cause, no quartering of soldiers in subjects' homes, and no martial law in peacetime. Sadly, Charles I continued to ignore the common law and anger his subjects by dismissing Parliament, overspending on disastrous military campaigns, and other acts violating English common law, leading to two civil wars. After a trial in which the High Court of Justice declared him guilty of attempting to "uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people," he was executed in 1649 (Gardiner 1906).

4.2.3. Scottish Enlightenment: Locke, Montesquieu

England did not see peace after Charles I's execution until 1660 with the Restoration, when Charles II, Charles I's eldest surviving child, was brought back from exile on the

Continent. Unfortunately, Charles II (the Merry Monarch) though publicly popular because of his liveliness and hedonism, made several serious political mistakes by seizing his opponents' estates, replacing judges, packing juries, and supporting religious freedom for Catholics against Parliament's opposition. Locke had written in support of religious tolerance in the face of a vehemently anti-Catholic Parliament and had also opposed absolutist monarchy, along with his benefactor, the Earl of Shaftsbury. To avoid possible prosecution, he fled to France in 1675, returning in 1679, and then again to Holland in 1683, remaining there until William and Mary were crowned in 1688. Locke wrote his two treatises on government in the 1679–1683 interim.

Locke's First Treatise refuted the divine right of kings (understandable given his situation), a concept that later became widely accepted in the Anglosphere. In his Second Treatise, Locke posited that man in the state of nature is created free and equal, and that government is founded on the implied consent of the governed. (As is consistent with long-held English habits and customs). He went on to develop his labor theory of property ownership: while land was originally owned in common, man owns his labor, and once he has used his labor to work the land, he is justified in regarding that land as belonging to him—as long as "there is enough, and as good, left in common for others." (Locke 1740, chp. V, para. 27). Liberty is primary: man is endowed with the liberty to follow his own will in all things unless they are proscribed by law. He describes government's end as the preservation of private property and the peace, safety, and public good of the people. The people are sovereign, not the rulers. Government may not impose or raise taxes without the people's consent, and it serves three functions: executive, legislative, and judicial. Consistent with what Coke had posited, to Locke the government (whether a monarch or anybody with executive power) is subject to law, and if it acts contrary to the trust reposed in it by the people, then the power previously ceded to it returns to the people. Thus, he allows that a revolution may be justified. Consistent with English themes, for Locke the law is supreme, and a tyrannical government can be overthrown.

Sir William Blackstone (1723–1780), whose work was subsequently targeted by Bentham, became known for his Commentaries on the Laws of England, which was used as the authoritative source on common law for almost a century and the primary work studied by lawyers in the nascent United States. The very first chapter of his Commentaries deals with free individuals' absolute rights, while the last chapter discusses the rise, progress, and gradual improvement of the laws of England. His intended audience was future leaders being educated in English universities, and his aim was to replace the university and clerical emphasis on civil and canon law with common law. Going back to Tacitus, he notes the origin of common law in Anglo-Saxon sources predating the Norman Conquest and emphasizes continuity as the source of political liberty. He stressed the extent to which law evolved through the wisdom of generations, and that such evolution is more effective and just than beginning anew: "We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant" (Blackstone [1765–1769] 2016), thus building on Hobbes' empiricism.

Montesquieu wrote one of the most important inductive studies of English law by an outsider in Spirit of the Laws (1748, see Montesquieu 1989). A well-read lawyer and landed baron, he spent two years studying England. Like Locke, he does not identify a concept equivalent to the rule of law, but similarly identifies a number of the same mechanisms limiting governmental power: the separation of powers (positing that tyranny results where any two of those three functions are unified in one entity), he approves of the jury, checks and balances in giving the executive a veto over legislation, a legislative override of that veto, and the right of the parties to a lawsuit having the power to object to a partisan judge.

Madison, in Federalist 48, described the Anglo-American concept a bit more accurately: Separation of Powers, as used in the U.S. Constitution, "does not require that the legislative, executive, and judiciary departments, should be wholly unconnected with each other . . . [in fact] unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as

essential to a free government, can never in practice be duly maintained." (Madison 1788b). This explanation is very different from the French conception of complete separation of powers. A clear (an amusing) metaphor for the Anglo-American conception is the hand game of rock-paper-scissors, where no one of the three participants (departments) can remain dominant. On a more serious note, it shows that under Anglo-American legal thought, no one governmental entity has the final word, in contrast with the Civilian tradition – the Supreme Court may have the final word concerning the constitutionality of a legislative act, but the Legislature can then moot that decision with a new law.

4.3. The American Experience—Founding, Limitations, Checks and Balances, Jury Trial

On the surface, the American Revolution and the French Revolution look very much alike. In both countries, the populace adopted Enlightenment ideals and revolted against a King, the French revolution being somewhat inspired by the American Revolution, which took place approximately 13 years earlier. However, here, appearances are deceiving. The French were fighting for things they had never had (liberty, representative government, freedom from Feudal vestiges, equality, and class mobility), adopted the ideas of the French Enlightenment, and shortly after that suffered widespread violence in the Reign of Terror. The Russian and other revolutions followed a very similar course: a short-lived bourgeois/republican government followed by mass violence and unrest and eventually a totalitarian government that re-established civil order. In contrast, the American Colonists were fighting for what they already had or believed they had. Every American colony was self-governed from its foundation, having its own elected assembly and its own courts in addition to a crown-appointed governor and a crown-approved charter (and those self-governing charters had been endorsed by the Stuart kings with their absolutist pretensions) (Nedzel 2020, pp. 90–92). However, the Americans started to object when the English government started controlling trade and demanding that the Colonists pay taxes to reimburse the Crown for its expenses in defending them during the French and Indian war (1754–1763).

The American Colonies had grown rapidly; by 1740, their population was close to 1 million, 1/6th of England. As the Colonies grew and started producing some marketable commodities (tobacco, timber) and purchasing others (tea, molasses and sugar to make rum), so did England's desire for control, income, and respect—none of which the Colonists were willing to give. As far as they were concerned, they had been governing themselves and defending themselves against Indian attacks for over 100 years. While the original assemblies were not particularly authoritative before 1688, after 1713, they began to display sovereign attributes out of necessity: issuing paper currency, raising armies, setting policy, building infrastructure, setting rules for elections and legislators, and taxing themselves to pay civil servants, including the crown-appointed governors. Friction increased rapidly as England started enforcing taxes and duties on tea and other goods, preventing the importation of sugar from non-English colonies, and declaring local self-governing bodies void after acts of rebellion such as the "Boston Tea Party."

The American character, from its start, was one of self-determination, religiosity, daring, entrepreneurship, and hustle, the characteristics necessary for someone willing to settle in a new, uncharted, and dangerous continent. They were familiar with the common law, and they were incensed when England started enforcing taxes and customs duties because Parliament passed the taxes without giving the Colonists any voice. James Otis, a fiery attorney, popularized the phrase, "Taxation without representation is Tyranny." In 1787, in looking to draft the Declaration of Independence and later the Constitution, they turned to Locke, not Grotius, Pufendorf, or other continental writers. Locke was read widely, in part because he endorsed a right to rebel against a tyrannical government. Other ideas of his were incorporated into U.S. law as well: "were it not for the corruption and viciousness of degenerate Men, there would be no need" for government, whose entire purpose is to punish the evil men in society. Governments only have the power compatible with that end (punishing evil men). They cannot act arbitrarily, depart from established

laws, take anyone's property without his consent, or delegate law-making power to others." Locke's ideas (and other ideas taken from the Scottish Enlightenment) were incorporated into both the Declaration of Independence and the Constitution.

From the beginning, Americans believed that public virtue was an absolute necessity for self-government and that a lack of public virtue led to Rome's fall. It was also widely accepted that direct democracy was inherently unstable, as both Plato and Montesquieu described it because the public is likely to alternate between mob violence and an unreasoning faith in a totalitarian leader. Northern republicans believed, as did John Adams, that they needed to teach their children to value religion, morality, and liberty, and avoid fortune, ease, and elegance to avoid Rome's pitfalls, whilst southern agrarian republicans (e.g., Jefferson and Washington) believed that maintaining public virtue required fiscal independence: owning enough land to provide for oneself and family and having the ability to bear arms to defend oneself. Slavery was the tragic flaw of the United States from its inception[13]—but North and South united in terms of the need for checks and balances to protect against both evil men in government and the inherent tendency for governmental power to increase, something they had seen repeatedly in their decades of self-governance.

As the Declaration of Independence famously stated, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, . . . that to secure these rights Governments are instituted among Men deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . " The Declaration of Independence was described as a promise, the "apple of gold" framed by the silver frame of the Constitution which came later. That Constitution serves the Declaration's promise of "Liberty to all." (Lincoln 1861; see Guelzo 2001). Both documents are foundational to U.S. law.

To limit governmental power, the American Founders relied to some extent on limits they inherited from the common law: the adversarial process, judicial review, and the jury. The adversarial process limits government by demanding transparency in the judging process. Each side presents its case attempting to convince the judge or jury that the other side is less truthful and that the applicable law is in their favor. The jury, if there is one, serves to identify which side is more truthful; it does not pronounce the law—if there is no jury, then the judge decides both fact and law.[14] The judge must ultimately write an opinion explaining his decision, grounding it in established law, which is then verified by at least one reviewing court consisting of (at least) three judges. Judicial review means that courts are charged with reviewing the acts of the legislature and executive regulations to make sure they comply with constitutional mandates—but only in litigated cases where the constitutionality of a statute or regulation is fairly at issue, and private individuals have the power to bring such claims to courts. The jury historically limits both prosecutorial and judicial power in criminal cases (e.g., the O.J. Simpson murder trial). In civil cases, it can check the power of a big-money litigant—the McDonald's hot coffee case is one such example.[15]

The American Founders built additional structural limitations into the U.S. Constitution. To begin with, each branch was given "enumerated" powers—their power was limited to the actions listed in the Constitution, but additionally, each branch could check

[13] However, it must be noted that at the time of the American Founding, $\frac{3}{4}$ of all people on the planet were enslaved, not just Black Americans.

[14] Contrary to the opinion of many outside the U.S. that this is an anachronism, American lawyers and judges find that given modern technology, lawyers and judges can clearly explain both facts and applicable law in a way most juries can understand, and most of the time jurors make the right decision based on the parties' credibility (Nedzel 2009).

[15] A fuller explanation of the McDonald's hot coffee case and this function of the jury in U.S. law is set forth in Nedzel (2020, pp. 108–110); see also *The Truth About the McDonald's Coffee Lawsuit* for an amusing (and true) explanation of the ingenious rationale behind Jury's decision. Available online: www.youtube.com/watch?v=Q9DXXCpcz9E.

the others. James Madison (1788c) explained the reasons for such overlapping powers in Federalist 51:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Other built-in limitations on the power of the U.S. federal government included its compound nature. As Madison indicated in Federalist 45 (Madison 1788a), while a robust federal government was seen as needed to protect against foreign danger and wars among the different states, it would have little power over state governments, which make their own laws concerning all but the small scope of authority delegated to the federal government. Furthermore, the large number of states, with their individual militias, could combine to check an abusive federal government, while the federal government, in combination with some states, could check abusive state governments (as happened during the Civil War and the Civil Rights movement). An electoral college was added to prevent urban, highly-population states from running roughshod over the interests of more rural or agricultural states. In some of the most recent presidential elections won by electoral vote (e.g., Bush v. Gore, Trump v. Clinton), this provision has been questioned—by those on the heavily-populated coasts and urban centers.

4.4. Dealing with Factions: Federalist 10 and Contrast with France

During the two years between the drafting of the U.S. Constitution and its ratification in 1789, writers both for and against the proposed Constitution wrote what has now become known as the Federalist Papers and the Anti-Federalist papers. The former compiles one of the best explanations of the Founders' reasoning. Of these, #10 is one of the most powerful, written by James Madison (1787) based on his understanding of David Hume and discussing the problem of factions, i.e., how to handle the diverse public opinions that can tear a democracy apart. Rousseau and his followers argued that factions should be repressed because there could only be one proper, correct, "general will." Madison vehemently disagreed. He acknowledges that factions can be violent and cause instability, injustice, and confusion in a popular government. We might wish that that was not true, but evidence and experience prove otherwise. He defines a faction as a group of citizens, whether a majority or a minority of the whole, who are "united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens or to the aggregate interests of the community." Another term for factions would be political interest groups. Madison finds only two ways of stopping factions: removing causes or controlling effects.

The first of two ways of removing the causes of faction is to deny citizens the right to disagree, in other words, to destroy "the liberty which is essential" to the existence of factions. Without liberty, there are no factions because liberty is to faction like air is to fire. Madison argues that abolishing liberty to abolish factions is like wanting to annihilate air: while preventing fire, it would also destroy life. The truth in Madison's reasoning can be seen in the consequences of the Jacobins' attempt to abolish factions to establish a "general will"—which led inexorably to mob violence and totalitarian government. Similarly, giving all citizens the same opinions, passions, and interests is just as impracticable as the first is

unwise. As long as man has the liberty to exercise his reason, his reasoning will be fallible, and as long as his reason is connected to his self-love, that will shape his opinions and passions. Furthermore, people's abilities differ, including differences in earning potential, leading to different interests, financial situations, and political opinions. Factions, therefore, are a natural consequence of being human.

Madison continues to consider different kinds of factions and other ways to control them: religious and political differences and attachments to different leaders who compete for power all lead to mutual animosity, and then people aligned with different factions are more inclined to vex and oppress each other than to co-operate for their common good. Sometimes even the most ridiculous distinctions have been enough to lead to violent conflicts, but the most common source of conflict is the unequal distribution of property. Regulating these various interests and preventing any one of them from dominating either judicial decisions or drafting legislation in their favor, says Madison, is the primary task of modern legislation. Unfortunately, we cannot trust that we will have enlightened statesmen who will ensure that one faction recognizes the rights of another. Thus, Madison concludes that we cannot destroy liberty or change man's nature to avoid factions; therefore, we must find a way to control their effects.

Madison then considers ways of doing that. Where a faction with "sinister views" consists of less than a majority, it is not a threat to a regular vote. It may clog the administration or convulse society, but it will be unable to dominate and realize its aims. However, if the sinister faction is in the majority, it will tyrannize minorities. (The example that comes easily to mind is the rise of the Nazi party in Weimar Germany, but there are many others). Thus, that situation must be avoided, and it is the traditional weakness of a pure democracy.

Madison posits that to control the effects of factions in popular government, in a republic (as opposed to a pure democracy), elected representatives serve as a filter to refine and enlarge public views, and those representatives may be less likely to act precipitously and more likely to work for the good of the nation. However, it is always possible that corrupt or ineffective politicians will betray their elector's interests once elected. One must consider the importance of the number of representatives. In this instance, corruption is less likely to predominate where there are more representatives rather than a few. Still, if there are too many representatives, they may not understand their local electors' concerns and will not be able to work together for the public good. Thus, one needs to find the perfect median number of representatives.

Madison described what was generally known at the time, that a small society will have fewer distinct parties and interests and will more frequently form oppressive majorities. In contrast, however, he theorized that with a large and diverse number of parties and interests, it is less likely that a majority of the whole will have a "common motive to invade the rights of other citizens." Even if such a common motive exists, it will be more difficult for them to act in unison to effectuate that common motive. Consequently, he predicted that a large, compound republic stabilizes popular government by balancing factions against each other, which has proven to be the case in the U.S. The U.S. Constitution and the republic it established are the oldest ones in existence, and it is both large and compound: each of the 50 United States has its own constitution and its own separate republican government that is NOT subservient to the federal government. While the U.S. Constitution stipulates that its law and the law of the federal government is supreme, that law applies only in certain, enumerated areas and only where there is a direct conflict between state and federal law ((Nowak and Rotunda 1991, §§9.1–9.3 (*the Preemption Doctrine*)). Contracts, property ownership (both business and land), licensing, as well as family relationships are governed almost entirely by state law, so most of the law an American citizen encounters in everyday life is state law, not federal.

4.5. Nineteenth Century English philosophers: John Stuart Mill (1806–1873) and A.V. Dicey (1835–1922)

Nineteenth-century legal philosophers further described the British custom of limited government. In *On Liberty*, Mill discussed "the nature and limits of power which can be legitimately exercised by society over the individual," positing that the history of government has been a continuous struggle between liberty and authority (Mill 1989). Governmental power is dangerous. A single ruler can be a tyrant, but the danger posed in a republic or democracy is the tyranny of the majority. Such governments' power must also be limited to protect individuals.

Interestingly, Mill remarked that the strength of the English tradition of limited government does not depend so much on the habit of regarding governmental power with suspicion but instead relies on the British being unaccustomed to being controlled.[16] Mill also remarked that he noticed an increasing inclination worldwide on the part of the government to control individuals through legislation and that this was corrosive on liberty. He stressed that the only proper exercise of power over anyone against his will in a civilized community is to prevent him from harming others.

The term *rule of law* was first popularized by A.V. Dicey, though he may have taken the phrase from the 1610 Petition of Grievances. Like Mill, Dicey was concerned that the obsession with legislated law was destructive of the rule of law, as was what he perceived as the unchecked growth of administrative law in France. Noting that 1914 Constitutional reformers in England were looking for ways to ensure that any law passed by Parliament should be publicly popular (or at least not unpopular) he wrote: "But these schemes make in general little provision for increasing the chance that legislation shall also be wise, ..." (Dicey [1915] 1982, p. lxxix). He also argued that Bentham's utilitarianism and insistence that all law be (recently) legislated leads inevitably to socialism and instrumental law and thus is destructive of the rule of law: "The patent opposition between the individualistic liberalism of 1830 and the democratic socialism of 1905 conceals the heavy debt owed by English collectivists to the utilitarian reformer. From Benthamism the socialists of today have inherited a legislative dogma, a legislative instrument, and a legislative tendency . . . ." (Dicey [1917] 2008).

Dicey described three guiding principles that had enabled the stability of the British Empire: (1) Parliament's legislative sovereignty; (2) the supremacy of ordinary law (which he called the rule of law), and (3) the English reliance on written conventions concerning constitutional law (i.e., Magna Carta, etc.) only as a last resort. He traces the history of the concept of the supremacy of the law in England (as was completed above) and then describes three characteristics of the rule of law. First, as James I found to his chagrin, customary law must be supreme and exclude governmental arbitrariness and its broad discretion. Next, there must be equality before the law, meaning that the ordinary law of the land, as administered by ordinary courts, applies equally to the rich, the poor, and governmental officials. Finally, because individual rights in England were grounded in ordinary judicial decisions, they are the source of England's constitution. Where rights are sourced in written constitutions, the danger is that they may be only (as Jefferson also termed it) paper guarantees, with no actual remedy should government intrude on them. The English focused on providing remedies for intrusion on rights rather than declaring something a right. This distinction is now more usually described as negative rights—the right to be free from governmental interference—as opposed to the civilian concept of positive rights described or listed in a constitution.[17]

[16] This *cultural* trait was seen again in the twenty-first-century vote for Brexit—the British did not like being subject to control by the European Union and its directives (legislation without representation). As confirmed by Brexit polls, the English voted to leave the EU for two reasons: (1) the E.U. top-down legal system violated the British understanding of the relationship between citizen and government (49%), and (2) EU membership and the requisite acceptance of its directives were seen as a cause of economic problems caused by large numbers of immigrants (approx. 33%) (Ashcroft 2016).

[17] As the author has described elsewhere, the problem with positive rights is that over time they are likely to be interpreted more and more narrowly. See (Nedzel and Block 2007).

4.6. The 20th Century: Hayek, de Soto, Leoni, and Fuller

During and after World War 2, Anglospheric jurists were concerned about preventing the perversions of law and popular government (as well as the economic crisis) that had enabled Hitler's dictatorship and atrocities in a country generally as developed and forward-thinking as Germany.

Hayek, trained in both law and economics in Vienna, posited that the rule of law was never so seriously threatened as it had been by legislation-dominated popular government because of the positivist misconception that so long as all actions of the state are duly authorized by legislation, the rule of law will be preserved. "The fact that someone has full legal authority to act in the way he does gives no answer to the question whether the law gives him power to act arbitrarily . . . . It may be that Hitler has obtained his unlimited powers in a strictly constitutional manner, and that whatever he does is therefore legal in the juridical sense. But who would suggest for that reason that the Rule of Law (i.e., justice) still prevails in [Nazi] Germany?" (Hayek [1944] 2007). Hayek rejected "constructivist rationalism" (scientism) as posited by Bentham, Jhering, Kelsen, and later Hart, Dworkin, and others who assume that social institutions such as legislation and government should be the product of deliberate design. He argued that such approaches are factually false, are connected with a belief in an unlimited "sovereign" power of government, cannot account for unintended consequences of their legislation (and legislators are not held accountable for those consequences), and can lead to a misunderstanding of the very things that make a society great (Hayek [1973] 1983, pp. 5–7).

The positivist/analytic concept of giving a "scientific" account of the law challenges the previous normative framework that informs the law and replaces it with a theoretical and instrumental conception aimed at what some legal philosopher perceives as a desirable human purpose. The instrumental conception of the law invariably and inevitably leads first to socialism and then to totalitarianism because it views law not as consisting of rules that make possible the formation of spontaneous order by the free action of individuals who limit their actions based on those rules, but instead as the instrument by which an individual is made to serve some collective good as determined by the legislative body or the entity that designed the legislation.: "the whole conception of legal positivism . . . is a product of the intentionalist fallacy characteristic of constructivism, a relapse into those design theories of human institutions which stand in irreconcilable conflict with all we know about the evolution of law and most other human institutions."(Hayek [1973] 1983, p. 71). Under these circumstances, one is ruled by experts, not by the law.

