A Treatise of Legal Philosophy and General Jurisprudence

Volume 6

A History of the Philosophy of Law from the Ancient Greeks to the Scholastics

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A History of the Philosophy of Law from the Ancient Greeks to the Scholastics

edited by

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GENERAL EDITOR'S PREFACE
TO THE HISTORICAL VOLUMES
OF THE TREATISE

In the preface to Volume 7 of this Treatise, Andrea Padovani and Peter Stein point out that the volume purposely omits to treat the rationalistic natural-law school of the 17th and 18th centuries, this despite the volume being entitled *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*. This is how they explain why Volume 7 does not, despite its title, discuss Grotius (1583–1645) and the so-called natural-law school:

It is not by any accident that we have omitted to treat [...] the rational school of natural law. True, this school must be credited with affording the best innovation that juristic reflection would see in seventeenth-century Europe. But then an enquiry into the doctrines of the natural-law theorists would take us too far from our main focus, which is the *jurists'* philosophy of law. Now, it is well known that not only the jurists contributed to bringing out the new natural law, but also philosopher-jurists and philosophers tout court. Exemplary in this regard is Hugo Grotius. He was not a philosopher and had no philosophical interests properly so called, *yet he grounded the validity of his thought on a whole series of speculative questions* that cannot be ignored. In short, given any problem, such as defining "just war," the solution for it had to be forged on philosophical grounds, and only then would it find confirmation or validation through the authority of the *ius commune*. This procedure was common to the entire modern school of natural law. [...] The exponents of this scientific movement forsook all interpretive activity (no longer deemed useful) devoting themselves instead to the effort of "discovering" a new law, a law capable of sustaining each nation, and the family of nations, in its future course. The natural-law theorists found that the source of law no longer lay in the *Corpus Iuris Civilis* or the *Corpus Iuris Canonici*, but rather lay in the "nature of things," the only standard, certain and constant, by which to assess human behaviour. Thus, we no longer see in their treatises any mention of the methods of textual interpretation—no *argumenta* or *loci* devoted to that subject—which for three centuries had been the focus of the commentators and their exegesis. And not just anciently, either: most of the modern European jurists who practised law continued to be faithful to the canons of that long tradition. (Volume 7 of this Treatise, XIV–XV; italics added on first and second occurrence; in original everywhere else)

This passage contributes to illustrating the guidelines adopted in planning out the eleven volumes making up this Treatise, and the historical volumes in particular (Volumes 6 through 11). Indeed, in the preface to the theoretical volumes of this Treatise (Volumes 1 through 5), I indicate, on page XXI of Volume 1, that among the distinctions that from the outset served as guiding principles at the meetings held to plan out the Treatise project was the distinction (tracing back to Norberto Bobbio) between the *philosophers'* philosophy of law and the *jurists'* philosophy of law. Accordingly, the first of the historical volumes—Volume 6, entitled *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, edited by Fred D. Miller, Jr., in association with Carrie-Ann Biondi—is dedicated to the *philosophers'* philosophy of law from ancient Greece to the 16th century, and spans from the early Greek thinkers

to early modern Scholasticism. And the second of the historical volumes, Volume 7 (entitled *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, and edited by Andrea Padovani and Peter Stein) is dedicated precisely to the subject stated in its title, namely, the *jurists'* philosophy of law, and as such acts as a complement to Volume 6.

Then, too, there emerges from the previously quoted passage by Padovani and Stein a further kind of philosophy of law which came to bear in planning out the historical volumes of this Treatise. In fact, alongside the *philosophers'* philosophy of law and the *jurists'* philosophy of law, we thought it appropriate to introduce the *legal philosophers'* philosophy of law: the philosophy of law par excellence. Prior to the modern era there was no distinct discipline that could be called "legal philosophy": It was only in the modern age that thinkers began to view themselves as legal philosophers.[1]

For a long time, and in particular in the reaction that German legal positivism mounted against it, the "rational school of natural law" (as Padovani and Stein call the rationalistic natural-law theory of the 17th and 18th centuries) was regarded as *the* philosophy of law, meaning the *legal philosophers'* philosophy of law: It was regarded as the *Rechtsphilosophie* par excellence. (*Rechtsphilosophie* is a German expression that, in the light of what I maintain in Volume 1 of this Treatise, would be better translated to "the philosophy of what is right.") In this sense, the philosophy of law of the rationalistic natural-law school was the first classic instance of what I am calling here the legal philosophers' philosophy of law. Now, there are of course theoretical differences that distinguish these legal philosophers from one another, but then they all laid at the foundation of their doctrines a series of speculative questions from which they derived systems of ethics *ordine geometrico demonstrata* (Benedict de Spinoza, 1632–1677) or systems of natural law *methodo scientifica pertractatum* (Christian Wolff, 1670–1754). In other words, citing the title of a work by Wilhelm Leibniz (1646–1716), one of the fundamental aspects characterising the rationalistic natural-law school is a *nova methodus discendae docendaeque jurisprudentiae*, a new method for learning and teaching legal science, a method that leads to a systematic construction or reconstruction of law.[2]

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[1] I am using here a formulation kindly suggested to me by Fred Miller, Jr.

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

The rationalistic natural-law school—traditionally made to begin with Grotius—developed in the 17th century and received its classic Enlightenment form in the 18th century: It was the first philosophy of law to be considered a legal philosophy par excellence, the legal philosophers' philosophy of law.

The second classic instance of a legal philosophers' philosophy of law in the history of legal thinking was, ironically, German legal positivism itself, which proclaimed the end of the legal philosophers' philosophy of law as embodied in the rationalistic natural-law theory of the 17th and 18th centuries and replaced it with the *Allgemeine Rechtslehre*, that is, with the general doctrine, or theory, of law.[3]

Hence, from the 17th to the 19th century, the legal philosophers' philosophy of law (understood as legal philosophy par excellence) developed in various forms, and took different names, following a formalistic path and taking as well a strong systematic approach: It runs from the so-called natural-law school to the legal positivism of German inspiration.

This last orientation, in turn, German formalistic and systematic legal positivism, reached its most refined version in the 20th century, with Hans Kelsen (1881–1973), who gave us a very sophisticated representation of *the legal system*—a glorious and fragile representation of *das Recht* ("what is right") *als Rechtsordnung* ("as a system of what is right") that had the strengths and the weaknesses of a daring cathedral of crystal.

In the second half of the 20th century, Kelsen's formalistic legal positivism spread not only in civil-law countries (even outside of Europe: in Latin America, for example), but also, in some measure, in common-law countries, this on account of the influence that Kelsen's work and thought had beginning from the time of his emigration to the United States. Of course, as is well known, there is a native and very important empiricist legal positivism in Anglophone countries that traces back at least to Hobbes and was then developed in the so-called analytical jurisprudence, whose fathers are Jeremy Bentham (1748–1832) and John Austin (1790–1859).[4]

If we go back now to the observations made at the beginning of this preface, we can see that Volumes 6 and 7 bring out the twofold distinction (tracing back to Bobbio) between the philosophers' and the jurists' philosophy of law in a complementary fashion: Volume 6 (edited by Fred D. Miller, Jr., in association with Carrie-Ann Biondi) is mainly a history of the philosophers' philosophy of law from the early Greek thinkers to the 16th century; and Vol-

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[3] Or again, we might call this the "general doctrine of what is right," in keeping with the view I argued in Volume 1 (and in particular in Chapters 1 and 14) of this Treatise.

[4] I just qualified Anglophone legal positivism as "empirical" and did so to stress its difference from the German-inspired legal positivism of Europe, which by contrast is formalistic. I will not enter here into any detail, as into American and Scandinavian legal realism, since these matters I leave to the discussion in Volumes 8 through 11.

ume 7 (edited by Andrea Padovani and Peter Stein) is dedicated to the jurists' philosophy of law from Rome to the 16th century, and as such acts as a complement to Volume 6.

In Volumes 8 through 11, dedicated to the period running from the 17th to the 20th century, the underlying distinction is, instead, the threefold distinction sketched above between the philosophers', the jurists', and the legal philosophers' philosophy of law. These three philosophies of law are present in various forms in these volumes, however much not always in explicit distinction from one another, the reason being that the distinction was meant to be a principle for each author to interpret freely, according to his view of the purposes and contents of his volume. Volume 8 is a history of the philosophy of law in common-law countries from the 17th to the 19th century and, as is observed by its author, Michael Lobban, it is "primarily concerned with jurists' and legal philosophers' understandings of law, rather than with those of philosophers." Volume 9 is a history of the philosophy of law from the 17th to the 19th century in civil-law countries. Volume 10 can be considered in the first instance an ideal continuation of Volume 6, and hence a history of the philosophers' philosophy of law from the 17th to the 20th century, but it also discusses some thinkers, such as Grotius and Pufendorf (1632–1694), whose philosophy of law we might properly describe as a legal philosopher's philosophy of law. Volume 11, the last of the Treatise volumes, is concerned with 20th-century philosophy of law overall, in civil-law and common-law countries alike.

For the background leading up to the Treatise, and for the acknowledgements, I refer the reader to Sections 2 and 3 of the editor's preface to the five theoretical volumes, a preface found in Volume 1. The assistant editor's preface, by Antonino Rotolo, also in Volume 1, presents, instead, the editorial rules on which the Treatise is based.

In fine, I should like to take the opportunity of this preface to note that it would not have been possible to carry through the Treatise project without the care and farsightedness of the people at the publishing house (initially Kluwer, now under Springer). I have fond memories of a meeting I had, in 1995, with Alexander Schimmelpenninck and Hendrik Van Leusen. A word of thanks goes also to those at Springer who have since been entrusted with the Treatise project.

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PREFACE BY THE EDITOR OF VOLUME 6

<div align="right">

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ABBREVIATIONS

ACRONYMS FOR MODERN SERIES OR COLLECTIONS OF TEXTS

CC	*Corpus Christianorum Continuatio Mediaevalis*
CSEL	*Corpus Scriptorum Ecclesiasticorum Latinorum* (Vienna and Leipzig)
CTh	*Theodosian Code=Theodosiani Libri XVI* (Mommsen and Meyer 1954/ trans. in Pharr 1952, reproduced 1969).
Diehl	Ernestus Diehl, ed., *Anthologia Lyrica Graeca* (Leipzig: Teubner, 1952)
DK	H. Diels and W. Kranz, *Die Fragmente der Vorsokratiker*, 3 vols., sixth edition (Berlin: Weidmann, 1951–1952)
IC	F. Halbherr, *Inscriptiones Creticae* (Rome: Libreria dello Stato, 1935–)
IG	*Inscriptiones Graecae* (Berlin: G. Reimer, 1873–)
PL	J. P. Migne, ed., *Patrologia Latina* (Paris: Migne, 1854–1856)
POxy.	B. P. Grenfell and A. S. Hunt, eds., *Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1898).
SVF	J. von Arnim, *Stoicorum Veterum Fragmenta*, 3 vols. (Leipzig: Teubner, 1903–1905)

ABBREVIATIONS FOR ANCIENT AND MEDIEVAL TEXTS

Aeschylus

Eu.	*Eumenides*
Supp.	*Suppliants*

Alcinous

Did.	*Didaskalikos*

Alfarabi

Aphorisms	*Selected Aphorisms*
Virtuous City	*Principles of the Opinions of the Inhabitants of the Virtuous City*

Ambrose of Milan

Off.	*De Officiis Ministrorum*
Ep.	*Epistles*

Anon. Iamb.	*Anonymous Iamblichi*

Aristotle

An. Pr.	*Analytica Priora*
Ath.	*Athênaiôn Politeia*
Cael.	*De Caelo*
Cat.	*Categories*
de An.	*De Anima*
EE	*Eudemian Ethics*
EN	*Nicomachean Ethics*
GA	*De Generatione Animalium*
MA	*De Motu Animalium*
Metaph.	*Metaphysics*
MM	*Magna Moralia*
PA	*De Partibus Animalium*
Phys.	*Physics*
Pol.	*Politics*
Rhet.	*Rhetoric*
Rhet. Al.	*Rhetorica ad Alexandrum*
SE	*Sophistici Elenchi*
Top.	*Topics*

Athenaeus

Deipn.	*Deipnosophistae*

Augustine of Hippo

CD	*De Civitate Dei* (*City of God*)
Conf.	*Confessions*
Lib. Arb.	*De Libero Arbitrio* (*On Free Will*)
Op. Mon.	*De Opere Monachorum*
Enarr. in Psal.	*Enarratione in Psalmos*
Ench.	*Enchiridion*
Ep.	*Epistolae*
Faust.	*Contra Faustum Manichaeum* (*Against Faustus the Manichean*)
Iohann. Evangel.	*Tractatus in Iohannis Evangelium*
Questions	*De Diversis Quaestionibus*

Sermo	*Sermones*
Sol.	*Soliloquia*
Trin.	*De Trinitate*

Averroes (Ibn Rushd)

Republic	*Commentary on Plato's Republic*
Rhetoric	*Middle Commentary on Aristotle's Rhetoric*

Avicenna (Ibn Sīnā)

Epistle	*Epistle on the Divisions of the Intellectual Sciences*

Bible

Cor.	Corinthians
Deut.	Deuteronomy
Exod.	Exodus
Ezek.	Ezekiel
Gal.	Galatians
Gen.	Genesis
Heb.	Hebrews
Jer.	Jeremiah
Lev.	Leviticus
Macc.	Maccabees
Matt.	Matthew
Neh.	Nehemiah
Phil.	Philippians
Rom.	Romans

Calcidius

Tim.	*In Platonis Timaeum* (Commentary on Plato's *Timaeus*)

Cicero

Att.	*Letters to Atticus*
Fin.	*De Finibus* (*On Goals*)
Leg.	*De Legibus* (*On the Laws*)
ND	*De Natura Deorum* (*On the Nature of the Gods*)
Off.	*De Officiis* (*On Duties*)
Rep.	*De Re Publica* (*On the Commonwealth*)
Tusc.	*Tusculan Disputations*

Clement

Strom.	*Stromateis* (*Miscellanies*)

Dio Chrysostom

Or.   *Orationes*

Diogenes Laertius

D.L.   *Vitae Philosophorum*

Diogenes of Oenoanda

New Frag.   *New Fragments*

Duns Scotus, John

Rep.   *Reportatio Parisiensis*

Epictetus

Diss.   *Dissertationes* (*Discourses*)
Ench.   *Encheiridion* (*Handbook*)

Epicurus

KD   *Kuriai Doxai* (*Key Doctrines*)
Nat.   *On Nature*
Sent. Vat.   *Vatican Sentences*

Euripides

Ba.   *Bacchae*
Supp.   *Suppliants*

Gaius

Inst.   *Institutiones*

Gratian

Decr.   *Decretum*

Hesiod

Th.   *Theogony*
WD   *Works and Days*

Homer

Il.   *Iliad*

Irenaeus of Lyons

Haer.   *Adversus Haereses* (*Against Heresies*)

Isidore

Etym.   *Etymologies*
Sent.   *Sentences*

Josephus

Ant.   *Jewish Antiquities*

Justin Martyr

Dial.   *Dialogue with Trypho*

Justinian

Code   *Code* (*Corpus Iuris Civilis, vol. 2*)
Dig.   *Digest*
Inst.   *Institutes* (*Corpus Iuris Civilis, vol. 1*)

Lactantius

Inst.   *Divine Institutes*

Las Casas, Bartolomeo de

De Regia   *De Regia Potestae o Derecho de Autodeterminación*
De Úncio   *Del Úncio Modo de Atraer*

Lucretius

RN   *De Rerum Natura* (*On the Nature of Things*)

Maimonides

Guide   *The Guide of the Perplexed*

Marcus Aurelius

Med.   *Meditations*

Molina, Luis de

Concordia   *Concordia Liberi Arbitrii cum Gratiae Donis, Divinia Prae-scientia, Providentia, Praedestinatione, et Reprobatione, ad Non Nullus Primae Partis D. Thomae Articulos*
De Iure et Iust.   *De Iure et Iustitia*

Nemesius

Nat. Hom.   *De Natura Hominis* (*On the Nature of Man*)

Origen

Cels.   *Against Celsus*

Philo

Leg.   *Legum Allegoriae*
Mos.   *On the Life of Moses*
Opif.   *De Opificio Mundi*
Prob.   *Quod Omnis Probus Liber Sit*
Spec.   *De Specialibus Legibus*

Philodemus

Acad. Ind.   *Academicorum Index*
Herc.   *Herculanensia Volumina*
Stoic.   *On the Stoics*

Photius

Bibl.   *Bibliotheca*

Plato

Alc.   *Alcibiades*
Ap.   *Apology*
Clit.   *Clitophon*
Crat.   *Cratylus*
Ep.   *Letters*
Erx.   *Eryxias*
Euthd.   *Euthydemus*
Gorg.   *Gorgias*
Hipparch.   *Hipparchus*
Hp. Ma.   *Hippias Major*
Phd.   *Phaedo*
Plt.   *Politicus* (*Statesman*)
Prot.   *Protagoras*
Rep.   *Republic*
Tim.   *Timaeus*

Plautus

Bacch.   *Bacchides*

Plutarch

Alex. Fort.   *The Luck or Virtue of Alexander*
Contr. Ep. Beat.   *Contra Epicuri Beatitudinem*

Lyc.	*Life of Lycurgus*
Sol.	*Life of Solon*
Stoic. Rep.	*De Stoicis Repugnantiis*
TG	*Life of Tiberius Gracchus*

Porphyry

Abst.	*On Abstinence*

Pseudo-Plutarch

Fat.	*De Fato* (*On Fate*)

Seneca the younger

Ben.	*De Beneficiis*
Brev. Vit.	*De Brevitate Vitae*
Clem.	*De Clementia*
Cons. Marc.	*Consolatio ad Marciam*
Ep.	*Epistulae Morales* (*Moral Epistles*)
Nat.	*Naturales Quaestiones*
Otio	*De Otio* (*On Leisure*)

Sextus Empiricus

M	*Adversus Mathematicos*
PH	*Outlines of Pyrrhonism*

Sophocles

Ant.	*Antigone*
OT	*Oedipus Tyrannus*

Soto, Domingo de

De Iust. et Iure	*De Iustitia et Iure Libri Decem*

Suárez, Francisco

Leg.	*De Legibus sue de Deo Legislature*

Tacitus

Ann.	*Annales*
Dial.	*Dialogus de Oratoribus*

Tertullian

Anim.	*On the Soul*
Jud.	*Against the Jews*

Marc.	*Against Marcion*
Praescrip.	*Prescription of Heretics*

Thomas Aquinas

Comm. Eth.	*Commentary on Aristotle's Nicomachean Ethics*
SCG	*Summa Contra Gentiles*
STh	*Summa Theologiae*

Ulpian

Inst.	*Institutes*

Vitoria, Francisco de

Comm. STh.	*Comentarios a la Secunda Secundae de Santo Tomas*
De Ind.	*De Indis*
De Mat.	*De Matrimonio*
De Pot. Civ.	*De Potestae Civile*

William of Ockham

Rep.	*Reportatio*
In I Sent.	*Commentary on the Sentences*

Xenophon

An.	*Anabasis*
Cyr.	*Institutio Cyri* (*Cyropaedia*)
HG	*Historia Graeca* (*Hellenica*)
Hier.	*Hiero*
Lac.	*Respublica Lacedaemoniorum*
Mem.	*Memorabilia*
Oec.	*Oeconomicus*
Smp.	*Symposium*
Vect.	*De Vectigalibus*

Prologue

NEAR EASTERN ANTECEDENTS OF WESTERN LEGAL THOUGHT

by Fred D. Miller, Jr.

Western legal philosophy, like a stream flowing over three millennia, was fed by far-flung tributaries. A major spring was ancient Greek law and legal thought, manifested in a variety of sources, including poets, historians, orators, philosophers, and sophists (see Chapter 1). Greek philosophers made major contributions, including Socrates, Plato, and Aristotle and their followers, as well as the Hellenistic schools of philosophy (see Chapters 2–5). Another wellspring of Western legal philosophy was Roman jurisprudence, presented in a systematic manner by legions of Roman jurists. The combined influence of Greek philosophy and Roman law was evident in the Roman philosophers Cicero, Seneca, Epictetus, and Marcus Aurelius (see Chapter 6). A third important source was ancient Jewish legal thought, arising with the traditional Mosaic code and culminating in the Talmud. Emerging as a Jewish sect, Christianity soon became a separate branch and a distinct and powerful fourth influence on Western European medieval legal philosophers (see Chapter 7). St. Augustine's philosophy of law represented a major confluence of the Greco-Roman and Judeo-Christian streams of thought (see Chapter 8). Another important tradition was Islamic thought, represented by Alfarabi, Avicenna, and Averroes, which directly influenced Jewish philosopher Maimonides and indirectly Catholic philosopher Thomas Aquinas, and presented a fundamental challenge to European philosophers of law in the Middle Ages (see Chapter 9). Finally, the revival of Roman law and the development of Christian canon law, together with the rise of scholastic philosophy in the late Middle Ages, infused new concepts and theories into medieval European law codes and thereby created fertile ground for early modern Western legal philosophy (see Chapters 10–14).

Although Western legal philosophy arose in ancient Greece, the Greeks themselves recognized the existence of far older legal traditions. Aristotle remarks that the Egyptians "are thought to be the most ancient of people, and they have acquired laws and a political order" (*Pol.* VII.16.1329b32–3). The great antiquity of the Egyptian legal system is also accentuated in the story in Plato's *Timaeus* about the visit of Solon of Athens to Saïs in Egypt, where he interrogated priests about early history. The priests told him that "you Greeks are forever children" and "you have in your souls no belief about antiquity handed down by ancient tradition" (*Tim.* 22b4–8). While the Greeks had forgotten their own distant past due to a series of natural catastrophes, the Egyp-

tians, who were sheltered in the Nile valley, retained their history and social arrangement for 8,000 years according to their sacred scriptures. The priests reported that Athens already possessed a constitution 9,000 years before, which resembled the current Egyptian legal system (*Tim.* 23e2–6, 24a2–4; cf. *Laws* II.656d5–657a2).

Later, during the Hellenistic and Roman periods, it was claimed that early Greek statesmen were inspired by Egyptian archetypes. Diodorus Siculus (ca. 80–20 B.C.) mentions reports "in the records of the sacred books of Egyptian priests" that, in addition to Solon, Lycurgus the legislator of Sparta and Plato himself visited Egypt and "incorporated many Egyptian *nomima* (customs or statutes) into their own legislation" (*Library* I.96.1, 98.1). Plutarch (ca. A.D. 45–121) (*Lyc.* 3.6) also cites Egyptian claims, confirmed by some Greek historians, that Lycurgus visited them and copied some of their institutions. On the basis of such texts it has been argued that Greek political and legal philosophy was heavily indebted to Egypt. Whether these events actually occurred, however, is questionable. Lycurgus was a semi-mythical figure about whom little is certain, and there is no early report of him going to Egypt. Solon did visit Egypt, according to Herodotus (490–425 B.C.) (*History* I.29–30), but only after finishing his legislative work in Athens. Herodotus (*History* II.176; cf. Diodorus Siculus, *Library* I.77.5) elsewhere says that Solon copied an Egyptian law against idleness, but this seems to be an error later corrected by Theophrastus (Plutarch, *Sol.* 31.2), who writes that Pisistratus, not Solon, laid down this law. As for Plato, there is no evidence in his own writings or other classical sources that he visited Egypt or had firsthand knowledge of Egyptian laws.[1]

Granted that the claims of direct influence are exaggerated and poorly substantiated, the question remains whether Greek legal thought was stimulated in a subtler, more general way by contact with Near Eastern societies. Greek merchants and mercenaries frequented Egypt by the end of the sixth century, and the Greeks had extensive commercial ties with Asia much earlier than that. Scholars have detected foreign influences in Greek religion, philosophy, and science (e.g., mathematics and astronomy). "In a much broader context, eastern influences helped shape the development of Greek religion, crafts, art and architecture, technology (both civil and military), coinage, and writing. Although more debated, such influences are visible also in social, legal, and political phenomena, such as tyranny, the enactment of written law, and the symposium" (Raaflaub 2000, 51).

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[1] Bernal 1987, 53, 103–8, alleges extensive influence based on evidence about Lycurgus and Plato. Lefkowitz 1996, 75–6, 81–2, however, notes problems in Plato's guarded account of Solon in Egypt (which Critias heard from his grandfather, who heard it from his father), questions the historicity of the later anecdotes, argues that such stories of influence become suspiciously more colorful and detailed over time, and concludes that "[t]he idea that early Greek law was inspired by Egyptian law is a historical fiction." See also Vasunia 2001.

The question of Egyptian influence is complicated by the fact that the study of Egyptian law presents serious problems of its own. The legal documents of Egypt, mainly kept on papyrus or ostraca, have largely perished, and what has survived is often incomplete and difficult to interpret (e.g., the fragmentary edict of Horemheb from the nineteenth dynasty, ca. 1300 B.C.). Yet a text from the eighteenth dynasty (thirteenth century B.C.) affirms that "everything is done according to what is specified by law" and refers to recorded legal precedents, and "thousands of legal documents of trials, inheritance, and transfers of real and personal property, attest to the functioning legal system" (Brewer and Teeter 1999, 73; see also Théodoridès 1971; Lorton 1995; Jasnow 2003, 255). But it is debatable whether Egypt had a regular system of law courts following genuine legal codes, in the sense of systems of laws promulgated by a king, during most of the dynastic period. There is also a danger of projecting later legal categories (deriving from the Greeks and Romans) back into Egyptian thought, a process no doubt already underway by the Hellenistic period (Kruchten 2001, 279).[2] Nonetheless, some Egyptian legal terms have been thought to offer parallels to important Greek concepts. One such word *hp*, understood to correspond to "law," is also often used for a "decree," for example, of a pharaoh, although it has a broader meaning of "rule" or "regulation," and can even refer to the regular movement of a planet (Kruchten 2001, 277–8).[3] The legal term *hp* came into common usage during the Middle Kingdom (Jasnow 2003, 255). Another word *ma'at* is often interpreted as "justice" or "truth." In addition to naming a goddess, the word refers to the cosmic order, which holds together the natural world, the kingdom of Egypt, and the individual subject. *Ma'at* has a normative connotation, for the gods placed the pharaoh on earth "forever and ever, judging mankind and propitiating the gods, and setting (*ma'at*) in place of disorder" (Vasunia 2001, 128). In a social context it involves reciprocal justice: "The reward of one who does something lies in something being done for him. This is considered by god as *ma'at*" (Assmann 2002, 128). The extent to which individuals internalize *ma'at* in this life determines their fate in the afterlife (Assmann 1996).[4] *Ma'at* "goes down into the necropolis with him who renders it" (trans. Wilson 1946, 94). In the *Book of the Dead*, during postmortem judgment the deceased's heart is weighed on a scale against an ostrich feather, a hieroglyphic symbol for *ma'at* (see Taylor 2001, 36, fig. 17). The value of impartial justice is as-

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[2] By the end of the Ptolemaic dynasty in the late first century B.C., the Egyptians had an elaborate judicial system. "The entire body of the laws was written in eight volumes which lay before the judges," reports Diodorus Siculus (*Library* I.75.3). He also mentions the legend that the laws were initially laid down by the first pharaoh Menes (compared to Lycurgus), who had received them from the god Hermes (i.e., Thoth) (ibid., I.94.1). But these phenomena may well reflect Greco-Macedonian influence.

[3] Nims 1948 discusses the later use of *hp* in demotic.

[4] See Tobin 1987 on *ma'at* in comparison to the Greek term *dikê*.

sumed in the injunction of the vizier Ptahhotep (probably sixth dynasty, 2345–2181 B.C.) to judges to "hew a straight line […] do not lean to one side" (as quoted in Brewer and Teeter 1999, 73; cf. similar passages in Wilson 1946, 98–100). Similarly, a Middle Kingdom papyrus states that "partiality is abhorrent in god's eyes" (as quoted in Assmann 2002, 155). The underlying principle of human equality is implied by a pronouncement of the sun god: "I have made each man the same as his neighbor and have prohibited that they do wrong. But their hearts have violated my commands" (as quoted in Assmann 2002, 154).

After the conquest of Egypt (525 B.C.) Darius, king of Persia, ordered his satrap in Egypt to assemble Egyptian sages and compile all the laws of ancient Egypt. Working from 519 until 503 B.C., the commission published a written legal code in Demotic and in Aramaic. There was a basic division into public law, temple law, and private law. This work governed subsequent legal practice in Egypt and may have provided a basis for legislation during the Ptolemaic period including the "code of Hermopolis West" (*POxy.* 3285) from the reign of Ptolemy II Philadelphus (308–246 B.C.) (see Briant 2002, 474; Bowman 1989, 61–6; Mattha 1975).

Ancient Mesopotamia has yielded much more legal evidence preserved on cuneiform tablets and inscriptions on monuments. These include fragmentary records of the law codes of Ur-Nammu, founder of the third dynasty of Ur (ca. 2100 B.C.), Lipit-Ishtar of Isin (ca. 1900 B.C.), Dadusha of Eshnunna (ca. 1770 B.C.), and, most importantly, Hammurabi of Babylon (ca. 1750 B.C.) (Richardson 2000; Driver and Miles 1960; Pritchard 1958, 133–72; Pritchard 1975, 31–41; Kramer 1963, 336–40). The early Mesopotamians had no general word for "law," but the word *di* in Sumerian (*dīnu* in Akkadian) was used for a lawsuit, trial, or decision, and *nì-si-sai* (*mīšaru* in Akkadian) signified "justice" (Soden 1994, 131; Saggs 1968, chap. 7; Saggs 1989, chap. 8). Justice was upheld throughout the universe by the gods, especially the sun god Utu (Shamash), also god of justice, with the king as his representative. Hammurabi declares, "By the command of Shamash, the almighty judge in heaven and earth, let my justice shine over the land" (E10; as quoted in Richardson 2000, 123). The king was ordained by the gods "to demonstrate justice within the land, to destroy evil and wickedness, and to stop the mighty exploiting the weak, […] to improve the welfare of my people" (P3; as quoted in Richardson 2000, 30–1; see also Westbrook 2003b, 364). Although ultimately responsible for administering justice, the king could, and generally did, delegate this responsibility to judges who held court in or before temples (Jacobsen 1946, 208–9; Saggs 1989, 170–3; Postgate 1992, chap. 15).[5] Hammurabi proclaimed

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[5] Saggs and Postgate reconstruct early Mesopotamian legal procedures. Hammurabi's code is distinctive in adhering strictly to the *lex talionis* (law of retribution) and prescribing very severe punishments.

that his commandments should remain in force unchanged in perpetuity: "May any king appearing in this land at any time at all in the future heed the righteous commands that I have inscribed on this stone. May no one change the justice for the land which I have ordained and the verdicts for the land which I have rendered" (E14; Richardson 2000, 125). Anyone who violated or emended the code would fall under a curse (E19). Hammurabi's code evidently influenced later legal codes, including the Assyrian, Hittite, and Jewish.

Persian legal practices may also have had a direct influence on the Greeks who had numerous contacts with the Persian Empire over several centuries. Plato (*Ep.* VII.332b) remarks that Darius of Persia (522–486 B.C.) "set an example of what a good lawgiver and king should be, for he established laws that have kept the Persian Empire to this day" (cf. Plato, *Laws* III.695c; Xenophon, *Oec.* 14.6). Plato here uses the Greek word *nomos* (law) for the Persian word *dāta*. Olmstead (1948, 120–33) argued that Darius promulgated a code with echoes of Hammurabi's code, so that his legislation might have served as a conduit for much earlier Mesopotamian influence. But later scholars question the existence of a "royal code" of Darius for the entire Persian Empire (see Briant 2002, 510–11, 956–7).

It must be emphasized that even when Greek laws and legal concepts resembled their predecessors', this does not prove influence. Different societies can independently find similar ways to meet similar challenges, as Aristotle observes:

[O]ne should believe that nearly everything has been discovered often in a great span of time—or rather infinitely often. For need itself is likely to teach the necessary things, and once these are already present, it is reasonable to expect that the things that promote elegance and abundance will increase. And so one should suppose the same to hold for constitutional affairs. And that all such things are ancient is indicated by facts about Egypt. (*Pol.* VII.16.1329b25–32)

Moreover, the Near Eastern view of law was in important respects alien to the later Greek view. The Sumerians and Babylonians (like the Egyptians) viewed "the cosmos as a hierarchically structured state that is ruled, with absolute authority, by the gods under the leadership of the sky god Anu," and the human king was an agent authorized by the gods and charged with the responsibility of maintaining divine order and justice in his domain. These views implied that virtue consisted in unquestioning obedience to political authorities (Raaflaub 2000, 56–7; cf. Jacobsen 1946). Later, Greek thinkers challenged the top-down model of divinely sanctioned oriental despotism.

Further Reading

Westbrook 2003a is a valuable comprehensive history of ancient Near Eastern legal systems with separate chapters by specialists on different periods of Egyptian, Sumerian, Akkadian, Babylonian, Assyrian, Israelite, and interna-

tional law, including extensive bibliographies and excellent indexes. Early concepts of law are discussed in general histories of the ancient Near East, including Saggs 1989, chap. 9, Soden 1994, and Snell 1997. Frankfort et al. 1946 examines the place of various concepts (including law) in myth before the emergence of Greek philosophy; see Wilson 1946 on Egypt and Jacobsen 1946 on Mesopotamia. Assmann, Janowski, and Welker 1998 includes comparative studies of law and justice in ancient Near Eastern, Egyptian, Jewish, Assyrian, Christian, and Greek traditions. Pritchard 1958 includes translations of some legal documents from Mesopotamia and Egypt.

Breasted 1906–1907 and Lichtheim 1973, 1976, and 1980 are multi-volume collections of translated Egyptian texts, including references to *ma'at* (justice). Assmann 2002 is a valuable comprehensive study of Egyptian thought including law. Assmann 1996 discusses Egyptian views of justice in relation to the afterlife. Seidl 1942, Théodoridès 1971, Lorton 1995, Brewer and Teeter 1999, chap. 5, and Kruchten 2001 provide concise introductions to ancient Egyptian law. Mélèze-Modrzejewski 1995 discusses law and justice in Ptolemaic Egypt. See Bernal 1987, Lefkowitz 1996, and Vasunia 2001 for very different views on the question of whether Greek thinkers were influenced by the ancient Egyptians.

A comprehensive recent source is Roth 1997, containing translations of Sumerian, Babylonian, Assyrian, and Hittite laws. Driver and Miles 1960 offers a transliterated text and translation with commentary on Babylonian laws. Yaron 1988 is an edition of the laws of Eshnunna, and Richardson 2000 is a transliterated text and translation of Hammurabi's code. Brief discussions of Mesopotamian law are found in Kramer 1963, Saggs 1968, Oppenheim 1977, Postgate 1992, chap. 15, and Greengus 1995.

Regarding Assyrian legislation Driver and Miles 1935 offers a transliterated text and translation with commentary. Neufeld 1951 and Hoffner 1997 provide texts and translations of the laws of the Hittites. Gurney 1990 includes discussion of Hittite laws and legal institutions.

On the controversy over the so-called code of Darius of Persia, contrast Olmstead 1948 and Briant 2002.

Chapter 1

EARLY GREEK LEGAL THOUGHT

by Michael Gagarin and Paul Woodruff[1]

1.1. Law and Legal Procedure in Early Greece[2]

To write about early Greek legal thought requires, first, some consideration of what this expression might have meant at the time. "Legal philosophy" in the modern sense did not exist before Plato, but "legal thought," in the sense of thinking about law, undoubtedly did. We find various reflections on law explicitly or implicitly in the writings of many who are now classified separately as poets, philosophers, sophists, or historians, but whom the Greeks would have grouped together under the term *sophoi*—"wise men." In thinking about law, however, the Greeks differed considerably from us in their basic construction of the subject.

This is evident in the first place in the fact that there is no single word or phrase in Greek that conveys the general notion of "law," as, for example, in the expressions "early Greek law" and "Athenian law." The closest equivalent to "law" is *nomos*, which can mean a legal rule or statute and is also broadly used for "custom," "tradition," "social norm," etc., but which never means "law" in the most general sense that the English word can have.[3] *Nomos* does not come to designate a law (or statute) until the fifth century B.C.; earlier Greeks used different words: *thesmos* ("what is laid down"), *rhêtra* ("what is said"), and *graphos*, *grammata* ("what is written"). In fifth-century Athens, the plural of *nomos*—*hoi nomoi*—can designate the entire set of a community's laws, and this is perhaps the closest the Greeks could come to our general sense of "law." But *hoi nomoi* still designates only "the laws" and does not

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[1] This paper is the result of a joint effort, with Gagarin writing the first draft of Sections 1.1–3 and Woodruff of 1.4–6; both of us then read and revised all sections. All translations are by the authors unless otherwise indicated. We received much good advice at a meeting in Williamsburg, Virginia, from the authors of other chapters in this volume, and we especially thank Fred Miller for his many useful comments and suggestions as well as his overall stewardship of this project.

[2] Along with archaeological discoveries, poetry is our main source for Greek civilization in the eighth century B.C.; no inscriptional evidence for Greek law is earlier than the seventh century B.C. (see below, Section 1.2). One must exercise care in using poetic sources, of course, since their intent is not historical accuracy; but to the extent that similar features are found in several different sources, we can be more confident that these accurately represent conditions at the time.

[3] On the meaning of *nomos*, see Section 1.4 below. English differs from Latin and many modern languages in using only one word ("law") for both a legal rule and an entire institution (the Law). Contrast Latin (*lex*, *ius*), French (*loi*, *droit*), German (*Gesetz*, *Recht*), etc.

necessarily include that aspect of law we would categorize as the legal process (i.e., courts, trials, etc.). For "legal process," the closest equivalent was *dikê*— "judgment," "settlement," "trial"—which, especially in its later form *dikaio-synê*, comes to mean "justice" with much the same broad range of meaning as the English word.

Early Greek thinkers tended to be concerned with one or the other of two aspects of law: substance and process. The earliest are more concerned about the means of regulating conflict and bringing order to society (process); later there was more interest in the rules and standards that govern the way humans lived their lives (substance). To some extent, however, this change reflects the emergence of self-conscious reflection on theoretical issues that does not appear in our earliest sources, the poets.[4]

The poems of Homer and Hesiod, composed around the end of the eighth century B.C., already indicate the importance the Greeks attached to the rudimentary process they had developed for the peaceful settlement of disputes. In the *Iliad* this is most evident in the trial scene portrayed on Achilles' great shield. On the shield are two cities, one at war, the other at peace. In the latter, there are just two scenes in the town, a trial and a wedding, and one scene in the country, a harvest. The inclusion of a trial in itself conveys the sense that a process for resolving conflict is an essential ingredient of peace and prosperity. The details of Homer's portrayal, moreover, indicate the characteristic features of this process. The scene portrays two litigants who wish to resolve their disputes:

Meanwhile a crowd gathered in the *agora*, where a dispute
had arisen: two men contended over the blood price
for a man who had died. One swore he'd pay everything,
and made a public declaration. The other refused to accept anything.
Both were eager to obtain a settlement from a referee.
People were speaking on both sides, and both had supporters;
but the heralds restrained them. The old men
took seats on hewn stones in a sacred circle;
they held in their hands the scepters of heralds who raise their voices.
Then the two men rushed before them, and they in turn gave
their judgments. In the middle there lay two talents of gold
as a gift for the one among them who would give the straightest judgment. (*Il.* XVIII.497–508,
as quoted in Gagarin and Woodruff 1995, 6)

Two men disagree about payment for a man who has been killed. The precise point of disagreement has been much debated and need not concern us here,[5]

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[4] This poetry was probably composed and transmitted largely without the help of writing. It is difficult to speak of substantive law before the introduction of writing because rules of all sorts (legal, moral, practical, religious, etc.) tend to be undifferentiated in oral cultures, as in Hesiod's *Works and Days*. Writing provided a means of distinguishing laws from other rules. See further Gagarin 1986, 1–17.

[5] The main possibilities are that the two men disagree about the amount of payment, or

for the procedural details are fairly clear. They seek a resolution and so they have brought their dispute to the *agora*, or central meeting place, where a special gathering of elders will hear the case. A crowd of onlookers and supporters attend the session; they express themselves vocally and have to be restrained by heralds. The litigants plead their case one after the other, after which the elders express their opinions. One of these opinions is eventually determined (probably by consensus) to be "the straightest judgment (*dikê*)," and the elder who gave this opinion is rewarded with a prize. There is much that we are not told (Homer is, of course, not a legal historian), but ideally (we may assume) the litigants accept the "straightest" (fairest, most acceptable, most just) judgment and are reconciled, and the community thus remains at peace.

Already here we see the main features of the Greek concept of procedural justice. First, the process is public; like all large gatherings it takes place in the *agora*, and much of the community is present. A small group of respected members of the community "judge" the case—that is, they seek the best ("straightest") resolution; in other scenes of judgment there is often a single judge, but this variation does not appear to affect the other features. The entire process is oral: Litigants speak their cases, judges speak their settlements, and the members of the crowd voice their feelings. It is a characteristically Greek scene with substantial community participation, turbulent but still orderly. The goal is a settlement that is "straight," the primary metaphor for justice in early poetry.[6] And since there is no mechanism for enforcement of the settlement (and enforcement would be incompatible with the loosely structured society portrayed by Homer), "straightest" must be determined by some sort of consensus, and the outcome must, in the long run at least, have the support of the community.

The importance of this process is also evident in the work of Homer's contemporary Hesiod, who tells us he experienced it directly in the course of a dispute with his brother Perses over the division of their inheritance. In *Works and Days* he complains that Perses has been trying to get more than his fair share of their father's estate and worries that the "gift-devouring kings" who want to judge the case may side with Perses. In a long passage (*WD* 213–85), he urges first Perses, then the kings, then Perses again, not to give way to "crooked" justice, for in the long run crooked justice will result in famine and destruction for the whole community, whereas straight justice will lead to prosperity. Hesiod summarizes his advice in the following conclusion:

whether the agreed sum has been paid, or whether payment must be accepted or may be accepted. See Gagarin 1986, 26–33, with further references.

[6] A "straight" settlement may originally have been a straight boundary line dividing a disputed piece of property, but the metaphor is also often used of speech that is truthful, honest, and unbiased ("straight talk").

This was the way of life (*nomos*) Zeus established for human beings:
for fish and beasts and flying birds he allowed
that one may eat another, since there is no justice (*dikê*) among them;
but to human beings he gave justice, which turns out to be
much better. For if someone is willing to speak justly (*ta dikaia*)
in full knowledge, wide-seeing Zeus makes him prosper;
but if someone lies intentionally under sworn oath
in giving testimony, and so hurts justice, he is incurably ruined.
From that time forth his family will be left in obscurity,
while the family of an oath-keeping man will prosper ever after. (*WD* 276–85, as quoted in
Gagarin and Woodruff 1995, 19)

Like Homer, Hesiod understands the importance of the legal process; a corrupt process will lead to ruin, whereas justice leads to prosperity. Hesiod is also aware, like Homer, that justice is an oral process requiring speech that is just, here specifically in the form of truthful testimony and true oaths.

Hesiod also portrays this process for settling disputes in his *Theogony*, where he praises the Muses for the blessings they can give a king:

If the daughters of great Zeus [the Muses] should honor and watch
at the birth of one of the kings who are nourished by Zeus,
then they pour sweet honey on his tongue, and the words
from his mouth flow out in a soothing stream, and all
the people look to him as he works out what is right (*diakrinonta themistas*)
by giving judgments (*dikai*) that are straight: he speaks out faultlessly
and he soon puts an end to a quarrel however large, using his skill.
That's why there are kings with intelligence: so they
can turn things around in the *agora* for people who have suffered
harm, easily, persuading them with gentle words.
As he comes to the hearing, they seek his favor like a god
with respect that is soothing, and he stands out from those assembled. (*Th.* 81–92, as quoted in
Gagarin and Woodruff 1995, 19–20)

Here, although there is only a single judge, the process resembles Homer's description in several ways: It takes place in the *agora*, where a crowd is assembled; people come forth to seek a resolution for their dispute or some compensation for injury. The king's success depends in part on his intelligence and his ability to find a straight (fair, just) resolution, but Hesiod's main point is that with the Muses' help the king is also a successful speaker. His honeyed tongue speaks "a soothing stream" of words and he persuades the people (litigants and supporters) "with gentle words." The gifted king, in other words, is able not only to declare a resolution to a dispute that is fair, but to speak it effectively, so that both sides will be satisfied and accept the settlement. Such a king is honored like a god.

These scenes, together with many briefer references to settling disputes,[7] give a good picture of how the Greeks at the time envisioned law in terms of an

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[7] For a review of these scenes, see Gagarin 1986, 19–50.

effective process for achieving a fair resolution to conflict. "Straight" justice required in the first place a process for hearing the pleas of both litigants—a requirement summed up in the maxim attributed to Hesiod but perhaps coined at a later time: "Do not judge a case before hearing both sides" (Hesiod, frag. 338, as quoted in Merkelbach and West 1967).[8] The hearing took place in a public setting, open to all members of the community, and a judge or group of judges, who were figures of authority (often kings), heard the pleas and proposed settlements. A straight *dikê* provided adequate compensation for loss and for the most part satisfied the litigants. The entire process was oral: A set of speech acts by litigants and judges (and perhaps by onlookers, too) culminated in the straight settlement persuasively delivered by a judge. As Hesiod's complaints make clear, the process did not always work as envisioned, but straight justice ideally not only resolved conflict between litigants, but also contributed to the general harmony and cohesiveness of the community.[9]

1.2. The Emergence of Written Laws

The poetry of Homer and Hesiod shows that a process for settling disputes was well established in Greece at the beginning of the archaic period (ca. 700–500 B.C.). By this time we can also discern the main features of that characteristic Greek political form, the *polis* ("city-state" or "city"). Greece remained a collection of independent city-states through the classical period (ca. 500–322 B.C.) and beyond, each *polis* being governed by its own set of laws.[10] The political structure of most cities in the archaic period was some form of oligarchy with at least one deliberative body. Democracies developed in some cities by expansion of the franchise beyond the wealthy, and some cities experienced a period of "tyranny," or the illegitimate rule of a single man.[11]

Our evidence for different cities varies widely,[12] but none of it is inconsist-

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[8] This fragment is not included in Hesiod, *The Homeric Hymns and Homerica*, edited by Evelyn-White 1914.

[9] We should note that a similar process is found in many early communities in other parts of the world; see, for instance, Köhler 1956.

[10] Of course, there were similarities among many of these independent legal systems, and some small cities may have adopted laws of a larger city with little change, but it remains problematic whether we can usefully speak of "Greek law." For further discussion, see Todd 1993, 15–6, 32–3, and other works cited there.

[11] "Tyranny" reproduces the Greek word *tyrannis*, but many of the tyrants ruled benevolently and did much to promote their city's culture. The Athenian tyrant Pisistratus (sixth century B.C.) ruled "more like a citizen than a tyrant"; he maintained the laws as they had been before him and, when accused of homicide, he even appeared in court, though his accuser did not (Aristotle, *Ath.*16).

[12] For the archaic and classical periods, in addition to poetry and archaeology, our sources include the accounts of later historians and philosophers, which vary widely in reliability, and inscriptions recording laws and other material. Inscriptions have been found, somewhat haphazardly, all over Greece, but they are often incomplete or fragmentary and very difficult to

ent with the assumption that the legal process portrayed by the poets formed the basis for the emergence of a more formal legal system based on written laws in many, if not all, Greek cities during the archaic period. As written laws emerged and the *polis* grew in size and authority, there was a general shift toward a more compulsory process and toward some degree of state involvement in the enforcement of settlements, but even in the classical period, litigation and its consequences depended largely on the initiative of individuals. And the basic structure of an oral legal process remained in place through the classical period, long after the use of writing for legal matters became widespread.

Writing was introduced into Greece around 750 B.C.[13] At first it was used only for private matters—dedications to a god, personal sentiments, and other graffiti. More than a century later it began to be used for public matters, and the earliest public inscriptions, beginning sometime after 650 B.C., were predominantly legal in nature. These inscriptions, together with later historical sources, show that during the next century (ca. 650–550 B.C.) cities all over Greece began to use writing to inscribe and publicly display legislation. In some cities early legislation was traced to a few figures who first wrote laws, Zaleucus of Locri (traditionally the first, ca. 650 B.C.), Lycurgus of Sparta (seventh century B.C., but perhaps legendary), and Draco (ca. 620 B.C.) followed by Solon (ca. 590 B.C.) in Athens. Except in Sparta, which had an antipathy to writing, almost all cities wrote laws and inscribed them, often on stones that were displayed in prominent public places such as the *agora* or a religious sanctuary. At this time laws were almost the only public documents that were thus displayed, so that in some cities writing became synonymous with law, and the expression "what is written" became a way of referring to the city's laws.

Writing down laws on relatively permanent materials and displaying them in public had several effects. First, it differentiated certain rules of the community so that they could be identified as laws. Second, it conveyed a sense of the stability and permanence of these rules. Third, it assured that the laws were available to the members of the community—not to all members, given the fairly low degree of literacy at the time, but probably to most of those who commonly participated in public affairs and would be likely to be involved in litigation. Fourth, it conveyed the idea that these were a special set of rules with special authority: the rules that are written (*ta grammata*), or that are laid down (*hoi thesmoi*). Fifth, it implied or affirmed that these rules were backed by the authoritative political body that caused them to be enacted.[14]

understand. Van Effenterre and Ruzé 1994–1995 is a useful collection of most archaic legal inscriptions (with a French translation).

[13] An earlier form of writing Greek, called Linear B, was used in the Bronze Age, but it did not survive the end of that civilization (ca. 1200–1100 B.C.), and the later script we know as Greek was an independent development out of Near-Eastern scripts.

[14] The earliest surviving law from the Cretan city of Dreros (ca. 650–625 B.C.) opens with

Thus, writing created the idea of laws as a special class of rules backed by the authority of the *polis*. The stories of the lawgivers, moreover, even if much distorted (and sometimes clearly false), also conveyed the sense that the community's many different laws were a unified set. Even in the fourth century, Athenian litigants spoke of "the laws of Solon" as including all Athenian laws, even though many of them had been enacted long after Solon's time. Lawgivers could easily become idealized, and some were said to have been given their laws by a god (see Section 1.5.2 below), thus adding to the authority of their legislation. In sum, publicly displayed, written legislation conveyed the sense that the community had a coherent collection of fixed norms of behavior backed by the authority of the *polis*, which we would call the city's "law."

From all this we see that during the archaic period, Greek law was developing into a productive combination of fixed, stable, written legislation together with an oral, dynamic process for settling disputes. Although some thinkers focused their attention on one aspect or the other, Solon, who not only wrote an extensive set of laws for Athens but also wrote poems reflecting on his political accomplishments, seems to understand the connection between them when he says, "I wrote laws [*thesmoi*] too, equally for poor and rich, and made justice (*dikê*) that is fit and straight for all" (Solon, frag. 36.18–19, as quoted in Gagarin and Woodruff 1995, 27). Here for the first time we see substantive laws (*thesmoi*) and legal process (*dikê*) put together, suggesting that they are part of a single sphere of human activity, though this thought is not further developed at this time. But Solon's verses suggest that archaic Greeks understood the close connection between written laws and the process of settling disputes, even if they did not have a word for this unified entity.

Other sixth- and fifth-century B.C. thinkers also seem to understand justice (*dikê*) as legal process. For example, the idea of a dynamic process of dispute settlement underlies Anaximander's use of the metaphor of justice to describe the behavior of the cosmos: "they render justice (*dikê*) and retribution (*tisis*) to each other for injustice (*adikia*) according to the assessment of time." Like litigants in court seeking retribution for injuries, the elements may give and take from each other, but over time the universe maintains a stability, which is not inert but is a dynamic process. Justice resides in the process, producing just outcomes in the long run though not necessarily in each case. Similarly, Heraclitus's paradoxical equation (Heraclitus, DK 80, as quoted in Gagarin and Woodruff 1995, 22) of justice (*dikê*) and strife (*eris*) conveys the idea that the essence of justice is not permanence but a dynamic process of adversarial competition. But Heraclitus also sees the importance of substan-

the statement, "the following was pleasing to the *polis*" (i.e., "the *polis* approved the following"). The Dreros law can be found in Gagarin 1986, 81–2. See Section 1.3 below for one provision of the law.

tive law for the survival of the city: "The people must fight for the law (*nomos*) as they would for the city walls" (Heraclitus, DK 44, as quoted in Gagarin and Woodruff 1995, 7; see further Sections 1.5.1 and 1.6.1 below).

The continuing interest in law as process is evident in the story of Deioces, the first king of the Medes, told by the mid-fifth-century B.C. historian Herodotus, which illustrates the sharp difference between the traditional, oral procedure in Greek law and an oriental legal process using writing (Herodotus, *History* I.96–100, as quoted in Gagarin and Woodruff 1995, 80–1). At first, when the Medes were still living in separate villages, Deioces acted like an archaic Greek judge: He was a prominent citizen to whom people came to have their disputes settled. He gained a reputation in his own village for "practicing justice (*dikaiosynê*)," and soon people in other villages heard of it and began coming to him. In the end they would take their disputes to no one else; Deioces (as we might say) had cornered the market on settling disputes. One day, realizing the power this gave him, he stopped judging cases entirely, saying he needed to tend to his own business. Lawlessness (*anomia*) and disorder immediately ensued. When the situation became intolerable, a group of Medes gathered and decided that they needed to institute a monarchy. Naturally, they chose Deioces as their first king.

Once Deioces was king, his whole approach to justice changed. He built a large new palace and shut himself off from his people, conducting all business through messengers. Specifically with regard to law, Herodotus tells us, Deioces

became a severe guardian of justice. People had to put their cases in writing and have them sent in to him; then he made his decisions and sent them back. In addition to this procedure for legal disputes, he established others: if he heard of anyone assaulting someone, he would send for him and impose on him a punishment appropriate to the crime, and he had spies and observers throughout the extent of his kingdom. (Herodotus, *History* I.100)

Herodotus presents this story as a historical event, but most scholars consider it fictional. We see it as a discourse contrasting Greek legal procedure, which Deioces follows at first, and an oriental type of justice, which he implements once he becomes king. When Deioces becomes king, law changes from an oral, public procedure open to the whole community to a closed process dependent on writing, in which the king is an absolute judge (presumably not himself subject to the law), dispensing decisions alone and in writing. Law thus is removed from the people and controlled by a single ruler. From this perspective, the story can be seen to illustrate the importance the Greeks attached to maintaining their traditional oral public procedure, thereby keeping law open to the participation of ordinary people.

1.3. Law in the Classical City

In the fifth century, interest in and use of the law increased substantially, especially after 450 B.C. For this period we concentrate on Athens, the political and cultural leader of Greece in the fifth and fourth centuries, where the public inscription of laws and decrees flourished and use of the courts expanded dramatically. Our sources of information for Athenian law far surpass those for other cities; in addition to inscriptions, they include drama, history (especially the *Constitution of the Athenians*, a work attributed to Aristotle but perhaps written by his pupils), and most notably some one hundred speeches written for delivery in actual trials. But before considering Athens, we look briefly at the city of Gortyn in Crete, which, although apparently of little importance at the time, has left us the largest and best preserved Greek legal inscription, the Gortyn Law Code, a set of laws covering especially family and property matters, that runs to twelve columns and some 3,000 words. We know nothing about law at Gortyn besides what can be inferred from this code and a few other separate legal inscriptions, but it is striking that the very first sentence of this document establishes the principle that the process of law must take precedence over extra-legal action: "If anyone wishes to contest the status of a free man or a slave, he is not to seize him before a trial." The provisions that follow set substantial fines for violating this rule and procedures for adjudicating disputed cases. This endorsement of law over an earlier system of self-help is notable, as is the large number of inscribed laws, which go back as early as the late seventh century.

One of the early provisions from Gortyn limits the term in office of the highest official, the *kosmos*, by prescribing a minimum interval of three years between terms; a similar provision at Dreros requires a ten-year interval.[15] These *kosmoi* and other public officials at Gortyn and elsewhere could also be fined if they did not enforce the law properly.[16] Gortyn and some of the other cities where such provisions occur had aristocratic forms of government, but they all seem to share the sense that the highest officials are subject to the law like everyone else.[17] Such provisions, together with other evidence, indicate that all Greeks held to the principle of "the rule of law."

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[15] The provision from Gortyn is line 2 of *IC* 4.14.*g-p* (as quoted in Gagarin 1986, 93–4); line 1 has the Gortyn law on fining public officials. For the Dreros law, see Gagarin 1986, 81–2.

[16] See preceding note. It was very common in Greece to fine judicial officials who did not carry out their duties as specified by law, and similar provisions are found in many other cities; see, e.g., van Effenterre and Ruzé 1994–1995, 1: no. 78 (seventh century B.C., from Tiryns), and 2: no. 95, lines 11–3, 48–9 (fifth century B.C., from Thasos).

[17] One of the provisions concerning illegal seizure in the Gortyn Code (col. 1, 51–5**;** see Arnaoutoglou 1998, 29–30) provides that accusations of illegal seizure involving a *kosmos* as either accuser or accused are to be heard after the *kosmos*'s term of office ends (though any fines are to be calculated from the date of the original seizure)—an ancient precedent the U.S. Supreme Court might have done well to follow when it ruled that President Clinton was subject to private litigation during his term of office.

In general, Athenians placed a similar emphasis on the importance of law. One of the earliest and best-known endorsements comes in Aeschylus's *Oresteia* trilogy, when Orestes and the Furies (his mother's avenging spirits) seek the help of Athena in resolving their dispute over Orestes' responsibility for his mother's death. After hearing their preliminary pleas, Athena sets up a human court, the Areopagus, because the matter is too important for a single god to decide (*Eu.* 470–88). The court's decision and the more general resolution at the end of the play seem to connect the city's peace and prosperity directly to the existence of the legal process.

Support for the legal system in Athens was also assisted by the close connection between law and democracy. Democracy meant not just equal access to the courts—as Pericles says, "we have equality at law for everyone here in private disputes" (Thucydides, *History* II.37, as quoted in Gagarin and Woodruff 1995, 94)—but also popular control of the courts. This association of law and democracy seems to have originated under Solon, among whose "most democratic" reforms, according to the *Constitution of the Athenians* (9.1), were that anyone who wished could bring suit for an injured party and that cases formerly decided by a magistrate could be referred to the popular courts.[18] The popular courts were originally a counterweight to the aristocratic Council of the Areopagus and to the individual magistrates, who at the time were all from the upper class. After Solon, almost all important matters were referred to courts staffed by large numbers of ordinary citizens. Solon also opened up some types of cases to prosecution by any citizen who wished; previously, only victims could bring suits, but Solon realized that some victims would be unable to act for themselves and so he allowed others to act on their behalf. Gradually, this procedure expanded to include many sorts of offenses.[19]

In the fifth century further reforms, by Ephialtes who reduced the power of the Areopagus (ca. 462 B.C.) and by Pericles who first instituted pay for jurors (ca. 450 B.C.), opened up the legal process to anyone who wished to participate. Almost all legal power now resided in the popular courts, where juries numbering in the hundreds and composed of any citizens who wished to participate decided most cases. Also in the fifth century *nomos* ("custom," "convention") became the word for "law," replacing *thesmos* ("enactment"); this was probably intended to convey the sense that the city's laws were not imposed from the outside but were a natural development of the city's customs and traditions. One result of all these reforms was that litigation in-

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[18] Elsewhere Aristotle says that Solon "established the democracy by creating courts whose members were drawn from everyone" (Aristotle, *Pol.* II.12.1274a2–3).

[19] This new procedure was called a *graphê* ("writing," perhaps because the charge had to be filed in writing) to distinguish it from the traditional suit called *dikê*. In some ways the distinction between *graphê* and *dikê* mirrors our distinction between criminal and civil actions, respectively, but there are important differences, too, such as the fact that homicide always remained a *dikê* for the Greeks.

creased substantially during the fifth century, to the point that the comic poet Aristophanes often joked about Athenian litigiousness (see below). The Athenians undertook several reforms, most notably providing that in some cases a plaintiff who did not receive one-fifth of the jurors' votes had to pay a stiff fine. But in general they felt it was more important that people with grievances have their day in court than that the amount of litigation be reduced.

Another important development was that increasingly in the fourth century B.C. political decisions were also made by the popular courts, especially by means of the *graphê paranomôn* or "suit against unlawful (*para-nomos*) decrees." This was a process whereby any citizen could bring suit against a decree of the Assembly on the ground that it violated an existing law. The resulting trial would normally consider both the legality of the decree and the larger issue of its merit. The most famous of such cases was the trial "On the Crown" (ca. 330 B.C.). A certain Ctesiphon proposed a decree awarding Demosthenes a crown for service to Athens. Aeschines, a political opponent of Demosthenes, then brought suit, charging that the decree violated two laws.[20] Demosthenes joins in Ctesiphon's defense and he, like Aeschines, concentrates most of his efforts on defending his own public record and attacking the character and record of his opponent. But although the case clearly turns on a political judgment about the two opponents, both devote some attention to the narrow legal issues,[21] showing that even in a highly political case, litigants felt an obligation to adhere to the city's laws. Such cases also indicate a sense of obligation to uphold "the rule of law," but in other cases litigants sometimes seem largely to ignore the law.[22]

Unlike modern liberal democracies, which to a large degree treat law as an autonomous institution and generally make every effort to keep law and politics separate, the Athenians openly acknowledged the close ties between them. Litigants sometimes addressed jurors as if they were sitting in the Assembly hearing a political debate, and the large number of jurors in important cases, sometimes as many as 1,500, made identification with the Assembly easier, as did the fact that jurors were not expected to have any professional or technical expertise. There were no professional judges, moreover, so that these jurors carried out most of the functions that we today assign to judges together with those of modern jurors. We today consider law to be the province of specifically trained professionals in which amateurs have a limited role. We also tend to think that political concerns ought not to affect legal decisions, although we may admit that in practice they often do. But, to take a

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[20] One law made it illegal to award a crown in the theater, the other to crown someone who still held office.

[21] Both speakers cite various laws and discuss their meaning and relevance, much as a modern lawyer might do.

[22] See Carey 1996 (with further references), who notes that although litigants may use laws in various ways, no one directly criticizes a law of the city.

modern example, the U.S. Supreme Court insisted that it decided the 2000 presidential election on legal rather than political grounds; openly to admit that it was moved by political considerations would have been generally condemned (though it might be different if the Court were composed of a thousand randomly selected citizens, as would be the case in Athens, rather than nine trained professionals). In any case, the Athenians were not concerned that political interests might influence legal decisions; law was one of the most important pillars of their democratic form of government, and referring political decisions to the popular courts was only natural and desirable.

Modern critics have often complained about the politicization of Athenian courts, but the complaint is almost never voiced by ancient critics, who focus instead on the litigiousness of Athenians.[23] Aristophanes devotes an entire play, *Wasps*, to satirizing the legal system (the name comes from a chorus of jurors in the form of these insects). The protagonist, Philocleon, is addicted to jury-duty; he loves to vote for harsh sentences and to see litigants grovel before him. And many other plays of Aristophanes poke fun at people's fondness for litigation. Further criticism from the same period comes from an anonymous treatise commonly known as the "Old Oligarch"[24] because of its author's conservative views. He argues that although democracy is a deplorable system of government, the Athenian system does in fact benefit those who control it—the worst people (i.e., the lower classes).[25] He complains that Athens's allies are forced to come to Athens for trials, but he admits that this additional litigation benefits the city in higher fees for the courts (and more pay for jurors) and other sorts of revenue. The system also helps Athens control its allies' affairs (pseudo-Xenophon or Anonymous, *The Constitutions of the Athenians*, 1.16–18).

A more sophisticated critique of the Athenian legal process comes in the papyrus fragments of *Truth* (44B), by the sophist and speechwriter Antiphon (ca. 480–411 B.C.).[26] Since only a small amount of the original work survives, we cannot know what Antiphon's overall view was, but in the text we have he presents several criticisms of the legal system. First, after noting that a person will not suffer any penalty if he disobeys the law when no one sees him, he observes that people who do what the law requires of them are often worse off for it. He continues:

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[23] On litigiousness, see further Todd 1993, 147–63.

[24] This treatise, entitled *The Constitution of the Athenians* (not to be confused with Aristotle's work of the same name), is falsely ascribed to Xenophon. It is translated in Gagarin and Woodruff 1995, 133–44.

[25] This anticipates Thrasymachus' view (discussed in Section 1.5.2 below) that law is the advantage of those in power.

[26] The entire text is translated in Gagarin and Woodruff 1995, 244–7. This text is also important for the issue of *nomos* and *phusis* (see Section 1.5.3 below). On the identity of the Antiphon who wrote speeches and the Antiphon who wrote *Truth*, see Gagarin 2002, 38–52.

If the laws provided some assistance for those who engaged in such behavior [behavior required by law], and some penalty for those who did not but did the opposite, (col. 6) then the tow-rope of the laws would not be without benefit. But in fact it is apparent that the justice (*to dikaion*) derived from law (*nomos*) is not sufficient to assist those who engage in such behavior. First, it permits the victim to suffer and the agent to act, and at the time it did not try to prevent either the victim from suffering or the agent from acting; and when it is applied to the punishment, it does not favor either the victim or the agent; for he must persuade the jurors that he suffered, or else be able to obtain justice by deception. But these means are also available to the agent. (Antiphon, *Truth*, cols. 5–6, as quoted in Gagarin and Woodruff 1995, 246)

Antiphon here contests the traditional view of law's benefits. The legal process, he argues, does not prevent wrongdoing or provide support for victims, who are not compensated unless they can persuade a jury. In other words, the principle of hearing both sides does not ensure justice, since the wrongdoer may be acquitted. This indictment targets not just the legal system in practice but also the system as conceived, for it was not designed to prevent wrongdoing (except by its deterrent value, which Antiphon ignores) or to compensate victims automatically.

Despite these criticisms, some of which are reflected in later court speeches, Antiphon later directed his energy toward working within the legal system, writing speeches for litigants to deliver in court. In these he naturally praises the laws and the legal system, though he can be very critical of the opposing litigant, especially for misusing the legal process. One such passage of criticism seems to suggest that law everywhere grants certain basic rights to Greeks. The defendant, accused of homicide, is arguing that he should not have been imprisoned before trial but allowed to leave and go into exile if he wished: "This rule is common to all, but you have enacted your own private law, trying to deprive me alone of something available to all other Greeks" (Antiphon, *Truth*, 5.13, as quoted in Gagarin and MacDowell 1998, 54). The argument that the law everywhere in Greece grants defendants this right suggests an awareness, at least in embryonic form, that there exist certain basic legal rights that are being violated in this case. This criticism of the way law is used in this particular case, however, also implicitly praises law in general for assuring this right. Indeed, praise of the laws is, not surprisingly, common in forensic oratory of the fifth and fourth centuries B.C.

1.4. The Concept of Law

We now turn to the substantive concept of law in archaic and classical times, concentrating mainly on *nomos* in the sense of statute law. We must distinguish at the outset between what we take to be prevailing views about law, expressed in a wide range of authors, and the critical views that arose within what we call the New Learning. This is the intellectual movement that brought much of Greek traditional thought under critical examination in the later fifth century. The most famous spokesmen of this movement included

some of the traveling teachers known after Plato as sophists, but we must keep in mind that not all sophists were critical of tradition, and that not all of the critics were sophists. Scientists, especially those interested in medicine, were especially prominent in the New Learning.

Although criticisms of law as unnatural became strident in the later fifth century, the prevailing view never seems to have abandoned its confidence in law as a bulwark of society, one that was consistent both with nature and with the will of the gods. This is all the more impressive in view of the wide range of usage for the word *nomos*. When not used of statute law, the word could refer to an opinion that is contrary to the truth (see Section 1.4.2), and this usage could give the word an awkward penumbra when it was used of statute law.

The word *nomos* has a range of uses that are distinct in English translation and, indeed, are distinguished by most modern theories. For ancient speakers of Greek, however, the various uses probably resonated with one another in such a way that they could not be sharply separated. Normative and descriptive uses of *nomos*, to begin with, were not clearly distinguished; this reflects the view, common in many unselfconscious cultures, that the laws or customs that are found to obtain among a people are precisely those that are right and were ordained by a god. Experience of different cultures provoked intellectuals in the fifth century to examine the difference between what is and what ought to be, but such examinations were not fundamental to the felt meaning of the word *nomos.* Hence, as we shall see, *nomos* almost always seems to carry some normative weight, and the idea that it is opposed to *phusis* ("nature," "reality") developed fairly late in the fifth century, was not widely accepted, and was unrelated to the earlier history of the words. The opposition of *nomos* to *phusis* is an important development in the history of ideas, however, serving as one of the roots of the ideal of natural, as opposed to conventional, justice.

1.4.1. Way of Life

Nomos is used in many contexts in which modern speakers would not use a word cognate with law. It can refer to a way of life, a procedure for farming (Hesiod, *WD* 388), a manner of making music, a custom for social interaction, and so on (see Ostwald 1969). Still, even these uses of the word are only small shades of meaning away from more familiarly legal ones. Consider this striking passage, from Hesiod's *Works and Days*, the end of which we cited for a different purpose in Section 1.1 above:

[I]t is bad to be a just man
When the greater injustice leads to the better verdict.
But I don't expect that Zeus in his wisdom is quite finished!
But you, Perses, should take this to heart:
Listen to justice, and forget the use of violence altogether.

This was the *nomos* that Zeus established for human beings:
For fish and beasts and flying birds he allowed
That one may eat another, since there is no justice among them;
But to human beings he gave justice, which turns out to be
Much better. (*WD* 271–80, as quoted in Gagarin and Woodruff 1995, 18–9)

The consensus of scholars is that *nomos* "does not here bear the sense of 'law' or 'ordinance' which prescribes a certain behavior but designates the behavior itself," and being god-given is "only incidental" (Ostwald 1969, 21). True, the passage implies that the behavior of birds is their *nomos*, and such behavior hardly counts as a norm—or even as something governed by norms. To speak of the *nomos* of birds would be to use the word descriptively. But in the human case, as line 272 makes clear, Hesiod means that, although the usual behavior of human beings is unjust, the *nomos* of Zeus is such that people will eventually be punished for what they have done unjustly—by a divine judge if not by a human one. And although Hesiod is not appealing to statute law here, he is appealing to *nomos* as the gift of a norm (for human beings, justice) that is enforced by a god and ought to be enforced by human judges. In the end, the distinction between such a gift and divine law is a small one.

1.4.2. Conventional Opinion

Nomos can also be used for merely conventional opinion or the customary manner of speaking as opposed to what can be known to be true. This is the most striking way in which *nomos* departs from the sphere in which we find modern words for law. Empedocles opposes *nomos* to *themis:* It is not right (*themis*) to speak of dissolution as a dreadful fate, but even Empedocles, following custom (*nomos)*, will do so (Empedocles, DK 9, lines 4–5). Democritus opposes *nomos* to truth: "By *nomos* sweet, by *nomos* bitter, by *nomos* hot, by *nomos* cold; but in truth atoms and void" (Democritus, DK 9). The most famous example of this usage is the *Nomos-Basileus* fragment of Pindar:

Nomos, king (*basileus*) of all,
Of mortals and immortals,
Takes up and justifies what is most violent
With a supremely high hand. (Pindar, *Nomos-Basileus* fragment, as quoted in Gagarin and Woodruff 1995, 40–1)

Pindar's example is Heracles' theft of cattle from Geryon and of horses from Diomedes. Interpretation of the passage is vexed, but the prevailing view is that *nomos* here refers to the tradition that Heracles is a hero and that his deeds must be accepted as justified. The poet seems to side with the victims of these two stories, and is therefore impressed by the power of *nomos* to make a crime acceptable to common opinion. The passage was much quoted in antiquity, most famously by Herodotus (*History* III.38, as quoted in

Gagarin and Woodruff 1995, 82) and Callicles in Plato, who does not seem to realize that Pindar's sympathies here are not with the thief (Plato, *Gorg.* 484b, as quoted in Gagarin and Woodruff 1995, 311). *Nomos* as statute law and *nomos* in compounds have much more positive connotations than Pindar's usage would predict; still, the positive usage does not shed the linguistic memory of *nomos* as something that may be artificial and false.

1.4.3. Compounds

Nomos appears in various compounds in which the original meaning was not directly related to statute law[27] (see Ostwald 1969, 62–95): *Eunomia*, good order, came to be used for specific legal systems admired by conservatives in Athens, such as that of Sparta. *Anomia*, lawlessness, ranges from disregard for norms of behavior to absence of law as a process. It is a condition under which human life is impossible—even worse, says an anonymous writer of the period, than living in solitude. *Autonomia* is not exactly independence, but it does not draw its meaning from statute law, since it is attributed to Antigone in virtue of her resistance to Creon (Sophocles, *Ant.* 821), where it seems to mean that she is taking the law into her own hands. Generally, it is the condition of life unfettered by tyranny.

1.4.4. Statutes

The pride that ancient Greeks took in their laws was a significant part of their sense of national and civic identity. Herodotus shows the Spartan Demaratus boasting of his city's laws to Xerxes:

Although they [the Spartans] are free, they are not free in all things; for they have a master— law—whom they revere more than your people revere you: to remain in battle array and either conquer or be destroyed. (Herodotus, *History* VII.104)

The contrasting speeches by Archidamus and Pericles early in Thucydides' *History* reveal the importance Spartans and Athenians placed on their distinctive laws (Thucydides, *History* I.84, II.36–7). The Hippocratic text *Airs, Waters, Places* 16 (as quoted in Gagarin and Woodruff 1995, 165) represents the view that Greeks were superior to Asians because of their laws, which are inimical to tyranny (cf. Herodotus, *History* VII.104, discussed below). The idea that written statute law is a bulwark against tyranny is sounded again and again in the classical period. According to Thucydides, the Thebans excused

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[27] On *eunomia*, see, e.g., Solon, W 4, as quoted in Gagarin and Woodruff 1995, 25–6. On *anomia* as a condition under which people cannot live, see Anon. Iamb. 6.1, as quoted in Gagarin and Woodruff 1995, 293, and also the story of Deioces summarized in Section 1.2 above. On the value of *autonomia* in contrast to tyranny, see the Hippocratic text *Airs, Waters, Places* 16, as quoted in Gagarin and Woodruff 1995, 165.

their actions during the Persian Wars by appealing to the fact that their city at the time was governed not by laws but by a tyrannous clique (Thucydides, *History* III.62). The clearest statement is from Euripides:

Nothing means more evil to a city than a tyrant.
First of all there will be no public laws
But one man will have control by owning the law,
Himself for himself, and this will not be fair.
When the laws are written down, then he who is weak
And he who is rich have equal justice. (Euripides, *Supp.* 429–37, as quoted in Gagarin and Woodruff 1995, 70.18)

1.5. The Origin of Law

The concept of law is partly fleshed out by theories of its source or origin. In the period before Plato, three sources for law were under consideration: Law might be given by gods, invented by human lawgivers, or developed by nature. With each account of origins comes a slightly different concept of law. Ancient thinkers were concerned with the question whether law really is something that is ordained by god or nature, or whether it is something human beings invent. The legitimacy of law seems to depend on the outcome.

Generally, ancient theories about the origin of law seem designed to serve as theories of moral foundation—or the lack of it. Historical origin and moral foundation are not the same, however. If the laws are god-given, it does not follow that their moral foundation lies in their origin, though this is often assumed. The point is most clear for the theory that laws were developed by agreement, which could be used to de-legitimize as well as to legitimize the laws. We need to keep in mind also that early Greek thinking allowed the possibility that an event has concurrent human and divine causes. Similarly, one might believe that laws are a human invention and that they can be supported by an appeal to nature, as we shall see in the case of the Anonymous Iamblichi.

1.5.1. *Gift of the Gods*

The idea is as old as Homer, and is felt even among the younger sophists. In the *Iliad*, Odysseus speaks of "one king / To whom the clever son of Cronus gave the staff / And the rule of *themis*" (*Il.* II.204–6, as quoted in Gagarin and Woodruff 1995, 4). Thus the basic rules of life, *themis*, are enforced by kings though given by Zeus. Tyrtaeus expresses the Spartan view that their basic law was given to the human lawgiver Lycurgus by Apollo at Delphi (Tyrtaeus, frag. 4, as quoted in Gagarin and Woodruff 1995, 23). The idea is taken up by orators and poets. Gorgias, in his funeral oration, speaks of "the most divine and universal law: to speak, to be silent, and to act as one ought and when one ought" (Gorgias, DK 6, as quoted in Gagarin and Woodruff 1995, 203).