As Hayek describes, it is by this means that a positivist-based legal system becomes politicized, as the winning party's "collective good" becomes mandated law over all objections by minority parties. Especially if that process is corrupted by favors granted to special interests, the public's faith in government and the legal system is weakened. Furthermore, as he makes clear in *The Road to Serfdom*, the mere accretion of legislative and regulatory law encourages rent-seeking: It encourages manipulation of such laws, with the rich and better connected able to hire lawyers to help them do so effectively, while the poor, who cannot afford to manipulate the law or governmental agents, cannot comply, forcing them into what economist Hernando de Soto terms "dead capital," a system of unregistered, clandestine small businesses that can neither grow nor defend themselves because they have no legal presence (De Soto [2000] 2007). All this further leads to the public acceptance of untruths, unfair government actions, corruption, and injustice and its distrust of both law and the government.

Hayek defined the rule of law as meaning that government in all its actions is bound by rules fixed and announced beforehand (Hayek 1955, pp. 33–34). To him, the intelligibility of these norms rests not on a deductive order but instead on customs where an order originally formed itself spontaneously because the individuals followed rules that had not been deliberately made but had risen according to need and were gradually improved upon over time (Ibid., pp. 2–15). It is the observance of common rules that makes the peaceful existence of individuals in society possible, that limit governmental power, and

that order, that rule of law develops spontaneously. (Hayek 1955, pp. 29–34; Hayek [1973] 1983, pp. 35–50, 56–59). Spontaneous order as embedded in practice led to the development of implicit agreement on fundamental principles, which may never have been explicitly expressed, yet which made possible written fundamental laws, i.e., the implied assent theory of government which Fuller elaborated on as well. Hayek further states that the only country that succeeded building the modern conception of liberty under the law from its roots in medieval "liberties" was England. This was partly due to the fact that England escaped a wholesale reception of the late Roman law and with it the conception of law as the creation of some ruler, but it was probably due more to the circumstance that the common law jurists there had developed conceptions somewhat similar to those of the natural law tradition but not couched in the misleading terminology of that school . . . The freedom of the British which in the eighteenth century the rest of Europe came so much to admire was thus not, as the British themselves were among the first to believe . . . "originally a product of the separation of powers between the legislature and the executive, but rather a result of the fact that the law that governed the decisions of the courts was the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered and, when it did, mainly only to clear up doubtful points . . . . " (Hayek [1973] 1983, p. 85).

Bruno Leoni, a 20th Century Italian legal philosopher, similarly found legislated law problematic and preferred the English system, stating that "[c]ontinental European scholars, notwithstanding their wisdom, their learning, and their admiration for the British political system from the times of Montesquieu and Voltaire have not been able to understand the proper meaning of the British Constitution." (Leoni [1961] 1991, p. 59) He argues that the assumption that legislators represent their citizens in the legislative process is utterly inconsistent with the claim that such legislation is based on some scientific or technological process and has led to a kind of schizophrenia in contemporary society.[18] "What happens, in fact, is that a handful of people . . . are given the power to decide what everybody must do within vaguely defined limits—if any."

The resulting legislation is a conglomeration of quick and far-reaching remedies against any kind of evil, and what goes unnoticed is that those remedies are often too quick to be efficacious, too unpredictably far-reaching to be beneficial, and too directly connected with the views and interests of a handful of people (the legislators and their friends). The enormous increase in legislation and quasi-legislative (i.e., administrative) activity on the part of governments everywhere has yet to contribute to any certainty of law but has led to unproductive and sometimes nonsensical intrusions on daily life. Leoni does not argue that legislation should be entirely discarded but that it is incompatible with individual initiative and freedom. While the continental legal tradition did not initially gravitate around legislation, it certainly does now—as does the Anglosphere. (Leoni [1963] 1991, p. 12). Moreover, legislation has come to resemble more and more a diktat that winning majorities impose on minorities; the relationship that legislation has to the social opinion of the community in which it operates may be tenuous at best. (Ibid., pp. 17–18). As former Speaker of the House Democrat Nancy Pelosi once infamously said about the 1990 pages of the Obamacare bill when the Republican minority claimed it was so long they did not have time to read it before voting on it: "We have to pass the bill so that you can find out what is in it." (Roff 2010).

Leoni argued that the devotion to legislative supremacy has entitled officials to behave in ways that under previous law would be judged usurpations of power and encroachments on individual freedom, and that concept has also spread to England: traditionally, legislation that was contrary to the common law would be struck down by the courts, but that is no longer the case.[19] In the United States, realist judge Oliver Wendall Holmes Jr.,

[18] Id. at 8–9
[19] Id. 98–100

who strongly supported legislative supremacy, famously wrote that "I always say, as you know, that if my fellow citizens want to go to Hell, I will help them. It's my job." (Holmes 1920, discussed in Nedzel 2020, pp. 125–27).

Leoni found defining the rule of law challenging because it is a practice, not a theory, distinguishing it from *rechtsstaat*. The latter, he found, because it is a theory focused on legislative law rather than customs developed over time, imports current politics—specifically socialism—into law, giving license to bureaucrats to act arbitrarily. Bureaucrats are self-interested in ensuring the stability of their agencies, increasing their incomes, and increasing the scope of their powers. In contrast, the rule of law, as it developed in England, Leoni argued, leads to liberty, equality under the law, and therefore more trust in and respect for the law. His views likely were the catalyst for Hayek's migration from the *rechtsstaat* approach to his embrace of the common law's conception of the Rule of Law (Zywicki 2015).

Leoni, like Hayek and Fuller, objected to the positivist dichotomy between law and morality: he saw no point in separating them.[20] He also objected to defining law as an obligation and instead saw law as an accumulation of individual claims—much like Fuller, he posits that law (like language) developed spontaneously out of personal interaction and reciprocal claims, an assertion demonstrated in Ellickson's work. He also discusses the differences between a legal philosopher who sees things from a theoretical viewpoint and a legal operator, who deals with the practical results. He posits that the legal philosopher has a more nuanced picture of the law, rather than the black-and-white view of the practicing attorney/advocate (Leoni [1963] 1991, p. 200).

Interestingly, while Fuller (like Leoni) is skeptical of the abstractions produced by legal philosophers, he would probably disagree about the black-and-white view. Common law attorneys, because of adversarial procedure, must always analyze both sides of a client's situation to anticipate the opponent's arguments and either rebut them or encourage their client to settle. We are trained, from the very first classes in law school, to think inductively, to address both sides of an argument, and consequently realize early on that law is rarely ever black and white. Civilian-trained attorneys, for the most part, are not exposed to this type of thinking, nor are they often exposed to inductive thought.[21] As shall be seen, Fuller's method of attacking Hart and Dworkin's theses is empirical: he applies them to hypothetical real-life situations, thus demonstrating that they are not going to be helpful in practice. Research has failed to disclose any instance where either Hart or Dworkin cogently rebutted the reasoning of those examples. Instead, they simply dismissed them.

4.7. Twentieth Century: Fuller and Oakeshott

Like Hayek, Lon Fuller was educated in economics and law but studied economics first at Berkeley and then at Stanford before getting his J.D. He taught law at Harvard for many years, beginning before World War 2. During World War 2, he worked at a law firm in labor relations and continued as an arbitrator of labor disputes until 1959, even after resuming his duties at Harvard. His practical experience in negotiation and dispute resolution informed his thinking about the nature of law in that much of it was related to the principle of reciprocity: tacit and implied mutual assent as well as intentional assent (Lacey 2010, p. 10; see also Fuller 1969, p. 23). Thus, his was a modern take on the implied consent/assent theory and the nature of the rule of law: as society develops, people work out patterns of behavior that maintain peace, and those patterns of behavior gradually become the practice of law, no legal theory needed. That process was demonstrated in Robert Ellickson's widely known *Order Without Law: How Neighbors Settle Disputes*, which discussed the fence-in, fence-out rules that developed in the American West when sheep

[20] (Leoni [1963] 1991, p. 193). See also (Bertolini 2015, pp. 561–606) (discussing the importance of the concept too Leoni's thought).

[21] (Nedzel 2021). The Author is known internationally for her work teaching civilian-trained attorneys how to translate their thinking to common law "IRAC" analysis and ran Tulane's LL.M. program doing just that for several years.

and cattle farmers' interests collided (Ellickson 1991). Like Hayek, Fuller was convinced that the positivist distinction between "is" and "ought" fed into Hitler's rise to power, and he explored ways of preventing this from reoccurring.

Through a beautifully drawn (and humorous) parable about a hapless King Rex who wants to be a good ruler, Fuller set forth eight ways an attempt to create and maintain a legal system can fail in *The Morality of Law*. Those eight distinct routes to disaster include (1) failing to set any rules at all so that every issue must be decided on an ad hoc basis; (2) failing to publicize the rules people are expected to observe; (3) enacting legislation retroactively; (4) failing to make rules understandable; (5) enacting contradictory rules; or (6) enacting rules that require conduct that cannot be followed; (7) introducing frequent changes so that those affected cannot orient their actions; and (8) a failing of congruence between rules as announced and as they are administered (Fuller 1969, pp. 33–51). It is for this that Fuller's work is well known, but he goes much further than that to describe what he calls the "inner morality of the law."

Fuller describes two different kinds of morality: the morality of aspiration and the morality of duty. The morality of aspiration is that which the Ancient Greeks described: it is the morality of the fullest realization of human powers, of excellence, of conduct such as befits a human being functioning at his (or her) best. While the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom, consisting of the basic rules without which an ordered society is impossible. Thus, the morality of duty is negative in nature, as in the Ten Commandments. In contrast, the morality of aspiration that the Ancient Greeks proposed is positive. Rousseau identified virtue with knowledge and assumed that if men truly understood the good, they would desire it and seek to attain it. Bentham substituted the pleasure principle for the Greeks' excellence—the greatest happiness for the greatest number of people. Fuller posits that Bentham (and Rousseau, and the Ancient Greeks) and those who think like them are unrealistic: there is no way by which the law can compel a man to live up to the excellences of which he is capable; we can only seek to exclude his life from the "grosser and more obvious manifestations of . . . irrationality" and therefore for workable standards, the law must turn to the morality of duty (Fuller 1969, pp. 5–18). Thus, Fuller, like Madison, views humanity as fallible.

In addition to sharing some of Madison's insights on humanity, Fuller shares insights on the nature of freedom and limited government with both Hayek and Oakeshott, and he shares insights on the relationships among common law, spontaneous order, and freedom with Hayek and Leoni. He agrees with Hayek that the classical liberal state promotes meaningful choice and hence freedom because of the shared view that government should provide a common defense, prevent fraud and violence, protect private property, and enforce contracts (Fuller 1955, p. 1322, citing Hayek). Meaningful choice and hence freedom, however, declines where government has an agenda favoring one group over another, for example if it legislates a policy mandating that the production of coal be doubled, that negatively impacts workers' choice of employment (Fuller 1955, p. 1322). As Oakeshott later described it, freedom is maximized in a civil association that does not favor any group over another, in contrast with an enterprise association which limits it. Fuller, like Leoni, found that the market principles and resulting spontaneous order inherent in common law feed into civil association, providing further support for reasoned choice and freedom (Fuller 1955, pp. 1322–24).

Fuller describes three conditions necessary for (moral) duties to arise (Fuller 1969, pp. 23–24). First, he posits that duty develops out of a relationship of reciprocity resulting from a voluntary agreement between parties. Next, the parties' reciprocal performances are, in some sense, equal in value. Finally, the relationships within the society must be sufficiently fluid so that these relationships of duty must be reversible: a duty owed by one person to another today will likely be owed by the second back to the first tomorrow.[22] Thus,

[22] *As American Founder Thomas Paine said it*: "Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess." (Paine 1791).

Fuller agrees with Hayek (whom he cites) that the rule of law is dependent on reciprocity and man's anticipation that a relationship he has today may be reversed tomorrow and that this is a process, not a theory: society must be organized on the market principle, and the rule of law will collapse in any society that abandons it (see Maine 1861). Those duties (primarily negative) that society has identified over time as being the minimal necessary to maintain such fluid reciprocity are what have developed over time into law, which Fuller describes as the "internal morality of law, i.e., the enterprise of subjecting human conduct to the governance of law." (Fuller 1969, pp. 96–97) He carefully distinguishes this from natural law, saying that this has nothing to do with any "brooding omnipresence in the skies," nor does it have any affinity with religious rules such as a bar against contraception. Moral duties are like the "natural laws of carpentry or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it." Thus, Fuller regards law as a system of minimal duties that developed over time to enable men to live in peace with each other; he was NOT professing natural law. Instead, he argued that law developed gradually as generations wrestled with developing ways of mitigating and minimizing conflict.

English philosopher Michael Oakeshott (1901–1990), like Hart, served during World War 2—he joined after the fall of France in 1940 at the age of 40 and volunteered for the virtually suicidal Special Operations Executive but was turned down because he was "too decidedly British." Educated at Cambridge in political science, he found Representative Democracy the least unsatisfactory form of governance despite its muddle and incoherence because the "imposition of a universal plan of life on a society is at once stupid and immoral." (Oakeshott 1939) After the War, he returned to Cambridge but left it four years later to teach at Oxford. He left Oxford in 1951 for the London School of Economics, where he was appointed Professor of Political Science, remaining there until retiring in 1980.

Oakeshott posited that we cannot even begin to understand the world if we do not first understand ourselves—understanding ourselves is fundamental, and understanding the world is derivative (see O'Sullivan 2003, discussed in Nedzel and Capaldi 2019, p. 244). He posits that there is no such thing as a human telos that aims at some ultimate fulfillment; thus, aiming for the "greatest happiness for the greatest number" is an oxymoron. The predicament we find ourselves in with freedom is that we are continually challenged to create and recreate ourselves and our understanding of the world based on our experience. We employ freedom by using imagination and intelligence but do not exercise those in a vacuum but within an inherited social context. We are free to add to this inheritance or develop it, ignore it, fritter it away, or even reject it. Oakeshott describes the human condition as a conversation within this inheritance: you join the conversation by speaking at first in the voices of others and eventually in your own voice.

Oakeshott posits that rationalism in politics (what I have termed scientism) is the most severe destabilizing threat to modern societies. Rationalists believe that one can stand both inside and outside the universe of discourse and practice, and they reject any analysis that does not terminate in an unassailable timeless abstraction (think Hart, Rawls, Dworkin, Unger, etc.). They reject explication because it can never be final and definitive. A Rationalist, to Oakeshott, is one who values thought free from any obligation to any authority save the authority of reason, seeing himself as the "enemy of authority, of prejudice, of the merely traditional, customary, or habitual." The problem with this stance is its innate arrogance: in bringing his social, political, legal, and institutional inheritance before the tribunal of his intellect, a Rationalist presents an exaggerated view of both his intellectual ability and his opinion of himself. What is to be feared even more than his conceit, argues Oakeshott, is his belief that he is looking for an innocuous power that can be made so great as to control all other powers, his belief that political machinery can take the place of moral and political education, and that there is no knowledge that is not technical knowledge. The Rationalist wants to begin by getting rid of his social inheritance and fill the resulting nothingness with items of knowledge that he abstracts from his personal experience that he believes to be approved by the common "reason" of humankind.

In his essay on the Rule of Law, Oakeshott explains the role of government and rules/laws about how government should be controlled. He posited that the rule of law describes a kind of human relationship, i.e., that between man and government, that, like many relationships, is governed by rules (Oakeshott [1983] 1999). Most such associations have a goal, and he describes them as "enterprise associations": businesses want to earn money, football teams want to win games, etc.

Thinking about the rules/laws of football, to be both just and fair, they cannot favor either side—they are thus non-instrumental. Players have a mutual obligation to play according to the rules and defer to the umpire's decisions. Therefore, there is no rule that Manchester United will always be the top team in England's Premier League. There may be penalties for the non-observance of the rules of the game, but the rules themselves do not presume any recalcitrance on the part of the players; "fair play" means only that one should play the game conscientiously according to the rules (Oakeshott [1983] 1999, pp. 137–38). Interestingly, cricket goes beyond this, demanding that players themselves report when they have broken a rule, even if no one else would or could notice it—a sort of internalization of the rules, a "conscience," if you will.

Moral rules are similarly adverbial. They are not instrumental to the achievement of anything but describe obligations to observe adverbial conditions in performing self-chosen actions. The rule of law therefore stands for a mode of moral association that recognizes the authority of known, non-instrumental rules (laws) that impose obligations to adhere to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction. They are not promoting a common interest, such as a particular religious view (Oakeshott [1983] 1999, p. 149). In a secular world with a population that is not homogenous, toleration (and thus justice) is best promoted by non-instrumental laws, i.e., laws that do not favor any particular group and are not formulated to accomplish any political goal.[23] Oakeshott describes them as "adverbial"—rules that describe how to do or what not to do, not what to do. So, for example, the rules of the road tell you which side of the road to drive on, but they do not tell you where to go. Criminal laws describe under what conditions killing another human being will be punished (more severely if the killing is planned, less if it is negligent, and perhaps no punishment if it is in self-defense). Thus, government should be a civil association, remaining neutral to any factions and to preserve justice and liberty to the greatest extent possible. There are times when a government must become an enterprise association, e.g., in times of war or perhaps plague—but otherwise, it should be distinct from enterprise associations such as businesses, hospitals, charities, etc., all of whom have goals to pursue, to preserve an a-political, disinterested nature that is likely to promote justice for all.[24]

According to Oakeshott, western societies are made up of autonomous individuals and anti-individuals (Oakeshott 1991). Autonomous individuals internalize societal rules, and their consciences help prevent them from breaking them; they may even make recompense if they find they have inadvertently broken a rule, as in cricket, and are thus those who embrace civil association over enterprise association. They are also the ones who become entrepreneurs, daring to think and act differently from others, daring themselves to create what was not there before, and taking risks believing that society will find their products useful. Anti-individuals are incapable or unwilling to accept personal responsibility for themselves or their actions and are always parasitic on autonomous individuals. They cannot transition from a communal identity to an individual identity, finding the collective identity familiar and comfortable. They think of themselves primarily as a member of a group—hence the origin of "identity politics." Thus, they become resentful of autonomous individuals, even though they want to enjoy the products produced by them. Consequently,

[23] Prominent American law professor Brian Tamanaha agrees with Oakeshott and Hayek on this point. (Tamanaha 2006).

[24] See Oakeshott [1983] (Oakeshott [1983] 1999, p. 155), rejecting abstract rights as fundamental values of the rule of law because they cannot be logically delineated, unlike adverbials: "thou shalt not imprison anyone without due process", etc.

whereas the autonomous individual wants the rule of law so that he can exchange with other autonomous individuals, the anti-individual wants the state to be a new community that provides him with an increasing list of positive rights, economic equality, solidarity, dignity, and etc.

4.8. Fuller on Hart, Dworkin, and Analytic Theorists

Fuller objected to Hart's positivistic theory on practical grounds, setting forth his final arguments in the ten years of the debate with Hart in his 1969 revised edition of the *Morality of Law*. Fuller argues that Hart's division of the Rule of Recognition into duties and powers is an untenable distinction because legal rules often implicitly combine the two, and one must look into legislative intent to discern the difference rather than just reading the text of the rule. Additionally, the distinction is impossible to effectuate (Fuller 1969, pp. 134–41). To illustrate this, Fuller uses King Rex to oversimplify. Suppose King Rex's small country has unanimously agreed that the highest legal power rests in Rex, recognizing him as the sole and ultimate source of law, consistent with Hart's "rule of recognition." Hart posits that the rule of recognition is a power-conferring rule. To discourage anarchy, Hart implies that the rule of recognition does not allow the authority conferred to be withdrawn for abuse. Assuming Rex abuses his power by keeping his laws secret from his subjects, and they take his crown away for doing so, it does not matter whether he was deposed because he violated an implied duty or because he exceeded the limits of his power—it is a classic "distinction without a difference."

Next, borrowing a famous example from Wittgenstein, Fuller provides an example of a mother leaving her children with a babysitter, and instructing the babysitter to teach her children a game. The babysitter teaches the children to gamble with dice or play with knives. Does it make sense for the mother first to consider whether the babysitter violated a tacit duty or whether she exceeded her authority before saying truthfully that she did not mean that kind of game and firing the babysitter? Thus, Fuller's objection to Hart's Rule of Recognition is that it does not consider the rule's purpose. An Anglo-American attorney would argue that it is not enough to follow the letter of the law; one must also follow its "spirit."

In a third example, Fuller returns to King Rex. If Rex IV dies and is succeeded by Rex V, then all laws enacted by Rex IV, under the Rule of Recognition, remain unchanged until Rex V changes them. One did not need Hart to explain this; it is a sociological fact described in the eighteenth century by Portalis "*L'expérience prouve que les hommes changent plus facilement de domination que de lois*." On the other hand, if Brutus, by a *coup d'état* deposes Rex IV in open violation of the accepted rule of succession, Hart's Rule of Recognition would posit that all previous laws will have lost their force, or he could presumably stipulate that by saying nothing, Brutus tacitly re-enacts previous law—but Hart criticized that argument when it was used by Hobbes, Bentham, and Austin. The need for continuity in the law despite changes in government is so apparent that one typically assumes this continuity as a matter of course. It becomes a problem, according to Fuller, only when one attempts to define law as an emanation of formal authority and excludes from its operations the possible influence of human judgment and insight, as positivism tried to do.

Fuller concludes that neither the rule of recognition nor its division into powers versus duties makes any sense because it excludes tacit reciprocity, it does not provide any insight into legal institutions that by their very nature constantly change (such as Parliament), and it is trying to give neat, juristic answers to questions that are essentially issues of sociological fact. Positivism generally sees law as a one-way projection of authority emanating from an authorized source and imposing itself on the citizen, ignoring the tacit cooperation between lawgiver and citizen. It does not ask what law is or does but only from where it came, and positivism does not view the lawgiver as occupying any distinctive office, role, or function. Since the lawgiver is not regarded as having a distinct and limited role, positivists do not consider that any moral code attaches to his performance—but in real life, an ordinary American lawyer or judge is subject to a stringent code of ethics

governing conduct toward clients, fellow lawyers, courts, and the public. It is not a mere restatement of moral principles governing human conduct. The Rules of Professional Conduct (American Bar Association 2020) set forth certain standards that apply to all those in the legal profession. Finally, Fuller objects to the positivist belief that one must separate the purposive effort that goes into making law from the law that emerges from that effort because it would otherwise be impossible to think clearly about the law. He argues that this, and the other tenants of positivism, completely ignore the importance of human interaction, which brings law into existence in the first place, and without which, the law cannot be understood. In other words, Fuller argues that any scientistic theory about law—whether Kelsen's, Rawls', Hart's, or Dworkin's—is necessarily invalid because it begins by taking human interaction out of the equation.

With regard to Dworkin and the analytic movement, Fuller argues that the basic fault of the New Analytical Jurists is the same as the basic fault of utilitarianism—the utilitarian philosophy encourages an intellectually lazy presumption that means are a mere matter of expediency and need not be seriously considered. In a legal system, what is means from one point of view is an end from another, so means and ends are inextricably intertwined. While Dworkin "accepted" Fuller's conclusion that some degree of compliance with Fuller's eight canons of law is necessary to produce or apply any law, he and other analytic legal philosophers ignore the need to consider the purpose of the law. Dworkin, as well as Hart and others, object to Fuller's statement that law has an internal morality, that a legal system, to be considered just and respected, must follow its own impartial processes and apply its laws equally, and that this is the morality of the law. To discredit Fuller, Dworkin and Cohen facetiously argue that there can be an internal morality of even the most disreputable and censurable of human activities, such as when a would-be assassin forgets to load his gun, or a blackmailer is inept. Hart argued that Fuller's position is confusing and nonsensical because one must separate the purpose of law from morality, saying that under this description, even a poisoner's art could have an inner morality.

Fuller initially found this line of argument so bizarre and so perverse as not to deserve an answer, but later recanted that opinion (Fuller 1969, p. 201), stating that his critics' tacit presupposition that the internal morality of law is a mere matter of efficacy propelled him to clarify his position, which he did with an example from Soviet Russia. Apparently in the early 1960s, so many Russians were trading illegally in foreign currencies that the Soviet authorities decided drastic measures were in order, and in May and July of 1961, they passed statutes subjecting such crimes to the death penalty, apparently to convey that they were serious about punishing such economic crimes. When a leading Soviet jurist was asked about why the Soviet Supreme Court was applying that law retroactively in violation of the Soviet 1958 Fundamental Principle of Criminal Procedure, he replied "We lawyers didn't like that." What he was saying was not that it was ineffective, but that it compromised the principle of justice and impaired the integrity of the law. (The bar against retroactive enforcement of new substantive law is one of Fuller's eight canons). Most important, however, to show Fuller's point, the Soviet action impaired the efficacy of law because it undermined public confidence in both law and the legal system. **Fuller's inner morality of the law is a composite of those principles that enable and encourage public confidence in the law and the legal system.**

Dworkin further tried to discredit Fuller's position that the morality inherent in the law includes a principle against contradictory laws: "A legislature adopts a statute with an overlooked inconsistency so fundamental as to make the statute an empty form. Where is the immorality or lapse of moral ideal?" (Fuller 1969, p. 222, citing Dworkin (1965)) Fuller responded that to begin with, Dworkin's example is outlandish, but more important, in such a case and consistent with the previous example, the public's trust in the law is impaired, and so again, the breach of public trust is the immoral act in question.

Fuller further perceives two assumptions underlying his critics' rejection of the concept of the inner morality of the law: (1) a belief in the existence or non-existence of law is, for them, from a moral point of view a matter of indifference; and (2) they assume that

law should be viewed not as the product of purposive interplay between a citizen and his government, but as a one-way projection of authority, originating with government and imposed upon the citizen. What both Dworkin and Hart miss is any recognition of the role legal rules play in making possible an effective realization of morality in human beings' actual behavior. Moral principles do not function in a social vacuum or in anarchy. To live the good life requires more than good intentions, even if they are generally shared; in the modern world, it "requires the support of firm baselines for human interaction, something that only a sound legal system can supply." (Fuller 1969, pp. 204–5) Fuller's underlying assumptions are consistent with the original ethos of English law: that the law itself is a product of prior practice and a stable and common possession of the culture.

For Fuller, governmental respect for the internal morality of law encourages respect for the law and the legal system. Without that faith in and respect for the law and the legal system on behalf of all citizens, whether they are in government or not, society will collapse into anarchy. One of the most critical aspects of the law is how it is interpreted, as Fuller describes it, "the task of maintaining congruence between official action and declared rule" such that interpretation occupies a sensitive, central position in the internal morality of the law, revealing the cooperative nature of the task of maintaining legality. Hart regarded this as a non-issue and that concern about properly interpreting law is a "preoccupation with the penumbra," something that causes only occasional difficulties (Fuller 1969, pp. 224–26). Kelsen similarly dismisses judicial interpretation as simply a form of legislation, the motives which shape legislation by judges being irrelevant for analytical positivism as those that move a legislature to pass one kind of statute instead of another—an issue that belongs to politics and sociology, not juristic analysis. Dworkin makes a similar mistake in equating judicial interpretation with political theorizing. One American Realist even proposed that statutes be treated not as law at all but only as sources of law, ignoring the fact that such statutory law must be applied by bureaucrats, sheriffs, patrolmen, and others who act without judicial guidance—some cooperation concerning methods of statutory interpretation is an absolute necessity. What all of these critics share in dismissing Fuller's position that interpretation is an integral part of the morality of law is their assumption that law must be regarded as a one-way projection of authority, not as a collaborative enterprise. That cooperation is a vital part of the morality of law.

In Fuller's view, law, like language, arises out of human interaction. Suppose we do not agree on the meaning of words. In that case, we cannot communicate with each other, a fundamental principle that reminds one of Mark Twain's great discussion between Huckleberry Finn and his friend Jim, where Huck is trying to simultaneously show off and explain to Jim that he would not understand what a Frenchman is saying. Huck says, "S'pose a man was to come to you and say Polly-voo-franzy, what would you think?" Jim initially responds that he would "bust him over de head," but when Huck explains that the Frenchman was asking if he spoke French, Jim responds, "Well, it's a blame ridicklous way, en I doan' want to hear no mo' 'bout it. Dey ain' no sense in it." (Twain 1885, Chapter 2) Without agreement as to the meaning of words, we cannot communicate. Similarly, without agreement on the meaning of a law, it cannot be a law.

An authoritative and current American definition of justice is "the fair and proper administration of laws" (Garner 2004, p. 881), but there are several different ways the term is used. Popular justice is "demotic justice, usually considered less than fully fair and proper even though it satisfies prevailing public opinion in a particular case"; in contrast, substantial justice is "justice fairly administered according to rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." Consequently, though CRT, CLS, and Dworkin have influenced legal theorists in the United States as well as some popular movements, the traditional view of justice still survives and proves Fuller's admonition that law, morality, and justice grow out of collaboration and reciprocity.

5. Discussion

The long explication of the histories of the two Western legal traditions provides insight into commonalities and differences and spots those concepts with a positive influence on justice and those with a negative influence. Both traditions have remained true to their roots. Still, the current predominance of scientistic, theory-dominated academic views about the nature of law, seen in Hart and Dworkin, is both nonproductive and corrosive on academia itself, on the legal system, on justice, and on the public because it discourages truth-telling in the name of politics. Hidden-structure theories have no limits and have led to the destruction of civil discourse.

The Civilian tradition, from its inception, has valued top-down authority and expertise as well as deductive thought to help bring coherence and predictability to the law. It holds that the government's appropriate role is to improve society. Napoleon's creation of the original French Civil Code was, in many ways very positive. First, it helped stabilize France's juristic recovery by building from law (both *Ius Commune* and the *Coutumes*) that pre-dated the Revolution, it incorporated the liberal values of equality, protection for private property and contract, and it made the law that generally applies to private citizens both coherent and transparent, appropriate for self-government. It eliminated the vestiges of feudalism. The man on the street could easily read it and understand his obligations to family and others. (Having been trained initially in Louisiana's Civilian Tradition and having taught Civil Code topics for many years, the author profoundly values the elegance, organization, consistency, and clarity of French-derived Codes and has a great deal of respect for the intellectual rigor of the Swiss and German-derived Codes). The concept of a Civil Code was also very portable, which is why 90% of all countries have them.

One of the inherent problems with the civilian presumption that the only legitimate law is that which is produced by the general will as embodied in a legislature is that such law embraces the majority rule. Thus, the law is of necessity driven by politics (Talmon [1952] 2021). The common law tradition, with its traditional emphasis on judicial decision and narrow interpretation of legislation, offsets that tendency to some extent, while the complicated legislative process outlined in the U.S. Constitution was intended to discourage all legislation unless a significant consensus was reached by a large number of factions that the legislation is needed and would be efficacious.

The common law tradition, similarly, has maintained much of its essential integrity, despite the same dangers posed by its adoption of legislative supremacy. It values limited government and customary law and balances judicial doctrine against legislative supremacy in self-governing systems. In many cases, the doctrinal law of both systems uses different mechanisms and concepts, but often reaches the same results (see, e.g., Nedzel 1997).

The role of the judiciary at common law and judicial procedure remains very different from that of civil law; nevertheless, the two legal traditions are often amalgamated into something described as "the" Western tradition, as Europe and the United States came to global dominance and both systems share some underlying values. Problems began, however, when the two were conflated by academic theorists who claimed they were applying science to the study of law, looked for underlying hidden structures that they could claim showed legal universality, and also claimed that as morals are "subjective," they belong to politics and are irrelevant to the science of law. This unfortunate habit of claiming the existence of a hidden universal structure began with the positivists and has proceeded through the analytic legal philosophy of Dworkin to the CLS view that all law is illegitimately based on power, that mere power is the "hidden" foundational structure.

The underlying false premise of the scientistic approach is that there is one "true" and "certain" objective and neutral approach from outside human experience. This first premise is patently false: human beings cannot possibly approach the study of a human institution from outside human experience. A second underlying premise corrosive of freedom is that the purpose of law is to shape and direct human life in society. A democratic version of this second premise, grounded originally in Ancient Greece and continuing through Rousseau's view of the law as representing a General Will and the modern world, leads

inexorably to politicization and even totalitarian repression of dissenting views, as those who adopt it believe with religious fervor that theirs is the only "right" way.

The enormous impact of Hart's book further obscured the distinction between the two different conceptions of law. Dworkin rightly criticized Hart for not clarifying the legal system's normative foundation. What Dworkin (and others) failed to do was recognize that there are competing conceptions of the normative foundations of different legal systems. In so doing, curiously, both Hart and Dworkin smuggled in their own political, normative conceptions without actively engaging the prominent alternative conception, i.e., that of the traditional common law, exposited by Dicey/Fuller/Hayek. The irony of this is that both Hart and Dworkin were products of the Anglo-American tradition but, in fact, imposed on it a continental model viewing law as emanating top-down from legal experts rather than a common, cultural possession.

As Fuller pointed out, the scientistic approach excludes the common-sense tacit understanding of the purpose behind the rules. It excludes all implicit reciprocity, all comprehension that law does not develop in a vacuum. Dworkin's approach and approaches like his, which claim that what judges do is not coherent or purposeful, generate distrust in the system, thus giving an opening to those who want to claim that the underlying *grundnorm* is simply power, or racism, or anti-feminism or . . . etc. No legal system is utopic. Still, the scientistic approach necessarily leads to the denigration of the system, enabling majorities to trample on the rights of minorities, and eroding the public's trust in the system and thus potentially doing devastating damage to a stable society, rather than carefully studying how and why those involved in the legal system interact and the strengths and weaknesses of those interactions.

One of the ways Dworkin's work denigrates the law is in his repeated dismissal of the claim that common law judges make decisions fairly and impartially. This is a tragic misconception for someone who clerked for Judge Learned Hand on the United States Second Circuit Court of Appeals, which reviews decisions of federal district courts in New York, Connecticut, and Vermont. Moreover, it shows an almost unbelievable ignorance about how such systems perform. As mentioned earlier, common law practicing attorneys and civil law-trained attorneys think very differently about the law, because of the differences between civilian and adversarial procedure. First, the adversarial process gives each party the incentive to hunt for any untruth or partial truth emitted by the other party; it also encourages them to agree when there is no factual dispute on a matter. Each party has an equal opportunity to present his or her case or rebut the other party's case, and either party can challenge the judge's impartiality (for good reason) on the record. Another judge will review such a challenge to determine if there is a basis for it and if so, the judge will be replaced. Every utterance made and every paper filed in the lower court becomes part of the public record, ensuring transparency. Reviewing lower court decisions to make sure they are fair and impartial as well as consistent with the law has been systematized for many generations. Though formal procedural rule details undoubtedly differ from court to court, the process is generally the same through all common law court systems, as is the way of writing about and analyzing individual legal problems.

American legal reasoning and writing are highly standardized and taught to every law student; that same method is used in every litigant's memorandum of points and authorities submitted to a court and in every court decision. That method is drawn from the common law tradition but has been made somewhat more concise and efficient and is known by the acronym IRAC reasoning (Issue, Rule, Application, Conclusion).[25] Each legal issue becomes the subject of an individual IRAC. The writer begins by identifying the legal concept at issue, then explains the applicable legal authority thoroughly and objectively so that a reader unfamiliar with the concept will have a good grasp of it and be convinced that the writer fully understands it. Every element of the concept must be documented with

[25] The author's own textbook on legal reasoning and writing has been used around the world to teach that method to attorneys pursuing American LL.M. degrees: (Nedzel 2021).

appropriate citations. If a statute is at issue, it is presented, and every component of it is explained in light of interpretive (and cited) case law. Once the Rule section is complete, the writer turns to Application, systematically applying the facts of the instant case to every component of the rule and analogizing to the facts of interpretive cases cited in the rule section where appropriate. Finally, the writer states a reasonable conclusion in light of that application. The process is, in fact, an expanded syllogism: the Rule is the major premise, and the Application is the minor premise leading to the conclusion. The difference is that both Rule and Application must be proven by referencing authority and factual analogy or distinction. In contrast, as the author's Chinese LL.M. candidates once explained, in China, the court flatly states the syllogism, with no concern about whether the resulting decision is analogous to previous decisions, so one wonders about the presence of legal coherence and judicial accountability: there is no way to demonstrate that similar cases are decided similarly. The result of the IRAC discipline is that the writer is obligated to prove to the reader that (1) he understands the law and (2) that it applies to the specific facts of the case as he describes.

Having clerked for Judge Carl E. Stewart of the United States Fifth Circuit Court of Appeals[26] (known for his integrity and collegiality) and having communicated with others who clerked for other judges, the author is very familiar with the appellate process, especially in federal courts. The lower court's complete record, its written decision, the appellant's claims about the errors the lower court made, and the appellee's rebuttal of those claims is delivered to the Circuit Court, and three judges and their nine clerks are assigned the task of reviewing the decision. Before an appellate decision is drafted, the entire trial court record is read, and every case, statute, and legal source cited in the lower court's decision is reviewed to make sure it is accurately described, as is every source cited in both parties' memoranda in support of their positions.

One judge (or one of his/her clerks) is then assigned the task of drafting an initial appellate opinion. The three judges then review that opinion in light of the relevant facts and (this is where their experience becomes important) consider whether, as drafted, there is a good "fit" between facts and law. As compared to previous, similar cases, they consider whether the same result should apply or whether the facts of the instant case are distinctive enough that it would be unjust and inconsistent/incoherent for the same result to apply. The appellate opinion may be redrafted several times before a majority of the judges agree that it is a "good fit."

In addition to the detailed process implemented to ensure coherence and impartiality, judges in the U.S. take an oath to follow the law in making their decisions. The vast majority of them take great pride in following the law, whether or not they agree with it. (If they disagree with it, they can write a dissent, which will be included in the public record and in the Reporters that collect and publish judicial opinions).

Mandatory law and professional habits and customs apply in interpreting statutes and rules. One begins with the plain language of the statute, researching prior case law to see if other courts have interpreted that statute's meaning (see Singer 2000; Llewellyn 1950; Posner 1983; Nedzel 2021, pp. 196–206). The researching attorney or deciding judge also considers the purpose of the law, in light of statutory context, and if still unclear, the attorney may look to legislative history to see what the legislature intended in passing the law. A similar process is used in interpreting contracts between private parties.

One must also consider the peer pressure put on trial court judges as well as the codes of conduct that apply to them in measuring objectivity and fairness. While a judge might be tempted to be less than impartial, the fact that his or her opinion will be carefully reviewed and could be overturned means that his reputation would be damaged as a result. Peer pressure is a powerful force encouraging impartiality, as are the applicable judicial codes

[26] The Fifth Circuit reviews decisions from federal district courts in Louisiana, Texas, and Mississippi, and is one of the largest of the 13 Circuit Courts of Appeals, as well as having (with the 2nd and the 7th Circuits) one of the strongest reputations.

which dictate that the mere appearance of impropriety is sanctionable.[27] No judge wants to be overturned on appeal. Consequently, though occasionally a judge will be sanctioned, that is a rare occasion and is more likely to be at the local state court level, where judges are elected and thus more likely to be affected by political winds than federal judges who are appointed.

Merely following common law practice from IRAC through the trial and review processes demonstrates the reciprocity which Fuller described. All have been put in place to encourage truth-finding and justice. Most civil law jurisdictions have similarly detailed processes, some more than others (e.g., Switzerland, Germany, Chile). Thus, as Fuller points out, morality is already in the law, its processes, its procedures, its internal social interactions, and its mechanisms to preserve fairness, impartiality, and coherence to the greatest extent possible. We need to examine what is without thinking that we need to develop some abstract theory about what we are doing. Human institutions are not, and can never be, described in the abstract, and pretending we can step outside ourselves to study ourselves is oxymoronic.

6. Conclusions

It has been the focus of this article to demonstrate why Dworkin's approach is not only non-productive in the pursuit of truth and justice but even destructive of the legal system (whether common law or civil law). A more productive approach is that demonstrated by Lon Fuller, that of simply examining what is undertaken without abstractions and studying the history of how those habits developed and what purpose they serve, bearing in mind that they are the product of reciprocal human interaction, whether active, tacit, or implied, and the ultimate goal is to encourage and secure positive human interaction.

Will such studies obviate the current lack of truthfulness seen in society? Obviously not, but to the extent that such has been the result of trickle-down of the inherent lack of respect shown in analytic works such as Dworkin's, at least it will not make things worse. To improve truthfulness, we must build the public's trust in the fairness of the legal system and its pursuit of justice, regardless of whether we believe that the purpose of government is to improve society or whether it should be a civil association. (Though the author believes that the Fuller/Oakeshott view is more likely to help depoliticize legal systems and increase public trust). Time and again, it has been shown that legal transplants and programs such as U.S. Aid's Rule of Law Projects do not work because they do not respect the local culture; transplants never develop the same way in a context different from the ones in which they originated, and they are often imposed on unwilling recipients tolerating the impositions primarily because they came with substantial funding—for example, Venezuela's independent judiciary and restructured Supreme Court came at a World Bank investment of USD 35 million, only to be gutted two years later when elected dictator Hugo Chavez rose to power (Garcia-Serra 2001, pp. 263, 276).

In contrast, legal change that comes from within because of consensus that the pre-existing system was lacking, and which incrementally implements an improved institution in competition with the original system is much more likely to be successful. That was how Henry II created the common law courts: the public found his judges were much more likely to be fair and impartial than the 100 courts run by barons, and the jury system was much more likely to determine who was telling the truth than trial by ordeal. Much more recently, Chile's criminal legal system was similarly redone (Nedzel 2010, pp. 102–8 and sources cited therein). A political consensus was reached that the previous system was dysfunctional. Using a substantial amount of Chile's own money, Chilean attorneys designed a new system borrowing concepts from both common law and civilian tradition and putting recent law school graduates into the roles of judge, defense attorney, prosecuting attorney, and victim's advocate. New courts were set up as an alternative that criminal defendants

[27] Canon 2 Code of Conduct for U.S. Judges (Effective 12 March 2019), available at https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (accessed on 18 January 2023).

could choose and quickly became favored. Within 15 years, the new system replaced the old one and was followed by similar developments in other fields, such as labor and family courts.

Concerning truthfulness, I close with the following quote from Johann Goethe, which seems on point now more than ever before, when we are surrounded by social media giants claiming that they have checked facts when they have not, or who are imposing their political viewpoints on a public that can now find the truth only with great difficulty:

> "Truth has to be repeated constantly, because Error also is being preached all the time, and not just by a few, but by the multitude. In the Press, Encyclopedias, in Schools and Universities, everywhere Error holds sway, feeling happy and comfortable in the knowledge of having Majority on its side."
>
> In this Article, I have tried to tell that Truth.
>
> Nadia E. Nedzel
>
> 29 November 2022

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Article

Transitional Justice Process and the Justice Theory of Roland Dworkin

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Abstract: The determination of *truth* in the aftermath of war aiming at establishing *justice* and *peace* is a key element of a transitional justice (TJ) process. The theory of justice of Roland Dworkin deals with an approach in which the interpretation of values such as *equality, liberty* or *truth* are paramount. Dworkin's theory of justice is applied to constitutional states and lays out how democratic values are negotiated. The goal of a TJ process is to lead a state towards democracy after a war or internal armed conflict. TJ processes as well as Dworkin's theory of justice are to be understood as dynamic, which implies that they are subject to constant change and thus to be considered in their respective social, cultural, political, and economic contexts. This paper explores the relationship between *truth* and *justice* in the framework of a TJ trial and Roland Dworkin's theory of justice. The TJ process in Colombia serves as a case study because that was where I conducted field research in TJ in 2019.

Keywords: transitional justice; truth; justice; theory of justice by Roland Dworkin; interpretive approach; democracy; legal understandings; peacebuilding; Colombia

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1. Introduction

The question of how *truth* is determined after a war in order to establish *justice* cannot be answered conclusively and can be approached from different scientific perspectives. After a war, destroyed places must be rebuilt on the one hand; on the other, social cohesion has to be restored. The establishment of peace thus requires a multi-layered reappraisal on different levels, as the question of who belongs to society and how political power is distributed are often at the root of violent and armed conflict.