We find the idea also in all three of the surviving tragic poets: Aeschylus (in *Supp.* 670–3), as well as Sophocles and Euripides in the following:

Chorus:
Be with me always, Destiny,
And may I ever sustain holy
Reverence in word and deed
according to the Laws on high,
brought to birth in brightest sky
by Heaven, their only father,
the Laws that were not made by men.
Men die, but the Law shall never sleep forgotten;
great among gods, it never ages. (Sophocles, *OT* 863–71)

Ion:
Since you [Apollo] are powerful, strive for virtue.
When anyone who is mortal
is by nature wicked, he is punished by the gods;
so how could it be just for you to write the laws
for us mortals, and then incur a charge of lawlessness
yourselves? (Euripides, *Ion* 439–43, as quoted in Gagarin and Woodruff 1995, 67)

The author of the *Sisyphus Fragment* (either Critias or Euripides, imitating sophists) questions this view, suggesting that a clever man invented fear of the gods, in order that human beings would obey the law in private as well as in public when they are subject to human punishment—but this presupposes that people generally believed that the gods were behind human law (*Sisyphus Fragment*, lines 12–5, as quoted in Gagarin and Woodruff 1995, 261).[28] Antiphon treats human law as parallel to the will of the gods: "whoever kills someone unlawfully sins against the gods and violates the rules of human society" (Antiphon, *Tetralogy* 3.a2, as quoted in Gagarin and Woodruff 1995, 237). Heraclitus mentions a more sophisticated idea, that human law is supported by divine law, using the image of nourishment:

Those who speak with intelligence should strongly defend what is shared by all, as a city does its law, only much more strongly. For all human laws are nourished by one divine law; it controls as much as it wants, it is sufficient for all things, and it prevails. (Heraclitus, DK B 114, as quoted in Gagarin and Woodruff 1995, 152)

1.5.2. *Human Invention or Agreement*

At least from early classical times, bodies of law were attributed to legendary lawgivers such as Lycurgus for Sparta and Solon for Athens. The antiquity and authority of these figures conferred legitimacy and permanence on the

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[28] On the provenance of this fragment, see Kahn 1997. Although often attributed to Critias, recent opinion is swinging toward taking this as a fragment from a lost play by Euripides.

laws associated with them, as well as a sense that the laws of a founding law-giver formed a kind of unity (see further Section 1.2 above). To speak of the laws of Athens as the laws of Solon is to invite the sort of respect for them that in the modern United States is evoked by mention of its founding fathers. Legends of lawgivers need not exclude divine sources; indeed, the Lycurgus legend, as we have seen, is consistent with a divine source.

In the second half of the fifth century, however, various intellectuals began to argue that law as found in cities was entirely the product of human intelligence and therefore suspect:

Human beings laid down laws for themselves, without knowledge of what they were legislating about, but the gods put the nature of all things in order. (Hippocrates, *de Victu*, DK 22 C 1)

There was a time when human life had no order
But like that of animals was ruled by force;
When there was no reward for the good,
Nor any punishment for the wicked.
And then, I think, men invented laws
For punishment. (*Sisyphus Fragment*, lines 1–6, as quoted in Gagarin and Woodruff 1995, 260)

A similar idea shows up in *Antigone*'s Ode to Man, in which the Chorus say that man "has taught himself speech and windswift thought and *astunomoi orgai* (the character to live in cities under law)" (Sophocles, *Ant.*, line 355, as quoted in Gagarin and Woodruff 1995, 51). They proceed to distinguish "the law of the land" from "the oath-bound justice of the gods," which, however, are supposed to be woven together in harmony. In the broader context of the play, the Chorus seem to be alluding to the power of the state to make law (in this case through its king, Creon) and insisting that the laws made by the city be in accordance with divine justice (as Creon's apparently are not).

Elsewhere, the idea that law is a human invention is held against obedience to law. Plato's Thrasymachus says that justice is nothing other than the advantage of the stronger (Plato, *Rep.* I.338c, as quoted in Gagarin and Woodruff 1995, 255.3 b), meaning that law is made by whoever happens to rule in a city (338e); he goes on to say that it is therefore foolish to pursue justice or (by implication) to obey the law (348c). A similar argument is recorded in Antiphon (see Section 1.3 above).

An analog to modern social contract theory emerged in the fifth century—law by agreement. Although Socrates famously treats his agreement as obliging him to obey the law (Plato, *Crito*), he is not taking agreement to be the foundation of law. The only clear text in which agreement theory occurs before Plato is Antiphon's *Truth*, but Plato's treatment of the theme suggests that the theory was known to many intellectuals. The prevailing theory of this kind seems to have been this: People invented law by an agreement that limited their freedom to harm others while promising to protect them from the harm others

might inflict upon them; but if law is merely the product of such an agreement, it has no basis in nature or reality, and therefore no real harm can come from violating it—not, that is, to the one who violates it without being observed. Antiphon's text[29] takes law to be a product of human agreement, contrasting the requirements of law against those of nature (we will return to the theme of nature below). It observes that violations of nature bring true harm on the violator, whereas violations of law damage only the opinion (*doxa*) in which the violator is held—and then only if he is caught (Antiphon, *Truth* 44b, col. 1, as quoted in Gagarin and Woodruff 1995, 245). These two basic ideas—that breaking the law hurts you only if you are caught, and that law is a product of agreement among human beings—are developed more fully in Plato's *Republic* (*Rep.* II.358e3–359b5, as quoted in Gagarin and Woodruff 1995, 309–10), where they are presented in the hope that they will be refuted.

Modern contract theory derives the legitimacy of law from an original or ideal contract, but nothing like this is explicit in early antiquity.[30] The agreement theories that have come down to us are designed to de-legitimize laws, apart from the theory implicit in Socrates' argument of the *Crito.* Generally, in ancient Greece, the analogs of modern contract theory are advanced as arguments against the legitimacy of law—that is, as reasons why an individual has no reason to follow the law that was created by the agreement of other people. Apparently, then, ancient Greeks had the anti-positivist tendency to hold that law is legitimate only insofar as it is actually—and not merely by agreement—in accordance with *dikê*.

1.5.3. Nature

The concept of unwritten law (to which we will turn below) seems to imply commitment to the existence of a law of nature, as Aristotle recognizes:

For there is something of which we all have an inkling, being a naturally universal right and wrong [...] to which Sophocles' Antigone seems to be referring [by "unwritten laws"]. (Aristotle, *Rhet.* I.13.1373b6–9)

The clearest statement of the idea that law is natural to human beings—even if they invented it—is found in an anonymous fifth-century B.C. text preserved in Iamblichus:

For if humans were by nature incapable of living alone and therefore joined together, yielding to necessity, and have developed their whole way of life and the skills required for this end [i.e., for living together], and cannot be with each other while living in a state of lawlessness—for

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[29] The text of his *Truth* is fragmentary and may represent a set of opposing views none of which Antiphon himself espoused. See Gagarin 2002, 63–92.

[30] But see Kahn 1981b, who finds traces of social contract theory very early in Greek thought, most remarkably in early Greek science.

the penalty of lawlessness is even greater than the penalty for living alone—because of all these constraints, law and justice (*to dikaion*) are king among us and will never be displaced, for their strength is ingrained in our nature. (Anon. Iamb. 6.1, as quoted in Gagarin and Woodruff 1995, 293)

This of course is consistent with the thesis that law was invented differently in different cultures. But justice and law are conceptually linked (as we can see from this passage), and we have abundant evidence that a concept of natural justice was entertained in the fifth century. Because Antiphon's text contrasts law with nature, it has no way of articulating the concept of natural law, but it does seem to allow for the separation of justice from law (Antiphon, *Truth* 44c, col. 1, as quoted in Gagarin and Woodruff 1995, 247), where it appeals to justice in its criticism of legal procedure. In context, the justice appealed to could well be conceived as natural justice. Certainly Callicles, as represented in Plato, contrasts law-based justice against natural justice (Plato, *Gorg.* 483a7–484c3), and this—in view of the close conceptual link between justice and law—could be thought to imply the idea of natural law.

Defenders of traditional law, however, claimed that their law was simply natural. Such claims appear fairly late, so that the idea of nature-based law is probably a response to the criticism of existing law by figures such as Antiphon and Callicles. The Chorus in *Bacchae*, in the larger context, are inveighing against those who take traditional law lightly:

The cost of these beliefs is light:
Power lies
With whatever thing should be divine,
With whatever law stands firm in time
By nature ever-natural. (Euripides, *Ba.* 893–6, trans. Woodruff 1998, 36)

In Antiphon, the contrast between human agreement and nature is parallel to the contrast between opinion and truth: Agreement is a matter of opinion, nature is truth. This builds on the opposition we mentioned above between truth and *nomos* when the latter is used to refer to conventional opinion. But the concept of truth does not exhaust that of nature. What sort of nature, or rather, the nature of what sort of thing, is supposed to underlie natural law or natural justice? Callicles' concept of nature is based on his view of the behavior of beasts of prey (dissolving a distinction between humans and other animals that meant a great deal to most Greeks).[31] The details of Antiphon's view are lost to us, owing to a lacuna in the surviving text, but the outline is clear: Our natural goal is to live and to avoid death; our natural advantage, therefore, lies in whatever supports life and puts off death, whether obtaining that advantage is lawful by convention or not.

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[31] Recall Hesiod's distinction between humans and animals, *WD* 271–80 (see Section 4.1 above).

We have tantalizing scraps of evidence for theories of natural law that would challenge custom in more positive ways. Hippias, as Plato represents him, argues that the concept of citizenship divides people unnaturally (Plato, *Prot.* 337d–338b, as quoted in Gagarin and Woodruff 1995, 216.5; cf. Gagarin and Woodruff 1995, 70.17). We have also this striking fragment:

One day showed us all to be one tribe of humans,
Born from one father and mother;
No one is by birth superior to another.
But fate nourishes some of us with misery
And some with prosperity, while others are compelled
To bear the yoke of slavery. (Sophocles, *Tereus* frag. 591 Radt, as quoted in Gagarin and Woodruff 1995, 56.24)

And we can be fairly sure that someone in this era raised the question whether slavery accords with natural justice. The main evidence for this is Aristotle's response to the argument of an unnamed opponent that slavery is unnatural because slaves may not differ from their masters in a way that would justify their situation:

Others think that it is contrary to nature to be a master, because the fact that one man is a slave and another free is by *nomos*, whereas in nature they do not differ at all, which is why it [slavery] is not just either; for it is the result of force. (Aristotle, *Pol.* I.3.1253b20–23)

Certainly some thinkers thought it wrong for Greeks to enslave Greeks, but a human nature theorist should discount the moral relevance of Greekness, as we find in the *Truth* of Antiphon:

We have therefore become foreign to one another, when by nature we are all at birth in all respects equally capable of being both foreigners and Greeks. We can examine the attributes of nature that are necessarily in all men and are provided to all to the same degree, and in these respects none of us is distinguished as foreign or Greek. For we all breathe the air through our mouth and through our nostrils. (Antiphon, *Truth* 44a, col. 2, as quoted in Gagarin and Woodruff 1995, 244)[32]

1.6. The Functions of Law

1.6.1. Laws of the Polis

Similar to what is now known as positive law is the law given by the authorities of the city in order to maintain order and preserve the city from internal dissension. The law of the *polis* seems to include what we would call its constitution or system of government,[33] but it is mainly the body of statute law.

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[32] See Ostwald 1990, for commentary on this passage.
[33] See the Tyrtaeus poem quoted above; see also Thucydides, *History* II.37, as quoted in Gagarin and Woodruff 1995, 94: "We have a form of government that does not try to imitate the laws of our neighboring states."

There was a broad consensus in early antiquity that the laws of the city—any city—were good in themselves.

The law sustains the *polis*, protecting everyone, and most importantly the common people, from those who would tyrannize over them. Heraclitus recognizes this in saying, "The people (*demos*) must fight for their law as for the city wall" (Heraclitus, DK 44, as quoted in Gagarin and Woodruff 1995, 152). The content of the law does not matter very much for this purpose; Thucydides has Cleon say, in defense of the decision to kill all the men of Mytilene: "A city with inferior laws is better off if they are never relaxed than a city with good laws that have no force" (Thucydides, *History* III.37, as quoted in Gagarin and Woodruff 1995, 109). Elsewhere, Thucydides writes of the dreadful effects of lawlessness on Athens during the plague (ibid., II.53) and on Corcyra during the civil war (ibid., III.81–4).

Civil conflict was what the Greeks of this period most feared from a breakdown of law. Internal tensions, ranging from factionalism to outright rebellion could not only weaken a city's moral fabric (Thucydides' point) but also deliver it to its enemies. Many of the victories of Athens as it expanded its empire were made easy by conflicts within the cities that Athens subdued. In Sophocles' *Antigone*, King Creon expresses the view that he must uphold the law in order to prevent such disasters (Sophocles, *Ant.*, lines 382, 449, 481).

The law of the *polis* is usually understood to consist of written statutes (see Ostwald 1969, 46). The importance of written law is clear in Euripides' *Suppliants*:

When the laws are written down, then he who is weak,
And he who is rich have equal justice. (Euripides, *Supp.*, lines 433–4, as quoted in Gagarin and Woodruff 1995, 65)

We find a similar thought implied in Gorgias' *Palamedes*: "written laws, guardians of justice" (Gorgias, *Palamedes*, DK 11a.30, as quoted in Gagarin and Woodruff 1995, 201). In one of Aesop's fables the Frogs ask Zeus for a king; instead, Zeus sets up a piece of wood in their pond—probably meant to stand for a tablet on which laws were written. Not seeing the value of this, they insisted on a real king, and Zeus sent them a snake that devoured them (Aesop, *Fables* 44, as quoted in Gagarin and Woodruff 1995, 146.5).

In the later fifth century B.C., intellectuals came to criticize the laws of the city as artificial and conventional; this apparently did more to add to people's fear of the New Learning than it did to undermine the consensus. Thucydides has the Spartan king, Archidamus, speak to this issue in his first speech: "We [Spartans] have good judgment because our education leaves us too ignorant to look down on the laws" (Thucydides, *History* I.84, as quoted in Woodruff 1993, 28). Fear of the New Learning was very real in Athens; it is given vigorous play in Aristophanes' *Clouds* (which ends with the burning of Socrates'

school) and it surely helped the prosecution secure a conviction of Socrates some twenty years later.

1.6.2. Unwritten Law

In the funeral oration, Thucydides has Pericles say that Athenians obey "the unwritten laws that bring shame on their transgressors by the agreement of all" (Thucydides, *History* II.37, as quoted in Gagarin and Woodruff 1995, 95). We find a similar expression in Sophocles' *Antigone:*

What laws? I never heard it was Zeus
Who made that announcement.
And it wasn't justice, either. The gods below
Didn't lay down this law for human use.
And I never thought your announcements
Could give you—a mere human being—
Power to trample the gods' unfailing,
Unwritten laws. These laws weren't made now
Or yesterday. They live for all time,
And no one knows when they came into the light.
No man could frighten me into taking on
The gods' penalty for breaking such a law. (Sophocles, *Ant.*, 450–60, trans. Woodruff)

Unwritten law may be understood as either the law of the Greeks or, more generally, the law of nations. The two concepts are not clearly distinguished; an author who seems to write of universal law may have in mind law that is universal among the Greeks. But we must not overlook the tendency of Greek writers before Herodotus to imagine all human societies as following Greek customs, as Homer does in the case of the Trojans.

In any case, the concept of unwritten law as something distinct from the law of the *polis* appears to be new in the mid-fifth century B.C., and may be due to debates about the legitimacy of the *polis* law. Before this period, there seems to have been no need to remind potential lawbreakers of the idea that laws as such are divinely ordained (although both Hesiod and Solon took pains to argue for divine support of justice). The idea of unwritten law may be an artifact of the challenges to the laws of the city by intellectuals such as the sophists.

1.6.3. The Law of the Greeks

It is not easy to distinguish references to universal law from references to the laws of the Greeks, meaning laws common to all of the cities and governing the interaction of the cities. Some texts, however, refer fairly clearly to Greek law as such. In Thucydides the Plataeans urge the Spartans not to "violate the common laws of the Greeks" (Thucydides, *History* III.59, as quoted in

Woodruff 1993, 80); in context, these appear to be laws supporting the keeping of sworn promises, as the Spartans had sworn to protect Plataea. The same principle, keeping promises across the boundaries of the cities, is at stake in Herodotus (*History* VI.86). Also in Thucydides we find the Athenians insisting that every power has a right to punish its own allies (inference from Thucydides, *History* III.40; see Woodruff 1993, 70–1)—apparently an appeal to laws of the Greeks governing warfare. To these we should add the passage from Antiphon cited above (Section 1.3), which appeals to a common Greek law protecting defendants from imprisonment before trial (Antiphon, *Truth* 5.13).

We have said that the Greeks of the fifth century took pride in their laws, because they believed that their laws made them superior to other peoples. Herodotus has the Spartan Demaratus say in reply to Xerxes' boasts of Persian power: "Poverty is as familiar to Greece as its nursemaid's child, but virtue we have achieved out of wisdom and strong law" (Herodotus, *History* VII.102.1).

1.6.4. *The Law of Nations: Universal Law*

A concept of universal law, applying to all peoples (and sometimes even to gods and animals), is well attested for the classical period. Some thinkers, for example, the Athenians on Melos, according to Thucydides, took this universal law to be natural and destructive of conventional laws, whether of the cities or of the Greeks:

Nature always compels gods (we believe) and men (we are certain) to rule over anyone they can control. We did not make this law, and we were not the first to follow it, but we will take it as we found it and leave it to posterity forever. (Thucydides, *History* V.105, as quoted in Gagarin and Woodruff 1995, 122)

Elsewhere we find the related idea that conventional law is powerless against human nature: "They all have it by nature to do wrong, both men and cities, and there is no law that will prevent it," says Diodotus (Thucydides, *History* III.45, as quoted in Gagarin and Woodruff 1995, 115). Later, in his own persona, Thucydides observes that men bent on revenge "are determined first to destroy without trace the laws that commonly govern such matters." And he goes on to say, "but it is only because of these [laws] that anyone in trouble can hope to be saved, and anyone might be in danger some day and stand in need of such laws" (ibid., III.84, as quoted in Gagarin and Woodruff 1995, 108).[34] Thucydides saw the destruction of law as one of the harmful conse-

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[34] This chapter of Thucydides' *History* III.84, was not known to certain ancient authors who commented on the section to which it belongs, which is on the civil war in Corcyra. It is therefore under suspicion as an addition by a later author. The language and thought, however, are thoroughly Thucydidean, and we may consider it representative of fifth-century thought about law.

quences of civil war; he would not agree with the Athenians or with Diodotus that human nature is always destructive of law. Human nature, he believes, shows itself differently in different circumstances:

Civil war brought many hardships to the cities, such as happen and will happen as long as human nature is the same, although they may be more or less violent or take different forms, depending on the circumstances in each case. In peace and prosperity, cities and private individuals alike are better minded because they are not plunged into the necessity of doing anything against their will; but war is a violent teacher: it gives most people impulses that are as bad as their situation when it takes away the easy supply of what they need for daily life. (Thucydides, *History* III.82, as quoted in Gagarin and Woodruff 1995, 105)

Most commonly, Greeks of this period seem to have believed in a universal law that is not at odds either with nature or with the laws of their cities. Gorgias speaks of "the most divine and universal law: to speak, to be silent, and to act as one ought and when one ought" (Gorgias, *Funeral Oration*, DK 6, as quoted in Gagarin and Woodruff 1995, 203). And Euripides writes that the only law that is common to humans, gods, and animals is the law that parents love their children (Euripides, frag. 334). In Thucydides' debate between Plataeans and Thebans, both sides appeal to universal laws: "The law that holds everywhere: piety allows one to repel an aggressor" (Thucydides, *History* III.56.2, as quoted in Woodruff 1993, 79) and "it is the leaders who break the law, not the followers" (ibid., III.65 as quoted in Woodruff 1993, 84), where the law in question is evidently a universal one.

   In some cases, the universal law is represented as divine:

Chorus:
Ingenious, how the gods
keep time's long foot a secret
while hunting down irreverent men.
There's no improvement on the laws,
none we should know or practice.

The cost of these beliefs is light:
power lies
with whatever thing should be divine,
with whatever law stands firm in time
by nature ever-natural. (Euripides, *Ba*. 888–96, trans. Woodruff 1998, 36)

1.7. Conclusion

In the above remarks we have tried to convey something of the range and diversity of early Greek thinking about law and to show the close connection between this and the historical development of early Greek legal systems. These never developed into the kind of autonomous system created by the Romans, nor did the early Greeks ever have a single word, like Latin *ius*, to designate the entire legal system, substance and procedure, together with the

expected result, namely, justice. Greeks very early developed a legal (or proto-legal) process before they had civic laws (in the strict sense), and this process (*dikê*, later *to dikaion*, *dikaiosynê*) became synonymous with its proper outcome: justice. Only later, around the end of the seventh century, did they begin to isolate (by means of writing) specific rules that were the city's laws. At this point the difference between their customs, traditions, and ways of behavior, on the one hand, and laws, on the other, was clear from separate terminology: *nomos* versus *thesmos*, *grammata*, *rhêtra*, and related words. In the fifth century, when *nomos* was extended to cover civic law, gradually displacing these other terms, resonance among its wide range of meanings led to new ways of thinking about laws, including new concepts such as "unwritten laws." Some thinkers brought law and justice together conceptually, but *nomos* never expanded to include procedure, nor did it (or any other term) ever come to mean "law" in the most general sense (though some uses, e.g., Heraclitus DK 44, suggest the possibility of such a development). The closest one could come to this expression was to use the plural, *hoi nomoi*, and this expression was thus taken up later by philosophers such as Plato and Theophrastus for the title of their treatises on law, though these still are primarily concerned with substantive rules.

Further Reading

Translations of many of the important passages from the poetry and drama cited in this chapter, as well as the fragments of the sophists, are included in Gagarin and Woodruff 1995. Also relevant are the speeches of the Attic Orators, many of which were written for delivery in law courts. These are mostly from the fourth century, but Antiphon and Andocides wrote in the late fifth century (see Gagarin and MacDowell 1998). A useful selection from other orators is Carey 1997.

   For thinking about Greek law in general, an excellent place to begin is with the first study undertaken from a comparative viewpoint by Maine 1861. Many of Maine's major theses (such as the progress "from status to contract") still influence scholarly discourse today. For Greek law in the pre-classical period see Gagarin 1986. Ostwald 1986 is a good political and intellectual history of fifth-century Athens. For the concept of *nomos*, Ostwald 1969 is still the standard work. For historical information about Athenian law, the most important ancient source is *The Athenian Constitution*, attributed to Aristotle but perhaps by members of his school. For specialists, Rhodes 1981 provides an excellent, thorough commentary; non-specialists should consult the notes to his fine 1984 Penguin translation.

   The best modern works covering all of Athenian law are MacDowell 1978 and Todd 1993; of these Todd is more theoretical and is more explicit about similarities and differences between Athenian and modern common law.

Harrison 1998 is more oriented toward the needs of specialists. Boegehold et al. 1995 has a useful collection of the archeological evidence for Athenian law together with testimony from ancient authors (all of it translated into English).

For more theoretical, and quite controversial, work on Athenian law, see D. Cohen 1991 and 1995. Also theoretical are many of the essays in Boegehold and Scafuro 1994; Cartledge, Millett, and Todd 1990; and Foxhall and Lewis 1996. Among the most recent approaches to Athenian law and litigation are Christ 1998 and Johnstone 1999. For forensic oratory and Athenian ideology, Ober (1989) has been very influential, although the emphasis he and others have placed on citizen ideology has now been strongly challenged by E. Cohen (2000).

Chapter 2

SOCRATES AND EARLY SOCRATIC PHILOSOPHERS OF LAW

by Richard F. Stalley and Roderick T. Long[1]

2.1. The Socratic Movement

Socrates is arguably the most important and elusive figure in the history of moral philosophy. The few known facts about his life are easily told. He was an Athenian citizen, born in 469 B.C., and worked as a sculptor. He served his city bravely in the Peloponnesian War, but did not seek an active role in politics. Nevertheless, he was briefly forced into prominence after the battle of Arginusae when, as one of the presidents of the Assembly, he resisted the clamor to try the generals en masse, which he saw as illegal. During the rule of the Thirty Tyrants (404–403 B.C.) he refused an order to take part in arresting Leon of Salamis. After the restoration of democracy, he was put on trial in 399 for introducing strange gods and corrupting the young.[2] He refused to save himself by opting for exile or by using any of the devices by which defendants usually sought to arouse the sympathy of Athenian juries. As a result, he was condemned and put to death by poisoning.

It is clear that Socrates was an exceptional individual for his intelligence and for his moral character and integrity. He was interested less in questions about the nature of the universe than in what we could call moral questions, above all the question "What sort of life should we lead?" Although he wrote nothing and did not call himself a teacher, he acquired an extensive circle of admirers. These included the notorious Alcibiades, as well as Critias and Charmides, relatives of Plato who both took part in the tyranny of the Thirty. Several of his followers wrote "Socratic" dialogues, but only those by Plato (427–347 B.C.) and Xenophon (ca. 430–355 B.C.) survive in more than a fragmentary form. After Socrates' death, the hedonistic Cyrenaics and the ascetic Cynics both traced their intellectual ancestry to Socrates. All these authors were immensely impressed by Socrates' moral character and mode of argument, but they interpreted these in very different ways. It is therefore better to talk of a "Socratic movement" than a "Socratic school."

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[1] In this chapter, Richard F. Stalley is the principal author of Sections 2.1 and 2.2, while Roderick T. Long is the principal author of Sections 2.3 and 2.4. All translations are by the authors unless otherwise indicated.

[2] The precise grounds of these charges are unclear. The involvement of some his pupils in the tyranny of the Thirty may account for the charge of corruption. His own references to a divine "sign" (*daimonion*) may explain the charge of introducing new gods.

According to Plato, Socrates claimed to be wise only in the sense that, unlike most other people, he recognized his own ignorance about the important things of life. He thus did not give lectures or make long speeches, but rather chose to question people reputed to have knowledge. Not surprisingly, those of Plato's dialogues that seem most Socratic in character generally end inconclusively. Socrates leads his interlocutors to appreciate their own ignorance without asserting any view of his own. Nevertheless, some positive doctrines do emerge. The most important of these are that everyone seeks the good and that it is always in our interest to be just. Taken together these imply that anyone who knows what is just will act justly. Unjust behavior must result from ignorance of what is truly good. It follows both that those who do wrong do so unwillingly and that virtue is a kind of knowledge. In many respects, the picture of Socrates offered by Xenophon is similar to Plato's, though Xenophon's Socrates seems less enigmatic than Plato's and is more prone to give positive moral advice.

At one time scholars assumed that Xenophon gives the more historically accurate picture of Socrates, but most now give preference to that of Plato. More recently, many have followed Vlastos (1971, chap. 1; 1991, chap. 2), who claimed that Plato's early dialogues embody "the philosophy of Socrates" and that only in the middle period does Plato begin to speak with his own voice. But this view is now under scholarly attack,[3] as is the practice of dismissing Xenophon's evidence (Morrison 1987; Cooper 1999). Even though Plato seems to have known Socrates well, he is clearly not concerned with historical accuracy as we now understand it. Some scholars conclude that there is no reliable means of disentangling the Socratic and Platonic elements in Plato's work; others defend a "triangulation" strategy, using overlapping evidence from Plato and Xenophon to reconstruct the views of the historical Socrates. Whether or not those facts on which all the sources agree permit us to attribute to Socrates a fully worked out philosophy of law, they are sufficient to confirm his importance for the history of legal thought.

Both Xenophon and Plato agree that Socrates was always obedient to the law of Athens. He showed this most notably in his willingness to accept the verdict of the court that condemned him to death. According to both authors he lived by the principle that one should never behave unjustly. But if Socrates never committed injustice, the legal system that allowed him to be condemned cannot itself have been wholly just. This implies that positive law and justice do not necessarily coincide. Socrates' life thus presents a kind of paradox: We must be just and must obey the law, yet the law itself may be unjust. As we shall see in this chapter, several of Plato's dialogues, particularly the

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[3] This is argued at length by Kahn 1996. Of course, the fact that Plato's dialogues may not give an accurate picture of the historical Socrates does not, in itself, mean that we should rely on Xenophon. Kahn (1996, 393–401) also argues that Xenophon relies on Plato as a source.

Euthyphro, *Apology*, and *Crito*, which are all dramatically linked to Socrates' trial, seem to wrestle with this problem.[4] There are similar concerns in certain passages from Xenophon's *Memorabilia*. Socrates' insistence on the importance of justice suggests that justice cannot simply be the product of convention. He must therefore take issue with the sophistic use of the distinction between *nomos* ("law" or "convention") and *phusis* ("nature") to imply that justice is simply a matter of conforming to the customs of one's community.

2.2. Plato's "Trial" Dialogues: *Euthyphro*, *Apology*, *Crito*

Early in the *Euthyphro* we learn that Socrates' interlocutor claims to be an expert in matters of religion. In fact, he is so confident of his expertise that he is prosecuting his own father for impiety.[5] This prompts Socrates to question him about the nature of piety or holiness. In the first phase of the dialogue Euthyphro defines the holy as "what is dear to the gods" (6e–7a). But, since he accepts the traditional tales of quarrels among the gods, especially over matters of right and wrong, he has to admit that what is dear to some gods may be hated by others. So, his definition implies that the same thing may be both holy and unholy (8a). Socrates sets this issue aside by agreeing to investigate the claim that the holy is what is dear to *all* the gods, and then asks Euthyphro whether the holy is holy because it is dear to the gods or whether it is dear to the gods because it is holy (9e–10a). Euthyphro eventually agrees that the fact of the gods loving something is not what makes it holy. Rather, the gods love holy things because they are holy (10d). As we might say, there must be some standard of what is holy that is independent of whether the gods love it.

Plato's Socrates is evidently aware that similar difficulties can be raised for the claim that the just is the lawful.[6] If we take this to mean that any act permitted by a legal system is just and that any act forbidden by a legal system is unjust, then we have to concede that the same act can be both just and unjust, for obviously acts forbidden in one city may be permitted in another. We cannot avoid this difficulty by arguing that to be just is to be in accordance with a law promulgated by the gods, because Socrates would then ask whether the fact that an act is commanded by the gods makes it just or whether the fact that something is just leads the gods to command it. Socrates would certainly opt

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[4] Most scholars assume that the *Apology* and *Crito* are among Plato's earliest dialogues. The *Euthyphro* is dramatically linked to the others and its brevity and simplicity of construction suggest that it is an early work. Whenever it was written, it seems likely that Plato intended it to be read in conjunction with the other two.

[5] When a slave killed one of his free workmen, Euthyphro's father had the slave bound and left him in the open while he sent to Athens for a religious ruling on what should be done. The slave died, presumably of exposure.

[6] Later in the dialogue it is argued that the holy is part of the just (11e–13e).

for the latter view. He believes that what is just is not dependent on the will of any agent, human or divine. It follows that human legal systems may include measures that are contrary to true justice. So, if merely being in accordance with some human code is enough to make an act lawful, the just and the lawful need not coincide. Since the gods are wise and good, the requirements of divine law must be the same as those of justice. So, if "lawful" means "in accordance with divine law" Socrates would recognize that the just and the lawful are in fact identical. But he would still insist that justice is prior to lawfulness.

The *Apology* purports to describe the three speeches Socrates made at his trial. Rather than dwelling on the legal niceties of his position, he mainly offers a justification of his life in moral and religious terms. A main element in this justification is the claim that he has a divine mission to subject his fellow citizens to philosophical examination. He first realized this when the Delphic oracle, questioned by his friend Chaerephon, replied that no one was wiser than Socrates (21a). This puzzled him, because he was not conscious of possessing any special wisdom. He therefore began questioning those, such as politicians and poets, who were reputed to be wise, only to find that they really understood nothing about the most important things in life. Socrates then understood the real meaning of the god who spoke through the oracle to be that the wisest human beings are those who recognize that they have no real wisdom (23a–b). Since then he has assisted the god by questioning those who seem to be wise and showing that they are not really so. This activity has naturally made him unpopular.

This account of his mission enables Socrates, later in the defense, to compare his own duty to philosophize with that of a soldier: "[W]herever a man has taken a position that he believes to be best or has been placed by his commander there he must, I think, remain and face danger without a thought of death or any thing else rather than disgrace" (28d). It would be dreadful if Socrates, who during his military service had remained where his commanders posted him, had abandoned the post assigned to him by a god (28e). No one knows whether death is a good or bad thing, but it is certainly wrong to disobey one's betters, whether they be gods or men. So, even if the court offered to release Socrates on condition that he gave up philosophy, he would have to refuse (28e–29d; cf. 37d–e).

The second main theme of Socrates' defense is the overriding importance of being just. In particular, it is more important to be just than to preserve one's life: "You are wrong, sir, if you think that a man who is any good should take into account the risk of life or death; he should look only to this in his actions whether what he does is right or wrong and whether he is acting like a good or a bad man" (28b). In fact, as he claims in his concluding speech, "a good man cannot be harmed" (41d). It is a good thing that he has refrained from political activity, because no one can survive who opposes the populace and prevents it from doing unjust and illegal things (31d–32a).

As evidence that he would rather die than do wrong, Socrates refers to the trial of the generals when he risked his life to be on the side of law and justice. He also cites his refusal to arrest Leon of Salamis as showing his determination to avoid unjust or impious acts (32a–e). In the same vein he refuses to beg the jury for mercy, partly out of a regard for his own reputation, but also because it would be wrong to induce the jurors to decide a case other than in accordance with law (34b–35d, 38d–39b).

The *Apology* certainly gives modern readers the impression that Socrates is much more concerned to show that he has lived justly than to show that he has broken no law. It may be that the vagueness of the charges forced this strategy upon him—we have no real information as to what activities on his part were supposed to have constituted introducing new gods and corrupting the young. But, in any case, most interpreters take his speeches to imply that considerations of what is morally right override those of legality in the sense that they may sometimes justify one in breaking the law. Two passages in particular have been thought to make this point explicit. One refers to the affair of Leon of Salamis. Some scholars have argued that since the Thirty had legal authority at the time, this passage shows that Socrates was prepared to defy the law when it conflicted with justice. Unfortunately, we do not know whether Socrates and the majority of his fellow citizens regarded the Thirty as having valid legal authority. So it is not clear that he or the jury would have seen the incident in this light (Weiss 1998, 14).

In a more important passage Socrates insists that, even if the court were to release him on condition of giving up philosophy, he would not comply with their wishes. This has generally been taken to show that Socrates was willing to defy a legal requirement in order to do what he believed to be just. It certainly looks as though Socrates is envisaging a situation, albeit a purely hypothetical one, in which he would have to disregard a legal requirement in order to carry out his divinely imposed mission. As a matter of fact there was, it seems, no legal basis on which the jury could have imposed such a requirement, so Socrates cannot be seen as announcing an intention to break a requirement that could have been imposed upon him under the law as it stood at the time of his trial. But the passage surely does imply that if the Athenians had passed a law forbidding Socrates from philosophizing, he would have defied it.[7] Hence, there are conceivable circumstances in which he would be willing to break Athenian law.

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[7] According to Brickhouse and Smith 1994, 146, even if the Athenians had introduced such a law, Socrates could have argued that, since he had a divine mission to philosophize, failure to do so would be an act of impiety and, as such, contrary to Athenian law. But it might be argued that to obey the law is not simply to follow one's own interpretation of the laws; it also requires us to obey the commands of duly appointed officials, if they are issued in accordance with the law, and to respect the decisions of properly constituted judicial bodies, if they are reached by correct procedures. Socrates might have argued that a law forbidding him

This is closely linked to the idea that the gods have assigned him the task of philosophizing. If he had argued that divine authority is higher than that of any human legal system, his contemporaries would easily have understood his position. The difficulty for him would be that he has very little evidence to support his claim that his divine mission was imposed on him by the gods. It is not *obviously* implied by the response of the Delphic oracle. Socrates may be relying on his own conviction that he has a moral duty to philosophize and that the gods, being good, want us to do our moral duty. His position would then be very much what we would expect from our reading of the *Euthyphro*. Right and wrong do not depend on the decision of any human or divine agent, though we may be sure that the gods command us to do what is right. Human laws, on the other hand, may be incorrect and inconsistent. We may in the last resort have to break human laws in order to do what is right, but in doing so we can claim the authority of a superior law, namely, that of the gods.

The *Crito* reports a conversation that is supposed to have occurred when Crito visited Socrates in prison a day or two before the latter's execution. Crito, who, in spite of being a close friend of Socrates, seems to have little philosophical insight, urges him to escape. His main point is that if Socrates is put to death he and Socrates' other friends will be seen as having failed him in his hour of need and will thus be disgraced in the eyes of the public. Moreover, by failing to save himself, Socrates will leave his children without a father and create the general impression that he has been totally spineless. In response to these arguments, Socrates points out that he and Crito have always agreed that they should attend not to the views of the ignorant many, but to those of the one who has knowledge. Just as those who undergo physical training follow the advice of the expert trainer, so in matters of right and wrong we should be guided by those with knowledge rather than by public opinion. Given that we think that life with a sick body is not worth living, it would be absurd to allow "that part of us which is improved by justice and spoiled by injustice"—presumably, Socrates means the soul—to become corrupted (47d–e). It is not living as such that matters but living a good life. Thus the question to be addressed is not what the general public will think if Socrates does not escape, but whether it would be just for him to do so. In fact, Socrates goes on to argue, we must never willingly do any kind of unjust act, even when we have been treated unjustly ourselves.[8] He thus insists on the

to philosophize would conflict with the laws against impiety, but there would be little likelihood of his convincing his fellow citizens that this was the case. So he would in practice have been faced with a choice of defying the law or abandoning his mission. See Weiss 1998, 12; and Kraut 1984, 14–5.

[8] Vlastos 1991, chap. 7, suggests that this would have seemed extraordinary to most of Plato's contemporaries. Certainly the idea that we should seek to help friends and harm enemies was central to Greek popular morality. On the other hand, *harming* and *doing injustice* need not be synonymous.

principle that "neither to do wrong nor to return wrong is ever right, not even to injure in return for an injury received" (49d).

At this point Socrates secures Crito's assent to the claim that one ought always to do what one has agreed to do, provided that it is just.[9] He goes on to suggest that by leaving prison without persuading the city, they would not only be failing to abide by what they agreed to be just, but would also be harming the very thing that they ought least to harm (49e–50a). Socrates' point is clearly that by escaping he would be doing an unjustified harm to the laws of the city; to elucidate his position, Socrates personifies the laws of Athens and imagines them coming to complain that by ignoring the verdict of the court he would be destroying them. The laws present two main reasons why this would be particularly unjust. The first main reason appeals to the principle, which Socrates himself accepts, that we ought to keep our agreements (at least when it is just to do so). Socrates has shown his agreement to live by the laws of Athens by remaining in the city throughout his life, by fathering children there, and by refusing the opportunity to go into exile before his trial when it would have been legal for him to do so. The second main reason is that the laws are in a quasi-parental position. They were responsible for his birth and education, so the obligation he owes to them is stronger even than that which he owes to his parents. In fact, he belongs to the laws as a child or slave and must therefore obey them. Even if Socrates has been unjustly convicted, it is human beings who have wronged him, not the laws themselves (54c).

On a superficial reading, at least, the laws personified appear to maintain that it would always be unjust to disobey them. If this is what they are claiming and if we assume, as most commentators have, that Socrates endorses their view, then there would be a discrepancy between the *Crito* and the *Apology*. Socrates in the *Apology* seems to allow that there are circumstances in which disobedience would be justified, while in the *Crito* he seems to deny it. But the discrepancy between the two dialogues is not the only point that is puzzling. The laws argue that because Socrates has entered into an agreement with them and is, as it were, their child, he has an obligation to obey them. This implies that our obligations to keep agreements and to obey our parents are independent of and prior to positive law. Thus the arguments of the laws themselves seem to imply that there is a distinction between justice and mere lawfulness. If this is right, then there is at least a logical possibility that the laws might require Socrates to do something unjust. Since Socrates also believes that one must never act unjustly, he must recognize that in such circumstances he would be obliged to disobey the law. Indeed, the laws themselves indicate ways in which this might happen. They base their case on the obligations to keep agreements and to obey superiors. These two grounds are dis-

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[9] See Kraut 1984. Here we have ignored an ambiguity in the passage, which could perhaps be taken to say "we should keep our agreements because it is just to do so."

tinct and could in principle conflict. For example, a parent, or other superior, might order a child to break an agreement. If we think of the laws as quasi-parental superiors, we may ask what would happen if they required us to break an agreement. Conversely, if we think of the obligation to obey the law as resting on an agreement, we may ask what would happen if their requirement clashed with those of some superior authority such as the gods. Presumably, in such cases, the commands of the gods would be overriding. Thus if the laws are taken to be demanding unconditional obedience, their arguments seem to undermine themselves.[10]

There are other indications in this dialogue that the arguments of the laws are perhaps not to be taken at their face value. Socrates compares these arguments with what an orator might say (*Crito*, 50b), which suggests that they are not rationally convincing. In this he is arguably right, since the apparent claim of the laws to unconditional obedience seems to go beyond anything they could reasonably justify simply on the basis of their arguments. Ordinary morality, then as now, recognizes that there are cases where it is legitimate to break agreements, and even in ancient Greece parents did not have an unlimited right of control over adult children. Thus neither of the laws' arguments would support a demand for unlimited obedience. It is not surprising therefore that at the end of the laws' speech Socrates does not say that he finds their arguments logically unassailable, but rather that he is overwhelmed by the noise they make: "[T]hese are the words I seem to hear, as the Corybantes seem to hear the music of their flutes, and the echo of these words resounds in me and makes it impossible for me to hear anything else" (54d). Plato may well be hinting here that the laws have overstated their case (Weiss 1998, 134–40).

If we are not supposed to be convinced by the claims of the laws to unconditional obedience, the obvious question is "what are we supposed to believe?" The most useful guide may be the passage at 49e, cited above, where, immediately before introducing the laws, Socrates stipulates that we ought to keep our agreements provided that they are just. The most natural interpretation is that there may be occasions when keeping agreements would be unjust, in which case we ought to break them. Since the obligation to obey the law is seen in part as a matter of keeping agreements, this implies that there may be occasions when it would be unjust to obey the law. This could happen, for example, when obedience to the law would involve the violation of some higher obligation. Socrates would thus have been justified in breaking a law forbidding him to carry out what he saw as his divine mission to engage in philosophy. Similarly, in the circumstances of the *Crito* he would be justified in escaping from prison if remaining there would involve him in violating some higher duty. But no argument presented in the *Crito* suggests that this is the case. So,

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[10] For more on these points, see Harte 1999.

because he has no superior obligation to escape, it is his duty to obey the law and await his execution.

A somewhat different solution—similar in spirit, but requiring less discounting of the arguments in the *Crito*—is to take Socrates to be distinguishing between laws commanding one to *suffer* injustice and laws commanding one to *commit* injustice, and to be counseling (a) obedience to the former and (b) disobedience to the latter.[11] The *Apology*, as we have seen, is plausibly interpreted as endorsing (b), but Socrates' concern for obeying human authorities when doing so does not clash with obeying divine ones (28d–29d) likewise favors (a). The *Crito* clearly endorses (a), but Socrates' insistence that one should never commit injustice, together with his emphasis on our duty to keep *just* agreements, suggests (b) as well. Hence, the two dialogues would be propounding the same doctrine.

If either of these readings is correct, then we can find a consistent view of the law across the three dialogues we have been considering. According to this view, we must in all things do what is just. Although Socrates claims to be ignorant, he is evidently convinced that there is an absolute standard of justice and that human beings can become clear about this standard through reasoned discussion. By giving a central place to reason, he points forward to Platonic doctrines that will be discussed in the following chapter of this volume. But it is already clear that justice, in Socrates' view, is prior to both the commands of the gods and human laws. Because the gods are wise and good we may be sure that they command only what is just. Thus, to be just is to obey divine law. We have a general obligation to obey human law, but because it is the product of imperfect beings it may sometimes conflict with the requirements of justice and divine law. On such occasions we should break human law in order to do what is just.

2.3. Xenophon

Xenophon (ca. 430–ca. 355 B.C.), like Plato, was one of the young Athenian aristocrats drawn into Socrates' intellectual orbit; and his writings are, like Plato's, among our principal sources of information about Socrates.[12] Unlike Plato, however, Xenophon spent much of his life in exile from Athens, serving as a mercenary soldier in Persia, Sparta, and elsewhere. His writings encompass a variety of topics and genres, but Socratic ideas and values nevertheless inform all his works. As with Plato, we face the usual puzzles about the extent to which the characters in his dialogues represent either Xenophon's views or the views of their historical originals, though from Xenophon at least we do

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[11] Socrates argues at length in Plato's *Gorgias* that suffering injustice is preferable to committing it.

[12] For a defense of Xenophon's reliability as a source, see Cooper 1999.

have much that is asserted *in propria persona.* While many readers find Xenophon superficial and conventional, others argue that a more careful reading reveals a subtle and creative mind at work.

The two Xenophontic texts that most directly address the nature and status of law are both in the *Memorabilia* (I.2.40–46 and IV.4). In the first, *Mem.* I.2.40–46, Xenophon recounts a (probably fictitious) conversation on the nature of law between the youthful Alcibiades and his guardian, the democratic statesman Pericles. Xenophon's stated purpose in giving us this account is to show how Alcibiades learned the Socratic technique of dialectic simply in order to advance his own political career, but Xenophon may have other purposes as well. In the dialogue, Alcibiades exploits a tension within ordinary Athenian thinking about law; Pericles is torn between a positive conception, identifying law with manmade statutes, and a moralized conception, denying the status of law to statutes that fail to meet certain moral requirements. He does not at first feel this tension when discussing democracy, being a democrat himself, but the tension soon becomes evident when the conversation turns to oligarchy and tyranny, systems of which Pericles disapproves. On the one hand, Pericles feels the pull of the positivist account, according to which whatever is enacted by the supreme power in a state counts as law. But it turns out that, on the other hand, Pericles is still more deeply committed to the conceptual association of *law* with *persuasion*, and of *lawlessness* with *violence*, and so he is driven to conclude that the edicts of tyrannical and oligarchic governments are not laws after all, since they are imposed by force on an unwilling majority rather than emerging from democratic consensus. At this point Pericles does not yet see any conflict between his moralized conception of law and his own political commitments, but is left without an answer when Alcibiades then points out that a democratic government, in forcibly imposing the will of the majority on an unconsenting minority, is departing from lawfulness no less than is a tyrant or a body of oligarchs.

For Cartledge (1997, 5), Alcibiades' argument is a "clever piece of oligarchic pamphleteering" that stigmatizes democracy as "a form of collective tyranny, whereby the ignorant and ill-educated masses ruled despotically over the unwilling and unconsenting elite few." But of course the argument says nothing about the masses being ignorant and ill-educated, and in any case it is just as much an indictment of oligarchy as of democracy. (Indeed, in Roman times Tiberius Gracchus used a similar argument to draw a *democratic* moral: Plutarch *TG* 15; Erskine 1990, 171–80.)

The connection that Alcibiades draws between law and consent surely represents Xenophon's own view, since he likewise attributes to Socrates, with clear approval, the claim that a genuine king is one who rules in accordance with laws (*kata nomous*) over those who consent (*hekontôn*), while he who rules unwilling subjects not by law but by his own will, is a mere tyrant (*Mem.*

IV.6.12).[13] Why, then, does Xenophon choose Alcibiades, a character he portrays negatively, as the spokesman for this view in I.2.40–46? Perhaps he does so because it allows him to state a criticism of Athenian institutions without being in the position of having to endorse it explicitly; both Alcibiades and Socrates state the premises, but only Alcibiades draws the anti-democratic conclusion.[14] Certainly the greater effectiveness of persuasion over coercion is a theme that pervades Xenophon's writings (*Mem.* I.2.10–11, II.6.31; *Oec.* XXI.12; *An.* V.7, VII.7; *HG* II, VI.1.7–8; *Vect.* I.1–2, V.1–10). It is unclear whether Xenophon's case against violence is purely consequentialist (basing the rightness of an act solely on its having beneficial consequences) or whether he also recognizes a deontological aspect (regarding an action as right even apart from its consequences); there is certainly a deontological flavor to Xenophon's defense of justice over expediency in the "trial of the cloaks" passage (*Cyr.* I.3.16–17).[15] There are no grounds for attributing to Xenophon a special concern with *freedom* in its modern sense(s).

If the rule of a majority over an unwilling minority is no less tyrannical than the reverse, it might seem that nothing short of unanimous consent could justify political authority; but perhaps all that is required is that the ruler do his *best* to gain the consent of his subjects, rather than simply imposing arbitrary edicts. At any rate, Xenophon's aversion to forcible rule is not absolute, since he happily endorses paternalism (*Mem.* I.2.49–60, IV.2.14–18; *Lac.* X.4–6; *Hier.* X.2–4; *Oec.* XIII.5–9). Perhaps compulsory measures are not regarded as "violent" or "forcible" in the forbidden sense if they aim to benefit the ruled; after all, if such paternalistic measures succeed in shaping noble characters, the ordinary problem of backlash against violence will be avoided.

This suggests that Xenophon's criteria for legal legitimacy include not only *consent* but also *benefit*; and indeed some indication of this is found in the Alcibiades/Pericles exchange itself, where it is established that all laws state what ought to be done—but on the assumption that good rather than evil is what ought to be done (*Mem.* I.2.42). The implication is that the legitimacy of a law depends not only on the way in which it is imposed, but also on its beneficial content. This may simply be an instance of Xenophon's apparent con-

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[13] It is striking that Xenophon thinks that lawfulness depends not just on the *benefit*, but also on the *consent*, of the governed; compare Aristotle, *Pol.* III.14.1285a27–b21, IV.9.1294b34–39, IV.10.1295a15–24, V.10.1313a5, VII.2.1324b22–36, VII.14.1333b5–1334a10, *EN* IX.5.1167a26–b16; Plato, *Plt.* 276d–277a, but contrast Plato, *Plt.* 291e–293e. Cf. R. Long 1996, 787–98.

[14] The identification of lawfulness with the choice of persuasion over violence was a Greek commonplace (Lysias, *Funeral Oration*, 2.19). Hence it is the (potentially anarchic) conclusion, not the premise, that is controversial.

[15] Young Cyrus is chastised for adjudicating a dispute over cloaks by awarding a cloak to the disputant it fits best, rather than to its rightful owner. It is equally possible to follow Hume in seeing the passage as an endorsement of *indirect* consequentialism (Hume 1751, Appendix III).

viction (IV.2) that ready-made exceptionless rules of just conduct are hard to come by.

In addition to the benefit and consent criteria, Xenophon also invokes a wisdom criterion: The claim to rule must be based on *knowledge* and *virtue* (equivalent terms for a Socratic).[16] He has Thrasybulus ask the Thirty what entitles them to rule: Are they more just, more courageous, more wise (*HG* II.4.40–42)? We should no more accept a ruler than we would accept a physician without evidence of his expertise (*Mem.* IV.2.3–7), for "kings and rulers [...] are not those who hold the sceptre, or who are chosen by just anyone, or who are selected by lot, or who use violence or deception, but rather those who possess knowledge of ruling" (III.9.10–11). Here the wisdom and consent criteria appear in combination; the benefit criterion may be implicit as well, if Xenophon assumes that anyone who possesses the art of ruling would want to benefit his subjects, would know how to do it, and would also recognize the greater utility of persuasion than of violent measures.

In yet another passage (*Mem.* IV.3.16), we are told that, when the Athenians asked how they should go about worshipping the gods, the Delphic Oracle replied that they should do so in accordance with the *nomos* ("law," "custom") of the city. Crucially, Xenophon leaves out what happened next, but his audience would certainly know it and could be expected to supply it: We learn from Cicero (*Leg.* II.40) that when the Athenians explained that their traditions contained many competing and conflicting *nomoi* and asked which of these was meant, the oracle answered "whichever is best." The clear implication is that Xenophon's test for whether something is a genuine *nomos* of Athens is the fact that it is best.[17]

This may sound odd to modern ears. When we disapprove of governmental edicts, we generally say that they are bad laws or unjust laws, not that they are not laws at all. But the moralized conception of law (which was in fact the orthodox position in legal philosophy throughout most of European history) can be given some plausibility. What is the difference between a command issued by a legislature and a command issued by a mugger with a gun? Both have the *power* to enforce their demands, but the legislature, unlike the mugger, is presumed to have *authority*. Yet the legislature's authority is conditional, being derived from the people or the constitution. But where do the people, or the con-

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[16] Xenophon's much-noted stress on the importance of noncognitive training does not conflict with his commitment to the Socratic thesis that virtue is knowledge, since for Xenophon the role of noncognitive training is not to supply a motivational force that moral knowledge on its own would lack, but to prevent moral knowledge from being lost; cf. Charlton 1988, 13–33; R. Long unpublished.

[17] Xenophon's usage is not entirely consistent, however; an unjust provision that he describes at *Mem.* I.2.31 as being "written into law" he describes at IV.4.3 as being "contrary to law." Presumably "law" has a positive sense in the first passage and a normative sense in the second.

stitution, get *their* authority? If the regress terminates in a bare fact of power, all the subsequent links of the chain seem to revert to mere power, not authority; hence, it can be argued, the regress must terminate with something inherently authoritative, and only a *normative* fact could meet this requirement.

Although the first major passage of Xenophon (the Alcibiades-Pericles dialogue), with related passages, supports a moralized conception of law, the second passage might seem to point to a different view of law. In a conversation between Socrates and Hippias at *Mem.* IV.4, Socrates defines the just as the lawful (IV.4.12; cf. 6.5–6), prompting many commentators to view him as a legal positivist.[18] But Socrates' equation of the just with the lawful does not commit him to a positivist account of *justice* unless he is committed to a positivist account of *law*.[19] Hippias offers such an account (*Mem.* IV.4.13), defining law as a written agreement among citizens concerning what ought and ought not to be done.[20] Hippias disparages Socratic respect for law on the grounds that laws are constantly changing, but Xenophon's Socrates counters that cities first go to war and then later make peace (*Mem.* IV.4.14; cf. Plato, *Minos* 316c); presumably, the idea is that the same principle may issue in different concrete recommendations in different circumstances. Hence, it seems, what is really *nomos* in a city's written agreements is not the concrete applications but the principle they embody.

In his discussion of the passage, Morrison (1995, 334–5) argues that a defender of what he calls "legal idealism" cannot coherently say that "it is just to obey the [positive] law in force, even if that law can and will be changed," because "[i]f the first law is not beneficial, and its later replacement *is* beneficial, on the idealist interpretation the first law was not a law and should not have been obeyed." Now Morrison does admit that "[l]egal idealism can accommodate the idea that different laws are best in different circumstances," so that "when the statutes are changed due to a corresponding change in circumstances, the idealist view can allow that the earlier and later statutes are both 'law'." But Morrison objects that this qualification applies only in a "limited range of cases." Yet Xenophon clearly thinks (as Morrison 1995, 335, sees) that *a general habit of obedience to manmade statutes is beneficial*. So if the state commands something harmful, it is not a law, but if it commands something that is (prior to being commanded) neither beneficial nor harmful,

[18] Striker 1996b and Strauss 1972, from very different perspectives, both agree that Xenophon's text endorses positivism. Striker dismisses the argument as evidence of Xenophon's limitations as a thinker; Strauss dismisses the argument as insincere and looks for a coded anti-positivist message buried in the subtext. But as we shall see, both responses are inappropriate, because there is no positivism in the text to dismiss.

[19] Hence it is also no concession to positivism when Xenophon defines holiness (*Mem.* IV.6.2–4) as the knowledge of what is lawful in relation to the gods.

[20] It is not actually clear that even this must be taken as a positivist definition (see the discussion of the *Minos* below, in Chapter 5, Section 5.2), but Hippias probably so intends it.

acting as the new statute dictates is *now* beneficial (as an instance of the general habit of obedience) and so is required by natural—that is, nonconventional—justice.

In any case, Hippias, like Pericles before him, finds his commitment to legal positivism undermined by his other beliefs, though in Hippias' case it is not the unlawful character of violence but, as Xenophon indicates, the recognition of *unwritten laws* that trips him up.[21] These hold everywhere—and, as Hippias grants, are laid down by the gods. It soon becomes evident, however, that Socrates and Hippias do not have quite the same understanding of what it means for a law to hold everywhere. Hippias thinks that holding everywhere means being *accepted* everywhere, since a law cannot hold where it is not backed up by penalties, and (he assumes) only where people accept a law is it backed up by penalties. But Socrates, in the spirit of an Antiphon moralized,[22] argues (*Mem.* IV.4.19–25) that there are penalties inherent in the natural consequences of human actions. Ingratitude naturally breeds distrust, and no one wants to be distrusted; so even if the unwritten law against ingratitude were not *accepted* everywhere, ingratitude would still be *penalized* everywhere, and so is unlawful. Likewise, Socrates says, the prohibition on incest, though not accepted in every country (and therefore, Hippias initially thinks, not a candidate for an unwritten law), is unlawful everywhere because it has bad consequences everywhere (cf. Plato, *Gorg.* 469d–470b).

This notion of natural law as a set of hypothetical imperatives backed up by natural penalties (cf. Barnett 1998, chap. 1) recurs throughout Xenophon's writings. Those who break their oaths, Xenophon tells us, will be punished by the gods (*An.* II.5, III.2); but he also tells us that those who break their oaths suffer by getting a reputation for being untrustworthy (*An.* VII.7), and it is not clear that there is anything more to the divine punishment than this. A tyrant cannot disregard good advice with impunity, since the automatic penalty is that he ends up doing the wrong thing; nor can he kill the wise man with impunity, since in doing so he loses his most reliable advisor (*Mem.* III.9.12). The god commands us to sow in the autumn (as was the Greek custom) by making that the time when sowing has the best consequences (*Oec.* XVII.1–4). The earth is a teacher of justice because it teaches people that they reap benefits from it in proportion as they serve it (*Oec.* V.12–14). It is against the laws (*thesmoi*) of the gods to reap without having sown or to succeed in battle without having trained, and so it is impious to pray for such things (*Cyr.* I.6.6). In Xenophon's historical writings, accounts of wrongdoing are often immediately followed by a description of the natural penalty the perpetrators eventually paid in consequence (*An.* V.1; *HG* I.7.35, V.7.1; *Lac.* XIV.2–7).

[21] The appeal to unwritten law was another Greek commonplace; cf. Sophocles, *Ant.* 447–56; Thucydides, *History* II.37. See Chapter 1, Section 1.6.2, of this volume.

[22] On Antiphon, see Chapter 1, Section 1.3, of this volume.

Some may conclude that Xenophon's profession of belief in the gods is disingenuous, and that for him the causal sequences we find in the natural world are all the reality there is to the notion of divine legislation. But reading Xenophon as a crypto-naturalist would do unneeded violence to his text; his religious beliefs are genuine, though unconventional. He argues rather ingeniously (employing a combination of the arguments from design and from consciousness) for the existence of a divine creator (*Mem.* I.4.8–18, IV.3.13–14; cf. DeFilippo and Mitsis 1994); and if nature is the work of a god, the causal sequences embedded in nature must presumably be the god's handiwork as well. (Hence, although Hippias does not challenge the idea that the unwritten laws are of divine origin, Socrates would have had an argument ready, had Hippias done so.) Xenophon also thinks that some of the causal sequences we need to know are too obscure to discover without divine help; hence, he recommends divination for those cases (and *only* those cases) where the natural connection is not manifest (*Mem.* I.1.6–9).

Xenophon's account of natural penalties clarifies his position on law. We have already seen that no unjust statute counts as a genuine law for Xenophon, but this might suggest that the content of true law is restricted to a *subset* of positive law—namely, all those positive laws that meet Xenophon's normative criteria. But now we see that Xenophon also recognizes laws even where no manmade statutes apply. Hence, contra Morrison (1995, 333), the body of true law for Xenophon includes both *less* and *more* than the body of manmade statutes—less, because it excludes the unjust statutes,[23] and more, because it includes divine law. (This of course is likewise the opinion of jurists from Aquinas to Blackstone.) Hence, there can be no clash between nature and law (cf. *Oec.* VII.30).

As further evidence that law for Xenophon includes both divine (or natural) laws and (just) human laws, consider Xenophon's vindication of the justice of Socrates. To prove this justice, Xenophon first points out Socrates' obedience to positive law (*Mem.* IV.4.1), but then describes Socrates' disobedience to commands that were contrary to positive law (IV.4.2–3; cf. *HG* I.7.15),[24] and finally cites Socrates' refusal to employ flattering appeals to the jury on the grounds that such conduct was "contrary to the laws" (*para tous nomous*)—though of course it was at that time contrary to no *positive* law. Hence, Xenophon's Socrates apparently regards the *laws of Athens* (i.e., the laws that hold there, the laws whose violation is penalized there; cf. *Mem.*

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[23] The phrase "unjust statute" is not unambiguous. In the light of the discussion in Plato's *Apology* and *Crito*, we should perhaps distinguish between statutes that it is unjust for the legislator to *enact* and statutes that, once passed, it is unjust for the subject to *obey*; arguably it is only the latter that Socrates means to exclude as unlawful.

[24] Significantly, as Xenophon describes the cases, it seems clear that Socrates would have disobeyed the same commands even if they *had* been authorized by positive law, since obeying them would be unjust.

IV.4.13) as containing requirements not embodied in any manmade Athenian statute.

Xenophon's theory of divine law raises a question analogous to that posed in Plato's *Euthyphro*: Do the gods issue these edicts because they are just and lawful, or are the edicts just and lawful because the gods issue them? The *Euthyphro* suggests a theologically objectivist view: Divine approval is a *response* to the non-theologically based property of promoting human welfare. Xenophon's account of divine law might seem to tend in the same direction, since the things the gods forbid are things that naturally tend to have bad results for human beings. But on the other hand, given Xenophon's teleological cosmology, the divine mind *constructed* the natural world. It is not as though, for example, the god saw in his wisdom that jumping off cliffs has bad results, and so he benevolently commanded us not to do it; rather, the god *made* the cliff, and the law of gravity, and the fragile structure of the human body, and his making these things as he did is what his commanding us not to jump off cliffs *amounts* to—so the binding force of these commands is a product of divine will. Hence, Morrison (1995) concludes that the theologically subjectivist reading must be the right one (cf. Striker 1996b).

However, premises drawn from Xenophon's own text show that his own commitments are theologically objectivist:

(1) Nature contains cause-and-effect sequences that count as natural laws backed up by penalties [defended in *Mem.* IV.4 and passim].
(2) The natural world is the product of the Divine Mind [defended in *Mem.* I.4, IV.3.13–14, and to some extent also in IV.4.24–5, as an inference from (1)].
(3) Therefore, the cause-and-effect sequences that count as natural laws backed up by penalties are the product of the Divine Mind [(1), (2)].
(4) The Divine Mind, in constructing the natural world, was guided by a concern to promote human welfare [defended in *Mem.* IV.3].
(5) Therefore, the cause-and-effect sequences that count as natural laws backed up by penalties are designed to promote human welfare [(3), (4)].

Hence, for Xenophon's Socrates as for Plato's, human welfare seems to be an independent standard to which divine law must measure up in order to be authoritative.

Xenophon, like many of his contemporaries, supports the "mixed constitution," a blend of aristocratic and democratic elements (*HG* II.3.48)—which is no great surprise, in the light of his argument that the despotism of the rich over the poor and the despotism of the poor over the rich are equally objectionable (*Mem.* I.2.40–46). Yet Xenophon also gives an impression of sympathizing with the sentiment "For forms of government let fools contest;

Whate'er is best administer'd is best." For Xenophon, the welfare of a regime depends primarily on the virtue or vice of its rulers rather than on constitutional structures; Persia did well under Cyrus and badly under his successors, despite the same laws remaining in place (*Cyr.* VIII.1.7–8, 8.1–2; cf. *Vect.* I.1). For the successors found it possible to keep to the letter of the law while distorting its spirit; a written law cannot guarantee its own correct application (*Cyr.* VIII.8.8–11). Hence, Xenophon concludes that a king is superior to written laws because he is a *law with eyes* (*Cyr.* VIII.1.22; cf. *Oec.* XII.19–20). Thus the first aim of Lycurgus, founder of the Spartan constitution, was not—contrary to popular belief—to instill respect for law in the citizens of Sparta, but rather to secure first the support of the Spartan elite (*Lac.* VIII.1–2); virtuous leaders are more important than laws. Yet at the same time Xenophon has a horror of constitutionally unrestrained factions scorning procedural niceties and disregarding the rule of law, be those factions democratic (*HG* I.7.26–29), oligarchic (*HG* II.3.20–21), or autocratic (*HG* VII.1.43–45).

Xenophon's remarks on governmental administration do not add up to a system; but in other respects Xenophon appears to have a reasonably coherent legal philosophy. Natural law is based on cause-and-effect relationships with a bearing on human welfare; human law derives its authority from natural law. Xenophon's theory of natural law would exercise a profound influence on later developments in legal philosophy, particularly among the Stoics.

2.4. Cyrenaics and Cynics

Apart from Plato and Xenophon, the Socratic thinkers most important for legal philosophy are the Cyrenaics and the Cynics. Each school traced its ancestry to a disciple of Socrates—the Cyrenaics to Aristippus of Cyrene (ca. 435–355 B.C.), whence the name "Cyrenaic," and the Cynics to Antisthenes (ca. 446–366 B.C.).[25] In the case of both movements, however, there is a dispute as to whether the school's founder has been correctly identified. The Cyrenaic doctrine in its systematic form appears to derive not from Aristippus of Cyrene but from his grandson and namesake, Aristippus the Mother-Taught; and while the traditional story that Diogenes of Sinope (ca. 412–ca. 324 B.C.), who gave Cynic doctrine its distinctive shape, was the student of Antisthenes is chronologically possible (barely), it is now thought unlikely.[26] Nonetheless, whatever their personal involvement, Aristippus and Antisthenes incontro-

[25] Whether the label "Cynic" first arose because Antisthenes taught at the Cynosarges gymnasium (so D.L. VI.1.13) or because the Cynics were "doglike" (*kunikoi*) in their shamelessness and ferocity, it was for the latter reason that the name stuck.

[26] For a summary of the argument, see A. Long 1996, 45. On the other hand, Goulet-Cazé (1996) argues that Aristotle's reference to *kuôn*, "the Dog," at *Rhet.* III.10.1411a24–5 is probably to Antisthenes (rather than, as is usually thought, Diogenes), which would bolster Antisthenes' claim to be the first Cynic.

vertibly exercised a strong influence on the schools that later claimed them as founders.

The urbane hedonism of the Cyrenaics and the rough asceticism of the Cynics initially seem so different from one another that one might easily wonder in what sense they could be part of the same Socratic movement, but each school could reasonably claim to be developing some aspect of Socrates' legacy.[27] In any case, the differences between the two schools are easily exaggerated; hedonism regards pleasure as the highest good, while asceticism embraces self-discipline and self-denial, but the "ascetic" Cynics advised indulging one's sexual desires as freely as animals, while the "hedonistic" Cyrenaics cautioned that pleasures should be pursued only so long as one is not mastered by them but can take them or leave them (D.L. II.8.69, 75). Aristippus endorses the Cynic view that those who lack philosophic wisdom are mere slaves (II.8.72), and both schools emphasize self-mastery and self-construction (cf. Foucault 1985; 1986).

The relevance of the Cyrenaics and Cynics to legal thought lies in their social philosophy. Both Aristippus and Diogenes practice a certain kind of independence and detachment from the world; but for Aristippus this means adapting himself with effortless flexibility to every social circumstance, while for Diogenes it means "defacing the currency" by rejecting social conventions and material comforts, mocking the establishment, and seeking maximal self-sufficiency. Hence, Diogenes throws away his cup as a superfluous luxury upon seeing a child drinking from his hands (D.L. VI.2.37). Aristippus cultivates the social graces and biting wit of a courtier, cajoling favors from tyrants like Dionysius of Syracuse, whereas Diogenes scorns social distinctions and, invited to ask Alexander of Macedon for a favor, tells him to step out of Diogenes' light. Yet Aristippus might well justify his life of luxury with the same reply that Diogenes gives to justify his life of squalor: That sunshine is not sullied when it lands on filth (D.L. VI.2.63). Diogenes refers to Aristippus as a "royal dog" (*basilikon kuôn*; D.L. II.8.66); the epithet is (no doubt deliberately) ambiguous between the complimentary "regal Cynic" and the abusive "king's lapdog," and either judgment could plausibly be defended.[28]

The generally indulgent lifestyle of the elder Aristippus was worked into a comprehensive system by his grandson, Aristippus the Mother-Taught. The new theory was hedonistic and egoistic in ethics and psychology alike; among its implications (II.8.91–3) is the doctrine that "wisdom is not for itself but on account of its consequences," and so "nothing is just or noble or base by nature, but only by convention [*nomos*] and habit [*ethos*]"; nevertheless,

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[27] Plato's Socratic dialogues, for instance, exhibit concerns congenial to each group; see Irwin 1992 and 1997, Rudebusch 1999.

[28] Diogenes and Aristippus are also described as similar in their reliance on gifts and money from friends, but the amounts required were no doubt vastly different.

"the virtuous man will do nothing inappropriate, on account of the penalties imposed and on account of reputation [*doxas*]." The latter rationale appears to clash with the elder Aristippus' statement (D.L. II.8.68) that if all laws were abolished, the virtuous man would continue to act in the same way as before.[29]

At least one early Cyrenaic, Theodorus (late-fifth century B.C.), maintains (D.L. II.8.98–9) that patriotism is irrational—since a wise man would not risk his life to save a country of fools—and that social conventions exist in order to hold communities together, but only because their citizens lack wisdom; in themselves theft, adultery, sacrilege, and the like are not wrong by nature and should be indulged in when the circumstances call for doing so; and likewise there is nothing wrong with gratifying one's sexual appetites in public, since whatever is appropriate in private is equally appropriate in public. This anti-nomian attitude is embraced by the Cynics as well; Diogenes endorses theft, adultery, and cannibalism (D.L. VI.2.72–3), and also masturbates in public, saying that he wishes his appetite for food could be satisfied as easily (VI.2.46). The Cynic philosophers Crates (ca. 368–287 B.C.) and his wife Hipparchia likewise have sexual intercourse in public (D.L. VI.7.97). This attitude of indifference to the public is arguably a development of Antisthenes' advice to be concerned solely with virtue and to despise reputation and social convention (VI.1.11), and indeed goes still further back to Socrates' insistence that we should care for no one's opinion but that of the wise, but this antinomian development of the idea appears to have been pioneered by Diogenes.

The Cyrenaics and Cynics are also like-minded in their cosmopolitan rejection of local ties and allegiances. On the Cyrenaic side, we are told (Xenophon, *Mem.* II.1.8–13) that in Aristippus' view, to be a ruler is to take on an unwelcome burden of responsibility, and to be ruled is to be a slave; hence, Aristippus favors a "middle path" that leads "neither through rule nor through slavery but through freedom," avoiding compulsion by not submitting to any regime but being a *xenos* ("stranger," "guest," "foreigner") everywhere. Theodorus calls the cosmos his only homeland (D.L. II.8.99). On the Cynic side, Antisthenes holds (VI.1.12) that to the wise man nothing is foreign (*xenon*), while Diogenes claims to be a "citizen of the cosmos" (*kosmopolitês*; D.L. VI.2.63; cf. 72) and may well have coined the term. Again, Crates claims to be at home in every land (VI.7.98; frag. 15 Diehl), also identifying himself as a "citizen of Diogenes" whose homeland was the Land of Penia (Poverty) and the City of Pera (Knapsack) (VI.5.93; frag. 6 Diehl).

Scholars debate whether these forms of cosmopolitanism are "positive" or "negative"—that is, whether they represent a genuine allegiance to a global community or merely an alienation from all local ones. Cynic cosmopolita-

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[29] But similar remarks are attributed to Aristotle (D.L. V.1.20) and Xenocrates (Cicero, *Rep.* I.3), so it may just be a commonplace that has attached itself to Aristippus.

nism seems negative in contrast with later, more Stoic forms of cosmopolitanism, which stress participation in human life rather than dropping out. On the other hand, Cynic cosmopolitanism seems more positive than that of the Cyrenaics; the Cyrenaics may practice more outward conformity than the Cynics, but they are less engaged, as is suggested by the difference between the elder Aristippus' advice to be a *xenos* everywhere, and the Cynics' advice to be a citizen everywhere (Diogenes) and a *xenos* nowhere (Antisthenes). (However, among the Cyrenaics, Anniceris and the younger Aristippus, unlike Theodorus, did endorse patriotism.) To be sure, being a citizen of Poverty and the City of Knapsack sounds a bit less positive than being a citizen of the cosmopolis, and may suggest a withdrawal from society, but *kunismos* was a proselytizing faith, and Diogenes presents his mocking attacks on convention as philanthropically motivated: Other dogs bite to harm, but he bites to save (Stobaeus, *Eclogues* III.462).[30]

With Diogenes in particular we see the first steps toward the later Stoic theory of the Cosmopolis.[31] Diogenes is said (D.L. VI.2.72) to have offered the following argument:

(1) Without the polis, the civilized (*asteion*) is of no benefit.
(2) The polis is civilized.
(3) Without law, the polis is of no benefit.[32]
(4) Therefore, law is civilized.

The sense of the argument is elusive. Assuming that Diogenes must have had a negative attitude toward polis, law, and civilization, Schofield (1991, 130–40; 1995, 134) and Moles (1995, 130–1; 1996, 107–8) take *asteion* pejoratively; Goulet-Cazé (1982) by contrast takes *asteion* approvingly, but only to conclude—on the basis of Stoic parallels—that the argument is of Stoic provenance and not attributable to Diogenes at all. Yet Diogenes did not always use *polis* and *politeia* pejoratively, since he spoke approvingly of the cosmos as the true *polis* and *politeia* (D.L. VI.2.63, 72), so why should he not on occasion have drawn a distinction between true and false *nomos* as well?

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[30] Moles 1996 argues convincingly against a purely negative interpretation of Cynic cosmopolitanism.

[31] Diogenes' own preferences, if he had any, among existing political systems are difficult to discern. According to one story (D.L. VI.2.50) he, unlike Thucydides and Plato, thought highly of Harmodius and Aristogeiton, the tyrannicide heroes of Athenian democracy, whatever that may imply about his political sentiments; yet he was also an admirer of Sparta over Athens (VI.2.27, 59).

[32] Or: Without the polis, law is of no benefit; *nomou de aneu poleôs ouden ophelos* could bear either meaning. But the first reading is more likely if, as seems plausible, Diogenes is consciously echoing Plato's "to whom would a polis be acceptable without laws?" (*tini gar an polis areskoi aneu nomôn*) at *Crito* 53a.

Proceeding from the assumption that the argument is Diogenes', and that the Stoics got it from him, let us further assume that he meant by *asteion* what they meant by it. We know from Clement (*Strom.* IV.26, as quoted in *SVF* III.327) and Arius Didymus (Stobaeus, *Eclogues* II.103.14–17, as quoted in *SVF* I.587) that the Stoics used *asteion* approvingly, arguing that nothing counts as a genuine polis unless it is *asteion*. We also know from Cicero (*Leg.* II.12–13) that some Stoics argued as follows:

(1) If being without X makes the state worthless, then X is good.
(2) Being without law makes the state worthless.
(3) Therefore, law is good.
(4) But unjust statutes are not good.
(5) Therefore, unjust statutes are not laws.

Putting Arius Didymus, Clement, and Cicero together, we can reconstruct Diogenes' intended argument as follows, supplying some implicit premises.[33]

(1) [If being without X makes a good/civilized thing of no benefit, then X is good/civilized.]
(2) Without the polis, the good/civilized is of no benefit.
(3) Therefore, the polis is good/civilized [(1), (2)].
(4) Without law, the polis is of no benefit.
(5) [Therefore, being without law makes a good/civilized thing of no benefit.] [(3), (4)]
(6) Therefore, law is good/civilized [(1), (5)].

Propositions (3) and (6) must mean not that existing cities and laws are good/civilized (a claim that Diogenes would not accept), but, *more stoico*, that nothing counts as a city or a law unless it is good/civilized. Presumably, only the cosmopolis will count as a city, and only the dictates of reason as laws. And perhaps it is in this city that Diogenes will employ his vaunted art of ruling (D.L. VI.2.29, 74); for Diogenes offers the following argument (VI.2.37; cf. I.12) as well:

(1) All things belong to the gods.
(2) Friends share all their belongings in common.
(3) Therefore, all things belong to the friends of the gods [(1), (2)].
(4) The wise are friends of the gods.
(5) Therefore, all things belong to the wise [(3), (4)].

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[33] Notice too that (3) below is here treated as an inference from (2) rather than as an independent premise; this reading makes better sense of the argument, and brings out the parallel with Cicero.

This is presumably one of the arguments Diogenes uses to justify theft (D.L. VI.2.72–73), since if all things belong to the wise, then the wise have the authority to take whatever they can make good use of. But if gods rule the universe, and the wise enjoy a share in all that the gods possess, it would seem to follow that gods and wise men rule the universe together. The Cynics, like Xenophon, thus lay the foundations for the more detailed theories of natural law and cosmopolitanism that will be developed in the Hellenistic era by Stoics and others, while the Cyrenaics, with their stress on the instrumental character of social relationships, lay the foundations for the contractarian approach to law that will be championed by the Epicureans.

Further Reading

Socrates has been the subject of an extensive literature. Scholars have debated the "Socratic problem," that is, the comparative value of Plato, Xenophon, Aristophanes, and other ancient authorities as sources for the views of Socrates. Most scholars have regarded Plato as the most reliable, and *Apology* and *Crito* as especially important sources for Socrates' views about the law. *Apology* is discussed by Brickhouse and Smith 1989, Reeve 1989, and Colaiaco 2001. Brickhouse and Smith 2002 is an excellent collection of translated ancient and modern writings on the trial of Socrates. For Socrates' views on obeying the law in *Crito*, see Woozley 1971 and 1979; Allen 1980; and Kraut 1984. Scholars often consider whether the views attributed to Socrates in *Apology* and *Crito* are consistent, an issue taken up by Santas 1979, chap. 2, and Brickhouse and Smith 1994, chap. 5; 2000, chap. 6.

Some of the best recent research on the early Socratic philosophers is collected in Vander Waerdt 1994b, which includes essays on Plato, Aeschines, Aristippus, Antisthenes, and four on Xenophon. Morrison 1988 has compiled an invaluable compendium of bibliographical information on Xenophon. An influential study of Xenophon is Strauss 1972. Recent defenses of Xenophon as a source for Socrates' views include Morrison 1987 and Cooper 1999. Morrison 1995 argues for a legal-positivist interpretation of Xenophon's *Memorabilia.* Annas 1993, chap. 11, offers a thoughtful discussion of Cyrenaic social philosophy. A rich source of articles on Cynic social philosophy is Branham and Goulet-Cazé 1996.