After a violent conflict, which can either be between states or internal, the relationship between government and society is often disrupted because the state is weakened or dysfunctional. This can be due the fact that a government no longer has the support of a majority of the population, as was the case in Colombia, for example.

The determination of truth has been an overall goal in TJ processes around the world. At the same time, TJ processes must be understood within the respective zeitgeist and specific conflict situation, which in turn can lead to highly divergent results. TJ processes have become increasingly popular in Latin America, especially after the Cold War, and have led to different outcomes (cf. Encarnación 2022; cf. Gonzales Ocantos 2020; cf. Teitel 2003, 2014).[1] In this article, I shall be referring to the transitional justice process in Colombia as a case study for transitional justice (TJ).[2]

In the turbulence of a so-called post-war period,[3] TJ as an international instrument offers a variety of approaches to problem solving so as to (re)establish democracy in a state. The goal of a TJ process is to determine truth in order to establish *justice* and guarantee stable

[1] The best-known exampels are Argentina and Brazil, which deal with their past military dictatorships in very different ways.

[2] In 2019, I was in Colombia for three months conducting field research on the topic "Coming to terms with sexual violence during the internal armed conflict in Colombia." The field research is a basis for a documentary film "la verdad no es una prostituta" which is still in development (accessed on 30 March 2023).

[3] By post-war period I mean any period after a war, so not just the post-war period after WW2.

peace (Teitel 2003; Werle and Vormann 2018). A TJ process can feature different mechanisms, such as a special court or a truth commission, that are used in the process during a certain period of time to achieve the goals set (cf. Elcheroth and De Mel 2022, p. 1 f.; cf. Werle and Vormann 2018, p. 6).

Roland Dworkin's (2011, 2014) theory of interpretation and justice revolves around the concept of a successful way of life within a liberal constitutional state. Essentially, it is about how a society can implement *equality, liberty,* and *law* in a democratic state. Law and morality are to be understood interpretively and as interrelated elements (Dworkin 2014, pp. 22f., 678 f.; cf. Ibric 2022, p. 139). Dworkin's interpretive and justice theory provides an interesting basis for examining the relationship between *liberty* and *justice* in relation to *truth-finding* within a TJ process.

TJ seeks to facilitate elementary coexistence of a society within a state, by guaranteeing *liberty, equality,* and *justice* through *law* (cf. Dworkin 2014, pp. 15–21). In this context, the interplay of law and state must be clarified, as both are supposed to guarantee peaceful coexistence in society by means of legal structures. In every post-war period, *justice* is a concrete demand; however, there cannot be *justice* without *truth* (cf. Dworkin 2014, pp. 15–21, 274, 307, 319). The question is how *truth* can be determined within a TJ process in such a way that *justice* can be established. The demand for *justice* is universal; nonetheless, the way in which it can be negotiated, in the context of different conflict situations and conceptions of *justice* in relation to the establishment of *truth*, must be clarified on a case-by-case basis.

The concepts of "liberty", "truth", and "justice" are presented in this paper in the context of value attributions and interpretations. Their definition is not to be regarded as conclusive, but rather as a framework for their understanding and discussion in a society or TJ process.

In this paper, the theoretical concept of TJ is first briefly introduced; thereafter, the TJ process and mechanisms in Colombia are explained in more detail. Subsequently, the concepts of *equality, liberty, democracy, justice,* and *truth* according to Dworkin's theory of justice will be presented and placed in the context of the TJ process in Colombia.

2. Transitional Justice (TJ)

2.1. Transitional Justice: A Theoretical Concept in Transition

As a dynamic process, TJ is subject to constant change and must be considered in its respective historical context (Teitel 2003). The concept of TJ has gained popularity since the 1990s, particularly with the publication of Neil Kritz's homonymous paper. The central aspect of Kritz's definition is the specification of the process as a transitional phase from a previously *dictatorial* to a *democratic* state (Werle and Vormann 2018, p. 3; cf. Gyr 2020, p. 155). TJ has since often been understood as a *mechanism* or *toolbox* that provides a concerned state with options on how to *truthfully* address past crimes in order to guarantee stable future peace (Elcheroth and De Mel 2022, p. 1 f.; Werle and Vormann 2018, p. 6). Such mechanisms of TJ include special courts, truth commissions, or reparations.

However, calling TJ a toolbox certainly falls short. Jens Ohlin for example, analyzes the two terms *transition* and *justice* separately and in their relationship to each other. According to Ohlin, *justice* is a term oriented towards normative and universal guidelines in the context of finding justice. Moral values are central to this concept. The term *transition*, on the other hand, places itself in the context of a political state of emergency, says Ohlin (2007, p. 51). There is a strained connection between the philosophical idea of *justice*—with its universal character—and the *transition* of a society—in a political state of emergency (cf. Gyr 2020, p. 156). Their fractured relationship is also detectable in the link between freedom and justice in the context of finding truth within a TJ process. After a war, justice is a concrete demand that cannot be achieved without truth (see introduction; cf. Dworkin 2014, pp. 15–21, 274, 307, 319). However, the exact shape of truth-finding in the aftermath of an armed conflict cannot be determined conclusively in a TJ process, because it is contingent on the political situations and actors involved in each individual case. Both are shifting

and potentially conflicting elements after a war as different actors have diverging interests, especially when it comes to negotiating liberty and equality within a state.

TJ according to Kritz—depicted as a process from a *dictatorial* to a *democratic* state—is a phase of transition. In the limited time span of a TJ used after violent conflict and massive human rights violations, Ruti G. Teitel (2003, p. 69 f.) argues that both the historical context and the means by which truth is determined to establish justice are important (cf. Gyr 2020, p. 157). After all, the goal is to establish justice and bring about democratic change. In her historicization of TJ, Teitel (2003, pp. 69–94) divides TJ into the following phases: *post-war TJ*, *post-Cold War TJ*, and *steady-state TJ*.

Teitel (2003, p. 90) understands *post-war TJ* as the influence of World War I and World War II on the concept of TJ. The Nuremberg and Tokyo Tribunals are examples of this, which, through their collective sanctions and international (military) jurisdiction, shaped this phase significantly. The replacement of national jurisdiction with international jurisdiction and international policy are key factors in this phase. They give TJ an unrestricted and universal character (Teitel 2003, p. 72; cf. Gyr 2020, p. 157).

According to Teitel (2003), the unrestricted and universal character of TJ is not questioned until the *post-Cold War* phase. Teitel (2003, pp. 75, 78) considers the *post-Cold War* period as the phase ushered in by the collapse of the Soviet Union, the beginning of which is related to the liberation movements in South America in the late 1970s and which ends with the Soviet Union's dissolution in 1991. Moreover, it can be demonstrated that new political beginnings after war have been increasingly linked to TJ issues. The International Criminal Tribunal for Rwanda (ICTR) or the Truth and Reconciliation Commission (TRC) of South Africa exemplify this phase (Anders and Zenker 2014, p. 395). The restorative model, in which the aim is to come to terms with past crimes and reconstruct history, has been gaining in importance. Increasingly, truth commissions have been used for historical assessment. Truth commissions thereby represent national reconciliation and special courts embody the establishment of justice. Together, they aim at guaranteeing peace (Teitel 2003, p. 77 f.) According to Richard A. Wilson (2003, p. 369), the truth commission can be understood as a constitutional and social approach to the reconciliation of conflicting parties (cf. Gyr 2020, p. 158).

Therefore, TJ consists in the attempt to respond to the different conflicts in a situational manner and to cooperate with the state concerned to the extent necessary to achieve the goal of peace and reconciliation (Teitel 2003, p. 77 f.).

In the establishment of peace and reconciliation, organizations from outside the state structure are becoming increasingly important, such as non-governmental organizations or churches (Teitel 2003, p. 83 f.; cf. Elcheroth and De Mel 2022, p. 10 f.). However, the growth of non-governmental actors leads to complex relationships between state institutions, international organizations, and local groups (Anders and Zenker 2014, p. 396 f.).

In the first phase of *post-war TJ*, the conventional and legal process played an important role in determining winners and losers. In *post-Cold War TJ*, the focus is on reconciliation resulting in a new beginning as a united state (Teitel 2003, p. 83 f.).

The third phase, *steady-state TJ*, is based on standardized and normalized procedures to create a liberal and democratic state under the rule of law from an "unjust" state after an internal armed conflict. In this phase, the general application of human rights gradually replaces the phase of contextual, local, and limited negotiation (Teitel 2003, p. 89 f.).

In this context, the relationship between freedom and justice is addressed with regards to the establishment of truth within a TJ process. Here, the question that arises is what is meant by truth in a TJ process and how does it relate to liberty and justice, especially if the TJ process is to be understood as a dynamic process.

2.2. Transitional Justice in Colombia: Comprehensive System of Truth, Justice, Reparation and Non-Repetition—SIVJRNR

After years of conflict and failed negotiations between the government and the guerrilla group *Fuerza Armada Revolucionaria de Colombia* (FARC), the Colombian government

and the FARC held new negotiations in October 2012 under international observation. Four years later, a peace treaty was negotiated, but narrowly rejected by the Colombian people in a referendum on 2 October 2016. A new peace treaty was then negotiated on 30 November 2016; however, it was not put to the vote (Werle and Vormann 2018, p. 287).

The negotiated peace agreement stated that TJ would be established in Colombia. The legal basis for the specific design of TJ in Colombia and its mechanisms was laid on 4 April 2017 (SIVJRNR). The first article introduces the concept of *Sistema Integral de Verdad, Justicia, Reparación y No Repetición* (SIVJRNR), which aims to regulate the termination of the armed conflict and ensure the establishment of stability and the permanence of peace.

The following mechanisms and measures are included in the SIVJRNR: a Truth Commission (CEV), a Special Unit for the Search of Missing Persons (UBPD), a Special Court (JEP), and measures for integral reparations. Together, they are intended to prevent a recurrence of conflicts and violent clashes in the future (JEP).

Truth and *justice* are explicitly mentioned in the name of the TJ of Colombia (SIVJRNR) and are institutionalized through the Truth Commission CEV and the Special Court JEP. Due to the temporary nature of the TJ process, the mandates of the aforementioned institutions are limited in time. Overall, all mandates of the SIVJRNR aim at determining *the truth* and establishing *justice*; therefore, the results of the different mandates must be considered jointly. The Colombian TJ nomenclature, however, provides no indication of the role and importance that *liberty* should take within the TJ process. The fact that the first peace treaty was (narrowly) rejected by the Colombian people in a referendum and the second one was not brought before the people shows the people's discord over the peace treaty and the associated TJ process. The disagreement also became evident in the presidential elections. In 2018, Ivan Duque was elected as a candidate who clearly positioned himself against the planned implementation of the peace treaty of his predecessor Juan Manuel Santos (cf. García Pinzón 2020, p. 2). In 2022, Gustavo Petro was the first member of a left-wing party to win the presidential elections. He was also a former member of the guerrilla group *Movimiento 19 de abril*. The TJ processes are always shaped and influenced by the political situation in a country, which, as described by Ohlin (2007, p. 51) points to the tension between *transition* and *justice* (see Section 2.1).

2.2.1. Truth Commission CEV

"Hay futuro si hay verdad" (There is a future if there is truth) is the official slogan of the Colombian Truth Commission, which has been tasked with the historical reappraisal of the internal armed conflict that has lasted more than fifty years. The mission of the Truth Commission is described as follows in its constitutional act dated 4 April 2017: "The Commission is an independent and temporary body with the specific task of providing clarification regarding events during the armed conflict. It aims to provide clarity regarding the complex interconnections in society so that victims and responsible parties can be identified. Furthermore, violations of human rights during the armed conflict should be clarified and the indirect as well as the direct involvement of actors should be shown. In this respect, the individual and collective responsibility of those involved should be made visible. However, the truth commission has no legal status. Its purpose is to promote peaceful coexistence in society by establishing the truth and thereby preventing the recurrence of violent conflicts" (JEP, Actos legislativos No. 01 del 4 de Abril de 2017).

The Truth Commission (CEV) commenced its work in November 2018. Its mandate was limited to three years. It collected testimonies from victims, created public and private archives, documented human rights violations, identified victims and those responsible, and presented proposals that were included as recommendations in the final report (CEV).[4]

On 28 June 2022, the Truth Commission presented its final report in Bogotá. The final report comprises ten chapters, documenting serious human rights violations in ten volumes

[4] Observation protocol on 7.3.19 for the occasion: Evento de lanzamiento de la cartilla "Participación de las víctimas en el Sistema Integral de Verdad, Justicia, Reparación y No Repetición"—OACNUDH.

totaling six thousand pages. The report is not legally binding and makes recommendations for the incumbent government as well as for the population. The central demand of the Truth Commission is that the government should consistently enforce the peace treaty and become active above all in the rural regions of Colombia, where there are still armed groups (cf. CEV, Hallazgo y Recomendaciones).

The slogan of the Colombian Truth Commission, *"Hay futuro si hay verdad,"* promises a future if there is truth. However, what will happen if the truth presented by the CEV is not accepted remains open. It is unclear what consequences the human rights violations documented by the Truth Commission will have. One of the goals of the Truth Commission is to ensure that there is no recurrence of violent conflict. Since violence in Colombia has once again increased after the peace treaty, this is in strong contradiction to the promise of the TJ process (cf. García Pinzón 2020, p. 2; cf. UN). This does not mean that the work or efforts of the Truth Commission are not having an effect, but it is simply not clear whether the truth-finding process has been completed with its final report and what will actually happen with the results now. There is a large discrepancy between the prescribed goal of the CEV and the time provided. In connection with the post-Cold War phase described by Teitel (2003, p. 77 f.), the Truth Commission should aim at reconciliation and thus also a new political beginning (see Section 2.1; Anders and Zenker 2014, p. 395; Wilson 2003, p. 369). Whether a mere listing of serious war and human rights violations is sufficient to fulfill this task is highly doubtful because it is not made clear what a new political beginning will actually look like in order to resolve the existing conflicts peacefully in the future.

2.2.2. Special Tribunal JEP

The Colombian *Jurisdicción Especial para la Paz,* or JEP, is the only judicial body within the SIVJRNR. The JEP follows a restorative approach aimed at punishing all those who participated in the armed conflict, either indirectly or directly. The overarching goals of the Special Tribunal are as follows: to provide legal justice for the victims, to present the true events to Colombian society, to protect the right of the victims, to support peace, and to offer legal security to all those who participated in the armed conflict. JEP's mandate is limited to ten years, until March 2028, after which it can be renewed for five more years. If there is further need after the extension, the Special Court may decide to extend it for another five years, so that the maximum possible duration of the mandate is of twenty years (JEP) (See footnote 4).

The JEP assumes two different procedures for seeking justice. The first procedure involves the voluntary acknowledgement of responsibility. Here, participants acknowledge the truth of a matter and accept responsibility for it, and also declare their willingness to make reparations to the victims. In return, no deprivation of liberty is ordered against the acknowledging actors. The second procedure is a legal dispute: that is, a contradictory procedure. After investigation by the *Unidad de Investigación y Acusación*, defendants are charged and tried in a legal process (JEP. Misión, visión, funciones y deberes) (See footnote 4).

Within the TJ process, the special court JEP is the body exemplifying justice. In this regard, the question arises as to whether a judicial determination of truth is sufficient to establish justice. JEP is an important tool, and in terms of a functioning rule of law, it is important for human rights violations to be prosecuted and adjudicated. During my field-work in Colombia in 2019 on the topic "The Sexual Reappraisal during the Internal Armed Conflict in Colombia," I conducted semi-structured interviews with different individuals, organizations, and collaborators within the TJ process, such as Ángela Salazar from the Truth Commission. According to Salazar, persons affected by sexual violence[5] during the internal armed conflict have different ideas about how *justice* can be restored. For example,

[5] In the 1998 Rome Statute, sexual violence as a strategic tool in a war is taxed as a crime against humanity under Art. 7 para. 1 lit. g and as a war crime under Art. 8 para. 2 lit. b. No. xxii as a war crime. According to Art. 7 para. 1 lit. g and Art. 8 para. 2 lit. b. item xxii, sexual violence includes: "rape, sexual slavery, coercion into prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity."

affected individuals have confided in her that they do not care if the perpetrator in question is convicted. They said it was more important to them that their bodies and genitals be restored. Others want the perpetrators to be convicted at all costs. For almost all of them, it is important that there is no repetition of sexual violence as a weapon of war.[6] Accordingly, linking the results of the different institutions of the TJ process in terms of finding *the truth* and establishing *justice* is important, but should also flow into a public discourse, because without context and public discourse, the results remain invisible.

2.2.3. Special Search Unit for Missing Persons UBPD

The *Unidad de Búsqueda de Personas dadas por Desaparecidas* (UBPD) is a special unit responsible for searching for missing persons who have disappeared in connection with the armed conflict. The mandate of the UBPD lasts twenty years and can be renewed again. The mission of the UBPD Special Unit is to guarantee the return of living persons and, in the case of deceased persons, to determine their identity and deliver their remains to their relatives. The UBPD is not a legal body. The search and identification of missing persons entrusted to it is governed by a national and regional plan (cf. UBPD) ((See footnote 4). According to the UBPD, more than 99,000 people have been reported missing since the internal armed conflict (UBPD, así buscamos).

The Bellavista-Bojayá massacre of 2 May 2002, in the department of Chocó, is an example of the UBPD's special task force. The attack was perpetrated by the former guerrilla group FARC. A cylindrical shell killed 119 people in a church. Earlier, 300 people had sought refuge in this church because the FARC attempted to wrest control of the Rio Atrato basin from the former paramilitary group *Autodefensas Unidas de Colombia* (AUC). No efforts were made to identify the dead or provide medical assistance to survivors until the signing of the peace treaty. With the massacre and the struggle for control of the Rio Atrato area, an estimated 1744 families were displaced and considered internally displaced (Vergara-Figueroa 2018, pp. xix f., 3, 50).

With the identification of the dead and the handover to the family, a burial is made possible. The Bellavista-Bojayá massacre is thus an exemplary example of what the UBPD special unit is used for.

The presented TJ mechanisms of the TJ process in Colombia, i.e., the Truth Commission CEV, the Special Court JEP and the Special Unit for Missing Persons UBPD are used for the determination of *truth* and the establishment of *justice*, so that stable peace becomes viable in a democratic constitutional state. Below, the extent to which the requirements of Roland Dworkin's theory of justice are applicable to a TJ process will be examined. In this context, the concepts of *liberty, equality, democracy, law,* and *truth* and how they are related to *justice,* and how they are to be understood at all in the context of a liberal constitutional state, is of central importance.

3. Justice in a Liberal Constitutional State According to Dworkin

Roland Dworkin's theory of justice refers to a successful conduct of life, as it was already of significance in antiquity in Aristotle's works and, in terms of historical influence, also with theologians of the Middle Ages, such as Thomas Aquinas. Accordingly, a successful conduct of life is not possible without interweaving values and without *truth* in relation to facts of life. Rather, an ethical attitude is necessary (2014, pp. 13, 207). According to Dworkin, the two ethical principles of *self-respect* and *authenticity* are elementary in order to achieve a successful way of life (2014, p. 346). *Self-respect* means respect for one's own person and the recognition of an independent concept of life that leads to a successful conduct of life (Dworkin 2014, p. 348 f.). *Authenticity* is understood in terms of how we shape life and what basic conscious attitude is adopted (Dworkin 2014, p. 356 f.). *Self-respect* and *authenticity* are to be considered together with human dignity and the equality of people, which are indispensable within a liberal constitutional state according

[6] The statement comes from the interview with Ángela Salazar in Bogotá on 12 April 2019.

to Dworkin (2014, p. 345 ff.). However, the theory of justice does not work without the interpretation of values for the individual person as well as for society. This is due to the concept of justice in the today's dynamic society being constantly subject to social and political changes and these developments having an influence on the life of each individual person as well as on society as a whole (Dworkin 2014, pp. 269, 307).

One can refer to the verse of the ancient Greek poet Archilochos about the fox and the hedgehog, which is the eponym for Dworkin's theory of justice.[7] The quote in question is: "The fox knows many things, but the hedgehogs knows one big thing. [*Truth*] is one big thing" (Dworkin 2011, p. 1, Quoted from: Isaiah Berlin (2009), The Hedgehog and the Fox. Essay on Tolstoy's Understanding of History, Frankfurt/M.: Suhrkamp 2009, p. 7). According to Dworkin, *truth* thereby cumulates through an interconnected network of values that together form a supporting togetherness. Dworkin argues that *truth* should be seen as an "interpretive assertion" so that *truth* can be discussed (2014, p. 296).

According to Dworkin, the scientific interpretation is to be understood in the sense of an *active holism,* meaning the dense interweaving of values as a whole. Thus, the interweaving of individual values with others is the underlying idea. Consequently, a change or questioning of one value always affects the whole network of values. Thus, an interpretation is always active, which is Dworkin's (2014, p. 263 ff.) consequent demand from scientific interpretation. Furthermore, values are to be considered as equal and accordingly have no hierarchical function among each other. Accordingly, the terms *liberty, equality, democracy*, *right* and *truth* are also equivalent in the context of *justice*. Consequently, justice is to be understood as an independent value, which is however connected with different values and thus also affected by these. According to this assertion, Dworkin's theory of justice always depends on the interpretive approach of how values are interpreted. Accordingly, Dworkin's theory of justice is to be understood as a dynamic one that is influenced by the social contexts examined.