Chapter 3

PLATONIC PHILOSOPHY OF LAW

by Richard F. Stalley[1]

3.1. Introduction

Plato (427–347 B.C.) belonged to an aristocratic Athenian family and appears to have been a follower of Socrates from an early age.[2] A letter ascribed to him describes how he originally intended a political career but decided after Socrates' death to devote himself to philosophy (*Ep*. VII.324b–326b). To this end he founded a school, known as the Academy, in which he was joined by many pupils including Aristotle. In his later life he made two visits to Syracuse, apparently with the intention of educating the young ruler of the city in the ways of philosophy (*Ep*. VII.342a–e; 345c–352a). This brief involvement in practical politics was totally unsuccessful.[3]

Plato wrote some thirty dialogues. Socrates leads the discussion in most of these and is present in all except the *Laws*. Modern scholars usually assign the dialogues to three periods (Guthrie 1975, 41–54; Lane 2000, 155–60). Those of the early period are mostly quite short, present a lively picture of Socrates, and generally end in uncertainty. Those of the middle period are longer, present a less lively picture of Socrates, and expound a more positive philosophy based on the theory of "Forms."[4] The dialogues of the late period are stylistically distinct from their predecessors but differ considerably from one another in form and content. Most make no overt reference to the theory of Forms as that was understood in middle period dialogues.[5] Whereas the distinction between the late period dialogues and the others is firmly based on stylometric analysis, the distinction between early and middle period dialogues depends on literary and philosophical judgment (Brandwood 1990; 1992). Many scholars have held that Plato's thought developed in important

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[1] All translations are by the author unless otherwise indicated.

[2] For an account of what is known of Plato's biography, see Guthrie 1975, 8–30.

[3] There is considerable disagreement both about the authenticity of *Ep*. VII and about the purposes of Plato's visit to Syracuse; see Schofield 2000a, 298–302.

[4] In the *Republic*, Plato argues that besides the many beautiful things of ordinary experience there is a single "Form" of beauty. The beautiful things of ordinary experience are subject to change and decay and may be found to be ugly from some point of view, but the Form of beauty is unqualifiedly beautiful and does not change or decay. In the same way, Plato claims that there are Forms of justice, equality, and so forth. The Forms are known by reason. The Form of the Good is given a preeminent role as the source of knowledge and being.

[5] The apparent exception is the *Timaeus*. Owen 1953 (criticized by Cherniss 1957) proposed an earlier dating of this dialogue, but this has generally been rejected on stylometric grounds; cf. Brandwood 1990; 1992.

ways over his lifetime. It is claimed that in the early period Plato sticks fairly closely to the teaching of Socrates (Vlastos 1988; 1991; criticized by Kahn 1981a; 1997). The middle period dialogues, with their emphasis on the Forms, represent a more distinctively Platonic philosophy, but Plato changed his mind very substantially in the late period when he modified (or perhaps even abandoned) the theory of Forms (Owen 1953; Cherniss 1957). However, other scholars argue that his fundamental views remained essentially unchanged throughout his career, despite important changes in the manner of presentation.[6] This controversy affects our understanding of Plato's legal thought, since many developmentalists would argue that his middle period philosophy allows only a subordinate place for law while his later philosophy gives it much greater prominence (Barker 1918; Klosko 1986; see also Owen 1953).[7]

Five dialogues will be examined in this chapter. Taken together, they provide us with a rich understanding of Plato's views on law. The *Protagoras* and *Gorgias* both depict Socrates in vigorous debate with representative figures of the sophistic movement. Although there is disagreement about the relative dating of these dialogues, virtually all scholars assign them to Plato's early period. The *Republic*, the most celebrated of Plato's works, is assigned to the middle and the *Statesman* to the late period. There is evidence that Plato was still working on the *Laws*, his longest work, when he died.[8]

3.2. Plato's Critique of the Sophists: *Protagoras* and *Gorgias*

If the interpretations offered of the *Euthyphro*, *Apology*, and *Crito* in Chapter 2, Section 2.3 of this volume are correct, Socrates there insists that right and wrong are not simply matters of human decision. He must therefore reject the sophistic view that they are the product of convention (*nomos*) rather than nature (*phusis*) (see Chapter 1, Sections 1.4–5 of this volume). But he does not

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[6] The traditional view saw the Forms as the center of Plato's thought throughout his life. Dialogues that made no explicit reference to the Forms were read as pointing toward them. The more recent tendency has been to emphasize that Plato's works are dialogues rather than monographs. The dialogue form enabled Plato to approach questions from different points of view without committing himself to a dogmatic position. This more nuanced approach, which pays close attention to the form of Plato's writing, is evident in Schofield 2000c, and Laks 2000.

[7] An alternative view is that differences between the *Republic* and the *Laws* stem from the fact that the former presents an ideal while the latter offers a more practical model. Thus Saunders 1970, 28, sees these two dialogues as "opposite sides of the same coin." Laks 2000 sees the *Laws* as completing and revising the *Republic* while also pointing to the implementation of Plato's views.

[8] Diogenes Laertius (D.L. III.37) reports that Philip of Opus transcribed the *Laws* "from the wax" (i.e., from wax tablets). There are other signs, such as the absence of dialogue in Book V and the presence of inconsistencies and stylistic infelicities, which may indicate that the work did not receive its final polish.

make this point explicitly. We can now look at two dialogues where Plato brings this issue to the surface.

Early in the *Protagoras* the great sophist, after whom the dialogue is named, defends his claim that virtue or political excellence can be taught, even though there are no recognized experts or teachers in the field (319a–320b). He bases his case on a myth that tells how human beings at first lived in isolation from one another but fell prey to the animals. Zeus then sent them the gifts of justice and respect, which enabled them to band together and form cities (320c–323a).[9] This myth is usually interpreted naturalistically as showing that law and morality are human creations (Taylor 1976, 80).[10] In order to survive, human beings must form communities and agree on common standards of behavior. These agreements determine what counts as virtue. On this basis Protagoras argues that cities, in fact, make great efforts to train citizens in virtue from earliest childhood. Law is essential to this process, for citizens are compelled to learn the laws and to use them as patterns in their everyday lives (326c–d). The use of punishment manifests, particularly clearly, the belief that virtue can be taught, since people are not punished for faults that are due to nature or chance, but for those resulting from poor training: No one punishes for the sake of what is past. That would be to exact blind vengeance like a beast. Punishment is in fact directed to the future. Its purpose is to prevent both the one who undergoes it and those who witness the punishment from repeating the offense (323c–324b; see Saunders 1981; Saunders 1991, 133–6, 162–4; and Stalley 1995b). So, although Protagoras sees justice as resting on laws established by convention, it is still vitally important in his eyes because it is essential to the survival and well-being of society.

Instead of attacking Protagoras' account of virtue directly, Socrates raises the question whether virtue is one thing or many, and proceeds to argue that virtue is knowledge of what is good for us (351b–360c). This, of course, implies that Protagoras' account of law and morality as resting on convention must be rejected. Nevertheless, it leaves untouched several features of Protagoras' account, in particular his view that punishment and training are essential to the acquisition of virtue. As we shall see, Plato came to incorporate similar ideas into his own theories.

The *Gorgias* is ostensibly a discussion of the nature and value of oratory. But several passages bear on the philosophy of law. For example, Socrates argues, against the sophist Polus, that oratory and sophistry are spurious arts because they aim merely at pleasure and the appearance of good and can give

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[9] Many scholars have supposed that the speech paraphrases or perhaps even quotes from a genuine work of Protagoras, but there is little real evidence for this (see Taylor 1976, 77–84; Kerferd 1982, 125–6; and de Romilly 1991, 196–203).

[10] Given that Protagoras was well known for his agnosticism about the gods, it seems unlikely that Plato would put into his mouth a doctrine that required a literal belief in their existence.

no rational account of what they do. They are contrasted with the genuine arts of legislation and justice, which seek the good and involve rational understanding. Legislation, in fact, stands to the soul as gymnastics does to the body because it makes us live in ways that promote the well-being of the soul. The administration of justice is like medicine because it restores disordered souls to health (461b–466a). Underlying these arguments are Socrates' claims that it is better to suffer wrong than to do wrong and better to be punished for one's misdeeds than to go unpunished. Vice is, in fact, a disorder or disease of the soul. Just as we take the sick to the doctor for treatment, so we must take the wicked to the judge for punishment. Thus, just punishment cures criminals of their wickedness. The really wretched individual is the criminal who goes unpunished. Oratory should not be used to escape punishment, but to ensure that we and our friends receive the punishment that will cure us of wickedness (472d–481b).

The *Gorgias* offers no explanation of how just punishment might cure criminals.[11] But Plato is certainly serious about the claims that legislation demands a rational understanding of the good, that it is better to suffer wrong than to do wrong, and that wrongdoers benefit from punishment. These claims imply that legislation, properly understood, should not only promote conformity to accepted norms of behavior, but also secure the good of the citizens' souls. Moreover, what counts as good is determined not by the amount of pleasure it produces but by rational judgment.

This view of law and justice is contested by Callicles, who argues that by nature it is right for the stronger to rule.[12] Laws are mere conventions, created by the weak to restrain the strong. The truly admirable man is strong enough to ignore the restraints of law and gratify his desires at will (482c–484c, 488c–492e). Callicles thus agrees with Protagoras that laws are human creations that benefit the community at large, but his attitude toward law thus understood is totally different. According to Protagoras, laws deserve everyone's support because without them life would be intolerable, but according to Callicles, they have no claim on those strong enough to break them with impunity. Only the weak and worthless have a motive for obedience. As the dialogue progresses, Callicles proves unable to defend this ideal of unlimited self-gratification against Socrates' persistent questioning. This leaves the way open for Socrates to reassert his view that the good, which is the object of everything we do, is to be distinguished from pleasure. An orator who genuinely sought the good

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[11] In *Gorg.* 504d–505b Socrates claims that if a soul is to be virtuous its unhealthy desires must be restrained. Since the word *kolasis* ("restraint") is standardly used to mean "punishment," there is a suggestion here that just punishment restores the soul to health by disciplining or restraining the desires; see Irwin 1979, 218.

[12] The character of Callicles has been much discussed. He is not known from other sources and may be a Platonic creation. Some have seen him as representing a position Plato himself found seriously attractive in his youth; see Dodds 1959, 12–15.

would aim to create regularity (*taxis*) and order (*kosmos*) in the souls of his audiences. These orderly states of the soul are called "law" (*nomos*) and "lawful" (*nomimos*). Those with souls ordered in this way possess the virtues of justice (*dikaiosunê*) and self-restraint (*sophrosunê*) (503e–504d). They are brought about by restraining the desires of an unhealthy soul. Such restraint is called *kolasis* ("discipline" or "correction").

In this part of the *Gorgias* Socrates identifies law with order and harmony, particularly the order and harmony of the just soul. The same principles, Socrates claims, characterize a healthy body, a well-made artefact, and even the universe at large. In fact, the universe is called *cosmos* ("order") because, according to wise men, "heaven and earth, gods and men are held together by community (*koinonia*) and friendship (*philia*), and orderliness, temperance and justice" (507e–508a). Thus, in the view presented in the *Gorgias*, law is so far from being a purely human creation that it governs the entire universe. Earthly courts and legislative assemblies may, of course, be led astray by orators who pander to the masses, but, Socrates claims in the mythical account of divine judgment that rounds off the dialogue, the just will be rewarded and the wicked punished after death (523a–527e).[13] So, whatever may be the case with the positive laws of existing cities, genuine laws, such as would be enacted by true statesmen, promote the true good of the citizens by creating order and harmony in their souls.

3.3. The Philosophy of Law in Plato's *Republic*

Plato's *Republic* is primarily an investigation of the nature and value of justice, though it also deals with many other questions about morality and society, about the nature of reality, and about the possibility of knowledge. The questions "What is justice?" and "Is it worth our while to be just?" are raised in Book I. There Socrates encounters Cephalus, for whom justice consists simply in the kinds of behavior conventionally regarded as just, such as telling the truth and giving back what one owes, and Polemarchus who sees justice as a matter of helping friends and harming enemies. Socrates shows that neither view can be defended in a coherent way (328b–336a). He is then challenged by a more formidable opponent, the sophist Thrasymachus, who claims that "justice is the interest of the stronger" (338c–339a). His point is that what is commonly called "justice" is simply obedience to the positive laws of one's community. These laws, as a matter of fact, embody the interests of the dominant party. The implication is that everyone else should ignore considerations

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[13] There are similar myths of judgment in the *Phaedo* and the *Republic*. The *Phaedrus* and the *Laws* also contain accounts of what happens to the soul after death. The details of these myths vary and their meaning has been much discussed. But Plato certainly seems to believe that the soul survives death and that the universe is so organized that we will eventually suffer for our misdeeds in this life. In this sense, human law derives from and is supported by divine law.

of "justice" if they can get away with it.[14] Although he does not appeal explicitly to the sophistic distinction between *nomos* and *phusis*, Thrasymachus is evidently using similar ideas to undermine conventional morality. He goes on to claim that justice is "another person's interest," in other words, that just acts always benefit someone else. So the unjust person always gets the better of the just one. As Thrasymachus sees it, justice is thus mere stupidity; the genuinely wise and admirable person is the one who gets away with injustice. Best of all is the tyrant who exploits the city for his own benefit (343b–344c).

Socrates "refutes" these claims by forcing Thrasymachus to contradict himself. Although his arguments are largely fallacious, they introduce ideas which play an important part in Plato's thought—that the genuine ruler seeks the good of his subjects rather than his own interests (341a–342e), that excellence in anything consists in achieving the correct standard rather than going to excess (349b–351d), that the just city and the just man are genuinely strong (351e–352b), and that to be just is to live well and therefore to be happy (352d–354a).

A new start is made in Book II where Socrates avows that justice is good not only for the rewards and reputation it brings, but also for its own sake (357a–358a). As Glaucon points out, this is not the usual view. Most people think of justice as something like medical treatment, which we reluctantly accept because of its beneficial consequences. According to this view, the ability to injure others if one wants is good, but suffering injury is bad. As a kind of compromise, people therefore agreed not to injure one another. They established "laws and covenants" and called what these laws required "lawful and just." The implication, according to Glaucon, is that only the fear of punishment and disgrace makes people behave justly (359b–360d). Justice has no intrinsic value of its own. To see this we have only to compare a just man who suffers extreme misfortunes with an unjust man who succeeds in everything he does and avoids the punishment and disgrace which are the normal penalties of injustice. No one in his right mind would prefer the life of the just individual who suffers to that of the unjust one who prospers (360e–361d).

The common view of justice, as described in the passage under discussion, is very close to that of Protagoras. So in effect, Plato here shows that conventionalism, for all its apparent plausibility, has serious weaknesses. If justice rests solely on agreements made for mutual self-protection, someone who can commit crimes without fear of detection has no motive to be just. Thus the Protagorean theory collapses into the immoralism of Callicles and Thrasymachus. To defend the claims of justice, one must show that it has some foundation other than positive law.

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[14] The exact interpretation of Thrasymachus' position is a matter of dispute. In fact, he seems to change his ground a good deal. At times he seems to be arguing, rather like Callicles, that the strong have a right to rule; see Annas 1981, 34–57.

The reply that Plato puts into the mouth of Socrates is long and complex. He proposes first to look for justice by examining a city coming into being. He argues that a city will function best when each citizen sticks to one task for which he or she is fitted by nature and training. This requires a clear division between the soldier class and that of the farmers, artisans, and traders who engage in economic activities. The soldiers should undergo an elaborate training in poetry, music, and gymnastics in order to develop their characters (II.376c–III.412b). They will live in common having no private property, wives, or families of their own (III.416c–417b). The best of these soldiers will be selected as rulers or "guardians" (412a–414b). These are seen as constituting a third class within the city (414b–415d). Since the city's well-being and survival depend on each of these classes sticking to its own task, this must be what makes the city just. Plato thus comes up with a surprising definition of justice in the city as "doing one's own work and not meddling with what isn't one's own" (IV.433a, trans. Grube). He then gives a similar account of justice in the individual. Our souls have three parts: reason, spirit, and appetite. We are just when each of these does its own work, that is, when reason rules—with the aid of spirit—and appetite obeys reason (441e). Conversely, we are unjust when the order of the soul is subverted and the appetites seize control.

The *Republic*'s account of justice both in the city and in the individual is very different from any ordinary conception of justice. Some commentators have therefore seen a fallacy at the very heart of the dialogue (Sachs 1963; discussed by Vlastos 1971; 1977; Demos 1964; Annas 1981, 118–23, 152–9). Plato claims to show that justice is good for itself as well as for its consequences, but since what he in fact talks about is not justice as ordinarily understood, he has not done what he set out to do. It is impossible here to review the extensive literature on this issue, but two points seem crucial: (a) Plato evidently believes that to define justice he must describe the ideal case. So he is concerned not with what counts as justice in existing imperfect cities, but with the genuine justice of the best possible city. Similarly, he aims to describe the ideally just individual, not someone who might be regarded as just by ordinary opinion. (b) He realizes that justice cannot be defined by giving lists of right and wrong acts. He therefore claims that for the individual to be just is for his or her soul to be constituted in the right way. We may think of acts as just, in a secondary sense, if they approximate to what the truly just individual would do, but the primary concern of a legislator must be to shape the character of the citizens rather than simply to control their outward behavior.

The middle books of the *Republic* explain how a long training in philosophy will enable the rulers ultimately to grasp the Forms of goodness, justice, and the like. Books VIII and IX reinforce the account of justice and injustice by describing inferior kinds of constitution in order of merit, beginning with timarchy, the government of those motivated by military and political ambition, and proceeding though oligarchy and democracy to the ultimate degra-

dation of tyranny. For each of these constitutions, Socrates describes the character of a corresponding individual. He takes these descriptions, particularly that of the tyrannical man whose soul is dominated by an overwhelming lust, to show that the just individual is truly better off than the unjust one (IX.571a–580c). The dialogue ends with a myth, telling how the just are rewarded and the unjust are punished after death, and links this moral order with the visible order of the heavens (X.612a–621d).

According to most interpreters, Plato in the *Republic* holds that a city with genuinely wise rulers will have little or no need for law (Barker 1918, 225–7; Klosko 1986, 134, 190; Annas 1981, 105–7). The rulers will be able to direct the affairs of the city in the best possible way, untrammeled by legislation. On the surface at least, it seems true that the account of the ideal city makes little reference to law. No legislative procedures are described and there is only a brief mention of a judicial system (III.409a–410a). Moreover, a passage in Book IV has been taken to say explicitly that the ideal city has no need for legislation (425b–e). There, Socrates claims that, if the guardians and soldiers are properly educated and have orderly and law-abiding characters, the rest of what is required of them should not prove too difficult. There will be no need to legislate about matters of good manners, such as the behavior of the young toward their elders. Written legislation on such matters is ineffective, while those who have been properly educated need no further inducement to correct behavior. Similarly it is inappropriate to lay down rules about commercial matters such as contracts and market dues, since good and honorable men will easily discover them for themselves (425c–d). They must not waste time making and amending petty regulations, like people who become sick through their own intemperance but refuse to adopt a healthier lifestyle (425d–e).

In considering this passage and the general lack of emphasis on law in the *Republic*, there are a number of points to bear in mind. First, the city of the *Republic* is avowedly an ideal. No doubt citizens of an ideal community would seldom, if ever, take explicit recourse to law. Because they are virtuous and fully accept the principles on which the city is founded they will settle disagreements amicably and will fulfill their obligations without the threat of sanctions. But this ideal is unlikely to be achieved in practice. So Plato ought to recognize the need for law in the world as we know it. The condemnation of democratic cities for openly flouting the laws (VIII.557e–558a) implies that law has an important role at least in nonideal communities.

Second, Plato devotes virtually all his attention to the rulers and soldiers who have received an intensive education focused on the development of character and have no interest in money or property. The farmers, artisans, and traders, who form the largest part of the citizen body, will apparently not receive the same education and will have property and families. Even if the soldiers and rulers could manage without law, it is difficult to see how the economically active people could do so.

Third, Plato frequently describes Socrates and his companions as legislating or making laws (*nomoi*) (e.g., III.409e–410a, 417b; IV.424c–e, 430a; V.458c; VI.501a; VII.530c). The rulers are called "guardians of the laws" (VI.504a; VII.521c; Morrow 1993, 582) and there is even one reference to a law binding on the guardians themselves (VII.519e–520a). This may suggest that the city will have a fairly extensive legal system. Indeed, one might argue that *nomos* is needed to define the functions of the different classes. It thus enables the city to instantiate the form of justice. The difficulty is that the Greek word *nomos* can refer not only to measures promulgated by a government and enforced by courts of law, but also to customs and conventions of an informal kind that are enforced mainly by social pressures. It is not clear whether the *nomoi* of the *Republic* are to be written down or whether there is to be any formal system of adjudication and enforcement. But the claim that there is no need for legislation about good manners (IV.425b) presupposes some distinction between laws and informal customs.[15]

Fourth, the concluding pages of Book IX sum up the moral argument of the *Republic* by stressing that if we are to be truly happy the lower elements in our souls must be subordinate to the divine power of reason. Those who lack this power within themselves must, for their own good, be "enslaved" to those who have it. This is the purpose both of law, which is the "ally" of everyone in the city, and of education, which does not allow children to be free until a "constitution" (*politeia*) has been established within them (590c–e). Whether this passage refers to existing cities or the ideal one, it implies that law is essential as a guideline and means of restraint for those who have yet to develop the power of self-direction.

Read in the light of these points, the critique of petty legislation at IV.425c–e clearly cannot be taken to imply hostility to law as such. There is no need to propose laws about markets and the like because the well-trained rulers of the ideal city can do this for themselves. Similarly, the attack on those who try to improve the life of the citizens by constantly introducing new laws does not imply that there is no need at all for legislation. The point is rather that, if the system is fundamentally sound and if the citizens are well educated, there will be no need to regulate every detail of their lives. If, on the other hand, the system is not sound or the citizens are not well educated, then no amount of legislation will solve the problem.

If this is right then the *Republic*'s account of law is consistent with that of the *Gorgias*. The fundamental aim of the city and of the individual must be justice. But being just is not, as people generally suppose, simply a matter of

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[15] It is not entirely clear how Plato would distinguish matters that require legislation from those which may be left to habit and custom. Evidently, legislation determines the main structures of the state, the educational system, and the methods of procreation (II.380c; III.417b; V.452c, 453d, 457b–c). If these work effectively, the citizens will have good characters and there will be no need for legislation on matters such as dress and deportment (IV.425b–c).

conforming to conventional norms. It consists rather in the rule of reason. The soul is just when its rational element rules over its passions and desires. The city is just when it is ruled by the guardian class, but this can come about only when all classes conform to the fundamental laws of its constitution. Laws not only make social life possible but are also the precondition of rational government. However, in a well-ordered city they work through education rather than through sanctions. They provide guidelines for the young and for those without developed powers of reason, which enable them to acquire habits of virtuous behavior. This, in turn, creates order and rational government in their souls.

3.4. Law in Plato's *Statesman*

In the *Statesman* an unnamed "stranger" from Elea leads a search for the definition of the statesman.[16] In conducting this search his key assumption is that the statesman is an expert who possesses the "royal art" of ruling. This leads him to take issue with conventional classifications of constitutions. These are based on factors such as the number of rulers (one, few, or many) and on the manner in which they rule: whether they use force or rely on consent, whether they are rich or poor, and whether they do or do not make use of written laws.[17] The Stranger dismisses such matters as irrelevant to the search for a genuine constitution. All that really matters is whether the ruler (or rulers) possesses the genuine science of government (*Plt.* 292a–293e).

The Stranger defends his claim that the use of law is irrelevant to the classification of governments, by arguing that laws, because they are general, cannot adapt to particular circumstances. They thus resemble "some self-willed and ignorant person," who allows no one to modify or question his instructions (*Plt.* 294b–c). However, the Stranger concedes that laws may in practice be necessary. Just as a gymnastic trainer who cannot give individualized advice to each member of his class has to prescribe what is best for the majority, so lawgivers, who obviously cannot attend to the individual needs of each citizen, give rulings that suit most of them (293e–295b). Moreover, a doctor or trainer who left written instructions for those in his charge before going abroad would not be bound by them, were he to return early. He would gladly modify them in the light of changed circumstances. Similarly, expert

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[16] The structure and purpose of the *Statesman* are far from clear. The dialogue is ostensibly a demonstration of philosophical method and the discussion is led by the Stranger rather than by Socrates. It is clearly relevant to Plato's views on politics and law, but it is doubtful whether we should take it as an authoritative exposition of Plato's own view.

[17] On the conventional view there are five forms of government. The lawful form of rule by one man is kingship, while the unlawful form is tyranny; the lawful form of rule by a few is aristocracy, while the unlawful form is oligarchy; and no distinction is made between lawful and unlawful forms of rule by the many (democracy).

rulers should not be bound by anything they have written (295b–296a). It would be even more absurd to subject genuine rulers to laws approved by the populace at large. That would be like compelling doctors, navigators, and the like to carry out their duties in strict accordance with rules laid down by a democratic assembly, leaving no room for professional judgment. However, it would be even worse if a city that had established such laws, after taking advice and persuading a majority to pass them, then allowed officials to dispense with them at will (300b). The upshot is that only rulers with expert knowledge may ignore laws. Others should imitate them not by dispensing with law, but by using as laws the written instructions that the experts would give. In the light of this, the Stranger claims that we should recognize six forms of constitution besides the true one with its expert ruler(s). The city may be ruled by one person, by a few, or by many, and in each case government may be conducted in accordance with law or without law (300b–303c).[18]

Many commentators assume that the expert ruler, who can dispense with law, is the philosopher-king of the *Republic*. By allowing that cities without such a ruler should use laws, the *Statesman*, it is claimed, moves from the unrealistic utopianism of the *Republic* to the more practical ideal of government by law (Klosko 1986, 194–7). However, this interpretation overlooks significant differences between the philosophers of the *Republic* and the expert ruler of the *Statesman*. The knowledge of the philosopher-rulers differs in kind from any other form of expertise. To achieve it they have to undergo a long training that develops their character and enables them to grasp the Form of the Good. This grasp of the good differentiates them from other experts who know how to achieve specific ends but cannot tell whether these are worth pursuing. None of this is mentioned in the *Statesman*, which assimilates the ruler's knowledge to other forms of skill or expertise.

Another difference between the expert ruler of the *Statesman* and the philosophers of the *Republic* is that the latter do not dispense with law. One message of the *Republic* is that a city must have the right institutions. In particular, it needs a system of education and a social structure that will enable philosopher-rulers to emerge, while ensuring that other citizens willingly obey the philosophers' instructions. Laws make these institutions possible and act as guidelines for those without the power of reason. In the *Statesman*, these points are simply ignored. Moreover, its comparison of law with the instructions of a doctor or gymnastic trainer is manifestly flawed. Trainers give general instructions to a whole class only because they cannot give separate in-

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[18] Of the lawful forms the most tolerable is the rule of a single individual, and the least tolerable the rule of many, but the order is reversed in the case of the lawless forms. Thus in order of merit we have kingship (the lawful rule of one person), aristocracy (the lawful rule of a few), lawful democracy, lawless democracy, oligarchy (the lawless rule of a few), and finally tyranny (the lawless rule of one individual).

structions to each individual, but the generality of law is not merely a regrettable necessity. It is precisely because laws are general that they enable people to coordinate their activities and to establish complex institutions. The *Republic* does not thematize these points, but it is certainly aware of them.

The inadequacy of the *Statesman*'s account of law undermines such arguments as it offers to show that a city governed by laws is the best practical possibility. Moreover, the concessions made to law are extremely grudging. The Stranger, in effect, satirizes the law-governed city by imagining one where medicine and navigation are treated in a totally legalistic way. Although he goes on to the more positive idea that those who make laws may imitate the truth embodied in the rule of the genuine statesman (*Plt.* 300b–e), he does nothing to develop this idea. If Plato had intended to make the case for government by law as the best practical alternative to rule of the expert he could hardly have done so in a less convincing way. The interpretation of the *Statesman* as marking a transition from the ideal of the philosopher-ruler to that of government by law is therefore questionable (see Rowe 1995a, 5–19; 2000, 244–51; Gill 1995, 301–4; Lane 1995; Schofield 1999a; and Laks 2000, 270–3). The passages we have been considering form only part of a dialogue ostensibly devoted to questions of philosophical method. Its primary significance for the philosophy of law may lie in what is not said explicitly, but should be obvious to an intelligent reader: There is a distinction between ruling and other forms of expertise and between laws and professional advice. Because ruling is not just another craft, laws are essential to its very nature.

3.5. Plato's *Laws*

The *Laws* describes the conversation of three old men—an unnamed Athenian, a Spartan named Megillus, and a Cretan named Clinias—who are walking to the cave where, according to legend, Zeus gave laws to King Minos. The Athenian opens the discussion by asking his companions whether the laws of their own cities were the work of a god or of some man. Both claim a divine origin for their own systems, which, they suggest, were designed for success in war (I.624a–626c). But the Athenian shows the inadequacies of this conception. Internal disputes are a greater danger than external wars. So, as well as seeking victory over other cities, the legislator must ensure that the better elements within the city are victorious over the worse. But it is even better to achieve peace and reconciliation so that the worse elements gladly obey the better. Analogous points are made about the individual (626c–628e). Because they sought victory in war, the Cretan and Spartan legislators concentrated on a single virtue, namely, courage. But the legislator ought to aim at virtue as a whole (630d–631a; cf. III.688a–b). He will then make the citizens really happy, for the virtues of wisdom, temperance, justice, and courage are divine goods. Without them, human goods, such as health, beauty, strength,

and wealth, are unattainable. The legislator must therefore proclaim that all his commands are directed toward these divine goods, that the human goods are subordinate to them, and that the divine goods themselves are under the leadership of reason. He must direct every aspect of the citizens' lives, from conception to the grave, toward this end. Those who are most obedient to the laws must be honored while the disobedient must be punished. In this way reason will show how legislation is subordinate to virtue rather than to wealth and ambition (I.631a–632c; cf. III.697b–c).

These pages reveal much about the attitude toward legislation that underlies the rest of the dialogue. Genuine law is a divine gift and is likely to be the work of a single inspired legislator who creates an all-embracing system. His ultimate aim is to make the citizens virtuous, but the *Laws* and the *Republic* differ significantly in their understanding of virtue. In the *Republic* it was implied that virtue, in the fullest sense of the word, requires an insight into the good, so only philosophers could be genuinely virtuous. But the *Republic* also seemed to recognize a secondary kind of virtue characteristic of the soldiers or auxiliaries. These have not only learned correct opinions about right or wrong, but have also been trained to live by them no matter what temptations they encounter (III.412b–414a; IV.429e–430c). The kind of virtue envisaged in the *Laws* is much more like the latter, so the object of legislation is to enable citizens to make correct judgments about right and wrong and to harmonize their passions and feelings with these judgments (II.653b–c, 654b–d). They must learn to take pleasure in what is right and hate what is wrong (659d–e). All citizens and not just the philosophers can acquire this virtue.[19]

The implications of this view both for cities and for individuals are explored in the remainder of Books I–III. Then the Cretan suggests that he and his companions should continue their conversation by imagining a constitution and legal code for a new city that is about to be established in Crete (III.702b–e). This occupies the remainder of the dialogue. The fact that a city is to be founded in a specific location gives their discussion practical relevance and enables Plato to emphasize that legislation must be adapted to the circumstances of a particular community (704a–705c). On the other hand, because the three old men are not themselves legislating for the new city, they are free to talk about principles rather than particularities (V.745e–746d).

The city of the *Laws* appears very different from that of the *Republic*. For example, the former has no philosopher-rulers and nothing like the *Republic*'s division of the citizens into three classes. All are to participate in public affairs and to serve as soldiers (753b). Those elected to office have experience, prac

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[19] Most scholars see this as a consequence of the fact that there are no philosopher-rulers in the *Laws*, but Bobonich, in 1994, 1995, and 2002, argues that Plato had changed his view and came to believe that ordinary people are capable of being virtuous. This in turn led to major changes in his political thought.

tical wisdom, and a good moral character, but no specifically philosophical training. However, at the end of the dialogue we hear briefly about a body called "the nocturnal council," which will apparently ensure that there is some philosophical input into government (XII.951c–952d, 961a–968c). Equally the *Laws* abandons the idea that guardians should be without families or private property of their own. Common families and property may be a theoretical ideal, but it could happen only among gods or the children of gods (V.739a–e). All citizens will be required to marry and will have their own farms (739e–741a), though they will not be allowed to engage in trade and manufacturing (VIII.846d–847b).

The key idea underlying the political arrangements is that of the sovereignty of law. Every success comes to cities whose rulers are slaves to the laws, while destruction threatens any city where the laws are overruled (IV.715d). Indeed, cities where different factions wield power in their own interest cannot really be said to have constitutional government (715b). This idea of the sovereignty of law is worked out in two main ways. There must, firstly, be a fixed code of law that is difficult to change (VI.772b–d; XII.957a–b), for if the members of any group within the city could change the law at will then they, and not the laws, would be supreme (IV.712e–715d).[20] Secondly, officials must be subject to law in everything that they do. This is ensured by complex constitutional arrangements.[21] Virtually all who hold office act as members of collegial bodies rather than as individuals, different elements within the constitution act as checks and balances on one another, and the actions of all officials are subject to scrutiny to ensure that they always follow the law (945b–948b; Morrow 1941; Morrow 1993, 219–29, 244–5, 538–40, 550–1; Stalley 1983, chap. 8). Thus no one exercises unrestricted power. This is, of course, very different from what was envisaged in the *Republic*. Even if there was a place for law in that dialogue, its dominant idea was that philosophers should rule. In the *Laws* this is replaced by the rule of law.

Many scholars see this as reflecting a change of mind on Plato's part (Barker 1918, 338–43). Traditionally this has been attributed to Plato's realization, after the unsuccessful visits to Syracuse, that the city of the *Republic* is not a practical possibility. A more plausible suggestion associates it with a change in his view of moral psychology. On this interpretation, Plato aban-

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[20] There is disagreement about how difficult it would be to change the laws. Morrow 1993, 570–1, claims that it is extremely difficult, which is a view followed by Stalley 1983, 82, and Klosko 1986, 323; 1988, 87, but criticized by Bobonich 2002, 395–408.

[21] At V.735a and VI.755a, Plato notes that there are two elements in the formation of a constitution (*politeia*): establishing magistrates and giving laws for those magistrates to enforce. This has been read as indicating a distinction between the constitution and the laws; see Laks 2000, 263. But since both elements are seen as part of the *politeia* and since the word *nomos* (law) is used in describing what we would think of as constitutional measures, Plato does not seem to have a clear distinction between constitutional and other types of law.

doned the idea that there are distinct reasoning, spirited, and appetitive parts of the soul, and with it the ideal of the philosopher-king. Other scholars maintain that there is a broad consistency between the two dialogues (Saunders 1970, 20–8). The *Republic* uses the figure of the philosopher-king to set out the ideal of rule by reason, but Plato always realized that this ideal was unlikely to be achieved in practice. The closest we can come to it is by submitting to laws which embody the principles of reason (Morrow 1993, 563–9; Stalley 1983, 21, 92–3, 113–5).

From the beginning of the *Laws* it is clear that there are objective standards of right and wrong that can be known by reason and embodied in law. For example, at I.644d–645b, the Athenian compares human beings to "puppets" of the gods who are pulled not only by "hard and steely" strings of the passions and desires, but also by the "pliable golden string" of reasoning, which is called "the common law of the city." At IV.713e–714a, having described an imaginary golden age when the god Cronos ruled directly over mankind, he insists that wherever people have mortals rather than gods as rulers they will have no rest from trouble unless they imitate the rule of the god by ordering their homes and their cities in obedience to "the immortal element within them." The name given to this rational order is "law."

This position is supported by the long and closely argued preamble to the law on atheism in Book X. This is targeted against those who distinguish nature (*phusis*) from convention (*nomos*) and see the latter as the source of all ethical standards (888e–890b). Against this it is argued that the universe is directed by a divine soul (or souls) that is concerned with human affairs (893c–899b, 901d–903c). Thus the universe is ultimately the product of rational design. The legislator must therefore insist that law exists by nature or by "some cause not inferior to nature," since it is "the offspring of reason" (890d). In other words, law is the product of the same divine mind that creates order in the universe.

The task of translating the principles of divine reason into the positive laws of earthly cities ideally belongs to a wise legislator. We learn very little about the qualifications of this legislator, but he seems to rely on natural intelligence, experience, and good character rather than on philosophical training. At several points the wisdom and experience of the old are seen as guides to what is right (I.634d–e; II.659d; IV.715d–e). Insofar as anything provides a philosophical basis for the city, this is the work of the Nocturnal Council. It is required to understand the rational principles underlying the city's laws, but the details of its function are left very unclear. The trust Plato places in the common sense of the old and the borrowings he makes from the legal codes of existing cities (particularly Athens) suggest that conventional wisdom can be an acceptable basis for legislation (Morrow 1993, 295–6, 533–5, 546–8; Saunders 1991, 353). Perhaps the underlying idea is that most individuals have some grasp of the good and that this is, to a considerable extent, re-

flected in existing codes of law. Experienced people, who have received a good education, who are no longer dominated by the passions of youth, and who can decide matters in a calm and impartial way, will have sufficient understanding of the good to make sound laws. This view may seem preferable to that of the *Republic* in that it does not require us to put all our faith in philosopher-kings. But it is still vulnerable to serious objections. In practice, even the wisest and most experienced people may disagree about what is good. And even those who agree about what sorts of thing are good may differ in the priorities they attach to them. These points could be met only if there is a single objective standard of good. This claim, in turn, may need to be grounded in something like the theory of Forms.

If genuine law is the work of reason, what about the so-called laws of existing states that are not founded on rational principles? Three passages in the Platonic corpus imply that these should not be called laws, but none of these commands much conviction as a statement of Plato's own view.[22] The point is not explicitly raised in the *Laws*. However, the claim that cities whose rulers pursue their own interests have neither constitutions nor correct laws (IV.715b) seems to imply that their "laws" are invalid. On the other hand, Plato could hardly show such respect for traditional wisdom unless he saw the legal codes of existing cities as containing much that is fundamentally sound. Perhaps he holds that these codes may be called "laws" and should be obeyed insofar as they are consistent with the demands of justice. If, however, a ruler lays unjust demands on his subjects, these are not genuine laws and need not be obeyed.

As we have seen, the legislator's task is to inculcate virtue rather than merely to ensure compliance with norms of outward behavior. One implication of this is that the legislator must pay close attention to the education and upbringing of children, since this obviously influences the development of moral character (see, for example, I.643b–644b; VII.804c–d). It also obliges the legislator to concern himself with matters that we might see as belonging to the private sphere or as being best left to social custom. Not surprisingly, in the city of the *Laws* the educational curriculum is as much concerned with character as with knowledge or practical skills. Music, dance, poetry, and even children's games are strictly regulated. The minister of education is deemed to be the most important of all the officials (VI.766e). Much legislation is also designed to strengthen family life, but in this, as in some other areas, Plato allows for what he calls "unwritten laws," that is, customs enforced by social pressure rather than formal sanctions (VII.788a–c, 790a–b).

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[22] The passages are *Hp. Ma.* 284d–e, *Crat.* 429a–b, and *Minos* 314–5. Most scholars believe that the *Minos* is spurious, and some take the same view of the *Hippias Major*. In the *Hippias Major* the claim is put into the mouth of Socrates, but in a context where there seems to be a good deal of irony. In the *Cratylus* the argument is attributed to Cratylus and may not represent Plato's own view.

A striking feature of the *Laws* is the idea that government should rely on persuasion rather than force. Most legislators simply issue instructions and impose penalties on those who disobey. But, according to the *Laws*, it is preferable to use persuasion, resorting to penalties only when that has failed. Thus all laws should be preceded by preambles designed to secure voluntary obedience (IV.720e–722c). There is, therefore, a general preamble to the legal code as a whole, as well as individual preambles for specific measures. For example, the law that men should marry by the age of thirty-five begins with the argument that only by marrying and having children can men satisfy their natural desire for immortality. Those who are unconvinced by this and remain unmarried will be punished by a yearly fine and by deprivation of honors (721b–e).

This emphasis on persuasion rather than force is clearly important. No legal system can rely exclusively on the threat of penalties. Moreover, imposing penalties on individuals who do not understand or accept the reasons for them may alienate them and reduce their respect for the law. Persuasive methods also avoid the pain and inconvenience of penalties. But persuasion can have a more sinister side. The institutions of the state cannot inculcate specific opinions and kinds of character if they allow the expression of contrary views. Thus, the use of persuasion is linked to a feature of the *Laws* which most modern readers find distasteful: its hostility to freedom of thought and expression. The most striking indication of this is the provision that persistent atheists should be put to death (X.908e–909a).

Some commentators see the role of persuasion in a more optimistic light, taking it to imply that the legislator must secure the consent of the citizens through rational argument. If this is correct, then there would be a big difference between the *Laws* and the *Republic* where only the philosophers have a rational grasp of right and wrong and where the other classes simply obey (Hall 1981, 93–6; Bobonich 1992; criticized by Stalley 1994). But this cannot be his point. Proposals made elsewhere in the *Laws*, such as those for the tight control of music, poetry, and children's games (II.656d–660a; VII.797a–798e), make it clear that Plato would rely heavily on nonrational methods of persuasion. The same also applies to the preambles. For example, the law on marriage described above does not require that someone should argue in a rational way with bachelors until they see the error of their ways. Rather it simply offers a highly suspect argument for marriage and then imposes a penalty on those who are not persuaded (IV.721b–e). Many other preambles make even less use of rational argument. They are mostly conventional exhortations relying more on prejudice than reason (see, for example, V.741a; VI.772e–773a; VII.823d–824a). The notable exception is the law on impiety with its extended proof of the existence of a god who cares about human affairs. But, although this preamble uses rational argument, it certainly does not respect the right of an individual to make up his or her own mind. The penalty for remaining unconvinced is ultimately death. Thus Plato's emphasis on persua-

sion rather than force is not as attractive as it initially sounds. He does not expect the legislator to secure the free and informed consent of the citizens, and he certainly does not see the authority of law as resting on that consent.

3.6. Plato on Punishment

In the *Protagoras*, as we saw in Section 2 above, Plato makes the sophist denounce a retributive conception of punishment (324a–b). He insists that it must look to the future and emphasizes its role as a deterrent. In the *Gorgias* Socrates also rejects a purely retributive account. He compares judges with doctors and argues that just punishment cures the criminal's soul of its wickedness in much the same way that medical treatment cures bodies of physical disease (476a–479c). Several passages in the *Republic* suggest a similar view (II.380a–b; III.409e–410a; IV.445a; IX.591a–b). In the *Laws* Plato again denounces purely retributive accounts of punishment and repeats many times that its primary purpose is to cure wrongdoers. But if criminals are so depraved as to be beyond cure, they should be put to death (IX.854d–855a, 862c–863a, 933e–934c; XII.941d, 957e–958a). This will rid the city of their presence while also providing an example to others (IX.862e; XII.942a, 957e–958a). Indeed, these incurable characters will be better off dead than living with their depravity. A few passages also hint at other purposes of punishment. For example, the contrast between the persuasion exercised by preambles and the force involved in penalties suggests a deterrence theory: If persuasion fails, fear of the penalty must force us to obey the law.

The penalties prescribed in the *Laws* vary considerably. Many offenses are punished by fines. In cases such as theft, which involve loss or injury to fellow citizens, the general principle is that the criminal should compensate his victim and pay an additional sum as punishment (IX.857a–b). For other crimes, particularly minor offenses against the state, the penalty involves deprivation of certain civil rights or some form of public disgrace (VI.754e–755a, 762c, 784d). Corporal punishment is sometimes prescribed for slaves or foreigners and very occasionally for citizens (IX.881d). Sentences of exile are mainly used in cases of homicide where, according to traditional religion, the continued presence of the killer in the city would cause pollution (IX.864e, 867c–868e). For a few offenses the penalty is imprisonment, usually for a period of a year (IX.880b–c; XI.919e–920c; XII.954e–955a). The death penalty is used for very serious offenses against individuals, such as deliberate murder, and for public offenses, such as theft from temples, taking bribes, and persistent atheism (IX.854e, 871d, 877b–c; X.910c; XII.955b–d). Most of these proposals have precedents in Athens or in other Greek cities, though the use of imprisonment as a punishment was unusual (Saunders 1991, chaps. 8–14).

These punishments might be effective as deterrents, but it is not clear how they could cure criminals of their wickedness. Indeed, if the aim is to cure the

criminal, we may wonder why punishment, understood in the traditional sense as the infliction of something painful or unpleasant, should be applied at all, since there is no obvious reason why it should make people better. Some commentators have concluded that Plato is engaging in wishful thinking (Dodds 1959, 254). He is convinced that punishment could only be justified if it cures the criminal. He cannot contemplate the thought that it is in fact unjustified, so he concludes that it is a cure. T. J. Saunders (1991, 131–95; criticized by Stalley 1996) argues that the physiology of Plato's *Timaeus* would allow him to argue in purely medical terms that the experience of pain helps to bring the soul to order. The main trouble with this argument is that there is no apparent way in which the punishments Plato actually prescribes (few of which involve physical pain) could have this effect. A more plausible explanation may be that Plato is influenced by the view, which seems to have been more or less universal in Greece, that the punishment of children improves their characters by restraining their unruly desires (*Prot.* 225d). Given the generally paternalistic attitude he adopts toward the citizens of the *Republic* and the *Laws*, it would not be surprising if Plato held that this idea could also apply to adults. This would not mean that the punishments imposed in existing cities necessarily benefit those on whom they are inflicted, for Plato is committed only to the idea that *just* punishment improves the soul (*Gorg.* 476d–477a). But he could, perhaps, argue that in an ideal city, where there is every inducement to citizens to identify with their community and to internalize its values, it could be genuinely beneficial (Stalley 1995a).

If the interpretations offered here are correct, there is a substantial continuity in Plato's legal thought. From his earliest writings onward, he argues that there is an objective criterion of what is just and that this is determined neither by an agreement among the citizens nor by the will of a legislator. Because the gods are wise and good their laws are always, as a matter of fact, just. Human laws, on the other hand, may fall short of what is just, so it may sometimes be right to disobey them. In Plato's later works these fundamental claims remain unchallenged, though they are developed and expanded.

Two themes that come to prominence in these writings give Plato's legal thought much of its distinctive character. The first is that the purpose of law is not merely to secure conformity to norms of external behavior, but to make people virtuous, virtue being understood as an orderly and harmonious condition of the soul. This implies that law cannot be neutral between different conceptions of the good, that it must be concerned with all areas of life, and that it is inseparable from education. In these respects Plato's view is very different from that of modern liberals who advocate a state that is neutral between competing conceptions of the good and does not interfere with the private lives of citizens. Indeed, his arguments have something in common with communitarian critics of liberalism.

The second theme, that law is the product of reason, may not in itself seem particularly controversial. After all, rational discussion is necessary if a community is to agree on norms of behavior that are acceptable to its members as a whole, and lawmakers must use reasoning to assess the likely effects of their proposals. But, coupled with the idea that the goal of legislation is virtue, it implies that reason enables legislators to form a correct conception of the good. In the *Republic* this view is underpinned by the theory of Forms and the associated doctrine of the philosopher-ruler. The *Laws* gives the impression that wisdom is the product of natural intelligence combined with experience, but it still assumes an objective criterion of good that is independent of human wishes and desires. The problem of explaining how there can be such a criterion and how it can be known constitutes the greatest difficulty for Plato's theory of law.

Further Reading

The main texts for Plato's philosophy of law are found in his *Protagoras*, *Gorgias*, *Republic* (especially books I–II and IV), *Statesman*, and *Laws*. Although almost every page of *Laws* has some relevance to the topic, books I and IV are particularly important for Plato's conception of law and book IX for his view of punishment. Cooper includes modern translations of the entire Platonic corpus, and translations of most dialogues are also available in separate editions published by Hackett. A translation of *Laws* by Saunders, with helpful notes, is readable but sometimes imprecise. Bury is often more reliable. The translations of *Republic* by Bloom and *Laws* by Pangle may be helpful to Greekless readers who wish to make a careful study of particular passages. The Clarendon Plato series includes literal translations with philosophical commentaries (from an analytic point of view) of *Protagoras* (Taylor) and *Gorgias* (Irwin).

Guthrie (1975 and 1978) provides very useful discussions of the evidence for Plato's biography, of views on the chronology of his works, and of interpretations of each dialogue. Kraut 1992 includes chapters on the dating of Plato's dialogues and on his later political thought. Rowe and Schofield 2000 contains authoritative treatments by leading scholars of Plato's political philosophy, which sheds light on the context of his legal thought. De Romilly (1971) discusses many Platonic passages in the course of the general history of Greek legal thought. Otherwise there is little systematic writing on Plato's philosophy of law. Commentaries on *Republic* pay little attention to questions about law, though all give a central place to its theory of justice (see, e.g., Annas 1981; Santas 2001). Most treatments of Plato's political philosophy assume that Plato became seriously concerned with law only at a late period when he had despaired of making his ideal state a reality (e.g., Barker 1918; Klosko 1986). This style of interpretation is criticized by Kahn 1995 and sev-

eral other contributors to Rowe 1995b. For other recent treatments of *States-man* see Rowe 1995a and 2000; Lane 1998; and Schofield 1999a.

Saunders and Brisson 2000 gives a very full bibliography for *Laws*. Morrow 1993 provides an extended account of the institutional proposals of *Laws* and relates them to Greek practice. Stalley 1983 is a philosophical introduction to *Laws*, including questions about the nature of law. Saunders 1992 and Laks 2000 offer overviews of *Laws* from very different perspectives. Laks pays special attention to the form and structure of the dialogue. There are discussions of the relation between *Republic* and *Laws* in Laks 1991a; 1991b; and 1995. In a major new study, Bobonich (2002) argues that Plato's later political philosophy is a radical departure from his earlier views.

The literature on Plato's theory of punishment includes Mackenzie 1981, Saunders 1991, and Stalley 1995a and 1995b.

ARISTOTLE'S PHILOSOPHY OF LAW

by Fred D. Miller, Jr.[1]

4.1. Life and Writings of Aristotle

Aristotle was born in 384 B.C. at Stagira in northern Greece, the son of Nicomachus, a physician of King Amyntas II of Macedonia. At age seventeen he entered Plato's Academy in Athens, where he studied for nineteen years. In addition to composing a number of dialogues now lost, he may have then begun work on his *Rhetoric*. After Plato's death (348) Aristotle grew alienated from the school and soon after left Athens. He resided at Assos, where he married Pythias, the niece of the philosophically trained tyrant Hermeias, and then lived at Mytilene on Lesbos. In 343 he was invited by King Philip of Macedonia to educate his thirteen-year-old son Alexander. Subsequently, Philip and his successor, Alexander, defeated an alliance of Greek city-states, and most of Greece—including Athens—submitted to Macedonian hegemony while Alexander was conquering the Persian Empire. Aristotle returned to Athens in 335 after the death of Philip and became a metic (resident alien). He founded his school at the Lyceum outside the city and began the most productive stage of his career. He offered lectures on technical philosophy (logic, physics, and metaphysics) in the morning, and on more popular subjects (rhetoric, ethics, and politics) in the evening. He also collected a celebrated library, and with his students compiled descriptions of 158 constitutions. During this period he probably composed most of his greatest treatises, including much of the *Politics*. After his wife's death he took a mistress, Herpyllis of Stagira, who gave birth to Nicomachus, after whom the *Nicomachean Ethics* was named. This work is probably Aristotle's revision of an earlier work, the *Eudemian Ethics*, from which three books were reused (*Eudemian Ethics*, Books IV–VI becoming *Nicomachean Ethics*, Books V–VII).

After Alexander's sudden death, the Athenians rose up against the Macedonians. Aristotle, who was a friend of Alexander's viceroy, Antipater, bore the brunt of anti-Macedonian sentiment. Charged with impiety he left Athens lest she "sin twice against philosophy." Appointing Theophrastus his successor as head of the Lyceum, Aristotle retreated to Chalcis, where he died soon after (322).

According to an ancient tradition, Aristotle's writings were lost after his death and only rediscovered in the first century B.C. Andronicus of Rhodes assembled numerous papyrus scrolls into treatises, which were recopied in

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[1] All translations are by the author unless otherwise indicated.

manuscripts over two millennia. Consequently, the works of Aristotle as we now have them raise many difficulties. This applies to the major works that contain Aristotle's legal philosophy: the *Politics*, the *Nicomachean Ethics*, and the *Rhetoric*. In the case of each of these works, scholars debate over the following questions: Were the parts of this work written at roughly the same time or do they express Aristotle's thought at different stages of his life? Does the organization of the work reflect Aristotle's intention or is it the construction of a later editor (which may be contrary to what Aristotle intended)? Does the work as it now exists express a coherent philosophical position? Moreover, another work that contains material on the law, *Magna Moralia*, may have been written not by Aristotle but by an early member of his school. An early spurious work, *Rhetoric to Alexander*, also contains some relevant material. Finally, Aristotle's 158 constitutions vanished altogether except for scattered quotations, until the rediscovery of a major fragment of the *Constitution of Athens* in the late nineteenth century. This work may also have been written by an early student of Aristotle during his lifetime.

4.2. Overview of Aristotle's Concept of Law

The concept of law is deeply embedded in Aristotle's political philosophy. Although legal terminology occurs frequently in his writings, Aristotle does not himself present a systematic and unitary legal treatise. Not infrequently he quotes (or paraphrases) others and appropriates their remarks, which results in considerable imprecision and apparent inconsistency in his various characterizations of law. He identifies law in different places with reason, with agreement, and with order. A reconstruction of Aristotle's legal philosophy should explain how these different characterizations are interrelated.

Aristotle's main term for "law" is the noun *nomos* (plural *nomoi*). Related expressions are *kata ton nomon*, "according to the law," *nomikos*, "legal," and *nomimos*, "lawful." The noun *nomimon* can also have the sense of "statute." In contrast, *para ton nomon* signifies "against the law," and *paranomos* means "illegal" or "unlawful." The precise meanings of these terms vary with the context. Sometimes Aristotle speaks of written law, in contrast to unwritten custom (*ethos*), for example, that one should honor one's parents, do good to one's friends, and return good to one's benefactors (*Pol.* III.16.1287b5–8; *EN* X.9.1180b4; cf. Pseudo-Aristotle, *Rhet. Al.* 1.1421b35–1422a1). But he also distinguishes between unwritten law and written law (*Pol.* VI.5.1319b40; *EN* X.9.1180a35; *Rhet.* I.10.1368b7, I.13.1373b4). He also uses *nomos* more loosely for "convention," the sense in which *nomos* was opposed to *phusis* ("nature") by the sophists (*SE* 12.173a7–30). Aristotle's term *nomos* can denote either a particular law or the law in an abstract sense.

A particular law is a rule (*kanôn*) prescribing or prohibiting various kinds of actions (see *EN* I.2.1094b5). For example, it commands the citizens not to

leave their posts in time of war, not to commit adultery or act abusively, not to hit or slander others, and so forth (see *EN* V.1.1129b19–23). Because they command and prohibit general classes of action, the laws are universal in form: "The law speaks universally" (*EN* V.10.1137b13, 20; cf. 7.1135a5–8). The universality of the laws has an obvious advantage: The citizens can learn what the laws require, adapt their behavior to them, and acquire the habit of obedience.

But because laws are universal, they cannot address unusual cases. For example, the assembly might want to bestow honorary citizenship on a foreign potentate who has come to the aid of the city-state (*polis*). This requires an ad hoc rule. In an authoritarian regime this is called an "edict" (*epitagma*), and in a popular constitution a "decree" (*psêphisma*). Such rules concern individual acts to be done (*EN* VI.8.1141b27–8); they cannot be universal (*Pol.* IV.4.1292a37).

What distinguishes a universal rule *as* a law? This is the question, "What is law?" in the abstract sense, which Aristotle does not address in a systematic fashion in our extant texts, although there is considerable evidence as to how he would answer it: Law is "a sort of order" (*Pol.* VII.4.1326a30; cf. III.16.1287a18; II.5.1263a23). Unfortunately, Aristotle does not explain this claim, but we can gather what it means by considering how he understands order in his metaphysical works. Order is a ratio or proportion of opposites (*Phys.* VIII.1.252a14–15). Aristotle illustrates the concept of order in his discussion of the atomist theorists Democritus and Leucippus, who distinguished order from the relations of position and shape. For example, **A** differs from **N** in shape, **AN** from **NA** in order, and **A** from **Ɐ** in position (cf. *Metaph.* I.4.985b17; *Phys.* I.5.188a24). As this illustration indicates, order is a ratio or proportion of prior and posterior elements (cf. *Metaph.* VII.12.1038a33). In a social context the fundamental type of priority is that of ruler to ruled:

Whenever a thing is established out of a number of things and becomes a single common thing, there always appears in it a ruler and a ruled. (This is true whether it is formed out of continuous or discrete parts.) This [relation of ruler and ruled] is present in living things, but it derives from all of nature. For even in things that do not have a soul there is a sort of rule, for example, of harmony. (*Pol.* I.5.1254a28–33)

According to this principle of rulership, social order must be produced and maintained by a ruling element. This assumption reflects the link between the Greek noun, *taxis*, "order" ("arrangement," "organization," etc.), and the verb, *tassein*, "to order" ("to command," "to arrange," etc.). Similarly, in a living organism the soul is the natural ruler and authority over the body (*de An.* I.5.410b10–15; cf. Plato, *Phd.* 79e–80a). Aristotle also compares the order of the entire cosmos to that of an army; just as military order is due to the general, cosmic order is due to God. In both cases the parts are organized for the sake of a single end (*Metaph.* XII.10.1075a13ff.).

Given that law is a kind of order, where does it come from? Aristotle recognizes two different causes of order: nature and reason. In the physical world, outside of human creation, "nature is everywhere the cause of order" (*Phys.* VIII.1.252a12). Aristotle here understands "nature" (*phusis*) in terms of his teleological theory that entities have natural ends. Nature provides an internal directing principle, which causes a body to move or remain at rest in a regular manner (*Phys.* II.1.192b20–3). For example, an acorn grows by nature into an oak tree. Because of its internal nature the acorn grows in an orderly manner. Hence, "order is the proper nature of perceptible objects" (*Cael.* III.2.301a5–6). That is, orderliness is the natural condition of things (*GA* III.10.760a31), and disorderliness is unnatural (*Cael.* III.2.301a4–5). In the realm of human production, however, it is reason rather than nature that does the ordering (see *EN* III.12.1119b17). For example, a builder conceives of a form of a house and imposes this form upon a heap of bricks, constructing the house through a definite sequence of stages: foundations, walls, roof, etc. If, then, all order is due either to nature or to human reason, which of these is the cause of law?

For Aristotle, the primary source of law is reason embodied in a human legislator. The *Constitution of Athens* describes Solon's legislative activity at the beginning of the sixth century B.C.:

Next Solon established a constitution and laid down other laws; and they stopped observing the ordinances of Draco, except those relating to murder. They wrote up the laws on the wooden tablets [mounted on pillars revolving on an axis], and set them up in the Stoa (porch) of the Basileus, and everyone swore to observe them. And the nine archons used to swear an oath upon the stone, declaring that they would dedicate a golden statue if they transgressed any law. This is the origin of the oath to that effect which they take to the present day. Solon fixed his laws for a hundred years, and he ordered the constitution in the following manner […]. (*Ath.* 7.1–2)

Nomothetês, the Greek word for "legislator," derives from *nomos*, "law," and *tithenai*, "to lay (down)." The name "legislator" thus implies that the laws owe their existence to a human producer, who is also compared to a "craftsman" (*dêmiourgos*) of the laws or constitution (*EN* X.9.1180a21–2; *Pol.* II.12.1273b32–3). Like a weaver or shipbuilder, the legislator imposes a certain form on his materials, in particular, on the population of the city-state (*Pol.* VII.4.1325b40–1326a5). The legal order resembles cosmic order caused by God (1326a29–34). Legislators include the founders of constitutions, such as Lycurgus of Sparta and Solon of Athens, as well as assemblies or magistrates who lay down particular laws, unwritten as well as written (*Pol.* IV.1.1289a22, 14.1298a17; VI.5.1319b40; *EN* X.9.1180a35–b1).

Aristotle would have rejected the notion of "spontaneous order" espoused by some modern social scientists. He criticizes the theories of some pre-Socratic philosophers that the order of the cosmos arose by chance from earlier events, because he holds that regular outcomes cannot result from chance

events: "chance is a cause in a disorderly or haphazard way" (*MM* II.8.1206b39–1207a1; cf. *Phys.* II.4.196a24–b5, 8.198b34–6, and *Cael.* III.2.301a10). If order does not arise by nature, order can only be due to rational design. Consequently, Aristotle would have dismissed the suggestion that legal order evolves spontaneously through myriad human interactions, as if (but not in fact) "by an invisible hand."

Aristotle also recognizes, however, that the legal order can subsist only if the citizens are law abiding. He thus characterizes law as a kind of common agreement (*homologia*) (*Pol.* I.6.1255a6) and as, "on the whole, a sort of convention [*sunthêkê*]" (*Rhet.* I.15.1376b9–10; cf. *Pol.* III.9.1280b10–11). His point is not that law is *merely* conventional, but that ruling according to law goes hand in hand with being ruled voluntarily (*Pol.* IV.10.1295a15–16). Furthermore, he states: "The law has no power to command obedience except that of habit" (*Pol.* II.8.1269a20–1). Habitual obedience is a precondition of the "compulsive power" of the law (mentioned at *EN* X.9.1180a21). But how is the claim that law results from agreement to be reconciled with the thesis that reason is the source of law? The answer may be sought in Aristotle's distinction between a strict cause and a contributing cause (*sunaition*). For example, he argues that heat is a contributing cause—but not the strict cause—of biological growth, because it does not determine when the process is complete (*de An.* II.4.416a14). Similarly, the laws of Athens required the general agreement of the Athenian citizens if they were to have the force of law. Solon's constitution, in fact, soon failed partly due to the wealthy class's general "dissatisfaction with the constitution because of the great change that had occurred" (*Ath.* 13.3). The contributions of reason and agreement are both recognized in the Aristotelian *Rhetoric to Alexander*: "Law, simply described, is reason [*logos*] defined according to the common agreement [*homologia*] of the city-state, regulating action of every kind" (1.1420a25; cf. 1422a2–3, 2.1424a9–12).

The purpose of law must be understood in relation to the constitution. The following passage makes clear that the study of law is subordinate to constitutional theory:

> The laws ought to be laid down (and everybody does lay them down) with a view to the constitutions, but not the constitutions to the laws. A constitution is the ordering [*taxis*] of offices in city-states: in what way the offices are distributed, what element has authority in the constitution, and what is the end of each community. But the laws which are separate from those revealing the constitution are those according to which the magistrates should rule and guard against violators of them. (*Pol.* IV.1.1289a13–20)

Like law, the constitution (*politeia*) is a sort of "order" (cf. *Pol.* III.1.1274b38), which provides the answer to three questions: (1) How are political offices distributed? (2) What is the sovereign or authoritative element? (3) What is the end of the city-state? Aristotle devotes considerable attention to the first two questions, and, from this viewpoint, the constitution is

identified with the government (*politeuma*) (III.6.1278b8–11). Hence, some translators render *politeia* as "regime." But insofar as *politeia* signifies the order or "form" of the city-state (III.2.1276b7), it corresponds to "constitution." Although the Greek city-states did not have written constitutions in the modern sense, the constitutions were often administered by means of written laws, as in the case of Solon. The above passage (IV.1.1289a13–20) distinguishes three kinds of laws: laws that reveal the constitution, that is, laws regarding the orderly selection of officials (cf. III.16.1287a18); laws administered by magistrates, presumably to maintain order among the citizenry; and laws concerning the prevention and punishment of crime. Such laws are necessary: "The salvation of the city-state depends on the laws" (*Rhet.* I.4.1360a19–20; cf. *Pol.* V.9.1310a34–6). And "where the laws have no authority," Aristotle declares, "there is no constitution" (*Pol.* IV.4.1292a32). Yet the laws are subordinate to the constitution, and the constitution is the first concern of the legislator (III.1.1274b37).

The constitution has to do with the end or goal of the city-state. This is correctly defined by the basic principles of Aristotle's political philosophy: First, the city-state exists for the sake of the good life or happiness (*Pol.* I.2.1252b30, III.9.1281a1–2). Hence, the legislator should try to fashion laws that will tend to produce and protect the happiness and its components for the political community (see *EN* V.1.1129b17–25). Second, the best life or happiness consists of a life of virtuous activity (*EN* I.7.1098a16; *Pol.* III.9.1281a2–3, VII.1.1323b40–1324a2). Therefore, the highest purpose of the legislator is to make the citizens virtuous (*EN* X.9.1180b23–5). When the laws are "laid down correctly," they command the citizens "to live according to each excellence and [forbid] us to live according to each vice" (V.2.1130b23–4, 1.1129b23–5). From this standpoint the constitution is "the way of life of the city-state" (*Pol.* IV.11.1295a40). Citizens who are habituated under the laws acquire self-ruling souls: that is, they are governed by reason rather than appetite. Having internalized the law, a virtuous individual becomes "a law unto himself" (*EN* IV.8.1128a32; *Pol.* III.13.1284a13).

Just as a doctor accepts as a given that health is his aim, "a statesman does not deliberate about whether he shall produce good law, nor does any one else deliberate about his end" (*EN* III.3.1112b14–15; cf. *EE* I.5.1216b18; cf. *Pol.* III.9.1280b6). Good law (*eunomia*) is defined in normative terms: "[L]aw is a certain order, and good law is good order" (*Pol.* VII.4.1326a29–31). By "good law," however, Aristotle means not merely that the laws are good, but that the city-state is in a good legal condition:

Good law does not consist in laying down good laws, if they are not obeyed. We must therefore suppose that good law in one way consists in the actual obedience to the laws that have been framed, and in another way it consists in the fact that the laws that are actually obeyed are laid down nobly (for laws laid down badly can also be obeyed). (*Pol.* IV.8.1294a3–7; cf. *MA* 10.703a30–4)

A city-state with good law is like a virtuous person who knows the right thing to do and acts accordingly. But it may happen that a legislator frames good laws that the citizens fail to obey. For example, the Athenians did not abide by the constitution of Solon, and the tyrant Pisistratus soon after rose to power (see *Ath.* 13–14). Such an inconstant city-state resembles a morally weak person: "[I]t passes the decrees it should and has excellent laws, but makes no use of them" (*EN* VII.10.1152a20–1).

There is thus a close connection among Aristotle's different characterizations of law as "order," "reason," and "agreement." Laws are general rules that produce a kind of order in the actions and desires of the citizens, which are devised in a rational manner by a legislator, and which are effective only if the governed accept and obey them. Because legislation is a rational activity, it is the appropriate subject for an Aristotelian science.

4.3. Legislative Science

The special science called "legislative" (*nomothetikê*) belongs to the second of the three main Aristotelian divisions of the sciences: contemplative, practical, and productive (*Top.* VI.6.145a15–16; *Metaph.* VI.1.1025b25, XI.7.1064a16–19; *EN* VI.2.1139a26–8). Each has a distinctive aim. The end of contemplative thought (e.g., physics, mathematics, and theology) is knowledge or truth for its own sake; the end of productive thought (e.g., poetry, medicine, and architecture) is the creation of an object distinct from the productive activity; and the end of practical thought is good action for its own sake. "Practical" thought is so called because it aims at action (*praxis*). The excellence of practical thought is practical wisdom or prudence (*phronêsis*), which issues in true judgments about actions that are good or bad for a human being (cf. *EN* VI.5.1140b4–6). This has three subtypes: practical wisdom concerned with the individual, economics (*oikonomikê*) concerned with the household (*oikos*), and political science ("politics" for short) concerned with the city-state. Politics includes legislative science (*nomothetikê*) and politics in a more familiar sense, involving everyday political activities such as deliberation and adjudication (*EN* VI.8.1141b29–33; *EE* I.8.1218b12–14). The latter are concerned with particular circumstances; for example, a judge must determine whether a particular crime was committed or not (*Rhet.* I.1.1354b13–15). Thus, legislative science is a part of politics (*EN* X.9.1180b30–1). Aristotle conjoins the term "legislator" with "statesman" (*politikos*) (*Pol.* III.1.1274b37, IV.1.1288b27, V.9.1309b35; cf. *EN* I.13.1102a7–10), and he likens the laws to "acts [*erga*] of political science" (*EN* X.9.1181a23).

Aristotle views legislative science as the capstone of politics:

Of the practical wisdom concerned with the city-state, the practical wisdom which plays a controlling role is legislative, while that which is related to this as particulars to their universal is

known by the common name of "political." This is capable of action and deliberation, for a decree is a thing to be carried out in the form of an individual act. That is why the exponents of this art are alone said to take part in politics; for these alone do things as manual laborers do things. (*EN* VI.8.1141b24–9)

Legislative science is thus the "master science" of the human good (*EN* I.2.1094a26–b7). The study of legislation, and in particular constitutional theory, is needed to bring "the philosophy of human affairs" to completion (X.9.1181a12–15).

Aristotle discusses in *Politics* IV.1–2 the tasks of "the legislator and true statesman" (1288b27). Any complete science or craft must study a wide range of issues concerning its subject matter. Political (i.e., legislative) science studies a range of constitutions (1288b21–35): not only the ideal constitution, but also inferior systems. "For it is probably impossible for many persons to attain the best constitution, so that the legislator and true statesman must overlook neither the best constitution without qualification nor the best under the circumstances" (1288b24–7). The legislator must be acquainted with three sorts of constitution: first, the best without qualification, that is, "most according to our prayers with no external impediment" (1288b23–4); second, the best under the circumstances for a given population; third, the constitution that serves the aim a given city-state population happens to have that is best based on a hypothesis:

[F]or [the political scientist] ought to be able to study a given constitution, both how it might originally come to be, and, when it has come to be, in what manner it might be preserved for the longest time; I mean, for example, if a particular city happens neither to be governed by the best constitution, nor to be equipped even with necessary things, nor to be the [best] possible under existing circumstances, but to be a baser sort. (1288b28–33)

This passage has been interpreted in very different ways: Some view Aristotle as endorsing "Machiavellian realism," with the political scientist as a "hired consultant" equipped with "political mechanics employed perhaps for an inferior or even a bad end" (Barker 1931, 164; Irwin 1985, 155). Others note Aristotle's emphasis on constitutional reform (*Pol.* IV.1.1289a3–4) and argue that "constitutional reform presupposes a political ideal" (Keyt 1999, xv; F. Miller 1995, 183–90).

Aristotle chides earlier theorists (including Plato no doubt) for fixating on ideal theory and neglecting practical necessity. The legislator/statesman should try to establish "a constitutional order that people will be easily persuaded to accept and able to participate in," since reforming a constitution is no less a task than setting one up in the first place (*Pol.* IV.1.1288b35–1289a7). This requires a thorough knowledge of constitutions: what kinds there are, how many there are, how they can be combined with each other. "It is with this same practical wisdom that one knows the laws that are best and those that are suited to each constitution. [...] So grasping the varieties and

the number of each type of constitution is clearly necessary also for laying down laws" (IV.1.1289a13–22).

Aristotle distinguishes between correct constitutions, which promote the common advantage, from deviant constitutions, which promote the advantage of the rulers, and combines this with the observation that the ruling class may consist of one person, a few, or a multitude. Hence, there are six basic constitutional forms (*Pol.* III.7):

	Correct	*Deviant*
One ruler	KINGSHIP	TYRANNY
Few rulers	ARISTOCRACY	OLIGARCHY
Many rulers	POLITY	DEMOCRACY

The correct constitutions are just and according to nature, and the incorrect constitutions are unjust and unnatural (*Pol.* III.6.1279a18–20, 17.1287b36–41). And since the laws are subordinate to the constitution, "the laws conforming to correct constitutions must be just, but those conforming to deviant constitutions must be unjust" (III.11.1282b10–13).

The above sixfold schema[2] is only the starting point for Aristotle's classification of constitutions, because there are many varieties of each type. A large democracy like Athens might include wealthy landed aristocrats, farmers, craftsmen, merchants, sailors, fishermen, and manual laborers. The character of the democracy would depend upon the relative power of these different classes (IV.3.1290a8). Aristotle distinguishes a range of democratic constitutions that might arise, from a moderate form with a modest property qualification (excluding the "baser" sort of citizen) to an extreme form, which included all freeborn persons no matter how poor and uneducated who were susceptible to demagoguery (IV.4.1291b14–1292a13). In general, "the legislator and statesman ought to know what democratic measures save and what destroy a democracy, and what oligarchic measures save or destroy an oligarchy" (*Pol.* V.9.1309b35). This requires knowledge of the different sorts of constitutions and how these can be combined to become "mixed" constitutions of various sorts (*Pol.* IV–VI). Aristotle's view is, again, open to different interpretations: Should legislators try to bring about genuine reform, making actual democracies or oligarchies more like the ideal constitution? Or should they strive for quasi-reform, making them more stable and viable constitutions of their type, even if they are not more just?

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[2] This is adapted from Plato's *Plt.* 300b–303c. See the discussion in this volume, Chapter 3, Section 3.4.

In any case, the legislator for the best constitution must possess broad knowledge of human cultures and be able to adapt the laws to variable social contexts: "[T]he excellent legislator should observe how a city-state or race of men or any other community may participate in a good life and in the happiness that is possible for them." For example, in the case of military affairs, the legislator must obviously take into account the actual threats faced by the city-state: "There will be differences, however, in the statutes that are enacted; and if there are neighbors, legislative science has the task of seeing what sorts of training are needed in relation to what sorts of people, and which measures should be adopted in relation to each sort" (*Pol.* VII.2.1325a7–14). But, as an overriding objective, "the legislator should be more serious about arranging military regulations and other legislation for the sake of leisure and peace" (VII.14.1334a3–5).

Aristotle discusses two distinct but interrelated applications of legislation: laying down laws and educating the citizens (VII.14.1333b9). Let us consider these in turn. The statutes and customs regulate all aspects of conduct, including marriage and family relations, contracts, property, voluntary transactions, and torts; but the most important of these concern the distribution of political power within the city-state. Aristotle argues that every constitution contains three elements: deliberative (e.g., the popular assembly), adjudicative (e.g., jury courts), and offices (e.g., treasurers, wardens, and auditors). The excellent legislator must consider which of these is advantageous for each constitution (IV.14.1297b38). These elements can take very different forms; for example, all the citizens have a right to deliberate (e.g., extreme democracies), or only some may be permitted to deliberate (e.g., oligarchies), or all of them may deliberate about some things (e.g., whether to pass a decree), but not about others (e.g., determining whether a decree is legal), as in moderate democracies and polities. Aristotle provides (*Pol.* IV.14–16) a systematic and almost exhaustive account of the different "modes" or ways these matters are handled; for example, which persons are eligible for office, how are they selected, in what manner, etc.? This systematic and almost exhaustive inventory of modes is the fruit of Aristotle's extensive empirical study of existing city-states. Drawing on such knowledge, the legislator can fashion appropriate statutes for each constitution.

Education is the other major concern of legislative science. For the legislator has not completed his job by merely laying down good laws. As the unfortunate example of Solon shows, the citizens may not be disposed to obey the laws. Threats of punishment are not in Aristotle's view a sufficient guarantee that the citizens and officials will support the constitution and laws (see *Pol.* IV.5.1292b11–17). The laws themselves thus must have an educative function: "Whoever wants to make people, whether many or few, better by his care must try to become capable of legislating, if it is through laws that we can become good" (*EN* X.9.1180b23–5). Aristotle argues as follows: Rational moral

arguments involve an appeal to goodness or nobility. People will be motivated only by pleasure or pain unless their souls have first been cultivated "like earth which is to nourish seed," that is, unless they have been taught by habit to love the good and noble and to hate the evil and base (1179b25–6). They will come to recognize the inherent value of virtue only by performing virtuous actions repeatedly, so that they acquire the habit of acting virtuously. Hence, they will not respond to rational moral arguments unless they have first been morally habituated. Further, those who have not yet been morally habituated will only respond to "compulsive power," which commands have only when they are backed by the law (1180a21). Therefore, people can be morally educated only if they are habituated under the laws.

Because legislative science has an important pedagogical function, Aristotle devotes over half of his discussion of the ideal constitution to its educational system (*Pol.* VII–VIII). The legislator must be knowledgeable of human nature and cognizant of the diversities of human lives and actions as he designs a system of education that will promote the development of the citizens' bodies and souls (VII.14.1333a37–41, 15.1334b6–28). There must be a detailed program of prenatal and infant care, physical education, and liberal education, including letters, mathematics, and music. The educational system must be public in view of the fact that the citizens have a single common end, the life of moral virtue, which can be achieved only if every citizen is educated (VII.13.1332a31–6; VIII.1.1337a21–6). But education in civic virtue is also necessary for deviant constitutions. "The most beneficial laws, even though they are ratified by everyone in the government, will be of no benefit, unless the people are habituated and educated in the constitution, democratically, if the laws are democratic, and oligarchically, if the laws are oligarchic" (*Pol.* V.9.1310a14–18).

Even when there is not a system of public education, private citizens should undertake to educate their children and friends, and they will do so more effectively if they are capable of legislating. "For it is clear that public care comes about through laws, and reasonable care through excellent laws. And it would seem to make no difference whether the laws are written or unwritten, nor whether an individual or many persons are educated through them" (*EN* X.9.1180a34–b2). Furthermore, parental statements and habits may have a force in households analogous to that of statutes and habits in city-states, perhaps even more since they are buttressed by natural affection and propensity to obey. Aristotle allows that individualized instruction has an advantage over mass education. The teacher can adapt teaching techniques to the particular needs and circumstances of the individual student, just as a medical doctor can treat the individual patient. But he also notes that just as the doctor requires universal knowledge of what is good for every one or for persons of a specific kind, so also the educator needs universal knowledge: "[H]e who wants to make people, whether many or few, better by his care

must try to become capable of legislating, if it is through laws that we can become good" (*EN* X.9.1180b23–5).

4.4. Justice and Law

Law and justice are frequently coupled in Aristotle's thought. "Man when perfected is the best of animals," he maintains, "but when separated from law and justice, he is the worst of all" (*Pol.* I.2.1253a31–3). The close connection between the two concepts is an important theme of his treatise on justice (*EN* V = *EE* IV). Aristotle begins by emphasizing that justice is a moral virtue; justice is "that kind of state which makes people disposed to do just things and makes them act justly and wish for just things" (*EN* V.1.1129a7–9). He remarks that "justice" is spoken of homonymously (i.e., ambiguously), a fact that we recognize more clearly from its opposite "injustice." Sometimes, a person is called unjust in the sense of "unlawful" (*paranomos*), and sometimes in the sense of being "unfair" or "taking too much" (cf. *Pol.* VII.2.1324b27–8). Likewise, "just" has a broad or universal sense of "lawful" (*nomimos*), as well as a narrow or particular sense of "fair." The universal sense of "justice" accordingly presupposes a theory of legislation:

Since the unlawful person was [seen to be] unjust and the lawful person just, it is clear that all lawful things are in a way just. For the acts that are prescribed by legislative science are lawful, and we say that each of these is just. As they address all affairs the laws aim at the advantage either of everyone in common or at that of the best persons or of those who have authority either based on virtue or on some other basis, so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political community. (V.1.1129b11–19)[3]

Therefore, a just person (in the universal sense) pursues the same end as the laws, namely, the well-being of the political community (see Kraut 2002, 111–18). Justice in this universal sense is not a particular virtue like courage. Instead, it is the same as complete virtue, not in itself but in relation to other persons. It is complete virtue in the fullest sense, because its possessor can exercise his virtue in relation to other persons and not merely in relation to himself. Similarly, its opposite—universal injustice—is identical with the totality of vice. Universal justice provides the standard by which the legislator can define lawful and unlawful acts:

By and large most of the lawful acts [*ta nomima*] are those prescribed from a concern with virtue as a whole; for the law commands us to practice every virtue and forbids us to practice any

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[3] The text is apparently redundant. Editors propose two solutions: Susemihl's Teubner text deletes *ê tois aristois* ("or at that of the best persons") at 1129b15–16 and reads *ê* before *kat'* at b16. Bywater's Oxford Classical Text deletes *kat' aretên* ("based on virtue") at b16. The two solutions seem equivalent.

vice. And the things that tend to produce virtue as a whole are those lawful acts which have been prescribed with a view to education for the common good. (*EN* V.2.1130b22–6)

This implies that completely virtuous persons have been educated under the laws, and they are thoroughly law-abiding individuals who seek the common advantage of their fellow citizens.

"Justice" can also designate a particular virtue on a par with courage or temperance, and in this case its opposite is the vice of unfairness or taking too much (*pleonexia*), involving an excessive desire for gain. Aristotle distinguishes forms of particular justice, namely, distributive justice, corrective justice, and perhaps also commutative justice.[4]

Distributive justice applies to the distribution of offices, honors, property, or other things that may be divided among the citizens. It implies that people should be treated equally in terms of their merit or desert. This involves a "geometrical" equality, since the parties should receive shares proportional to their merits rather than precisely the same shares. Conflict often results from disagreements over distributive justice: "Although everyone agrees that justice in distributions ought to be according to merit in some sense, they do not call merit the same thing, but democrats call it free birth, advocates of oligarchy wealth, and those of aristocracy virtue" (3.1131a25–9). The constitutional theory in the *Politics* is explicitly based on Aristotle's theory of distributive justice.[5] He holds that constitutions such as democracy and oligarchy are deviant because they are based upon conceptions of distributive justice that fall short of justice in the unqualified sense, in that they have a mistaken standard of merit and ultimately a mistaken hypothesis about the end of the city-state: The democrats think that the end is freedom, and the oligarchs think that it is wealth. The correct conception of justice for Aristotle makes moral virtue, along with freedom and adequate property, the criterion of merit. But the legislator must also be cognizant of the deviant conceptions of justice in framing the constitution and laws of a city-state, or it will be plagued by faction and even revolution.

Corrective justice is concerned with the rectification of past injustices, where the loss may be either voluntary (e.g., loans or sales) or involuntary (e.g., adultery, fraud, murder, or robbery). Unlike distributive justice, which involves "geometric" equality, corrective justice assigns shares to parties based

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[4] The place of commutative or "reciprocal" (*antipeponthos*) justice in Aristotle's theory is controversial. At *EN* V.2.1130b30–1131a9, he expressly distinguishes between two types of particular justice: distributive justice and corrective justice (cf. 1131b25). But at 5.1132b31–4, he both recognizes reciprocal justice as a distinct type involved in communities of exchange and emphasizes its importance (cf. *Pol.* II.2.1261a30–1). This discussion assumes that commutative justice has a place in Aristotle's legal thought.

[5] Note that *Pol.* III.9.1280a18 refers to *EN* V.3.1131a14–24, and *Pol.* III.12.1282b20 refers to *EN* V.3.1131a11–14. See Keyt 1991 for an illuminating discussion.

on their relative merits, and so involves an "arithmetical" proportion. It treats the violator and victim as equals: "The law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other being wronged, and if one inflicted injury and the other received it" (4.1132a4–6). To reach a just verdict the judge must in effect restore equality by transferring from the perpetrator to the victim an amount equivalent to his loss so that he is made whole again. The penalty is thus intended to restore equality. Aristotle argues that this is generally what people have in mind when they go to a law court and seek justice. The judge is a kind of "mediator" who is supposed to arrive at a just settlement consisting in a distribution that is intermediate between an unjust gain and an unjust loss.

Aristotle's account of corrective justice can be viewed as an early explanation of the law of torts. This account plausibly "links the plaintiff's right to compensation to the defendant's duty to compensate" (Gordley 1999, 96). But it seems unsatisfactory as a theory of punishment, since guilty parties merely have to yield up their ill-gotten gains while suffering no real loss for their misdeeds. But Aristotle elsewhere indicates that the law may require punishment apart from mere compensation. For example, the law forbids suicide, even though the person who kills himself has not inflicted a harm on anyone else. Because the person who committed suicide has committed an injustice against the city-state (presumably for failing to carry out his duties as a citizen), the law may punish him, for example, posthumously "dishonoring" him by stripping him of his civil rights (11.1138a9–14). Again, someone who injures an official should not be merely injured to the same degree in return but should also suffer an added punishment (5.1132b29–30). Aristotle also mentions seemingly with approval the doubling of penalties in the case of drunkenness (III.5.1113b31–2). But there is no sign that he sees the need for a theory of punishment over and above his discussion of corrective justice.

Aristotle does however discuss a topic related to punishment, namely, the "difference between a voluntary and an involuntary act" (V.5.1132b30–31). Understanding this distinction is "necessary for investigators of virtue and useful for legislators with a view to assigning honors and punishments" (III.1.1109b34–5; cf. *EE* II.10.1226b36–1227a1). His treatment of voluntariness (*EN* III.1–5; cf. *EE* II.6–11) influenced subsequent theories of legal responsibility. In brief, an occurrence is involuntary if it takes place under compulsion or due to ignorance. "Under compulsion" means that the moving principle is outside the party in question, that is, the person makes no contribution, as in the case of a ship carried somewhere by the wind, or a person transported by kidnappers. "Due to ignorance" means not ignorance of a universal rule, for example, against patricide (one is culpable for this), but of the particular circumstances or objects of an action, for example, killing one's own father in battle thinking that he was an enemy. Conversely, "the voluntary would seem to be that of which the moving principle is in the agent himself, when he knows the

particular circumstances of the action" (*EN* III.1.1109b35–1111a24). Although this seems clear-cut, Aristotle mentions several complex cases, which he handles with subtle and controversial distinctions. For example, actions performed under duress (e.g., breaking the law when ordered to by a tyrant who holds one's relatives hostage) or in an emergency (e.g., throwing cargo overboard in a storm) are voluntary in Aristotle's sense. He calls these "mixed" actions (because they are voluntary but nobody would choose to do such acts unless one had to), and suggests that forgiveness may be in order "when one acts wrongly due to factors which exceed human nature and which no one could endure." Aristotle also denies that a crime committed due to drunkenness or rage is involuntary. If a drunken person causes harm without realizing it, he is acting "in ignorance" rather than due to ignorance, because he is responsible for his ignorant condition. Aristotle also denies (rather unpersuasively) that the act is involuntary when the agent subsequently lacks remorse, even when he was nonculpably ignorant of what he was doing, and he classifies this case as "not voluntary."

Commutative or reciprocal justice holds the city-state together (*EN* V.5.1132b33–4), because it ensures that parties to a voluntary exchange each receive a fair or equal outcome. This equality is measured in terms of need (*chreia*), Aristotle says rather obscurely. Money is introduced as a representative of need by convention (*sunthêkê*). It exists not by nature but by law (*nomos*), which is why it is called *nomisma*, "money" (*EN* V.5.1133a25–31; cf. *Pol.* I.9.1257b10–11, *MM* I.34.1194a23). Because Aristotle thinks that exchanges must be equal, he denigrates the use of trade to generate profits: "[F]or it is not natural, but a way of gaining from one another. Usury is very reasonably hated, because it makes wealth out of money itself, and not from the aim for which it was introduced. For money came into existence for the sake of exchange, but interest makes it greater. […] So of all the modes of acquisition this is the most unnatural" (*Pol.* I.10.1258b1–8). The clear implication is that just laws would prohibit or severely limit commerce and banking.

Having discussed the three particular forms of justice, Aristotle considers the application of justice to the city-state. "Political justice exists among persons who share a way of life with a view to self-sufficiency, who are free and are equal either proportionately or numerically." If these conditions are not satisfied, there is no political justice but only justice in a qualified or analogous sense. For the law and judicial proceedings discriminate between just and unjust acts (*EN* V.6.1134a26–32). Political justice is "according to law" (*kata nomon*), and holds for persons who are naturally able to obey the law. These are the sort of people who are capable of self-government, because they can share equally in ruling and being ruled (1134b13–15).

4.5. Natural Law

The relationship between law and nature is one of the hardest issues in Aristotle's legal philosophy. Especially controversial is his stance on natural law. He has been dubbed "the father of natural law," and he unquestionably exerted a profound influence over later natural law theorists such as Thomas Aquinas (Shellens 1959, 72; cf. Barker 1946, 336; Friedrich 1958, 22–3; Crowe 1977, 19). Yet Aristotle discusses "natural law" explicitly only in his *Rhetoric*, and these discussions seem inconsistent with doctrines expounded in his ethical and political works. Some scholars even deny that Aristotle belongs to the natural law tradition (Ritchie 1895; Kelsen 1957, 128; Yack 1990, 216). This section will summarize the discussion of natural law in the *Rhetoric*. The following section will examine the related topic of natural justice in Aristotle's ethical and political works, and consider to what extent the different discussions can be reconciled.

The idea of natural law is discussed in three different passages.[6] These discussions basically agree on several points: The law is both particular (*idios*) and common (*koinos*) (10.1368b7, 13.1373b4). The common law consists of things agreed upon by all persons (10.1368b7–9, 13.1373b6–9), and it is law according to nature (*kata phusin*, *phusei*) (13.1373b6–7, 10; 15.1375a32). It is tacitly assumed that the common law is equivalent to common or natural justice (13.1373b6–9; 15.1375a27–9, b3–5). The common law is eternal and never changing, because it is natural (13.1373b9–13, 15.1375a31–b2). The common law can come into conflict with the particular law in the sense that the same act can violate natural law but conform with the former. Here Aristotle cites the example of Sophocles' Antigone, who buries her brother Polyneices in defiance of an edict of the tyrant of Thebes (13.1373b9–13; 15.1375a27–9, a33–b2, 7–8).

The three discussions also make distinct but complementary points to the effect that particular law is conventional: Particular law is the law according to which people govern themselves (10.1368b7–8). It is defined by each group in reference to themselves (13.1373b4–5) and is a sort of covenant (15.1376b7–11). Hence, in contrast to the common law, particular written laws often change (15.1375a32–3). His citations from Sophocles and reference to Alcidamus also suggest that natural or common law has a divine origin (13.1373b9–18, 15.1375a33–b2), but it should be emphasized that this claim is not explicitly made in the *Rhetoric*.[7] Nevertheless, Aristotle does state an important implication of the preceding claims: Natural law is the law of all in the sense that if an act is just for some persons it is just for all (13.1373b14–17). That is, common or natural law differs from particular law in that it is

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[6] Subsequent references in this section are to *Rhetoric* I unless otherwise indicated.

[7] Alcidamus' condemnation of slavery and Empedocles' denunciation of the killing of animals seem to be familiar invocations of natural law, rather than precepts endorsed by Aristotle.

absolute, whereas particular laws are relative to the communities that agree upon their enactment.

So far, these discussions provide an account of natural law which is on the whole coherent, although they do contain some apparent inconsistencies. The most notable of these involves the notion of unwritten law (*agraphos nomos*). Particular law is identified with written law at 10.1368b7–8, whereas particular law is distinguished as unwritten or written at 13.1373b5–6. The most plausible explanation for this inconsistency is that "unwritten law" is not a technical expression with a single fixed meaning for Aristotle, but varies from context to context depending upon what it is contrasted with.[8] In *Rhetoric* I.10 "the unwritten law" is used for the common or natural law, comprised of rules holding for mankind at large, in contrast to the particular or "written law." In *Rhetoric* I.13 "the unwritten law" is used for the portion of the particular law of a community that consists of unwritten customs rather than codified statutes, which might vary between communities, such as burial customs (cf. Pseudo-Aristotle, *Rhet. Al.* 2.1421b35–1422a4).

Apart from minor inconsistencies, the *Rhetoric* offers a coherent account of natural law with noteworthy similarities to the later natural law tradition. A central feature of this account is the claim that natural law is eternal and immutable. Aristotle quotes from Sophocles' *Antigone* 456–7:

These laws weren't made now
Or yesterday. They live for all time,
And no one knows when they came into the light. (Sophocles, *Ant.* 456–7, trans. Woodruff)

This passage illustrates the conflict between natural law and particular law (see especially I.15.1375a25–b25).[9] A persuasive speaker should appeal to natural law in opposition to the written law, on the grounds that natural law embodies eternal and immutable principles of justice. But if the written law supports our case, we should argue that the jurors have a duty to enforce this law. Aristotle's treatment suggests that litigants were more apt to invoke natural law when they had a weak case in regard to written statutes.

4.6. Legal Justice and Natural Justice

Aristotle does not mention "natural law" in his ethical works. Instead, he distinguishes "legal justice" from "natural justice" in *Nicomachean Ethics*.[10] Aris-

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[8] See Ostwald 1973 on the different uses of *agraphos nomos*. In some contexts "unwritten" is contrasted with "legal" (*kata nomon*), e.g., *EN* VIII.13.1162b21–3, where the issue is whether just claims arise from written or unwritten agreements.

[9] Compare the discussion in this volume, Chapter 1, Section 1.5.3.

[10] This exposition generally follows the *Nicomachean Ethics*, although mention will be made of some important variations in the parallel discussion of this topic in the *Magna Moralia*. Quotations in this section are from *EN* V.7 or *MM* I.33 unless otherwise indicated.

totle distinguishes two forms of political justice: natural and legal (*EN* 1134b18–19; cf. *MM* 1194b30–1). Natural (*phusikon*) justice has everywhere the same force and does not depend on people's thinking that something or other is the case. Legal (*nomikon*) justice is that which is such that at first it does not make a difference whether or not it is the case, but when it has been laid down it does make a difference, for example, that a prisoner's ransom shall be a mina, or in particular cases, to make a sacrifice in honor of Brasidas (1134b20–4; cf. *MM* 1195a4–5). Aristotle's legal justice anticipates the medieval idea of positive law.[11] Aristotle also describes legal justice as based on convention (*sunthêkê*) (1134b30–3, b35–1135a1) and as a human product (1135a3–4). This agrees with the parallel between conventional justice and particular law described in the *Rhetoric*.

The *Nicomachean Ethics* disagrees with the *Rhetoric*, however, in two important ways. The first concerns change and variation in the laws. Although the *Rhetoric* claims that natural law is eternal and immutable, the *Nicomachean Ethics* calls this into question, when it considers an objection against the possibility of natural justice:

That which exists by nature is unchangeable and everywhere has the same power, as fire burns here and in Persia.
Just things undergo change. Therefore, there is no natural justice, but all just things are legally just. (1134b24–7)

Aristotle replies that it may be true of the gods that there is no change, but in the human sphere some things may be natural even though they are changeable (1134b27–30; but contrast X.8.1178b10–12). He observes that other things may be natural as well as changeable, for example, the right hand is naturally stronger than the left, although anyone can become ambidextrous through practice (*EN* 1134b30–5; cf. *MM* 1194b33–7). Similarly, the fact that just things are capable of being otherwise does not show that they are not natural.

The *Nicomachean Ethics*' reference to right-handedness is rather opaque. In this case the *Magna Moralia* sheds more light by adding that "what holds for the most part and the greater time is by nature" (1194b37–9). Human beings are for the most part right-handed, although there are exceptions. By analogy, then, what is just for the most part is manifestly just by nature. This gives Aristotle his response to the above objection: Even if things change due to our usage, there is still natural justice (1195a1–4).

There is good reason to take this contribution of the *Magna Moralia* seriously. For the connection between what is natural and what holds always or

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[11] On medieval theories of positive law generally, see Ullmann 1975, 62–3; and Van Den Eynde 1949. For discussion of positive law in Abelard, see this volume, Chapter 12, Section 12.3.3; and for discussion of positive law in Aquinas, see Chapter 13, Section 13.5.

for the most part is found often in Aristotle's nonethical treatises.[12] It is tacitly assumed in the *Nicomachean Ethics* itself, in Aristotle's response to the argument that the noble and the just are conventional rather than natural because they are subject to difference and variation. Aristotle concedes this but proceeds:

We must be content, then, in speaking of such subjects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for the most part and with premises of the same kind to reach conclusions that are no better. (I.3.1094b19–22)

This passage presupposes the argument made explicit in the *Magna Moralia*: From the fact that moral propositions about justice hold only for the most part, it does not follow that they are true merely by convention.

This helps to clarify a fundamental difference between "natural law" in the *Rhetoric* and "natural justice" in the *Nicomachean Ethics* and *Magna Moralia*: While the *Rhetoric* regards the natural as eternal and immutable, the ethical works understand nature as consistent with change and what holds for "the most part," as in the biological works. Aristotle doubtless found it necessary to adopt this biological perspective because he had repudiated the metaphysical foundations of Plato's theory of natural law and justice. Plato's *Laws* represents justice and law as "natural" in the sense of having a divine origin (see IV.715e7–716a3, 716c4–6; X.888d7–890d8). Nature in Plato's *Republic* is a transcendent, eternal, and immutable principle involving the theory of Forms (V.501b2; cf. X.597c2, 598a1; also *Phd.* 103b5). Aristotle replaced this Platonic ideal with a notion of nature as a principle of change which is inherent in substances and which, in the sublunary realm at least, holds always or for the most part.[13]

A second important disagreement concerns the relation of nature to human legislation. The previous section noted that the *Rhetoric* emphasizes the possible adversarial relationship between (divine) natural law and (human) written law, a conflict illustrated by Sophocles' *Antigone*. The *Magna Moralia* makes a somewhat similar point, concluding that natural justice is better than legal justice, and then states: "But what we are seeking is political justice; but political justice exists by law, not by nature" (1195a6–8). Although the *Magna Moralia* departs from the *Rhetoric* here by contrasting law with nature, the two seem to agree that there is an opposition between natural justice and po-

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[12] See *An. Pr.* I.3.25b14, 13.32b5–6; *Phys*. II.8.198b35–6; *PA* III.2.663b28–9; *GA* I.19.727b29–30, IV.4.770b11–13, 8.777a19–21; and even *Rhet.* I.10.1369a35–b2 (cf. *Metaph.* VI.2.1027a8–11).

[13] See Maguire 1947; Morrow 1941; Moser 1952; and this volume, Chapter 3, Section 3.3. The Platonic ideal survives in the pseudo-Aristotelian *De Mundo* (written between 50 B.C. and A.D. 100): "God is to us a law, impartial, admitting not of correction or revision, and better, I believe, and more secure than those which are written up on tablets" (6.400b28–31). On the differences between Aristotle and later natural law theorists, see Striker 1996b.

litical justice. The paradoxical implications are that although natural justice is superior it plays only a marginal role in legal affairs, and that political justice is conventional rather than natural.

The *Nicomachean Ethics* takes a very different tack: Having defined political justice as the justice found among members of the city-state (see V.6.1134a26–8), it treats the legal and natural as distinct *parts* of political justice, so that natural justice is included in rather than opposed to political justice. There are two ways of understanding this distinction: as a vertical division of political justice into different sets of laws, or as a horizontal distinction whereby each law has a natural and legal (conventional) aspect. The latter seems to be more consistent with Aristotle's approach (see Burns 1998). The natural is thus viewed as penetrating or permeating political justice. This suggests that if one were to examine the constitution, laws, and customs of a just city-state, one would discern some features that were naturally just, and others—such as the example of the amount of a prisoner's ransom—that would be indifferent until they were instituted. When the *Nicomachean Ethics* states that "constitutions are not [the same], though everywhere only one is the best according to nature" (1135a4–5), it implies that constitutions can be evaluated and compared as better or worse on the basis of the extent to which they possess naturally just features.

The claim that political justice has both legal and natural components is bound up with the theory of political naturalism that is defended in Aristotle's *Politics*. This involves the claims that the city-state exists by nature (*Pol.* I.2.1252b30), humans are by nature political animals (1253a2–3), and the city-state is by nature prior to the individual (1253a25–6). But Aristotle conjoins the claim that political association is natural with the recognition that the legislator plays an indispensable role:

Therefore, there is by nature an impulse for such a community in everyone; but the one who first established it was the cause of the greatest of goods. For just as a human being is the best of the animals when perfected, so also when he is separated from law and justice he is the worst of all. For injustice is harshest when it possesses arms; but a human being is born possessing arms for the use of practical rationality and virtue, which are especially suited the opposite use. Therefore, when he is without virtue he is the most unholy and savage [animal], and the worst concerning sex and food. But justice is political; for the administration of justice [*dikê*] is [the] order [*taxis*] of the political community, and the administration of justice is a judgment regarding what is just.[14] (1253a29–39)

Here Aristotle recognizes human nature and the legislator as joint causes of the city-state: Humans have a natural propensity to join in political life, but the legislator provides the legal order which human beings require to realize their natural human ends (see Barker 1959, 327; F. Miller 1995, chap. 5; Saunders 1995, 63; Burns 1998, 155; for an opposed interpretation see Keyt

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[14] I read *dikê* at 1253a38 with Dreizehnter and the manuscripts.

1991). Legislators should follow nature's guidance, taking into account the ways human beings naturally grow and behave (see, e.g., *Pol.* VII.17.1337a1). Yet they must often use their ingenuity to fashion laws suitable for particular city-states. To the extent that the legislator succeeds, the city-state will be in a natural condition—that is, it will have a correct or just constitution.[15]

4.7. The Rule of Law and Legal Change

Aristotle's philosophy of law gives rise to a number of difficulties, some of which he attempted to address. One of these concerns "the rule of law," a generally accepted ideal in classical Greece. According to Aristotle, the best constitution, based upon the correct interpretation of justice, assigns political authority to virtuous individuals (*Pol.* III.9 and 12; see Section 4.4 above). Aristotle notes that "some persons" think that this implies the rule of law:

[S]ome people think that it is not according to nature for one person to have authority over all the citizens, where the city-state is established out of similar persons. For persons who are similar by nature necessarily have the same right and the same merit according to nature. [...] Consequently, it is just to rule no more than to be ruled, and it is just [to rule and be ruled] by turns. But this is already law; for law is the order [*taxis*] [by which offices are shared]. Hence the rule of law is preferable to that of a single citizen. (III.16.1287a10–14, 16–20)

The statements about the rule of law in *Politics* III.15–16 occur in a context where Aristotle subtly paraphrases interchanges between advocates of absolute kingship and proponents, so this passage needs to be interpreted in a careful manner. Aristotle does however subsequently suggest that he finds the above argument convincing, provided that the citizens are in fact similar and equal (*Pol.* III.17.1287b41–1288a5; cf. *EN* V.6.1139a26–30, b13–15).

Aristotle mentions some of the key elements of the rule of law contrasting it with the rule of an individual or group acting according to mere wish or will. Willful rule occurs when monarchs substitute edicts for laws, or democratic majorities substitute decrees (*Pol.* IV.4.1292a6–7, 18–21). The rule of law is typically found when the citizens take turns in holding offices where statutes define eligibility, selection, review, etc. (III.6.1279a8–13). The rule of law may be enforced by special officials, such as "guardians of the laws" who see to it that assemblies or magistrates do not transgress the laws (see IV.14.1298b26–1299a1).

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[15] Kelsen 1957, 128, argues that for Aristotle the correct conception of distributive justice can only be defined by positive law: "Only if it is supposed that the positive law decides the question which rights shall be conferred upon citizens, and which differences between them are relevant, [is] Aristotle's mathematical formula of distributive justice applicable." According to Kelsen (1957, 125) the content of justice can only be determined by the positive law. Kelsen is correct to emphasize legal justice, but he fails to take into account the importance of human natural ends in Aristotle's ethics and politics.

Some of Aristotle's arguments echo Plato (*Laws* IV.714b3–715d6) and others are commonplaces: The law is impartial (*Pol.* III.16.1287a41–b5; cf. *EN* V.6.1134a35–b2). If all political activity were left up to decisions by individuals on a case-by-case basis, there is a danger that they would be influenced by particular factors such as friendship, animosity, and self-interest rather than justice. The process of framing the laws involves considerable deliberation and the legislator can take a broader view of the issues (see *Rhet.* I.1.1354a34–b11; cf. *Pol.* III.9.1280a14–16). Moreover, the law is the embodiment of "thought [*nous*] without desire" (III.16.1287a32; cf. Plato *Laws* IV.714a1–2, and I.644d103, 645a1–2, VIII.835e4–5). The rule of law is therefore superior to the rule of man: "The capacity for passion is not present in the laws, but every human soul necessarily has it" (*Pol.* III.15.1286a18–20). The equation of the law with reason (discussed above in Section 4.2) would be interpreted by Aristotle as the claim that legislation is the product of a legislator endowed with practical wisdom and thus able to frame the best constitution and legal system.

These eloquent arguments have often been quoted in support of the rule of law. Yet Aristotle himself acknowledges a major exception to the principle that "where the laws do not rule, there is no constitution" (IV.4.1292a32). This exception involves the case for absolute kingship. By his own principle of distributive justice Aristotle must admit as a theoretical possibility that if one person (or a small number) is so outstanding in moral virtue and political ability that the others are not even commensurable with him, then the superior person should have complete authority over all. Such a person is like a god on earth, and to deny him complete authority would be unjust and unnatural (III.13.1284a3–11, 17.1288a24–9). Aristotle tries to relieve the problem by remarking that the absolute kings are a law unto themselves (13.1284a13–14, 17.1288a3). Perhaps he means to suggest that such a person acts on his own accord the way an ordinary person would who consistently obeys the laws. Nonetheless, absolute kingship does not qualify as the rule of law in the strict sense (see E. Miller 1979). Aristotle remarks elsewhere that there are no actual candidates for absolute king, so that this is merely a theoretical possibility, and "it is evident due to many causes that everyone must share in ruling and being ruled in turn" (VII.14.1332b23–7). Practically speaking, then, the best constitution involves the rule of law provided there are enough citizens who are at least proportionately equal in virtue (cf. Plato, *Plt.* 301d8–e4; *Laws* IX.875c3–d5). For the principle of distributive justice can justify the rule of the many if the practical wisdom of the multitude (in aggregate) outweighs that of the best man (see Keyt 1991; Waldron 1995).

Aristotle also mentions a problem involving the application of law: "[A]ll law is universal but about some things it is not possible to make a universal statement that is correct" (*EN* V.10.1137b13–14). The legislators try to lay down laws that are almost always correct, and may not realize that exceptional

circumstances will occur. Or they recognize that they are "unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part; or where it is not easy to be complete owing to the unlimited number of cases that may arise, such as the kinds and sizes of weapons that may be used to inflict wounds—a lifetime would be too short to enumerate these" (*Rhet.* I.13.1374a26–33; cf. *MM* II.1; *Ath.* 9.2). For example, the written law may forbid striking another person with a metal weapon and not specify every exception. If one strikes another while wearing a ring, has he committed a crime? According to the written law he has, but in truth he has not. In order to recognize that this is an exceptional case, we need the virtue of equity (*epieikeia*) rather than justice in the sense of strict lawfulness (*EN* V.10.1137b34–1138a3; *Rhet.* I.13.1364a33–b1). Equity is the correction of a law insofar as it is defective due to its universality. In such a case the equitable decision is just, because it is what the legislator would have decided in these particular circumstances if he had been present. Not all things can be decided according to the laws; in some cases, a decree is needed. Aristotle compares the use of decrees to the use of a Lesbian rule made of soft lead: Just as the rule is not rigid but adapts itself to the shape of the stone, the decree is adapted to particular circumstances (*EN* V.10.1137b26–32). This provides a limitation to the rule of law: "[T]he laws ought to have authority, when they have been correctly laid down; but the ruler, whether one or many, ought to have authority concerning these matters on which laws cannot speak with precision because it is not easy to make a universal declaration about everything" (*Pol.* III.11.1282b1–6; cf. 15.1286a10). Although the laws are indispensable in providing a structure in which the citizens can share authority and seek the good life, they are nevertheless subordinate to the ultimate goal—the survival and well-being of the citizens.

Aristotle grants that legal change may sometimes be warranted: "As in the various crafts, so in the political order, it is impossible that all things should be precisely set down in writing; for it is necessary to write universal [laws], but actions are concerned with particulars. Hence it is evident that some laws should sometimes be changed." But he immediately sounds a note of caution: "When the benefit is small and the habit of casually changing the laws is bad, then some errors of legislators and rulers should be left alone. […] For the law has no power to command obedience except that of habit, and this comes about only through a long time, so that easily changing from old to new laws weakens the power of the law" (*Pol.* II.8.1269a9–12, 14–17, 20–4). Aristotle recognizes the need for legal reform (IV.2.1289a4–5), and he proposes many remedies for existing constitutions (see especially *Pol.* V), but he is conscious that the benefits of change may be outweighed by damage to the respect for law.

Aristotle's philosophy of law is closely bound up with his other views, including his natural science and moral philosophy, and especially his theory of justice. This is a source of both strength and weakness. The advantage is that

the meaning and justification of different elements of his legal theory can be found in other parts of his system. The liability is, of course, that when his other doctrines have come under criticism, his legal philosophy has also been called into question. Notwithstanding, his discussions of legal issues are deep and insightful and have continued to influence legal scholars of all persuasions.

4.8. Ancient Greek Conceptions of Rights

By the end of the fourth century B.C. the Greeks possessed a number of locutions to assert and deny claims in legal, political, and other settings. Many translators of classical Greek texts have assumed that such claims are often equivalent to "rights" claims in modern languages. Some scholars, however, agree with MacIntyre (1981, 67) that "[t]here is no expression in any ancient or medieval language correctly translated by our expression 'a right' until near the close of the Middle Ages." Ostwald (1996) also argues that the ancient Greeks thought of citizenship in terms of communalistic "shares" rather than individualistic "rights."[16] Although these scholars generally concede the rough equivalence of some Greek words to the predicate "right," they contend that it is a mistake to translate any Greek term by the substantival expression "*a right*." For, they argue, the ancient terms only refer to an objective condition of justice, such as the correct assignment or relation of things to persons, and thus could not denote a *subjective right*, that is, a right possessed by an individual. To resolve this issue, therefore, it is necessary to explicate the concept of a subjective right, which is difficult in view of the wide assortment of mutually inconsistent modern theories of rights.

The modern jurist Hohfeld's analysis of "rights" locutions (1923) is useful because he relies on minimal assumptions concerning the theoretical underpinnings of rights.[17] Hohfeld distinguishes four senses in which one person X might have a "right" against another person Y: first, X has a *claim* to A against Y, in which case Y has a correlative duty to X to do A (e.g., the right to repayment of a debt); second, X has a *privilege* or *liberty* to do A against Y, in which case X has no duty to Y to forbear from doing A (e.g., the liberty to consume one's own property); third, X has a *power* or *authority* to A against Y, in which case Y has a correlative liability to X's doing A (e.g., the authority to arrest someone); and fourth, X has an *immunity* against Y's doing A, in which case X has no liability to Y's doing A (e.g., immunity from being re-

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[16] This view is shared by others, such as Strauss 1953 and Villey, e.g., 1996. Villey's thesis that there were no rights in Roman law is also discussed in Chapter 6, Section 6.6, of this volume.

[17] Hohfeld's analysis has been widely accepted by recent legal theorists and philosophers as a basic account of the logical form of rights claims.

quired to testify against oneself). Hohfeld sheds valuable light on modern legal discourse by disambiguating the modern term "right." Although the ancient Greeks did not have a single word corresponding to "right," it is noteworthy that they had instead a family of terms that correspond to the conceptions distinguished by Hohfeld:

HOHFELD	GREEK
just claim	*to dikaion*
liberty, privilege	*exeinai*
authority, power	*kurios*
immunity, exemption	*adeia*, *ateleia*

These expressions will be discussed in turn, considering first some epigraphical evidence, followed by examples drawn from both Aristotle and his contemporary, the orator Demosthenes (384–322 B.C.).

4.8.1. *Just Claim* (to dikaion)

A just claim, which is at the core of a right, is a claim of justice which a member of a community has against the other members of the community. The most important Greek locution with this sense is *to dikaion* (plural, *ta dikaia*), literally "the just (thing)," the noun phrase formed from the neuter definite article with the neuter form of the adjective meaning "just." Though sometimes equivalent to "justice" (*dikê*, *dikaiosunê*), it often signifies an act required or entitled by justice.

The expression *to dikaion* occurs in connection with rights of pasturage in a law recorded on a bronze plaque from a Locrian community settling new territory (ca. 525–500 B.C.): "Pasturage-rights [*epinomia*] shall belong to parents and son; if no son exists, to an unmarried daughter; if no unmarried daughter exists, to a brother; if no brother exists, by degree of family connection, let a man pasture according to what is just [*ka to dikaion*]" (trans. in Fornara 1977, no. 33; cf. Meiggs and Lewis 1988, no. 13; see also Jeffery 1961, 104f., pl. 14). In this passage the phrase *to dikaion* is equivalent to "justice" (*dikaiosunê*) and has the sense of "objective right." In this context the implication, however, is that the colonists are entitled to pasture in a location, and the entitlement is inherited according to degree of consanguinity as prescribed by the law.[18]

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[18] Cf. Tod 1948, no. 174.14–16, which is an Athenian decree (340 B.C.) extending property rights to the citizens of Elaeus, "that the people of Elaeus have their own habitations correctly and justly [*dikaiôs*] along with the people of Athens and Chersonese."

By the fourth century, *to dikaion* has the sense of "subjective right," for example, in an Athenian decree in the archonship of Anticles (325/4 B.C.), recorded on a marble stele on the Acropolis. The inscription records decrees concerning Heraclides of Salamis, who delivered wheat to Athens for a fair price during a shortage and also contributed 3,000 drachmas toward the purchase of more wheat for the people. The first decree honors him with the titles of *proxenos* and benefactor, and also confers various legal rights (to be discussed below). The second decree mentions that the inhabitants of Heraclea had interfered with Heraclides en route to Athens and seized his sails. The decree authorizes the election of an ambassador "who will go to Dionysius of Heraclea and demand that he return the sails of Heraclides and do no further injustice to those sailing to Athens; and by doing these things he will do just things [*ta dikaia*] and he will not fail to obtain any of the just things [*tôn dikaiôn*] of the people of Athens."[19] The aim of the decree is thus to uphold the just claims of Heraclides who has been robbed, and to protect the just claims of the Athenians and their allies.

The expression *to dikaion* figures prominently in Demosthenes' first oration *Against Aphobus.* Because the defendant has refused to submit to arbitration, Demosthenes is left no option but to try to obtain his just claims (*ta dikaia*) from him in the courtroom (27.1) and he asks the jury to "help me with just claims" (27.3). He elsewhere speaks of the jury deciding the just claims of disputants *against* each other (13.16). That Demosthenes uses *to dikaion* to signify a subjective right is clear from the fact that he treats such claims as belonging to claimants: "*having* this just claim [*to dikaion*] we brought suit for the inheritance with the archon" (44.29). Again, he attaches a possessive pronoun to *to dikaion* contrasting "*our* just claims" with "the just claims *of others*" (3.27; cf. "*your* just claims," 24.3).

This term is also employed by Aristotle, who notes that disputants go to a judge in order to obtain the just (*to dikaion*) (*EN* V.4.1132a19–24). If they think that the judge has correctly resolved the dispute, the disputants "say that they have their own." In this context, *to dikaion* is what one receives in a just settlement of a dispute, that is, that which is "one's own." This is clearly what the claimant has a just claim to (cf. *Pol.* IV.4.1291a39–40). The term also has an important application in the political context in which various parties dispute over who is entitled to hold political office. Those who have an erroneous conception of justice or equality "will have an excess of political just claims [*tôn politikôn dikaiôn*]" (*Pol.* III.12.1282b29). The implication is that only a correct standard of distributive justice will yield a defensible assignment of political rights.

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[19]   *IG* II².360; Schwenk 1985, no. 68.37–42: *outhenos atuchêsei tou dêmou tou Athenaiôn tôn dikaiôn.* For a similar construction, see Xenophon, *HG* III.1.23: *tôn dikaiôn oudenos.*

4.8.2. *Liberty or Privilege* (exeinai)

Liberties or privileges pertain to acts that individuals *may* perform, that is, they are not obligated to refrain from them. Such rights are typically asserted with the verb *exesti* (infinitive *exeinai* or *exeimen*) or the noun *exousia*. In a legal sphere these rights specify what it is permissible for someone to do, and thus define a sphere of freedom within which the agent is free to choose. This locution occurs in a law inscribed on a bronze plaque by the Hypocnemidian Locrians concerning their colony at Naupactus (ca. 500–475 B.C.?). The term is used to assert a series of civil rights of colonists. For example, a colonist shall "be at liberty [*exeimen*] to share in religious privileges and to make sacrifice as a visitor [*xenos*], when he is present, if he wishes." "If compulsion drives the Hypocnemidian Locrians out of Naupactus, they must be at liberty [*exeimen*] to return, each to his place of origin, without entry fees." "If anyone leaves behind (in Locris) his father and a portion of his property (which he has consigned to his father), when (his father) dies, the colonist shall be at liberty [*exeimen*] to recover his property" (see Fornara 1977, no. 47; Meiggs and Lewis 1988, no. 20.2–3, 8–10, 35–7).

The word *eleuetheros* ("free") can also be used in this sense. For example, a law of Hallicarnassus recorded on a marble stele (465–450 B.C.) states that any citizen of Halicarnassus who has complied with the law is free (*eleutheron einai*) to bring a lawsuit concerning property (Meiggs and Lewis 1988, no. 32; Fornara 1977, no. 70). In addition, the negative form *mê exeinai* is often used for prohibitions, for example: "The people of Athens are not at liberty [*mê exeinai*] to restore the exiles […]" (Athenian decree concerning Clazomenae, 387 B.C.; see Tod 1948, no. 114).

Demosthenes frequently uses the term *exeinai* to assert a liberty, for example: "Indeed, Callicles, if you have the liberty [*exesti*] to enclose your land, surely we also had the liberty to enclose ours. But if my father did you an injustice by enclosing his land, you also do me an injustice by enclosing yours" (*Against Aphobus* 55.29). The implication is that owners are at liberty to build walls on their property, provided this does not harm others. Especially important is the liberty to name an heir when one has no offspring. For example, in the oration *Against Leptines*, Demosthenes states that "Solon made a law that one had the liberty [*exeinai*] to give his things [i.e., property] to whomever he wishes, if there were no legitimate children" (20.102).

Demosthenes asserts that individuals have a liberty right to defend their property: "Earth and gods! Is it not monstrous, and manifestly contrary to law—I don't mean only contrary to the written law but also contrary to the common [law] of all human beings—that I should not have the liberty [*exeinai*] to defend myself against a person who comes and takes my possessions with force as though I were an enemy?" (23.61). This seems to anticipate modern views that individuals have a natural right to protect their property.

This locution also has an important role in Aristotle's final definition of a citizen: A citizen is "one who has the liberty [*exousia*] to partake in deliberative and judicial office" (*Pol*. III.1.1275b18–19). Different constitutions establish different criteria for assigning this liberty. For example, in a moderate democratic constitution, individuals can meet a low property assessment in order to have the liberty (*exousia*) to hold office (IV.4.1291b40–1). In a moderate oligarchy the assessment is set so high that the majority, who are poor, cannot meet it, but a person who possesses sufficient property has the liberty (*exousia*) to share in the constitution (5.1292a41). Aristotle also uses the negative form of *exousia* for a prohibition: For example, he says, in Plato's *Laws* no citizen has the liberty (*exousia*) to own more than five times the amount of the smallest property holding (*Pol*. II.7.1266b5–7, cf. 5.1265b21–3, on Plato *Laws* V.744d–e).[20]

4.8.3. *Authority* (kurios)

The term *kurios* signifies that the bearer has the authority to carry out acts in a specific domain. The sphere of authority may vary from narrow to wide, and the authority may be a private individual, group, official, political body, city-state, treaty, contract, will, or the law itself. What distinguishes an authority is its ability to bestow duties and rights on others. The word *kurios* is commonly used for the authority of private persons over their property. An important example of this use, involving the equivalent term *karteros*, is found in the civil laws of Gortyn in Crete (engraved on the inner surface of a circular wall). A section dealing with intestate inheritance begins, "The father has authority [*karteron*] over his children and the division of his property and the mother over her property" (trans. Arnaoutoglou 1998, no. 3; *IG* IV.72; Meiggs and Lewis 1988, no. 41). In this system the father and mother each had legal power over their own property. The wife's property was not merged with her husband's, and women could inherit property in their own right. Neither her husband nor her son could alienate or promise her property. This contrasts with the Athenian system where female "heiresses" were in effect mere conduits for male ownership.

Inscriptions of public decrees understandably contain many political applications of the term *kurios*. In a typical formula the assembly in passing a decree confers discretionary authority to the council to carry it out. For example, in decreeing the dispatch of a colony to the Adriatic (325/4 B.C.), the Athenian assembly directs the council to supervise its implementation, includ-

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[20] Ostwald (1996, p. 60, n. 41) objects that *exousia* in this passage "cannot possibly refer to the 'right' of a citizen to own no more than five times the amount of the smallest property." But here Aristotle clearly means that none of the citizens has the liberty right to own this much. ("Not having the right to own *X*" should not be confused with "having the right to own not-*X*.")

ing the election of a board of representatives: "If this decree needs anything in addition for the representation, the council is decreed to have authority [*kurian*], but not to nullify anything decreed by the people" (*IG* II².1629; Tod 1948, no. 200.262–6; cf. no. 157.35–6).[21] Sometimes the stronger term *autokratôr* is used to indicate that exclusive authority is assigned; for example, in an Athenian decree moved by Callias (434/4 B.C.), the council is said to be the exclusive authority (*autokratôr*) over when the thirty financial officials are to meet (*IG* I².91; see Fornara 1977, no. 119; Meiggs and Lewis 1988, no. 58.9).[22]

Demosthenes also uses the term *kurios* to signify that a person has legal authority. For example, a master is *kurios* over a slave, but the slave is not *kurios* even over himself (*Against Aphobus* 37.51, 47.14–15). To be free is to be *kurios* over oneself, in contrast to being a slave (59.46). Demosthenes describes officials and jurors as having authority (27.159, 19.71, 59.12; cf. Isaeus 2.47) and speaks of the assembly delegating authority to the council (literally, making it *kuria*) in some specific domain (19.154). The term *kurios*, in the sense of "sovereign," applies to Philip of Macedonia, who is "*kurios* over everything" (1.4). Ideally, the people of Athens are sovereign: In the good old days, "the people had authority [*kurios*] over everything, and an individual was content to receive from them a share of honor, office, and reward" (13.31; cf. 3.30–1). Demosthenes also applies the adjective *kurios* to laws (20.8, 34; 24.205), decrees (23.96), wills (36.34), and contracts (47.77, 59.46).

Aristotle also uses the term *kurios* in the sense of "sovereign." For example, "Solon seems at any rate to grant the most necessary power to the people, namely, to elect and audit the offices, for if it did not have the authority [*kurios*] over this, the people would be a slave and an enemy [of the constitution]" (*Pol.* II.12.1274a15–18; cf. 10.1272a5).

4.8.4. *Immunity* (adeia) *and Exemption* (ateleia)

A common term for immunity is *adeia*, which implies that one is not subject to the authority of another. This type of legal right is illustrated by the aforementioned decree of Callias, which allocated funds for work on the acropolis of Athens. The decree stipulated that the funds be used for no other purpose: "But for no other purpose shall use be made of the monies unless the people pass a vote of immunity [*adeian*] just as when they pass a vote about property taxes. If anyone proposes or puts to a vote, without a decree granting immu-

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[21] Authority is also attributed to a decree, in Tod 1948, no. 162.11, 34, and elsewhere to a law (162.16–17), treaty (142.19), and a city-state generally (114.10, 202.23–4).

[22] In another decree (ca. 445 B.C.) Democlides, governor of the Athenian colony of Brea, is deemed "*autokratôr* in establishing the colony as best he can." The implication is that he has the authority to act on his own discretion without restrictions from the council or assembly; see Meiggs and Lewis 1988, 49.9; cf. Fornara 1977, no. 100.

nity having been passed, that the funds of Athena be utilized, he shall be liable to the same penalty as one proposing to have a property tax or putting this to the vote." Ordinarily, anyone who proposed to divert the funds to another purpose would be subject to prosecution, but this decree provides that the assembly could pass a special decree granting immunity from such prosecution (trans. Fornara 1977, no. 119; *IG* I².92; Meiggs and Lewis 1988, 58 B15–19; cf. Meiggs and Lewis 1988, no. 77; cf. Fornara 1977, no. 144).

Demosthenes uses *adeia* for safe conduct granted to foreign troops (*Against Aphobus* 23.159) or an actor on tour (5.6). He declares that only Athens grants immunity (*adeia*) to speak on behalf of its enemies, that is, the Macedonians (8.64). In *Against Timocrates*, Demosthenes addresses the problem of excessive granting of special immunities: Timocrates is prosecuted for proposing an unconstitutional law granting immunity (*adeia*) from punishment to any debtor to the city-state until the ninth prytany of the year if he provided bail (24.103).

Aristotle also recognizes the importance of immunity, observing that law grants immunity (*adeia*) to buy and sell in the marketplace (*EN* V.4.1132b15–16). In a political context *adeia* could also imply "impunity." For example, in a polity (a moderate constitution), the poor should have immunity (*adeia*) from fine if they fail to serve on juries, or they should be subject to smaller penalties than the rich (*Pol.* IV.13.1297a21–4).

A related concept is exemption (*ateleia*) from public burdens, in particular, from taxation. An Eritrean inscription (411 B.C.) grants such an exemption to a foreigner who helped the city-state to rebel from Athens: "Hegelechos of Tarentum shall be proxenos and benefactor, both he himself and his sons, and public maintenance shall be granted to him and his sons when they are in the country, and immunity from public burdens [*ateleia*] and seating privileges at the games, since he joined in the liberation of the city from the Athenians" (trans. Fornara 1977, no. 152; *IG* XII.9.187; Meiggs and Lewis 1988, no. 82; cf. Fornara 1977, no. 199). The Athenians frequently made similar grants, for example, in 338/7 B.C. to Acarnanians who were granted exemption (*atelesi*) from the tax due from resident aliens and equality with citizens in court and in paying special taxes (*IG* II².237; Schwenk 1985, no. 1.24–8). These Acarnanians were incidentally also granted *enktesis*, the privilege to acquire and own property. The right of a resident alien to pay taxes at the same rate as a citizen is elsewhere called *isoteleia* (see Schwenk 1985, no. 12.17; *IG* II².276).[23]

The grant of *ateleia* is the subject of Demosthenes' first speech, *Against Leptines* (355 B.C.). Leptines had proposed to abolish public grants of *ateleia* from public service: "none shall be exempt from public services" (cf. 20.1–2,

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[23] Heracleides (mentioned above) was also granted *enktesis* and *isoteleia*; see *IG* II².360; Schwenk 1985, no. 68.19–21.

127). Demosthenes defended the right of the people to grant *ateleia* in order to protect the polis, and criticized Leptines for assuming a mistaken class envy (20.24). Aristotle mentions an example of exemption in the Spartan constitution: A father of three sons is exempt from military service and a father of four exempt from all burdens of state. Aristotle himself regards this policy as misguided, since it promotes excessive division of property and impoverishment of the citizenry (*Pol.* II.9.1270b1–6).

In conclusion, there is abundant evidence of rights locutions in Greek inscriptions as well as the writings of Demosthenes and Aristotle. The fact that Aristotle and Demosthenes share a common vocabulary of rights is interesting, because they represent polar opposites in the ideological spectrum of the late fourth century B.C. Demosthenes was deeply committed to democratic ideals of equality and liberty, whereas Aristotle favored an aristocracy of virtue. Despite these differences, they and their contemporaries understood legal and political issues in terms of rights, that is, of countervailing claims of justice, liberty, authority, and immunity.[24]

Further Reading

Historical surveys of legal philosophy and of natural law usually devote a chapter to Aristotle. Rowe and Schofield 2000 contains authoritative treatments by leading scholars of Aristotle's political philosophy, which sheds light on the context of his legal thought. A book-length treatment is Hamburger 1951. There are useful articles by Wormuth 1948 (reprinted in 1972) and Schroeder 1981. Aristotle's controversial place in the "natural law" tradition is discussed by Shellens 1959, F. Miller 1991, and Burns 1998.

Aristotle's discussions of law are scattered throughout various treatises, most importantly *Nicomachean Ethics*, *Magna Moralia*, *Politics*, and *Rhetoric.* A convenient collection of reliable English translations is Barnes 1984. The relation of law to justice is a major theme in *Nicomachean Ethics* V, including the distinction between legal justice and natural justice, a topic also taken up in *Magna Moralia* I.33. For discussion of justice see Hardie 1980, chap. 10, and Kraut 2002, chap. 4. An illuminating analysis of the relevance of justice to Aristotle's political theory is Keyt 1991. *Nicomachean Ethics* X. 9 discusses the educative function of law and legislative science, on which see Curren 2000. There are numerous references to law in Aristotle's *Politics*, for which

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[24] Ostwald (1996, 55) contends that "there is nothing in [Aristotle's] vocabulary that corresponds exactly to our concept of 'right' in the sense of 'claim' or 'entitlement'." It is evident, however, that the family of terms discussed in this section are parallel to modern terms for legal and political rights, understood as claims or entitlements. And, as Hansen (1996, 96) remarks, "in practice [the Athenians] knew about the privileges and liberties connected with their democratic constitution, and these rights were highly valued and crucial for their belief that democracy was the best constitution."

Newman 1887–1902 remains the most important commentary. *Politics* III and IV especially include discussion of constitutions and the rule of law, on which see Robinson 1995. On law in *Politics* generally see Keyt and Miller 1991, F. Miller 1995, and Kraut 2002. *Rhetoric* I contains important discussions of natural law; see the useful commentary of Grimaldi 1980. On *Constitution of Athens* (probably composed under Aristotle's supervision) see the commentary by Rhodes 1981 (revised in 1993) and von Fritz and Kapp 1950.

Chapter 5

HELLENISTIC PHILOSOPHERS OF LAW

by Roderick T. Long[1]

5.1. The Hellenistic Era: A New Political Context for Legal Thought

Between 338 and 323 B.C., the entire eastern Mediterranean region—including Greece, Egypt, and most of western Asia (the remains of the Persian Empire)—fell under Macedonian rule. Although the unity of this new empire did not survive the death of its creator, Alexander of Macedon, the various smaller empires into which it had been fragmented continued to dominate the region for centuries to come. This development signaled the end of the independent Greek *polis* ("city-state"); but since the emergent local empires now had Greek overlords, the new era also extended the influence of Greek language and culture, which soon became dominant throughout the area. Alexander's conquests thus mark the end of one age (the Classical) and the beginning of another (the Hellenistic), a turning point conventionally dated from Alexander's death in 323 B.C. The other end of the Hellenistic era is placed by some at the Roman conquest of Greece (146 B.C.), and by others much later, at the Roman conquest of Egypt and western Asia (a gradual process, somewhat arbitrarily fixed around 31–27 B.C.).

The new political conditions of the Hellenistic era naturally had an impact on philosophy in general and on legal philosophy in particular. Unfortunately, few philosophical works from the Hellenistic era have survived intact; as with the Presocratics, Cyrenaics, and Cynics, much of the philosophy of this period is consequently known only through later sources, mostly Roman, and separating the original ideas from their later elaborations (and perhaps distortions) is often difficult—particularly in the case of philosophy of law, where Roman authors might well be particularly prone to introduce, into their discussion of Greek sources, ideas derived from Rome's own distinctive contributions to legal thought. Roman philosophical works also tend to be aimed at a wider, less technical audience than their Greek counterparts, and so to obscure some of the more precise theoretical details of the originals. In addition, Hellenistic philosophers generally proclaim their allegiance to some particular school or tradition, and it is not always clear whether an author is expressing the orthodox consensus of his entire movement or is in a given instance speaking only for himself. Accordingly, the role of guesswork in interpreting and reconstructing Hellenistic thought is inevitably greater than in studying Xenophon, Plato, or Aristotle.

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[1] All translations are by the author unless otherwise indicated.

While Hellenistic philosophy of law must be understood within the political context inaugurated by Alexander's conquests, the connection should not be exaggerated. According to a still popular interpretation, for which one influential source is Zeller (1903), Hellenistic thought is above all a response to the new shift of power from *polis* to empire, a shift that leads, on the one hand, to a de-emphasis on political participation (only the imperial dynasties could hope for a share in governance now) in favor of a private, interior life and personal happiness, and on the other hand, to a weakening of local, parochial allegiances in favor of a cosmopolitan identification with the global community. In contrast to Socrates' attachment to Athens, the Hellenistic era sees increased mobility of intellectuals, as scholars migrate to new centers of learning such as Alexandria. The boundaries of concern, formerly aligned with those of the *polis*, simultaneously contract inward to the individual and expand outward to the entire world. The accompanying sense of rootlessness and insecurity allegedly moves Hellenistic thinkers to reject abstract, technical philosophy in favor of pragmatic doctrines offering "self-help" paths to contentment and self-sufficiency. The Hellenistic era is accordingly seen in some respects as an era of intellectual decline. There is *some* truth to this interpretation, but it is more misleading than helpful, for three reasons.

First, the intellectual paths that Hellenistic philosophers followed were not merely an adaptation to social and environmental factors, but were also *theoretically* motivated; in many respects, Hellenistic theories can be seen as responding to and developing themes from within Classical philosophy.[2] This is not to deny that pressures external to philosophy can and do routinely reinforce pressures internal to it; but one-sidedly psychologistic, sociological explanations of philosophical developments are no improvement over one-sidedly ahistorical, decontextualized ones.

Second, the notion of a radical transition from the age of independent city-states to the age of all-engulfing empires is overstated. As Gruen (1993, 341) points out, throughout much of the Classical era itself most Greek cities were already under the hegemony of some empire or other, be it the Athenian, the Spartan, or the Persian, while on the other hand, even during the Hellenistic period most cities still had a fair degree of autonomy. Mobility of intellectuals was nothing new; even in the Classical era, philosophers who kept to their native cities had been the exception, not the rule. Moreover, far from renouncing political participation, many Hellenistic philosophers exercised considerable influence on public policy through their role as advisors to kings and princes.

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[2] In any case, the ideals of cosmopolitanism, self-sufficiency, and withdrawal from political participation were already clearly present in the Socratic movement, if not earlier; even Democritus said that the wise are at home everywhere and have the universe as their homeland (DK 68 B 247).

Third, the suggestion that Hellenistic philosophy is less abstract and technical than Classical philosophy is simply untenable. Some of the most complex and sophisticated developments in logic, ethics, and philosophy of language belong to this era; Chrysippus, for example, is easily the match of any Classical thinker in this respect.

While it is a gross distortion to say that the social philosophy of the Classical period had nothing to say about moral relationships beyond the boundaries of the *polis*,[3] it is certainly true that society *within* the polis was the primary object of concern for Classical social philosophy. Hence, the Hellenistic era did see a definite shift in emphasis from one's relationship to one's fellow citizens to one's relationship to humanity in general.

Much of Greek social philosophy turns on the differing senses of the concept of *phusis* ("nature"). This term, in Greek and in English, is ambiguous in (at least) three ways. On the one hand, nature can mean the way things tend to be if nothing is done about them; one might call this nature-as-default. On the other hand, a thing's natural state can be seen as something that has to be *achieved*. (This distinction corresponds roughly to Annas' distinction [1993, 142–58] between nature and *mere* nature.) But nature-as-achievement can, in turn, be seen in two ways: as scouring off all foreign accretions in order to get down to an original, unsullied simplicity (call this nature-as-recovery), or as developing one's innate tendencies in order to achieve one's *telos* ("end"; call this nature-as-completion).[4] From the standpoint of nature-as-default, watering a plant is an artificial intervention that saves the plant from the decay that it would naturally suffer, whereas, from the standpoint of nature-as-completion, watering a plant is working with rather than against the plant's natural tendencies. Perhaps one reason for the disagreement between Aristotle and the sophists concerning whether or not human beings are naturally social and political is that for Aristotle "natural" signifies human beings at their highest potentiality, while for the sophists "natural" signifies the way that people would turn out if it were not for education and law. The Cynics, with their hostility to artificial conventions and abstract theorizing, may in turn be seen as endorsing a lifestyle according to nature-as-recovery; and the transition from Cynicism to Stoicism is arguably a transition from the ideal of nature-as-recovery to a more Aristotelian ideal of nature-as-completion.

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[3] Aristotle, for example, though often regarded as particularly parochial in this regard, endorses obligations of both friendship (*EN* 1108a9–28, 1126b19–1127a2, 1155a16–31) and justice (*EN* 1159b34–1160a8, 1161b4–8; *EE* 1242a19–28; *Pol.* 1275a7–10, 1324b22–36, 1333b26–40) to those outside one's polis; cf. R. Long 1996, 783–4.

[4] This distinction has its analogues in ancient Chinese philosophy and early modern European philosophy as well, with Hobbes and Hsün-tzu favoring nature-as-default, Locke and Mencius favoring nature-as-completion, and Rousseau and the Taoists favoring nature-as-recovery.

The emerging cosmopolitanism, particularly in its Cynic-Stoic version, tended not to take a specific institutional form. For example, the cosmopolis of the early Hellenistic philosophers was not yet identified, as it would be later, with any specific earthly community, such as the Roman Empire or the Christian Church. Certainly, it was not intended as ideological support for the Macedonian imperialism; few[5] would have agreed with Plutarch's later claim (at *Alex. Fort.* VI. 329a–c) that Alexander had achieved in action the cosmopolis that philosophers like Zeno had only theorized about. Likewise, the Cynic-Stoic conception of natural law had not yet been brought into connection with actual earthly codes of law (though Xenophon had pointed a way toward the possibility of doing so), and the connection between one's role as a *kosmopolitês* ("citizen of the cosmos") and the specific role in which one finds oneself in the everyday world was not yet clarified. It fell to the practical-minded Romans to work this transformation of Hellenistic philosophy, making Hellenistic views more useful while at the same time depriving them of much of their edge and radicalism.

5.2. Academics

Plato's Academy—so called because of its location in the grove of Hekademos—resembled not only a modern research university, devoted to knowledge for knowledge's sake, but also a public policy institute or "think tank" with the practical aim of influencing legislation and constitutional reform (Klosko 1986, 188). Such an ambition was by no means quixotic; the philosophical schools of Athens boasted princes and statesmen among their graduates, and philosophers were often called upon to play an advisory role in drawing up legal codes. Moreover, the founding of new colonies was a fairly frequent phenomenon in the Greek world, so even the prospect of designing a new political system from scratch was by no means as unrealistic as is often supposed. Unfortunately, after Plato's time little is known of the legal theories of the early Academics; in Diogenes Laertius' catalogue of works by Speusippus and Xenocrates, who were the first leaders of the school, we see such tantalizing titles as *On Legislation*, *On Justice*, *On the Citizen*, *On the Republic*, *On Equity*, and *On the Power of Law* (D.L. IV.2.12), but their contents are unknown.

We do, however, possess four Socratic dialogues from the early Academy that deal with issues of law: *Minos*, *On Justice*, *Sisyphus*, and *Demodocus*. These works have come down to us as part of the Platonic corpus, but (with the possible exception of the *Minos*) they are not the work of Plato.[6]

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[5] Among the possible exceptions are Onesicritus, a decidedly heterodox Cynic (see Moles 1995, 144–9), and whoever wrote *To Alexander On Kingship* (see below, Section 5.3).

[6] The *Minos* has the best claim of the four to be regarded as authentic. One argument against its authenticity is an alleged Stoic influence. The doctrines that only just laws are

The *Minos* concerns a conversation between Socrates and an unnamed comrade concerning the definition of law, and is clearly related in some way to Xenophon's treatment of the subject (see Chapter 2, Section 2.3, of this volume).[7] Like Pericles and Hippias in the *Memorabilia*, the comrade is torn between a positivist and a moralized conception of law. The comrade (313b–c) initially defines *nomos*, law, as what is *nomizomenon* ("customarily accepted"); here, the linguistic link between *nomos* as law and *nomos* as custom is being exploited in the service of positivism. But Socrates objects that, just as sight is not what is seen but that *by* which things are seen, so *nomos* must be not what is *nomizomenon* but that *by* which things are *nomizomena*. The comrade's next move is to define law as the judgment of the state; but he, like Pericles, is sensitive to the link between justice and law. Since judgments of the state are sometimes unjust, he is driven to redefine law as the *correct* judgment of the state. In Socrates' words (*Minos* 315a): "[L]aw wishes to be the discovery of what is."[8] But how, in that case, can there be different laws in different places? Socrates' answer is that all these laws agree in one sense and not in another: They all agree in legislating *justice*, but they disagree about which things are just; so they *aim* at agreement even when they fall short of it. It is insofar as they agree, presumably, that they are genuine laws, not insofar as they disagree.

And how can laws change over time? Socrates answers, obscurely, that "being moved like gamepieces they remain the same" (*Minos* 316c). The meaning of this claim is unclear, but is reminiscent of the Xenophontic analogue about war and peace, and is perhaps making a similar point about principles remaining the same when their applications change. Someone might say, "Before I could move my pawn ahead, but now I can't! The rules must have changed!" However, not the rules, but the circumstances—e.g., there is another piece on that square now—have changed. Similarly, all laws, to the

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genuine laws (*Minos* 314d–e, 317c) and that only wise kings are genuine kings (317a–318b) are certainly accepted by the Stoics; but this is a weak argument, since both of these doctrines are likewise found in Plato and Xenophon. For these views on law, see Xenophon, *Mem.* I.2.41–6; Plato, *Hp. Ma.* 284b–285b, *Laws* IV.715b. For these views on kings, see Xenophon, *Mem.* III.9.10–11, IV.6.12; Plato, *Rep.* I.347d, *Euthd.* 292a–c. Moralized definitions of genuine judges (Plato, *Ap.* 39e–40a), work (Xenophon, *Mem.* I.2.56–7), power (Plato, *Gorg.* 466b–470b), friendship (Plato [?], *Alc.* I.126c–127d, *Clit.* 409d–e), beauty (Xenophon, *Mem.* III.8.5–10, *Smp.* V.3–4; Plato, *Gorg.* 474d–475b), and wealth and profit (Xenophon, *Oec.* I.5–13, *Mem.* IV.2.37–9, *Smp.* IV.34–45; Plato [?], *Hipparch.* 230a–231e, *Erx.* 399e–400e) are also found in Plato and Xenophon. Socratic dialogues contain Stoic-looking theses because that is where the Stoics found them in the first place.

[7] If it is not by Plato, then it is probably a response to Xenophon. On the other hand, if it is by Plato then Xenophon might be responding to it, or both authors might be responding to some other thinker—Socrates himself, perhaps.

[8] This might seem counterintuitive, but Hayek 1973 argues that the conception of law as something *discovered* rather than *made* is both older and more defensible than the positivist account; cf. also Leoni 1991.

extent that they are laws, embody the same principle; but the applications may differ either through a change in the circumstances or through the ignorance and incompetence of those applying the laws.

True law, the *Minos* argues, is an expression of the art of kingship, which is the knowledge of which laws to pass. Here, the criterion is objectivist rather than subjectivist: Kingship is the art of promoting the welfare of the human soul. Minos, legendary ruler of Crete, accordingly has the best claim to be a true king: First, because his laws are unchanging, which is (some) evidence that they are based on knowledge, since laws based on knowledge do not change (but what about the game pieces?), and second, because he learned them from Zeus (which is presumably evidence that his laws are beneficial). But Minos has a bad reputation in Athens because his version of wisdom comes into conflict with the sort of wisdom claimed by the poets. But until we can discover what, in fact, is best for human souls, we will not fully grasp the essence of kingship. Here the dialogue ends.

The other three dialogues are slighter works. *On Justice* consists mainly of arguments paraphrased from various Platonic dialogues; in its one original contribution (Pseudo-Plato, *On Justice* 373c–e), Socrates claims that when judges determine what is just and what is unjust, they employ *speech* in the same way that weighers and measurers employ scales and measuring sticks to determine what is heavy or light, long or short. Socrates raises (but does not answer) the following question: What sort of thing must justice be, in order for it to be true that speech is the tool for resolving disputes about it?

The *Demodocus* and *Sisyphus* also address the question of how deliberation and debate in assemblies and law courts could be a rational way of settling issues. The worry is that if nobody knows what to do, public discussion is pointless, while if somebody does know what to do, public discussion is superfluous. These arguments could be read either as a critique of democracy or as a *reductio ad absurdum* of strongly individualist approaches to epistemology—and so, indirectly, as a vindication of the necessity of legal institutions of public deliberation (cf. Aristotle, *Pol.* III.11.1281a42–b10; R. Long 2000, 27–9, 101–3, 112–4).

In the third century, the Academy came under the leadership of Arcesilaus (ca. 318–242 B.C.), who moved the Academy in a skeptical direction, interpreting Plato's dialogues as purely aporetic. For the Skeptical Academy, no philosophical questions can be decisively settled, so it is imperative to suspend judgment. It is unclear how far the Skeptical Academics were influenced by the earlier skeptical movement of Pyrrho (ca. 360–270 B.C.), who also advocated suspension of judgment as a way of gaining psychic tranquility.[9] Both

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[9] Sedley 1983 argues for, and Decleva Caizzi 1996 against, an influence of Pyrrho on Arcesilaus. The stories that have been handed down about Pyrrho (no doubt exaggerated) suggest Cynic withdrawal and indifference, while the Academics in their social attitudes sound more like Aristippus.

schools of Skeptics practice arguing on both sides of every question, in order to move the mind to a suspension of judgment.

Some Pyrrhonists define law in purely positivist terms,[10] as a written contract among citizens, backed by punishment (Sextus Empiricus, *PH* I.146), maintaining that because of the cultural relativity of laws and customs we cannot say what is right or wrong in itself or by its nature, but only how it appears to us (Sextus, *PH* I.148–63, *M* XI.140; cf. D.L. IX.11.83–4, 101). Hence, nothing is more just than unjust; *nomos* (here meaning "custom") and *ethos* ("habit") govern all human action (D.L. IX.11.61).

The first member of the Skeptical Academy known to have contributed to legal philosophy is Carneades (ca. 213–129 B.C.), who gave two famous speeches in Rome, one in favor of justice and the other against it. It is the speech against justice that excited the most interest, and although it does not survive, numerous reports and paraphrases do. Carneades' speech appears to combine both Pyrrhonist and sophistic arguments. Like the Pyrrhonists, he argues that if justice were a matter of nature rather than convention, all countries and all eras would have the same laws (Cicero, *Rep.* III.818). Like the sophists, he argues that justice clashes with self-interest (Cicero, *Rep.* III.24; Lactantius, *Inst.* V.16–VI.9). Drawing on Glaucon's challenge in Plato (*Rep.* II), he maintains that justice is a mutual nonaggression pact regarded as a poor second-best situation in comparison to the enticing, but excessively risky, alternative of trying to commit injustice with impunity (Cicero, *Rep.* III.23). Thus the vaunted "mixed constitution," recognizing as it does the need to avoid giving any one group too much power, is an open confession that mutual distrust is natural, and so justice is unnatural (Cicero, *Rep.* III.23). Hence, political justice (i.e., acting justly when injustice is punished by law) is mere prudence, not justice, while so-called natural justice (i.e., acting justly when injustice is not punished by law) is folly (Lactantius, *Inst.* V.16).

The anti-Skeptical backlash against the Skeptical Academy was led by Antiochus of Ascalon (ca. 130–ca. 68 B.C.), who attempted to revive the interpretation of Plato as a "dogmatist" (i.e., someone committed to definite doctrines rather than simply suspending judgment), and produced a version of Platonism that borrowed heavily from Stoic and Peripatetic doctrine as well. Cicero (*Leg.* I.23) records an argument that is likely to be of Antiochean provenance:

(1) Reason is shared in common by all rational beings.
(2) For those to whom reason is the same, right reason is also the same.
(3) Therefore, right reason is shared in common by all rational beings [(1), (2)].

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[10] Though if pressed they would presumably suspend judgment on whether positivism itself is correct.

(4) Law = right reason.
(5) Therefore, law is shared in common by all rational beings [(3), (4)].
(6) Those who share law in common are fellow citizens.
(7) Therefore, all rational beings are fellow citizens [(5), (6)].

This vision of the cosmopolis is essentially Stoic (it recurs in Marcus Aurelius, *Med.* IV.4), but as Dillon (1977, 80) argues, "it is very likely that the discussion of the Natural Law in Cicero *On the Laws* I is basically Antiochean" because it "contains the characteristic mark of Antiochus' presence, a survey of the doctrines of the old Academy and of Zeno's agreement with it." The argument also fits in well with Antiochus' doctrine that friendship should be extended to the entire human race (Cicero, *Fin.* V.65; Augustine, *CD* XIX.3).

The Academic thinker most important for legal philosophy is Marcus Tullius Cicero (106–43 B.C.). However, in his writings on ethical, social, and political matters, he generally adopts a Stoic position, maintaining that, as an Academic Skeptic rather than a Pyrrhonist, he can accept Stoic doctrines as plausible opinions rather than as knowledge (*Off.* II.7–8). In any case, Cicero, while technically falling into the Hellenistic period (at least under the broader of its two definitions), clearly belongs in the context of Roman thought, and so will be considered in Chapter 6 of this volume.

5.3. Peripatetics

Like its ancestor the Academy, Aristotle's school—the Peripatos (after the *peripatos* or colonnade where the school met) or Lyceum (after the public grove of Apollo Lykeios where the *peripatos* was located)—was *inter alia* a public policy institute that aimed, not without success, at swaying the counsels of state. In addition to Aristotle's own contributions as tutor to Alexander and (allegedly) legislator for Stageira, Theophrastus (ca. 370–286 B.C.), Aristotle's chosen successor as president of the school, was able to exert considerable influence on legislation during the period when Athens was governed by his student Demetrius of Phaleron. Nor did the demand for Peripatetics as political advisors cease with his fall from power; Demetrius, Strato, and Lycon were all invited to foreign courts to serve as political advisors (D.L. V.58, 67–8, 78; Lynch 1972, 151). Concerning Strato's and Lycon's contributions to legal thought, however, we know little; our information about Peripatetic philosophy of law after Aristotle focuses on three figures: Theophrastus, Dicaearchus, and Demetrius.

Among Theophrastus' works on law (which survive only in *fragmenta* and *testimonia*) are the *Laws* (Theophrastus seems to have made collections of laws in the same way that Aristotle made collections of constitutions) and *On Critical Opportunities* (the latter title excellently capturing Theophrastus' focus on the particular situation). Theophrastus criticizes attempts to make laws

universally applicable by anticipating every contingency; laws should be framed for situations that occur for the most part, not for those that occur rarely (Justinian, *Dig.* I.3.3, 6, as quoted in Fortenbaugh et al. 1992, 629–30; cf. Fortenbaugh 1993). Accordingly, he advises that one should violate the law, and ordinary moral rules as well, when special circumstances call for it, weighing values carefully against one another, since just as a lot of bronze can outweigh a small amount of gold, so considerations that are usually less important can sometimes outweigh those that are usually more important (Gellius, *Noctes Atticae* I.3, as quoted in Fortenbaugh et al. 1992, 534). This leniency toward exceptions is consistent with Theophrastus' own particularist turn of mind (cf. Sharples 1998, 270).

On Theophrastus' view, good men need fewer laws than bad men (Stobaeus, *Eclogues* III.37.20, as quoted in Fortenbaugh et al. 1992, 628). A useful example of why this is so is his recommendation that the law of contract be reformed to require exceptions for rage and drunkenness (Stobaeus, *Eclogues* IV.2.20, as quoted in Fortenbaugh et al. 1992, 650). Since, on his own view, what happens only occasionally should be ignored, it follows that the law should take rage and drunkenness into account only if these are usual rather than exceptional occurrences; hence, this reform must be intended for a society where rage and drunkenness are frequent occurrences, and so would not be needed in a society where more people were virtuous.

Cicero attributes to Theophrastus, Dicaearchus, and Demetrius a common commitment to the mixed constitution and division of powers (*Leg.* III.14–17). In his treatise *Tripolitikos*, Dicaearchus defended a blend of three principles: democratic, oligarchic, and monarchic (Cicero, *Att.* XIII.32; Athenaeus, *Deipn.* IV.19.141a–c; Photius, *Bibl.* 37; cf. Lintott 1997, 72). Theophrastus seems to have held some version of a cosmopolitan doctrine (Porphyry, *Abst.* II.162.6; cf. III.22, 25); similar concerns are detectable in Dicaearchus' lament that more people die by violence than by natural calamities (Cicero, *Off.* II.5.16–17), and in his nostalgic portrait of a lost golden age free from strife (Porphyry, *Abst.* IV.2.1–9).

Demetrius of Phaleron (ca. 350–280 B.C.) served as governor (some would say dictator) of Athens for ten years, as the result of negotiations between Athens and Macedon, since he was acceptable to both sides;[11] hence, he had maximal opportunity to put his own political theories into practice. Demetrius abolished liturgies and trierarchies (compulsory patronage) in favor of taxation, thus weakening the power of private patronage and centralizing power in the state. He reformed the law courts: Litigation fell sharply under Demetrius because success in the law courts was no longer the path to power and prestige which now depended on external forces (see Gagarin 2000, 361–

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[11] It was under Demetrius that the metic-controlled Peripatos, the Aristotelian school, finally gained the right to own the land on which it met.

2; cf. Tacitus, *Dial.* 40-41). Demetrius also passed sumptuary laws (from which he, notoriously, exempted himself) and assigned officials called *gunaikonomoi* ("regulators of women") to supervise public morals. His *nomophulakes* ("guardians of the law") seem to have had the power to override the decisions of the democratic Assembly. Demetrius' 1,000-drachma requirement for political rights can be seen as a move in an oligarchic direction, if contrasted with the absence of any property qualification under the earlier regime of Polyperchon (Gottschalk 2000, 369), or as a move in a democratic direction if contrasted with the still earlier 2,000-drachma requirement under the regime of Antipater (Tracy 2000, 338–9). In either case it harmonizes well with Aristotle's defense of the "middle constitution."

Issues relevant to philosophy of law are also raised in *Problemata* and *To Alexander on Kingship*, two works which, though traditionally ascribed to Aristotle, are generally thought to derive from the early Peripatos. While the *Problemata* is concerned primarily with issues of natural science, two chapters (29, 30) contain interesting attempts to rationalize common legal practice. The methodology employed is characteristically Aristotelian, starting from the assumption that existing practices are more or less right, and reasoning back to principles that would justify or explain them and solve the puzzles they raise.