If Dworkin's theory of justice is applied to the TJ process, specifically to the TJ process in Colombia presented earlier (see Section 2.2), the following considerations can be made. The TJ process in Colombia has as its overarching goal to establish stable *peace*, for which various mechanisms and bodies have been created (see Section 2.2; cf. JEP). According to Dworkin's theory of justice, one could deduce that *peace* can only exist in a democratic state based on the rule of law, which is characterized, among other things, by the interwoven values of *liberty*, *equality,* and *justice*. In this context, however, it must be remembered that democratic states also wage or support war in order to protect *democratic values*. Accordingly, *liberty* is not to be understood as a fixed constant. Values, as well as a TJ process, are at the mercy of a dynamic process, and the establishment and preservation of *peace* is to be understood as a negotiation in constant flux (see Section 2.1). Accordingly, the stability of *peace* cannot be understood as static because peace itself is subject to constant change, subject to social, political, and economic conditions. In addition, there is also a discordant attitude toward peace policy in Colombia, which does not automatically presuppose unity for peace policy due to conflict-ridden disputes. Therein lies the greatest challenge in a TJ process: finding solution that takes into account *all* voices and thus reflects the values that are shared by *all*. In this regard, it is critical to consider whether this ideal is at all feasible.

3.1. The Interpretive Approach

Values are to be fathomed as being part of a multilayered and intertwined network connected to other values. The interpretive approach should therefore be understood in relation to *active holism*. It is considered to be an interpretive reasoning in relation to the interlocking of values. Thus, an interpretive assertion is never simply true, but addresses a particular event to provide the best possible interpretive justification. Value concepts change and new knowledge alters the big picture, so interpretive statements must be

[7] Dworkin quotes in his work from the book by Isaiah Berlin, Der Igel und der Fuchs. Essay on (Tolstoy's Understanding of History, Frankfurt/M.: Suhrkamp 2009, p. 7; Dworkin 2014, pp. 13, 715).

constantly renegotiated (Dworkin 2014, p. 263 f.). Accordingly, *justice, liberty, equality*, *democracy*, *law*, and *truth* are also interpretive concepts that are subject to permanent change and are deemed pillars of a liberal constitutional state. The right to vote can be mentioned as an example in this context. With the formation of nation states in the 19th century, the right to vote was attributed mainly to men. The demand for *equality* in a liberal state thus related primarily to the participation of men (cf. Senn 2020, p. 7). In this respect, the demand for *equality* and *justice* in a liberal state under the rule of law is not to be simply taken for granted, but requires a continuous questioning of what we understand by these values. With regards to interpretation, Dworkin (2014, p. 172 f.) distinguishes between *moral responsibility* and general as well as *conceptual interpretation*. *Moral responsibility* refers to an integrated moral epistemology that relates to sound reasoning about moral issues. In this regard, *moral responsibility* is related to the question of integrity (Dworkin 2014, p. 174). The issue of integrity, as well as *moral responsibility*, refers to *individual responsibility* on the one hand, but also to how a community makes political decisions on the other. The problem of resource distribution or equal treatment of citizens can be subsumed under this (Dworkin 2014, p. 601 f.).

In Dworkin's (2014, p. 214) *general interpretation*, the theory of value is central to address general conditions of interpretation. Thereby, according to Dworkin, there is no generally valid interpretation that can be applied in all fields, but there has to be a case-by-case assessment from the presuppositions of the different disciplines. An interpretation is always influenced by the usual standards, such as a scientific methodology or by concrete social practices in everyday life (Dworkin 2014, p. 22 ff.). Accordingly, the justification of interpretations is only possible through an extended interpretation. Thereby the person who interprets bears a responsibility, i.e., it is central how a concrete situation is suitably represented by means of an interpretation (Dworkin 2014, p. 22 ff.). According to Dworkin (2014, pp. 205, 225), concepts are to be interpreted again and again, because the shared social practices change and are to be understood within the respective zeitgeist. This includes, for example, a moral value conception, which should correspond to the basic ethical attitude of the interpreting person(s) (cf. Derrida 1972, p. 423; cf. Senn 2017, pp. 6 f., 9; cf. Senn 1993, p. 73 f.).

Transition and *justice*, according to Jens Ohlin (2007, p. 51, see chap. 2.1) are also interpretive terms in the Dworkin sense, because they are moral and political concepts. TJ revolves around universal values such as human rights and about a respective political state of exception characterized by violent conflict. Thus, the universal values of human rights cannot be considered in isolation and implemented in a society without contextualizing the political and conflictual context. Consequently, any interpretation requires a contextualization of the problem linked to it, which, according to Dworkin (2014, p. 24), is based on interpretation, which in turn consists of values. It is for this reason that a permanent discussion, as it is maintained by philosophers, is paramount.

Accordingly, the fundamental problem of a TJ process in general can be defined as follows. On the one hand, TJ relies on the universal value of *justice*. On the other, it is confronted with social and context-specific events that call into question a universal solution approach. A universal solution approach is hardly feasible if one wants to do justice to the different conceptions of *justice*. Although the problem appears to be universal, it still cannot be solved universally, but rather concretely.

In the context of the TJ process in Colombia, it will now be shown how an integrated moral epistemology feeds into the process. The question to ask is how, in a TJ process, the conditions for *individual responsibility* (with regard to a successful way of life) and *collective responsibility* (with regard to political decisions) can be realized. It is essential that the concepts of *justice, liberty, equality, democracy*, and *right* are understood as interpretive in the TJ process because they are linked to concrete social and political conditions.

In what follows, I shall use the interpretive approach and selected perspectives from the philosophy of law, social philosophy, and social anthropology to show how interpretations and attributions of meaning are dealt with in different disciplines.

3.1.1. Scientific Self-Reflection and Sovereign Creative Capacity

Questions about *justice* and humanity in a social and cultural context are a central subject of the philosophy of law and society. In connection with the historical-critical examination of different understandings of law and their historical influence, it provides a suitable basis for considering the concept of TJ in the framework of Roland Dworkin's theory of interpretation and justice (cf. Gyr 2020, p. 156).

Open and clear conditions are necessary to maintain a critical debate in the discipline and thus to enable a scientific self-maturing process. *Scientific self-reflection* is understood as requiring a critical examination of one's own collective discipline as well as one's own *individual* ways of thinking and attitudes, insofar as these are always shaped by a social and cultural worldview that feeds into scientific text production (Senn 1993, p. 72 f.; vgl. Gyr 2020, p. 162 f.). Dworkin's (2014, pp. 22 f., 679) interpretive approach is about recognizing the social, economic, and political practices that influence our thinking and discipline and that feed into interpretations.

Historiography is read and interpreted depending on the zeitgeist and the way of thinking and can thus never be reduced to the same denominator (Stolleis 2016, column 1497; cf. Senn 1993, p. 73). Thus, it takes a kind of *sovereign creativity* to present the results of a historical analysis. The writing of scientific texts is thus always a construction that can never represent the whole picture (cf. Gadamer 1975, p. 465). Within *sovereign creativity*, the goal is not only to produce a constant improvement of knowledge, but also to show new points of view. It is about reflexive and conscious interpretation of history based on a critically examined experience and how it can be transposed into the present (Senn 1993, p. 73 f.).

In relation to the TJ process in Colombia, which is currently ongoing, the question is what results contribute to how the story about the internal armed conflict in Colombia is presented for the future. The TJ process in Colombia—SIVJRNR—is tasked with reporting on the true facts of the conflict in order to prevent recurrence of the conflict and its grave human rights violations (see Section 2.2). The Truth Commission CEV has a special role in terms of truth-telling. However, the time allotted for truth investigation is too short. In this context, it is critical to consider how it is possible to adequately resolve a conflict that has lasted more than fifty years within three years (see Section 2.2.1, cf. CEV, Mandato y Funciones) (See footnote 4). In addition to the CEV, the Special Court JEP and the Special Unit for the Search for Missing Persons UBPD are also used to determine the truth (see Section 2.2). The JEP refers to legal truth-finding and the UBPD to the search for missing persons. The latter is primarily concerned with whether the missing persons are still alive, whether they disappeared in the context of the internal armed conflict, or whether the persons in question themselves are to be counted as members of parties to the conflict or as civilian victims (see Section 2.2.3; cf. UBPD) (See footnote 4).

The TJ process in Colombia highlights the tension between *transition* and *justice*. On the one hand, there are institutions such as the CEV, JEP, and UBPD that have been installed to determine *the truth* to achieve *justice*. On the other hand, they are bound by political circumstances as to exactly how *truth* can be determined. For example, there is a lack of *open and clear conditions* on how affected persons can participate in the process at all. Non-governmental organizations (NGOs) play an important role in mediating between affected persons and the institutes of the TJ process (see Section 2.1). At the time of my field research in 2019, the clear conditions governing how exactly individuals or a collective can participate in a TJ process had not been fully determined. In addition, a list of individuals who provided testimony was published during this time by mistake, which did not promote confidence in the TJ process (See footnote 4). In addition, in relation to historical contexts, a rejection of the parties to the conflict continuing with serious human rights violations is notable. For example, no party to the conflict wants to be associated with the use of sexual violence as a weapon of war. In this regard, an attempt is being made to focus on *individual responsibility* as a result of having been a party to the conflict that used sexual violence as a tactical weapon of war hampers the process of electioneering in search of a new beginning.

3.1.2. The Perspective of Social Anthropology

Social anthropology[8] emerged during the colonial period of the 19th and early 20th century and aimed at systematically researching "foreign peoples" and describing their cultural habitat as comprehensively as possible (Kohl 2012, p. 131; cf. Gyr 2020, p. 163). In this context, so-called "foreign cultures" were regarded as objects of research that could be objectified. During this period, the theory of evolutionism also played an important role; it was intended to trace the progress of mankind in the field of society and culture and to legitimize the colonial masters vis-à-vis the subjugated and, in the view of the colonial masters, "second- or third-rate" peoples (Kohl 2012, p. 154; cf. Gyr 2020, p. 163 f.; cf. Senn 2017 with regard to "othering", p. 199; cf. Senn and Gschwend 2010 with regard to "racial doctrine", p. 86). Racial doctrine rapidly gained popularity in academia as the answer to the inequality between the "superior" and "inferior races" lay in the responsibility of the bearer of a race itself (Kohl 2012, p. 154 ff.). Racial doctrine must also be considered along with the politics and nation-building of the 19th century. The political focus was on finding a national identity based on a common denominator, namely one's own people. In this regard, the problem and danger of a scientific discussion of cultural differences should also be noted, especially when it can be misused for political purposes (Senn and Gschwend 2010, pp. 77 f.). Racial doctrine also aimed at justifying colonial policy, and the task of cultural anthropologists was to show the differences between cultures and thus legitimize the power of the "superior race" (Senn and Gschwend 2010, p. 86; cf. Senn 2017 about "othering", p. 199). For this reason, anthropology in Europe was tied to the system of colonialism, and with the collapse of this structure, interest in the discipline also declined, making it necessary for anthropologists to come to terms with their own discipline.

The most impactful debate within social anthropology took place in the late 1970s and is known as the *Writing Culture Debate* (Marcus 2012, p. 73; cf. Gyr 2020, p. 164). The debate addressed the colonial legacy and the question of how to write about cultures. Ultimately, it was also about demonstrating the presence of colonial structures within social sciences, especially in social anthropology and more specifically in the context of researching the "foreign" (Beer 2008, p. 13; cf. Gyr 2020, p. 164). The critique focused primarily on ethnography, which emerged out of the confluence of field notes, observations, dialogues, and discourses in written form (Marcus 2010, p. 264 f; cf. Gyr 2020, p. 164). The central problem of ethnography was (and still is) that from an interpretation—without further reflection—a neutral objective attribution of meaning was assumed and thus the interpretive result had to be regarded as generally scientifically valid. This problem can therefore be compared to the problem of positivism (cf. Gyr 2020, p. 164).

According to Jacques Derrida (1972), social anthropology occupies a privileged sphere of action solely because that the discipline lost its privileged position with the collapse of colonialism, and it then had to deal with its own raison d'être. By trying to break away from Eurocentrism, it simultaneously absorbed the idea of Eurocentrism. According to Derrida (1972, p. 427), this cannot be circumvented, because only by acknowledging historical contexts can they also be consciously and seriously questioned (cf. Dworkin 2014, p. 205: cf. Senn 1993, p. 73 f.).

The temporary structures which TJ as well as positivism can be examined by means of the "structurality of structure" as developed by Derrida. According to Derrida (1972, p. 422), the "structurality of structure" in science serves to reduce a structure until a core emerges that reveals a steady origin from which all attributions of meaning can in turn be derived. According to Derrida (1972, p. 422), however, the center is located both inside and outside the structure. Thus, events are characterized by realizations of a respective zeitgeist, whose beginning and end must be renegotiated time and again. This means that the attribution of meaning has a complexity that cannot simply be limited to a structure

[8] In the following, no distinction is made between the application of terms of social anthropology, cultural anthropology, social and cultural anthropology, and ethnology. All areas deal with the same problem, but with different approaches and accentuation, whereby the differentiation is not addressed in this study.

and a center. The same is true of Dworkin's (2014, pp. 269, 307) interpretive theory with respect to the interpretation of value ascription. In this sense, positivism in social science as in jurisprudence is always only one way to find *truth*. For positivism severely limits perspectives from the outset by its self-imposed framework, so that the reconstructed truth taken as a basis here is always only able to reflect a small and probably also distorted section of history (cf. Gyr 2020, p. 159 f.).

In the context of TJ, the events in question are mostly violent conflicts. Nevertheless, through the temporary structure of TJ, *the truth* is to be determined and *justice* is to be established. However, with neutralization and reduction, socio-cultural differences are filtered out of the process. This allows for a universalism that does not exist in the practice of TJ in this way (cf. Gyr 2020, p. 159 f.).

With respect to the TJ process in Colombia, the issue of politics and nation-building in the context of racial doctrine is quite relevant from a social anthropological perspective (see Section 3.1). Most Latin American states gained their independence from colonial states in the 19th century. As a result, especially in the second half of the 19th century, laws were enacted in the new states that allowed an elite to appropriate land from indigenous communities and privatize communal property (Huizer and Stavenhagen 1974, p. 379 f.). According to Anibal Quijano (2000, p. 533 f.), for example, racial doctrine was deliberately used as an instrument of power during the period of decolonization (cf. Senn and Gschwend 2010, p. 86). Alyson Brysk (2000, p. 7); they argue that the distribution of land from collective to individual ownership was detrimental to societies in Latin America because it gave rise to elites with whom a majority of the population could not identify. According to Quijano (2000, p. 534 f.), the identities created by the colonialists, such as *Indios* and *Afros*, have erased previous identities and histories, reducing collective identities to the event of colonization. Thus, the people referred to as *Indios* by the colonialists are those who were present before the colonialists and the *Afros* are the slaves who were sold to the Americas to increase global labor production.

With regard to the TJ process in Colombia, it can be stated that mainly regions where *indigenous* and *Afro-Colombian* people live were, or still are, affected by violent conflicts. During my 2019 fieldwork in Colombia, I traveled to Bogotá and the department of Chocó. Bogotá is home to all the headquarters of the institutionalized mandates of the TJ process, such as the Special Court JEP, and the department of Chocó is one of the departments in Colombia that is still contested by different parties to the conflict. The discrepancy between Bogotá and Chocó is demonstrated not only by the violent confrontation but also by the absence of rule of law. Consequently, the TJ process in Chocó is not represented by an institution. It is mediated primarily through NGOs, which are networked locally and internationally and are thus gaining in importance (Teitel 2003, see chap. 2.1, *Post-Cold War Phase*).

3.2. Liberty and the Rule of Law as the Basis of Transitional Justice

To achieve *justice* in a constitutional state, a theory of *liberty* is required so that the framework between the government and the people is clarified. Dworkin distinguishes between *Freedom* and *Liberty*. By *Freedom*, he means the *freedom* to do anything and everything without any restriction from the government. *Liberty*, on the other hand, entails certain rights of *freedom*. In the context of a liberal constitutional state, the discussion always pivots around certain *liberties* and not about the *freedom* to do everything without government restriction. However, there is a great deal of leeway in this regard, which is constantly being changed between the government and the population. In this context, *liberty* often conflicts with the question of *equality* (Dworkin 2014, p. 18). This conflict is also observable in Colombia's TJ process, such as in relation to natural resource allocation.

3.2.1. Liberty According to Dworkin

The general idea of *liberty* is widespread and known, but what is of interest in this context is the connotation of *liberty* in the context of a just state. According to Dworkin (2014, p. 616), to classify the concept of *freedom*, it must be treated interpretively so that the

controversy can be addressed at all. In a liberal constitutional state, *liberty* is associated with coercion, which, according to Dworkin (2014, p. 617), must be considered in the context of personal responsibility. Personal responsibility here consists of the two basic ethical principles of *self-respect* and *authenticity*. This entails that it is the responsibility of every human being and, accordingly, their *liberty* to appreciate and decide by making "something" of their own lives (Dworkin 2014, p. 345 f.). Taking responsibility for one's life, then, means living life in such a way that it conforms to self-imposed ethical values (Dworkin 2014, pp. 346, 357). Transferred to the state community, political decisions are subject to conditions related to respect for *individual responsibility* (Dworkin 2014, p. 617). This means that participation in collective decisions must be guaranteed and that decisions concerning personal responsibility can only be made by the actual people affected by them (Dworkin 2014, p. 618).

Regarding *liberty*, Dworkin (2014, p. 618) distinguishes between *positive* and *negative liberty*. *Positive liberty* is concerned with what appropriate means can be used to ensure the necessary participation of citizens. *Negative liberty*, on the other hand, encompasses the situations when collective decisions come into conflict with personal responsibility.

According to Dworkin (2014, p. 621), controversies about *liberty* can only be thoroughly grasped if we understand the concept of liberty interpretively and relate it to personal responsibility. Only in connection with human dignity does *liberty* appears valuable.

Accordingly, all people should be entitled to the same *liberty*, which is why the implementation of equality is crucial. In the constitutional state, the question arises under which conditions a government can justifiably restrict the *liberty* of all and where the limits for this lie (Dworkin 2014, p. 624). Ethics plays an important role when it comes to drawing the line between collective decisions and *personal responsibility* (Dworkin 2014, p. 628). According to Dworkin (2014, p. 33), ethics is related to the topic of leading a successful way of life, whereas morality focuses on how we behave towards other people. Accordingly, for Dworkin, a successful way of life is elementary in terms of *liberty* and responsibility. The individual thus plays an important role according to Dworkin. Regarding responsibility, the focus in a TJ process is on the conflict parties as a collective. In this context, *collective responsibility* in a TJ process refers to acts of serious human rights violations committed during the internal armed conflict. Personal responsibility, as described by Dworkin, is to be understood in the framework of a functioning liberal state under the rule of law that is not at war or in armed conflict. The description bears a discrepancy between *personal* and *collective responsibility*. According to Dworkin, *personal responsibility* should adhere to basic ethical principles. In relation to a violent conflict, goals, which can also be related to the idea of a successful way of life, are enforced by violent means. Therefore, it is not clarified what happens when the framework conditions that enable the fundamental values of a successful way of life are missing and how these are built up, which in turn is precisely the goal of a TJ process.

3.2.2. Transitional Justice and Liberty

Liberty in the aforementioned sense is also a central element in a TJ process because the result is to guarantee *Liberty* (see Section 2.1). Regarding a TJ process, the question arises whether personal responsibility in the sense of *self-respect* and *authenticity* is guaranteed.

In a TJ process, the relationship between citizen and state is complicated, as shown by the example of the peace treaty in Colombia (see Section 2.2.1). It is therefore difficult to comply with the conditions described by Dworkin regarding *liberty*. The two basic ethical principles of *self-respect* and *authenticity* are in a state of exception and subject to difficult, unpredictable conditions. Particularly, it is unclear to what extent a person in a state of emergency of violent conflict can participate in the decisions of a collective and to what extent respect for personal responsibility can or may be taken into account in these decisions (cf. Dworkin 2014, p. 618). In the TJ process of Colombia—SIVJRNR—there is no indication of how the idea of liberty of individuals can be concretely implemented. The TJ process aims to shed light on past events; this is done through a report by the

Truth Commission, the search for missing persons and the Special Court (see Section 2.2). However, the SIVJRNR does not provide a concrete indication of how the relationship between the citizen and the state will be shaped in terms of the two fundamental ethical principles. The TJ process provides mechanisms that are used primarily for dealing with the violent events of the past. There are no specific instructions on how the *liberty* and *equality* of Colombians should be shaped in concrete terms. For years, Colombia has been one of the countries with the most internally displaced persons. According to the United Nations High Commissioner for Refugees (UNHCR), between June 2021 and May 2022, approximately 60,000 people were internally displaced or forcibly resettled (UNHCR 2023). People in rural areas, such as the departments of Chocó, Cauca, Nariño, and Norte de Santander, are particularly affected. Although the report of the Truth Commission points out this situation, it cannot take any measures other than making recommendations (see Section 2.2.1). Here, the tension between "transition" and "justice" is clearly manifested (see Section 2.1). The discrepancy between an ideal conception of liberty and the actual political circumstances is substantial. Liberty, in terms of personal responsibility and political co-determination, depends on conditions that make it possible to participate in a process in the first place and to be respected as equal participants. The decisive factor here is the value attributed to freedom and how it connects with equality. If no values were ascribed to liberty in a political decision-making process, it would be meaningless and the people would likewise have no significance.

3.3. Equality

In addition to *liberty*, *equality* is another factor in achieving *justice* within a constitutional state. As already mentioned, the question of equality can come into conflict with the idea of *liberty*. According to this, the goal is the equal treatment of people within a constitutional state, so that everyone decides for themselves how to shape their lives (Dworkin 2014, p. 15). However, the self-determined shaping of one's own life depends on the possibilities and how resources are distributed within a state. This means, for example, access to education and state infrastructure, but also the distribution of and access to land. The challenge in the distribution of resources is to ensure that people are treated equally (Dworkin 2014, p. 15 ff.). Accordingly, the question is how decisions of a political community can bring the distribution of resources in line with personal responsibility: namely, how the individual life design with collective, political decisions can meet the requirement of justice for liberty and equality (Dworkin 2014, p. 602). In relation to this, it is not clear how a state distributes natural resources by appropriate means that meet the demand for *equality* and *liberty* at the individual and collective levels, which are also in a constant state of flux (cf. Dworkin 2014, pp. 269, 307, see chap. 3).