The pseudo-Aristotelian letter *To Alexander on Kingship*, preserved only in Arabic, appears to embody both cosmopolitan and anticosmopolitan sentiment. In its cosmopolitan aspect, the letter calls for Alexander to unite all of humankind into a single kingdom (8) and a single city (4), free from strife and devoted to leisure and reflection (8). Less benignly, it seems to reject such notions of universal fellowship by calling for pro-Greek favoritism (6) and an ethnic cleansing of Persians (8).[12]

Stern (1968) inclines to the view that the work is a genuine letter of Aristotle's. Against this is the letter's endorsement (8) of the *lex talionis* (the principle of "eye for an eye") of Rhadamanthys, which Aristotle condemns at *EN* V.5.1132b2–5; but Stern (1968, 32) argues that for Aristotle "what was no justice for the Greeks, could very well be justice for the barbarians." Might Aristotle have favored a cosmopolis ruled by Alexander? Differing historical traditions have cast Aristotle both as a friend and as a foe of his former pupil's imperial aims. The evidence in Aristotle's own writings is equivocal. Aristotle generally rejects empire, both because imperialistic domination is unjust (*Pol.* VII.2.1324b23–1325a8) and because an empire is too large to be a proper political community (VII.4.1326a34–b13). Additionally, his remark that nowa-

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[12] Plutarch, *Alex. Fort.* VI.329b, apparently knew of a purportedly Aristotelian letter advising Alexander to treat Greeks as friends but Persians as *animals or vegetables*. This is stronger than anything in *To Alexander on Kingship*. Was Plutarch quoting a different work, now lost? Or was he simply paraphrasing freely? And if he was paraphrasing, might he then simply be paraphrasing the defense of natural slavery in Aristotle's *Politics* rather than a letter?

days all monarchs are tyrants (V.8.1313a4–5) hardly sounds like a ringing endorsement of the Kingdom of Macedon. Still, imperialistic domination might not be unjust when exercised over barbarians; and Aristotle's remark (*Pol.* VII.6.1327b34) that the Greeks could rule the entire human race if they were united in a single *politeia* seems more favorable to Alexander's empire. Despite Stern's inclination to view the letter as authentic, he does acknowledge "some similarity between the phrases of Dicaearchus and those of our passage" (Stern 1968, 60–1). Should Dicaearchus be the letter's author, its cosmopolitan sentiments might stem from his doctrine of a single unitary life force immanent in all of nature (Cicero, *Tusc.* I.21).

5.4. Polybius

While Polybius (ca. 200–ca. 118 B.C.) was primarily a historian and statesman, the constitutional theory adumbrated in his *Histories* is a milestone of legal philosophy. Despite some words of praise (*Histories* II.38, 42) for the democratic policies of the Achaean League (in which he had been politically active), Polybius' favored constitutional order is a blend of monarchical, aristocratic, and democratic elements. The virtue of this system is its division of powers, which provides checks and balances; these are needed because no one is to be trusted with complete independence and unchecked power—not because human nature is inherently corrupt, but because complete independence and unchecked power tend to cause corruption (cf. Plato, *Laws* 694a–695d). Although no constitution can be rendered permanently stable, constitutions with a division of powers tend to outlast those without, because in the latter the ruling party, finding its power unrestrained, begins to abuse its position and so provokes a revolution.[13] The Polybian regime is more flexible: In emergencies, the three powers are able to work together for the common good; in peacetime, when self-serving motivations dominate, the self-interest of each power leads it to restrain the other powers' tendencies toward self-aggrandizement (Polybius, *Histories* VI.18). Polybius identifies Sparta and Rome as examples of his favored system, and sees them as owing their success to that system. They differ primarily in two ways: The Spartan system was established (as Polybius supposes) by a rational plan instituted at a single stroke, while the Roman system evolved through a series of piecemeal adjustments to particular situations (VI.9–10; cf. Cicero, *Rep.* II.2); and Sparta's severe restrictions on commerce weaken its economic power, making it less effective than Rome at maintaining an empire (Polybius, *Histories* VI.48–50).

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[13] In Polybius' particular version of the cycle of constitutions, monarchy matures into kingship, degenerates into tyranny, and is replaced by aristocracy, which degenerates into oligarchy and is replaced by democracy, which degenerates into ochlocracy and is replaced once more by monarchy (*Histories* VI.4–9).

To what extent Polybius is relying on earlier thinkers is unclear. His version of the mixed constitution does not fit what we know of the earliest Stoics (there would be no need for a balance of powers in Zeno's community of sages) nor the Epicureans (who never seem terribly interested in questions of constitutional structure),[14] but is more likely to reflect Academic or Peripatetic influence, particularly since Polybius' cycle of constitutions, though not identical with those proposed by Plato or Aristotle, evinces a similarity of approach. Moreover, as Hahm (1995, 16) points out, Polybius' particular version of the constitutional cycle works in terms of the tension between "two elements in the human psyche: (1) a uniquely human, rational element and (2) an element that operates independently of human reason and that human beings share with other animals." This certainly sounds more Academic or Peripatetic than Stoic or Epicurean. Polybius also seems concerned to defend history against Aristotle's charge that history cannot be philosophical because it deals with the particular rather than the universal (*Histories* III.1), which suggests some familiarity with Aristotelian literary theory. Further, as Hahm (1995, 42–5) again points out, Polybius' laws of history take conditional form—the antecedent is not necessary, though once the antecedent is in place, the consequent follows; this suggests familiarity with the Academic doctrine of "legal fate" (Alcinous, *Did.* 26.179.1–20; Pseudo-Plutarch, *Fat.* 569e–570b; Tacitus, *Ann.* VI.22; Calcidius, *Tim.* 150, 179; Nemesius, *Nat. Hom.* 38). Since Dicaearchus in particular is known to have advocated a *trinal* division of powers based on monarchic, oligarchic, and democratic elements (unlike Aristotle's binary division between oligarchic and democratic elements), and since this is the central feature of Polybius' model as well, it seems possible that Dicaearchus influenced him in this respect. Polybius' enthusiasm for the Roman Empire as a kind of universal political order (*Histories* I.1–2, VI.50) may echo Dicaearchus as well.

5.5. Epicureans

In the Classical era, legal thinkers had been divided over whether to regard justice as a conventional agreement, that motivates obedience through sanctions, or as an inward psychic state valuable for its own sake. Epicurus (342–271 B.C.) and his school can be seen as attempting to incorporate aspects of each view into a single account (cf. Mitsis 1988, 59–97; Annas 1993, 293–302): Justice is defined as a contract, yet the wise person behaves justly without being motivated by fear of punishment.

For Epicurus, pleasure is the supreme good; hence, all the virtues have merely instrumental rather than intrinsic value (cf. Diogenes of Oenoanda,

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[14] Though Polybius' account of the origin of civilization may owe something to Epicurean speculation.

New Frag. 26.1–3), and justice is no exception. Justice is nothing in its own right, he tells us, but is simply a contract made for mutual benefit, an agreement not to harm or be harmed (Epicurus, *KD* 31, 33); hence, nothing counts as just or unjust conduct among those who are either unable or unwilling to make such contracts (*KD* 32). Justice in general outline is the same universally, but its specific details vary with time and place because the same things are not always useful (*KD* 36–7), and when a law ceases to be useful for social interaction, it ceases to be just (*KD* 37–8).[15]

But what reason do we have to abide by the legal contract? Here our sources seem to differ. According to Epicurus' own words in the *Kuriai Doxai* (*Key Doctrines*), the badness of injustice depends not on anything intrinsic to injustice, but solely on the fear of punishment (*KD* 34). Yet this seems to be contradicted by the testimony of Epicurus' student Hermarchus (ca. 325–ca. 250 B.C.), whose treatise *Against Empedocles*, though lost, is liberally excerpted in Porphyry. In his presentation of the Epicurean account of the origin and justification of law, Hermarchus tells us that wise people obey the law not from fear of punishment but because they recognize its utility; it is only the unwise who need to be motivated by legal punishments. Hence, if all people were wise, no laws would be needed (Porphyry, *Abst.* I.7–12). Our two chief sources of information concerning Epicurean legal thought are the *Kuriai Doxai*, on the one hand, and Hermarchus, on the other. What are we to make of this apparent disagreement between them?

It might seem obvious that as evidence for Epicurus' intentions, the exact language used by Epicurus himself must trump Porphyry's quotations from one of Epicurus' students. But things are not quite so obvious. We possess more material from Epicurus in his own words than from any other early Hellenistic thinker, thanks to Diogenes Laertius' happy decision to transcribe four Epicurean works verbatim in the last book of his *Lives* (D.L. X.35–117, 122–35, 139–54)—the *Kuriai Doxai* is one of these. However, the works that Diogenes preserves for us are abbreviated summaries of a popularizing sort (X.35–6); it is clear from the surviving fragments of Epicurus' *On Nature* that Epicurean theory in its full technical detail was more complex and sophisticated than the summaries suggest. Hence, in reading the *Kuriai Doxai* we must keep in mind that we are probably dealing with a simplified version of a more nuanced theory. Ideally, then, we should try to find an interpretation that makes *KD* 34 come out as being *approximately* right. If the ordinary person's only motivation for obeying the law is fear of punishment, what might the Epicurean sage's motivation be?[16] Something more than punishment, if we

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[15] There is no suggestion, however, that it ceases to be a *law*.

[16] Epicurus holds that virtue is the one *sine qua non* of pleasure; we can be happy without food, but not without virtue; see D.L. X.138. This is presumably because we can adapt to the absence of food, but not to the absence of virtue, since virtue is what enables us to adapt our

are to trust Hermarchus, but not something completely unconnected with punishment, lest we do too much violence to *KD* 34.

Epicurus rejects the Cyrenaic version of hedonism, but he had surely considered the views of his hedonistic predecessors seriously, and this may provide a clue concerning his view on obedience and the law. Recall the apparent conflict (Chapter 2, Section 2.4, of this volume) between the elder Aristippus, who said that the wise man would continue to behave rightly if all laws were abolished (D.L. II.8.68), and the younger Aristippus, who said that the wise man behaves rightly "on account of the penalties imposed and on account of reputation" (D.L. II.8.91–3). These views seem contradictory, but may not be. The younger Aristippus gives us *two* reasons to obey the laws: punishment and *doxai* ("reputation"). In the situation contemplated by the elder Aristippus, the abolition of all laws might remove punishment as a concern, but perhaps not reputation.

Why would the Epicurean sage care about his reputation? He would care not in order to win acclaim or renown, of course, but perhaps in order to facilitate relationships of reciprocity. After all, the motivation for making the contract in the first place is not fear of punishment by government officials (since such institutions do not exist prior to the contract), but fear of retaliation by one's neighbors. If I want others to cooperate with me rather than aggress against me, I must convince them that I am a reliable cooperation partner; for if they cannot trust me to behave peacefully, then violence against me will be their only recourse (*Abst.* I.12). Thus it is in my interest to build a reputation as someone who can be trusted to do his part in cooperative interactions; abiding by norms of reciprocity is "useful for mutual association" (*KD* 38; cf. Axelrod 1985). Damaging my own reputation for trustworthiness, and thus increasing the incentive of others to act violently toward me, is what Xenophon would call the *natural* penalty of injustice (Chapter 2, Section 2.3, of this volume).[17] But this natural penalty does not fall upon the wrongdoer at once; the results are gradual and irregular. Hence, the sage will find the natural penalty to be a sufficient deterrent to injustice, but ordinary people tend to be too short-sighted and so need something that is quicker, more certain, and harder to forget or ignore: *legal* penalties.

This is evidently the difference between the motivations of the two groups in Hermarchus. And so *KD* 34 does not turn out to be *exactly* right, since it treats legal penalties as the only reason to avoid injustice.[18] But the fear of be-

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desires in the first place. Cf. Plato's doctrine in the *Euthydemus* that virtue is the one tool that cannot be misused because it is the standard of correct use. But this simply pushes us back to a further question: Why is justice a virtue?

[17] Perhaps this is why Epicurus calls justice based on this consideration *natural* justice; see *KD* 31.

[18] *KD* 34's reference to "punishers who are put in charge of such things" (*huper tôn toioutôn ephestêkotas kolastas*) clearly points to an established institution of punishment rather than mere private retaliation.

ing harmed by other people is close enough to the fear of punishment that *KD* 34 can be treated as an over-hasty summary rather than as a decisive repudiation of Hermarchus.[19]

The following dilemma, however, might then be raised for Epicurus: Does the Epicurean mutual nonaggression pact require the sage to renounce or restrain certain desires he has to inflict harm on others? If the answer is yes, then the picture looks too much like Glaucon or Carneades: The sage would ideally like to commit injustice against others but is fearful of the consequences and so settles for justice as the second best. On the other hand, if the answer is no, because the sage lacks the incentive to do harm, then it seems as though the sage is going to have a hard time getting others to enter into a contract with him, since the motive for making such contracts is to avoid being harmed by the other party, and no one is in danger of being harmed by the sage.

Does the sage have motives for harming others? Let us first distinguish between motives for *initiatory* harm and motives for *defensive* harm. Clearly, the sage has motives for engaging in defensive harm, and acts on those motives: The Epicurean community as described by Hermarchus employs violence against both those who break the contract (as when lawbreakers are punished) and those outside the contract (as when dangerous animals are killed).[20] Hence, it would be a mistake to regard the Epicurean sage as a patsy who cooperates no matter how often the other side defects. The contract does not require the sage to renounce his motives for defensive harm; in fact, it assumes their retention.

On the other hand, the sage has no motives for engaging in initiatory harm, since the desire to harm arises from hatred, envy, or low regard (*kataphronêsis*), and the sage is subject to none of these (D.L. X.117).[21] The Epicurean sage shuns the political life and chooses to "live unknown" in simplicity and freedom from disturbance, mastering all unnatural and unnecessary desires. Hence, the justice contract does not require the sage to sacrifice anything he values; its purpose is not to prevent the sage from *committing* harm, but to prevent him from *suffering* it (Stobaeus, *Eclogues* IV.142).

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[19] Lucretius (ca. 99–ca. 55 B.C.), the chief Roman expositor of Epicureanism, lends support to this interpretation; see *RN* V.959–1028, where the institution of punishment is clearly intended to be an *additional* incentive, over and above the fear of private retaliation.

[20] Epicurus holds that there are no obligations of justice among "whichever animals" (*hosa tôn zôiôn*) are unable to make contracts (*KD* 32; cf. 39). If the Epicurean requirements for contract are indeed looser and more informal than in traditional social contract theory, it becomes conceivable that some nonhuman animals might meet the entrance requirements for the moral community. Did Epicurus intend this? Some sources (Epicurus, *Nat.* 34.25.22–34; Lucretius, *RN* V.855–77) suggest yes; others (Hermarchus, as quoted in Porphyry, *Abst.* I.12.5–6) suggest no.

[21] Underestimating the extent of retaliatory harm that one's victims might be able to inflict in return would perhaps fall under "low regard."

As Epicurean values spread, then, the need for legal penalties should correspondingly decrease. The Epicurean cosmopolis, unlike its Cynic-Stoic counterpart,[22] is a dream for the future, not a reality for the present; the Epicurean propagandist Diogenes of Oenoanda (*New Frag.* 21.1. 4–14, 2.10–14) looks *forward* to a golden age where justice and friendship will replace laws (cf. Hermarchus) and city walls, and human beings will live "the life of the gods."[23] This is clearly a world in which everybody has become an Epicurean sage, and reliably chooses the benefits of cooperation. But the vision may have implications for the present as well: Diogenes of Oenoanda calls the whole world his homeland (*New Frag.* 25.2.3–11), while Epicurus speaks of friendship dancing around the world (*Sent. Vat.* 52), and is said to have numbered his own friendships by whole cities (D.L. X.9; Cicero, *Fin.* I.65).[24]

To the Roman poet Lucretius (ca. 99–ca. 55 B.C.), Epicurus was "a god indeed, who first discovered the rational system of life that is now called Wisdom, and who by his art moved life from such turbulence and such darkness into such serenity and such light" (*RN* V.9–12). His epic poem *On the Nature of Things* undertakes the daunting task of setting out Epicurus' "rational system of life" in hexameter verse.

Lucretius' brief discussion of law seems to follow Epicurus' contractarian account—particularly in the two-level version related by Hermarchus (Porphyry, *Abst.* I.7–12), where fear of strife motivates the wise to abide by an informal contract, but the unwise need the additional incentive of formal punishment. (Given the scantiness of our sources on Epicurus, the extent of Lucretius' originality is difficult to judge.) In a conjectural history of the beginning of human society, Lucretius tells us that our primitive ancestors, lacking awareness of the mutual benefits of the rule of law, grabbed from one another whatever their strength could win them. However, sexual love eventually gave rise to stable families, which led in turn to a gentling of the human spirit. Now each family, "eager to avoid harming and being harmed," was accordingly motivated to enter a mutual nonaggression pact with its neighbors (*RN* V.959–1028).[25] But as the growth of civilization brought inequalities of status, ambition and conflict arose—until, weary of strife, people were willing to ac-

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[22] But like that in Pseudo-Aristotle, *To Alexander on Kingship* 8.

[23] The wording suggests Stoic influence. Centuries earlier, we find Cicero—with his Stoic hat on—writing that if human beings ever realize their universal kinship with one another, then they will live "the life of the gods" (*Leg.* I.33, fragment, as quoted in Lactantius, *Inst.* V.8); and Stoics commonly describe the cosmopolis as a common habitation of men and gods.

[24] Why doesn't caring about our friends' welfare impair our self-sufficiency (as per Theodorus the Cyrenaic) by making our happiness vulnerable to the bad luck of our friends? Apparently, this is because Epicurus thinks that we can take as much pleasure in our friends' past or future happiness as in their present happiness (*KD* 19–20, 40, 66; Cicero, *Tusc.* V.95; D.L. X.137; Lucretius, *RN* III.1087–94; Plutarch, *Contr. Ep. Beat.* 1105e).

[25] By contrast with contemporary "hypothetical contract" theories, the Lucretian contract represents an actual (if tacit) accord that we have reason to bring about.

cept a system of "strict laws and rights" backed up by punishments (1105–61). For Lucretius, formal law is the price humanity pays for its own folly.

5.6. Stoics

The most influential of the various Hellenistic schools was the Stoa (named after the *stoa poikilê*, or "painted colonnade," where the school met), whose founder, Zeno of Citium (ca. 334–ca. 262 B.C.), was a student of Crates the Cynic. The Stoic emphasis on self-mastery and indifference to everything but virtue indicates Stoicism's debt to Cynicism. Since the writings of the early Stoics are lost, it is unclear how much of the Stoa's distinctive doctrines derive from Zeno and how much from the "second founder" of Stoicism, Chrysippus (280–208 B.C.). What is clear, however, is that the early Hellenistic Stoa—the Stoa of Zeno, Cleanthes, and Chrysippus—was much closer to the antinomianism of its Cynic origins than was the more respectable later Hellenistic Stoa that grew up in the shadow of Rome—the Stoa of Diogenes of Babylon, Antipater of Tarsus, Panaetius, Poseidonius, Hecaton, and their successors. The two works that caused the later Stoics the most embarrassment are also the starting point for Stoic legal thought: Zeno's *Republic* and Chrysippus' *On the Republic* (the latter being a commentary on the former).[26]

We are told that in the city advocated by Zeno, only the virtuous are friends or fellow citizens; equality of men and women is established through unisex clothing[27] and the abolition of marriage in favor of open sexual relations based on mutual consent; and temples, law courts, gymnasia, and currency are banned (D.L. VII.1.33). Many of these proposals simply take to their logical extreme the Spartan institutions praised by Xenophon (*Lac.* I.3–4, VI.1–3, VII.3–6). Chrysippus apparently endorsed most of Zeno's program (D.L. VII.1.131), adding a defense of the legitimacy, under the right circumstances, of masturbation, incest, and cannibalism (DL VII.1.121, 188; Plutarch, *Stoic. Rep.* 1044b–1045a; Sextus Empiricus, *PH* III.247–8).

The two clearest influences on the Zeno-Chrysippus *Republic* are the works of the same name by Plato and Diogenes. But is the Stoic republic an independent city-state like Plato's, a utopian blueprint for a community of sages? (Diogenes Laertius' description [D.L. VII.1.33] of Zeno as banning law courts, etc., in the *cities*, plural, might suggest that the envisioned community does not embrace the entire earth.) Or is it a still more utopian blueprint for a worldwide Stoic empire? (Plutarch tells us [*Alex. Fort.* VI.329a–c] that Zeno advo-

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[26] Some of the later Stoics found Zeno's *Republic* so embarrassing that they attempted its suppression; cf. D.L. V.1.34; Clement, *Strom.* V.9.58.2.

[27] Presumably following the precedent of the Cynic Hipparchia (D.L. VI.7.96–7), though Plato's female students wore men's clothing as well (D.L. III.46; Philodemus, *Acad. Ind.*, *Herc.* 1021).

cated replacing local communities with the cosmopolis.) Or is it a description of how the wise should conduct themselves here and now, in the existing universal community, the Cynic cosmopolis? (Thus Zeno began his *Republic* [Philodemus, *Stoic.* 18] with the statement that it was relevant to his own place and time.) But the three interpretations need not be inconsistent. Zeno is describing how the wise will interact; the account will apply equally to a small community of sages living together, or to the entire community of sages scattered throughout the earth, or to a world in which everyone has achieved sagehood.[28] If the sages build their own city, be it a local or a global one, they will not construct any temples or gymnasia; if the sages live among people who do construct such things, they will simply not *treat* any existing structures as temples or gymnasia. Temples are places where conduct that is ordinarily permitted is forbidden (as sacrilege); gymnasia are places where conduct that is ordinarily forbidden (public nudity) is permitted. Zeno is rejecting such artificial divisions; just as the Cynics rejected the idea of different rules of conduct in private and in public, so Zeno is rejecting the ideas of different rules of conduct in different locations.[29] Zeno's rule that there is no part of the body that must always be covered (D.L. VII.1.33) converts the whole world into a gymnasium.

Yet if the rules of the ideal community hold for sages in the here and now, what are we to make of the claim, ascribed to Zeno and Chrysippus (D.L. VII.1.121; Seneca, *Otio* III.2), that the sage will, when circumstances call for it, take part in ordinary civic institutions such as politics and marriage? Perhaps there is a difference between the way a sage interacts with other sages and the way he interacts with ordinary people.[30] The Stoic reverence for both Socrates and Diogenes perhaps required some way of reconciling the marriage and (admittedly limited) political participation of the one with the antinomianism of the other.[31] (As part of the de-Cynicizing of Stoicism, later

[28] Schofield 1991 argues that the Zenonian republic was an individual community; Erskine 1990 and Vander Waerdt 1994c defend a cosmopolitan interpretation. One of Schofield's arguments (1991, 26) is that we cannot imagine "what it would mean to rule that women are to be held in common" unless Zeno is describing "a community whose members are known to one another and live in more or less close proximity to one another." But Zeno's "community of women" means that sexual liaisons are to be open and based solely on mutual consent; to internationalize this is simply to deny that such freedom of choice stops at national borders. Helen and Paris were practitioners of "community of women" in its internationalized form.

[29] Plutarch (*Stoic. Rep.* 1034b) attributes to Zeno a somewhat different reason for the prohibition on temples, namely, that nothing made by human hands can be sacred. The ban on currency might have a similar motivation.

[30] For example, if community of women holds between sage and sage but not between sage and fool, the sage might commit adultery with Crates' wife Hipparchia, but not with Menelaus' wife Helen.

[31] Seneca offers a different interpretation (*Otio* III.2–3, VIII.1–4). By Zeno's and Chrysippus' rule, a sage will participate in politics unless something prevents him. But, says Seneca, if the state is too corrupt to obey the sage's advice, that will be enough to prevent him. Every state, however, is too corrupt to obey the sage's advice, as the fate of Socrates in Athens

Stoics would defend marriage and political activity as expressions of the natural tendencies of social animals.)

Who are the citizens of the Stoic cosmopolis? Some sources tell us that only the wise are its citizens (D.L. VII.1.33; Philodemus, *Herc.* 1428.7–8; Plutarch, *Lyc.* 31); others extend its citizenship to all rational beings (Cicero, *Off.* I.50–51, *Leg.* I.61; Plutarch, *Alex. Fort.* VI.329a–c). A possible solution is offered by Dio Chrysostom (*Or.* XXXVI.23): Human beings (i.e., unwise ones, actual ones) get counted as citizens of the cosmopolis along with gods in the same way that, in human cities, children get counted as citizens along with adults, because they have a natural potentiality for the functions of citizenship even if they cannot yet exercise that potentiality. Schofield (1991, 78) argues convincingly that Dio's position is likely to have been the orthodox Stoic one. The cosmopolis, then, is both a community of everyone potentially and a community of the wise actually (cf. Obbink 1999).

What are the normative implications of the cosmopolis? According to Cicero (*Leg.* I.61–2), once we recognize our true status as citizens of the cosmos, we will naturally be led to despise ordinary concerns (which sounds Zenonian enough) and to start making orations, enacting legislation, praising the virtuous, protecting the weak, punishing the wicked, and ruling nations— all of which sounds rather more Roman than Zenonian. Knowing where the contributions of Zeno and Chrysippus end and Roman influence begins is accordingly difficult. But we can be reasonably confident that the early Stoics regard the cosmopolis as governed by a moral law that supersedes positive law. Zeno describes the human race as sharing citizenship in common, nurtured by a common law (*Alex. Fort.* VI.329a–c), and Chrysippus identifies law as the supreme ruler, the criterion of justice and injustice, and the standard of correct conduct for political animals (Marcian, *Institutes* I.2.25, as quoted in *SVF* III.314). The only true law—that is, the only rule that has normative authority—is right reason (Cicero, *Leg.* I.23; Marcus Aurelius, *Med.* IV.4). The justice it defines is natural, not conventional (D.L. VII.1.128; Cicero, *Leg.* I.28, 44). It is the same for all times and places, and statutes which deviate from it are not genuine laws but instead have no better status than the dictates of a criminal gang (Cicero, *Leg.* I.17–19, 42, II.8–14; *Rep.* III.33; cf. Augustine, *CD* IV.4). Anyone who does violate the natural law will be punished, even if he escapes all worldly punishments, because the worst penalty of all is to be in violation of one's nature as a rational being (Cicero, *Off.* II.36; Lactantius, *Inst.* VI.8 [cf. V.11]; Epictetus, *Diss.* IV.1.118–22).[32]

(and, by implication, Seneca under Nero) shows; so the Zeno-Chrysippus rule in effect rules out political participation entirely. If someone advises "Sail, but not on any sea where storms are likely to occur," that, Seneca concludes, amounts to the advice "Do not sail."

[32] It is interesting to see how the basic Antiphonian idea of natural penalties is developed in a consequentialist direction by Xenophon and Epicurus, and in a nonconsequentialist direction by Plato and the Stoics.

For later natural law thinkers like Aquinas and Locke, obedience to the law of nature involves obedience to certain *rules* that right reason discovers to be appropriate for human beings. This is arguably true for the later Stoics as well—as evidenced by the casuistical debates recorded in Cicero's *On Duties*, and the lists of appropriate Stoic actions in Diogenes Laertius (VII.1.107–9). But is it likewise true of the early Stoics? Vander Waerdt (1994c) argues that the early Stoics have a dispositional rather than a rule-following conception of natural law; the law the sage follows is his own judgment, but his judgment is based on an insight into the requirements of the particular situation, rather than on the application of an abstract rule. By the time of Seneca (*Ep.* 94–5) the official Stoic doctrine was that the wise man will grasp and apply precepts (*praecepta*), but Seneca's discussion shows that the question had once been a matter for debate.[33] Most of the regulations in Zeno's *Republic* might be seen less as rules than as the waiving of rules: One need not treat any one place as special (temples, gymnasia), one need not cover any particular body part, one need not abstain from sexual intercourse with another's spouse—though the prohibition on currency is less easy to fit into this pattern.[34]

Subsequent generations saw a transition from the Cynic-leaning Stoicism of Zeno's and Chrysippus' era to the more Aristotelian Stoicism of Panaetius and his contemporaries. This transition involved two major changes: a shift from an ideal of nature-as-recovery to an ideal of nature-as-completion, and a greater willingness to take our socially assigned roles as well as our natural ones into account in defining that completion. The result was a fuller engagement with the social and legal institutions of the day, and, accordingly, a greater need to sort out the good from the bad in such institutions, rather than simply rejecting them *in toto* in the manner of the Cynics; Diogenes of Babylon, in particular, marks such a turning point. This helps to explain the later Stoa's casuistical turn, and thus the development of a more rule-oriented version of natural law.

What Zeno and Chrysippus had accomplished was to take a way of life—the stern independence of the Cynic—and turn it into a logical system so powerful and rigorous that it quickly placed other schools on the defensive. The Stoics soon came to set the philosophical agenda and terms of debate for the Hellenistic era, so that even those who argued against Stoic doctrine had to use Stoic concepts and terminology. Dazzling dialectical skill in pursuing the implications of an argument to the end, however paradoxical, was the way to win Greek minds. But it was not the way to win Roman minds; the next

[33] Seneca's example of an antirule Stoic, however, is Ariston, who is generally so unorthodox that he is dangerous to generalize from. On the whole question of rules versus insight in Stoicism, see Kidd 1979; Inwood 1986; Annas 1993, 96–108; and Striker 1996b.

[34] But it is, of course, a literal application of the Cynic injunction to "deface the currency" of convention.

stage in the development of ancient philosophy would need a new approach—and it got one. With Diogenes of Babylon, the Stoa begins to turn its face to the West. It is Diogenes who begins the process of bringing the Stoa into engagement with the social and legal institutions that frame and permeate our quotidian practical experience. Significantly, it is also Diogenes who joins the delegation (155 B.C.) that brings Greek philosophy to the Roman world.

The Stoa conquered Greece by learning logic. To conquer Rome, it would learn law.

Further Reading

The writings of the Hellenistic philosophers survive mostly in fragmentary form. An excellent source by Long and Sedley (1987) provides texts and translations of quotations and testimony with valuable interpretive material. Two recent volumes stand out as the indispensable starting point for further study of the philosophy of law in the Hellenistic and Roman periods. The best synoptic account of Hellenistic philosophy is Algra et al. 2000, with separately authored chapters placing the thinkers discussed in this chapter in a wider philosophical context. Rowe and Schofield 2000 contains an extensive section on Hellenistic philosophers, including discussions of Cynicism, Epicureanism, Stoicism, and particular thinkers. An illuminating general study of Hellenistic moral and social thought is Annas 1993. Laks and Schofield 1995 is a helpful collection of essays on Hellenistic social and political philosophy emphasizing themes of justice and generosity. Vander Waerdt 1994b includes articles on the Stoic and Skeptic reception of Socrates. Sorabji 1993, though primarily concerned with the moral status of animals, offers fascinating information and reflections on all aspects of Hellenistic moral and social thought.

The standard collection of *fragmenta* and *testimonia* for Theophrastus (it does not include the works which survive complete) is Fortenbaugh et al. 1992. The collection of essays by van Ophuijsen and van Raalte (1998) is a good introduction to Theophrastus. For other early Peripatetics, text, translation, and commentary for Demetrius of Phalerum is provided in Fortenbaugh and Schütrumpf 2000, and for Dicaearchus of Messana in Fortenbaugh and Schütrumpf 2001. Stern 1968 is a careful study of the "cosmopolitan" passages in the letter *To Alexander on Kingship* attributed to Aristotle.

The best source of Epicurus' writings and testimonia in translation is by Inwood and Gerson 1994. Mitsis 1988 is the definitive study of Epicurus' ethical and social thought. Schofield 1991 is a carefully detailed and persuasive study of the evidence for the political theory of Zeno and the early Stoa. Setting the same evidence in a broader historical and political context, Erskine (1990) defends a more democratic and egalitarian interpretation of the early Stoics. Ierodiakonou 1999 includes useful articles on Stoic social theory. An important discussion of late-Stoic casuistry is Annas 1989.

LAW IN ROMAN PHILOSOPHY

by Brad Inwood and Fred D. Miller, Jr.[1]

6.1. Historical Overview of Roman Law and Legal Thought

Legal philosophy in late antiquity must be understood in relation to Roman law, a system which continued to evolve from the traditional founding of Rome (753 B.C.) until the fall of the Eastern Roman (or Byzantine) Empire (A.D. 1453). Rome was at first ruled by kings about whom little is certain. A set of laws attributed to them (*leges regiae*) and compiled by Papirius a priest (*pontifex*) were probably statements of customary and religious norms, concerning marriage, family relations, funeral rites, and so forth (Johnson, Coleman-Norton, and Bourne 1961, 3–6). The Roman Republic (509–27 B.C.) was initially threatened by internecine conflict between the patrician and plebeian orders. This was resolved in part through the Twelve Tables (451–450 B.C.), a written public code composed by officials called decemviri, which could not be arbitrarily changed by patrician magistrates. This collection of statutes, which the Roman historian Livy called "the fount of all law, public and private" (*Roman History* 3.34.6, trans. Jones), was lost, although many quotations, paraphrases, and descriptions were preserved by later Roman authors (Johnson, Coleman-Norton, and Bourne 1961, 9–18; Warmington 1967; see also A. Watson 1975).

The republican constitution had three elements: the magistrates, the senate, and the assemblies. The important magistrates (most holding office for a year) included the two consuls, praetors (both of whom held a coercive power termed *imperium*, which entailed a judicial capacity), *aediles* (whose general concern was maintenance of public order through adherence to regulations), quaestors (whose responsibilities were largely financial), and censors (in charge of census and supervision of morals). In emergencies, usually on the advice of the senate, a magistrate with *imperium* could nominate a dictator who, if approved by the senate, would hold supreme *imperium* for at most six months. The senate (literally "council of elders") had a purely advisory role based on *auctoritatas*, a morally binding authority, but it eventually became the dominant political body. Ideally, it had 300 members (later 600) who were mostly former magistrates and had lifelong tenure. Among the various assem-

[1] Sections 6.2–5 were written by Brad Inwood, and Sections 6.1 and 6.6 by Fred Miller. Section 6.1 benefited from suggestions by Thomas Banchich and Richard Epstein. Portions of Inwood's discussion appear in an expanded and more fully developed form in Inwood 2003. Sections 6.4 and 6.5 owe a great deal to the assistance of Fred Miller. All translations are by the authors unless otherwise indicated.

blies, the oldest was the curiate (*comitia curiata*), composed of thirty curiae, which ratified the Twelve Tables but gradually lost importance. The most powerful assembly was the centuriate (*comitia centuriata*), organized into classes based on wealth as an index to military capacity, which elected magistrates such as the consuls with supreme power (*imperium*) and had the right to declare war or ratify treaties. The tribal assembly (*comitia tributa*) elected lower magistrates and adjudicated some non-capital cases. Finally, to help resolve their conflict with the patricians, the plebeians formed their own assembly (*concilium plebis*), presided over by ten tribunes, which gradually became an important legislative body. The tribunes acquired increasing power, including the right to veto the proposals of magistrates and fellow tribunes. These assemblies underwent changes. For example, the patrician and plebeian membership of the tribal assembly gradually melded with the purely plebeian membership of the plebeian assembly, so that the tribal assembly became the dominant legislative and electoral body in republican Rome.

Every adult male citizen was a member of the curiate, centuriate, and tribal assemblies, and every plebeian (the vast majority of citizens) had a right to membership in the plebeian assembly. Although all citizens could vote, their votes were tallied in groups, whether curia, tribe, or century (the last weighted in favor of wealthy citizens who could afford to arm themselves more fully). The Romans recognized different sources for law (*ius*, pl. *iura*). In the Republic, a measure approved by an assembly was called a statute (*lex*, pl. *leges*). The acts of the plebeian assembly (called *plebiscita*) had the force of law binding on all citizens after the enactment of the Hortensian statute of 287 B.C. An assembly's powers were limited, because it could not initiate legislation. It could only approve or reject a measure placed before it by a magistrate, which had been previously discussed and approved by the senate. These resolutions could be vetoed by a tribune or a magistrate with *imperium* before the assembly had the opportunity to act on them. The edicts proclaimed by magistrates were also regarded as laws. In some instances, these edicts served to confirm resolutions of the senate (*senatus consulta*).[2]

Jurists (*iuris consulti* or *prudentes*) also played an important role in the development of Roman law (see Lenel 1889; Frier 1985; Bauman 1971; and Johnston 2000). Originally priests but later normally former magistrates, they were legal experts who advised the praetor as members of his council. Some jurists wrote widely circulated manuals, including Quintus Mucius Scaevola (consul in 95 B.C. and author of an influential treatise on civil law), his pupil Aquilius Gallus (praetor in 66 B.C.), Servius Sulpicius Rufus (consul in 51 B.C.), and Alfenus Varus (interim consul 39 B.C.). There was also a school (*secta* or *schola*) in the senate that discussed legal issues. The jurists wrote an-

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[2] Johnson, Coleman-Norton, and Bourne 1961 and Crawford 1996 are collections of laws, edicts, rescripts, and other legal documents. See A. Watson 1974.

swers to legal questions (*responsa prudentium*) concerning the interpretation of laws and official edicts. They also assisted in the drafting of legal documents such as contracts and wills, and they advised judges and disputants in lawsuits. Their opinions were embodied in court decisions which served as precedents for later decisions. The jurists influenced the interpretation of the unwritten (*non scriptum*) law or custom (*mos*, pl. *mores*), which, like the Greeks, the Romans distinguished from written (*scriptum*) law.

The historian Polybius (ca. 200–ca. 118 B.C.) viewed the Roman constitution as the true exemplar of the "mixed constitution," combining monarchical, aristocratic, and democratic elements:

> [I]t was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical. This was indeed only natural. For if one fixed one's eyes on the power of the consuls, the constitution seemed completely monarchical and royal; if on that of the senate it seemed again to be aristocratic; and when one looked at the power of the masses, it seemed clearly to be a democracy. (Polybius, *Histories* VI.11.12, trans. Paton)

Within the Roman Republic, as described by Polybius, each branch has distinct powers: The consuls are the supreme magistrates, especially in matters of war; and they summon assemblies, introduce measures, and preside over the execution of decrees. The senate controls public finance, investigates public crimes such as treason, conspiracy, and assassination, and is in charge of embassies to foreign countries. The popular assemblies have sole constitutional authority (*kurios*) over the imposition of honors and punishments and to bestow offices. Also, writes Polybius, "the people have the power [*kurian*] of approving or rejecting laws [*nomôn*], and what is most important of all, they deliberate on the question of war and peace" (*Histories* VI.14.10, trans. Paton). The three parts of the constitution are each able, if they wish, to counteract and cooperate with the others in various ways. For example, although the people are obliged to be submissive and deferential to the senate (VI.17.1), the assemblies can curb the traditional authority (*exousia*) of the senate and the tribunes can prevent it from acting (VI.16.3–4). Polybius admires the Roman system involving separated powers with checks and balances: "Such being the power that each part has of hampering the others or cooperating with them, their union is adequate to all emergencies, so that it is impossible to find a better political system than this" (*Histories* VI.18.1, trans. Paton).

Polybius was the friend and teacher of Scipio Aemilianus, a powerful politician and the general who destroyed Carthage. Scipio shared Polybius' ideal of the Roman balanced constitution, but feared its eventual decline. This ideal was increasingly jeopardized by the division between the rich and the poor, which was reflected in disputes within the Roman ruling class itself between the so-called *populares* (who tended to rely on tribunes and the tribal and plebeian assemblies) and the so-called *optimates* (who tended to rely on the senate and magistracies). The political order was shaken by a series of crises, in-

cluding the attempt of the tribune Tiberius Sempronius Gracchus to institute land reform through the plebeian assembly and bypass the senate, leading to his assassination (133 B.C.). His reforms were continued by his brother, Gaius Sempronius Gracchus (d. 121 B.C.), one of whose laws required that juries be selected from the *equites* (cavalry). Although this was meant as a populist measure, it had the unintended consequence of empowering the *publicani* (tax collectors) as an interest group and exacerbating political instability. L. Cornelius Sulla used an army to have himself appointed dictator with unspecified tenure (81–79 B.C.). A succession of violent conflicts among powerful holders of *imperium*, including Marius, Pompey, Julius Caesar, Marc Antony, and others finally brought down the Republic.

Marcus Tullius Cicero (106–43 B.C.) was an influential figure during this tumultuous period. Scion of an affluent but not politically established family, he studied law under the jurist Mucius Scaevola and gained personal influence through his rhetorical skill and successes in the law courts. A supporter of optimate tactics, Cicero defended the Roman Republic as a mixed constitution without parallel. He studied philosophy in Athens, consorted with Greek intellectuals in Rome, and popularized Greek philosophy among his compatriots. Late in life, forced to withdraw from politics, he wrote dialogues dealing with legal philosophy, including *On Duties*, *On the Commonwealth* (with Scipio Aemelianus as an interlocutor), and *On the Laws*, the latter two modeled after Plato's dialogues. He criticized the traditional jurists for concentrating on particular laws, for example, "about water running off roofs or about shared walls," and neglecting questions about the source of law and justice (*Leg.* I.14). (His views are discussed in Section 6.2 below.) After the assassination of Julius Caesar (44 B.C.), Cicero reentered politics only to be killed on order of his nemesis Marc Antony, who was in turn defeated by Caesar's nephew, Octavian, who, as Caesar Augustus, gained constitutional control of the state in 27 B.C. Despite his claim that as "first man" (*princeps*) he had restored the republic, Augustus was in fact the first Roman emperor.

The history of the empire has two main periods: the principate (27 B.C.–A.D. 284) and dominate (A.D. 284–585).[3] During the early principate, legal authority shifted increasingly to the emperor to whom the people had committed its "entire authority and power" (Justinian, *Dig.* I.4.1). Legislation by assembly gave way to imperial enactment (*constitutio*), and the last statute (*lex*) was passed under the emperor Nerva (ruled 96–98). At first the emperor relied on the senate to approve his proposals, but this procedure became increasingly perfunctory and finally ceased. Nevertheless, there was considerable interest in the law during this period. During the reign of Augustus there arose two contending legal schools (intellectual movements, not educational institutions) in the senate: the Proculians and the Sabinians. Since the former

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[3] See Buckland and Stein 1975 and Schulz 1967 for law in the Roman empire.

school (founded by Labeo, a critic of Augustus) challenged the more traditional view of the latter (under Capito), there ensued vigorous debate over jurisprudence. Augustus granted certain jurists the right to give answers with the force of law (*ius respondendi*), although this practice died out during the second century A.D. The emperors increasingly relied on edicts, legal decisions, and rescripts (written answers to queries by officials). The power of the jurists in the senate waned under Emperor Hadrian (117–138), but one of his rescripts did establish that the concurrent written opinion of privileged jurists had the force of law, although a judge could use his discretion if the jurists' opinions disagreed.

During the first two centuries of the Roman Empire, Stoic philosophers made important contributions to legal thought. These included, most notably, the statesman and dramatist Seneca (1–65), the freed slave Epictetus (60–140), and the emperor Marcus Aurelius (b. 121, ruled 161–180). (They are discussed in Sections 6.3–5 of this chapter.)

Throughout the course of the Roman Empire, there continued, however, to be considerable scholarly interest in jurisprudence (see Honoré 1994).[4] Many ancient treatises on this subject have unfortunately perished, although numerous excerpts were preserved in Justinian's *Digest* (see Chapter 10, Section 10.1, of this volume). In the first century A.D., Masurius Sabinus published *Three Books on Civil Law*, a collection of opinions of jurists. Like other scholars, he distinguished civil law (*ius civile*), which applied only to Roman citizens, from the law of nations (*ius gentium*), that is, Roman law concerning cases involving foreigners and Romans (as in international commerce). He also distinguished different kinds of civil law—law of succession, law of persons, law of obligations, and law of things—an approach followed by later writers. Many collections of juridical opinions circulated during the first three centuries A.D., including the *Epistulae* of Proculus (mid-first century) and of Neratius Priscus (d. after 133), the *Digesta* of Julian (second century), the *Digesta* and other works of Celsus (second century), the *Enchiridion* of Pomponius (second century), the *Quaestiones* and *Responsa* of the highly revered Papinian (d. 212), the *Institutes* of Marcian (early-third century), and the many works of Paul (d. after 235), fragments of which were later collected in the extant *Sententiae* or *Opinions*. Of special interest to modern legal scholars is the *Institutes* of Gaius (ca. 160), of which a manuscript was discovered in 1816.[5] The only work of a jurist to survive substantially intact, it covers the law of persons, property rights and inheritance, and legal actions. Ulpian (d. 228), perhaps the most influential of the jurists, published a *Digest* and numerous other works with many citations of his predecessors. The extant

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[4] Robinson 1997, chap. 3, gives a valuable overview of critical editions, translations, and studies of the extant texts.

[5] Gordon and Robinson 1988 is a text and translation. Honoré 1962 is a study of Gaius.

Epitome was a later compilation of excerpts from his writings.[6] The last of the great jurists was Herrenius Modestinus (third century). The *Vatican Fragments* (mid-fourth century) is a valuable extant collection of extracts from Papinian, Paul, and Ulpian, as well as later rescripts and opinions. Also surviving is the *Mosicarum et Romanarum Legum Collatio* (composed between ca. 390–438), which compares Roman law with Mosaic law, quoting legal experts (on Mosaic law see Chapter 7, Section 7.1, of this volume).

These authorities tended to be scholars and editors rather than original legal thinkers. But their works were widely read and often cited in legal decisions. Some of them (e.g., Proculus, Neratius Priscus, Celsus) favored the more rigorously principled Proculian viewpoint, and others (e.g., Masurius Sabinus, Cassius Longinus, Julian, Gaius) favored the more traditional and pragmatic Sabinian position. Their differences in legal philosophy resulted in disagreements on some particular issues, for example, on whether the price of something must be pecuniary (Proculians) or can consist in other goods as in barter (Sabinians) (see Gaius, *Inst.* III.140–1). Some of them, especially Gaius, Paul, and Ulpian, were strongly influenced by the discussions of nature and law in Aristotle and the Stoics, although they understood these concepts differently. For example, Gaius generally follows Aristotle's treatment of law and justice, including his distinction between the natural and the legal. Gaius distinguishes civil law, "which each people makes for itself" and is "peculiar to itself," from the law of nations (*ius gentium*), which is common to all peoples: "The law which natural reason makes for all mankind is applied in the same way everywhere." Gaius here suggests that commonality of legal practice is evidence of its reasonableness. Differences of civil law reflect local conventions that were in effect different ways of implementing general principles (e.g., that promises are binding). Gaius expresses a Roman legal viewpoint that supported toleration of different local legal systems. According to Gaius, natural reason also reveals natural law (as in the case of the right of first acquisition), so that the law of nations is, in effect, equivalent to natural law (*Inst.* I.1, II.65–6; cf. Justinian, *Dig.* I.1.9; see Honoré 1962, chap. 6). Ulpian, in contrast, sharply distinguishes these concepts:

Private law is tripartite, being derived from principles of natural law, law of nations, or civil law. Natural law is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals [...]. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing [...]. The law of nations is that which all human beings observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas the law of nations is common only to human beings among themselves. (Ulpian, *Inst.* I *ap*. Justinian *Dig.* I.1.1)

Using this distinction, Ulpian reasons, for example, that slavery and consequently manumission belong to the law of nations, "since, of course, everyone

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[6] Translated by Muirhead 1880.

would be born free by the natural law" (Ulpian, *Inst.* I *ap*. Justinian *Dig.* I.1.4; cf. 3–4). Ulpian agrees here with other jurists such as Tryphoninus (*Disputationes* VII *ap*. Justinian *Dig.* XII.6.64) and Florentinus (*Institutes* XII *ap*. Justinian *Dig.* I.5.4) (see Carlyle 1936, vol. 1: 39). Unfortunately, the crucial distinction between natural law and the law of nations is not further clarified in the surviving texts of the jurists. Nor do they explain their use of the term "natural," which seems to be used for what they regard as normal or reasonable (Levy 1949, 7; Kelly 1992, 57–63).

Concerning the concept of law, the jurists drew on Greek orators and philosophers in an eclectic way. Marcian quotes Demosthenes and Chrysippus. Drawing on Demosthenes, he mentions three reasons why everyone ought to obey law: "It is a discovery and a gift of god"; "it is a resolution of wise men, a correction of misdeeds both voluntary and involuntary"; and "it is the common agreement [*sunthêkê*] of the *polis* according to whose terms all who live in the *polis* ought to live." Papinian echoes this view, when he defines a statute (*lex*) as a "resolution of wise men" and "a communal covenant of the state" (*Definitions* I *ap*. Justinian *Dig.* I.3.1). Marcian also appeals to Chrysippus, "a philosopher of supreme Stoic wisdom": "Law is king over all divine and human affairs. It ought to be the controller, ruler, and guide of good and bad men alike, and in this way to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done" (Marcian, *Institutes ap*. Justinian *Dig.* I.3.2, trans. Watson). Ulpian expresses a similar view, closely connecting law (*ius*) and justice (*iustitia*): Legal wisdom (*iuris prudentia*) "is an awareness of God's and men's affairs, knowledge of justice and injustice" (*Rules* I *ap*. Justinian *Dig.* I.1.10). Ulpian also remarks, somewhat obscurely, that civil law neither follows wholly nor diverges entirely from natural law or the law of nations, and that it is made by adding to or taking away from the common law (*Inst.* I *ap*. Justinian *Dig.* I.1.6). The surviving writings of the jurists have little else to say concerning the nature of law.

During the dominate (starting A.D. 284) the emperors wielded absolute political power. The later empire came to resemble an oriental despotism with the emperor as a god or, after the triumph of Christianity, God's representative on earth. Deprived of independent authority, the jurists devolved into mere advisors to the emperor who possessed the ultimate legislative authority. Nonetheless, the emperors and citizens alike recognized the lack of, and pressing need for, a comprehensive and consistent system of laws that would apply throughout the empire. At the beginning of this period, the Gregorian Code (ca. 291) and the Hermogenian Code (ca. 295), named after two officials of the Emperor Diocletian (reigned 284–305), undertook to systematize the rescripts of emperors.[7] In an effort to resolve the many inconsistencies in

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[7] The word "code" translates *codex*, which indicates that the works were published as books with pages rather than as rolls.

the extant legal literature, Emperor Theodosius II laid down the Law of Citations (426), which involved the following decision procedure: Follow the writings of Papinian, Paul, Ulpian, Modestinus, and Gaius; and secondarily follow other jurists cited by them. If these five disagree, follow the majority. If there is no majority, follow Papinian. If Papinian says nothing on the issue, the judge may use his own discretion. Finding this procedure insufficient, the emperor promulgated the Theodosian Code (438), which sought to combine the previous codes, laws, and juridical opinions into a consistent statement of public law (see Mommsen and Meyer 2002–2005; Pharr 1952; Harries and Wood 1993; Harries 1999). Laws were dated, with later laws given precedence. The law of citations was retained for citations of the jurists. The code itself was divided into sixteen books, of which the last eleven have survived in manuscripts. Material from the other books was preserved in later works, especially the Justinian Code (528–555), the *Lex Romana Visigothorum* (506), and other legal codes of the Germanic barbarians. After the end of direct Roman rule in much of western Europe, the history of Roman legal thought continued in Constantinople, the New Rome.[8]

6.2. Cicero

There is little original philosophy of law in ancient Roman thought, if "philosophy of law" is understood in a narrow sense to designate a field distinct from political philosophy. But, for whatever reason, legal concepts enjoyed an extensive and vital use in the philosophical discourse of this era. The exploitation of "law" and various legal concepts is especially associated with Stoicism. This is not without reason, although Platonism had a very important influence on Roman legal thought (as did, to a lesser extent, Aristotelianism and Epicureanism).[9] The authors most characteristic of Roman legal philosophy—Cicero, Seneca, Epictetus, and Marcus Aurelius—will be the focus of the rest of this chapter. Particular attention shall be paid to what is regarded as their most important contribution to legal philosophy: the idea of natural law.[10]

In the philosophical tradition it was Plato who first brought "law" and "nature" into fruitful philosophical contact (see Chapter 3 of this volume). Early Stoicism pushed these ideas even further, in ways that remain controversial among scholars (see Inwood 1999; Vander Waerdt 1994c; and Chapter 5,

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[8] See Volume 7 of this Treatise, Chapter 1, for fuller discussion of the Roman jurists' conception of law. See Chapter 10, Section 10.1, of this volume for further discussion of the Justinian code and its historical importance.

[9] Although Lucretius (99–55 B.C.) lived during this period, his thought is more closely related to the Epicureans (and is discussed in Chapter 5, Section 5.5, of this volume) than to other Roman thinkers.

[10] See also Colish 1985, chap. 6, for the issue of the impact of Stoicism on Roman law. More generally, see Johnston 2000, 622–3, 630–3.

Section 5.6 of this volume).[11] Natural law (or the "common law," *koinos nomos*, the better attested term for early Stoics) is the perfected rationality of Zeus and the sage, giving orders about what is to be done and what is not to be done, orders whose content is one of two sorts. First, the common law commands that rational agents act virtuously, in accordance with their perfected reason and nature. These commands are immune to exception when left at this level of generality, but they are not definitively action-guiding since the virtuous thing to do is often to be determined by variable circumstances. Second, this law also provides more concrete guidance about how one should act by specifying the kinds of things one should do in particular circumstances. But once it does this, it loses the immunity from exception that characterizes the broad injunctions to act virtuously. A natural law, then, is always imperatival; but if universal it will be to some extent vague, and if definite enough to be action-guiding it will admit of exceptions (cf. Inwood 1999). This is a perfectly reasonable application of a conception of law to philosophical thinking: It reflects a general truth about the relationship between laws or rules and moral behavior (a truth which Aristotle recognized when discussing equity in its relationship to laws), namely, by their very nature laws have a vagueness that demands flexible interpretation if the underlying purpose of attaining justice is to be achieved.

These Stoic ideas influenced Cicero (b. 106 B.C.), the Roman statesman and philosopher whose career spanned the most turbulent years of the late republic. He was first elected to public office in 75 B.C., won the consulship in 63 B.C., and was preoccupied with the constantly decaying condition of the republic until his murder in 43 B.C. by the minions of Marc Antony. His early education included a thorough study of Greek philosophy, and he continued to read and write philosophical works throughout his life. The two works of Cicero that matter most to the present discussion are *On the Commonwealth* and *On the Laws*, which were composed during the 50s B.C. when Cicero was effectively deprived of political power yet constantly yearning to preserve the old Roman Republic of his ideals, one characterized by the enlightened leadership of a stable elite and by a high degree of social cohesion.[12] These works were part of a

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[11] Contrast the views of Striker 1996b; Mitsis 1993; Mitsis 1994, who have argued with great vigor for a conception of natural law that is markedly at variance with that advanced by Vander Waerdt 1994c and Inwood 1999. For the purposes of this chapter it is reasonable to maintain a rather minimalist view about early Stoicism.

[12] In the dialogue *On the Orator*, a no less Platonic work composed at this period, Cicero shows enormous respect for the intellectual resources and integrity of Roman law and jurisconsults—this forms an important contrast to the relative dismissal of it in *Leg.* I.14–17. In his philosophical treatments of law, Cicero is more concerned to argue for the central importance of the Twelve Tables, which are the foundational documents of the Roman legal tradition, than he is to grapple realistically with the actual state of law in his own day (see Section 6.1). Like the unphilosophical orators of *On the Orator*, unphilosophical lawyers offered little to the vitality of Rome's intellectual culture.

Ciceronian project to emulate Plato in a Roman context; Plato's *Republic* and *Laws* were the obvious models for Cicero when he conceived these works.[13]

These are the first works of distinctively Roman philosophy of law which demand our attention. In *On the Commonwealth* Cicero presents us with a wide-ranging debate about the best constitution, arguing that the traditional Roman manner of organizing a state is the closest to an ideal that one can achieve. In this debate a spokesman for Academic skepticism is the foil for both Stoic natural law theory (which argues that justice has a uniform foundation in nature) and Epicurean conventionalism (which holds that justice is a function of utility in varied human societies). Cicero's sympathy for the natural law position is manifest.[14] But we must also take notice of the fact that at least in *On the Laws* the Stoic character of the theory is ambivalent. No matter how much sympathy Cicero had for Stoicism and despite his use of characters whose persona is Stoic, these works are emulations of Plato, and Cicero is himself an Academic by inclination as well as by choice. One of his teachers in the Academy, Antiochus of Ascalon, argued for the essential harmony of early Academic, Peripatetic, and Stoic philosophy, and Cicero could not avoid being influenced by this view—though it is a position which most members of those schools would have vigorously rejected.

The Stoic influence on Cicero can be seen in his inclusion of a translation of the famous proem to *On Law* by Chrysippus in his own *On the Laws* I.18, though it is highly significant that throughout this work Cicero attributes Stoic ideas not to the school nor even to philosophers, but to "learned men." Where Stoics are explicitly mentioned, it is in a discussion of the demarcation disputes between various Socratic schools and the importance of focusing on their common ground (*Leg.* I.53–6).[15] Overall, the flavor of the books is heavily Platonic (as witnessed by the allusion to recollection at I.25) and for whatever reason Cicero has chosen to conceal the level of Stoic influence (see Inwood 2003).[16] Hence, it is difficult to distinguish with confidence the

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[13] A consideration of the impact of Cicero's *On the Laws* and *On the Commonwealth* on the development of Roman jurisprudence is included in Vander Waerdt 1994a. See Atkins 2000, sec. 5, for an excellent general account of these two works.

[14] *On the Commonwealth* III contains a defense of the view that justice is natural, based on the famous reply of Diogenes the Stoic to Carneades. Hence, the Stoic credentials of that defense may well be more secure than the theory of *On the Laws* I.

[15] See also *Leg.* I.38, where in an Antiochean spirit Cicero emphasizes that differences between Stoics and Academics are merely verbal.

[16] This issue cannot be discussed at length here, but for now one small observation might be made. The contrast between natural law and positive law is made in *Off.* III.68–9. In this book Cicero is most self-consciously speaking in his own Academic voice, having noted that his Stoic source, Panaetius, left him little to work with. Hence, the Platonic metaphors applied to natural law at the end of *Off.* III.69 (*umbra*, "shadow"; *imagines*, "images") strongly confirm what we also see in *On the Laws*, namely, that Cicero associates what is natural in a normative sense with Platonic idealism and not necessarily with anything characteristically Stoic. On this and related issues, see also Ferrary 1995.

Ciceronian themes we can claim for the Stoics and those which we cannot—except where there is independent evidence that a given idea is Stoic (as indeed there is on many points). This indeterminacy with regard to the filiation of much of the argument, as well as the sketchy nature of what Cicero says here, help explain why these works have played a less prominent role in the large and well-aired debates about the nature of natural law in Stoic thought.

It may seem peculiar to claim that *On the Laws* gives us a sketchy account of natural law, but this claim can be substantiated by looking at the text. First, though, the following general assessment made by Vander Waerdt should be invoked: Cicero's twin goals in *On the Laws* were to "reformulate Stoic doctrine on natural law so as to make it practically useful, and to reformulate the [Roman] *ius civile* so as to bring it into conformity with this modified Stoic theory" (Vander Waerdt 1994a, 4867). He also maintains that this project was unique and uniquely uninfluential. Vander Waerdt's concern is to show that the Ciceronian project was uninfluential with regard to Roman jurisprudence, but it is just as true that it remained relatively unimportant in later ancient philosophy whether written in Latin or Greek. While the now fragmentary *On the Commonwealth* had a powerful impact in antiquity, just the opposite is the case for *On the Laws*. Zetzel's suggestion (1999, xxi; see also Atkins 2000) is surely right: Cicero never completed the latter book, left off work on it in 51 B.C., and did not think it appropriate to publish it during his lifetime. Left incomplete—in part because changing political circumstances sapped his motivation and in part because he was likely unable to solve serious problems with the consistency and intellectual cohesion of the work as it stood in 51 (cf. Atkins 2000, 501–2)—the work was published posthumously and left to relative neglect for centuries.

In both *On the Commonwealth* and *On the Laws* the central idea is not that "law" in any narrow or well-defined sense is grounded in nature. What matters far more to Cicero is the claim that justice is natural. This is certainly the central point that emerges from *On the Commonwealth*, where Cicero explains what natural law offers us in contrast to human law:

[The wise man] alone can truly claim all things as his own, not under the law of the Roman people but under the law of the philosophers; not by civil ownership but by the common law of nature, which forbids anything to belong to anyone except someone who knows how to employ and use it. (I.27)

This is a clear reflection of one of the Stoic paradoxes—that all things belong to the wise man, or that only the wise man is wealthy—and we should conclude that one purpose of the Stoic postulation of an ideal cosmopolis is to provide a city in which the paradoxical claims about the wise man are true. Later in the book (I.48–9) Cicero repeats the traditional idea that law is the bond that holds a society together, and suggests that the necessary condition for an ideally stable society is equality under the law. These themes are famil-

iar from earlier Stoic and Cynic thought and ultimately stem, no doubt, from Plato's *Republic*.

The claim that justice exists by nature rather than by potentially variable human convention is explored at greatest length in *On the Commonwealth* III, and it is this idea which we associate most readily with Cicero's treatment of natural law.[17] The principal philosophical claim, as far as philosophy of law is concerned, is that the naturalness and objectivity of moral virtues, including justice, follows from some law-like feature of the natural order of things. The debate played out in Book III is important for political philosophy, but it seems that almost nothing in it turns on any conception of *law*. As with the earlier Stoics and with Plato, Cicero adorns an argument for natural justice in terms of "law" language; but the dress is paper thin.

The more definite claim that there is a natural foundation for specific laws (as opposed to the general institutions of justice) is distinct and far more difficult to defend. It is this claim which comes to the fore in *On the Laws*, especially in Book II. This is a hard position to defend, in part because of the commitment Cicero makes to connect his broad claims about the virtue of justice and a "utopian" natural law (expressed in Stoic terms) with the specific constitutional arrangements of the state sketched in *On the Commonwealth*. That he does take on this commitment in *On the Laws* is indicated by the following:

Then since we want to preserve and protect that form of the commonwealth which Scipio showed was the best in the six books of *On the Commonwealth*, and since all the laws must be fitted to that type of state, and since morals must be planted and we should not rely on the sanctions of written laws, I will seek the roots of justice in nature, under whose leadership our entire discussion must unfold. (I.20, trans. Zetzel)

Moreover, the exposition of particular laws in *On the Laws* II–III is prefaced by a recapitulation of the utopian conception of natural law as nothing but the perfected practical rationality (in the commanding rather than the theoretical mode) of the wise person or the gods, buttressed by a repetition of the claim that any law which is subject to amendment or abrogation is *eo ipso* not a law at all.

The claim that there is a natural law, then, in contrast to the much more general and less challenging claim that there is a natural foundation for justice

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[17] Cicero does, however, provide a very clear statement of the Chrysippean notion of natural law in a fragment of *On the Laws* III preserved by Lactantius, *Inst*. VI.8.7–9. It begins: "Indeed, true law is right reason in agreement with nature, distributed among all people, consistent, and eternal; it summons to appropriate action by commanding, and by forbidding it deters from wrong-doing." Compare the translation of Chrysippus' *On Law* in Cicero, *Leg*. I.18, which concludes that the natural law in question is the virtue of practical wisdom (*prudentia*). This kind of law is said to have the same features of irrevocability and independence of temporal and spatial contingencies that characterize the utopian natural law of Cicero's *On the Laws* (see below).

(and other virtues, too, as a result—see *Leg.* I.42–3) is one of two things. Either it is the claim that there is a divine law which is the perfected rationality of the gods, Zeus, or a perfected human mind (I.18–19, 21–7)—what we might call a Chrysippean conception of natural law, since Cicero is clearly translating the proem to Chrysippus' *On Law* and drawing on Stoic definitions when he identifies law with *recta ratio* (*orthos logos*, "right reason")—or it is the claim that there are laws found in and constitutive of a polity that are grounded in nature via their relationship to the perfect divine law of gods and sages.

To see how sketchy the notion of natural law is in this text, we should consider the options more closely. If by the natural law we mean the perfected rationality of Zeus commanding what ought to be done and forbidding what ought not to be done—that is, the Chrysippean notion of natural law—then we discover in the course of *On the Laws* I and the proem to Book II that its content seems to consist in the virtues and the pursuit of true Socratic utility by perfection of our rational nature and harmonization of it with the divine nature of the cosmos. Hence, its commands would be the sorts of injunctions to act virtuously which are insufficiently action-guiding and hence, from the point of view of *legal* requirements, more or less vacuous.[18] But if we mean by natural law the detailed and contentful specific arrangements given in the rest of *On the Laws*, which are indeed laws that would fit nicely with the kind of state sketched in *On the Commonwealth*, then the problem for Cicero is acute. Are any of the laws which he gives in those books the sorts of permanent, invariant, unamendable, and irrevocable laws which he claims any law must be, on pain of not being any sort of law at all (*Leg.* II.13–14), antedating any written or even conventional instantiation in society (II.8, 10–11, I.19)? No one reading the "laws" of Cicero will claim that these provisions for the idealized republic of Cicero's historical imagination meet this standard.

What we get, then, in *On the Laws* is a powerful and important argument for the natural foundations of justice. It begins in I.16 when Cicero announces that the origin of law and justice will be found in an understanding of human nature, especially our mind, our function, and our natural kinship and unity with other people.[19] By I.21–35 Cicero is arguing for the divine origin of an immutable law which grounds all other laws; it is in itself a feature of the divine mind, but is binding on us humans and our society because we share our nature with the divine. It is only human defects that limit the actualization of

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[18] See Inwood 1999. At best, its content will be (as Vander Waerdt 1994c has argued) "appropriate actions" (*kathêkonta*) subject to situational exceptions, but not necessarily fixed and irrevocable "laws" in the sense used in *On the Laws*.

[19] This is, of course, not an idea original to Cicero or even to the Stoics. Yet it recurs consistently in Stoic social and political thought and turns up as being of fundamental importance in Cicero's *On Duties*, written a decade after *On the Laws*.

our godlike potential, so that striving to emulate divine law is something natural for us as humans. Human perfection in virtue is our natural goal, so that the perfection of divine reason has lawlike authority for us, at least if we wish to perfect ourselves and live according to our true nature.

From this broad philosophical argument about the naturalness of human virtue and its kinship with the divine emerges the broadly Chrysippean claim about natural law, that it is perfected reason, human and divine, functioning as the basis and criterion for all normative claims about human behavior. This claim is a common inheritance of the entire Socratic moral tradition (I.37–9).

In the balance of *On the Laws* I Cicero argues for the naturalness of justice, as he did in *On the Commonwealth* III, although the book does end with a rhetorical conclusion that emphasizes our divine origins and the importance of our divine nature. But there is apparently nothing in either work which shows that the facts of nature which ground justice are themselves lawlike; there are only arguments against basing justice on utility and in favor of basing it on permanent and invariable facts of human and divine nature (including natural human sociability). What is divine, wise, perfectly rational, and so forth is genuinely "useful" to human beings and human societies, and just behavior is part of that usefulness.

In *On the Laws*, then, we find a straightforward identification of perfected practical reason and all the virtues that flow from it with "law" in the Chrysippean sense, supported by a splendid exposition of those features of human nature which dictate this perfection.[20] But the lawlike character of this moral and rational perfection seems to be exhausted by the imperatival and authoritative nature of the reason. Nothing else at this level is particularly lawlike; there is no derivation of a code of specific moral rules from this abstract natural law.[21] Where the lawlike features come in is in Books II and III with the specific features of an ideal state. The problem for Cicero is to connect these two kinds of natural law to each other in the way that he claims is the case. But he utterly fails to do so, and the emphasis with which he announces the connection merely underlines this failure. He does not provide even one example of a substantive law that meets the divine utopian criteria that he himself sets out.

In short, Cicero leaves himself in the same dilemma in which many modern students of Stoic natural law seem to find themselves: He can have utopian law, which is equivalent to perfected rationality, or he can have substan-

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[20] The central features of divine or natural law are recapitulated in the early chapters of Book II.

[21] This is also the view of Schofield 1999b, 767, esp. n. 54: "The idea of natural law is sometimes taken to imply a code of moral rules [...]. But although *kathêkonta* seem to form a system, the fact that they do is not connected in the sources with natural law, whose range of connotations is as indicated above" in *Leg.* I.18–19.

tial law, which inevitably fails to meet the demanding and inflexible standard that any perfection will have to manifest. It may be that modern critics of Stoic natural law are in the Ciceronian bind because of direct or indirect Ciceronian influence. It is tempting to guess that Cicero abandoned the project of *On the Laws* in part because he came to see its ultimate incoherence. Cicero perhaps realized that you could not have substantive natural laws without equivocating on the term "law."

It is, however, true that Cicero makes further and significant use of legal concepts in his moral philosophy. The most important example is perhaps the notion that moral decision making should be thought of (to some extent) on the model of legal determinations by a judge who deliberates about the right course of action in a legal case in light of a *formula* ("rule of procedure") for the case in hand. Several passages of *On Duties* III reflect this notion (in particular, III.19–22, 50–53; see Inwood 1999, 120–6). The crucial fact to note in the present context is that this application of legal concepts is both quite independent of the idea of natural law and, it can be argued, more philosophically rewarding than the proposals of *On the Laws*.

6.3. Seneca

Most of Seneca the Younger's life (ca. 4 B.C.–A.D. 65) was spent both in public activities and in studying and writing. He had been tutor to Nero, and after Nero assumed the throne, Seneca shared power with Burrus for several years. After Burrus' death Seneca fell from favor and went into voluntary retirement. Subsequently he was accused of involvement in a conspiracy to kill the emperor, and ordered to commit suicide. One of the most gifted writers of his generation—known for his tragedies as well as for the prose works that are of greatest interest to historians of ideas—he was the next Roman thinker to make a significant contribution to the philosophical use of ideas drawn from the law. Unlike Cicero, Seneca was a professed Stoic, but this did not make him an unreflective transmitter of traditional Stoic arguments and doctrines. He was consistently ready to disagree with his own school and to think through philosophical problems in an independent-minded manner that he thought would be of interest to his Roman readers (see Inwood 1995). Throughout his works he employed various aspects of legal thinking in just this spirit. For Seneca was, like Cicero, educated as an orator in a culture where this in part involved extensive legal training; and he was also a politically active philosopher, though under the markedly different conditions of the Julio-Claudian age.

In some instances, Seneca understands law in a "real world" or narrow sense, that is, the ordinances and conventions of his own time. In the treatise *On Anger*, for example, Seneca consistently presents the law as a sober and unemotional force, able to punish, but doing so without the loss of control and partiality characteristic of an angry man (I.16.5–6). This is an unremarkable

connotation for "law." Also familiar is the idea that laws are inflexible and often fall short of the subtlety needed to guide moral deliberations and evaluation.[22] Throughout the treatise *On Favors*, especially in Book III, Seneca acknowledges this point as he argues that the morally significant relationship between willing donor and grateful recipient cannot be legislated. And, again in *On Anger*, Seneca emphasizes that law often has an excessively narrow focus:

> Who is there who can claim that he is innocent under all the laws? And suppose that he can: what a narrow form of innocence it is to be "good" for legal purposes alone! The guidelines for appropriate action extend so much wider than those of the law. Piety, decency, generosity, justice, and honor demand so much, all of which lies beyond the scope of publicly promulgated law [*publicae tabulae*]. (II.28.2)

More interestingly, Seneca makes broad and creative use of various legal ideas. In particular, he exploits the Stoic notion of a natural law in a range of applications that have not often been discussed.[23] This is almost certainly because he does not usually tackle the "problem" of natural law in the form which Cicero's unsuccessful experiment made canonical for the Latin tradition. Augustine and Lactantius looked to Cicero rather than to Seneca for their reflections on the relationship between the realms of divine and human law. It is perhaps not surprising that Christian authors should have turned to the explicitly Platonizing Cicero rather than to the more clearly Stoic Seneca, since the Platonic account of transcendent values fits better with the demands of their theology. The popularity of the "Dream of Scipio"—the conclusion of Book VI of Cicero's *On the Commonwealth*—among Christian readers shows that it was content and not just classical prose style that enabled Cicero to make the mark he did on later authors.

When Seneca writes about natural law, he does so in a way that reflects his distinctive philosophical strengths and weaknesses. Hence, there is little formal system in his use of the concept of natural law; unlike Cicero, he does not even try to use it as a solution to a formally stated philosophical problem. But he does think through several important philosophical issues in terms of various creative applications of the idea of a natural law. These applications are, of course, interconnected, but they can be classified into five uses, outlined as follows: (1) The basic principles of Stoic ethics are thought of as "natural" laws for life. (2) The fundamental sociability of human nature is a special case of this kind of natural law, one that is rooted in our biological nature more obviously than are the principles of Stoic value theory. (3) The basic uniform operations of the physical world are also treated as "laws"; and so too (4) is

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[22] This point is, of course, made by both Plato and Aristotle.

[23] A fuller account of this is given in Inwood 2003. The neglect of Seneca in discussions of natural law is puzzling, given his importance as an author in the Stoic tradition. G. Watson 1971, for example, virtually ignores him. But see Düll 1972, which confirms the realism and legal accuracy of Seneca's handling of legal concepts.

the entire system of divinely ordained fate, which is providentially organized for the benefit of all rational animals. But for Seneca, the key sense of natural law emerges as (5) the natural and inevitable fact of human mortality, a sense of natural law which draws on all of the other senses of the term.

(1) In one of Seneca's most important works, *Moral Epistles*, he applies the idea of law to moral concepts in a more direct way, one which transforms the notion of law into a philosophical tool for thinking about the overall governance of our lives. "What, then? Is philosophy not a law for life [*vitae lex*]?" (*Ep.* 94.39). Here he obviously is not using the term "law" (*lex*) in its literal sense. The claim that philosophy is a kind of "law for life" calls to mind the traditional definition of philosophy as an "art of life" (*technê tou biou*), and so yields an ethically important sense of "natural law." Seneca often employs similar language in his description of general moral principles. For example, in the final book of *On Favors*, Seneca is outlining the great invariant moral principles which those making moral progress, the *proficientes*, must cling to and use as a reference point in all of their practical decisions[24]:

Let him know that nothing is bad except what is shameful and that nothing is good except what is honorable. Let him allot the duties of life by reference to this standard; let him undertake and complete all his duties in accordance with this law, and let him judge to be the most wretched of mortals those who, no matter how great and splendid their wealth may be, are devoted to greed and lust and whose minds lie around in sluggish inactivity. (VII.2.2)

These are the "moral laws" that determine the basic values of things, and so make up the set of *leges totius vitae* ("laws for all of life") (*Ep.* 95.57)[25] and

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[24] But it is important to remember that such laws are general, and that they do not dictate to the sage what he ought to do in specific cases. Consider *Ben.* II.18.4 (cf. *Brev. Vit.* XV.5): "Let me remind you repeatedly that I am not talking about sages, who take pleasure in whatever they ought to do and who have control over their own minds and who declare for themselves any law that they want and obey the law they declare […]." The self-imposed law of sages will, clearly, be in accord with the law of nature. But they do not experience it as an imposition from outside, dictated by a theory they happen to ascribe to. Rather, the law just is their own decision about what to do in the case at hand. In this passage, Seneca is considering choices about who to receive a favor from, an example of the kind of particular moral decision which people must make on a daily basis. But despite the fact that the law is a self-imposed decision, it is no doubt just as deeply rooted in the natural principles that underlie all of the passages considered so far. So too in Letter 70. A wise man, then, lives as long as he ought to, not as long as he can, and the factors which go into deciding how long one ought to live are the kinds of situational particulars with which we are familiar from Aristotle's account of morally sensitive deliberation in the *Nicomachean Ethics*: "He will see where he is to live, in what manner, and what he is to do. He always thinks about the quality of life and not about its length" (*Ep.* 70.4–5). Sometimes circumstances indicate a rapid acquiescence to threatening circumstances (70.5–7), sometimes a delay (70.8–10). There is a particularistic variability in how this kind of situation should be approached. Hence Seneca generalizes: "And so you couldn't make a universal pronouncement on the question of whether, when some external force announces 'death,' one should anticipate it or just wait for it. For there are many considerations which can pull you in either direction" (70.11).

[25] This may be the use of "law" that we see at *Nat.* 3 Pref. 16: "This makes one free not

vivendi iura ("laws for living") (*Ep.* 119.15). This kind of "law" can be used to guide character development (*Ep.* 108.6). It also serves to set a limit on the role that wealth and pleasure play in our lives, even on Epicurean principles,[26] and functions as a standard to which we refer when making choices.[27]

(2) The application of legal ideas to moral principles also turns up elsewhere. One of the principles (*Ep.* 95.51–3) asserts the fundamental community of all human beings (cf. Cicero, *Off.* III.20–22). Nature, he says, has made us all blood relatives (*cognati*) and instilled in us a love for our fellow humans, so that the basic moral principle which asserts our fundamental social bond to our fellow man is also a law of nature. This moral principle is regularly referred to with the language of law, especially in *On Favors*. At III.18.2 the "law of humanity" (*ius humanum*) is an assertion of the common humanity of all, slave and free alike, and at VII.18–19 Seneca invokes the "bond of the law of humanity" (*societas iuris humani*), which is broken by the actions of the bloodthirsty tyrant[28]; the same kind of basic bond is referred to as a law of nature (*lex naturae*) at *On Favors* IV.17.3 (see also *Clem.* I.18.2, 19.1–2).[29] The idea that the natural social bonds between humans are like laws relates directly to the idea of a cosmopolis, a universal polity of reason. This idea, which has its roots in Cynic claims and was adopted by both Zeno and Chrysippus among earlier Stoics as well as by Cicero in his *On the Laws* (especially in II.5), turns up in Seneca as well. Although it plays an important role in the fragmentary treatise *On the Private Life*, Seneca's version of Stoic political thought[30] does not otherwise make extensive use of the idea of a universal commonwealth of reason:

under civic law [the *ius Quiritum*] but under the law of nature." Cf. *Ep.* 65.20–22 on the freedom that we have under the law of nature. In both of these cases it is our ability to see the minimal value of life, and so to part with it readily, that constitutes our freedom under natural law. But this assessment of the value of life is precisely one of the basic axiological claims of Stoic ethics. Similarly for the law of death at *Ep.* 70.14–15: The eternal law makes it easy for us to die, a fact emphasized in its relation to human autonomy at *Ben.* VI.3.1.

   [26] See *Ep.* 4.10, 25.4, 27.9, where *lex naturae* is used to refer to the limits imposed by nature in Epicurean ethics.

   [27] Law as a *kanôn* (or "standard" to refer to) appears in the proem to Chrysippus' *On Law* (*SVF* 3.314); see also Cicero, *Leg.* I.18.

   [28] This is again comparable to the view Cicero takes of Caesar's tyranny in *On Duties*.

   [29] At *Ep.* 48.2–3 such bonds are called "the common law of mankind."

   [30] Seneca's own original reflections on political philosophy are perhaps best represented in his *On Clemency*, a now fragmentary treatise, addressed to the emperor Nero, which (in a striking departure from Roman political traditions) explicitly recasts the role of *princeps* ("first citizen") in the tradition of Hellenistic monarchical regimes. Although this work shows the influence of earlier and Greek theories of monarchy, and although it stands out as an early example of the *speculum principis* ("mirror of princes") genre of political writing, there is little about the philosophy of law (as opposed to political thought) in the work. In *Clem.* I.19, however, the idea of natural law is invoked to reinforce the claim that clemency is the regal virtue *par excellence*, and in the course of this discussion he advances the important but scarcely original argument that kingship is natural based on the analogy with the animal

We must grasp that there are two public realms, two commonwealths. One is great and truly common to all, where gods as well as men are included, where we look not to this corner or that, but measure its bounds with the sun. The other is that in which we are enrolled by the accident of birth—I mean Athens or Carthage or some other city that belongs not to all men but only a limited number. Some devote themselves at the same time to both commonwealths, the greater and the lesser, some only to one or the other. (IV.1)

(3) Seneca also uses legal language and ideas to express the familiar notion of a natural law as a uniform natural process or the principles which determine it. The underlying notions are fixity and nonarbitrariness, and therefore reliability. For example, in *On Anger* Seneca emphasizes the irrationality of projecting onto the gods and the natural world the kind of vengeful mentality humans are capable of:

And so it is madmen and those who are ignorant of the truth who blame the gods for the sea's cruelty, for torrential rains, and for a stubbornly prolonged winter, while all the time none of the things which harm or help us are directed specifically at us. For *we* are not the motivation for the cosmos to bring back summer or winter; they have their own laws, laws by which divine matters are worked out. We think too highly of ourselves if we think that we are worthy objects of such great activities. Therefore none of these things is done to hurt us, rather they are done to help us. (II.27.2)[31]

(4) Seneca does not restrict the language of law to individual phenomena that occur in an orderly, predictable, and stable way. In fact, he more often uses the language of law to refer to larger and more comprehensive patterns of events in the cosmos, often making it explicit that this is the same as fate. This is clear in *On Providence*:

I am not compelled and I suffer nothing against my will. It is not that I am a slave to god; I give him my assent, all the more so because I know that everything proceeds in accordance with a law [*lege*] which is certain and proclaimed for all eternity. The fates lead us and the first hour of our birth determines how much time remains for each person. (V.6–7)

This lawlike stability and predictability can also be expressed as a feature of the gods' rationality (*Nat.* I Pref. 3; cf. II.35ff.). At one point he says, "consider too that external pressures do not compel the gods. Rather, their own will is an eternal law for them" (*On Favors* VI.23.1). In making a law for themselves by their rational decision, the gods provide us humans with the most reliable framework for our own lives, since they cannot change away from what is already determined to be the best possible arrangement: "Nor do they persist because of any weakness, but because they do not choose to

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kingdom. The "king" bee is a model for human kings both in the natural legitimacy of his authority and in his mildness in the use of that authority: "the king himself has no stinger." Setting aside the obvious defects of ancient entomology, this rhetorical argument for regal clemency has little philosophical force.

[31] Cf. *On Providence* I.2; *Ep.* 65.19, 117.19; and frequently throughout the *Natural Questiones* (e.g., *Nat.* III.15–16, VI.1.12).

deviate from what is best and because they had resolved on taking this path" (VI.23.2). This lawlike divine decree has built into it a consideration of the best interests of mankind.[32]

Of course, it is one thing to know that the events of fate are governed by a lawlike rationality and quite another to know the details of what is to come. In Letter 101.5 Seneca says, "To be sure, time does proceed by a 'fixed law' [*rata lege*], but amidst obscurity. However, what is it to me if nature is certain about what I am uncertain about?" Seneca elsewhere argues that it is useful to know *that* whatever happens proceeds from a fixed law; and because it is a divine law, he elsewhere maintains that this knowledge is a crucial component of piety toward the gods (*Ep.* 76.23). Not to see and accept that such unpleasant eventualities as our own death are governed by this law (stable, predictable, part of a benevolent plan) is folly. Daily uncertainty about such prospects is a source of wretchedness; the rational solution is to live each day as though it were our last (*Ep.* 101.7–8).

(5) Seneca concentrates heavily on the inevitability of the transitions and changes dictated by nature as part of what makes nature's functioning lawlike. His interest in this feature of the general laws of nature is so strong that it makes sense to think of it as a distinct application of the metaphor, and to label it the "law of mortality" (*lex mortalitatis*) (see *de Ira* II.28.4; cf. *de Vita Beata* XV.5; *Nat.* VI.32.12; *Ep.* 94.7, 123.16). It is, of course, prominent in consolatory contexts. In *To His Mother Helvia* VI.8 Seneca refers to the "law and necessity of nature" (*lex et naturae necessitas*) that governs people's comings and goings, and later in the same work (XIII.2) he explicitly claims that if we regard death not as a penalty but rather as a law of nature we will be able to conquer the fear of death. In the *Consolation to Marcia* Seneca (sec. 10, esp. 10.3, 10.5) refers to the law governing human life. The "law of birth" (*lex nascendi*) is that we are mortal and transient beings; being born under the terms and conditions of this law, we cannot reasonably complain about it when the inevitable occurs. Of course, this idea also turns up elsewhere. In Letter 77.12 Seneca emphasizes again features of the law of mortality into which we are all born: It is fixed and established, necessary, predictable and comprehensible, uniformly applicable to all. Death is a law for humans because it represents the impartial and fair terms under which we all live. Like any just legal regime in the human sphere, nature treats all its subjects alike (*Ep.* 30.11).

Nature's law has the same features as a good human law, and it is for this reason that it commands our rational allegiance. Just as Socrates in the *Crito* submitted to the laws of Athens because of his agreement to live under them as a fair bargain,[33] so too the Stoic envisaged in *Cons. Marc.* 17–18 faces the

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[32] Similar considerations lie behind the language of law at *Ep.* 16.5–6.
[33] Alluded to at *Ep.* 70.9: "Socrates could have ended his life by starving himself and could

perils of life and death with tranquility and resolution just because those risks are part of what he or she chose as part of the overall bargain of life, and because those terms and conditions were, Seneca suggests in section 17, disclosed fully and honestly ("I deceive no one"). Complaint against misfortune would, in the circumstances, be unreasonable: "After the promulgation of these laws [*leges*], if you raise children you exempt the gods from any resentment, for the gods have promised you nothing for certain" (17.7). The seemingly harsh facts of life, elsewhere called the law of mortality, are presented to us by nature in a speech that is honest and frank. There are facts of nature that we all know—or are deemed to know—and these are public and impersonal, known to all, like laws posted on public display. Anything one undertakes in the light of these laws is done on one's own responsibility. It is either unfair or irrational to complain about the application of laws to which one has willingly bound oneself. In a similar vein, at Letter 91.15, Seneca considers our proper reaction to the often unpredictable power of *fortuna* ("fate"):

None of this is grounds for outrage. We have come into a world where life is governed by these laws. If it suits you, obey. If not, leave however you like. Be outraged if any unfair conditions have been set down for you in particular; but if the same necessity binds the mighty and humble, then be reconciled with fate, by which all things are settled.

Even in this very brief discussion (see also Inwood 2003), it is clear that Seneca exploits the concept of law in a sophisticated philosophical way. Similar lessons can be drawn about his use of the idea of judgment (*iudicium*) or judging (*iudicare*), which is drawn quite concretely from the legal realm (see Inwood 2004). Just as Cicero drew on the procedures of the praetorian tribunal in his account of how moral decision making might best be undertaken (see previous section and Inwood 1999), Seneca developed a range of valuable philosophical and moral ideas using the language and concepts of law.

6.4. Epictetus

Both Epictetus and Marcus Aurelius, the other Stoics of the Roman empire whose works survive *in extenso*, make a similar and quite limited contribution to the philosophy of law in antiquity. This contribution is closely tied to the Stoic tradition of natural law theory and virtually devoid of the kind of independent developments so visible in Seneca.

Epictetus was an ethnic Greek educated in Rome, with the greater part of his philosophical training coming from his study with the Roman knight

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have died by lack of food rather than by poison. Nevertheless he passed thirty days in jail, waiting for death, not in the belief that 'anything could happen and that such a long time gave grounds for many hopes.' Rather, [he stayed] in order to submit to the laws [*ut praeberet se legibus*] and to make available to his friends Socrates in his final days."

Musonius Rufus.[34] He was for some time a slave of Epaphroditus, a powerful figure at Nero's court, and after the expulsion from Italy of philosophers under the Flavians he operated a Stoic school in Nicopolis across the Adriatic Sea. As one might expect, his works reflect the full range of Stoic ideas about natural law and the lawlike quality of moral norms. But two features distinguish him from Seneca. First, he is far more interested in the Cynic heritage of Stoic thought than Seneca was, which comes out in his adoption of cosmopolitan theory. And second, he is less prone than Seneca (and Cicero) to use legal ideas in a creative way to forge new philosophical insights.

What Epictetus gives is, for the most part, an embroidered restatement of the early Stoic idea of natural law rather than any new theory. But it would be unfair to leave it at that, for with respect to the notion of "freedom" Epictetus develops earlier Stoic thought with a new emphasis. Like other Stoics, and like Seneca, Epictetus appreciates the limitations of legal institutions in contrast with moral realities. In *Discourses* II.1.21–8 he contrasts merely legal freedom with the moral autonomy that philosophical education can bring. In I.12 and elsewhere (in particular, *Diss.* IV.1, entitled "On Freedom") Epictetus reveals his own particular interest in the idea of "freedom," transferred from the political and legal sphere, as a leading notion in moral reflection. Bobzien (1998, chap. 7) has demonstrated Epictetus' originality on this point. Epictetus makes distinctive and creative use of a broadly legal concept; however, the relevance of the *legal* content is quite limited.

Where Epictetus stays closer to the Stoic tradition, the idea of laws plays a more obvious role. He thus tends to regard moral principles as being lawlike, an idea crystallized in the *Enchiridion* 50–51, where he urges that we regard moral resolutions as inviolable laws. Following nature, the Stoic ideal, is regarded as obedience to a law (*Diss.* I.26.1–2) and such moral norms are frequently treated as divine law (I.29.13, 19; II.16.28; III.17.6)—in accordance with the Stoic equation of god and nature (cf. IV.12.11).

Another traditional Stoic application of natural law is the claim that human social bonds are embedded in nature, and Epictetus accepts this enthusiastically. As rational animals (III.7.33–5) and as "children of Zeus" (I.13.4) all humans are brothers who are bound together in a natural community of social relations (II.10.14; IV.11.1), which (in a polemical spirit) Epictetus thinks that even an Epicurean would have to recognize (I.23.1). It is a mark of divine care for humans, and our own proper benefit is interdependent with the common benefit for the entire polity. This nexus of ideas does draw on natural law, but here the original contribution of Epictetus lies with his development of the idea that all rational animals are "children of Zeus" (see Inwood 1996) rather than with his exploitation of legal concepts.

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[34] For the most recent and authoritative general account of Epictetus' philosophical character, see A. Long 2002.

The Stoic claim that we have a natural connection to each other qua rational beings has from the beginning found expression in the idea that we are all citizens of one universal commonwealth, an idea which Cicero and Seneca touch on but which Epictetus uses repeatedly. Thus *Discourses* I.9 contrasts at some length local citizenship, such as Athenian or Corinthian, with cosmopolitan bonds, and does so in a manner reminiscent of Cicero and Seneca. It is very much in character for Epictetus to emphasize the Socratic roots of this idea, as he does here. However, although this idea is widespread in Epictetus' works (II.5.26, 15.10; III.22.84–5, 24.66), there is little that is novel in his development of it. As a "cosmopolite" one has the rationality to understand the divine ordering of the world (II.10.3) of which one is a part (I.9.4–5, 12.7, 29.29)—a contributing part, to be sure, but still a mere part whose value is derived from the superior value of the whole (II.10.5). Epictetus applies rather than develops the familiar idea that rational beings are citizens of a single cosmic city (III.24.10) whose ruler is god (II.14.26–7).

Just as Seneca occasionally reflected on the philosopher's obligations with regard to the laws of his own real-world state, so too did Epictetus, characteristically looking to Socrates as a role model. But Socrates is a complex character, committed to the civic laws in the *Crito* and strong in his defiance of temporal authority in the anecdote about Leon of Salamis in the *Apology*. Epictetus reflects this complexity (III.24.107; IV.1.160, 7.30). In general, the standard Stoic balance between one's social commitments to the laws and mores of society and one's higher moral and philosophical commitments as a rational agent is reflected in Epictetus. We have social duties as family members and citizens (III.2.4, 3.8, 7.21). But in every case our highest duty is to philosophical values, since even these will bring the most genuine service to our society (*Ench.* 24.4). Ultimately, and *only* in cases of conflict between them, we obey the laws of god and not man, following the example of Socrates. The jurisconsults mentioned in *Discourses* IV.3.12 cannot obligate a rational agent to obey when their laws conflict with those of god. *Discourses* I.13.5 is brutal: Laws and conventions that are in conflict with divine law are "the laws of corpses." One could have no clearer or more forceful statement of the priority of cosmic and divine values, thought of as laws of nature, over the merely temporal values of our civic and political lives. It is a powerful expression indeed, but an expression of a traditional idea in the Platonic and Stoic tradition. Epictetus' contribution lies primarily in this expressive power and not in the creative development of new ways to think about moral philosophy using legal concepts and language.

6.5. Marcus Aurelius

The same might fairly be said of Marcus Aurelius Antoninus, who was emperor from A.D. 161 until his death in 180. Though deeply influenced by

Epictetus and manifestly Stoic in his basic sympathies, Marcus was not a Stoic in the narrow sense that comes with official school membership or working as a teacher of Stoic philosophy. But he did not present himself as a member of another school, as did the Academic Cicero. Like Seneca (though even more so) he was a member of the ruling elite of the empire, with an education in rhetoric and law as well as in philosophy. So it would not be at all surprising if he had developed creative applications of legal concepts in his philosophical reflection. But for all the interest and insight of his one small book, *To Himself*, it must be said that this work lacks originality on this point.

Nevertheless, the full range of familiar themes involving law and politics is evident in this poignant philosophical diary. He treats the imperatives of reason as "laws" of nature and regards them as being like the law code of a cosmic city governed by rational principles. Even the most unpleasant aspect of nature, our inevitable death, must be regarded as a responsibility to be embraced in a spirit of tranquil rationality. Our fulfillment as rational beings comes through following nature in the traditional Stoic sense, and the foundations of political and social life lie in a natural sociability that it is our duty to cultivate in the practical sphere.

The continuity of Marcus' thought on these matters with that of the early Stoic school is evident from the similarity between what he says in *Meditations* IV.4 (cf. III.2) and the views of Chrysippus:

> If the capacity to think is common to us all, then so too is the reason in virtue of which we are rational. And if this is common, then the reason which commands what ought to be done and what not is also common. And if this is so, then law is common. And if this is so, then we are citizens. And if this is so, then we participate in a political community. And if this is so, then the cosmos is, as it were, a city-state. For in what other political community can one say that the entire human race participates on a common basis? It is from that source, this common cosmic city, that we derive our capacity for thought, our capacity for reason, and our capacity for law.

This cosmic reason lays down rational requirements for our behavior (III.11.3), which we obey as a kind of law grounded in our reason—the fulfillment of which is an expression of our own end (II.16). Our obedience to such a law is, then, an act of human fulfillment as well as an obedience to forces greater and more valuable than we possess. This is in large measure because being rational involves being social (V.30; cf. VI.40, VIII.54), especially on the cosmic scale, and the society to which our rationality gives us access is hierarchical and organized around a single, all-embracing value:

> All things are intertwined and the bond which unites them is sacred. Virtually nothing is alien to anything else, for all things are organized in one whole and together they make up one cosmos. For there is but one cosmos made up of all things, and one god permeating all things, one substance, and one law, which is the reason common to all animals with the capacity to think. (VII.9)

As Cicero claimed in *On the Laws*, this shared rationality is grounded in the divine and in a cosmic law. We find ourselves fulfilled as individuals by play-

ing our role in the hierarchy of nature (*Med.* IX.9; II.9; VII.5) and in respecting the sociability which comes from sharing in a rational nature with our fellow human beings (XI.1.2), working to promote a common good even through our misfortunes (V.8.3, 7.5). This fundamentally social commitment does not alienate us from ourselves, because its sociability is rooted in our own rational nature, living according to which constitutes a pious life (I.17.5; II.9, 5.3, 9.1, 10.2). The general picture is that human rationality, sociability, and naturalness all converge in a kind of character and way of life that is ultimately *right* for us as individuals and also binds us to the universe and our fellow man (V.29; VII.11).

This kind of life according to nature is cosmopolitan in the original Stoic sense (X.15), and this cosmic nature is the foundation for our basic moral and political responsibilities (VIII.12; IX.23, 2; XI.10). Not only does Marcus claim, following his Stoic predecessors, that we should understand our relationship to fundamental moral values on the model of political and legal ideas, but also that our own social nature is itself rooted in (if not an imitation of) the social order of the universe as such.

These ideas are found throughout Marcus' book, and they are expressed with a passion and literary flair that (as far as we can tell) far exceeds that of his predecessors. In many passages he expresses these ideas in a way that suggests the influence of Platonism as well as Stoicism—something which should not surprise us, given both the integration of Stoic and Platonic ideas evident already in Cicero's work and the striking growth of Platonic sentiments in philosophy under the Roman empire. But as with Epictetus, there is relatively little, if any, creative application of distinctively legal ideas or concepts to philosophical purposes.

6.6. Ancient Roman Conceptions of Rights

"Justice is an unswerving and perpetual determination to acknowledge all men's rights [*ius*]." This pronouncement, attributed to Ulpian (*Rules* I *ap.* Justinian *Dig.* I.1.10 pr.), which is the opening sentence of Justinian's *Institutes* (I.1 pr.), implies that the law, insofar as it is just, protects human rights.[35] Indeed, the three parts of Roman law—of persons, of things, and of actions (*Inst.* I.2.12)—each seem to be concerned with rights. For example, the law of persons involves rights "such as the rights of a father over his children or the right of freedom itself" (Nicholas 1962, 98). It also includes the right to own, and to grant freedom to, slaves (*Inst.* I.3–8).

The Roman law of things corresponds to modern property rights. A thing (*res*) may be corporeal (e.g., land, slaves, gold, etc.) or incorporeal. The latter "consist of legal rights—inheritance, usufruct, obligations however con-

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[35] All translations of Justinian's *Institutes* in this section are from Birks and McLeod 1987.

tracted." Even though what one inherits may be corporeal (e.g., a house), "the actual right of inheritance is incorporeal, as is the actual right to the use and fruits of a thing, and the right inherent in an obligation" (*Inst*. II.2.2). Roman law distinguished between ownership of property and mere possession (*Inst*. IV.6.1; cf. Ulpian *ap*. Justinian *Dig.* XLI.2.12). It also identified "lesser real rights," which were "universally applicable" and "protected by remedies available against the world at large. The rights in question were 'lesser' in the sense that their scope was less than that of ownership," but they "had the common feature of placing a limitation upon the right of ownership from which they were abstracted" (D. Miller 1998, 65). Usufruct is such a lesser right: Thus, a person may leave to his heir the bare ownership of an orchard, but to someone else a usufruct, the right to the use and fruits of the orchard (*Inst.* II.4.1).

Modern readers are especially disposed to understand the law of actions in terms of juridical rights. "An action is nothing but a right [*ius*] to go to court to get one's due" (*Inst*. IV.6). The Roman jurists made an important distinction between two kinds of action: *in personam*, against a particular individual who is obligated to the plaintiff as a result of a contract or a tort (e.g., a claim of repayment of a debt), and *in rem*, against a defendant who is not under any kind of obligation to the plaintiff but is involved in a dispute with him over a thing (e.g., a suit over ownership of a house). It is apparent to the modern reader that such actions imply disputes over legal rights. Nicholas (1962, 100) remarks, "The Romans think in terms of actions not of rights, but in substance one action [i.e., *in rem*] asserts a right over a thing, the other [i.e., *in personam*] a right against a person, and hence comes the modern dichotomy between rights *in rem* and rights *in personam*." When a *ius* is based on a contract or delict, it corresponds to a right in the sense of a claim that entails a correlative duty (see Hohfeld 1923).

Aside from legal rights in the narrow sense, Post (1973, 687) sees in Roman law "a real concern for human rights. Influenced by the ideals of Stoicism, Ulpian and other great jurisconsults of the Golden Age of the Empire subjected all laws, private and public, to the natural law as a universal reason that should be observed in legislation and in all judicial decisions of courts." Bauman (2000, 8–9) argues "that the notion of human rights was well understood in Ancient Rome," and "that the Roman model was the ancestor of modern human rights." Mitsis (1999, 155) focuses on the Stoic philosophers, who "offer an account in which natural rights are bounded by natural law and grounded in a particular conception of a natural human *telos* and a natural impulse to community and social solidarity."

A number of Latin locutions correspond to the different senses of "rights" distinguished by Hohfeld (1923)[36]:

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[36] See the discussion of Hohfeld and of corresponding Greek "rights" locutions in Chapter 4, Section 4.8, of this volume.

HOHFELD	LATIN
just claim	*ius*
liberty, privilege	*libera potestas*, *facultas*
authority	*dominius*, *auctoritas*
immunity, exemption	*immunitas*

Some of these locutions occur in the so-called "Edict of Milan" (313), whereby the Emperors Constantine and Licinius granted religious liberty to Christians and pagans alike. In addition to its historical importance, this edict is of interest because the original Latin text was preserved by Lactantius (ca. 240–ca. 320) in *De Mortibus Persecutorum* 48, and a Greek translation by Eusebius (ca. 260–ca. 339) in his *Ecclesiastical History* X.5.1–14, thus providing evidence of parallels between Roman and Greek legal terminology in the fourth century. The emperors "grant both to Christians and to all men free power [*libera potestas* = *eleuthera hairesis*] to follow whatever religion each one wished." The emperors decided that "no one was to be denied the liberty [*facultas* = *exousia*] to follow the Christian worship or that religion which he felt to be suited to himself." The emperors granted Christians "the free and unconditional power" (*libera atque absoluta potestas* = *eleuthera kai apolelumenê exousia*) of religion. Others, too, have been granted this opportunity (*facultas* = *exousia*), so that "each individual may have the free 'opportunity' [*libera facultas* = *exousia*] to choose and practice whatever form of worship he wishes." They also recognize that property belongs by right (*ius* = *to dikaion*) to Christian congregations and command restoration of such property to these bodies. To be sure, these rights of religious freedom were conferred by an imperial rescript and were not asserted as natural rights against the Roman state. Constantine himself later issued decrees prohibiting pagan rituals and declared Christian heresy to be, in principle, illegal (Eusebius, *Life of Constantine* II.45.1, III.64–5; see Barnes 1981, 209–10, 224–5).

In spite of the foregoing arguments, a number of scholars have resisted the thesis that the ancient Romans grasped the concept of rights (for references, see Tierney 1997, 15, n. 11). It may be helpful to distinguish two questions: Is there a counterpart to "a right" in Roman legal reasoning? And did Roman philosophers and jurists anticipate the modern doctrine of human rights? Regarding the first question, Nicholas (1962, 100, quoted above) cautions, "The Romans think in terms of actions not of rights." In contrast, for the modern jurist, "rights rather than actions have become the primary concept," so that strict Roman distinctions tend to become blurred. For example, a typical Roman action *in rem* would involve ownership, whereas an action *in personam* would seek restitution for injury to one's property. On the modern rights view, however, the plaintiff's right to compensation presupposes a prior right

against injury by the defendant, which implies that the right *in rem* to property involves a bundle of rights *in personam.*

Villey issues a more radical challenge, arguing that rights are alien to Roman law.[37] In Ulpian's above-cited pronouncement that "[j]ustice is an unswerving and perpetual determination to acknowledge all men's rights," the phrase "all men's rights" translates *ius suum cuique*, literally, "to each his own right." Villey begins with the observation that *ius* or "right" has two different senses: In the *objective* sense, it means that a state of affairs is right or just; and in the *subjective* sense, it means *a right* which belongs to an individual subject. In some cases the former sense is clearly meant, for example, "written *ius* is law [*lex*], etc." (*Inst.* I.2.3). Villey argues that the word *ius* did not have the subjective sense for the ancient Romans, because the word acquired this meaning—that is, a licit power—only in the later Middle Ages, in particular in the writings of William of Ockham. Villey (1946, 217) points out that in some instances *ius* does not correspond to a right, for example, when Gaius (*Inst.* II.14) refers to the *ius* of a homeowner to take the overflow from a neighbor's gutter through his own property.[38] In this case, according to Villey, *ius* refers to the entire rightful relationship, which moderns construe in terms of rights and duties of the respective parties. Villey (1946, 219; 1953–1954, 173) also argues that the concept of *dominium* does not entail rights, a fact implied, for example, in the distinction between ownership and usufruct. Ulpian, for example, says, "The only person who can claim at law that he has a right [*ius*] to use and enjoy property is the man who has the usufruct of it. The owner [*dominus*] of the estate cannot do so, as a man who has the ownership does not have a separate right [*ius*] of use and enjoyment" (*Edict* XVII *ap.* Justinian *Dig.* VII.6.5 pr.).

A number of scholars have responded that, while Villey is correct that "Roman jurists did not conceive of the legal order as essentially a structure of individual rights in the manner of some modern ones" (Tierney 1997, 18), he goes too far in banishing individual rights altogether from Roman law. Pugliese (1954) objects that the mere fact that Latin terms like *ius* do not correspond exactly to modern "rights" locutions does not prove that the Romans lacked the concept of a subjective right. Kaser points out that, although *ius* has an objective character, it can also be used in a subjective sense, as in *meum ius*, "my right": When *ius* is subjectively interpreted as someone's entitlement, "the *objective* meaning of *ius* is also intended at the same time, because it defines the basis, the content and the limits of the entitlement" (Kaser

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[37] Villey's case is set forth in a series of influential essays, three volumes of collected essays, and several books: see the bibliography. For clear and concise summaries of his argument, see Tuck 1979, 7–13; Tierney 1997, 15–22.

[38] However, the translation of Gordon and Robinson 1988 glosses "a right of streams or run-offs," as "that a neighbor receive a stream or run-off to his buildings or his site."

1996). Zuckert (1989, 74) also notes "the easy migration of meaning from objective to subjective right: if one begins with right in the objective sense of 'the right or just thing in itself,' that is, the correct assignment or relation of things to person, then the 'part' in that distribution that pertains to each readily becomes the basis for the assertion of a claim of the subjective right sort. From being 'in the right' it is easy to move to 'having a right' […]" (cf. Tierney 1997, 33). Furthermore, in Roman law, "[o]ur authority [*potestas*] over our children is a right [*ius*] which only Roman citizens have" (Justinian, *Inst.* I.9.2). This treats a right as an authorized exercise of a power (*potestas*), which Villey views as Ockham's innovation. Finally, scholars question Villey's dichotomy between *dominium* and *ius*. For example, Gaius says that although "slaves are in the power [*potestas*] of their owners [*dominorum*] […] we ought not to abuse our rights [*nostre iure*]" (*Inst.* I.52). Tierney (1997, 17) remarks, "It is hard not to see here an assertion of the subjective *right* of the master consisting in his *power* over the slave who was under his *dominium*."

Aside from legal rights, there is the thorny issue of whether the Romans anticipated "natural rights" or "human rights" in the modern sense. Mitsis contends that Stoicism was a philosophical source for natural rights. On his interpretation, all human beings belong to a cosmic state governed by natural law, which, according to Chrysippus, is the "standard of right and wrong, prescribing to animals whose nature is political what they should do, and prohibiting them from what they should not do" (Marcian, *Institutes* I = *SVF* III.314, trans. Long and Sedley 67R). Just as the law of a particular city defines the rights and duties of each of its citizens, so natural law defines the moral rights and duties of each citizen of the cosmos (*kosmopolitês*) (see Mitsis 1999, 162–3). But this interpretation faces serious objections.

First, it is objected that the Stoics subscribed to an ethics of duty rather than a theory of rights (see Sorabji 1993, 134–57). That is, the Stoics are concerned with achieving a good life, through acting virtuously and living according to nature, rather than with recognizing the rights of others. A Stoic practices the virtue of friendship because he wants to be virtuous not because he is concerned about his friend's well-being.

Against this objection, Mitsis (1999, 168) points out that the Stoics distinguished between the motive for an action and its end or object. "A Stoic may be motivated to help someone by recognizing that such an action conforms to a duty enjoined by nature's law. But the object of that action is the benefit of the individual needing help" (see Seneca, *Ben.* VI.13.3). Insofar as they view the interests of others as the object of their moral duties, the Stoics may be able to cross the divide between duty and rights. Bauman (2000) also argues along similar lines, claiming that the Roman idea of *ius humanum* ("human right") is based on a general principle of *humanitas* (benevolence) and *clementia* (clemency). He finds this ideal expressed by Seneca, who speaks of a society (*societas*), "which makes us mingle as humans with our fellow hu-

mans and judges that the human race has certain rights [*ius*] in common" (*Ep.* 48.3).[39] Seneca lays down the following rule or principle (*formula*) concerning our duties toward other human beings:

Everything that you see, both divine and human, is one; we are the parts of one great body. Nature created us as relatives, for she created us from the same source and for the same end. She has endowed us with mutual love and sociability. She fashioned fairness and justice. According to her regulation it is worse to suffer than to inflict harm. Through her authority let our hands be prepared for what needs help. Let this verse be in your hearts and on your lips: "I am human; I regard nothing human as foreign to me" (Terence, *Heautontimorumenos* 77). Let us have common ownership; our birth is in common. (*Ep.* 95.52–3; see Bauman 2000, 97)

According to Bauman, this principle of *humanitas* was combined with the ideal of *Pax Romana*, a Roman empire that embraced the civilized world and extended clemency even to defeated barbarians, resulting in a moral universalism that prepared the way for the modern doctrine of human rights.

Second, it is objected that the principle of human rights seems to conflict with the brutal realities of Roman law, especially slavery. Ulpian's principle that justice acknowledges all men's rights sounds to moderns like "a resounding […] affirmation of the sanctity of human rights," but it "must be given a very much more limited scope in view of the fact that among the rights secured by justice in Roman law was that which permitted one person to hold another as a slave" (MacCormack 1998, 1). Ulpian himself says that everyone would be born free by the natural law (*Inst.* I *ap.* Justinian *Dig.* I.1.3) and that "as far as concerns the natural law all men are equal" (Sabinus XLIII *ap.* Justinian *Dig.* L.17.32); and Florentinus also calls slavery "against nature" (*Institutes* IX *ap.* Justinian *Dig.* I.5.4; cf. Justinian *Inst.* I.3.12). Nonetheless, the Roman jurists did not condemn slavery on these grounds (Johnston 2000, 621).

It should be noted, however, that modern proponents of rights, including the American founders, have condoned slavery. Arguably, some Roman philosophers implicitly undermined the moral foundations of slavery. Mitsis (1999, 102) remarks that "the Stoics are the first thinkers in antiquity to develop a view of rights that is natural in the stronger sense of being naturally attached to individuals by the mere fact that they are human beings and, as such, members of a natural human community." Seneca counseled, "Remember that he whom you call your slave sprang from the same stock and breathes, lives, and dies under the same skies as you. Treat your slaves as you would be treated by your superiors. Live mercifully and humanely with your slave, allow him to talk with you, plan with you, live with you" (*Ep.* 47.1–13, as quoted in Bauman 2000, 116). The Romans did in fact make reforms to ameliorate slavery (see Bauman 2000, 115–200). The Stoic emperor Antoni-

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[39] See the discussion of *ius humanum* in connection with Seneca's use (2) of "natural law" in Section 6.3 above.

nus Pius (161–180) instituted legal curbs on cruelty to slaves, making "a man who kills his own slave without good grounds liable to the same punishment as one who kills someone else's slave," and compelling cruel masters to sell their slaves (Justinian, *Inst.* I.8.2). The Romans never abolished the institution, but their philosophers and jurists, by theorizing about natural law and rights, helped pave the way for the moral condemnation of slavery.

Finally, the Romans possessed no document like a modern bill of rights, which delineated citizens' rights and circumscribed the powers of government. However, some scholars argue that Roman citizens possessed various legal rights that foreshadowed the rights enumerated in the U.S. Bill of Rights, including the right of free speech; the right against unreasonable arrest, search, and seizure; the right of the accused to receive due process and a trial by jury, and to be confronted with the witnesses against him (see Wiltshire 1992; Plescia 1995; and Herrmann and Speer 1994). Although it would be an anachronism to attribute a developed theory of human rights to the ancient Romans, the doctrine had roots in ancient Roman thought.

Our interest in this chapter has been in the creative application of ideas drawn from the law in Roman philosophy rather than in those aspects of the traditional Stoic or Stoic-Platonic theory of natural law that were merely reproduced by Roman thinkers. Epictetus and Marcus, working in a Roman milieu but writing in Greek, show surprisingly little innovation in this regard. The Stoic and Platonic ideas expressed in legal-philosophical terms are by and large the familiar ideas from the early generations of the Stoic school. With Cicero we do see more innovation, though to some extent we also see a difficult struggle to maintain consistency within his project of rethinking Roman political ideas along more philosophical lines. The most creative work—on natural law and, indirectly, on human rights—was done, it seems, by Seneca, and arguably the reason for this has a good deal to do with his freshness of approach. For Seneca, more than for Epictetus and Marcus, legal ideas were a part of his apparatus for thinking through independent philosophical questions. Fresh questions and independent thinking about them produce results that a mere reworking of the tradition cannot achieve. This is as true in the philosophy of law and politics as it is elsewhere. On a topic that is so burdened by the unreflective replication of traditional views as is the natural law tradition, such boldness is particularly welcome.

Further Reading

Brief histories of Roman law include Wolff 1951 and Tellegen-Couperus 1993 (the latter includes a chronological table and bibliography). Jolowicz and Nicholas 1972 is a more comprehensive historical introduction to Roman law. Robinson 1997 is a helpful introduction to the sources, and Buckland 1931, Schulz 1992 (orig. 1951), and Nicholas 1962 offer overviews of legal institu-

tions. Buckland 1939 and Bürge 1999 discuss Roman private law. Borkowski 1997 is a useful textbook on Roman civil law. Stein 1988 also offers essays on Roman civil law. Birks 1989 contains essays on the law of property. Crook 1967 and Daube 1969 discuss Roman law in its social and economic context. Watson has published numerous books on Roman law; see Watson 1995a for a summation of his views.

Useful collections of ancient Roman statutes include Johnson, Coleman-Norton, and Bourne 1961 (with English translation, commentary, and glossary), Crawford 1996 (epigraphic and other material with English translation and commentary), Flach 1994 (text with commentary of laws from the early Republic), and Elster 2003 (German translation with commentary of laws from the middle Republic: 366–134 B.C.)

The main source for the jurists is Justinian's *Digest*. Watson published in 1985 a valuable 4 volume edition with Latin text and English translation; there is a convenient paper reprint in 1998 (2 volumes) with the English translation only. On the rise of the early jurists see Frier 1985. Gordon and Robinson 1988 provide a Latin text and English translation to Gaius' *Institutes* with a useful glossary. Honoré 1962 is a study of Gaius, Honoré 1982 of Ulpian, and Honoré 1994 a general history of the role of lawyers in the Roman empire. Pharr 1952 is an English translation of the Theodosian Code, which is discussed in Harries and Wood 1993, Harries 1999, and Matthews 2000. See Volume 7, Chapter 1 of this Treatise, for fuller discussion of the Roman jurists.

For the philosophy of law in the Roman period, Rowe and Schofield 2000 is an indispensable starting point: Part II contains a historical overview of the period and detailed treatments of constitutional theory, Cicero, the historians, Pliny, Seneca, Platonic and Pythagorean theory, Josephus, Imperial Stoics, the Roman jurists, and Christian writers. Algra, Barnes, and Mansfeld 2000 provides valuable background, especially a splendid chapter by Schofield on Hellenistic social and political thought. Schofield 1991 is also a groundbreaking study; no general claims about Stoic political and legal theory or about natural law theory in the ancient world can be made until this book has been mastered.

The most important works of Cicero are *On the Commonwealth* and *On the Laws*, translated with introduction and notes by Zetzel, and *On Duties*, translated by Griffin and Atkins. Cicero's philosophical works are introduced by MacKendrick and Singh 1989. There are many books on Cicero's life and thought. Rawson 1975 is still very helpful, but more recent perspectives are reflected in Powell 1995. A number of relevant works by Seneca are translated in Cooper and Procopé 1995. The best general introductions to Seneca's philosophy and political career are by Griffin 1976 and Maurach 1991. The first thing to read on Epictetus' philosophy is now A. Long 2002. For Marcus Aurelius see Birley 1966 and 1987 and Rutherford 1989.

Inwood 1999 offers an overview of two main trends in recent scholarship about Stoic natural law theory. The "minimalist" tradition, represented by Vander Waerdt 1994a and 2003 and Inwood 2003, argues that natural law has very little to say about substantive social or political matters; Striker 1996b and Mitsis 1994, 1999, 2003 defend the more traditional view that Stoic natural law consists of substantive moral and social norms. Various aspects of Roman legal and political philosophy are addressed in articles in collections edited by Griffin and Barnes 1989 and 1997 and Laks and Schofield 1995. Temporini and Haase 1972, vol. 2, has a number of articles relevant to the theme of this chapter.

EARLY JEWISH AND CHRISTIAN LEGAL THOUGHT

by Fred D. Miller, Jr.[1]

7.1. Historical Overview of Ancient Jewish Legal Thought

In addition to Greek and Roman legal thought, the other major ancient source for Western legal philosophy is the Judeo-Christian tradition. Jewish law took shape over two millennia, from the legendary Mosaic code (as early as the thirteenth century B.C.) until the completion of the *Talmud* (seventh century A.D.). After emerging as a Jewish sect (first century A.D.), Christianity soon became a separate religion and developed a view of law in explicit and sharp contrast with Judaism. This chapter offers a brief overview of early Jewish and Christian legal thought, which is indispensable for an understanding of the subsequent history of medieval philosophy of law.

The Jewish legal tradition has its source in the Tanakh—the Hebrew Bible, known to Christians as the Old Testament—and especially, the Pentateuch, the first five books, called the Torah in Hebrew.[2] According to tradition the five books of the Pentateuch—Genesis, Exodus, Leviticus, Numbers, and Deuteronomy—were written by Moses, except for the final verses describing Moses' death. But most modern biblical scholars regard the Pentateuch as a later redaction from earlier texts composed by different authors at different times (see Segal 1967). Four main strata are generally distinguished: J (where God is called Yahweh or Jehovah), E (where God is called Elohim), D (Deuteronomy), and P (reflecting the viewpoint of priests).[3] Exodus recounts the liberation of the Israelites from bondage in Egypt and the establishment of their legal system (perhaps late thirteenth century B.C.). After delivering the ten commandments (Decalogue) orally to Moses on Mount Sinai, God inscribed them on two stone tablets (Exod. 24:12, 32:15–16, 34:28; Deut. 4:13,

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[1] Louis Lomasky and Charles Butterworth provided very helpful comments and criticisms of an earlier draft. In this chapter quotations from the Hebrew Bible (or Old Testament) are taken from *Tanakh: The Holy Scriptures*. Philadelphia: The Jewish Publication Society, 1985; and the quotations from The New Testament and from Apocrypha are from *The Revised English Bible*. Oxford: Oxford University Press, 1989. All other translations are by the author unless otherwise indicated.

[2] In common usage, "Jewish" refers to religious belief, "Hebrew" to language, and "Israelite" to racial origin, but the terms are often used interchangeably. "Gentiles" (Greek *ethnê*) refers to non-Jews (later to non-Christians), and "pagans" to believers in polytheistic religions such as the Greek and Roman.

[3] On the historicity of the Pentateuch, see Eissfeldt 1975b.

5:22), and Moses also wrote down all the laws given to him in the book of the covenant (Exod. 24:4, 34:27). The commandments are recorded in Exodus 20:2–17 (cf. Deut. 5:6–21), and other regulations are found in the rest of Exodus as well as in Leviticus (see Stamm and Andrew 1967). Moses may be compared to Asian kings like Hammurabi when he is said to "represent the people before God" (Exod. 18:19), but it is noteworthy that the laws are presented as part of a covenant (*berit*) of God with the Israelites: "If you will obey me faithfully and keep my covenant, you shall be my treasured possession among all the peoples. Indeed all the earth is mine, but you shall be to me a kingdom of priests and a holy nation" (Exod. 19:5–6). The Israelites collectively swore an oath to abide by the agreement (24:3–8). The obligation to obey the laws of Moses thus seems to rest on a form of social contract theory: The laws of Moses have authority over the Israelites because they have explicitly consented to obey them. Deuteronomy 29:14–15 makes explicit that the parties to the original covenant also bound their descendants.[4]

The Mosaic code encompassed not only civil laws ("You shall not murder," "You shall not commit adultery," "You shall not steal," "You shall not bear false witness against your neighbor"; see Exod. 20:13), but also many religious regulations ("You must have no other gods besides me," "Remember the sabbath day and keep it holy"; see 20:3, 8), dietary rules ("You shall not boil a kid in its mother's milk"; see 23:19), and so forth. Many crimes carried severe punishments including religious offenses: "Whoever sacrifices to a god other than the Lord alone shall be proscribed" (22:19; cf. Lev. 17:29). "Whoever does work on the sabbath day shall be put to death" (Exod. 31:15). Jewish law was distinctive in its requirement that all male babies be circumcised on the eighth day after birth (Lev. 12:3).

Scholars have noted many similarities between the Mosaic code, especially Exodus 20:22–23:13, and the laws of the Sumerians, Babylonians, Assyrians, and Hittites (see the Prologue to this volume). "It is generally agreed that Israel took over the laws in question from their neighbors in the ancient Oriental world, and it is natural to regard the Canaanites as intermediaries passing on the regulations which are common to the laws of Israel and those of their neighbors" (Eissfeldt 1975a, 563; cf. Smith 1960).[5] Like the code of Hammurabi, Mosaic law affirms the *lex talionis* (law of retaliation): "[T]he penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise" (Exod. 21:23–4; cf. Lev. 24:17–20). It is, however, disputed whether early Jewish law ever adhered strictly to the principle that perpetrators must suffer the same harms they had inflicted on others. The two sacred tablets were deposited in the ark of the

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[4] See Weinfeld 1991, 6–9, on Hittite and Assyrian parallels to these covenants.
[5] See Assmann 1997 on the more controversial claim that Mosaic laws had an "Egyptian origin."

pact or testimony and kept in the holy of holies within the tabernacle (Exod. 16:34, 25:16; cf. 31:18). Finally, the tribe of Levites were ordained as a priestly caste responsible for enforcing the laws (32:25–9).

A loose federation of Israelite tribes invaded Palestine and fought with difficulty against the Canaanites and Philistines, until the establishment of a monarchy that reached its apogee early with Kings David (1013–973 B.C.) and Solomon (973–933 B.C.). God promised to David that his family and kingdom would be established forever, and his throne would endure for all time (2 Sam 7:10). Solomon is extolled for his "divine wisdom to execute justice." The anecdote in which he judges the claims of two women to be mother of the same child recalls the judicial role of Mesopotamian kings (1 Kings 3:16–28, 4:29–34, 10:23–4). But even Solomon succumbed to pagan gods through the wiles of his many foreign wives. A major theme throughout the Hebrew Bible is the struggle against intermarriage with non-Israelites and against heathen practices such as idol worship and child sacrifice. After his death, Solomon's kingdom split into two: Israel in the north was annihilated in 722 by the Assyrians, and Judah in the south fell in 586 to the Neo-Babylonian Empire. During this period of division and decline, a series of prophets—including Isaiah, Jeremiah, and Ezekial—advocated social justice and religious reform. Jeremiah complains that the priests, "the guardians of the teaching [*torah*]," ignored God (Jer. 2:8).

King Josiah (ruled ca. 640–609) instituted religious reforms in an effort to save the kingdom of Judah. After "a scroll of the teaching [*torah*]" was rediscovered in the temple (2 Kings 22:8), Josiah read it to the assembled population and "solemnized the covenant before the Lord: that they would follow the Lord and observe his commandments, his injunctions, and his laws with all their heart and soul; that they would fulfill all the terms of this covenant written upon the scroll. All the people entered into the covenant" (23:3). Passover was celebrated according to the scroll of the covenant, idols were banned, worship was centralized in the temple, and Josiah followed "the teaching [*torah*] of Moses" (23:25). Many scholars believe that Deuteronomy, the fifth book of the Pentateuch, was written, or substantially redacted, at this time (Driver 1902; Weinfeld 1991; Mitchell 1991). Deuteronomy (Greek for "second law") contains the first use of the word *torah* for an entire book rather than for a specific ritual or statute, for example, "When he is seated on his royal throne, he shall have a copy of this teaching [*torah*] written for him on a scroll by the levitical priests" (Deut. 17:18; contrast Lev. 6:2, 7; 7:1, and passim). This passage incidentally contains a reference to kingship (Deut. 17:14–15), which some scholars regard as anachronistic because the kingship was not established until two centuries after Moses. Deuteronomy 12–26 listed many commandments and statutes that were added to the Mosaic code. One noteworthy development is the injunction, "Parents shall not be put to death for children, nor children be put to death for parents: A person shall be

put to death only for his own crime" (Deut. 24:16; cf. 2 Kings 14:6). This seems to be at variance with the principle of inherited or collective guilt implied by Exodus 20:5: "I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and fourth generations of those who reject me." In spite of Josiah's reforms, Judah was conquered soon after by Nebuchadrezzar of Babylon, who forcibly relocated many of the Jews. During the Babylonian captivity (586–538) the Jewish community preserved its cultural identity through strict adherence to the Torah. After the Persian conquest of Babylon (538), the Jews were permitted to return and rebuild the temple in Jerusalem, although the Jews remained under Persian rule (538–332).

In 444 B.C. the Persian king Artaxerxes granted legal authority to Ezra, a Jewish scribe living in Babylon, who "had dedicated himself to study the teaching [*torah*] of the Lord so as to observe it, and to teach laws and rules to Israel" (Ezra 7:6, 10). Ezra was permitted to return to Judea and to "appoint magistrates and judges to judge all the people in the province of Beyond the River who know the laws of your God, and to teach those who do not know them" (7:25). Ezra and his Levite colleagues read and interpreted the Torah to an assembled multitude (Neh. 8:1–3, 7–8). They said that God had handed the Israelites over to foreign conquerors to punish them for rebelling against Mosaic law. God kept his covenant, even though the Israelites had done injustice (9:26–33). The chastened people concluded that their survival hinged on strict conformity to the teaching of Moses, and they swore an oath to obey the law of Moses and fulfill all the commandments, rules, and statutes of God (10:29). The story of Ezra implies an ongoing tradition of judicial interpretation (*midrash halakhah*) by scholars or scribes (*soferim*). Such interpretation was necessary because the ancient laws had to be respected, but often they seemed inconsistent or unclear in application. For example, Exodus 21:5–7 states that if a slave denies that he wants to be free, he will be a slave for life; but Leviticus 25:40 states that a slave will work for his master only until the jubilee year (which occurs every forty-ninth year). Although these two statements seem contradictory, the interpreters tried to harmonize them: "the slave [...] was to be offered his freedom on the seventh year" (Zohar 1998, 205). According to tradition, the oral Torah was transmitted from Moses to Joshua to the elders to the prophets and finally to the Great Assembly (*keneset ha-Gedolah*) of teachers, which was founded by Ezra and continued until the time of Simeon the Just (d. ca. 270 B.C.). The tasks of the assembly were to "be deliberate in judgment, raise up many disciples, and make a fence around the Torah" (Tractate *Avot* 1.1–2, as cited in A. Cohen 1995, xxxvii).

Palestine was conquered by Alexander the Great in 332 B.C. and ruled successively by the Ptolemies (301–200 B.C.) and Seleucids (200–168 B.C.). At first the Israelites enjoyed some autonomy, and King Antiochus III (ca. 198 B.C.) permitted the Jews to govern by their own laws and establish a senate

(*sanhedrin*), which became like a supreme court presided over by the high priest. But there were increasing conflicts between Hellenizing and orthodox Jews, until King Antiochus IV (ruled 175–163 B.C.) issued an edict requiring the Jews to abandon their customs and religious practices such as circumcision "and so to forget the law and change all their statutes" (1 Macc. 1:49). Called upon to be "zealous for the law and stand by the covenant" (2:27), the Jews rebelled under Maccabean leadership in 168 and achieved freedom until the Roman conquest in 63 B.C. Throughout this period Jewish society was supported and unified by the "three pillars of ancient Judaism—the one God, the one Torah and the one Temple" (Schwartz 2001, 49). But two major factions disagreed over the Torah: the Sadducees (named after Zadok, a Levite priest; see Ezek. 40:46), who were associated with the wealthy and established priestly class, and the more populist Pharisees, who arose from the class of scribes. The Sadducees insisted on strict adherence to the written Torah, whereas the populist Pharisees accepted the oral Torah along with the written law. The Pharisees were also receptive to ideas such as the resurrection of the dead and postmortem reward and punishment determined by one's conformity during life to the law of Moses—ideas which were repudiated by the literalist Sadducees. The Pharisees were influenced by Greek ideas, although the extent of this influence is debated by scholars. During the third and second centuries B.C. in Alexandria, first the Hebrew Tanakh was translated into Greek as the Septuagint, then the rest of the scripture. This required a Greek reconstruction of Jewish concepts. For example, the Hebrew word *torah* was rendered as *nomos* in Greek. In the second century B.C. Aristobulus, an Alexandrian Jew, wrote a Greek commentary on the Pentateuch, arguing that Moses was a source for Greek philosophy.

Later Philo (Judaeus) of Alexandria (15? B.C.–A.D. 50?) wrote extensive treatises in Greek on Jewish religion and Mosaic law. He was deeply steeped in the writings of Plato, whom he called "that sweetest of all writers" (*Prob.*13). Yet he praises Moses as "the most admirable of all the lawgivers who have ever lived in any country either among the Greeks or among the barbarians [...]. [H]is are the most admirable of all laws, and truly divine, omitting no one particular which they ought to comprehend" (*Mos.* II.12). Philo views Moses as a philosopher, king, and prophet rolled into one (*Mos.* II.2–3). Moses was the living law (*empsuchos nomos*) (I.162, II.4). Philo upholds the Mosaic principle that "one must not add anything to, or take anything from the law [...], for there is nothing which has been omitted by the wise lawgiver which can enable a man to partake of entire and perfect justice" (*Spec.* IV.143). But he also argues that the law must often be interpreted in an allegorical sense (*Leg.* III.236). Moses began the Torah with the creation of the world, "under the idea that the law corresponds to the world and the world to the law, and the man who is obedient to the law, being by so doing, a citizen of the world [*kosmopolitês*], arranges his actions with reference to the

intention of nature, in harmony with which the whole universal world is regulated" (*Opif.* 3). This view of law presupposes the Hellenistic Stoic view of the world (*kosmos*) as a city (*polis*) (*Opif.* 143; cf. Clement, *Strom.* 6.172 = *SVF* III.327). The cosmic city possesses a constitution, which Philo calls "the right reason [*orthos logos*] of nature, which in more appropriate language is denominated law, being a divine arrangement in accordance with which everything suitable and appropriate is assigned to every individual" (*Opif.* 143). Philo thus expresses the notion of natural law in terms of his own idea of divine reason (*logos*):

The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a life law written on lifeless parchment or engraved on lifeless columns; but one imperishable, and stamped by immortal nature on the immortal mind. (*Prob.* 46)[6]

This concept of law had a profound impact on early Christian philosophers (cf. *Opif.* 20; see Goodenough 1933 and 1940; Tobin 1983; Runia 2001, 142–3; Najman 1999 and 2003).

During the Babylonian exile began the Diaspora, the dispersion of Jews throughout the world. Scattered Jewish communities tried to preserve their religious and cultural identity through a careful study of the Torah. This was also a period of remarkable ferment during which many sects sprang up, including the Essenes, who were mystics and ascetics who regarded matter as evil. The most successful movement, Christianity, hailed Jesus of Nazareth as the lord and long awaited messiah ("anointed one" and deliverer, the successor of King David) (see Matt. 16:16). Jesus acted as a teacher (rabbi) and healer. Although his professed aim was to fulfill the Mosaic law, his followers hailed him as the Son of God and the founder of a new religion that would transform or supplant Judaism, although some continued to comply with the Torah (see the following section). An influential faction, the Zealots, refused to pay taxes to the Romans and led a revolt that resulted in disastrous defeat and the destruction of the temple in Jerusalem (A.D. 70). After putting down further rebellions under self-proclaimed messiahs in the second century, the Romans expelled the Jews from Jerusalem and for a time even prohibited the practice of Judaism. Flavius Josephus (37–95?) reported the foregoing events in the *Jewish Antiquities* and the *Jewish War*. Although his writings contain valuable information, Josephus can be unreliable because he wanted to make the Torah palatable to his Greco-Roman readership. Following Philo, Josephus depicted Moses as a legislator in the Platonic mold:

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[6] There is a striking parallel with Cicero's statement that "true law is right reason, consonant with nature, spread through all people. It is constant and eternal […]" (*On the Commonwealth* III.33, trans. Zetzel). See Horsley 1978 and the discussion in Chapter 6, Section 6.2, of this volume.

He believed that it was above all necessary for one who manages his own life nobly and to legislate for others, first to study the nature of God and then having contemplated His works with his reason [*nous*] to imitate as far as possible that best model [*paradeigma*] of all and to try to follow it [...]. In legislating he did not start with contracts and mutual rights of the citizens; rather, when he led their thoughts up to God and the construction of the world and convinced them that we humans are the finest of God's works on earth, and after he had obtained their pious obedience, he easily persuaded them of everything else. (*Ant.* I.19, 21; cf. Philo, *Opif.* 3, *Mos.* II.48)

Thus Josephus explains why the Torah begins with Genesis, Moses' account of God's creation.

After the suppression of the temple priests and traditional political elites, the rabbis, who were spiritual heirs of the Pharisees, became the dominant force within Jewish society.[7] As scholars and teachers of sacred scripture, the rabbis increasingly provided spiritual leadership for their communities and presided over weddings and other rites. They had at their disposal the *midrash*, commentary preserved since the Babylonian captivity. The oral tradition had been continued under a succession of *zugot* or "pairs of leaders," from the early second century B.C. until the early first century A.D., when Hillel as patriarch founded a school and propounded seven rules of midrashic exegesis, thus initiating the age of the sages (*tannaim*) which lasted through the second century A.D. (see Elon 1994, vol. 3: chap. 28). The Romans permitted Jewish sages such as Johanan ben Zakkai to establish rabbinical schools and thus preserve the Torah. These ensured a period of revitalization of Jewish religion, culture, and law. In order to establish a comprehensive and consistent set of laws, the patriarch Judah ha-Nasi, "the Prince" (135–217 A.D.), commissioned the sages to compile a code of laws called the *Mishnah* (Moore 1927–1930). There were already several oral mishnayos in existence, and the new *Mishnah* presented these in a more concise, written form. The *Mishnah* was organized in six sections dealing with agricultural laws, the sabbath and festivals, family law, torts and financial laws, rules for sacrifices, and dietary laws. This incorporated the oral Torah, comprised of explanations given by God to Moses of the written Torah and supplementary interpretations of later sages and teachers. The Mishnah recognizes different sorts of rule: a commandment contained in the Torah (*mitzvah*, e.g., do not work on the sabbath), a rabbinical decree on how to apply a commandment (*gezeirah*, e.g., do not touch a tool on the sabbath), or a rabbinical enactment not based on the Torah (*takkanah*, e.g., the wife is to light a candle on the sabbath). The commandments of the Torah were more binding in principle, but they often needed to be interpreted or qualified.

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[7] Traditionally, historians held that the rabbis quickly filled the leadership vacuum in the second century A.D. Schwartz 2001 argues that the rabbis were at first a peripheral group and only very gradually acquired authority. See also Schäfer 2003, 133–5.

The Mishnah (completed ca. 200) along with the Tosefta ("supplement," completed ca. 250) became the subject of extensive commentary (*gemara*) by exegetes (*amoraim*) that was collected in the Jerusalem (or Palestinian) *Talmud* (ca. 400) and the more extensive and authoritative Babylonian *Talmud* (ca. 500, redacted until ca. 650) (see Ginzberg 1941; Goodblatt 1979; Elon 1994, vol. 3: chap. 29). The term *talmud* ("learning") was originally applied narrowly to the commentaries, but the entire collection of the Mishnah, the commentary, and other writings is called the *Talmud*. It included the *halakhah*, which contained laws and ordinances with many additions to the Pentateuch, and the *haggadah*, which contained anecdotes, parables, and other material. The word *halakhah* ("the way") came to refer generally to Jewish law. The *Talmud* also included the *baraisos*, excerpts from the sages (*tannaim*) that were not in the Mishnah. According to tradition, the *Talmud* represented the opinions of sages belonging to an unbroken oral tradition reaching back to Moses. But the *Talmud* often preserved discrepant interpretations without reaching a clear conclusion, thus encouraging further deliberation. The Babylonian *Talmud* recounts an argument between two rabbis. When a voice from heaven declares that the law accords with the one rabbi's position under all circumstances, the other retorts, "It is not in heaven!" A later rabbi explained, "The Torah has already been given from Mount Sinai, so we do not pay attention to echoes, since you have already written in the Torah at Mount Sinai, 'After the majority you are to incline'" (*Bava Mesia* chap. 4, 59b; cf. Elon 1994, vol. 3: 1068). As the culmination of two millennia of reflections on the Torah, the *Talmud* became the foundation for subsequent Jewish legal thought (see Strack and Stemberger 1992).

7.2. Paul on Christianity and the Law

St. Paul was the first Christian to theorize about the law. Born as Saul to Jewish parents at Tarsus in Asia Minor (A.D. 5?), he became a zealous Pharisee in Jerusalem (Acts 23:6; Phil. 3:5).[8] He helped to lead the opposition against the nascent Christian sect, including the execution of St. Stephen for speaking against the law (Acts 6:13; cf. 8:3). On the road to Damascus, where he intended to persecute other Christians, he had a vision of Christ that resulted in his conversion (9:1–19). He proselytized to the Gentiles, who called him Paul, and conducted major missions throughout the eastern Roman Empire. Finally, he was attacked by a Jewish mob in the temple in Jerusalem, and arrested by

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[8] Paul's claim that he was "according to the law a Pharisee" has been questioned on the grounds "that he appears to have read the scriptures, not in Hebrew, as any rabbinic scholar would have done, but in the Greek translation known as the Septuagint" (see Wilson 1997, 30–1). The issue is complicated, however, by the fact, noted in the previous section, that other hellenized Jews including Philo seemed unfamiliar with Hebraic writings.

the Romans. At his hearing he denied that he had offended against the Jewish law or the Roman emperor (25:8). As a citizen he appealed his conviction (25:11–12) and was sent to Rome where he was exonerated after preaching for two years. He was arrested again however and ultimately executed (A.D. ca. 67).

Paul's letters to churches and individual Christians were early accepted in the canon of sacred writings and comprise over a quarter of the New Testament. Although the authorship of some letters is disputed, scholars generally regard as genuine those to the Galatians and Romans, which contain important discussions of law. Textual interpretation turns on thorny issues concerning the historical context, the views of his antagonists, Paul's biography, and Jewish and Greco-Roman culture, in addition to broader questions of theology (see Sanders 1977 and 1983; Richardson and Westerholm 1991). Paul employs techniques of oral speeches and legal argument, so that individual passages must be understood within a wider context. Paul's style is distinguished by the vivid personification of abstract ideas: for example, "Love is patient and kind" (1 Cor. 13:4). Law is sometimes treated as a character in a spiritual drama: "The law entered, in order that the offence might increase. But where sin increased, grace increased all the more, so that, just sin reigned in death, so also grace might reign through righteousness to bring eternal life through Jesus Christ our Lord" (Rom. 5:20–21, trans. by author).

Paul's legal thought was influenced by two main factors. First, Jesus and the early Christians, including Paul himself, were accused of violating Mosaic law because Jesus was presented as the Messiah and the Son of God who openly flouted traditional laws, for example, against working on the sabbath. Jesus retorted, "The sabbath was made for man, not man for the sabbath" (Mark 2:27). But he also stated, "Do not suppose that I have come to abolish the law or the prophets; I did not come to abolish, but to complete" (Matt. 5:17). Later, in response to the Pharisees' question of what is the greatest commandment in the law, Jesus answered, "Love the Lord your God with all your heart, with all your soul, and with all your mind [...]. Love your neighbor as yourself [...]. Everything in the law and the prophets hangs on these two commandments" (22:36–40). Second, Paul himself was involved in an early controversy in the Christian church. He opposed other former Pharisees who maintained that Gentiles who wished to become Christians must become circumcised and follow the law of Moses (Acts 15:5; cf. Gal. 2:3, 6:15). Against this, Paul maintained, human beings are justified by faith apart from works of the law (Rom. 3:28).

In order to understand Paul's writings on law, it should be kept in mind that he uses the Greek word *nomos*, which is usually translated "law," in different senses (see Cranfield 1970, 148–9; Fitzmyer 1993, 131–2): (1) narrowly, for the law of Moses (Rom. 5:13–14, 10:5); (2) more broadly, for moral rules grasped even by Gentiles (2:14–15); (3) in the sense of a principle, for exam-

ple, of faith (3:27); and (4) in the sense of a commandment (Gal. 5:14). Consequently, the precise meaning of *nomos* ("law") is often in dispute.

Paul's harshest criticisms of law are aimed at the "foolish Galatians" for insisting that pagan converts to Christianity submit to being "under the law," especially through circumcision (Gal. 3:1, 6:12–13). Here "law" clearly refers to the Mosaic code. Paul declares that "no one [i.e. neither Jew nor Gentile] is ever justified by doing what the law requires, but only through faith in Christ Jesus" (2:16). He adds that "those who rely on obedience to the law are under a curse" (3:10). God put the law "in charge of us until Christ should come, when we should be justified by faith; and now that faith has come, its charge is at hand. It is through faith that you are all sons of God in union with Christ Jesus" (3:24–6). There can be no salvation under the law, because even if one is circumcised, he is "under obligation to keep the entire law" (5:3). Paul argues that "if you are led by the spirit, you are not subject to law [...]. The harvest of the spirit is love, joy, peace, patience, kindness, goodness, fidelity, gentleness, and self-control" (5:18, 22). He concludes that the old law, given to Moses, has been superseded by a new law: "The whole law is summed up in a single [commandment]: 'Love your neighbor as yourself'" (5:14). "Carry one another's burdens, and in this way you will fulfil the law of Christ" (6:2). This implies that the law criticized in Paul's letter to the Galatians is the old law of Moses, which has been supplanted by a new Christian law (see Martyn 1997, 548–58).

Paul has been criticized for overlooking a major doctrine of Jewish religion, that a loving God may allow sincerely repentant sinners to atone for their sins. This idea is celebrated in the Jewish Day of Atonement (*yom kippur*; see Exod. 30:10; Lev. 23:27, 25:9). Leviticus prescribes a ritual in which the high priest was to lay his hands on the head of a scapegoat, confess all the sins of the Israelites, and then cast out the creature: "The goat shall carry on it all their iniquities to an inaccessible region" (Lev. 16:22). Although it is widely agreed that Paul's omission of repentance and atonement resulted in an incomplete and inaccurate picture of Jewish religion and law, the explanation for this oversight is debated by scholars (see Sanders 1977). Perhaps it was due to his Pharisaic education, or perhaps his own anti-legalism led him to dismiss atonement, in its traditional form, as an ineffective palliative. In any case Paul claimed that atonement could be achieved only through the ultimate sacrifice of Jesus Christ and that it could be effective only through faith (Rom. 3:25; cf. Heb. 9:25–6).

Although Galatians emphasizes the special burden imposed by the Torah, Paul's letter to the Romans adds that Gentiles as well as Jews are liable to punishment:

Those who have sinned outside the pale of the law will perish outside the law, and all who have sinned under that law will be judged by it [...]. When Gentiles who do not possess the law carry

out its precepts by the light of nature [*phusei*], then, although they have not law, they are their own law; they show what the law requires is inscribed on their hearts [...]. (Rom. 2:12, 14–15)

This sounds like the idea of natural law in Cicero and the Stoics: All humans in their conscience understand the law's requirements (see Dodd 1953; Martin 1974; McKenzie 1964; Troeltsch 1960, 1: 80). Because pagans also know that their acts are unlawful, they—like the Jews—are condemned to punishment. "No human being can be justified in the sight of God by keeping the law: law brings only the consciousness of sin" (Rom. 3:20). Paul's legal theory is founded on the doctrine of original sin, that as a result of Adam's sin all men are condemned: "It was through one man that sin entered the world, and through sin death, and thus death pervaded the whole human race, inasmuch as all have sinned. For sin was already in the world before there was law […]" (5:12–13). Although the law reveals to humans their sinful condition, they are incapable of obeying it. Law has the paradoxical effect of prompting even more sin (see 5:20–1 quoted above). We can be saved from the punishment we justly deserve only through the intercession of Christ, the Son of God, who died for our sakes. "If, by the wrongdoing of one man, death established its reign through that one man, much more shall those who in far greater measure receive grace and the gift of righteousness live and reign through the one man Jesus Christ" (5:17).

The foregoing reflections lead Paul to ask whether the law is sin. Although he denies this, he observes that "had it not been for the law I should never have become acquainted with sin" (7:7–8). The law, for example, "You shall not covet," prompts me to covet the forbidden fruit. Our inability to obey the law results from an inner conflict: "In my inner man I delight in the law of God, but I see another law in my members fighting against the law of my mind and making me a prisoner of the law of sin which is in my members" (7:22–3, trans. by author). But even though our bodies are dead because of sin, our spirit is enlivened through the presence in us of Christ and the Holy Spirit (8:10–11). The Spirit strengthens us and enables us to follow the commandment to love your neighbor as yourself. This he calls "the law of the spirit of life" (Rom. 6:2; cf. Gal. 6:2; 1 Cor. 9:21).

In two other influential passages Paul explains the practical implications of the Christian understanding of law. In the first passage, he asserts, "Every person must submit to the authorities in power" (Rom. 13:1). He is expatiating on the dictum of Jesus that one should give to God what is God's and to Caesar what is Caesar's (Mark 12:17). Paul's premise is that "all authority comes from God." Hence, the ruler is a "minister of God" for the good of his subjects and an agent of punishment for wrath to wrongdoers. Paul thus presents a moral argument for obedience to the ruler based upon conscience (Rom. 13:1–5). One has an obligation to pay taxes to the government, and more generally to act justly: "Discharge your obligations to everyone: pay tax and levy,

reverence and respect, to whom they are due" (13:7). Paul observes that this is spelled out in the Ten Commandments, but that every commandment "is summed up in the one rule: Love your neighbor as yourself. Love cannot wrong a neighbor; therefore love is the fulfillment of the law" (13:9–10). Thus, according to Paul, the obligation to obey political authorities, and by implication the laws of the land, follows from the principle of Jesus Christ that one should love one's neighbor as oneself.

The second passage explains how Paul understands one's neighbor. Paul declares that, among Christians, "there is no such thing as Jew and Greek, slave and freeman, male and female; for you are all one person in Christ Jesus" (Gal. 3:28; cf. 1 Cor. 12:13). This view, which helped to motivate Paul's energetic proselytizing to the Gentiles, is a striking departure from the view that the Israelites were a chosen people, and the view that Greeks were by nature superior to barbarians. Although God establishes men in authority over women, free men over slaves, and rulers over subjects, these authorities are, as noted above, "ministers" of God whose authority derives from God rather than their innate superiority. Paul's view implies that all human beings are fundamentally equal under God's law.

Paul's considered view of law has been interpreted in very different ways. For example, his statement, "Christ is the end [*telos*] of the law" (Rom. 10:4) is ambiguous, because the word *telos* in Greek can be translated as "terminus" or as "goal." Emphasizing the first reading, some expositors view Paul as an antinomian, that is, a thoroughgoing opponent of the law. This is suggested by Ephesians 2:15: "he annulled the law with its rules and regulations, so as to create out of the two a single new humanity in himself." When Paul speaks of "the law of Christ," he means that we should follow the spirit of the law rather than the strict letter, because Christians "serve God in a new way, the way of the spirit in contrast to the old way of a written code" (Rom. 7:6). Early adversaries of Paul accused him of this view, while Marcion, a Gnostic heretic (d. ca. 160), sought support from this interpretation. Tertullian (ca. 160–ca. 220) criticized Marcion for separating the law and the gospel; and Irenaeus (140?–ca. 203) accused Marcion of mutilating Paul's writings by claiming that Christ "rendered null and void the prophets and the law." Similarly, Nietzsche hyperbolically calls Paul "the apostle of the annihilation of the Law," and further states, "The Law was the Cross on which he felt himself crucified. How he hated it! What a grudge he owed it" (*The Dawn of Day* aph. 68).

Diametrically opposed is the interpretation that Paul means "the law of Christ" literally and understands Christ as the goal (*telos*) of the law. On this view, Paul intends to distinguish a moral law distilled by Christ from the old Mosaic code. The apostle James, along these lines, speaks of "the sovereign law laid down in scripture: Love your neighbor as yourself" (James 2:8; cf. Lev. 19:18). Tertullian argues that a "new law" and a "new circumcision" had re-

placed the old. Justin Martyr (ca. 100–ca. 165) and Origen (185?–ca. 254) call Christ "the new lawgiver" (Pelikan 1971–1978, 16–8, 38–9). On this interpretation "gospel and law are essentially one" (Cranfield 1970, 169). During the Middle Ages, scholastic philosophers, including Abelard, developed this "new law" interpretation in a more systematic way (see Chapter 11 of this volume).

On a third interpretation, Paul's ambivalence toward the law derives from his view of human nature (see Fitzmyer 1981). St. Augustine (in *On Grace and Free Will*) draws on this interpretation of Paul to criticize the doctrine of Pelagius that human beings have a free will but Christ gave humans grace in the form of the law to help them avoid sin. Augustine objects that the human will has been so impaired by original sin that humans are incapable of following God's law on their own. The Augustinian interpretation was defended and elaborated in Martin Luther's *Lectures on Romans*. Rejecting the scholastic view that the gospel was a "new law" and that Christ was a legislator comparable to Moses, Luther (1961, 199) followed Augustine's interpretation of Pauline psychology. Paul describes an inner conflict between the law of God and sin, for example, when one covets a neighbor's property contrary to the law (Rom. 7:22–3). Paul says, "The good which I want to do, I fail to do; but what I do is the wrong which is against my will; and if what I do is against my will, clearly it is no longer I who am the agent, but the sin that has its dwelling in me" (7:19–20). According to Luther, the "I" that wants or does not want is the mind or spirit, and the "I" that does or does not act is the flesh. Luther (204) explains, "Because one and the same man as a whole consists of flesh and spirit, he attributes to the whole man both of the opposites that come from the opposite parts of him." This recalls Plato's division in the *Phaedo* between the soul and the body, which are described as in conflict with each other. But Luther (213) denies that Paul means that the spirit and flesh are "two separate entities," which Luther dismisses as "a silly and crazy fiction" contrived by "metaphysical theologians." When Paul says, "I myself with the mind serve the law of God, but with the flesh the law of sin" (7:25), he means literally that "one and the same man serves both the law of God and the law of sin, that he is righteous and at the same time he sins" (208). Even "saints in being righteous are at the same time sinners." Humans are inherently sinful and can be saved only through the grace of God and the mediation of Christ. Paradoxically, the spirit will enable us to fulfill God's law, but because of "our corrupted nature" the law itself is unable to bring this about (223–4).

Paul's tortuous discussions about the difficult relationship between law and justification by grace have influenced Christian legal thinkers of all stripes. However, a modern scholar remarks that Paul's "statements are more radical than the church has ever, except in rare moments of crisis, been willing to admit" (Meeks 1972, 441).

7.3. Early Christian Legal Thinkers

The Pauline critique of Jewish law was perpetuated by early Christian apologists such as Justin Martyr (ca. 100–ca. 165) in his *Dialogue with Trypho* (a Jewish philosopher). To the question whether those who have regulated their lives according to Mosaic law would be rewarded with life after death, Justin replied that the Jews who did what was "naturally [*phusei*] good, holy, and just"—that is, "things that are universally, naturally, and eternally good"—would be saved (*Dial.* 45.3–4), implying that the part of Moses' law which conformed to natural law took precedence over the rest. But Justin tells Trypho that there is a "final law and covenant which has authority over all persons." The Mosaic law "is already obsolete and was for you [Jews] only, whereas the [final] law is without qualification for all persons [...]. An everlasting and final law, Christ Himself, has been given to us [...]" (*Dial.* 11.2). Similarly, Origen (ca. 185–254) maintained that "the [divine] providence which long ago gave the law [of Moses], but now has given the gospel of Jesus Christ, did not wish that the practices of the Jews should continue [...]. In the same way it increased the success of the Christians [...]" (*Cels.* VII.26). Irenaeus of Lyons (140?–ca. 203) also asserted the superiority of the gospel to Jewish law: Christ "did not abolish, but extend and fulfill, the natural precepts of the law, by which man is justified." "The Lord himself spoke the words of the Decalogue alike to all: and so they abide equally with us, receiving extension and argumentation, but not abolition, but his coming in the flesh" (*Haer.* IV.13.1, 16.4). There was, however, a tendency toward a new legalism, inspired by Paul's reference to "the law of Christ" (Gal. 6:2). Christ was described as our "new lawgiver" by Justin (*Dial.* 18.3) and as "the lawgiver of the Christians" by Origen (*Cels.* III.7). Thus, Tertullian (ca. 160–ca. 220) contended that a "new law" and a "new circumcision" had replaced the old law, which was only meant as a sign to come (*Jud.* III.8). Tertullian refuted the heresy of Marcion (d. ca. 160) whose "primary and principal work" was the "separation of law and gospel" (*Marc.* I.19.4; see Section 7.1 above). Pelikan (1971, 17–8) observes, "[A]s moralism and legalism manifested themselves in Christian theology, much of the edge was removed from the argument of Christian apologetics against what was taken to be the 'Pharisaical' conception of the law."

Early Christian apologists also answered pagan critics by appropriating the classical idea of natural law (see Troeltsch 1960, 158–61). When the pagan Celsus proclaimed that "Pindar seems to me to have been right when he said that law is king of all," Origen retorted, "We Christians recognize that law is by nature king of all when it is the same as the law of god" (*Cels.* V.40). Origen argued that "where the law of nature, that is of God, enjoins precepts contradictory to the written laws," one ought to obey the divine lawgiver "even if in doing this he must endure dangers and countless trouble and deaths and

shame." In particular, one ought to disobey laws requiring the worship of pagan gods (V.37, trans. Chadwick). Origen was following the tradition of Antigone (see Chapter 1, Section 1.6.2, of this volume), although, among Christians, he was "apparently the first to justify the right to resist tyranny by appealing to natural law" (Chadwick 1953, 7 n.). The Christian rhetorician Lactantius (ca. 240–ca. 320) quoted with approval Cicero's definition of true law as "right reason in agreement with nature" of which God is the author, promulgator, and enforcing judge (Lactantius, *Inst.* VI.8 = Cicero, *Rep.* III.22). Tertullian also compared nature to a teacher in the service of God: "Nature is the teacher; the soul is the pupil. Whatever either the one has taught or the other has learned has come from God, that is, the teacher of the teacher" (*Anim.* 5). Tertullian was a severe critic of pagan philosophy: "What is there in common between Athens and Jerusalem?" (*Praescrip.* 7). Even if philosophers hit upon the truth occasionally, it is by sheer chance: "Most of our ideas about nature, however, are suggested by a kind of common sense with which God has endowed the soul of Man" (2.1). Other Christian thinkers, in particular Clement of Alexandria (ca. 150–ca. 215), took a more favorable view of philosophy: "Philosophy was schoolmaster to bring the Greek mind to Christ, as the law brought the Hebrews" (*Strom.* I.5.28; cf. Paul, Gal. 3:23).

The Christians who accepted the classical concept of natural law had to explain its relation to the law of Moses. St. Ambrose (ca. 340–397) argued that the Mosaic law was given to human beings because they were unable to obey the natural law. He interpreted the apostle Paul as teaching "that there is a natural law [*lex naturale*] written in our hearts [...]. This law is not written, but inborn; it is not perceived by reading, but is expressed in each person as from the flowing font of nature, and is taken in by human minds" (*Ep.* 73.2; cf. Rom. 2:14–15).[9] Ambrose converted and baptized St. Augustine, who gave a similar account of natural law: "Natural law [*natura ius*] is not produced by opinion, but a certain innate force has implanted it" (*Questions* 31.3). Ambrose was the scion of a noble family, a Roman official, and finally bishop of Milan, where he exerted powerful influence over political as well as religious affairs. His *De Officiis Ministrorum* was modeled after *De Officiis* of Cicero, and just as Cicero succeeded in popularizing Greek philosophy among his fellow Romans, "Ambrose reinterpreted Ciceronian Stoicism for a Christian public" (Markus 1988, 97). Following Cicero he described natural law as a moral principle obligating individuals to all humanity, to treat one another like parts of a single body (Ambrose, *Off.* III.17–18; cf. Cicero, *Off.* III.21–2). Ambrose, however, gives Cicero's simile a Christian interpretation: "The church should be the model of how human beings ought to relate"

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[9] See Carlyle 1936, 1: 105, who notes similar interpretations in Ambrose, *De Jacob et Vita Beata* VI; in St. Hillary of Poitiers (d. 367), *Tractatus On Psalms* 118.119; and Augustine, *Faust.* XIX.2. On this passage (Rom. 2:14–15), see Section 7.2 above.