3.3.1. Equality According to Dworkin

In resource allocation, Dworkin (2014, p. 601) distinguishes between *personal* and *impersonal* resources. The issue of resource allocation by a political community relates only to impersonal resources. According to Dworkin (2014, pp. 697 f., 600 f.), an equitable distribution of resources is not possible in a *laisser-faire* state, nor in a pure *welfare* state. Dworkin argues they both fail under the principle of *distributive justice*. In a *laisser-faire* environment, Dworkin notes (2014, p. 597 f.), the state does not assume the responsibility of a fair distribution of resources because it behaves passively. He sees (Dworkin 2014, p. 600 f.) the problem with a *welfare* state, on the other hand, in that it determines what constitutes a good life and a successful lifestyle; thus, personal responsibility cannot be guaranteed.

As claimed by Dworkin (2014, pp. 15 ff., 549 f.), the allocation of resources by the government should be transparent and based on the principles of equal treatment and individual responsibility; the state must bear responsibility so that domestic power-political interest groups cannot disproportionately enrich themselves. Dworkin's (2014, p. 601 f.) concept of equality is about the consideration of all citizens within a political community.

On the one hand, the personal responsibility of all members should be respected and, on the other, political decisions about resources should also be made on a basis of ethical responsibility.

3.3.2. Resource Equality and Transitional Justice Process in Colombia

With regard to the internal armed conflict in Colombia, the distribution of resources can be described as a major problem. Overall, the political disputes between liberals and conservatives in the 1940s and the social differences in the population are considered to have triggered the emergence of different guerrillas, which demanded a redistribution of power and land claims (Farnsworth-Alvear et al. 2017, p. 343). The emergence of drug trafficking in the 1980s and 1990s tightened the web of conflict (Richani 1997, p. 37; Werle and Vormann 2018, p. 286). The department of Chocó is one of the main hotbeds of the conflict of interests described above. The Bellavista-Bojayá massacre of 2 May 2002, in the department of Chocó exemplifies the massive use of violence to gain power and control over a catchment area on the Rio Atrato (see Section 2.2.3; Vergara-Figueroa 2018, pp. xix f., 3, 50).

The example of the Rio Atrato can be used to show different constellations, as it is central to the social, political, economic, and historical self-understanding, and to show the different conflicts and consequences for the population in the Chocó. The river was recognized as an independent legal entity by the Colombian Constitutional Court on 10 November 2016 (Río Atrato. Sentencia T-622/16). With this ruling, the river is recognized as an important source of livelihood for the department of Chocó. The river not only stands for biodiversity, but it is also the livelihood for the population in Chocó in general, a trade route, and attraction for gold prospectors (Vergara-Figueroa 2018, p. 27 f.) With the aforementioned ruling, the State of Colombia was obliged to ensure the protection of the river and its associated biodiversity.

According to Vergara-Figueroa (2018, p. 3), the colonial past continues to play an important role as people in the department of Chocó still receive little attention within the government. Access to state infrastructure is almost non-existent in the department, which speaks for an unequal distribution of resources. The Colombian government does not assume any responsibility in this regard. It is critical to consider how voices from Chocó are taken into account in political decisions related to resource distribution. According to Dworkin's (2014, pp. 15 ff., 594 f.) theory, this is necessary in order to live a successful life (see Section 3.3.1). The fact that violence has flared up again in the department of Chocó since the peace treaty shows that a peace treaty does not automatically mean peace.

The problem is that the peace treaty was concluded only between the government and the former guerrilla group FARC (see Section 2.2.1; cf. Werle and Vormann 2018, p. 287). Consequently, the entire drug conflict and the conflict between guerrilla groups, such as the *Ejercito Nacional de Liberación* (ELN), have not been included in Colombia's TJ process. Therefore, it matters in which department of Colombia someone lives. It is so difficult to treat citizens equally as, depending on the department, people live in different conditions and are affected differently by the conflicts that still continue. It is obvious that the Colombian government is far from ensuring equal treatment of the people of Colombia when it comes to the distribution of resources, because the different ideas of a successful way of life when making political decisions are not taken into account, and control cannot be asserted over the entire national territory.

3.4. Democracy

A liberal constitutional state is based on a democratic idea of the state. In a liberal constitutional state, Dworkin (2014, pp. 642, 647) understands the idea of *democracy* in the relationship of *equality*, *liberty,* and *justice*. *Liberty* and *equality* can come into conflict with each other when it comes to resource distribution, for example (see Sections 3.2 and 3.3). *Democracy* means is often associated to the form of participation in government and the guarantee of access to state power (Dworkin 2014, p. 19).

In a TJ process, equal participation plays an important role in ensuring that political decisions are supported as broadly as possible by the population. The question is how the concept of *democracy* is negotiated in Colombian society and whether the decision to no longer bring the revised peace treaty before the people satisfies the demand for *justice* (see Section 2.2).

3.4.1. Democracy According to Dworkin

In a *democracy*, according to Dworkin (2014, p. 653), human dignity is central to creating conditions in a state that allow people to be treated equally. Political equality is crucial to how political power is distributed. Dworkin (2014, p. 657) is not concerned with a mathematical calculation of how power is distributed; rather, his point is that the actual distribution of power also leads to equal treatment of citizens. *Democracy* is often described as a form of government by the people. Since the concept of *democracy* is interpretive, it is unclear what is meant by *the people*. Furthermore, it is not completely clear how political participation is guaranteed, since elections depend on the respective electoral systems, which in turn can have different influences on the final result (Dworkin 2014, p. 641 f.). *Democracy* therefore presupposes a political community, but says nothing about how this political community should be composed (Dworkin 2014, p. 643). It is therefore crucial what conditions are created for a person to belong to a political community. In relation to this, it is important to look critically at what happens to people who are not counted as part of a political community, but who are nevertheless affected by collective decisions. This includes, for example, stateless persons or sans papiers.

In a *democracy*, collective decisions can also be enforced by coercion. According to Dworkin (2014, p. 617), any government is coercion-based when it comes to negotiating the framework conditions. This is where the theory of *liberty* comes in, according to which Dworkin (2014, p. 18) is primarily concerned with certain rights of *liberty* (see Section 3.2). Dworkin (2014, p. 641) refers to a fundamentally ethical attitude as decisive, which goes hand in hand with governmental and individual responsibility. This means that every person is called upon to make ethical decisions independently of the government.

3.4.2. Transitional Justice in Colombia: Democracy and Belonging

The TJ process in Colombia was initiated by the signing of the Colombian government and the former guerrilla group FARC in November 2016, which at the same time reflects the ambivalence of the population regarding the peace policy (see Section 2.2; Werle and Vormann 2018, p. 287). A TJ process is about creating democratic state structures to ensure equal treatment of people and political participation (see Section 3.4.1). In this regard, it is not clear who is counted as part of the political community because *democracy* is an interpretive term (see Section 3.4.1; Dworkin 2014, p. 641 ff.). In this context, it is important to consider how the TJ process in Colombia interprets the concept of *democracy* in the first place and who is counted as part of the political community.

The Truth Commission takes up the question of who belongs to the people because one task concerns "national reconciliation" (Wilson 2003, p. 371). "National reconciliation" must be viewed critically in relation to the founding of the state of Colombia and the concomitant nationality and identity formation in the 19th century and the re-nationalization and identity politics of the TJ in the present (cf. Gyr 2020, p. 168 f.; cf. Senn and Gschwend 2010, p. 77 f.). The 19th-century search for nationality and identity can be compared to the emergence of social anthropology in the colonial context. In this setting, evolutionary theory and racial doctrine were important tools to legitimize domination over "third- or second-rate peoples" (see Section 3.1.2; cf. Kohl 2012, p. 131; cf. Gyr 2020, p. 163; cf. Senn 2017, regarding "othering", p. 199). It was only through a serious and prolonged engagement with the colonial legacy, triggered by the *Writing Culture Debate* in the late 1970s, that social anthropology could emerge anew (see Section 3.1.2; Derrida 1972, p. 427; cf. Gyr 2020, p. 164; cf. Dworkin 2014, p. 205; cf. Marcus 2012, p. 73; cf. Senn 1993, p. 73 f.).

In the context of the TJ process in Colombia, it is first necessary to examine whether nationality and identity politics play any role at all in achieving the goals. According to Huizer and Stavenhagen (1974, p. 379 f.), with the independence of the colonial states in the 19th century, an elite was formed which, through new laws, made it possible to appropriate land from indigenous communities and to privatize communal property (see Section 3.1.2; Brysk 2000, p. 7). In doing so, according to Quijano (2000, p. 533 ff.), racial doctrine was deliberately used as an instrument of power, and identities such as *Indios* and *Afros* were created by the colonialists, who reduced their identity to the event of colonization (See Section 3.2.1). At an event of the TJ process, which provided information about the participation of affected persons and groups of the internal armed conflict in Colombia, there were also meetings of different communities of interest. In relation to reconciliation, for example, the testimony of a person who was a representative of a religious group is that the reconciliation should also end the territorial claims of the indigenous population. He added that the dignity of the victims should be central and that a public apology was needed, but that indigenous people are not entitled to land. He feared that the latter were aiming to present themselves as victims. However, in the context of this event and the different representatives of communities of interest, it clearly emerged that opinions differ significantly on the idea of what a "reconciliation" should involve (See footnote 4).

In Colombia, slaves were used for forced labor and land was privatized from indigenous people. Around the middle of the 19th century, slavery was abolished in Colombia. The first law that allowed Afro-Colombian communities to own land was the so-called Law 70 of 1993 (Ley 70 de 1993; Vergara-Figueroa 2018, Foreword). Law 70 concerns Afro-Colombian communities and protects their ethnic identity and the preservation of traditional ways of life, with the aim of providing them with equal opportunities (Artículo 1, Ley 70 de 1993).

With this law, it became possible for these communities to make a collective claim to land. At the same time, the law is linked to a notion of identity, which it thereby seeks to protect and which can thus also only be asserted collectively. It is questionable how traditional ways of life are determined and what happens to communities that do not meet the requirements. In addition, there is a discrepancy that arises from the pressure to conform to Colombian society and the right to land, which is only granted to those who lead a "traditional" way of life. According to Jelin (1996, p. 105), this can be understood as a marginalization of a group that attaches rights to identity that are only guaranteed collectively.

In reference to Dworkin's (2014, pp. 263 f., 269, 307) interpretive approach, values are subject to constant change and require permanent negotiation (see Sections 3 and 3.1). Consequently, even a "traditional way of life" cannot be regarded as a static and unchanging way of life that does not change. Accordingly, collective rights that demand a "traditional way of life" are not compatible with personal responsibility, according to Dworkin (2014, p. 346, see chap. 3). The requirement of a "traditional way of life" in order to assert certain rights contradicts this principle. At the same time, it is also unclear how a "traditional way of life" can be guaranteed in terms of equal treatment and participation in political decision-making (cf. Dworkin 2014, p. 653). Due to the ongoing conflicts as well as the apparent ambivalence of the population regarding the peace treaty, Dworkin's demands have not been met.

3.5. Law

Law is the decisive factor for the rule of law. *Law* is not simply an instrument of a government; in fact, the government itself is subject to law. Only autonomous law as the basis of a state can permanently guarantee a peaceful and secure coexistence of a society, if the autonomy of *law* is also guaranteed (Senn 2022, p. 3). The examination of a society's understanding of its *law* is also an examination of its history. Within a TJ process, for example, it is necessary to deal responsibly with the history to be processed in order to get to *the truth* of what happened during the armed conflict (cf. Senn 2022, p. 2).

According to Dworkin, *law*, along with *equality*, *liberty*, and *democracy*, complements the demand for *justice*. Dworkin understands *law* as part of morality, which he considers a "tree-like structure":

> "It is also necessary to understand morality in general as having a tree structure: law is a branch of political morality, which is itself a branch of a more general personal morality, which is in turn a branch of a yet more general theory of what it is to live well." (Dworkin 2011, p. 5.)

It has not been fully clarified what role *law* should or can play within TJ. In legal theory, *law* assumes an integrating function for a functioning constitutional state, such as for peacekeeping and social integration (cf. Habermas 1992, with regard to "social integration", p. 527; cf. Mahlmann 2018, with regard to "functions of law", pp. 32–37).

Concerning TJ, however, it is not the state that forms the framework structure of law; rather, the fundamental orientation of law is located at the international level, as was already the case, for example, in the guiding ideas of natural law doctrine from antiquity through the Middle Ages and into modern times (cf. Welze 1962). Consequently, it is also unclear to what extent societal contexts and basic ethical attitudes are incorporated into the process of the different mechanisms of TJ in order to obtain an integrating legal function.

3.5.1. Legal Understandings

The philosophy of law and society, as formulated by Marcel Senn (2017, p. 4 f.), involves a historical-critical examination of the understanding of law per se and in its respective social reception, and sheds light on how it affects or affected a society (cf. Gyr 2020, p. 160). The plurality of views regarding *law* within a society is also addressed. For this reason, we also speak of philosophy of law and social philosophy, and not only of philosophy of law (Senn 2017, Foreword, p. V; cf. Gyr 2020, p. 160).

Law is to be understood within the respective social and cultural environment of a society and can be compared with Dworkin's interpretive approach.

A legal and socio-philosophical perspective deals with a historical-reflexive discussion and with how different conceptions of law can be examined.

3.5.2. Transitional Justice and Principles of General Natural and International Law

Concerning Dworkin's theory of interpretation and justice, the shaping of law and the idea of a liberal constitutional state must be understood in the context of the North American and European reception history. With regard to TJ, it is not a state that forms the framework structure of law, but TJ takes place in an international context and can be compared with the principles of general natural law doctrine (see Section 3.5; cf. Welze 1962). The legal source of TJ is international law (cf. Werle and Vormann 2018, p. 27).

In a TJ process, questions of the possibilities and the limits of the *law* are at stake. As a result of globalization, conflicts are not limited to one national territory. The emergence and development of international law plays an important role in understanding the problems of the present (Hobe 2020, p. 14 ff.; Ipsen 2018, p. 21).

The definition of international law can be traced back to the *ius gentium* of Roman law (Hobe 2020, p. 8; Ipsen 2018, p. 2). According to legal scholar Stephan Hobe (2020, p. 8), *ius gentium* did not acquire an international character until the early modern period. The legal scholar Knut Ipsen (2018, p. 21) argues that constitutionalism and the history of the effects of the Enlightenment played an important role in ensuring that states were recognized as legal subjects in order to regulate state relations in international law. In connection with imperialism and colonialism, it was also explored to what extent the colonized could be regarded as having legal capacity, and whether there was an equality of people. Since there is still a discrepancy between states after decolonization and TJ mechanisms are increasingly applied in former colonial states, some countries criticize this fact as a continuation of colonialism or latent "neocolonialism" (cf. Anders and Zenker 2014, p. 396).

In the context of the TJ process in Colombia, the question therefore arises as to how Colombia itself deals with its colonial past (see Section 3.1.2; Derrida 1972, p. 427; cf. Dworkin 2014, p. 205; cf. Senn 1993, p. 73 f.). The example with land distribution shows that especially with regard to land claims there is a discrepancy between privatization and collectivization, the latter being additionally linked to a clear notion of identity (see Section 3.4.2; Jelin 1996, p. 105). Here a comparison of Derrida (1972, p. 427) and Senn (1993, p. 73 f.) can be drawn, namely with regard to the critical consideration of one's own discipline and positioning. What is meant by this is the extent to which the historical contexts are seriously and critically questioned in order to recognize them accordingly (cf. Dworkin 2014, p. 205). Accordingly, in the context of the TJ process in Colombia, it is important to keep in mind that TJ is limited in time and focused on the phase of the conflict with the former guerrilla group FARC (see Section 2.2; Werle and Vormann 2018, p. 287). Considering the time pressure and the selection of the available means, a sufficient and critical reappraisal cannot be expected. With regard to the relationship between *liberty* and *equality*, the lack of treatment remains problematic, which would, however, be necessary in order to be able to conduct a serious and critical discussion.

Finally, it should be considered that the perspective presented regarding the TJ process is predominantly transposed from a European and North American stance to a South American reality.

3.6. Truth

There is no *justice* without *truth.* Thus, *truth* and *justice* are important components of a functioning constitutional state. Particularly in serious cases, such as massive human rights violations within a state, the government has an obligation to ensure that what happened is investigated and brought to justice.

In a democratic state governed by the rule of law, *truth* and *justice* are elementary components alongside *liberty* and *equality*. As already mentioned in the previous chapters, *liberty, equality, democracy,* and *justice* are interpretive concepts that are related to values and are therefore subject to constant change (see Section 3.1; Dworkin 2014, p. 263). Within a constitutional state, *truth* assumes an important role because it presupposes trust and responsibility. For example, statements made by the government or government representatives should be transparent and coherent. According to Dworkin (2014, p. 24 ff.), the exercise of power should be based on political morality, which in turn is influenced by values. This is also accompanied by a responsibility, which in turn is based on moral values (Dworkin 2014, p. 31). In order to connect values and truth, an abstract interpretation is needed first. With regard to *truth* and method, Dworkin (2014, p. 305) starts from an abstract understanding of truth which, after investigation, can lead to a theory that can be applied to a concrete domain.

3.6.1. Truth and Interpretive Statements

According to Dworkin (2014, p. 36), the knowledge of *interpretive truth* depends on science and metaphysics, which cannot function without ethics. Dworkin sees respect for other people, as well as self-respect, as central, because *interpretive truth* is linked to *moral truth.* Accordingly, a critical examination of one's own science as well as one's own way of thinking is also intended, which are shaped by social, political, and cultural environments, which in each case flow into the scientific examination and, according to Dworkin (2014, pp. 22 f., 679), also into the interpretation (see Section 3.1.1; Senn 1993, p. 72 f; Gyr 2020, p. 162). For, in order to be able to discuss *truth*, according to Dworkin (2014, p. 296), *truth* must be understood as an interpretive assertion in each case. Consequently, the relation between the concept of *truth* to *truth* in everyday habitual constitutions has to be clarified in order to be able to interpret them in the next step.

Interpretation relies on analysis, which can never show the whole picture (Dworkin 2014, p. 296; cf. Gadamer 1975, p. 456). In the context of a philosophical theory of *truth*, according to Dworkin (2014, p. 296 f.), theory must always be tested against practice, for

a theory of *truth* should be able to concretely effect and justify something. According to Dworkin (2014, p. 301 f.), the theory of value in connection with the theory of moral responsibility would be suitable to come closer to this intention (see Section 3.1). Thus, it is a matter of choosing an appropriate interpretive practice that does justice to the value of the concept of *truth* (Dworkin 2014, p. 225). In the context of the TJ process in Colombia, this means that the purpose of *truth* investigation is to reveal what actually happened during the internal armed conflict in Colombia in order to prevent the recurrence of the conflict and its associated atrocities (see Section 2.2.1.; cf. SIVJRNR) In this regard, the Truth Commission has a special role in a TJ process because it was explicitly established to determine *the truth*.

3.6.2. Transitional Justice and Truth

"Hay futuro si hay verdad" (There is a future if there is truth), the slogan of the Truth Commission CEV, conveys that the future relies on truth-telling (see Section 2.2.1). A fundamental problem here, as we have seen, for example, Ángela Salazar (former member of the Truth Commission) point out in an interview, is that everyone wants *the truth*. By this she meant that different parties or interest groups claim *the truth* for themselves and thus already have a clear idea of what *the truth* should look like. Consequently, it is delicate when individuals or a group claim *the truth* for themselves, because in this way the presentation of *truth* is ultimately used as an instrument of power. Truth cannot be relativized at will in order to strengthen or enforce interests (cf. Senn 2017, p. 35). In terms of Derrida's (1972, p. 264 f.) "structurality of structure" or Dworkin's (2014, pp. 205, 269, 307) interpretive approach, *truth* is not linked to an immutable origin from which everything can be derived, since interpretive *truth* is linked to values, which in turn are subject to a dynamic process (see Section 3.1.2; cf. Senn 1993, p. 73 f.). Consequently, *truth* cannot be considered immutable. However, the more different scientific investigations are made, for example, on the same event, the better an event can be represented. A variety of methods helps to take different perspectives on the same event and expands the overall picture (cf. Gyr 2020, p. 170). However, the quality and seriousness of the investigations is crucial in determining the extent to which truth can be established in order to come to terms with the past and look to the future.

3.6.3. Truth and Reconciliation

In the second phase of TJ described by Teitel (2003, p. 83 f.)—the *Post-Cold War TJ*—reconciliation is the central element. Consequently, forgiveness and reconciliation become the characteristic feature of a political justification on the part of a government that—through a performative act of repentance—sets itself the goal of coming to terms with the past in order to re-enter the common future as a healed and unified state.

Wilson (2003, p. 369) also symbolizes the truth commission as the element of reconciliation. The truth commission can be understood as a constitutional and social approach to the reconciliation of conflicting parties. A truth commission comes into being through a mandate from the government and it is only established for a specific period of time (see Section 2.2; CEV 2017, Mandatos y Funciones). The task of such a commission is first and foremost that of documenting: this is how the social, historical, and structural context of the conflicts is worked through and this information is secured, in particular by producing a report documenting the human rights violations committed during the period under investigation (see Section 2.2.1). According to Wilson (2003, p. 371), following Martha Minow (2009), the report serves to bring about national reconciliation by outlining the human rights violations published in it and asking for forgiveness (cf. Gyr 2020, p. 162). In this way, the people affected should be able to come to terms with the past and their conflicts, as the slogan of the CEV also points out (see Section 2.2.1). In this sense, a line should also be drawn so that the government can start anew in order to come to terms with the past and can no longer be held legally responsible (Wilson 2003, p. 371; cf. Gyr 2020, p. 158).