(Davidson 2001, 2: 818). Ambrose also emphasizes the universal scope of natural law: "If there really is one law of nature [*lex naturae*] for all, clearly there must be one standard of what is beneficial for all, and clearly we are bound to consider the interests of all. It cannot then be right for a man who wishes to follow nature's norm and consider the interests of his neighbor to transgress the law of nature by doing him harm" (Ambrose, *Off.* III.25; cf. Cicero, *Off.* III.27).

Political justice is to be understood in terms of this concept of natural law. For Ambrose agreed with classical philosophers that "justice is the basis of the association and community of the human race" (*Off.* I.28), and that "equity strengthens governments, and injustice destroys them" (II.19). But Ambrose rejected the pagan philosopher's understanding of justice, as doing no harm except in return for harm done, and as distinguishing private property from public. According to Ambrose's conception of natural law, God ordained the law of universal generation so that the earth is a kind of common possession. Private right was the result of human greed (I.28), that is, an inevitable consequence of original sin. Although Ambrose held that the authorities should comply with justice and law, he also contended that legal justice should defer to divine law. In a debate with the pagan prefect Symmachus (ca. 345–ca. 402), who argued that justice required the restoration of the altar of Victory in the Senate house (Symmachus, *Relationes* III.18), Ambrose wrote in a letter in 384 to the Christian Emperor Valentinian that "injustice is done to no one, over whom almighty God is given precedence" (*Ep.* 17.7).

In waging war on two fronts against Jewish and pagan adversaries, Christian philosophers developed a theory of three laws: the natural law given to Adam and Eve and consequently to all nations, the old law of Moses given to the Jews, and the new law of Jesus Christ. This tripartite view of law is found in a commentary on Romans by "Ambrosiaster" (ca. 380), the unknown author of commentaries mistakenly attributed to Ambrose who received his nickname from Erasmus. He remarks that natural law "which was partly reformed by Moses, and partly supported by his authority in preventing offenses, makes one aware of sin" (*Exposition of Romans* III.20). Augustine (*Faust.* XIX.2) attributes the same threefold distinction to Paul:

There are three kinds of law: One is that of the Hebrews, which Paul says belongs to sin and death. Another truly belongs to the Gentiles, which he calls natural [citing Rom. 2:14–15] [...]. The third kind of law is truth, which the apostle signifies in the same way, and says, "The law of the spirit of life in Christ Jesus freed you from the law of sin and death." (Rom. 8:2)

The idea of the three laws was later a major theme of Abelard's *Dialogue between a Philosopher, a Jew, and a Christian* (see Chapter 11, Section 11.3, of this volume).

Isidore, archbishop of Seville (ca. 560–636), who oversaw important religious reforms in Spain, also contributed mightily to the transmission of an-

cient legal concepts. He was an associate of Sisebut, the Visigothic king, who commissioned his *Etymologies*, a widely used desk encyclopedia, with derivations and explanations of important terms. Book V.1–27 discusses legal terminology, beginning with a survey of the first legislators: "Moses of the Hebrew race was the first to publish divine laws in sacred writings" (*Etym.* V.1). He is followed by Egyptian, Greek, and Roman lawgivers. Isidore then briefly sketches the history of Roman legislation down to the Theodosian Code (with no mention of the Justinian Code). This summation suggests a confluence of Jewish, Christian, and pagan legal traditions. He distinguishes human laws from divine laws, which are established by nature (V.2). He treats *lex* ("law") as a species of *ius* ("right"), which he relates to *iustum* ("righteous," "just"). "The word *lex* comes from *legere* (to read) because law is written." But law is also related to reason: "[L]*ex* may be considered as everything that is based on reason [*ratio*], provided it is compatible with religion, appropriate to discipline, beneficial for welfare" (V.3). He follows the tripartite analysis of the Roman jurists: "Right [*ius*] is either natural or civil or of the nations" (V.4). He explains natural right as follows:

Natural right [*ius naturale*] is common to all nations, and consists of what is universally held by natural instinct, not by constitution, e.g., the mating of male and female, the succession and education of children, universal common possession, universal liberty, the acquisition by hunting whatever may be caught in the sky, on land, and at sea. Again: the restoration of a deposit or of money lent; the offering of forcible resistance to violence. All this (and anything like it) is never unjust, but is held to be natural and equitable [*aequum*]. (V.5)

The tripartite account resembles Ulpian's, but Isidore does not adopt Ulpian's assertion that natural law is "not specific to human beings but is common to all animals" (Ulpian, *Inst.* I *ap.* Justinian *Dig.* I.1.1). His view of natural law seems closer to that of the Stoics and of the earlier Christian thinkers for whom natural law was written in human hearts: for the equation of the natural and the equitable is evidence of moral conscience rather than brute instinct. His account suggests some ambivalence about property: The reference to "universal common possession" seems to refer to a state of nature (i.e., prior to the Fall of Adam) in which there was no private property but the earth was owned in common by all human beings, but "the acquisition by hunting" may imply a natural right of original acquisition of private property.[10] Further, the mention of "universal liberty" seems to imply that in the state of nature there were no slaves but everyone is free. It is not clear how common ownership is supposed to cohere with the acquisition of private property. "There is an obvious problem, moreover, in reconciling 'common possession of everything' with rights in deposits and loans" (King 1988, 141). Perhaps he was uncon-

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[10] "The right to acquire" for *adquisitrio* in O'Donovan and O'Donovan 1999, 210, is an interpretation rather than a translation.

sciously combining two different notions of natural law: one governing Adam and Eve's innocence before the original sin, and another regulating human beings afterward. Isidore defines civil law (*ius civile*) as "what each people or civil community has established for itself in matters human and divine" (V.5), which closely follows the definition of the jurists (cf. Gaius, *Inst.* I.1; cf. Justinian, *Inst.* I.2.1), as does his definition of the law of nations (see Carlyle 1936, 1: 42–3, 106–10).

The right of nations [*ius gentium*] is the occupation of sites, the construction of buildings, armament, war, captivity, enslavement, the right of return to one's home, peace treaties, truces, the sacrosanct inviolability of ambassadors, the prohibition of mixed-race marriages. It is called the right of nations since all nations, more or less, observe it. (V.6; cf. Gaius, *Inst.* I.1; Justinian, *Inst.* I.2.1)

Finally, Isidore follows the classical principle that the law, properly understood, is just and honest, and "will serve no private interest but the common welfare of the citizens" (V.21). In keeping with this, in the *Sentences* Isidore claims that kings (*reges*) are so called from acting rightly (*recte*): "[T]he title of king, then, is retained by doing right, forfeited by doing wrong" (*Sent.* III.48). Further, a prince should conform to the rule of law: "Princes are bound by their own laws, and may not disallow in their own case laws which they uphold for their subjects. Justly does their voice command authority when they grant no license to themselves which they refuse to their people." He adds, however, that the secular prince has a religious duty: "Secular powers are subject to the discipline of religion. Though invested with the highest sovereignty, they are bound by the chains of faith, to proclaim the Christian faith by their laws and to protect its proclamation by good conduct." Additionally, "secular princes often hold the highest position of power within the church, that they may use that power to reinforce church discipline" (III.51).

Although not a very deep or innovative thinker, Isidore preserved fundamental elements of Roman legal thought, integrated them with Christian belief, and made this blend accessible to a wide readership. "His definitions were finally embodied, in the twelfth century, in Gratian's Decretum" (Carlyle 1936, 106). For example, Gratian cites Isidore's distinction between divine and human laws, his threefold distinction of law, and so forth (*Decr.* D1.1, 6 passim). Isidore thus had a profound impact on the development of canon law and the whole course of medieval philosophy of law.

Further Reading

Elon 1994 is a comprehensive work on the entire tradition of Jewish law—its history, sources, and principles; in particular, vol. 3 contains valuable information concerning the literary sources for the period discussed in this chapter. General discussions of ancient Jewish law include Patrick 1985, Daube 1981,

Neusner 1981, Greenstein 1984, Noth 1984, and Avalos 1995. Phillips 1970 considers the criminal law in the Decalogue. Robinson and Oesterley 1937 and Neusner 1981 discuss the place of law in the wider context of ancient Judaism. Boecker 1980 and Avalos 1995 survey law and legal and social institutions in ancient Israel. Zohar 1998 treats of the philosophical dimension of *halakhah*. On the authorship of the Pentateuch see Segal 1967, and on Deuteronomy in particular, see Driver 1902 and Weinfeld 1991. Moore 1927–1930 is a history of the age of the *tannaim*. Strack and Stemberger 1992 give an introduction to the *Midrash* and *Talmud*. See Ginzberg 1941 on the Palestinian *Talmud*, and Goodblatt 1971 on the Babylonian *Talmud*.

Schäfer 2003 is a detailed history of the Jews in the Greco-Roman world. Richardson and Westerholm 1991 give a general account of the debate over the law between Jews and early Christians in the period of the Roman Empire. Watson 1996 is a general discussion of Jesus and the law. For different perspectives on the place of natural law in the New Testament, see Dodd 1953, Derrett 1970, Martin 1974, and McKenzie 1964. Sanders 1977 and 1983 examine the relationship of the apostle Paul to Palestinian Judaism and Jewish law. Cranfield 1970 and Fitzmyer 1981 give divergent interpretations of Paul's view of law. Wilson 1983 discusses the problem that Paul's legal thought presents for Luke in the Acts of the Apostles. See also A. Watson 1995b for a discussion of Jesus and the Pharisaical tradition according to the apostle John.

Pelikan 1971–1978 is a historical overview of the entire Christian tradition including legal doctrines: Vol. 1 deals with the early Catholic tradition (A.D. 100–600), vol. 2 the emergence of Eastern orthodoxy (600–1700), and vol. 3 medieval theology (600–1300). Carlyle and Carlyle 1936 contains valuable discussion of legal philosophy in the context of medieval political theory; vol. 1 in particular covers early Christian thought from the second to the ninth centuries. Burns 1988 also contains valuable discussions of law in medieval political thought from the fourth to the fifteenth centuries. O'Donovan and O'Donovan 1999 is a valuable sourcebook with readings (in English translation) in Christian political thought from the second century through the Reformation era, with introductions and further reading suggestions.

Chapter 8

THE PHILOSOPHY OF LAW
IN THE WRITINGS OF AUGUSTINE

by Janet Coleman[1]

8.1. Life and Writings of Augustine

The Christian theologian and bishop of Hippo, Augustine (Aurelius Augustinus), was born in A.D. 354 to a non-Christian father and a Christian mother in that part of Roman North Africa that is today Algeria. Despite his mother's efforts Augustine initially found her religion uncongenial and intellectually unsophisticated. He received an education typical of ambitious, provincial Romans, becoming a student of Latin rhetoric in Carthage before he left for Rome in 383, whereafter he became a teacher of rhetoric in Milan. As had been the case during the last century of the Roman Republic, to be skilled in oratory with its uses in legal practice and local governance could lead to a civil service posting. During the late Roman Empire Augustine had considered such a career option. He had friends and contemporaries with whom he corresponded throughout his life who had chosen this path. As this chapter will show, Augustine's familiarity with the intricacies of contemporary Roman law had important consequences for his own political theory where he expressed his views not only on what politics was for but also on the compatibility of Christianity and politics.

Augustine harnessed a developing Christian doctrine to a set of distinctly imperial Roman discourses and realities in order to present, in his magisterial *City of God*, an image of two cities, the earthly and the heavenly, and their respective citizens. This considered perspective on history and politics, and the role of positive civil law in the lives of men, would be formulated rather later in his turbulent life lived in turbulent times. It would achieve its most mature form in the *City of God* XIX. What we may call his moral philosophy, however, began earlier in his increasing dissatisfaction with the legacies of ancient philosophy and the explanations philosophers had offered about human nature, self-knowledge, the respective roles of reason and will in determining moral responsibility, and on the nature of moral evil (see Evans 1982). Augustine's contribution to a Christian philosophy of law, then, may be said to fall into two successive but overlapping chronological periods, that of his own spiritual autobiography and his debt to ancient philosophy, and that of his reflection on Rome's history, not least as a consequence of the empire having

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[1] All translations are by the author unless otherwise indicated.

adopted Christianity as the state religion (380) during his own lifetime. The development of his moral philosophy took on new dimensions as he came to explore Roman and world history in the light of scripture and the role of the contemporary, institutional church. Thereafter, it gave rise to what may be called his political theory where he explained the role of any state's law in men's lives. Augustine's thinking about law has philosophical, theological, and historical dimensions.[2]

Augustine experienced a series of intellectual and spiritual conversions throughout his life and recounted these in his *Confessions* and in numerous letters to friends. He tells his readers that his training in rhetoric was meant to lead to a profession in the law and thence to a post as governor (*Conf.* VI.11.19). But his youthful enthusiasms drew him instead to philosophy after having read Cicero's *Hortensius.* It was to the skepticism of the New Academy as he found it largely in Cicero's other writings that he next turned.[3] He had learned much of what he knew of the classical and Hellenistic Greek philosophers from Cicero, his master in rhetoric, and from Cicero's contemporary, the encyclopedic polymath M. Terentius Varro.[4] Thereafter, he became familiar with Plotinus and some unknown Platonist writings, most likely in recent Latin translations, and it is through these works that he met a platonizing interpretation of Christianity. Despite his appropriation of an amalgam of ancient philosophical positions whose principal ingredient was Platonism, Augustine's own acquaintance with Plato's writings seems to have been largely secondhand and notably through Cicero (e.g., *Tusculan Disputations*, *de Finibus*, etc.).[5] These were supplemented by his experience of hearing the bishop of Milan, Ambrose, preach a version of Christianity that demonstrated his sophisticated familiarity with Greek Christian theology of the first to fourth centuries A.D., along with pagan, Jewish, and Christian Greek neo-Platonism and its Latin derivatives.[6]

The historical development of Christianity itself, and especially its ethical and political doctrines during its first centuries, was a process of continuous "translation" of its sources stretching back to pre-Christian Stoicism and Hel-

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[2] See Coleman 2000, vol. 1: 292–340, for a fuller account of the precursors to Augustine's thinking on philosophy and politics and their influence on his evolving perspectives in the context of his late imperial Roman times.

[3] On Cicero's own incomplete return to skepticism in later years, see Glucker 1988.

[4] Varro (116–27 B.C.) wrote a survey of Roman religion, *Antiquitates Rerum Divinarum*, in 41 books and *De Philosophia* that provided an account of all the possible ethical positions taught by Antiochus of Ascalon, an eclectic Platonist and the anti-skeptical heir to Carneades' skeptical Academy. Augustine targets Varro in *CD* VI, VII, and XIX.2f. For a brief discussion of Varro, see Schofield 2000b. On Antiochus, see Chapter 5 of this volume.

[5] For one of the best discussions of Augustine's debts to ancient philosophy, see Rist 1994. In general, see Bonner 1986.

[6] See esp. Brown 1989, chap. 17, for Ambrose's views and influences. Also see Brown 1972.

lenistic Judaism.[7] Ambrose in particular had read the works of Philo, Origen, and Plotinus, absorbing the fundamental antithesis between soul and body. He identified Paul's war between the flesh and spirit (Rom. 7:23) with the Platonist opposition between body and mind. Augustine heard him argue that man's mind is superior to his body, which is a mere "veil," indeed, a "perilous mudslick" that entices the will to slip. But because Christ sits in the inner person, having come to humanity in human flesh and thereby mediating the antithesis between heaven and earth, man can, even in this life, but with Christ's help through baptism, still the body's instincts. Ambrose emphasized far less than did the ancient philosophical tradition any long purification of the soul through spiritual *paideia* ("education"). Swift baptism secures the required transformation. Ambrose also defended the Old Testament against Manichaeism, a sect to which Augustine had been attracted while in North Africa and to which he maintained a somewhat troubled allegiance. In contrast to the dualism of Manichaeism, which proposed a doctrine of two cosmic forces of spiritual good and material evil in perpetual combat and which thereby limited the omnipotence of God, Ambrose urged his Christian congregation to think of God and the soul as distinct from material reality altogether. He further raised the possibility that belief was the prerequisite for understanding. Augustine was thus forced to confront a contemporary philosophical and cultural world that was constituted primarily by eclectic mixtures of Stoicism and varieties of Platonism. Under the influence of prominent Christians in Milan, notably the priest and Christian Platonist Simplicianus, he converted to Catholic Christianity and was baptized in 387. He returned to North Africa to live the monastic life, and was ordained as a priest in 391.

Nothing survives of Augustine's pre-conversion writings. His *Confessions* were written in 399, almost thirteen years after he converted to Christianity. The influence of Platonism endured throughout his life, even as his "philosophical models" became increasingly theological hypotheses learned out of scripture, notably from a re-examination of Paul's epistles, developed in his rejection of Manichaeism and Porphyry's tract *Against the Christians*, and were elaborated in debates with schismatic and heretical groups such as Donatists and Pelagians within the North African church where he had been elevated to bishop in 396 (see Coleman 1994). Insofar as all the writings we possess of Augustine are Christian, they are the work of a controversialist. They grew out of his arguments with his pre-Christian self, on the one hand, and with views current among his contemporaries both within North Africa (especially as he dealt with the pastoral burdens of being a bishop) and

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[7] See Chapter 7 of this volume. The literature here is enormous. For a recent discussion of the ethical and political implications of early Christianity, see Young 2000. Also see the contributions by Chadwick, Nicol, and Markus in Burns 1988. Coleman 2000, vol. 1: 292–310, briefly treats the development of early Christian and Jewish philosophical theology.

throughout the wider world of the late Roman Empire, on the other. He remained in North Africa for almost 35 years until his death in 430.[8]

8.2. Augustinian Ethics

Most analyses of Augustine's writings attempt to place his thought within the various legacies of Hellenistic philosophy (e.g., Kent 2001). His philosophical milieu was the practical, eudaimonistic framework of Greek philosophy during the Hellenistic period (e.g., Epicurean, skeptic, and Stoic), which became more pronounced under the Roman Empire. Pagan philosophy, and especially neo-Platonism, moved closer to religion, indeed to a distinctive, increasingly ascetic Latin Roman version of religion for that "western" part of Rome which was Augustine's fourth- and early-fifth-century milieu.

Augustine was to reuse topics dealing with the virtuous life selected from the agenda of ancient ethical theory. He, too, would focus on the question of happiness and examine the various educational and spiritual exercises recommended for seeking the truth in this mortal life. He believed that all men wish to be happy and the thing signified by the word "happiness" somehow lies in men's memory. In *Confessions* (X.20–23) he asks where or when he had any experience of happiness that he should remember, love, and long for it again. Have we at some time in the past been happy, individually or through Adam, and now know that we have lost this but remember enough to know what we have lost? Is there a natural appetite to learn of happiness as something utterly unknown, or is it somehow known and preserved but obscured in the memory?[9] Augustine equates seeking God with seeking happiness, and he speaks of all men's desire to have joy in truth—not in the seeking but in the finding, in being united with God, in living with God (*Conf.* X.28). But this cannot occur in this life. If God is either truth or something higher than truth, then the standard (*regula*) which is called truth is higher than the human mind and beyond our mortal experiences.[10] Until approximately 411 Augustine accepted that all men have a natural desire for God (see Burns 1980). Thereafter, the natural desire was replaced with a divine gift of charity—grace—which alone provides man's orientation to true happiness. But he always viewed man's life on earth as a trial without intermission, shifting between adversity and fear of future adversity. It is framed by various offices that require the officeholder to be loved and feared by men, men seeking to be praised and their power feared, not for any truth in their intentions or acts but rather relying on deceitful judgments of their fellows.[11] Augustine calls this a fellow-

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[8] There are numerous biographies of Augustine, including Brown 1967.
[9] See Coleman 1992, chaps. 6 and 7, for a discussion of Augustine on memory.
[10] This is a neo-Platonic claim. Cf. Plotinus, *Ennead* V.5.
[11] Cf. Cicero, *Tusc.* III.2.3: "We come to think that there is no higher ambition than civil

ship of like punishment (*Conf*. X.36). To escape it, he thought that there was some hope in a monastic setting, and he wrote to his friend Nebridius in 389–390 that he was experiencing a kind of deification through self-disciplined Christian philosophy. This, too, would be rejected, and thirty years later he would see "deification" as a tolerable thought only when considered as God's salvific justification after death (*CD* XIX.22).

From his own experiences of himself and others as ethical agents in the world, Augustine gradually came to the conclusion that men, including those reputed to be wise, are not now capable of giving absolute priority to the moral good or to seeing this as consistent with their nature. Rather, all men show themselves to be massively inconsistent and irrational agents who are forever frustrated in their search to understand whether or not their nature is conducive to the practice of virtue. He concluded that any correlation between a person's state of moral development and his understanding of his own nature is impossible to achieve autonomously and is meaningless without God's help. The only kind of person who can be relied on to look to the general interest of others and see that other-related virtue is natural must be someone who has been prepared and aided by God's grace in the achievement of this ethical state. There is no philosophical method to enable one to do this on one's own and with success. The power of autonomous human reason is incapable of changing a man's desires: No unaided mental process can enable any individual to arrive at the true grasp of the good so that he might live in accordance with the real. Through the power of introspection humans *can* to some degree reach a vision of truth or God within themselves. But if, as the Stoics had it, the beginning of understanding is in a pre-rational impulse that starts from an animal's or infant's love of self and self-awareness,[12] then for

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office, military command, and popular glory. Men seek not true honor but a shadowy phantom of glory."

[12] Stoic *oikeiosis* ("self-awareness") is discussed as a mental process by which a human being will, if things go rightly, arrive at the true grasp of the good, namely, living in accordance with nature (*convenientia naturae*) or "in accordance with the real." The Stoic account of *oikeiosis* has two stages, the first of which provides an account of pre-rational action in animals and infants, which they thought of as a pre-rational impulse (*hormê*). This is followed by an account of a change in understanding of the goals of action that comes with reason, whereafter what is truly good is grasped. The pre-rational stage where actions are governed by impulse starts from an animal's love of self, so that the impulse is explained in terms of the animal's awareness of things in the world either belonging to or being alien to the self of whose "constitution" or structure the animal or child has some instinctive awareness. Underlying the logical starting point of self-love was another relation to the self: self-awareness (Cicero's *sensus sui*; see his *Fin*. III.5.16). Stoics, therefore, worked with a triadic logic of being aware of oneself, seeing oneself as belonging to oneself (*ipsum sibi conciliari*: Cicero, *Fin*. III.5.16), and loving oneself. Cicero had observed that animals could not feel desire toward anything unless they possessed self-awareness and consequently felt love for themselves. These are pre-rational impulses, generic desires, the purely subjective point of view. Augustine adopts something similar but does not take the next Stoic step, which presumes that reason changes the goals of

Augustine we can go no further. Introspection only provides a recognition of the existence of the truth within ourselves that is God; it does not provide an understanding of either our own or the divine nature.[13]

Augustine's reflection on and absorption of themes in ancient skepticism (principally from Cicero's *Academica*) led him to make claims about the importance of belief as distinct from knowledge, even before he developed his ideas concerning human dependence on God for the possibility of any moral behavior. He shows in his *Against the Academics* (*Contra Academicos*) how seriously he takes radical ancient skepticism and, likewise, how seriously he is seeking answers to counter it.[14] He concludes that human certitude exists but that it is limited. He argues that one cannot believe falsely, that is, be mistaken in one's belief that one exists (*Trin*. XV.12.21; *CD* XI.26, XIX.18). He also believes that through introspection we can come to recognize the existence, though not the nature, of God. But the result of this introspection—self-awareness, self-love, and self-concern—is insufficient and, therefore, is incapable of leading either to self-understanding or to being extended to other-regarding intentions or acts. Even self-awareness can be diminished by carnal habits. The limits on self-understanding result in a recognition of unfulfilled desires. The dissatisfaction with one's search for truth is replaced with the necessity of the belief in one's dependence on an outside, unmerited redirection of willed attention. The necessity of belief and our dependence, for the plausibility of that belief, on the credibility of the authority that provides it were essential to Augustine's perspective on the conduct of human life. Authority is always followed when humans cannot have firsthand experiences, notably of the past, and most of our understanding of the past relies on the plausible testimonies of others (*Conf*. VI.5.7).[15] Humans necessarily take things on trust; they trust the authoritative community within which they acquire conventional languages and habits, traditions, and laws, and they weigh the plausible positions of authorities in order to settle disputes. Humans should not be characterized as knowers but as believers.

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pre-rational action to eradicate pure impulsive subjectivity in order to arrive at "the good for man" with rationality as a determining constituent of human selves (*hêgemonikon*). See Engberg-Pedersen 1990, esp. 119–23; Striker 1983; generally the various contributions to Schofield and Striker 1986; Inwood 1985; Rist 1979; and Nussbaum 1994.

[13] See Augustine, *Enarr. in Psal.* 42 (41) 13, for: we do not know our own hearts, which are an abyss; *The Nature and Origin of the Soul*, 4.7.10, for: the power of my understanding is actually unknown to me; and *The Usefulness of Belief*, 10.24, for: practically no one understands his capacities.

[14] See Rist 1994, chap. 3, for a good discussion of Augustine's skepticism, and passim for the overriding influence of Stoicism on his thought. On ancient and modern skepticism and the difference between them, see Burnyeat 1984.

[15] See Coleman 1992, 80–111, for a discussion of Augustine's views on epistemology, the problem of language, memory, the presentness of the past, belief, and self-knowledge.

Furthermore, where Stoics argued that what matters is whether the morally right act is performed for the right reason and intention, that motives are to be in accord with right reason for them to be virtuous, Augustine also focused on moral intention rather than on the act, but instead insisted that to perform the good act in the right spirit requires God's grace. This is because man is good not because of what he knows or does but because of what he loves (*CD* XI.28). Without God's aid humans cannot assent to what is truly to be loved, because they experience a divided will with its competing loves and what they love inordinately is themselves rather than God. (The will is now a set of loves accepted and confirmed. We are what we love.)

Augustine came to see the human condition as tragic, a consequence of the Fall following Adam's first disobedience as told in the Old Testament book of Genesis. Augustine provides an account of the post-lapsarian man in *On Free Will* (ca. 395) as both invincibly ignorant of what is of supreme importance to us and morally weak in the ancient philosophical sense of *akrasia* ("weakness of will") (see Kahn 1988). Men struggle and fail to do what they wish to do, although they know what they ought to do (Rom. 7:14–23). Later, he would give an account of pre-lapsarian Adam: Before the Fall Adam was able to decide between good and evil, knowing the difference and being able to exercise a "lesser virtue" of making the right choice. According to Augustine's views (after 411), Adam was in the position of knowing what is evil and being able to choose it. In Paradise he enjoyed divine grace as a "help without which" he could not choose the good or even avoid evil. But divine grace for Adam in Paradise was a necessary, although insufficient, condition of his free choice of the good. It did not render him incapable of sin, but it ensured that he had the means for choosing the good.[16] Freedom of choice on its own was not the sufficient condition of doing good; only free choice coupled with divine grace suffices for doing good.[17] After the Fall, without divine assistance, man is no longer able to choose the good, and he is now motivated by his desires certainly to choose evil. His free choice is a decision already directed by his present incapacity to be motivated by pure love in any of his acts. Without God's intervention he will now choose what is wrong *because* of what he loves, namely, his own private goods, his own autonomy, his self-sufficiency, and his domination of others.

These views are central to Augustine's justification of law in the societies of men whereby their distorted loves will be regulated to secure peace and order.

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[16] For a discussion of the changes in Augustine's notion of the will, see O'Daly 1989.

[17] See *CD* XIII in general on the Fall and its consequences, esp. XIII.13–15, XIV.26. Rist 1994, 131, observes: "[The] account of unfallen Adam is odder than it looks," and he notes: "Even if his understanding of the shattered identity of fallen man constitutes some kind of a defense of the free will of the elect, it raises the question of why we are not all elect—as Augustine certainly held—in a very acute form" (ibid., 135).

Men need to be freed from their fallen "free choice." The capacity to choose, of itself, is not man's excellence. Nor is man's will the kind of deliberated desire that can be used as a means to achieve his moral end. In *On Free Will* he has a concept of the will after the Fall as a middle good that is neutral and can be used either rightly or wrongly. From the will as an indifferent instrument, he moves on to a concept of will as good or evil depending on the value of what is willed (*Conf.* VIII.8.19–9.21). He would later[18] see that the will is either good or evil and that a good will is from God; the only way the human will may be moved from being an evil to a good will is through grace (*On Grace and Free Will* XX.41).[19] It is grace that attracts the will to what is true and good. In his later works the will is the human psyche in its role as a moral agent: goal-directed, active to some purpose, desirous of its objects (see Rist 1969). Grace transforms and activates this will. Hence, after the Fall man's will is more closely connected to a set of short-term, habituated wants. Man retains a power of free choice, but his freedom is merely the freedom or power to sin. What he wants needs to be transformed so that he loves what is truly to be loved: God. Man, therefore, needs God's preparation of his will and to have his free will restored by grace in the sense of being released from its corrupt, delusive mutation that we are free to do "what we like" (*Ep.* 157.2.10). He goes further and says that it needs not only preparation by God, but God also eternally and timelessly foreknows that it will be so for both the saved and the damned, without that foreknowledge determining events in men's lives (*On the Predestination of the Saints* III.7; *Iohann. Evangel.* CXXIV.48.4.6, CVII.7, CXI.5).[20]

But in this life no one can be completely freed from his fallen freedom and no one has a "right" to be freed. Even the (unknown) elect cannot be rewarded for something for which they are not responsible: God's gift of salvific grace to some and not others. Augustine's final view in the *City of God* XIII was to deny that man even tries to do what he wishes to do and to know what he ought to do: He does not try at all and he certainly fails.[21] It is this irrational and unintelligible nature that, in the end, requires the kind of punitive

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[18] In *On the Deserts and Remission of Sin* (*De Peccatorum Meritis et Remissione*), against Pelagius.

[19] For a wide-ranging discussion of Augustine on free will, see Stump 2001, 124–47.

[20] Many have observed a "paradox" in this freedom by noting a determinism that obscures what could be voluntary in willing. See Kenny 1975; and O'Daly 1989, especially 90–7, where he writes that Augustine's defense of a notion of freedom of will is not possible: It is a "glorious and influential failure." See also the remarkable analysis of Connolly 1993.

[21] *CD* XIII.14 describes a permanent condition, a "genetic" covetousness *concupiscentia*: "From the misuse of free will there started a chain of disasters: mankind is led from that original perversion, a kind of corruption at the root, right up to the disaster of the second death which has no end. Only those who are set free through God's grace escape from this calamitous sequence."

law of states that Augustine would outline elsewhere in the *City of God*.[22] Our condition here is penal. Man's behavior is determined not by reasoning but by the set of his will, which is a morass of habitual loves and hates (*83 Questions*, 40). Augustine had earlier discussed how bad habits can only be broken by suffering not only at the hands of men and their law, but also in the schoolroom: He describes how he was driven with threats and savage punishments to learn Greek (*Conf*. I.14.23). Later in life he saw man as needing to be continuously driven to correction, by the church's unwelcome discipline, by the father's punitive discipline in the home, and by the state's punitive discipline through enforced law and the executioner. If it is not in our power to reform ourselves, it is also not in our power to reform underlying evils that structure secular society: We can only vary them fatalistically. Augustine's final view was that the kind of man who needs God's grace is a man who requires utter transformation. It is the transformation of Saul into St. Paul. The transformation that is promised only to those predestined to salvation—not all are saved (*CD* XIII.23; *Ench*. XXVII.103)—is not a return to the original, Adamic moral self before the Fall, but rather, the gift of a self better than Adam (*CD* XIII.24; XXII.30).

In opposition to the philosophical tradition, men are now unable to achieve their drive toward perfection, wholeness, fulfillment, and peace. Like Paul, Augustine came to deny that the order that leads through all things to God is to be found in human affairs or revealed either in human philosophy or human law (Rom. 3:28). The possibility of securing happiness through the government of the wise, through following the rigors of outward legal precepts, or through men perfectly dedicated either to philosophy or to what they conceive of as God, is, in the end, an illusion. Since human society is irremediably rooted in disordered and tension-ridden history the only resolution of ultimate desires must be eschatological. Consequently, the itinerary to perfection involves finding rather than seeking the truth. Hence, Augustine explained what the *immortal* happy *next* life consists in. He criticized what he took to be pagan philosophy's false accounts of happiness and their bad advice on how to achieve it, changing his own mind as he moved further away from his youthful "Hellenistic" perspectives to a reliance on the Bible, Paul, and the teachings of an increasingly unified, institutional church. He sought, as did philosophers, a moral philosophy—but one based in scripture—that would reveal what has intrinsic, as opposed to instrumental, worth for us. Once this was clarified, he would show how politics should be seen as merely useful rather than as something having intrinsic worth.

We can draw the contrast between ancient and Christian ethics as follows. The answer to the question concerning the scope of human responsibility and

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[22] Cf. Cicero, *Tusc.* II, on pain as an evil to be endured or conquered, as well as the various philosophical schools' views on this issue.

free will, for much of ancient ethics as a whole and, in particular, for Stoic ethics, came in their refusal to consider any impulses or desires as inaccessible to rational guidance and discourse. But by the early-fifth century, and especially for Augustine, ancient ethics was seen as part of a perverse human fantasy of self-perfection, self-sufficient omnipotence, and self-dependent authority. The whole philosophical tradition exemplified, for Augustine, man's original sin, that of pride which rejoices in private goods and a perverse self-love. Augustine argued that for man's will to be free it cannot be understood as autonomous. Without Christian revelation we are nothing more than bundles of competing selves, with no sages in our midst. Where ancient ethics focused on man's ability to know himself and his responsibility either for self-perfection in the creation of a unified moral self or for successfully crafting his character to suit his circumstances, Augustine insisted that we can only be inwardly certain of self-existence. Humans may desire, but through their own efforts can never achieve, tranquility and moral wholeness.

Human autonomy is, then, a delusion of self-determination. Politics is no more than a symptom of the multiplicity of fallen man's partial and often competing loves. Augustine's answer to the question concerning the degree to which it is possible to treat man as having a measure of rational control over his political environment or even over his conscious moral intentions is that it is exceedingly limited. Here he absorbs aspects of ancient skepticism. But to this he adds the necessity of receiving God's unmerited grace so that a man's nature might be prepared and repaired if he is to experience moral development at all.

8.3. Augustine on Law and Order

At the basis of Augustine's conception of law and order is the "eternal law" (*lex aeterna*), that eternal plan of the world, reason, and the divine will, where the divine order respects the divinely created natural order and is inscribed in the human soul as the "natural law" (*lex naturalis*).[23] Each conscience, including a pagan's, is constrained by this natural law, and for this reason pagans are also able to formulate "the most useful of precepts" (*praecepta utilissima*). At first Augustine thought that human law could contribute substantially to man's itinerary toward perfection, in that it reflects the eternal law, and as a principle in nature is accessible to men through reason. The order of nature and the order expressed in human choices and enacted in human action could, thereby, constitute two streams of divine providence in the world. He observed that Christianity provides a new orientation in that it posits that the natural law (*lex naturalis*) is anterior to both Mosaic and New Testament law.

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[23] See *Conf*. I.18.29; II.4.9, where such impressed rules are themselves unjudgeable. See also Rom. 2:14–16.

But Christianity also insists that God has his law written down so as to prevent men from invoking the excuse of ignorance of its precepts (*Enarr. in Psal.* 57.1 [= *PL* 36.673]). Augustine came to deny the unaided capacity for good in man, and he also refused to accept the philosophical position that a few, wise men have such a capacity and that having this capacity is all that matters. The written Mosaic and New Testament law is there for all and, having been written, it is understood by a weakened but still flickering light of reason. But corrupt wills can, in practice, ignore its light. Where the moral law of the Old Testament is in substance identical with the natural law, Christian law perfects it. Its object is to go beyond the Ten Commandments and provide guidance to prevent one from doing to others what one would not wish done to oneself (*Ep.* 157.3.15 [= *CSEL* 44.463]; *Enarr. in Psal.* 118; *Sermo* 25.4 [= *PL* 37.1574]). The natural law (*lex naturalis*) is, then, the source and measure of human positive law, and the human legislator's mission is to follow its prescriptions. But the legislator need not order everything that the natural law prescribes nor forbid everything it forbids. Augustine saw the legislator's mission as realizing on earth the order that is necessary for human society to attain its temporal and spiritual ends. Hence, legislators are engaged in adapting the eternal law to the varieties of peoples and their social relations at a given time. Eternal law is the unwritten plan of everything, expressive of the divine will as divine order. It is larger than but pervades the created natural order. In man, as part of the created order, it is inscribed as *lex* in his soul, and written down in Old and New Testament law as commandments which constitute the divine law whose precepts should be recapitulated in the positive law of societies to fix men's obligations to one another. Legislators take into account the conditions of the times and the characters of the people being governed; it is the conformity to divine law's precepts that gives human law its obligatory force. But fallible human legislators achieve their end of legislating in conformity with the eternal law by means of historically and temporally judged forms of punitive constraint.

Augustine later defined human law (*ius humanum*)—both secular imperial law and human ecclesiastical law—as it was developing in his own time in *opposition* to divine law. His view of moral evil and his increasing focus on the disordered will in fallen men entailed not only that it is impossible to construct an institutional or legal utopia in this life, but that peace and order on earth also require utilitarian strategies to "do good" to a man against his will in order to secure temporary peace and concord in society. Acculturation to moral norms is to be achieved through infliction of pain throughout the whole of men's lives because both psychological and physical pain are, for him, the essential and enduring conditions of living a fallen, human life (see Rom. 5:3–4; cf. Cicero, *Tusc.* II). He came to argue that the state and its laws cannot make men good or even capable of performing any good act with the right intentions. Rather, it is punishment that constrains us to obey the law. The law

does not and cannot reeducate us. Augustine's mature conception of the state is that it is a temporal power that rightly has the monopoly of coercive force. This is so, regardless of any attempts by legislators or philosophers to justify by moral principle either the state's foundations or the means employed to secure its end. Augustine thereby argued not for the moral but for the functional "reason of state": The state and its absolute sovereign authority is the power that is ordained by an inscrutable but loving God; the state has the sole authority to define the terms of justice in this world in order to secure peace and order, even if this definition appears to man to be unjust. We shall see that Augustine argued that there is no legitimate individual resistance to political authority, even when it appears unjust, so long as it serves the end of securing peace and order and, thereby, ensuring men's conformity to the natural law.

8.4. Augustine the Roman in His Times

The half century from around 380 to approximately 430 marked a watershed in the cultural and religious history of western Europe (see Markus 1990; Herrin 1987; Fox 1986; Brown 1972; Coleman 2000, vol. 1; Hunt 1993). The last great controversy over the Altar of Victory in the Roman Senate (382–4)—a conflict between aristocratic pagan Romans with an allegiance to Roman traditions of government and a history of successful expansion and domination, on the one hand, and the Christian regime of emperor Theodosius I in the 390s, on the other—had been preceded by a long preparation for Christianity's triumph. In the late-third century Christians had begun to penetrate every level of Roman society and to assimilate the cultural lifestyles and education of Roman townsmen. Emperor Constantine's conversion to Christianity in 312 and the subsequent flow of imperial favor brought an increase in Christian respectability, prestige, and wealth. By 350 there was very little that seemed to separate a Christian from his pagan counterpart. If Christianity began as a religion attracting the lower classes, by the mid-fourth century the conversion of the upper classes was well underway and their roles in the Senate and civil service expanded. Roman government and education were running down in the western provinces, since Constantine had shifted the bureaucratic center of the empire eastward to Constantinople. Rome was seen by some as a traditionalist backwater. In Rome's social structure and governmental administrative functions, there was a growing prominence of the military and the Christian clergy with their more clerically orientated and scriptural culture. The western part of the empire experienced the spread of an ascetic mentality with its heightened attention to questions concerning Christian identity: What is it to be a Christian? Is being a Christian a special way of being a Jew? How much of the Jewish law is to be applied and how much to be dismissed as of no religious importance? Where does religion end and secular traditions, especially as enshrined in Roman law, custom, and history, begin?

To what degree is religion attached to the manners of the inner or outer man? This was the Pauline agenda, penetrated by Stoic and neo-Platonist insights.

It has often been noted by historians that in the pagan polytheistic world, notably of Rome, religion touched everything. A Roman's religion and his civic contribution to the preservation of the "state" were intertwined, since morality and religion were public expressions. Early Christians, however, were regarded, like Jews, with suspicion and as teaching a private religion, caring little for the survival of Roman institutions, customs, and values. They were seen as dedicated to an apocalyptic vision of a united society after Rome and history, and underwent, as a consequence, waves of persecution by Roman authorities and local communities. But by the late-fourth century, the mass Christianization of Roman society was depriving Christians of a discernible identity clearly separable from their pagan neighbors, since Christians could now take for granted the recognition of their church and relegate to the past the collective experience of persecution and martyrdom. But insofar as there was little—other than his religion—to distinguish an educated Christian in this late-Roman world from his educated non-Christian counterpart, intellectuals (not least Augustine) at first found it easy to pass from Stoicism and neo-Platonism to Christianity, because of pagan philosophy's instruction on the soul's access to another, more real world, its return to the One and the soul's own origin, and to truth. In the *Confessions*, Augustine describes his conversion to Christianity by means of his prior conversion to Platonism with its rational control of the body and an ascetic morality of detachment as a means to inner freedom. Indeed, he spent the first months after his conversion in the company of Christian friends in philosophical retirement, linking, as he then saw it, his unbroken progression from philosophical conversion to his adoption of a monastic and contemplative mode of life at Cassiciacum: He was living the "Christian life of leisure/reflection" (*Christianae vitae otium*). This prepared him for his attempt to set up a monastic community in North Africa where he could use his reading in leisurely fashion as an instrument to attain God. He would be living a lifestyle of detached simplicity, emancipated from wants properly regarded as indifferent, which was training in virtue. This was the Christian way to achieve philosophical self-mastery and a freedom from the passions that were thought to disturb the pursuits of the truly educated mind. Although the Stoic parallels are numerous, this monastic life was also consciously modeled on the first apostolic community, living in concord, sharing all property, where the root of all sin was private, self-enclosure that would be banished in this monastic republic (*res publica*) of God (*Op. Mon.* 25.32). The Stoic ideal of unspoiled human relationships and loving friendship would be fulfilled in that Christian monastic setting where men seek their own souls and God in concord together (*Sol.* I.12.20).

But Augustine thereafter recounts in the *Confessions* how he came to realize that the transition from being a Latin rhetor and a Platonist to being a

Christian is not an easy transition at all. It has to be a complete and revolutionary break. The values of his monastic community can only be realized eschatologically in the post-historical city that is the city of God.[24] Gradually, Augustine refused to treat the Roman empire as an "evangelical preparation" (*praeparatio evangelica*) for the evangelical phase of history, coming instead to insist on the homogeneity of redemption history between the Incarnation and the Parousia—the whole period since Christ to the last days—with the consequent lack of significance to sacred history of one or another historical and political regime. He came to see the Christianization of the Roman Empire as accidental to the history of salvation and, furthermore, as reversible: Rome could not be accorded any religious meaning. Indeed, no events after the Incarnation had any sacred significance and, therefore, could not affect the history of salvation. From having originally found scripture unsophisticated and primitive, Augustine came to believe that outside the narrow bounds of the scriptural canon accepted by his contemporary church, no one could have authoritative access to God's intentions in the past, present, or future of the world's history (*Contra Epistulam Fundamenti* V.6; *Faust.* XXV.1.5.6).

Although there were Epicurean, skeptic, and especially Stoic precursors to some of Augustine's views, his final perspectives on an ordered and peaceful life in a human community show him to have been very much a Roman of his times. Roman imperial law in a newly Christian empire exercised a strong influence on his thinking about the earthly city as seen from his vantage point as a bishop in North Africa. His philosophy of law, when applied to historically contingent political regimes, reveals him to be an heir less to pagan Rome and its Latin renderings of Greek philosophy than to imperial reformulations of post-classical Roman law from the Christian Empire beginning with Emperor Constantine (see Gaudemet 1957). His views on the city and its citizens are more easily understood as deriving from, but crucially breaking with, the ancient philosophical tradition. By interpreting Augustine's thought within the social and intellectual context that helped produce it, we can see how much he is a fourth- and early-fifth century North African Roman with a standard and unquestioned view about hierarchies of power from the emperor to the army, government, oligarchies, families, masters, and servants. He believed without question that women should serve men, children their parents, animals their human owners, and slaves their masters (see, e.g., *Sermo* 332.4.4). His vision implies an almost nonexistent power of ordinary citizens. Neither Plato, Aris-

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[24] Many of his Christian contemporaries looked upon the post-Constantinian and Theodosian times as progressive, a perpetual Roman peace (*pax Romana*) in which the Christian Empire could now be seen as a special place in God's providential plan of universal history. Mankind was now united under the rule of Remus so that, as Prudentius (*Peristephanon* II.425–34 [= *CC* 126] as quoted in Markus 1970, 51) had written, "customs once diverse now agree in speech and thought" and "this was destined in order that the authority [*ius*] of the Christian name might bind with one tie all that is anywhere on earth."

totle, nor Cicero held to such an empty notion of citizenship, or to such a strong view of uncritical faith in, and obedience to, authority. But Augustine's late imperial North African and Roman world under a *princeps* or emperor was not theirs. He accepted the late imperial Roman conditions of dominance and subservience as the very framework of all authority, even if he was also aware of abuses of power. He was unusually outspoken about the degree to which no person escapes, in this life, that kind of verbal and social conditioning to which he is subjected by authorities. This emerges from his theological hypothesis, the Fall of Adam, whereafter a desire to dominate, through speech or otherwise, and the attempt to satisfy this desire, constitute the characteristic features of fallen society. Having rejected obedience to God's authority at the Fall, the sons of Adam are always trying to reconstitute it.

8.5. Contemporary Roman Law and Augustine

Augustine's increasing awareness of political and social instability from 410 onward helped to shift his views on the relationship between the individual and society. Recognizing pervasive human wickedness and folly, he denied that civic institutions could be educational. Peace has always been, and only can be, achieved through force. Under Emperor Theodosius I (d. 395), the western part of the now Christianized empire comprised Italy, Africa, Gaul, Spain, and Britain. In 380 Theodosius issued an edict that defined the apostolic tradition from St. Peter as the *religio* of tradition (*CTh* 16.1.2), and this was meant to bring the language of Christian doctrine into the realms of Roman law. There is scholarly controversy over whether Christian doctrine influenced the laws of Constantine and his imperial successors,[25] but it is certain that the social structure reflected in the laws and the nature of the penalties are evidence of an increasing penetration of civil law into the private realm. The (incomplete) Theodosian Code was compiled by emperor Theodosius II and his advisers beginning in the 420s and finally published in 438. This code rationalized current legislation and legal opinions, assembling imperial constitutions from 312 onward,[26] and gives us a view of the last expression of Roman imperial unity as Augustine himself would have known it.

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[25] See the various contributions to Harries and Wood 1993; Matthews 2000; Honoré 1981. On the role of the Catholic Church in North Africa during the later Roman empire of the fifth century, see Courtois 1985; Gaudemet 1958; Gaudemet 1957, 135–212. Gaudemet (1957, 143) states: "The considerable innovation of Constantine would have consisted in transforming the canons of church councils into civil laws and obliging their acknowledgment upon pain of secular sanction. While councils had the power of imposition, the secular law's recapitulations did not provide any new force to such prescriptions *as conciliar* decisions."

[26] The Theodosian Code was meant to be a successor to earlier (late-third-century) codes of Gregorius and Hermogenianus. See Chapter 6, Section 6.1, of this volume for further discussion.

The Theodosian Code contains numerous Constantinian laws, approximately 25 percent of which deal in some way with the family and sexual relations (see Gaudemet 1983; Grubbs 1993). Constantine had repealed laws that previously penalized celibacy and childlessness. This was part of his wide-ranging program designed to facilitate inheritance procedures, especially for the wealthier classes, defending traditional Roman marriage and morality (see Clark 1993, especially chap. 1). Subsequent laws took into consideration the enthusiasm for Christian asceticism and celibacy among Roman senatorial families, and there were sumptuary laws issued in the 390s that forbade actresses to dress like nuns (*CTh* XV.7.11–12) and regulations for prohibiting ascetic women who had cut their hair short from entering churches (*CTh* XVI.2.17.1). Constantine had also toughened up the law on betrothal (*CTh* III.5.4, 5, 332). There is also evidence in the Theodosian Code XVI.10.11, 391, of a legal distinction between *religio* and (pagan, heretical, and Jewish) *superstitio*.[27] The view articulated here (XVI.2.25) is that true Catholic *religio* claims that the heretic commits sacrilege not merely in the bureaucratic sense of refusing imperial orders, but also in the religious sense of challenging the true faith that issues from the emperor. What issued from the emperor was not so much an expression of imperial whim, but was, rather, a reflection of the decisions of a network of episcopal politics and church councils where conclusions of councils were incorporated into imperial legal responses. By 421 this reflected the recognition of the institutional church's privileged place in the eyes of the state (see Hunt 1993, 148–51). Stringent laws were passed against heresy, notably to bring schismatic Christians, such as the Donatists, within their scope (*CTh* XVI.6.4 pr.). The Christian Roman state had not only become intolerant of any other religious allegiances and practices, but also sought to forge a unity of Christians under the law. Increasingly what was taken to be *religio* became a defined set of beliefs derived from the apostles (and the council of Nicaea) now "spoken" by imperial lips. Augustine's familiarity with this Roman law is especially revealed in his ethico-religious concerns regarding his pastoral duties, as reflected in his numerous letters and sermons. He had views on all of these issues concerning betrothal, marriage, celibacy, inheritance, a unified *religio*, and the role of the emperor in enforcing religious discipline and unity.[28]

Late Roman law was presented in the form of the emperor speaking to his people—often in the corporate "we" form of address or sometimes "iuxta statutum legis meae"—with the emperor portrayed as a severe but loving *pa-*

[27] See Lactantius, *Inst.* IV.28.11 and 3, on the etymological origins of *religio*, compared with Cicero, *ND* II.72.

[28] On the relation between law and religious change, see Brown 1972, 301–31. On Augustine's familiarity with Roman law as well as his ethico-religious concerns regarding his pastoral duties, see De Salvo 1993. On Augustine's recourse to secular law in Hippo, see Brown 1967, 192–8; Getty 1931.

terfamilias ("master of the house") responding to questions, threatening penalties, and explaining why changes in the law are necessary, most notably in family law. The Theodosian Code was to be valid for all lawsuits and legal transactions, while jurisprudence was acknowledged as a separate discipline where "judges" (*iudices*) had no authority to interpret or make law themselves. The aim was to communicate the will and the character of the emperor to his subjects. The wording of the emperor's pronouncements from the fourth century was owed to the imperial quaestors as legal advisors who drafted his laws, the topics often coming from "proposals" (*suggestiones*) on the running of the empire sent from praetorian prefects, those authorities to which provincial governors and "local officials" (*vicarii*) looked. Such officials were among Augustine's correspondents.[29] Augustine was in Milan when Valentinian II issued the law permitting the free assembly of Arian Christian congregations (*CTh* XVI.1.4; see also *Conf.* IX.7).[30] This rather pointedly opposed Ambrose's attempts to prevent any congregations other than Catholic ones; Augustine speaks of Ambrose being persecuted for his exclusionist views.

Significantly, from Constantine onward, bishops as one increasingly influential section of the community could approach the emperor without fear. Although internal church discipline was regulated by canons of church councils, bishops often found it convenient to request the backing of the secular arm to enforce ecclesiastical rule. The praetorian prefects were given the task of keeping the peace in cities across the empire, responding to wide-ranging or even local proposals of the clergy. In this milieu Augustine practiced his own ministry in Hippo, and even from his earlier days in Rome and Milan he was acquainted with men of high rank who administered the law.[31] By hearing the law announced in public places and reading it when posted on notice boards, usually in ephemeral form, the populations of the Empire were expected to have knowledge of it, and legal authorities were to take note by making copies of imperial enactments. It is significant that the Theodosian Code I.27.1 (A.D. 318) speaks of a bishop's judgment as "sacred" and final. The *locus classicus* is

[29] In earlier years before he became Rome's *praefectus urbi* ("prefect of the city") (417–418) and Italy's *praefectus praetoria* ("praetorian prefect") under Valentinian III (428–429), the senator Rufius Antonius Agrypnius Volusianus (d. 438) had been a correspondent of Augustine: *Ep.* 135.2. He was later baptized and, while on an embassy to attend the wedding of Valentinian III and Theodosius II's daughter, he heard Theodosius' announcement of his compendium of imperial law. On Volusianus and Augustine, see Brown 1967, 300–3; Matthews 1993, especially 20, and Matthews 2000.

[30] The law warned that those who refused other Christians from gathering would be regarded as authors of sedition and as disturbers of the peace of the church and shall, in consequence of their provoking agitation against the regulation of the imperial tranquility, and as authors of sedition and disturbers of the peace of the church, pay the penalty of high treason with their life and blood.

[31] See *Conf.* VI.8, 10, on his friend Alypius' legal career.

Constantine's reply to the Christian praetorian prefect Ablabius' enquiry on the status of episcopal judgments (*sententiae episcoporum*): "[T]he authority of holy religion searches out and reveals many things which the ensnaring bonds of legal technicality do not allow to be produced in court" (*Sirmondian Constitutions* I.5 [A.D. 333] as quoted in Seeck 1919). In both criminal and civil cases episcopal judgments are said to last forever and without possibility of review. A bishop's word is said to be necessarily true and incorruptible, issuing as it does from a holy man "in consciousness of an undefiled mind"; hence, their verdicts are held to be inviolable and sacrosanct. After Constantine there were efforts to enforce separate spheres of secular and episcopal jurisdiction so that in cases involving religion it was seen as appropriate to trouble bishops, but matters having to do with ordinary judges and the public law were to be heard in accordance with the laws (*CTh* XVI.11.1 [A.D. 399]; *CTh* XVI.2.23 [A.D. 376]). Augustine, as bishop of Hippo, had to have recourse to both secular law and ecclesiastical law in his ministry. There was no generally accepted canon law available for consultation at this time, and church discipline varied over time and place just as did secular law, with the consequence that local magistrates and bishops had considerable discretion in applying the law. The codification of canon law probably did not begin until 545 when the emperor Justinian decreed that the canons of the councils of Nicaea, Constantinople, Ephesus, and Chalcedon had the status of law. In Augustine's time, scope was allowed for the standards of local communities and for the discretion of local magistrates and clergy across the empire (see Clark 1993; Gaudemet 1957, 171, n. 5).

Augustine presents us with a distinction between the normative order of Christian imperial Roman culture, on the one hand, and the varied experiences and individual choices of daily, provincial social life, on the other, interweaving his particular ethical and political perspectives. While accepting late-imperial Roman conditions of dominance and subservience, he also argues that the church on earth is a mixed community of the predestined saved and damned. But he believes that the church, as an authority, backed by its interpretation of scripture which is never wrong (*Contra Epistulam Fundamenti* V.6; *Faust.* XXV.1.5.6), still is able to discern when to take severe measures, even against those who may be innocent, for the greater good of peace and order, since no one is ever truly innocent of sin. This parallels his view of the role of the Roman magistrate and judge, whose knowledge is not infallible but whose duty it is to take severe action, even against the innocent, in order to secure peace and order (*CD* XIX.6). He argues that humans always do and, indeed, must operate within and under authority. Authority is necessarily of a certain kind in this life precisely because of what human nature now is; hence, it determines what politics and unified church discipline necessarily are for. His focus on our need to have faith in authority is a consequence not only of his "reading" of human nature through pagan philosophy, history, and scripture, but also of his having

been a late-imperial Roman expressing widely shared views on state authority, coercion, and the utility of paternalistic government for the good of its citizens even against their wills. Augustine grafted his version of why Christians hold paternalism to be permissible onto a Roman imperial argument concerning what law was for and how it operated in citizens' lives.

Law as punitive constraint—where the citizens' liberty is defined by the space carved out by the silence of the authoritative, positive law—was already emphasized by Roman imperial rule of Augustine's time. As he sees it, the space carved out by the silence of the law is filled with acts proceeding from man's now corrupted free choice to follow his divided loves and misconstrued self-interest. Where Augustine argued for Christ's interior teaching, prepared for in each Christian by the authoritative teaching of the unified church, Roman imperial law proliferated to fill that space of silence to regulate those private behaviors seen as potentially disruptive of public order. For Augustine and fellow clergy, Christians were to live by a higher standard than the human law issued by emperors, but they were also to live by imperial law.[32] Constantine had already altered Roman law on divorce with a list of penalties[33] in order to make it more difficult to secure, but he did not limit the reasons for divorce to the wife's adultery as did some Christians. There is some evidence for a Christian influence on this toughening of divorce law, which was generally much harsher on women than on men (see Volterra 1958).[34] But most Christians would not have thought that Constantine's law differed significantly from their own beliefs. Augustine (*CD* XV.16) also discusses the principle by which marriage partners are to be selected, which reflects the law of Theodosius I forbidding marriage of the children of two brothers or the children of two sisters, in contrast to practices in the Christian Greek and near eastern parts of the empire.[35] The growth in imperial constraints on individual liberty, then, served as a partial model for Augustine's understanding of the scope of temporal authority and coercive sanction and the changes in the law reflected the kind of "earthly city" in which Augustine lived his life. It was the general

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[32] In *On the Good Marriage* VII [*PL* 40.378], Augustine goes beyond contemporary Roman law by insisting not only on restraint from divorce and remarriage, but also by arguing that even if a Christian man divorces his wife for adultery he is forbidden to remarry before her death.

[33] See *CTh* III.16.1. (A.D. 331), which was revived in modified form in *CTh* III.16.2 (A.D. 421).

[34] This is modified by Grubbs 1993, 127–9. For the view that divorce by consent was more readily available in the eastern empire than in the western, see Bagnall 1987.

[35] See Clark 1993, 42–6, on the persistent Roman attempt to end eastern endogamy; also see Saller 1994, 71. On the frequency of pre-Christian Roman divorce, see Crook 1967; Treggiari 1991. Marriage was seen as a continuing contract entered into by consent and, therefore, when consent came to an end the marriage ended (Justinian, *Code* VIII.38.2 [A.D. 223]). Hence, there was less interest in fault, but under Augustus there were strict penalties for the adultery of either spouse, on which see Johnston 1999, 34–7.

governance of the "earthly city," and not any historical manifestation of it, that enabled him to craft a vision of secular authority as coercive and useful to all. Imperial legislation and administration thereby allowed him selectively to ignore what was once, in Roman republican theory at least, the recognition of a simultaneous capacity in each citizen to evaluate, rationally and critically, just as opposed to unjust authority, and to act on this evaluation. This is not to say that he does not distinguish between better (Christian) and worse governments, but his point is that no government can be truly satisfying because none can satisfy men's desire for happiness as an intrinsic good.

The increasing inscrutability of imperial authority, brought to a kind of absolutism in the Greek-speaking Christian Byzantine east, would eventually provide the Latin west with the eastern Emperor Justinian's sixth-century codification of Roman law, the *Corpus Iuris Civilis*, which incorporated but went beyond the Theodosian Code. Justinian's Code[36] was to be appealed to by anyone, from the twelfth century when it was revived, who was interested in a centralized theocratic theory and practice of imperial Rome. They would find that it asserts that imperial authority derives from God; medieval commentators interpreted this to mean that the emperor was "ruler of the world" (*dominus mundi*). But where the theory of the theocratic state in the Byzantine east with its emphasis on imperial power, entrusted to the Christian emperor and derived directly from God's command, enabled the imperial law to be regarded as sacred, Augustine stopped short of endorsing this utopian unity of church and state. Instead, he argued for the less than perfect natures of the historical church and state. He transferred the sacred cause of imperial inscrutability away from the state and to God's power working in, and over and beyond, history. For religious purposes—ultimately, the individual's salvation—Augustine held the state to be neutral in the sense of morally and salvifically indifferent rather than sacred. But for secular purposes, necessary and arbitrary constraints by state authority are themselves determined by the needs of the times. Christian rulers and officials, he believed, owe service to God in their public capacities. When they act in the interest of the church, they do so as Christians who happen to have secular authority rather than as officials of the Christian Roman state. The church, then, uses the state to further Christian interests (as these are interpreted by church authority) in order to establish at least the conditions for the morally good act to be performed upon the hoped-for, but not guaranteed, reception of grace. Pastoral expediency, however, was part of Augustine's larger conviction based on his understanding of men's need to believe in authority *tout court.* The need for curbing violence and the sins that men will commit became paramount for him, so that temporal government must do what it can even if God does the rest. It is this vision that emerged in its final form in the *City of God*.

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[36] See Coleman 2000, vol. 2: 33–8; also see Chapter 10, Section 10.1, of this volume.

Imperial Rome fostered the image of the civil community as *useful* for maintaining peace and order. In having construed the image of the city and the citizen in this light, the imperial experience in the fourth and fifth centuries de-emphasized that aspect of the vision of the ancient philosophers which saw the *civitas* ("city" as law-governed political community) not only as securing peace and order, but, more importantly, as the setting for the self-motivated achievement of the human good—man's *eudaimonia* ("happiness")—his fulfillment through educated and self-directed moral choice and autonomy. Roman imperial reality and its law, however, highlighted as never before the notion that force can be justified in securing assent when the consequences of dissent for the peace and order of society are grave; more generally, it highlighted that an infinite harm needs only to be minimally probable in order to be worth avoiding through coercion. The utility theory of the state, found in Cicero's *On Duties* and his *On the Commonwealth* (see Coleman 2000, vol. 1: 251–66), was elaborated in late-imperial Christian Roman practice, but without what Cicero had provided as a Stoic balance to this: the reconciliation of the *utile* ("the useful act") with the *honestum* ("the good act in itself"). This utility theory and practice of imperial Rome constituted Augustine's milieu.

Augustine's version of this utility theory of the state is that so long as law serves the end of securing peace and order, and thereby ensures men's conformity to the natural law by preventing them from doing to others what they would not wish done to themselves, law achieves its purpose by being determined by the times and the peoples governed. By definition, human law, including human ecclesiastical law, is both mutable and fallible. Authorities can and do modify or dispense with the law for reasons of necessity and utility. This is not to say that Augustine is unconcerned with the injustice of certain human laws, an injustice that was often the product of the minds of fallen men. Indeed, he insists that human law and certain customs are unjust when they go against religious teaching, morality, and discipline. Local customs, even those not directly "against the faith" (*contra fidem*) are to be rejected if they cannot be shown to be in conformity with scripture and the councils and customs of the universal church (*Ep.* 54.2, 55.34 [= *CSEL* 34, 160, 208]). For him, the public authority suited to interpreting the exact meaning of scripture, church councils, and universal customs is the apostolic Catholic Church (*Faust.* XI.2 [= *PL* 42.246]; *De Vera Religione* 50.99 [= *PL* 34, 166]). The public authority suited to interpreting imperial law is the secular magistrate following imperial will. No separation of the two powers is implied: They are to work in collaboration for peace and order in the earthly city, sharing a concern for man's temporal and supernatural destiny. Secular authority in its juridical and coercive manifestation is to be used for religious ends, most notably in the battle against heresy, which, from the state's point of view, threatened the unity of the empire. The privately acknowledged injustice of human imperial law could not, therefore, authorize rebellion; only a passive resistance to its

unjust precepts, even to the point of martyrdom, could be legitimate (*CD* VIII.19). "As for this mortal life, which ends after a few days' course, what does it matter under whose rule a man lives, being so soon we die, provided that rulers do not force him to impious and wicked acts?" (*CD* V.17).

8.6. Augustine on Roman History and the Lessons for Politics

Augustine read about the history of republican Rome during this late imperial period, just before and just after the empire's adoption of Christianity as the state religion, and his political theory emerged from his reading of history. It has become fashionable to say that Augustine does not, strictly speaking, have a political theory. He does not, of course, have a notion of political theory as found in modern university departments of politics, but he has a much more enduring notion of history, which from ancient times was the study of war and politics, so that his political theory is precisely a consequence of this reading of the historical evidence men left of their (usually misguided) motivations to achieve worldly virtue and power. Certain assumptions about second- and first-century B.C. social coherence during the republican period remained dominant in the late fourth century A.D., but were somewhat differently construed (see Shaw 1987; Saller 1994). The Roman theory of governance and Rome's practice of rule by an inner circle of nobles influenced Augustine's view of paternalistic state authority. He insists that men must and do follow authorities, always seeking understanding on the basis of the trusted testimony of others, which is a form of belief rather than certain knowledge. Even the use of conventional language requires a coherent and trusted social context that allows for stable conventions of communication. Belief that is based on the authority of others is a necessary condition of human life in the family and society.

The model of the Roman *civitas* that Augustine accepts is one of a hierarchical society of patrons, who are heads of prominent families with a large clientele and are obliged by religiously sanctioned custom (*fides*) to protect their clients whether or not the clients are economically dependent on the patrons. Clients are obliged by a social and moral duty and by religious sanction to support their patron's political will (*obsequium*). Augustine's notion of authority parallels this Roman model in which the custom of the patron and the support of the clients created strong vertical links within a pyramid structure of society. This is not simply an image of the legal construct of the severe, all-powerful father, but an ideal of mutual allegiances and dutiful affections. The strong coherence within this pyramid, whose structure was based on social power and influence, had two important effects. First, in the republican period there emerged a kind of small state within a state, which relied on the power and patronage used by the *paterfamilias* to rule his kin and clients in order to help safeguard discipline and social order in the state at large. The

locus of his dealings with his public was his "private home" (*domus*). Second, the *paterfamilias* did not have the discretion to shape law and order arbitrarily, even in this small state within the state. Rather, moral values and a general code of conduct were forged and adopted by an elite of nobles. A consensus about moral behavior among a few nobles at the top of the social pyramid, who met in political groups or officially in the Senate thereafter, permeated downward to the citizen body. The consequence of this was that the opinion of the few at the top became the obligatory consensus of the much greater number of citizens at the bottom (see Eder 1991).

This top-down creation of an obligatory consensus was related to the conception of citizenship in Rome. Unlike the ancient Greek understanding of the citizen of the *polis*, citizenship for the Roman was an acquired civic right, but as such it did not entail the right to participate in power or self-governance. Indeed, citizenship was not a means to political participation, even in the republican period, unless it was supported by wealth, status, and residence in the capital, Rome. It was the common task of the elite group of citizens, as magistrates in the Senate, to anticipate social violence and destabilizations by taking into consideration the various interests of all Romans through compromises and reconciliations between competing classes or status-groups, a balancing that it was the duty of this elite to secure, which was described by Cicero as their achievement of a "concord of the orders" (*concordia ordinum*; *Off*. II.84).

Augustine finds in Cicero's and Sallust's analyses[37] the story of what happened when this elite no longer saw it as their common task to achieve consensus. Negotiations supposedly were left individually to various heads of the small states within the state, and an upper class elite consensus disintegrated. It was this tendency to a privatization of power that typified the end of the republic, and Augustine sees it as a tendency typical of the human social condition generally when there is no overriding authority to keep such privatized and willful men in awe through punitive means. It is then that Cicero had advised the need for a single rector or a new elite of leaders to bring republican Rome back from corruption to health, by which he meant the re-establishment of a senatorial elite with its confirmed and historical traditions founded in frugality, a disdain for personal luxury and material greed, and commitment to internal civic concord combined with external glory through conquest.

Augustine, the imperial Roman, maintains the need for authoritative elites, but he has much less confidence in them than does Cicero. He sees them not as ideals but as *de facto* necessities in history, in whose authority men believe

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[37] Augustine uses Sallust's *War with Catiline* and *War with Jurgurtha* extensively, along with Cicero's *On the Commonwealth*, in many of his writings. See esp. *CD* V.12–15. In fact, all moralizing Roman historians and playwrights, e.g., Plautus, *Bacch*. 410, use the recurrent motif of moral rhetoric to complain of a decline from some prehistoric age of virtue.

because their existence is justified by an even firmer belief in God's authority and the church's authority in interpreting God's will. The historical church and state elites are separately but relatedly provided with written law that enjoins concord, with the state serving the church in order to secure obedience to it. The authoritative elite in the unified church is enjoined to disdain luxury and wealth, and to follow scriptural authority in order to pursue voluntary poverty, continence, benevolence, and the just concord of piety, since "heavenly authority arrived into this filthy confluence for the sake of unity in the earthly city and also for everlasting well-being and the heavenly and divine republic whose peoples are everlasting" (*Ep*. 138, as quoted in Tkacz and Kries 1994, 211). The authoritative elite of the earthly city has a mission, like that of Cicero's Rome, which is coercively to subdue the irrational throughout the world—that is, those who are ignorant of what they ought to will—and to "civilize" them under one law.

Early in his Christian career Augustine wrote against the Manichean Faustus: "God is not the author of sin; nevertheless he is the governor even of it. Thus sins, which would not be sins if they were not against nature, are judged and governed and given the places and conditions they deserve in order that they might not be permitted to disrupt and disfigure the nature of the universe" (see Tkacz and Kries 1994, 227). This reflects Augustine's more optimistic early views where divine law is the divine order, inscribed in the human soul. It prescribes that men respect the natural order and is not yet opposed to the purely human law of civil or ecclesiastical society. The influence of ancient thought is evident, evoking the highest reason inherent in all things of which Cicero had spoken (*Off*. I.11). The primary characteristics of divine law are its universalism and immutability. It is superior, but not here seen in contrast, to human law since there exists a hierarchy of juridical rules comparable to the hierarchy of authorities.

But at the end of his career, Augustine acknowledged more explicitly the horrors of the violence incurred during Rome's imperial outreach to "civilize" men and make them bow to the Latin language and Roman law (*CD* XIX.7). The mature Augustine recognizes that it is the tragedy of human life that requires that something similar will need to occur through the fighting of just wars if men are to be unified in one church and one belief, and in relatively peaceful and orderly earthly cities, preparing them for the selective future salvation in the city of God. Unlike Cicero and Sallust, he thinks that the correct attitudes—instilling a patriotic caring for one's country, holding oneself to principles of frugality and continence, maintaining fidelity to the marriage bond, and remaining chaste, upright, and honorable in one's behavior—are all to be taught by and learned in the one and unified church where the true and truthful God is worshiped (*Ep*. 91 as quoted in Tkacz and Kries 1994, 204). Rejecting Cicero's view that the model for proper moral behavior is the traditional Roman elite of "honorable" men, Augustine says that character forma-

tion is taught by Christ dwelling within as the teacher. The correct model for civic behavior is the *Christian* citizen. Augustine insists that there is a compatibility of the Christian religion and politics, against those who think that Christians have no interest in the purposes of the law-governed state. Since the republic is rightly defined both by Cicero and Sallust as "the affair of the people," Augustine argues not only that a city is a multitude of human beings joined in a certain bond of concord but also that Christians are especially concerned to secure it. However, only the Christian recognizes that discord must be mitigated through precepts of concord that are written by divine authority and preached in Christian churches (*Ep*. 138 as quoted in Tkacz and Kries 1994, 206) rather than through rules of concord imagined by and modeled on a dubious elite of fallen men (*CD* XIX.21, 24).

The Roman republican concept of the unity of the state related not to some abstract idea of "the State," but rather, to a unity and consensus within an upper class (the republic was specifically not a democracy), and censors had been given the role to watch over the private and public conduct of this elite. Through the sanctions of censors, members of the senatorial elite were found guilty of deviant behavior and were rendered politically ineffective, thereby enforcing conformity of conduct and holding in check abuses of power. Augustine, in Christian imperial times, gives the role of the censor to church authorities. It is also of significance that in the Roman Republic once a magistrate took up his office he could not be directly controlled either by the people or the Senate; instead, he was supervised by colleagues of equal rank in office or by the aristocratic tribunes of the plebs. The magistrate was not, even in the republic, accountable to his voters. The mass of the Roman people were never allowed to engage actively in the deliberative formulation of public opinion and were, instead, orientated toward high-ranking persons as patrons, successful military leaders, or ambitious tribunes. It is not surprising, therefore, to find Augustine in late-imperial Rome comfortable with the idea and practice of "a people" never being autonomous agents defining the political agenda.

The overriding lesson Augustine learned from republican Roman history was the problem of the control of the nobles by the nobles. It was an illusion to trust in a so-called virtuous elite in order to maintain honest behavior, consensus, and a concern for fairness and concord amongst all members of the society. When this control of nobles by nobles failed, help was sought from the rector or *princeps*. Thus, in actual history, the republic failed and was absorbed into the principate of Emperor Caesar Augustus. Even Cicero's observation (*Leg*. I.19) that law for the people must be written as commands and prohibitions but for the rulers it is the highest reason implanted and developed in their minds (and such minds serve as standards by which justice and injustice are measured), was a terrible mistake, according to the mature, more pessimistic Augustine. Republican Rome had not been Christian and, there-

fore, none of its rulers could possibly have had access to highest reason and true justice, that is, God. It was no surprise to Augustine to find that, with the increasingly egoistic and irresponsible conduct of a noncohesive elite, at the end of the republic Rome became a society increasingly dominated by legislation. Indeed, social harmony in Rome was originally based less on written laws and more on a general agreement that order was to be regulated and upheld by the personal authority of the *paterfamilias* and the *patronus*. The Romans both in practice and in the ideal republic as fictionalized in Cicero's *On the Commonwealth* saw no need to give the rule of written law priority over the power of almost divine persons like Scipio Aemilianus, especially in times of crisis.[38] During the period in which Rome fell away from its ideals (second century B.C.), it became clear that to keep control over its changing society Rome needed to substitute written laws for moral consensus. The Roman criminal justice system established permanent courts to deal with offenses in Cicero's own lifetime. Rome thereafter reached its juristic high point in what is known as the classical age of the second and early third centuries A.D.— well after the republic was replaced by the principate. And during the principate and the subsequent post-classical imperial period, the rule of law came to take precedence as a juridical ideal.[39] In Augustine's vision of the earthly city, whether it be situated at Rome or anywhere else where men gather together to attempt to live in an unstable peace and harmony, the rule of law is the paramount principle. No Christian should think that law, in principle, is incompatible with his Christian faith.

In some of his letters and sermons Augustine frequently returns to interpret Christ's injunction not to return evil for evil and to turn the other cheek. He does not believe that Christ was espousing pacifism or quietism. While the individual may well turn the other cheek to an evildoer, thereby displaying patience and forbearance rather than revenge, Augustine does not think that this denies the need for laws and precepts backed by coercion of both the church and state. Private acts of vengeance no, but public acts of benevolent punishment, yes and always. And turning the other cheek to one who strikes one is not an acceptance of evil, but rather, a way of forbidding the one who has

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[38] Cicero, *Rep*. I.2.3 claims that the leading citizen who compels all men by the authority of magistrates and the penalties imposed by law to follow the rules whose principles philosophers have also discovered but could never enforce, is superior to the philosophers who have come up with the principles alone.

[39] Ulpian (d. A.D. 233) includes the much-quoted extract from his *Institutes* in his *Digest*: "Whatever the *princeps* decides has the force of law [*legis habet vigorem*]"; "pronouncements by the *princeps* are admitted to be law" (*ap.* Justinian *Dig.* I.4.1.1). See also Ste. Croix 1981, 378–408. See Stein 1999, 24—and more extensively, Matthews 2000, 104–8—on the introduction of the *cognitio* procedure with state-appointed professional judges, copied by the church in its own administration, replacing the earlier formulary procedure (*in iure* ["in law"] and then *apud iudicem* ["according to the judge"]).

done this from increasing his wrongdoing. Augustine interprets the act of turning the cheek as a command to another, in effect, the scriptural injunction fixing the natural law precept not to do to another what one would not wish done to oneself. He enjoins men to maintain patience and forbearance in their hearts, but not in their acts. "The precepts of concord, written by divine authority, refer to a disposition of the heart within oneself, rather than to a deed," he writes to Marcellinus in 413 (*Ep.* 138 as quoted in Tkacz and Kries 1994, 208–9). But "with respect to those who, contrary to their own will, need to be set straight, many things must be done with a certain benevolent harshness. Their welfare rather than their wishes must be considered." Augustine observes that even Romans praised this kind of benevolent punishment and emphasized that the one with this duty to act with benevolent harshness is the ruler of the city. The image of the city's ruler is drawn in terms of the Roman *paterfamilias*, but we note that the ruler is one man, a father to his people, a paternal imperial persona:

In correcting a son, however severely, paternal love is surely never lost sight of. What is not wanted and what is painful is, nevertheless, done to one who appears to require healing through pain, even against his will. Accordingly, if this earthly republic kept to Christian precepts, wars themselves would not be waged without benevolence, so that, for the sake of the peaceful union of piety and justice, the welfare of the conquered would be more readily considered. He whose license for wrongdoing is wrested away is usefully conquered.[40]

Because Augustine believes that wars are found in the order of human affairs, "that very order justly constrains men either to command or obey with respect to such affairs [...]. Wars, then, would always be waged by the good so that by taming unbridled desires they would destroy these vices which ought to have been rooted out and subdued by just rule" (*Faust.* XXII.73–9 as quoted in

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[40] In *CD* XIX.15 Augustine says that everyone who commits sin is sin's slave; this is a standard Hellenistic position (that the good man, even if he happens to be enslaved, is really free, while the bad man who is worthless and senseless is always really a slave). Weithman 2001, 239, argues that in *CD* XIX.15 (actually XIX.16), Augustine suggests that, had original sin not been committed, human groups would have been guided by paternal authority akin to that exercised by a Roman *paterfamilias* or a biblical patriarch. On the contrary, however, Augustine argues that a true and just *paterfamilias*, *post*-lapsarian but guided by Christian principles, "has an equal affection for all the members of his family, especially in respect of the worship and service of God, all praying that they may come to the heavenly home and *there alone* will it not be a necessary duty to give orders to men because it will no longer be a necessary duty to be concerned for the welfare of those who are already in the felicity of that immortal state." There is no *paterfamilias* prior to original sin or in the City of God. According to Augustine, original sin does not destroy the naturalness of human sociability, but that sociability is permanently threatened by human quarrelsomeness and conflict, thereby requiring coercion, that is, restraint by force or its threat. Hence, in an *unfallen* condition humans within the family would not have required the coercive control of their actions even by a loving Roman *paterfamilias*. The model for Augustine's *paterfamilias* in the earthly city is something along the lines of what Saller 1994, chaps. 5 and 6, has described.