According to Wilson (2003, p. 371 f.), the documentation of human rights violations must therefore be considered in the context of social scientific and jurisprudential positivism, as it has become the accepted method in relation to the search for *truth* in TJ. A positivist understanding of *truth* is determined by tangible factors, which should be as value-free as possible and thus dispense with *epistemological reflection* (cf. Gyr 2020, p. 159). Accordingly, a positivist understanding of *truth* alone is not sufficient to satisfy Dworkin's (2014, p. 301 f.) requirements with regard to *truth* as an interpretive assertion (see Section 3.6.1). For example, according to the value theory, moral responsibility would have to be claimed with respect to the understanding of truth, which is not the case in positivism (see Section 3.1). Consequently, a positivist understanding of *truth* cannot suffice to bring about reconciliation. In the end, no method alone is sufficient to adequately portray the complex interrelationships of an internal armed conflict that has lasted for decades within such a short period of time.

4. Conclusions

According to Roland Dworkin's (2011, 2014) interpretive theory, the relationship between *liberty* and *justice* in relation to the search for *truth* within a TJ process is linked to value concepts. Values, Dworkin (2014, p. 29) argues, while independent in themselves, are also linked to other values, which thereby support each other. According to Dworkin (2014, pp. 13, 207), truth occupies a special position: on the one hand, because there is disagreement about what truth is in the first place, and on the other hand, because truth in connection with other values makes a successful way of life possible (see Section 3). According to Dworkin (2014, pp. 22 f., 678 f.), a successful way of life is achievable in a liberal constitutional state (see Section 3; cf. Ibric 2022, p. 139). On the one hand, citizens were able to co-determine these legal foundations, and on the other hand, these legal foundations are equally binding for all. *Law* and *morality* are thus intertwined and remain interpretive. Accordingly, the analysis of the terms goes hand in hand with the identification of political, economic, and social practices (Dworkin 2014, pp. 22 f., 678 f.).

In a TJ process, the peaceful coexistence of a society is to be made possible again through the determination of *truth* and *justice,* so that the basic requirements of a constitutional state are also restored (see Section 2.1; Teitel 2003, p. 69 f.; Werle and Vormann 2018; cf. Gyr 2020, p. 156 f.).

The TJ process in Colombia provides an example of how a complex and protracted internal armed conflict can significantly damage trust between the government and the population on the one hand, and the various strata within the population on the other.

Roland Dworkin's (2014, pp. 263 fff., 269, 307) theory of justice is built on the foundation of a liberal rule of law, which in practice is characterized by active and constant interpretation (see Section 3). It is basically the process that arises by itself within a state-constituted society because people always deal with key issues as well as with everyday questions. Therefore, *liberty* and *justice* in relation to finding the *truth* in a TJ process are also concepts that always have to be discussed from the concrete social, cultural, economic, and political conditions of a society (cf. Dworkin 2014, pp. 205, 224, 269, 307; cf. Derrida 1972, p. 423; cf. Senn 1993, p. 73 f.) But according to Dworkin (2014, pp. 172 ff., 222, 268) such an interpretation is always connected with a personal moral responsibility, which can be compared with the *scientific self-reflection* according to Senn (1993, p. 72 f.) and the *structurality of structure* according to Derrida (1972, p. 427).

Thus, a critical examination of one's own discipline as well as one's own attitude is indispensable. Therefore, moral responsibility is also to be judged interpretatively and on the basis of a further moral interpretation (see Section 4, Dworkin 2014, p. 174). An interpretation of *justice* is thus always accompanied by another moral interpretation, which in turn provokes a questioning, which provokes an ongoing discussion on the concept (see Section 3; Dworkin 2014, pp. 274, 601 f.). This circular procedure, however, represents every discourse in science and in a political discussion as a "normal procedure". In this

sense, various reference parameters are always considered and (usually only provisionally) evaluated.

Based on Dworkin's interpretive theory, the greatest challenge in a TJ process is to clarify and overcome the disagreement over fundamental values that have led to internal armed conflict. The unequal distribution of power, land rights and resources has usually been the triggering event for armed guerrillas to be formed (see Section 3.3.2; Farnsworth-Alvear et al. 2017, p. 343). This is particularly true in Colombia. The conflict, which has lasted for more than fifty years, has led to the formation of other parties to the conflict, such as drug cartels (see Section 3.3.2; Richani 1997, p. 37; Werle and Vormann 2018, p. 286). Countless massive human rights violations committed by the parties to the conflict, including the government, rob the rule of law of its legitimacy to guarantee *liberty* and *equality* through *law* (see Section 3.4; Senn 2022, p. 3; cf. Habermas 1992, with regard to "social integration", p. 527; cf. Mahlmann 2019, with regard to "Functions of the law", pp. 32–37).

This situation is consequently to be rectified by a TJ process.

Through its process, TJ seeks to create new stable conditions leading to a liberal rule of law (see chapter 2 with regard to Teitel 2003). Within the mechanisms of SIVJRNR, the Special Court JEP is the most important. The mandate of the Truth Commission CEV is usually short in relation to the time span involved in the internal armed conflict. Due to the limited time span of the mechanisms as well as the ambitious goal of re-establishing a just state, all participants are under high pressure to succeed. However, the overly rigorous demand for results to be available as quickly as possible does not encourage a more in-depth reflective examination of the subject under study and how it should be appropriately presented afterwards so that it is not re-historicized (cf. Senn 1993, p. 73 f.; cf. Gyr 2020, p. 161). In that sense, it must be possible to bring in the interpretive approach, as Dworkin (2011, 2014) points out, in order to be able to have a "normal" discussion, which cannot be concluded hastily and thus will not provide a reliable basis for the new society. The reason for this is that TJ represents a constant process and change that is shaped by global and regional events and hence cannot be explained from only one perspective.

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Stratagems as a Means of Achieving Justice and Spreading Truth

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Abstract: This contribution is based on the Chinese concept called Moulüe. A unique feature of Moulüe, without parallel in Western praxis-oriented schools of thinking, is its Yin-Yang dimension. The two hemispheres of the Yin-Yang symbol, a white one and a black one, are inseparably interconnected. According to the Moulüe concept, the white hemisphere is the place of transparent, conventional, legal ways to solve problems, whereas the black hemisphere harbors hidden agendas, and unconventional, cunning methods to solve problems, with the 36 stratagems as a central component. A person with Moulüe competence who is confronted with a problem can switch from options for action in one hemisphere to options for action in the other according to the circumstances. This contribution shows how the realization of justice, and the spreading of truth, can be achieved based on Moulüe skill which enables the application of the 36 stratagems.

Keywords: Chinese tradition; Yin-Yang; 36 stratagems; Moulüe concept (supraplanning); truth; justice; Ronald Dworkin

It is actually the task of a legal system to ensure justice. However, sometimes the legal system does not fulfil this task, either because it is incomplete or because it is repressive. Nevertheless, it is impossible to establish justice, not on the basis of statutory law, but with the help of stratagems. In this sense, stratagems are external to the law. Truth, too, cannot always be conveyed straightforwardly, and sometimes requires the support of stratagems.

Before addressing the question of how stratagems can promote justice and truth, I explain the word "stratagem". I then introduce the world's most comprehensive compendium of stratagems that originated in China, the "36 Stratagems", and explain their place within the comprehensive concept of "Moulüe". Then, I present four examples of how justice can be achieved based on stratagems. Before concluding, I show how a German journalist was able to determine and disseminate truth thanks to application of the stratagems and how one can immunise oneself against untruth thanks to stratagem knowledge.

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1. Explanation of the Word "Stratagem"

I use "stratagem" in the meaning of the german word "List (Duden 1981, p. 2517). On the meaning of the word "stratagem" in English (von Senger 1991, p. 1)". And what is a "stratagem"? In answering this question, I always refer to the most important dictionary of the German language: "*List, die:* [. . .] means by which one seeks (deceiving others) to achieve something that could not be achieved by normal means [i.e., by legal means]: a diabolical cunning [. . .] (Duden 1983, p. 791)". Put simply, "cunning" is a clever, unorthodox, and extraordinary problem-solving measure about which one exclaims in amazement: "I would never have thought of such a thing".

"Cunning" can be illustrated with the help of a diagram (Figure 1):

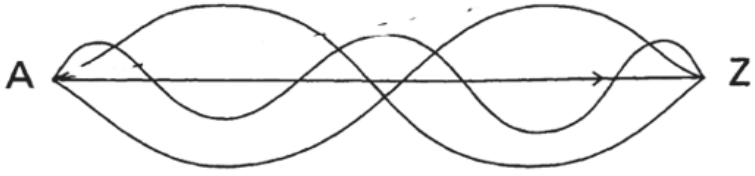

Figure 1. List scheme (The straight line from starting point A to destination Z symbolises the non-artificial, direct, transparent path to a problem solution. The legal path to justice is on this line. The curved lines illustrate cunning ways to the problem solution that is not possible in a straight line. Thus, "the idea of freedom expresses itself again and again in the cunning of reason, which develops freedom [. . .] in society and history in defiance of all obstacles." (von Senger 2006)).

The straight line from starting point A to destination Z symbolises the non-artificial, direct, and transparent path to a problem solution. The legal path to justice is on this line.

The curved lines illustrate cunning ways to the resolution of the problem that are not possible in a straight line (for more details see von Senger 2006, p. 5f.). Thus "the idea of freedom expresses itself again and again in the cunning of reason, which develops freedom [. . .] in society and history in defiance of all obstacles (Senn 2017, p. 111 with a reference to Hegel; see further: von Senger 2021, p. 335: 24.14 Hegels List der Vernunft; Sloterdijk 2008, p. 87ff.)".

I consider the Duden's interpretation of the word "cunning" as a bridge to the Chinese understanding of cunning: "Chu qi zhi sheng 出奇制胜" (Sun Zi 2021, p. 24f.) This means: "To produce something extraordinary [and thus achieve] victory".

Cunning is a "means" that tends to be judged negatively in Europe. Cunning is assigned as one of the two "wrong kinds of cleverness", "craftiness" in a neo-Scholastic textbook of ethics that I had to use at the Einsiedeln Abbey School.[1] Cunning is a vice and consists of someone wanting to achieve a goal by dishonest means. "Cunning proceeds more from falsehood and misrepresentation" (Kälin 1954, p. 144f). John Locke (1632–1704), a thinker who prepared the theoretical foundation of liberalism (Senn 2017, p. 118) writes about cunning: "cunning, which, being the ape of wisdom, is the most distant from it that can be and as an ape for the likeness it has to a man, wanting what really should make him so, is by so much the uglier; cunning is only the want of understanding, which because it cannot compass its ends by direct ways, would do it by a trick and circumvention" (Locke 1909, § 140).

The first example of the use of the word cunning in the German dictionary Duden is "devilish cunning". From these references, one can see that, from the common European viewpoint, "cunning" is a disreputable device. In the eyes of many, it does not appear to be intrinsically moral and ethical. In this regard, it is often said that the end does not justify the means. In order to establish justice or to spread the truth, one should not resort to cunning.

Cunning is seen differently in China (von Senger 1996, pp. 27–102). In the Chinese language, there are many terms for cunning. However, only one Chinese character means "wisdom", "prudence". The two are not so precisely distinguished in the Chinese language. It is the character 智 (pinyin pronunciation: zhi, *see* von Senger 1983, p. 59). This character also means "stratagem" or "cunning" (Edition Institut Ricci 2001, p. 259f.).

Thus, in a Chinese character dictionary (Figure 2), in which the most important character meanings are also given in English, the character for "wisdom", zhi 智, is explained as follows:

[1] This collegiate school is run by the Benedictine monastery of Einsiedeln, which is over a thousand years old. Einsiedeln is located in the canton of Schwyz in Switzerland cf. on the history of the monastery: https://www.kloster-einsiedeln.ch/geschichte/ (accessed on 16 November 2022).

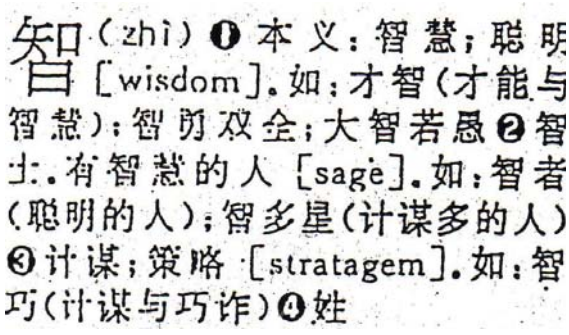

Figure 2. 智 (zhì) 1 本义: 智慧; 聪明 [wisdom]. 如: 才智 (才能与智慧): 智勇双全; 大智若愚 2 智士. 有智慧的人 [say]. 如: 智者 (聪明的人); 智多星 (计谋多的人) 3. 计谋; 策略 [stratagem] 。 如: 智巧 (计谋与巧诈). [*translation*] 智 (zhì) 1. Original meaning: wisdom, prudence [English: wisdom]. Such as [for example]: Caizhi 才智 (enablement and wisdom): both wise and courageous; making great wisdom [appear] like folly 2. Wiser. A person possessing wisdom [English: sage]. As [for example]: A sage (a wise person); cunning person (a person possessing many stratagems). 3. Jimou 计谋 [cunning]; celüe 策略 [stratagem]. For example: cunning and craftiness (Xin Bian Xin Hua Zi Dian 1994, p. 636).

Cunning is therefore seen in a fundamentally positive light because, from a Chinese perspective, the fact that one devises a ruse is evidence of cleverness. Cunning is compared to a kitchen knife (Yu 1993, p. 4). The kitchen knife itself is not subject to ethical evaluation. It is neither good nor bad. Only the use of the kitchen knife can be evaluated. If, according to a common Chinese opinion, it is used to prepare vegetables, the use of the kitchen knife is ethically and morally unobjectionable. However, if it is used for murder, the use of the kitchen knife is reprehensible. The same is true of cunning from the often-widespread Chinese point of view. Cunning, in itself, is ethically and morally neutral. An ethical-moral evaluation only begins when the cunning is used. In this respect, a distinction is made between four types of cunning:

1. Constructive use of cunning with a view to a morally-ethically good purpose;
2. Destructive use of cunning for a morally and ethically evil purpose;
3. The joking use of cunning with regard to a purpose serving mere amusement;
4. The hybrid use of cunning: here one does not know whether the destructive or the constructive predominates, whether one should laugh or cry (von Senger 2006, p. 35ff.)

The examples given in this paper of the use of stratagems to achieve justice (Sections 4.1–4.4) and to disseminate truth (Section 5.1) belong to the category of constructive stratagem use. Destructive uses of stratagems are discussed in Section 5.2. Hybrid uses of stratagems are discussed in Section 5.3.

2. The 36 Stratagems and Their Origin

About 500 years ago, a booklet entitled "Sanshiliu Ji Miben Bingfa 三十六计秘本兵法 (36 Stratagems. The Secret Book of the Art of War)" was written in China. It comprises 38 parts, a preface, an epilogue and 36 chapters. Each chapter consists of a chapter number (1–36), a stratagem formula consisting of four, sometimes only three, characters, a theoretical discussion of the stratagem in question, and a reproduction of examples of the application of the stratagem in question in Chinese history. Translating only the chapter numbers and the stratagem formulas results in a list of 36 stratagems (see Appendix A). There is no comparable book in the world devoted exclusively to stratagem techniques (von Senger 2017a, p. 27ff.). In the West, there are two ancient books on stratagems. The authors are Frontinus (born AD 35—died *c.* 103, see: Frontinus [1] n.d.; Frontinus [2] n.d.) and Polyaenus (flourished 2nd century AD, see Polynaeus [1] n.d.; Polynaeus [2] n.d.).

However, these books contain only casuistic collections of cunning military actions. These actions are ordered according to the circumstances in which they happened or the names of the actors, not according to different cunning techniques such as the 36 stratagems.

On 5 January 2018, the oldest English-language newspaper in the People's Republic of China (PRCh), China Daily, showed about 30 books that Xi Jinping finds important; among them was the book "三十六计 秘本兵法 (Sanshiliu Ji Miben Bingfa) The 36 Stratagems. The Secret Book of the Art of War".[2] This shows the importance of that book.

No Western science helps us to acquire cunning competence, for cunning is not a subject of Western scholarship, except in criminal law and the law of war. The 36 stratagems, compiled in China, represent an "everyday philosophy" that extracts behavioural patterns from the reality of life that have been qualified as cunning in China over the course of thousands of years, and they are formulated in a way which makes them consciously and intellectually tangible.

Ronald Dworkin distinguishes different genres and types of interpretation: conceptual, explanatory, collaborative, historical, sociological, psychodynamic, literary, artistic feminist, and Marxist interpretation (Dworkin 2011, pp. 134, ff., 141 ff.). From a Chinese perspective, one can add a type of interpretation which is unknown in the West: the stratagemic interpretation. This method focuses on how to assign a precise stratagem to an action (von Senger 2016, p. 123ff.). The following is an example of a stratagemic interpretation:

In the drama *Report on a Lonely Woman's Chamber* (see Figure 3) by Shi Hui from the Yuan Dynasty (1271–1368), the war cloak of the persecuted son of a high dignitary who has just been killed by imperial order lies next to a well shaft. The two captors initially think that the son had thrown himself into the well and thus taken his life. Then, one of the captors says: "We've been taken in by a stratagem."—"Which stratagem?"—"The stratagem «The cicada casts off of its skin of gleaming gold». He tricked us into looking for his body here. In the meantime, he's long gone" (Sheng 2006).

Figure 3. A dialogue in the Drama Report on a Lonely Woman's Chamber: [1] "Which stratagem?"; [2] "The cicada casts off of its skin of gleaming gold".

The statement "We have been taken in by a stratagem" could also appear in a Western text. However, the question "Which stratagem?" and the answer which refers to a precise stratagem (that is stratagem number 21) are unlikely to be found in any Western text since the dawn of Western civilization.

[2] Xi's bookshelves: From military history to culture, http://www.chinadaily.com.cn/a/201801/05/WS5a4eb6c6a31008cf16da5296_4.html (accessed on 16 November 2022).

Thus, the Chinese knowledge of cunning teaches us how to deal with the resource of cunning in a well-informed manner and conveys the intellectual armamentarium that enables us:

(1) To use against someone a stratagem, in a rational way and with deliberation, consciously and not just intuitivel from the gut (competence in applying stratagems):
(2) To react in a considered manner as a person targeted by somebody's suspected stratagem application looming on the horizon (competence in defending against stratagems);
(3) To perceive, as an uninvolved observer, the stratagem application of somebody (competence in identifying stratagems). My analysis of the stratagems in Sections 4.1–4.4 and 5.1–5.3 is based on the third competence.

3. The 36 Stratagems and the Concept of Shaping Reality "Moulüe"

On 2 July 2013, a full-page advertisement appeared in the Renmin Ribao 人民日报 (People's Newspaper), the mouthpiece of the Central Committee of the Communist Party of China, about a "collection of 30 traditional Chinese classical works". It was offered in a limited edition of 500 copies at a price of 36,000 yuan each. Among the 30 classical Chinese works, the treatise "The 36 Stratagems" was included alongside Confucius' Discourses and Lao Zi's Daodejing. The promotional text dedicated to this book reads:

> "This book generalises the stratagem [knowledge] of the military experts of Chinese antiquity. It is a famous work of military moulüe and the epitome of the military expertise and ingenuity of the successive epochs [of Chinese history]. Not only for appropriate measures in the military field and in political struggle, but also for the whole of social life, for economy and diplomacy, and for interpersonal intercourse, it can be applied in the highest degree" (Zhong Guo Jing Dian Chuan Shi Zang Shu 30 Bu 2013, p. 12)

Two things are evident from this text. First, that the 36 stratagems are considered as useful at all levels. Secondly, that the 36 stratagems are not an isolated arsenal of methods for achieving goals, but are placed within the Chinese concept of reality shaping, called "Moulüe".

This concept is based on the ancient Chinese Yin-Yang symbol (Figure 4).

Figure 4. The Yin-Yang Symbol.

This symbol does not reflect a purely binary black and white world view. Gray is also included. In reality, many things are not in glaring light and deep black darkness. Quite a lot, also with respect to justice and truth, happens in a gray area. Now, in the Yin-Yang symbol, there is a white circle in the black field and a black circle in the white field. This symbolizes eternal change: "Everything participates in a universal ebb and flow, returning to their opposites, and back again" (Wang 2012, p 223). Brightness develops out of the black hemisphere and darkness out of the light hemisphere. During the transition from light to dark and vice versa, the transition stage of twilight is passed through, in which "balanced shades of gray" appear (von Senger 2017b, p. 75 f.).

The light hemisphere stands for transparency, straightforwardness, and lawfulness. The dark hemisphere symbolises cunning in particular. Both are combined in one and the same figure. The Chinese are used to thinking in opposites, i.e., not considering one without the other. The dialectic in the sense of the unity of opposites would be destroyed if one of the two hemispheres were extended over the whole field in favour of the other and,

for example, if the whole figure were only white. Imagine interpersonal relationships in which the participants would constantly say to each other, completely truthfully, exactly what they are thinking and feeling at the moment. This is not possible from the point of view of the Yin-Yang concept. "Moulüe" can therefore be defined as the doctrine of using uncunning and cunning strategies and tactics to achieve a goal (von Senger 2018), even if this goal is simply a successful human coexistence.

A characteristic of "Moulüe" is the always-simultaneously possible conscious consideration not only of unconventional, unusual, or especially cunning, but also of the conventional, common, "normal", and legal problem-solving options. Thanks to the conscious consideration of the resource of "cunning" and simultaneous competence with regard to non-cunning approaches, "Moulüe" opens up a much wider scope of perception, action, reaction, and negotiation for the Chinese than is available to Westerners.

4. Justice and Stratagems

What exactly is justice? One would not be wrong to answer this question as follows: according to contemporary understanding, justice is achieved when a problem is solved in a way that conforms to human rights. What does "in accordance with human rights" mean? To answer this question, I would like to refer to the Universal Declaration of Human Rights (UDHR) "enacted by the United Nations General Assembly"[3] on 10 December 1948, in honour of which International Human Rights Day is celebrated every year on 10 December.[4] In the 30 articles of this Declaration, solutions to various interpersonal problems are outlined in conformity with human rights. In accordance with the third paragraph of the preamble of the International Covenant on Political and Civil Rights[5] and the International Covenant on Economic, Social and Cultural Rights,[6] both covenants from 16 December 1961, I consider all human rights proclaimed by the UN to be of equal rank. However, we also have comparable approaches in Ronald Dworkin (Dworkin 2011, chap. 5 & 16). In the following, I illustrate with four examples how stratagems can be used to establish justice in the form of the realisation of a human right in the absence of legal remedies.

4.1. Girl in Boy's Robe (Sheng 2006, p. 408f.)

Zhu Yingtai is famous in China. She is the subject of an apparently factual tradition dating back to the Eastern Jin Dynasty (317–420). Zhu Yingtai lived in an environment that essentially continued until the beginning of the 20th century and is described as follows by P. Karl Maria Bosslet in his book Chinesischer Frauenspiegel (Chinese Women's Mirror), published in Oldenburg in 1927: "Until recently it was common practice in China not to give women and girls any education of their own and even less to send them to school. Science for girls seems more than superfluous to a father. If they can work proficiently, they serve their purpose". Zhu Yingtai defied these barriers, put on boys' clothes, and attended a boys' school for three years.

The expedient used by Zhu Yingtai, namely her transformation into a boy, can be attributed to stratagem No. 21, the cicada casts off of its skin of gleaming gold. By entering school, Zhu Yingtai realised her human right to equal access to education (UEMR Article 26 in conjunction with Articles 1 and 2). This shows a point of contact between stratagems and human rights conceived in terms of natural law in the West.

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[3] United Nations: Universel Declaration of Human Rights, https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 16 November 2022).

[4] United Nations Human Rights Day 10 December, https://www.un.org/en/observances/human-rights-day (accessed on 16 November 2022).

[5] International Covenant on Civil and Political Rights, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (accessed on 16 November 2022).

[6] International Covenant on Economic, Social and Cultural Rights, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (accessed on 16 November 2022).

4.2. Cicada, Mantis and Siskin (Sheng 2006, p. 523)

The king of Wu intended to wage war against the great state of Chu. He had it announced to his entourage with the words: "Whoever dares to raise ideas will be put to death". There was a certain Shao Ruzi among the officials of the palace who would have liked to make remonstrances but dared not. So he pocketed bullets, grabbed a crossbow and roamed around the back garden of the palace. The dew soaked his clothes, for he stayed out all night until morning. He did this for three days. Then the king said to Wu: "Come here! Why have you drenched your dress so miserably?" Shao Ruzi replied, "There was a tree in the garden. On it sat a cicada. The cicada was sitting high up, singing plaintively, drinking the dew, not knowing that the mantis was just behind it. The mantis bent its body, ducked and wanted to catch the cicada. She did not know that the siskin was next to her. The siskin stretched its neck and wished to peck at the mantis. But in doing so, it had no idea that my crossbow and bullets were waiting below it. These three all wished to gain their advantage without considering the disaster looming behind them". The king of Wu said, "Good". Thereupon he stopped the preparations for war.

This story is taken from the writing Springs and Autumns of the States of Wu and Yue by Xu Tianyou (mid-13th century AD). From the point of view of the Universal Declaration of Human Rights (Art. 19), the official Shao cunningly realised the right to freedom of expression, cunning in the sense that he did not state his opinion outright, but by way of a parable, although still in such a way that the ruler understood the message. Shao Ruzi criticised the careless behaviour of animals, but the ruler understood that the criticism was directed at him, and he followed the advice given to him in clauses. Shao Ruzi's action can be attributed to stratagem No. 26 "Cursing the acacia, while pointing to the mulberry tree". The story warning against headlessness lives on in the saying "The praying mantis catches the cicada, but the siskin is already lurking behind it".

4.3. Avoiding Marriage through Feigned Mental Derangement (Sheng 2006, 538f.)

At a 24-day festival held in Beijing to celebrate the 200th anniversary of the Beijing Opera in early 1991, the opera Yuzhoufeng (The Heavenly Sword) was also performed. The Heavenly Sword is stolen from its owner and taken to an emperor's living quarters. Afterwards, the owner of the sword is accused of wanting to assassinate the emperor. However, it is not this, but another stratagem described in the opera that is in the foreground here. In the English-language literature, the opera is not called The Heavenly Sword, but Beauty Defies Tyranny.

The plot takes place around the year 206 BC. The emperor, an evil character, wants to take the daughter of a minister as his wife, with her father's consent but against the girl's will. In her desperation, the daughter mimes a madwoman.

In the seventh scene of the opera, the girl feigns mental derangement towards her father. She throws herself to the ground and cries out:

"I want to go to heaven, I want to go to heaven!"
The father replies:
"Heaven is too high, you can't go up there".
She continues to cry out:
"I want to go to the earth, I want to go to the earth!"
"The earth is too thick, and there is no gate!" says the father.
She cries, "You are my . . . ".
"Father" the father interrupts her . . .
"Son", she cries out.
"Stupid stuff", the father is indignant.

In the eighth scene, the girl sings and considers her next move. Her imperial bridegroom wants to see her. Continuing to behave insanely, she reproaches him for all his reprehensible actions. Filled with horror, he turns away from her, resolving not to marry her.

The opera scenes show how, in the absence of a legal system that protected the individual, Chinese women and men instead used stratagems to realise supra-temporal and supra-cultural human rights, in this case the right to freedom of marriage (Universal Declaration of Human Rights, Art. 16 No. 2), even if only as much-applauded stage characters.

4.4. Prevention of the Death Penalty by a Boy

Cao Chong (196–208) was the son of Cao Cao (155–220), and was, in his last period of life, one of the three rulers at the time of the Three Kingdoms (220–280). Cao Chong was very clever and had a big heart. One day he was playing in a backyard of the palace where he met the keeper of an armoury. He looked miserable. Cao Chong asked him what had happened. The guard replied that Cao Cao was very fond of a saddle in the armoury, but rats had destroyed it. He was on his way to Cao Cao to tell him that he was responsible for the damage. He hoped that if he confessed his negligence, Cao Cao would punish him more leniently, but he feared that Cao Cao, under the influence of his choleric temper, would immediately execute the death penalty on him. Cao Chong knew this guard. He knew that he was an honest and dutiful man. Therefore, he felt sorry for him and said, "Wait three days, only go to my father after I find a solution for you". Cao Chong returned to his room. With a knife, he cut a few holes in the coat he was wearing. He then put on a sad and despairing expression. His father heard that his son had stopped eating and drinking. What was wrong with him? Worried, he asked his son why he was so full of worries. Cao Chong replied, "Rats have eaten several holes in my clothes". Cao Cao was relieved and said, "That's a small thing". The son replied, "I was told that when rats destroy clothes, it is a bad omen for the wearer of the clothes". Cao Cao said with a laugh, "That is absurd. It often happens that rats destroy clothes. There is no need to make a story out of it!"

The son left his father and after a few moments the guard reported to Cao Cao. He reported to Cao Cao that he was responsible for the destruction of his saddle by rats. Cao Cao said, "Even my son's clothes in his bedroom were victims of rats. All the more can such a mishap happen in a depot". And without further words, Cao Cao dismissed the guard.

Chen Shou (233–297), who relates this anecdote in one of the 24 dynastic histories, characterises Cao Chong as "as wise-witted as adults" (Chen 1973, p. 580). No wonder that the account of Cao Chong's saving deed in the modern book Stories of Prodigies in Ancient Times is titled "Cao Chong zhi jiu kuli", which means "By means of a stratagem, Cao Chong saves a guard" (Huo 1993, p. 30). On the one hand, this anecdote shows that the death penalty in ancient China was sometimes imposed arbitrarily, which even children disapproved of. In particular, however, this anecdote shows how a good man was saved from the death penalty, not by legal means (there was no due process of law in ancient China), but with the help of a stratagem (Universal Declaration of Human Rights Article 3; Everyone has the right to life). By pretending to his father that there was a rat infestation, Cao Chong broke the potential outrage of the father over the guard's failure to prevent the destruction of the saddle by rats. This course of action can be assigned to stratagem No. 19, "Removing the firewood from under the cauldron".

5. Truth and Stratagems

I assume here that truth is a fact that only needs to be discovered, or that its concealment, glossing over, or suppression can only be done away with. In this sense, truth is the correspondence between fact and knowledge or imagination (Dworkin 2011, p. 7ff.).

5.1. Deceiving to Get at the Truth

Under this title, the Neue Zürcher Zeitung published a report on the German journalist Günter Wallraff (Ribi 2022, p. 29). In the spirit of investigative journalism, he gained undercover access to areas that were not accessible to open research and thus brought to light abuses in industrial companies, homeless shelters, in the German armed forces, in PKK training camps, and in a large bakery.

As "Hans Esser", he managed to become employed by the "Bild-Zeitung", the newspaper in Europe with the most readers,[7] and showed how unscrupulous reporters bend facts into explosive stories. As "Ali", a Turk, he worked for two years in a Thyssen steelworks and made the public aware of what it means to do the dirty work as a contract worker under inhuman conditions in 18-hour shifts, which only people who have no other choice do. Further, as the "Somali" Kwami Ogonno, he delivered a panorama of middle-class racism among allotment gardeners, dog sportsmen, and football fans. The books documenting his research, "Der Aufmacher" (1977) and "Ganz unten" (1985), and the film "Schwarz auf Weiss" (2009), became bestsellers. Günter Wallraff showed German society things it would rather not see, "And that is undoubtedly a merit" (Ribi 2022, p. 29).

From a stratagemological point of view, Wallraff applied metamorphosis stratagem No. 21 "The cicada casts off its skin of gleaming gold". In addition, Wallraff's actions, in which he deceived numerous superiors, can be qualified as the application of insubordination stratagem No. 1 "Crossing the sea while deceiving the heaven/the emperor". The imposition of false identities, as well, appears to be an application of stratagem No. 7 "Creating something out of nothing". For example, Wallraff was not Ali, but he managed to "create" an identity that did not exist. By using a whole package of stratagems, Wallraff made use of stratagem No. 35 "Stratagem-linking".

5.2. Resilience against Untruthfulness

Günter Wallraff's investigation of truth for the purpose of spreading truth was due to his competence in applying stratagems. Dealing with cunningly-spread untruths requires competence in defending against stratagems.[8] It is about seeing through and thwarting the destructive use of two stratagems in particular. Based on stratagem No. 7 "Create something out of nothing", unfounded rumours and false reports, most recently called fake news, are fabricated and spread. On the other hand, cunning persons apply stratagem No. 20 to any sensationally unclear situation in order to "catch fish in murky waters deprived of their clear sight". The "fishers in the mud" impress the public by pretending to have clear knowledge of the facts and thus secure the public's support in the pursuit of certain goals.

If one knows the facts, one can easily see through both stratagems. However, if the facts are unclear, it is helpful to know that one should expect people to use stratagem No. 7 or No. 20. Knowledge of the two stratagems encourages one to classify any reality that has not been checked by oneself as "murky", to bear the ambiguity of the facts and not to believe lightly in an account of a dubious fact that purports to bring the truth to light.

5.3. Caution with Truths in the Paths of Routine Thinking (von Senger 1991, p. 284 ff.)

The Chinese have a saying, Qi yi qi fang,[9] which means «to deceive someone by means of his own attitude or cast of mind». This can be seen as a highly refined application of

[7] Boulevard-Blatt ist Meistgelesene Zeitung Europa, 13.01.2003 https://www.handelsblatt.com/archiv/boulevard-blatt-ist-meistgelesene-zeitung-europas-bild-auflage-faellt-unter-vier-millionen-marke/2219480.html (accessed on 16 November 2022).

[8] On the Competence in defending against stratagems see the Covenant Mass of 8. 7. 2022, https://youtu.be/VjlnDSf_NjU, https://www.youtube.com/watch?v=VjlnDSf_NjU (accessed on 16 November 2022); see also Successful Appeal to the Pope regarding Matthew 10.16, http://www.36strategeme.ch/pdf/papst.pdf (accessed on 16 November 2022) and An example of transplantive sinology http://www.36strategeme.ch/pdf/transplantive-sinologie.pdf (accessed on 16 November 2022).

[9] This turn of phrase goes back to the book of Master Meng (372–289 BC), the second most important representative of the Confucian school of thought, Meng Zi https://baike.baidu.com/item/%E5%AD%9F%E5%AD%90/126?fromModule=lemma-qiyi_sense-lemma&fromtitle=%E5%AD%9F%E8%BD%B2&fromid=1294849; Qi yi qi fang, https://baike.baidu.com/item/%E6%AC%BA%E4%BB%A5%E5%85%B6%E6%96%B9/8816530 (accessed on 16 November 2022).English translation of the original quotation: "A superior man may be compelled by what seems to be as it should be, but he cannot be seduced into that which is contrary to right principle", see: The Chinese Classics in Five volumes with a translation, critical and exegetical notes, prolegomena, and copious index by James Legge, Vol. II: Th. II. The Works of Mencius Oxford at the Clarendon Press 1895, Wan Chang Part 1, p. 318: Meng Zi, https://starling.rinet.ru/Texts/Students/Legge,%20James/The%20Works%20of%20Mencius%20(1960).pdf Guoxue Wang,: juan jiu, Wan Zhang, http://www.guoxue.com/book/mengzi/0009.htm (accessed on 16 November 2022); Mong Dsi. The Teaching Talks of Master Meng K'ö. Translated by Richard Wilhelm, Diederichs Gelbe Reihe, Diederichs Verlag, Cologne 1982, p. 138.

stratagem No. 16 "If one wishes to catch something, one has first to let it go". One lets the addressee of the message bask in his or her own preconceived ideas, prejudices, convictions, or wishful thinking, rather than saying anything to disturb or contradict him or her, even when the truth in a particular instance may run contrary to those notions. In this way, one lets the addressee of the message "go", so that he/she remains a prisoner of his/her own routine logic.

One may even be in the uncomfortable situation of having to lie in order to appear truthful, to "bend" the truth in such a way that the person one is dealing with will be able to fit it into his own fixed conception of reality. This is exemplified in the following short story. The author Bai Xiaoyi (born 1960) won the first prize out of 30,000 entries in a 1985 all-China contest for short stories written by young people.[10]

The host poured tea in the cups and placed them on a small table in front of his guests. Then he covered the cups each with a lid making a sweet, tinkling sound. Seeing that something was missing, the host placed the thermos jug on the floor and hurried into the next room. The two visitors, a father, and his ten-year old daughter, heard the sound of pantry doors opening and things being moved around.

The daughter stood at the window looking at some flowers. The father's finger was approaching the delicate handle of his teacup, when suddenly there was a terrible bursting sound, like an explosion.

The thermos jug on the floor had fallen over. The girl was taken aback and turned around abruptly. Everything seemed normal and yet strange. Neither she nor her father had touched the jug. There could be no doubt of that. When the host had put it on the floor it had wobbled but had not fallen over immediately.

The sound of the crash brought the host running to his guests. In his hand he held a box of sugar cubes. He looked at the streaming puddle on the floor and murmured "It doesn't matter, it doesn't matter!"

The father seemed inclined to say something. But he held his tongue at first. "I'm terribly sorry", he said. "I touched it accidentally". "It doesn't matter", repeated their host calmly.

> On the way home, the girl asked the father, "Did you kick the thermos jug?"
> "I was nearest to it", said the father.
> "But you didn't touch it! I saw your reflection in the window, just at that moment. You weren't moving at all".
> The father laughed: "Well, tell me then what else could I have done?"
> "The thermos bottle fell by itself", insisted the girl, "because the floor was uneven. I saw it wobble when Uncle Li put it down, and it fell down after shaking. Dad, why did you say it was you.".
> "Uncle Li did not see what happened".
> "You could have explained it to him".
> "No, my child", was the father's reply, "it was better to say that I had accidentally kicked it. That was much more believable. Sometimes, you just don't know how something happens. And the more truthfully you tell about it, the less truthful it seems and the less you are believed". The girl was silent for a while. At last she asked, "Was that the only way?"
> "The only way".

[10] Bai Xiaoyi Zhongguo xiandai zuojia (Bai Xiaoyi, Chinese modern writer, without dates, https://baike.baidu.com/item/%E7%99%BD%E5%B0%8F%E6%98%93/5823558?fromModule=search-result_lemma (accessed on 16 November 2022); Bai Xiaoyi «Keting li de baozha » yuanwen ji shangxi (The Original Text and Appreciation of Bai Xiaoyi's «The Explosion in the Living Room»), 18.10.2020, http://www.vrrw.net/wx/15332.html (accessed on 16 November 2022); Zhongguo Zuojia Wang (Chinese Writers Network): Yong xiaoshuo jiang hao Zhongguo gushi, gaige kaifang 40 zhou nian zui ju yingxiangli xiao xiaoshuo pingxuan jiexiao (Using short novels to tell Chinese stories well, the selection of the most influential short novels for the 40th anniversary of reform and opening has been announced), 29 June 2018, http://m.cfbond.com/zclb/detail/20181029/1000200000020251540766535991060324_1.html (accessed on 16 November 2022).

What corresponds to one's own way of thinking is usually believed without hesitation. The host assumes without further ado that the guest knocked over the thermos bottle. Therefore, without asking the guest what had happened, he immediately said "it can't matter". Had the guest, instead of "letting the host go", i.e., leaving him in his preconceived opinion, told the truth, he would have run the risk that the host would not have believed him and would have considered him a liar. In order to continue to be regarded as an honourable man and to secure the goodwill of the host, the guest saw no other way than to leave the host to his ignorance, which is why he told the untruth.

In the short story, the stratagem of withholding the truth from the other person is harmless. It is about the self-protection of the stratagem user, not about inducing the stratagem victim to commit some possibly damaging act.

However, there may also be people who use stratagem No. 16 in the sense described here with reference to important events. They conceal the truth from other people against their better judgement and leave them to their own delusion, or even promote it, because this may serve destructive goals.

In any case, it is advisable, in view of today's flood of news, to be mindful not only of stratagems No. 7 and 20, but also of stratagem No. 16. Like the French philosopher Pierre Bayle (1680–1729), a pioneer of the Enlightenment, one should accept "practically nothing as certain".[11] This applies not only to rumours and unambiguous statements about extraordinary events, but also plausible opinions, news, and messages that correspond to everyday logic and routine thinking should always be met with a modicum of scepticism, and only facts that one has checked oneself or that trusted persons can testify to beyond any doubt should be considered "true".

6. Conclusions

It is comforting to see that a legal code with gaps in it does not necessarily impede the path to justice in conformity with human rights in an insurmountable way, and that, in principle, remedies external to legal code are available for the realisation of justice, such as for the realisation of individual human rights. These are not implemented with legal remedies based on positive statutory law, but by means of stratagems external to statutory law in the sense of an unwritten natural law, which has also been felt by the Chinese since the distant past and can therefore be classified as universal, and which is derived from the inherent dignity of the human being.

Another piece of good news is that knowledge of stratagems, when open access to the truth is barricaded, nevertheless enables the investigation and dissemination of true facts, and that knowledge of stratagems can help to immunise against untruths.

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Appendix A

The 36 Stratagems

According to the treatise Sanshiliu Ji: Miben Bingfa (36 Stratagems: The Secret Book of the Art of War) from circa AD 1500.

1. Crossing the sea while deceiving the heaven/Deceiving the emperor [by inviting him to a house by the sea that is really a disguised ship]

and [thus causing him to] cross the sea

2. Besieging [the undefended capital of the country of] Wei to rescue Zhao [the country that has been attacked by the Wei forces]

[11] Statement about Pierre Bayle by Prof. Dr. Eva Buddeberg, co-editor of TToleranz Ein philosophischer Kommentar von PierreBayle, Suhrkamp Taschenbuch, Frankfurt am Main 2016. Prof. Eva Buddenberg made the statement in the radio programme «Vor 375 Jahren geboren-Der französische Philosoph Pierre Bayle-Vorreiter der Aufklärung», Kalenderblatt-Deutschlandfunk 18 November 2022.

3. Killing with a borrowed knife
4. Awaiting at one's ease the exhausted [counterpart]
5. Taking advantage of a conflagration to commit robbery
6. Making a noise in the east, attacking in the west
7. Creating something out of nothing
8. Openly repairing the [burned] wooden bridges, in secret [before completing the repairs] marching to Chencang [to attack the enemy]
9. Observing the fire burning on the opposite shore [seemingly uninvolved]
10. Hiding the dagger behind a smile
11. Letting the plum tree with rin place of the peach tree
12. Quick-wittedly leading away the sheep [that unexpectedly crossed one's path]
13. Beating the grass to startle the snakes
14. Borrowing a body for the soul's return
15. Luring the tiger down from the mountain [onto the plain]
16. If one wishes to catch something, one has first let it go
17. Tossing a brick to attract jade
18. Catching the bandits by first catching the ringleader
19. Removing the firewood from under the cauldron
20. In murky waters catching fishes deprived of their clear sight
21. The cicada casts off s its skin of gleaming gold
22. Shutting the door to capture the thief
23. Befriending a distant enemy to attack an enemy nearby
24. Borrowing a route [through the country of Yu] for an attack against [its neighboring country of] Guo [to capture Yue after the conquest of Guo]
25. Stealing the beams and replacing the pillars [on the inside, while leaving the facade of the house unchanged]
26. Cursing the acacia, [while] pointing at the mulberry tree
27. Feigning madness without losing the balance
28. Removing the ladder after {the counterpart} has climbed onto the roof.
29. Decorating a [barren] tree with [artificial] flowers
30. Turning the role of the guest into that of the host
31. The stratagem of the beautiful man/woman
32. The stratagem of opening the gates [of a city that is unprepared for defense]
33. The special agent stratagem/the stratagem of sowing discord
34. The stratagem of the suffering flesh
35. The linking stratagem/Stratagem-linking
36. [When the situation is growing hopeless] running away [in good time] is the best stratagem

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