Tkacz and Kries 1994, 222). For this reason, Augustine argues that Christians do not condemn all wars and they are not prohibited from serving as soldiers. Hence, they benefit the earthly republic rather than being a detriment to it. Soldiers act as the instruments of legitimate state authority, punishing without private vengeance. In *Against Faustus*, Augustine notes that soldiers are not acting on their own desires, but as ministers of the law; they are not avengers of their own injuries, but defenders of public well-being. In the natural order where the peace of mortal things is aimed at, Augustine insists that an authority is required for deliberations and concerning war in order to secure civic peace.

Augustine's earlier thinking on the purpose of the state's law is continuous with what he says, though in a much more developed and vehement form, in the *City of God*. In his dialogue with his friend Evodius in *On Free Will* (I.5.11–6.15 as quoted in Tkacz and Kries 1994, 214–5), Augustine has Evodius ask whether the positive law of the state that allows one to kill in self-defense in order to avoid being killed is just. Evodius argues that the law gives license to lesser wrongdoings so that greater wrongdoings might not be committed: The killing of an unjust aggressor in self-defense is a lesser evil than being killed by an unjust aggressor. (In *Ep.* 47.5, Augustine opposes killing by private individuals even in self-defense, believing this to be the role of punishment by public authority on behalf of all individuals in society. See also *CD* I.17, where Augustine argues that no individual has a private right to kill even a guilty man.) He says that the principle behind this positive law is that no human should be violated against his will. Evodius also claims that in killing an enemy a soldier acts as an agent of the state and its law and can, therefore, fulfill his duty without the "unbridled desire" (*libido*) for vengeance or dominance. The state's guiding mandate from God's eternal justice, that is, to protect the people, requires that it enact law for the people's protection and such a law cannot be accused of unbridled desire. But even if the law itself is blameless, are people who act under it and kill others similarly blameless? The law only gives them a license to kill, but does not oblige them to act on this license. Augustine agrees that human law deals with crimes that require punishment if peace is to be maintained among ignorant humans, to the extent that such matters can be regulated by men. Other sins have other penalties, however, from which God's wisdom alone can free us. Augustine concludes, "It seems to you that the law enacted for the governance of cities makes many concessions and leaves many things unpunished that are nevertheless punished by divine providence and rightly so. Just because it does not achieve everything, what it does achieve should not be condemned" (*CD* I.17 as quoted in Tkacz and Kries 1994, 215).

How far, Augustine asks, should wrongdoing be avenged by the law that restrains people in this life? Because humans are changeable and subject to time, Augustine proposes two scenarios. In the first case, if a people is moder-

ate and serious and a diligent guardian of the common utility, thinking less of private good than public good, then it is right to enact a law permitting this people to choose for itself the magistrates through whom its affairs, that is, its *republic*, are to be administered. In the second case, if this same people, having become depraved little by little, preferring private to public good, sells its votes, is corrupted by those who covet honors, and turns the regime over to shameful and villainous people, then it is right that if some good and most capable man is to be found, he can remove from the people the power to bestow honors and hand it over to a few good men or even one. Augustine, therefore, sees the law as temporal; it can—indeed, must—change depending on the character of the people it governs. With an iniquitous people, the law suited to them must suit their depraved character. He seems to be invoking that very Roman legal principle of rights as civic acquisitions that are themselves changeable—they are not absolute, natural rights. Roman liberty was itself an acquired civic right resting on positive laws; it was not an innate right of man. But Augustine uses this notion to extraordinary effect. The principle of positive law that no human should be violated against his will, as mentioned by Evodius, is, therefore, changeable according to Augustine, just as are those human rights conferred by temporal authority. Depraved wills can and must be violated both for their own good and that of the peace and security of the social whole.

So, too, Augustine the Roman observes that property rights do not have foundations in rights established directly by God, but rather, in human rights distributed to men differentially by state authority (*Iohann. Evangel.* VI.25–6 as quoted in Tkacz and Kries 1994, 249).[41] He goes on to say that even those who acquire or use their property unjustly are still protected by positive law. This is because the purpose of this law is to minimize disorder; regulating even unjust use and acquisition is necessary if even greater harm would occur should it not be regulated (*Ep.* 153).[42] The use of force as a principle on which

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[41] For Augustine, before the Fall the law of nature would have been sufficient to guide human life, and like Ambrose (*Off.* I.28; see also *Commentary on Psalms* 118.8.22) Augustine argues that the world would have been held as the common property of all men. Augustine explains to what we owe the rights that we enjoy over our property: Property rights arise and are maintained by the law of emperors and kings, and everything we have depends on the authority of earthly rulers. God has distributed to mankind these human rights through emperors and kings. It is by a right derived from the emperor that one possesses the land. By human law alone can we claim anything as our own. But Augustine does not go on to advise extreme poverty, asceticism, or a renunciation of possessions. Money and property are simply not unconditional goods (they are the Stoic "preferred indifferents") and should be put to good use. In *Ep.* 153.6.26, he says: "[I]n this life the wrong of evil possessors is endured and among them certain laws are established which are called civil laws, not because they bring men to make good use of their wealth, but because those who make bad use of it are thereby made less injurious."

[42] This appears to reflect the post-classical lack of distinction between ownership and

earthly government necessarily operates to preserve unity and order is ultimately justified, even with respect to religious belief, as a particular instance of the necessity for forceful correction of corrupted wills. The Theodosian Code itself, in its recognition of an orthodox Catholic clergy charged with the conduct of the approved *religio*, contains laws of the late-fourth and early-fifth centuries that deprived heretics of the right of assembly, imposed restrictions on their testamentary wills, confiscated their property, and excluded them from civic life (*CTh* XVI.5.24, 8, 14, 66; 6.4 *pr.*).[43] Augustine believes that such men would in no way have considered changing for the better unless they had been terrorized into considering the truth. The weight of habit and unconsidered traditions, he says, prevent them from self-correction. Both the state and the church must, therefore, be engaged in salutary teaching joined to fear, with the power of fear alone being that which breaks the evil chains of custom. God not only teaches us but also frightens us continually for our own well-being (*Ep.* 93 as quoted in Tkacz and Kries 1994, 233).[44] Concord and unity are ultimately to be achieved in this life through men being compelled to justice.[45]

Augustine's philosophy of law has decisive consequences, notably in what he takes to be the Christian's attitude to civil law as it plays its role in the maintenance of an uncertain peace and order. Augustine perhaps best reveals this perspective when he discusses the civil magistrate and his necessary and onerous duties. In an acceptance of the way imperial Roman law necessarily operated, Augustine sorrowfully reflects in the *City of God* XIX.6:

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possession, speaking as Augustine does of acquisition and use alone. "Vulgar" Roman law in the west as practiced in the provinces simplified concepts: The notion of *possessio* ("possession") replaced *dominium* ("lordship," "complete ownership"); *possessio* became a right and they opposed *iure possidere*, which designates property, to *corpore possidere*, which designates the possession. Property, possession, and *iura in re aliena* ("rights in an alienable thing") are no longer rigorously distinguished. See Levy 1951; Gaudemet 1957, 123–31.

[43] There is much evidence in imperial Roman law from the times of Ulpian onward that flogging and torture, once reserved for slaves, was increasingly exercised on citizens of humble condition, and Justinian's *Digest* XXII.5.21.2 (third century A.D.) shows that the application of torture in court to accused persons had been extended even to freemen witnesses. The Theodosian Code XII.1.39, 47 (A.D. 349–59) even allows the use of the *plumbata*, the leaded scourge, on all except the leading decurions (*decemprimi*).

[44] Hunt 1993, 156, observes: "The drawing of the boundary around legitimate religion has almost ceased to be metaphorical: The laws envisage a Roman world the borders of which are coextensive with Christian orthodoxy, and which harbors no corner of refuge for the dissenting."

[45] Augustine claims that "it must be a sin to desire what the law of God forbids and to abstain merely from fear of punishment and not for love of righteousness" (*CD* XIV.10). This reflects the twofold purposes of church and state in historical time: to conjoin teaching with fear, and never one without the other. Fear of punishment need not be limited to physical chastisement. It can also include social embarrassment or degradation, and religiously, includes a fear of sin itself and not simply fear of burning in hell. See *Ep.* 145.4.

And so they [judges] are often compelled to seek the truth by torturing innocent witnesses [...]. [I]t is the fact that the judge tortures the accused for the sole purpose of avoiding the execution, in ignorance, of an innocent man [...]. He has tortured an innocent man to get to the truth and has killed him while still in ignorance. In view of this darkness that attends the life of human society, will our wise man take his seat on the judge's bench or will he not have the heart to do so? Obviously he will sit; for the claims of human society constrain him and draw him to this duty [...]. [H]ere we have what I call the wretchedness of man's situation [...] in his judicial capacity.

8.7. Conclusion

If we place Augustine's views in their contemporary context, we find him reflecting, often in detailed ways, on the set of institutions and laws that collectively administered imperial Rome's political affairs. He examines, in short, private legal remedies and what he believes to be the rightful interference in private affairs by local representatives of both the imperial government and the church.[46] No part of society is exempt from the Fall; both *loci* of control—familial and public—must now be regarded as the sites of "unnatural," but necessary, remedies for the Fall. Only eschatologically, after history and in the city of God, will it no longer be a necessary duty to give orders to men, because it will no longer be a necessary duty to be concerned for the welfare of those, formerly in families and in political societies, who have achieved, through God's election, the felicity of that immortal state. But in historical time, and in accordance with the characters of fallen, willful men, it is law backed by punitive sanction that must coerce men's wills to justice.

Much later, and despite his own intentions, Augustine would be recognized as having erected the signposts to the eventual secularization of history and politics. The sphere of politics, construed as belonging irrevocably to the realm infected by sin, would come to be understood by some as capable of mastery only by absolute authority. It would be argued that the only reasonable solution to the tragedy of the human condition, played out in the acts of misguided and destructively competitive wills in a fallen "state of nature," is to renounce and transfer any claims to self-governance to an overarching authoritative third party, namely, a Hobbesian sovereign. Technically, there is no law that Hobbes's sovereign may make that can be unjust and no claim that a subject can make against the sovereign's injustice. The state would come to be seen as the contractual construction of willful individuals, using their reason instrumentally to secure their shifting desires, engaged as they were in self-preserving bargaining. It would take Hobbes, in seventeenth-century conditions of civil war, to recognize what Augustine had already discovered in his own time: That there is no possibility of morality by rational agreement, only by

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[46] See Weithman (2001), who arrives at a range of interpretations that differ from those presented here, largely due to ignoring the context in which Augustine lived.

authoritative imposition. To arrive at this conclusion, however, many of the indigenous practices and theories of the medieval city-state—with its corporate governance and collective attempts to secure, through law, the common good—would have to be, and were, either forgotten or misconstrued. Republican Rome and Cicero's idealization of honorable men would come to appear as unrealistic or uncongenial to many in the early modern period as they had appeared to Augustine in late imperial Rome (see Coleman 2000, vol. 2: 272–6).

Further Reading

Although there is a very extensive literature on Augustine, scholars generally have not situated him decisively within his North African, late Roman imperial context. Harries (1999) is perhaps unique in having appropriately placed Augustine in his times, showing him to be a serious player in her detailed and important historical narrative. Similarly, the articles in Harries and Wood 1993 treating various aspects of the Theodosian Code reveal the contemporary backdrop to Augustine's familiarity with the law. Also useful and bold is the work of Matthews 2000.

Tkacz and Kries 1994 contains excerpts from the *City of God* and Augustine's other writings on politics and law. Atkins and Dodaro 2001 brings together thirty-five letters and several sermons that deal with political and legal matters.

The works of Markus are still, by far, the most detailed and sensitive readings of Augustine's philosophy, theology, political, and pastoral concerns; see especially Markus 1970; 1972; and 1990. His works, along with those of Brown 1967; 1972; and 1989, must be read as supplements, and sometimes as correctives, to the essays in Stump and Kretzmann 2001.

Rist 1994 is perhaps the most philosophically informed about what Augustine took and altered from the various legacies of classical philosophy; similarly, O'Daly 1989 and Kenny 1975.

Coleman 1992 discusses what Augustine inherited from his Platonist and Aristotelian forebears, and changed, in order to arrive at an epistemology, a theory of the workings of memory, and a revised conception of history, each of which would influence the future medieval centuries. Coleman 2000, vol. 1, treats more directly Augustine's political theory. Coleman 2000, vol. 2, observes the revival of some of Augustine's most important insights on the role of authority and positive law in all men's lives as the middle ages, more directly influenced by Ciceronian and Aristotelian thinking on the relation of reason, law, and constitution-building, gave way to a different agenda during the early modern period of European political theorizing. Rowe and Schofield 2000 reflects some of the most recent scholarship and bibliography on this formative period.

Chapter 9

PHILOSOPHY OF LAW
IN MEDIEVAL JUDAISM AND ISLAM

by Charles E. Butterworth[1]

9.1. Introduction

Properly speaking, there is no philosophy of law in medieval Judaism and Islam. In its place is jurisprudence, that is, the art or science that seeks to explain what the revealed law of either tradition means with respect to one particular situation or another and how it is to be applied. Similarly, jurisprudence entails moving from what is explicitly spoken of by the particular revealed law to what is not—extending that law to new phenomena or new applications. But philosophy of law understood as "philosophical reflections upon the general foundation of law [...] derived from an existing philosophical position" or leading "to such a position" (Friedrich 1958, 3) is not to be found in either one of these traditions; nor is it desired.[2] The reason is quite simple: Law in medieval (and contemporary) Judaism and Islam is Law with a capital "L." It is divine law handed down to a particular religious community by a divinely inspired lawgiver, a prophet or a messenger of the Almighty.

Consequently, those who accept this Law and believe in it do not speculate about it in the sense of asking where it came from or how it has evolved over the ages. They are asked to accept that it has been revealed by the creator and is the same now as when first revealed to the prophet or lawgiver. One need only consult the Law itself, as it is set forth in the scripture particular to each tradition, to see that it is not to be trifled with and certainly not to be subjected to scrutiny about its origins or evolution. Such an undertaking would be tantamount to casting doubt on the Law and on the claims of the particular religious community about its unique character.

This view concerning Law was recognized, although not emphasized, by Friedrich (1958, 8ff.), who, even as he noted that the Hebrew scriptures were part of the heritage to which current understandings of law lay claim or which "played a decisive role in shaping the origins of Western concepts of law," passed over those scriptures and that heritage to focus first on the philosophy of pagan Greece and then on the modern adaptation of both classical philoso-

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[1] All translations are by the author unless otherwise indicated.
[2] Even less to be embraced is philosophy of law as a pursuit that helps the individual become more aware of how human opinions affect law or as something that "provides clarity, intellectual order and structure, and standards of rational (often moral) criticism and evaluation"; see Murphy and Coleman 1990, xi.

phy and scriptural revelation to more pressing concerns. Similarly, Murphy and Coleman take their bearings from modern Western sources, yet ignore the religious traditions to which early Western jurists looked for inspiration or from which they sought liberation. Murphy and Coleman are completely silent about the history of jurisprudence in medieval times, Friedrich only about its medieval Jewish and Islamic manifestations. Witting or not, such silence is well-founded.

Indeed, the history of jurisprudence in both traditions is fraught with technicalities—numbing technicalities, more often than not. It entails the drawing of minute distinctions based on the sense given to a particular word or its linguistic antecedents and leads to heated argument about what should be done or not done under a vast array of real and hypothetical circumstances. For the most part, the discussion centers on actions to be performed or not, but it can also reach to opinions. In the latter case, action plays a certain role as well, insofar as primary emphasis is placed on what the members of the community are to believe concerning God, the world, and so on—this on the basis of what has been revealed in divine law.

Given the preeminence of the divine law, theology comes into being as a means of defending the actions and opinions promulgated by that law. Alfarabi provides an excellent summary account of dialectical theology or *kalām*, that is, the art of theology practiced in Islam:

The art of dialectical theology is a disposition by which a human being is able to defend the specific opinions and actions that the founder of the religion declared and to refute by arguments whatever opposes it. This art is also divided into two parts: a part with respect to opinions and a part with respect to actions.

It is different from jurisprudence in that the jurist takes the opinions and actions declared by the founder of the religion as given and sets them down as fundamentals from which he infers the things that necessarily follow from them, whereas the dialectical theologian defends the things the jurist uses as fundamentals without inferring other things from them. If it happens that there is a certain human being who has the ability to do both matters, he is a jurist and a dialectical theologian. He defends them insofar as he is a dialectical theologian, and he infers them insofar as he is a jurist. (*Enumeration of the Sciences*, V.5)

Those engaged in it draw upon the premises of philosophy, to be sure. They also have recourse to the arts of logic—especially sophistry. But these are weapons to be unsheathed in battle rather than handmaidens employed in the service of learning. The theologians of medieval Islam most often attacked the philosophers, even while making use of their premises. And no less an authority on Judaism than Maimonides (see Section 9.6 below) has recourse to the doctrines of Muslim dialectical theologians (the *mutakallimūn*) when he wants to illustrate important errors concerning the opinions that people hold about God. He does so, apparently, because to dwell on such matters would detract from the attention one ought to accord Jewish law, and understanding it is the supreme concern (*Guide*, I.71–6, especially 71 beginning [93b]).

These general observations need to be amplified in order to distinguish the place of law and reflection upon law in medieval Judaism and Islam from what occurs in medieval Christianity. Once such distinctions have been drawn, it will be easier to explain why philosophical speculation in medieval Islam takes the form it does and how such speculation affects, and is reflected in, the philosophical inquiry proper to medieval Judaism. Moreover, it will be possible to account for the guiding role that medieval Islamic culture takes in such inquiries, a role that appears unusual given the slight claim Islamic culture makes upon our attention today.

9.2. Law and Revelation in the Prophetic Religions

For philosophers belonging to the medieval Jewish tradition, only divine law is deemed worthy of investigation and commentary. Dispersed throughout the different lands of medieval Islam and tolerated, along with Christians and other peoples whose beliefs approximated those of the monotheistic or Abrahamic faiths,[3] Jewish thinkers in medieval times had no reason to dwell on questions related to secular or day-to-day political law. Except in rare circumstances, it was not their task to make such law or pronounce on its administration. Here, too, Maimonides provides an extraordinarily apt account of the world around him.

Political science is divided into four parts. The first is the individual's governance of himself; the second is the governance of the household; the third is the governance of the city; and the fourth is the governance of the large nation or of the nations [...]. The governance of the city is a science which provides its inhabitants with the knowledge of true happiness along with the way of striving to attain it; the knowledge of true misery along with the way of striving to keep it away; and the way of training their moral habits to reject the presumed kinds of happiness so that they do not take delight in them or covet them. It explains the presumed kinds of misery to them so that they do not suffer from them or dread them. Similarly, it prescribes laws of justice for them by which they can order their communities. The learned men of past communities, each according to his perfection, used to fashion regimes and rules[4] by which their kings would govern the subjects. They called them *nomoi*, and the nations used to be governed by those *nomoi*. The philosophers have many books about all of these things which have already been translated into Arabic. Those that have not been translated are perhaps even more numerous. In these times all that—I mean, the regimes and the *nomoi*—has been dispensed with, and people are governed by divine commands. (*Treatise on the Art of Logic*, XIV)

Maimonides' use of the term "divine commandments" (*al-awāmir al-ilāhiyya*) here is a deliciously indirect way of pointing to the Islamic *sharīʿa* as sole law

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[3] See Quran 2:62: "Indeed, those who believe, and those who are Jewish, and the Christians and the Sabians, anyone who believes in God and the last day and does what is correct, they will have their reward from their Lord; they have nothing to fear, nor are they to be sad."

[4] The Arabic term translated here as "rules" might more literally be rendered as "canons," for it is *qawānīn* (sing. *qānūn*).

(or, more accurately perhaps, Law) of the land. Lest the indirectness be missed, he reminds the reader that Arabic culture and language so dominate the thought and learning of his age that almost all of the important learning from the past has been translated into Arabic. Moreover, the learned Jews to whom Maimonides addresses himself here would have been all too aware of this cultural domination because they would have read these words of his first in Arabic—Arabic written in Hebrew script.

Two other aspects of this succinct statement are also deserving of further reflection. First, its whole tone is reminiscent of Maimonides' famous Arab predecessor Alfarabi (see Section 9.3 below), whom Maimonides held in such high esteem as to claim that his thoughts were finer than finely sifted flour (see Marx 1935, 378–80).[5] In *Selected Aphorisms*, for example, Alfarabi moves from a discussion of the way the individual soul is to be disciplined to reflection on the household and its governance, then the city and its governance, and ultimately arrives at the regime and its governance. When speaking of the latter, he notes that it can be a city, a nation, or a group of nations (aph. 95; see also aphs. 25, 26, 28, 38, 39, 42). Similarly, in *Political Regime*, Alfarabi distinguishes between perfect and imperfect political associations:

Human beings are of the species that cannot complete its necessary affairs nor gain its most excellent state except by coming together as many associations in a single dwelling-place. Some human associations are large, some medium, and some small. The large association is an association of many nations coming together and helping one another. The medium is the nation. And the small are those the city has mastery over. These three are the perfect associations.

Thus the city is first in the rankings of perfections. Associations in villages, quarters, streets, and houses are defective associations. Of these, one is very defective, namely, the household association. It is part of the association in the street, and the association in the street is part of the association in the quarter. And this latter association is part of the civic association. The associations in quarters and the associations in villages are both for the sake of the city. However, the difference between them is that quarters are parts of the city, while villages serve the city. The civic association is part of the nation, and the nation is divided into cities. The unqualifiedly perfect human association is divided into nations. (*Political Regime*, sec. 64)

Imperfect political associations are those smaller than the city, namely, households, associations comprised of those dwelling on particular streets or in a particular residential quarter, and villages. Perfect political associations, on the other hand, are those that are at least the size of the city. It, as well as the nation and even a group of nations that come together and assist one another, constitute the best or most complete—and, in this sense, the most perfect—kind of political association. They are complete or perfect in that they are self-sufficient and able to guide their inhabitants toward happiness.

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[5] The additional judgments by Maimonides on figures in the history of philosophy, especially as they reflect on Alfarabi, Avicenna, and Averroes, as cited by Pines in Maimonides, *The Guide of the Perplexed* (1963), lix-lx, are worth considering.

In both treatises, Alfarabi does speak of law. Indeed, in *Selected Aphorisms*, he speaks of traditional law (*sunna*), conventional law or nomos (*nāmūs*), and divine law (*sharī'a*). The existence of the first two in cities is assumed, and Alfarabi is more concerned with the standards for conduct they provide or how they are misused by some rulers in order to achieve their own base goals than with explaining how they come about (see *Aphorisms*, aphs. 14, 15, 31, 58, 92). That is to say, traditional, conventional, and divine laws are spoken of as though their presence were clearly to be expected, but not as anything to whose elaboration attention ought to be given. The emphasis, rather, is on inculcating opinions—especially correct ones—about the soul, virtues, and non-legal constituents of the well-governed city or regime.

In *Political Regime*, Alfarabi speaks of divine law, traditional law, and a lawgiver who posits traditional law (*wāḍi' al-sunna*). But the term *nomos* never occurs (see secs. 82, 102, 106, 113, 122). As in *Selected Aphorisms*, so here the assumption is that laws exist and that people guide themselves more or less with respect to them. But Alfarabi does not dwell on—indeed, he never turns his attention to—what makes laws or Laws good nor to how they come about. His perspective is more limited: His discussion of the best or virtuous city emphasizes that it alone aspires to bring about true happiness for its citizens, whereas his discussion of the other cities—the ignorant cities, of which he enumerates and explores six kinds—focuses on the goals they pursue that keep them from being virtuous. Not laws or Laws, but ends, are Alfarabi's sole focus in this work.

Yet, to return to the major point, whatever Maimonides may have learned from Alfarabi about the division of political science into four parts, that is subservient here to his dismay over inquiry into politics now being moribund. Anything he might have been able to learn from Alfarabi about regimes, their characteristics, and the qualities that make them sound or unsound is no longer of value. Similarly, what he might have learned about *nomoi* (notice that Maimonides does not speak here of traditional laws) is not now to be pursued. All this has now been superseded by "divine commands."

Second, the term translated as "communities" at the beginning of the above cited passage by Maimonides should properly be understood as "religious communities," the Arabic term being *milal* (sing. *milla*). For Maimonides, as for Alfarabi, political communities work best when they are organized around a religion common to the citizens. Maimonides does not dwell on the question here, but it is clearly central to the way he analyzes politics.

While those representative of medieval Jewish thought dwell on the religious law simply because they have access to no other law or can influence and interpret no other law, another consideration prompts thinkers within the medieval Islamic tradition to do the same. Though freer to explore other avenues as members of the dominant class, they are equally subject to the central tenet of the medieval Islamic tradition which holds that there is no law

other than the Islamic *sharī'a*. Everything within that tradition points to the idea that rule can be exercised only by God's vicegerent, the caliph (*khalīfa*), and his designated subordinates.[6] The prophet Muhammad (ca. 570–632) was the first legitimate ruler of the Islamic community, and all subsequent rulers are legitimate only insofar as they are his genuine successors.[7] More important, their exercise of rulership is legitimate only to the extent that their decrees conform to the letter of the Islamic *sharī'a*. Such, at least, is the theory, however much actual practice may have differed.

As a result, attention is focused on how to understand and apply the divine law, and political inquiry is limited to the study of this law, that is, to jurisprudence. Alfarabi explains the situation succinctly:

> The art of jurisprudence is that by which a human being is able to infer, from the things the lawgiver declared specifically and determinately, the determination of each of the things he did not specifically declare. And he is able to aspire to a verification of that on the basis of the purpose of the lawgiver in the religion he legislated with respect to the nation for which it was legislated.
>
> Every religion has opinions and actions. The opinions are like the opinions that are legislated with respect to God, how He is to be described, the world, and other things. The actions are like the actions by which God is praised and the actions by which there are mutual dealings in cities. Therefore the science of jurisprudence has two parts: a part with respect to opinions and a part with respect to actions. (*Enumeration of the Sciences*, V.4)

Yet differences about these opinions and actions arise, and they sometimes become so fixed as to be insurmountable. In medieval Islam, this phenomenon gave rise to schools or disciplines of law; these have prevailed through the ages and remain vibrant even now.

The differences concerning opinions and actions have to do, above all, with the way the Quran should be interpreted, that is, the extent to which it is permissible to rely upon analogical reasoning (*qiyās*) and independent or personal opinion (*ra'y*), as well as about how much authority is to be accorded to the sayings and deeds of the prophet—the *ḥadīth* and *sunna*[8]—as opposed to the Quran itself. In Sunni (sometimes called Orthodox) Islam, there are four schools. The Ḥanīfī school, named after Abū Ḥanīfa al-Nu'mān ibn Thābit (d. 767), is and always was most open both to analogical and independent reason-

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[6] The idea of a vicegerent or representative of God on earth goes back to the Quranic account of God first honoring Adam with this role, then David, and—by inference—Muhammad as well as his successors; see Quran 2:30–34, 38:26; see also 6:165; 7:69, 74; 10:14, 73; 27:62; and 35:39.

[7] Quranic verses that confirm this judgment abound, but note these from 2:2–4: "This is the book; there is no doubt about its being a guide for those in awe [of God]; those who believe in what is absent, stand fast in prayer, and spend from what We have provided them; those who believe in what was sent down to thee." The addressee ("thee") is the prophet Muhammad.

[8] A *ḥadīth* is a report or record about one of the Prophet's deeds or sayings; *sunna* is the traditional or customary law based upon these deeds and sayings.

ing. Indeed, the procedure of thinking through and interpreting the divine law in order to reach juridical decisions—what later came to be known as *ijtihād*—was especially developed in the Ḥanīfi school. By contrast, the Mālikī school founded by Mālik ibn Anas (d. 795), gives greater weight to the deeds and sayings of the Prophet, especially to Mālik's own collection of them. The writings of Muḥammad Ibn Idrīs al-Shāfi'ī (767–820) testify to his great reliance on analogical reasoning, and the school that bears his name (Shāfi'ī) promotes that tendency. Finally, Aḥmad ibn Ḥanbal (d. 855) and the school named after him (Ḥanbalī) allow little leeway in interpreting the Quran. It is the most literalist of these schools and frowns upon any kind of analogical or personal reasoning, preferring to privilege the deeds and sayings of the Prophet. In all important respects, the Wahhābī school, named after Muḥammad Ibn 'Abd al-Wahhāb (1703–1792) and dominant in contemporary Saudi Arabia, is the modern successor of Ḥanbalī doctrine.

Disagreement over who should succeed the fourth caliph 'Alī following his murder in 661 prompted a major rupture within the fledgling Muslim community. Demands that the caliphate pass to the heirs of 'Alī rather than to Mu'āwiyya, who became the first caliph of the Umayyad dynasty (and reigned from 661–680), led the partisans of 'Alī to form their own distinct group. Their eventual repudiation of the first three successors to Muhammad as usurpers formed part of other doctrinal differences with the now-dominant Sunni group, and the original designation of them as adherents or partisans of 'Alī (*shī'at 'Alī*) took on a life of its own insofar as they became known simply as the Shi'a, as opposed to the Sunni branch of Islam (or as Shi'i as opposed to Sunni Muslims). Almost eleven hundred years later (that is, around the middle of the eighteenth century), in order to work out a compromise of sorts, the legal school devoted to Ja'far al-Ṣādiq (d. 765) was recognized by Sunni Islam as comprising the fifth acceptable school of Islamic jurisprudence. It stands today as the school representative of Shi'i Islam.[9]

The salient point with respect to these distinctions is that they concern various schools of jurisprudence, which differ over particular approaches to the interpretation of the law. The schools, their adherents, and their doctrines start from the premise that the law is to be accepted as it has come down. No question is to be raised about the status of revealed law or its relationship to conventional and natural law. In fact, there is no discussion of such topics. Nor is any attempt made to inquire into revelation, that is, its character and genesis or its relation to the imaginative faculty of the soul. These are schools of law whose goal is, as Alfarabi so aptly puts it, "to infer, from the things the lawgiver declared specifically and determinately, the determination of each of the things he did not specifically declare." By privileging one approach to the divine law

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[9] Further details may be found in Gibb 1955, 72–98; Rahman 1968, 75–95, 203–19; and al-Shāfi'ī 1961, 3–16. See also Corbin 1964, 13–30; and Lewis 1960, 36–98.

or another, the schools "aspire to a verification of that [determination] on the basis of the purpose of the lawgiver in the religion he legislated with respect to the nation for which it was legislated." They are not schools of philosophy.

To be sure, it is sorely tempting to collapse the two and seek in the legal speculations and "mirror of princes" treatises of the jurists some insight into the political theory and political philosophy of medieval Islam. The problem is that inquiries into the principles that explain and justify the imamate, caliphate, sultanate, and wizirate and into how the divine law provides criteria for distinguishing good ones from bad do little to sharpen our understanding of state and government, not to speak of law as a subject of inquiry.[10] One way to illustrate how misleading reliance on the jurists can be is to turn to one, for example, the highly respected Takī al-Dīn Aḥmad Ibn Taimiyya (1263–1328). He has an especially compelling claim to our attention because he is the jurist who most influenced Muḥammad Ibn 'Abd al-Wahhāb. In Ibn Taimiyya's famous attack upon the Greek philosophers, he strives mightily to show that the divine law is sufficient for all the needs of the community. Basically, his argument is that nothing is to be learned either from the logical teaching set forth by the philosophers and logicians or from those jurists and theologians who have been misguided enough to seek to appropriate that teaching. All that an observant Muslim needs to know about logic or about the rules for thinking is clearly expounded in the Quran. Moreover, the teaching of the philosophers and logicians is unduly complicated and involved; the Quran is more direct. Nor is that all. Aware that individuals he deems intelligent, not to mention the philosophers, differ among themselves about the principles of logic, Ibn Taimiyya sees no reason for entering into their debates. Most important, the logic of the philosophers and logicians, in particular the syllogism they praise so highly, adds nothing to human knowledge of the beings or of the creator and the prophets; only the signs or verses (*āyāt*) of the Quran provide such knowledge.[11]

9.3. Alfarabi

Three individuals stand out in the tradition of medieval Islamic philosophy for the light they shed on what constitutes a well-ordered polity: Alfarabi, Avicenna (Ibn Sīnā), and Averroes (Ibn Rushd). Alkindi (d. 866), known as

[10] For recent examples of such attempts, see Black 2001 and Lambton 1981. Black's book is far more ambitious than Lambton's, both in its historical scope and its geographic purview, but, by his own admission, it suffers from his having no grasp of any of the languages in which these authors wrote.

[11] See Ibn Taimiyya, *Abridgement of the Counsel to the People of the Faith Concerning the Response to the Logic of the Greeks*, 94:17–96:6, 153:4–14, 194:13–195:12, 217:5–218:8, 234:12–235:18; see also Ibn Taimiyya, *Against the Greek Logicians*, secs. 29–30, 125, 207–8, 253–5, 286–9.

the philosopher of the Arabs, focused his attention primarily on metaphysics and had nothing to say about politics. Alfarabi's near contemporary and sometime fellow resident of Baghdad, Alrazi (864–925), was especially concerned with ethics and medicine, but sometimes also delved into metaphysical speculations. A book on the philosophic life, in which he compares himself to Socrates and speaks of something resembling Socrates' second sailing notwithstanding, he is quite similar to Alkindi in the way he ignores political subjects. Averroes' two illustrious predecessors and fellow Andalusians, Ibn Bājjah (d. 1138) and Ibn Ṭufayl (ca. 1110–1185), did turn their thoughts to political matters from time to time; in their writings, however, they say nothing with respect to law. Although Alfarabi is for the most part also silent about the law, even his silences prompt further reflection.

Widely referred to as "the second teacher," that is, second after Aristotle, Alfarabi (Abū Naṣr Muḥammad Ibn Muḥammad Ibn Ṭarkhān Ibn Awzalagh al-Fārābī) (ca. 870–950) is widely recognized as the most important philosopher within the medieval Islamic tradition. Born in the village of Farab in Turkestan, he resided in Bukhara, Marv, Ḥarrān, Baghdad, and perhaps in Constantinople, as well as in Aleppo, Cairo, and finally Damascus, where he died. Alfarabi first studied Islamic jurisprudence and music in Bukhara, then moved to Marv, where he began to study logic with a Nestorian Christian monk. While in his early twenties, Alfarabi left for Baghdad, where he continued to study logic and philosophy as well as to improve his grasp of Arabic. After a decade or so in Baghdad, Alfarabi went to Byzantium for about eight years to study Greek sciences and philosophy, then returned to Baghdad and concentrated on teaching and writing for the next quarter of a century when the political upheavals of 942 forced him to seek refuge in Damascus. Two or three years later, political turmoil there drove him to Egypt, where he stayed until returning to Damascus in 948 or 949, a little over a year before his death.

Alfarabi's writings address all of the sciences and embrace every part of philosophy. He composed commentaries on Euclid's *Elements*, Ptolemy's *Almagest*, and Plato's *Laws*; wrote several pieces on the history and theory of music; and provided an account of Plato's and Aristotle's philosophy. Alfarabi also wrote numerous commentaries on Aristotle's logical writings and an extensive commentary on the *Nicomachean Ethics*, but the latter is no longer extant. His inquiries into the challenge to traditional philosophy presented by revealed religion, especially its claims that the creator provides for human well-being by means of an inspired prophet-legislator, are central to his attempts to formulate a new political science that combines theoretical and practical sciences along with prudence and thus to political philosophy within Islam. All this has come to light only in recent years as heretofore unknown writings have been recovered.

In *Selected Aphorisms* and the trilogy known as *Philosophy of Plato and Aristotle*, especially in its first part, *Attainment of Happiness*, Alfarabi constantly

points to knowledge as the key to sound rulership. Neither Alfarabi's Plato nor his Socrates looks to law when investigating political matters. Rather, they focus on cities and their ways of life, as well as on how different civic regimes lead their citizens to happiness or fail to do so. For Alfarabi, Plato "presented in the *Laws* the virtuous ways of life that the inhabitants of this city [i.e., the city that 'had been rendered perfect in speech' in the *Republic*] should be made to follow." Paying no attention whatsoever to the speeches of the Athenian Stranger about laws and their preludes or to the efforts of Clinias to lead the Athenian Stranger and Megillus to set down a body of law for the colony that Clinias has been charged by his own city with establishing, Alfarabi's Plato focuses solely on virtuous ways of life. Then, after explaining "what distinguishes the human perfection achieved by him who combines the theoretical sciences and the political and practical sciences, and what ought to be his rank in this city," in the *Critias*, *Timaeus*, and *Laws*, his Plato focuses on what is needed "to have this city realized in deed." Though this brings him closer to laws and lawmaking, insofar as he recognizes that "this is accomplished only by the legislator of this city," Alfarabi's Plato does not go further. As Alfarabi notes, "therefore he afterwards investigated how the legislator ought to be" and "that is to be found in his book that he called the *Epinomis*" (*Philosophy of Plato*, secs. 30–35).

Alfarabi's Aristotle does not focus on law either. Indeed, convinced that it is necessary to go back beyond Plato's starting point in order to investigate human perfection, Alfarabi's Aristotle starts from the perception that all human beings pursue four things "from the outset" and deem these things "desirable and good," namely, the soundness of the human body, the senses, the capacity to discern what leads to these two, and the faculty to bring that soundness about. Investigation into what kind of knowledge is needed to realize or establish these four things leads him to note that there is a difference between knowledge or science that is useful with respect to them and another kind that is "beyond the merely useful knowledge and that is desired for itself and not for anything else." Differently stated, Aristotle comes to recognize the difference between practical and theoretical science (*Philosophy of Aristotle*, secs. 1–2).

Alfarabi's account of Aristotle's subsequent investigations says nothing, however, of what the Stagirite learned about practical science. Indeed, it focuses exclusively on the way Aristotle founds the logical arts or sciences so as to gain a better understanding of what wisdom is and how it is acquired, as well as to discern the order of the theoretical arts. This shows him why wisdom is prior in rank and provides him with awareness of the way first premises are used in each of the arts of logic. Along the way Aristotle learns, moreover, what theoretical argument is and how it is to be carried out soundly (*Philosophy of Aristotle*, secs. 4, 7–11). After working his way through such inquiries and pausing momentarily to reflect on how rhetoric and poetics pro-

vide a means of instructing those not competent to engage in the other logical arts and of giving persuasive images in speech of things discerned through stringent reasoning, his Aristotle sets about investigating the world around him—the things perceived by the senses and their distinctions with respect to essence and accident, true and false reasoning about being and change, the relationship between matter and form, and the way things both come into being through an agent as well as have specific ends or goals (*Philosophy of Aristotle*, secs. 15–16, 17–23). This investigation of nature leads Alfarabi's Aristotle to recognize that such inquiry is inadequate for his purposes, that he must go beyond the study of nature to what is beyond nature. His metaphysical investigations permit Alfarabi's Aristotle to arrive at a correct understanding of human existence, especially of the human soul's longings.

Although Alfarabi's explanation of Aristotle's philosophical quest ends without any account of how he views practical science, he now speaks in his own voice to emphasize what became apparent to Aristotle "from the preceding," that is, from the inquiry as a whole and not simply from metaphysics. According to Alfarabi, "it has become evident from the preceding that it is necessary to investigate, and to inquire into, the intelligibles that cannot be utilized for the soundness of human bodies and the soundness of the senses." Such necessary knowledge stands in opposition to another, more human, kind of knowledge, namely, awareness of "the causes of visible things." Though the soul longs for or desires the latter, the former is necessary.

But Alfarabi has also learned that it is necessary precisely to obtain the latter. We seek the former "for the sake of" (*li-ajl*) the latter. Indeed, "the awareness we formerly supposed to be superfluous is not so, but is what is necessary for a human being to become substantial or to reach his ultimate perfection." This is a reversal so striking that Alfarabi adds immediately:

And it has become evident that the knowledge he [Aristotle] investigated at the outset just because he loved to and inspected so as to settle upon the truth about the above-mentioned pursuits has turned out to be necessary for attaining the political activity for the sake of which the human being has come into being. (*Philosophy of Aristotle*, sec. 99)

Now, then, it is imperative that Aristotle or those who have grasped what Alfarabi has said of his pursuits turn to practical science. To remove any doubt about its importance, Alfarabi goes on to explain—still in his own name—how the knowledge or science "that comes next is investigated for two purposes, one is to perfect the human activity for the sake of which the human being has come into being and the other is to perfect what we lack with respect to natural science." The reason for such a lack or deficit is that "we do not possess metaphysical science."

If this is Alfarabi's final word, it would appear that all of Aristotle's investigations have come to nought. Everything we learned about knowledge and the ways to it, plus the many things we learned about the world around us,

seem inconsequential and petty so long as we cannot attain the knowledge we now discern to be "necessary for a human being to become substantial or to reach his ultimate perfection." At this point, namely, the conclusion of Alfarabi's *Philosophy of Aristotle*, it is worth recalling its opening words with their sense of promise:

Aristotle sees the perfection of man as Plato sees it and more. However, because man's perfection is not self-evident or easy to explain by a demonstration leading to certainty, he saw fit to start from a position anterior to that from which Plato had started. (*Philosophy of Aristotle*, sec. 1)[12]

The point is that while we are aware of what we need to know and of its importance, we are equally aware that we do not have this requisite knowledge. This is precisely why Alfarabi notes in conclusion "therefore philosophy must necessarily come into being in every man in the way possible for him." Having admitted to a lacuna or deficiency in our knowledge of metaphysics, we are now obliged to wonder about the sufficiency of law, even revealed law, and to take it upon ourselves to consider lawgiving from the beginning.

Before turning to Alfarabi's otherwise questionable attempts to identify knowledge as virtue and as what alone permits sound rule in *Selected Aphorisms*, it is important to return momentarily to the discussion of philosophy that launched him on his curious account of Plato's and Aristotle's philosophy, that is, to the closing words of the *Attainment of Happiness*. The reason is quite simple: Alfarabi's attempt there, first to identify and then to explain "the human things through which nations and citizens of cities attain earthly happiness in this life and supreme happiness in the life beyond," brought him to discern the intimate relationship between philosophy and religion. As he puts it, "according to the ancients," both philosophy and religion

comprise the same subjects and both give an account of the ultimate principles of the beings. For both supply knowledge about the first principle and cause of the beings, and both give an account of the ultimate end for the sake of which man is made—that is, supreme happiness—and the ultimate end of every one of the other beings. In everything of which philosophy gives an account based on intellectual perception or conception, religion gives an account based on imagination [...]. Also, in everything of which philosophy gives an account that is demonstrative and certain, religion gives an account based on persuasive arguments. (*Attainment of Happiness*, secs. 1, 55)

Prior to this insight, Alfarabi had discovered that it is not sufficient to have an intellectual perception of supreme happiness or even of what constitutes it. No, in addition, it is necessary to know how to bring it about, to have a grasp of practical philosophy. By means of practical philosophy, we are able to bring

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[12] All of the other passages cited in this and the preceding two paragraphs are from sec. 99. In three places, I have altered the published translation slightly so as to achieve greater clarity.

into existence the things that depend on the will, providing, of course, that we have a clear grasp of them by means of theoretical philosophy.

Now, then, building on the clear importance of practical philosophy and the close relationship between religion and theoretical philosophy, Alfarabi notes that once the person who is intent upon bringing these voluntary matters into existence actually succeeds in doing so by stipulating the conditions needed, he then recasts these stipulations as laws. This line of reasoning leads him to speak less about the particular laws now brought into being than about the character of the person who sets them down:

Therefore the legislator is he who, by the excellence of his deliberation, has the capacity to find the conditions required for the actual existence of voluntary intelligibles in such a way as to lead to the achievement of supreme happiness. It is also evident that only after perceiving them by his intellect should the legislator seek to discover their conditions, and he cannot find their conditions that enable him to guide others toward supreme happiness without having perceived supreme happiness with his intellect. Nor can these things become intelligible (and the legislative craft thereby hold the supreme office) without his having beforehand acquired philosophy. Therefore, if he intends to possess a craft that is authoritative rather than subservient, the legislator must be a philosopher. (*Attainment of Happiness*, sec. 56)

The laws in question are identified not as divine laws (*sharī'a*, sing. *sharā'a*), but as conventional ones (*nawāmīs*, sing. *nāmūs*)—this being the usual way to render in Arabic the Greek term *nomoi* (sing. *nomos*). Similarly, the person referred to here as the "legislator" is more properly the "one who sets down the *nomoi*" (*wāḍi' al-nawāmīs*). And the term translated as "legislative craft" is, literally, the "craft of setting down conventions" (*mihna waḍ' al-nawāmīs*).

In and of itself, such terminology is not striking. Only the context makes it so. A few lines earlier, Alfarabi linked philosophy with religion insofar as both provide the same account of things, philosophy on the basis of an intellectual perception and religion on the basis of an imaginative one. Now, having established that practical philosophy allows one to bring voluntary things into existence and set them down as laws, Alfarabi brings religion together with both theoretical and practical philosophy by affirming "it follows, then, that the idea of Imam, Philosopher, and Legislator is a single idea" and then goes on to insist:

However, the name *philosopher* signifies primarily theoretical virtue. But if it be determined that the theoretical virtue reaches its ultimate perfection in every respect, it follows necessarily that he must possess all the other faculties as well. *Legislator* signifies excellence of knowledge concerning the conditions of practical intelligibles, the faculty for finding them, and the faculty for bringing them about in nations and cities. (*Attainment of Happiness*, sec. 57)

In other words, the laws that a spiritual leader, an *imam*, or even a prophet, enunciates on the basis of insight gained through religion or revelation are the same ones a philosopher-legislator would.

There is yet another step to this reasoning. Alfarabi continues his explanation as follows:

When it is determined that they be brought into existence on the basis of knowledge, it will follow that the theoretical virtue must precede the others—the existence of the inferior presupposes the existence of the higher. The name *king* signifies sovereignty and ability. To be completely able, one has to possess the power of the greatest ability. His ability to do a thing must not result only from external things; he himself must possess great ability because his art, skill, and virtue are of exceedingly great power. This is not possible except by great power of knowledge, great power of deliberation, and great power of [moral] virtue and art. Otherwise he is neither truly able nor sovereign. (*Attainment of Happiness*, sec. 57)

Syllogisms such as these allow Alfarabi to link seemingly disparate pursuits or activities more intimately and thus to declare: "So let it be clear to you that the idea of the Philosopher, Supreme Ruler, King, Legislator, and *Imam* is but a single idea." Indeed, were we to pause and reflect upon our speech, we would readily assent to the accuracy of the conclusion:

No matter which one of these words you take, if you proceed to look at what each of them signifies among the majority of those who speak our language, you will find that they all finally agree by signifying one and the same idea. (*Attainment of Happiness*, sec. 58, with slight modifications to the translation)

Now, then, to digress for a moment, we may begin to appreciate Avicenna's enigmatic explanation of the political philosophy attributed to Plato and Aristotle, especially the importance he claims they attached to the idea of law. In a small treatise entitled *Epistle on the Divisions of the Intellectual Sciences* (*Risāla fī Aqsām al-ʿUlūm al-ʿAqliyya*), presented as a response to someone who requested a concise, complete, clear, truthful, easily understood, well-arranged, and well-ordered account of the intellectual or rational sciences, Avicenna provides a general account of what constitutes wisdom (*ḥikma*). It is noteworthy that he substitutes this term for the more usual one of philosophy (*falsafa*). Although Avicenna himself says nothing about the substitution, it is evident that by using the term *ḥikma* as the equivalent of *falsafa*—which for all practical purposes it is—he speaks in a distinctly Arab or even Islamic voice and avoids any suggestion that the intellectual virtue in question is somehow dependent on Greek or pagan learning.

As presented in this small treatise, wisdom is the art of reflection needed for a human being to ennoble and perfect his soul and thus be prepared for acquiring ultimate happiness in the life to come (*Epistle*, 104:13–105:3). Like philosophy, wisdom admits of two divisions: theoretical and practical. Noting that there are three subdivisions to practical wisdom—one focuses on the human being as an individual, another on the household community, and the third on civic community—Avicenna identifies the aim of each, as well as the particular writings that shed greater light on what each is about. The subdivision focusing on the individual human being makes known what this individual's moral habits and actions should be so that he will have a happy life

both here and in the world to come; Avicenna pauses to note that Aristotle's *Nicomachean Ethics* encompasses this subject. The second subdivision makes known how a human being ought to govern his household so that his relations with his wife, children, and servants will be ordered in such a manner as to lead to the acquisition of happiness. Citing here Bryson's *On the Governance of the Household*, Avicenna notes that many others have also written on this subject. He does not suggest, however, that the proper management of the household has anything to do with leading a happy life in the world to come; its purview is uniquely limited to concerns of this world (*Epistle*, 107:5–15). The third subdivision identifies the different sorts of virtuous and vicious regimes, rulerships, and civic communities, as well as how to bring each one about; it also explains the cause of each one ceasing to exist and the way each is transformed.

Considerably narrowing the inquiry he has just set forth to the theme of kingship for a moment, Avicenna mentions that this topic is discussed in Plato's and Aristotle's books about politics (107:15–108:2). The reference, presumably, is to Plato's *Republic* and Aristotle's *Politics*, even though it is generally accepted that the latter work was never transmitted to the Arabs. He then adds, as though this will suffice for the rest of the inquiry into political science, that with respect to prophecy (*al-nubūwa*) and divine law (*al-sharīʿa*), Plato and Aristotle each have another book about conventional laws (*al-nawāmīs*). In other words, Avicenna places divine law on an equal footing with conventional law. What Alfarabi implies through equivocal use of terminology in the *Attainment of Happiness*, Avicenna makes explicit (*Epistle*, 108:2–3). Moreover, although the reference to Plato's *Laws* is evident, the book by Aristotle he has in mind is by no means clear.

Avicenna apparently understands happiness to be even less a concern of political science than of household management, for he says nothing at all here about it leading to happiness—not in this world nor in the one to come. He seems, instead, to consider that the main subjects of political science can be summarized as kingship, prophecy, and divine law. Indeed, he subordinates further explanation of what constitutes political science to his development of a thought related to this mention of books by Plato and Aristotle about conventional laws (*nomoi*). He is intent, above all, on explaining what the philosophers mean by *nomoi* and how that relates to revelation:

By *nomos*, the philosophers do not mean what the vulgar suppose, namely, that the *nomos* is a trick and deception. Rather, according to them, the *nomos* is traditional law, established and fixed example, and the coming-down of revelation. The Arabs, too, call the angel that comes down with the revelation a *nomos*. (*Epistle*, 108:3–6)[13]

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[13] To highlight the nuances in Avicenna's explanation here, I have translated the Arabic term *nāmūs* as *nomos* throughout the passage instead of as "law"; the Arabic term translated as "traditional law" is *sunna*.

Avicenna contends here, then, that the philosophers—and the context allows him to be thinking only of the pagan philosophers Plato and Aristotle—understand *nomos* in the same way as the Arabs—that is, the Muslim Arabs—understand it. Moreover, his assertion that these pagan philosophers view the *nomos* as traditional law (*al-sunna*) strengthens the appearance of harmonious understanding he seeks to create between them and those who have received revelation.

In the rest of the passage, Avicenna emphasizes the affinity even more:

This part of practical wisdom makes known the existence of prophecy and the need the human species has of the divine law for its existence, preservation, and life to come. It makes known the wisdom in the universal penalties common to [all] divine laws and in those [penalties] particular to one divine law or another, according to one people or another and one time or another. And it makes known the difference between divine prophecy and all of the false claims to it. (108:6–10)

When a comparison is made between this account of what the part of practical wisdom having to do with the larger human community—that is, political science—makes known and what Avicenna has to say shortly hereafter about what metaphysics makes known, the two appear to have many common concerns (see 112:12–114:8, 114:9–116:9). Though he does not explicitly set forth here how political science prepares one for human happiness, reflection suggests that it must do so insofar as it apprises us of the need we have for law, whether it be conventional law or revealed, that is, divine law.

Like Alfarabi, then, and here we return to the point from which we digressed, Avicenna clearly wishes to insist upon the harmony, unity of purpose, or ultimate affinity between philosophy, including its pagan manifestations, and religion. For both, however, the argument in favor of such a relationship between philosophy and religion is based on reasoning whose premises are by no means evident. The same holds for what both have to say about the purview of political science. Still, it is recognition of this problem or impasse that leads them to investigate the teaching of Plato and Aristotle more closely.

Having reached the point of discerning what characterizes true philosophy and the true philosopher, Alfarabi is nonetheless aware that what may be true in theory does not necessarily hold in practice. The problem he now faces is gaining recognition for his new understanding of the philosopher as both a political ruler and a spiritual guide, as a king and an imam. An equally, if not more, important issue—what to do when no use is made of this philosopher who epitomizes the highest grasp we have of what philosophy is all about—troubles him less. Nay, it troubles him not at all:

If after reaching this stage no use is made of him, the fact that he is of no use to others is not his fault but the fault of those who either do not listen or are not of the opinion that they should listen to him. Therefore the king or the imam is king and imam by virtue of his skill and art, regardless of whether or not anyone acknowledges him, whether or not he is obeyed,

whether or not he is supported in his purpose by any group; just as the physician is physician by virtue of his skill and his ability to heal the sick, whether or not there are sick men for him to heal, whether or not he finds tools to use in his activity, whether he is prosperous or poor—not having any of these things does not do away with his being a physician. (*Attainment of Happiness*, sec. 62, with slight modifications to the translation)[14]

In this passage, blame is clearly placed upon those who fail to recognize the merits of the philosopher who would also be king and *imam*. And Alfarabi has an explanation for their shortcoming: They do not understand what true philosophy is, that is, the philosophy he has so painstakingly set forth in this first part of the trilogy (*Attainment of Happiness*, sec. 63).

Alfarabi's goal in the two subsequent parts of the trilogy was, as we have seen, to present an account of philosophy as provided by Plato and Aristotle and also of the ways they set forth for its pursuit. We have now discerned that Alfarabi's portrait of the philosophy of the one as well as of the other culminates in a call for their quest to be continued, a call based on acknowledgment that knowledge about the most important things has not yet been acquired. But that is not the issue of most concern to us. Nor is Plato or Aristotle—at any rate, not Alfarabi's Plato or Aristotle—of any help to us for this more pressing inquiry, namely, gaining a better understanding of law and the way it is treated in the medieval Islamic philosophic tradition. For Plato and Aristotle, or at least for Alfarabi's vision of them, and thus for him certainly, law is subordinated to educating or training the citizens. Instilling good habits, the ones that derive from good dispositions and lead to good actions, is the key political goal. Though it is served by law, reflection on, or investigation of, law is secondary. This, at any rate, is the message that appears from these public or political writings by Alfarabi.

Before turning to Avicenna and Averroes, it seems necessary to cast an eye on how Alfarabi addresses the issue of law in his other political works. The only time reference is made to law in *Enumeration of the Sciences* V, it has to do with the definition of jurisprudence cited above. Even then, at issue are two mentions of the term lawgiver—or, more precisely, divine lawgiver (*wāḍiʿ al-sharīʿa*)—as part of the larger explanation of what characterizes the jurist and how his tasks depend upon the preliminary work of the lawgiver. The jurist accepts as valid what the lawgiver has set down, without questioning its origin or validity. His goal is simply to explain how what the lawgiver has already stipulated applies in particular cases and, on rare occasions, to infer how it might be extended to issues the lawgiver did not address.

Even in *Book of Religion*, a small treatise in which Alfarabi explores the multiple similarities between religion and political science and then proposes an entirely novel approach to both, his references to traditional law (*sunna*), divine law (*sharīʿa*), and the lawgiver (*wāḍiʿ al-sharīʿa*) are in keeping with

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[14] See also *Aphorisms*, aph. 32, for a similar, albeit slightly stronger, account.

what he says in *Enumeration*, *Philosophy of Plato and Aristotle*, *Selected Aphorisms*, and *Political Regime*. He urges that *sharī'a* and *sunna* are "almost synonymous" and that they "most often [...] apply to the determined actions in [...] religion" (*Book of Religion*, sec. 4). Indeed, in the rest of the exposition, Alfarabi treats the two terms as largely synonymous (secs. 5, 7, 10).[15] The only hint of a distinction between the two has to do primarily with a matter of degree or nuance. It centers on the way Alfarabi draws attention to the role of the first ruler, that is, to the one presented in the opening words of the treatise as founding the religion:

Religion is opinions and actions, determined and restricted with stipulations and prescribed for a community by their first ruler who seeks to obtain through their practicing it a specific purpose with respect to them or by means of them. (Sec. 1)

To differentiate between this first ruler or founder and those who follow him and apply the opinions and actions—the laws (*sharā'i'*)—he has set down, Alfarabi speaks of the latter as kings of tradition or of traditional law. Their rule may well be virtuous, but it continues what has already been established rather than bringing about something new.

[Political science explains] that virtuous rulership is of two types: a first rulership and a rulership dependent on it. First rulership is the one that first establishes the virtuous ways of life and dispositions in the city or nation without their having existed among the people before that, and it converts them from the ignorant ways of life to the virtuous ways of life. The person undertaking this rulership is the first ruler.

The rulership dependent on the first is the one that follows in the steps of the first rulership with regard to its actions. The one who undertakes this rulership is called ruler of the tradition and king of the tradition. His rulership is based on an existing tradition. (Sec. 14b)[16]

Alfarabi's *Virtuous City* or, more literally, *Principles of the Opinions of the Inhabitants of the Virtuous City*, serves the same basic purpose and covers many of the same subjects as his *Political Regime* (also known as *Principles of the Beings*). In fact, there are numerous instances of parallel passages in the

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[15]   In sections 9 and 10, Alfarabi's discussion of the art of jurisprudence and explanation of how the jurist approaches the law (*sharī'a*) set down by the lawgiver (*wāḍi' al-sharī'a*) are in perfect harmony with what he says about the subject in *Enumeration of the Sciences* V.

[16]   The rest of this section reads: "The first virtuous kingly craft consists of cognizance of all the actions that facilitate establishing the virtuous ways of life and dispositions in cities and nations, preserving them for the people, and guarding and keeping them from the inroad of something from the ignorant ways of life—all of those being sicknesses that befall the virtuous cities. In this sense, it is like the medical craft; for the latter consists of cognizance of all the actions that establish health in a human being, preserve it for him, and guard it from any sickness that might occur." Similarly, in Section 18, when setting forth "political science that is a part of philosophy" and its features (as distinct from political science that is not a part of philosophy, discussed in Sections 11–14d), Alfarabi explains the account it gives of "the first virtuous kingly craft," then adds: "The one dependent on it, whose rulership is based on tradition, does not by nature need philosophy."

two treatises. For this reason, perhaps, Alfarabi's discussion of law in the *Virtuous City* is highly similar to his discussion of it in the *Political Regime*, even to the point that in the *Virtuous City*, as in the *Political Regime*, he speaks only of divine and traditional law and makes no mention of *nomos*. Laws, divine or traditional, exist. They are eagerly followed by the good rulers in the virtuous city, but adamantly contested by different groups of citizens in the ignorant cities (*Virtuous City* 250:4–6 and 282:6–9, Arabic text; 251:4–8 and 283: 11–16, English).

Finally, almost in desperation, we turn to Alfarabi's *Summary of Plato's Laws* fully expecting to find in this work a detailed examination of law in all its various aspects. Alfarabi does, to be sure, speak frequently here of laws, especially conventional laws or *nomoi*, this term being reflected in the Arabic title of the work. And at times, when reflecting on the laws attributed to the gods by the Athenian stranger or his interlocutors, Alfarabi contrasts *nomoi* to divine laws and even to traditional laws. At most, his analysis of Plato's dialogue confirms the suspicion formed earlier that *nomoi* for Alfarabi are equivalent to the ways of life, moral habits, and states of character that he sees political science striving to develop among the citizens. Consider, for example, this observation:

Then the extended discourse on wars led him to mention many aspects of the advantages of the law: it enables a person to control oneself, to pursue the power to suppress evil things (both those in the soul and the external ones), and to pursue what is just. Moreover, he explained in this connection what is the virtuous city and who is the virtuous person. He mentioned that they are the city and the person that conquer by virtue of truth and rightness. He explained also the true need for a judge, the obligation to obey him, and how this promotes common interests. He described who is the agreeable judge, how he ought to conduct himself in suppressing the evil ones and protecting people from wars by gentleness and good administration, and that he should begin with what is most needed, namely, the lowest. He explained the true need of people for avoiding wars among themselves and the intensity of their inclination to avoid wars because this promotes their well-being. But this is impossible without adhering to the law and applying its statutes. When the law commands waging wars, it does so in the pursuit of peace, not in the pursuit of war—just as someone may be commanded to do something offensive because its final consequence is desirable. (*Summary of Plato's Laws* I.6)

Only the remark "then he mentioned that not everyone who wishes to legislate is a true lawgiver, but only the one whom God creates and equips for this purpose" stands out (I.14).[17] Even this, however, is perfectly in keeping with the explanation Alfarabi provides of the first ruler in the opening section of the *Book of Religion*:

If the first ruler is virtuous and his rulership truly virtuous, then in what he prescribes he seeks only to obtain, for himself and for everyone under his rulership, the ultimate happiness that is

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[17] The Arabic term translated here as "lawgiver" is *wāḍiʿ al-nawāmīs*, as distinct from *wāḍiʿ al-sharīʿa* or *wāḍiʿ al-sunna*.

truly happiness; and that religion will be virtuous religion [...]. Now the craft of the virtuous first ruler is kingly and joined with revelation from God. Indeed, he determines the actions and opinions in the virtuous religion by means of revelation. (*Book of Religion*, sec. 1)

Lest such an explanation alienate the reader, Alfarabi quickly goes on to explain what he means by revelation and how it comes about:

This occurs in one or both of two ways: one is that they are all revealed to him as determined; the second is that he determines them by means of the faculty he acquires from revelation and from the Revealer, may He be exalted, so that the stipulations with which he determines the virtuous opinions and actions are disclosed to him by means of it. Or some come about in the first way and some in the second way. It has already been explained in theoretical science how the revelation of God, may He be exalted, to the human being receiving the revelation comes about and how the faculty acquired from revelation and from the Revealer occurs in a human being. (Ibid.)

Differently stated, whether we think that the lawgiver receives a precise image of the laws that he then enunciates or a general idea that he himself refines, we call the process revelation. A fuller explanation of the process belongs to a different inquiry, one not open to most people.

9.4. Avicenna

Avicenna (Abū ʿAlī al-Ḥusayn Ibn Sīnā) (980–1037) was born in Afshanah, in what is now Uzbekistan, and his family soon moved to nearby Bukhara where he began his studies. Having proved himself in the study of the Quran and related works of literature by the age of ten, he turned to Indian mathematics and Islamic jurisprudence, then to the study of philosophy. Afterward, he read Porphyry's *Isagoge*, logic in general, Euclid, Ptolemy's *Almagest*, and eventually undertook the natural sciences and metaphysics. For the latter two pursuits, he claims to have read both the original texts—presumably Aristotle—and the commentaries. At the age of eighteen, he became a physician to the ailing ruler of Bukhara and gained access to his well-stocked library.

Avicenna composed his numerous works under unusually trying circumstances at an intense, almost frenetic, pace and used his medical knowledge to push his body beyond normal limits. After his father's death, Avicenna accepted an administrative post from this same ruler, then moved to other locales where he served as a jurist or practiced the art of politics in service to different minor rulers. Occasionally, he also managed the affairs of the widows of rulers and eventually came to serve as physician to Shams al-Dawlah, the Buyid prince of Hamadhan and Qirmisin. On two separate occasions he was named chief minister (vizier) to Shams al-Dawla. Avicenna is most noted for his multivolume *Book of Healing* (*Kitāb al-Shifāʾ*), a massive exposition of all of the sciences that acknowledges, but does not depend upon, Aristotle. Toward the end of his life, he became a companion and learned advisor to ʿAlāʾ al-Dawla in Isfahan and died in Hamadhan.

Apart from the reflections on law set forth in the short *Epistle on the Divisions of the Intellectual Sciences* already alluded to, Avicenna's most extensive statement about law and political science occurs in Book Ten of his *Metaphysics* at the very end of his major compilation, *Book of Healing*. Taking a cue of sorts from Alfarabi's *Enumeration of the Sciences*, Avicenna postpones his inquiry into politics until after having set forth an account of all of the other sciences, especially natural science and its sequel—metaphysics or divine science. This account in Book Ten of the *Metaphysics* consists of five chapters, and Avicenna's political teaching may be divided into three parts. In the first part, set forth in chapter one, he explains the unique qualities of the prophet and addresses indirectly the all-important question of why it is appropriate to subordinate politics to prophecy. In the following two chapters, he explains how the prophet sets forth a traditional law (*sunna*) containing precepts about God and the afterlife that are needed for a people to come together in communal association. Then in the final two chapters, he enumerates and defends the actual laws a prophet-lawgiver might make in order to regulate a community and prepare its citizens for happiness, both here and in the world to come.

Avicenna begins by noting that just as there is a hierarchy among the things existing in the world and among the beings, with human beings occupying the highest rank or representing what is best among the beings, so, too, is there a hierarchy among human beings. The best or most virtuous of human beings is he who has so perfected his soul as to become fully rational and acquire the practical moral habits permitting him to manage his own affairs in an excellent manner. Among those who reach this level of accomplishment, the prophet is the best (*Metaphysics*, 435:6–16). Having established this hierarchy, Avicenna turns to consider why human beings have to live in communities at all. Simply stated, we cannot survive, much less strive for virtue, when isolated from one another or even when associated in small groupings such as families. Merely to feed and clothe ourselves, we must enter into exchange relationships with other individuals.

To perpetuate such relationships and give them structure, we form cities and communities. It is then necessary for these larger associations to be regulated and for there to exist a standard on which exchange is based, in other words, for there to be law and justice. The law at issue is traditional law (*sunna*), and Avicenna uses an active participle of this term to identify the one who sets it down (*sānnin*). Identifying this individual as a prophet, Avicenna emphasizes that he must exist for the affairs of human beings to be properly ordered (441:3–12, 441:13–442:6). The prophet-lawgiver seeks to teach the citizens about the existence of God and what He is like, as well as about the need for them to obey Him in order to merit happiness in the life to come. As Avicenna puts it, this individual understands how exceptional he is and how unlikely it is that another like him will come along in the near future.

Throughout this exposition, Avicenna shows himself to be especially attentive to the immediate needs of human beings. Having started his explanation from the most basic consideration, association in order to provide for physical survival, he now notes that the prophet-lawgiver's provision for acts of worship contributes both to the preservation of his laws and to the well-being of the people. Struggle (*jihād*) against others in defense of the laws and travel to distant places or pilgrimage (*ḥajj*) are also conducive to the worldly concerns of the citizens (see 442:8–443:9, 455:1–13; also 443:16–444:14, especially 444:13–14; see also Avicenna, *The Soul*, 181:5–19, 183:4–17).

In the course of this exposition, Avicenna alters his terminology. The prophet-lawgiver is no longer merely a *sānnin*, that is, one who brings traditional law (*sunna*). Indeed, he has now become one who brings divine law (*sharī'a*), that is, a *shāri'* (*Metaphysics*, 444:17 with 441:13; see also 443:18). In keeping with such a change, the size of his potential community has imperceptibly increased: No longer concerned with mere cities and communities, his focus is now upon a nation (*umma*)—one of such a size that people may have to migrate or travel long distances in order to reach the spot designated as his abode. Even the time for which he wishes to preserve his laws and teaching has expanded. He now thinks it important for the people to remember these things for more than a century or two. Finally, he has also become aware of the need to differentiate between the vulgar or common people (*al-'āmma*) and the select or elite (*al-khāṣṣa*) in his laws and teaching. With respect to the former, he intends merely that the formal aspects of prayer help them remember God and the afterlife so that they continue to obey the traditional and divine laws. With the latter, however, it is the way these acts of worship help them train their souls for happiness in the afterlife that dominates his concerns. These acts help the select develop moral habits and positive dispositions that allow them to purify their souls, that is, gird their souls against desire for the bodily things preventing happiness in the life to come (444:16–445:1, 445:9–10, 445:7–446:7). In this respect, the prophet-lawgiver's teaching becomes so predominantly moral or ethical as to eclipse both its political and its religious content.

Avicenna returns to political considerations in the last two chapters of the *Metaphysics*. Though not presented in a rigidly systematic manner, the subjects seem to fall under ten major groupings. The first—provision for the city being divided into three parts or groups—and the last—a discussion of the moral habits and character traits that lead to justice—echo themes addressed by Plato and Aristotle, while those falling in between evoke Muhammad's early legislation and its development among the first caliphs. Throughout this discussion, Avicenna speaks consistently of the prophet-lawgiver as a traditional lawgiver—that is, as a *sānnin*—and only once uses the term that denotes a bringer of divine laws—that is, a *shāri'* (447:4, 451:13, 454:14; see also 450:7). In this latter instance, even though he clearly means to praise the

prophet Muhammad, he uses the term in the plural sense. He has no difficulty in acknowledging that more than one prophet has brought divine laws, but he insists Muhammad is the best of all who have done so. A similar kind of exchange occurs between the term for traditional law, *sunna*, and that for divine law, *sharī'a*, with the latter being restricted to the community having the best kind of laws. In fact, at the risk of contradicting himself, Avicenna speaks of the possibility for there to be many different systems of traditional laws in effect at a given time, but implies there can be only one divine law or *sharī'a* (cf. *Metaphysics*, 453:10–454:1 with *Epistle*, 108:6–10).

What this means is that even though Avicenna recognizes a plurality of traditional and divine laws, he insists on the existence of a hierarchy among them—and explicitly among the traditional laws. The prophet-lawgiver identifies the best traditional law with the divine law. That commonality or identity allows him to incite his own followers against those who cling to any other traditional law. For such people, it is better to perish than to live in thrall to a misguided law. Avicenna passes quickly over this consequence, but precision would not be amiss here: For him, adherence to a traditional law that resembles a divine one—a *sharī'a*—goes beyond the political, as does the bringer of divine laws (*sharī'*). In other words, Avicenna does not deem political life, even excellent political life, the highest human good.

Avicenna begins his account of the prophet-lawgiver's political ordering by noting that his first objective is to provide the city with three classes or orders: administrators, artisans, and guardians. Reminiscent as such an ordering is of Plato's *Republic*, Avicenna does not elaborate. Apart from explaining that the prophet-lawgiver also provides for a hierarchy of rulership within each group—without, however, establishing a hierarchical arrangement between these three groups—he says nothing more about them or the duties each is to perform. The major purpose of the ordering appears to be just that, ordering. To ensure that each citizen has an employment, a determined place, and a use in the city, the prophet-lawgiver imposes a rigid hierarchy. This, too, echoes a theme from the *Republic*, namely, that justice consists in each person having one job. Again, however, Avicenna lets the parallel stand without comment.

Nor does Avicenna discuss the kind of regime established by the prophet-lawgiver. This individual himself begins by providing for the needs of the community in his own person and has sufficient foresight to establish conditions for determining the rightful successor and his successors. He does not entertain the possibility that rule by a few virtuous individuals or even by the majority of the citizens might be preferable, for his goal is to preserve the traditional and divine laws that he first set down. The regime, then, is that of rule by one in accordance with the established law. Nonetheless, the law itself is very general. Here, with respect to practical matters, as earlier with respect to theoretical, Avicenna insists that the prophet-lawgiver confine himself to

general rules or prescriptions and leave the details to those who come after him (*Metaphysics*, 447:4–5, 454:2–14).

Avicenna concludes his account of political science by insisting that the lawgiver (*sānnin*) must set down traditional laws about the moral habits and character traits leading to justice. He presents justice as a mean, and further explains that a mean is likewise sought with respect to moral habits and character traits. It is sought either to break the hold of the passions so that the soul may be purified and liberated from the body or to use the passions to pursue appropriate worldly goals. Passing over in silence the issue of breaking the hold of the passions—perhaps because it has been adequately treated in *Metaphysics*, Book Nine—Avicenna concentrates on how moderation and courage help human beings function well in this world in that they, along with practical wisdom, lead to justice. Unlike theoretical wisdom, which never admits of a mean, practical wisdom consists in achieving a mean or a balance with respect to worldly affairs; its selfish pursuit to attain for oneself things one would thereby deny to others is denounced strongly. Although theoretical wisdom has nothing to do with justice according to this presentation, happiness cannot be acquired without it. In other words, as important as justice is for the proper conduct of human affairs, it is not the end. More intent on presenting the fullest view of human accomplishment here, Avicenna does not pronounce on whether theoretical wisdom without justice is sufficient to acquire happiness. He concludes by affirming the lofty status of the human being who manages "to win, in addition, the prophetic qualities," for "he becomes almost a human god." Clearly, it is he we should seek as our ruler.

9.5. Averroes

Averroes (Abū al-Walīd Ibn Rushd) (1126–1198) was an accomplished commentator on Plato and Aristotle, physician, practicing judge, jurist, princely advisor, and spokesman for theoretical and practical problems of his day. His great intelligence and profound accomplishments in jurisprudence, medicine, poetry, philosophy, natural science, and theology were recognized by fellow Muslims as well as by the Jews and Christians who first translated his writings into Hebrew and Latin.

Born in Cordoba, Spain, the son and grandson of noted judges, Averroes was educated in jurisprudence, medicine, theology, and the natural sciences. Known above all for his commentaries on the works of Aristotle—commentaries that range across the whole of Aristotle's corpus—Averroes also wrote a commentary on Plato's *Republic*. In his commentaries on Aristotle, he demonstrates a remarkable awareness of Aristotle's vocabulary as well as the Greek tradition of commentary. Yet he knew no Greek and frequently complained about the poor quality of the Arabic translations at his disposal. Moreover, he composed treatises on topics of more immediate concern to fellow Muslims:

The *Decisive Treatise* on the relationship between philosophy and the divine law and the *Incoherence of the Incoherence*, which is an extensive refutation of Alghazali's attack upon the philosophers.

Averroes had a very close relationship with the Almohad rulers, serving them as cadi, supreme cadi of Seville as well as of Cordoba, and as personal physician and trusted advisor in Marrakesh. Nonetheless, in 1195, he was punished, along with other notable scholars, for being overly occupied with philosophy and "the sciences of the ancients" and banished to Lucena, a small town near Cordoba, for two years. Returning afterward to the court in Marrakesh, he died the next year.

In the manner of Alfarabi, Averroes strives to prove the importance of understanding Plato and Aristotle for the pursuit of philosophy, and of philosophy itself for sound political life. In the manner of Maimonides, he alternates between writing as a philosopher and as a learned follower of a revealed religion. To gain some appreciation of the way he understands law, we must turn to each kind of writing. His *Commentary on Plato's Republic* and *Middle Commentary on Aristotle's Rhetoric* are especially representative of the first, while hardly anything could be more pertinent for the second than his famous *Book of the Decisive Treatise: Determining the Connection Between the Law and Wisdom*.

Because the *Commentary on Plato's Republic* has come down to us only in Hebrew translation, on which the medieval Latin version was based, it is better to begin by considering what Averroes has to say about law in the *Middle Commentary on Aristotle's Rhetoric*. For him, rhetoric is an art used to find the possible means of persuasion about any given subject and is addressed most frequently to a multitude or to those who have neither the time nor ability to follow a lengthy or complicated chain of reasoning. Consequently, the extent to which rhetoric can exhaustively investigate any given subject is limited. There are frequent allusions to the idea that rhetoric cannot delve more deeply into the subject at hand, or that in a particular discussion he has actually gone beyond the limits of rhetoric and begun an investigation proper to another art (*Rhetoric*, 33:1–14, 33:17–34:1, 39:8–9, 67:15–19, 71:5–7). Moreover, precisely because rhetoric is usually addressed to those too hurried or not able to follow lengthy and complicated arguments, it is closely linked with the political art.

Patterning the formal structure of his *Middle Commentary on Aristotle's Rhetoric* on Aristotle's *Rhetoric*, Averroes devotes an entire chapter to an inquiry into political regimes. He introduces the chapter by declaring the importance of considering the different kinds of regimes, and speaks about the relationship between laws (*sunan*) and justice in two kinds of regime: The regime of force (*siyāsat al-taghallub*) and democracy (*siyāsat al-ḥurriyya*) (*Rhetoric*, 67:21–68:13). He then enumerates and examines the different kinds of regimes, explores the various laws that can be set down, identifies the ends of

each regime, inserts an explanation to the effect that existing regimes are in reality mixed regimes, suggests the importance of knowledge about the moral qualities and characters for rhetorical discourse, and concludes—almost in contradiction to what has preceded—by noting that a fuller examination of these matters is to be found in political discussions.

Within the context of discussing aristocracy, literally, the regime of good dominion (*siyāsa jūdat al-tasalluṭ*), Averroes explains why it is excellent:

Aristocracy is dominion that takes place in accordance with education about, and imitation of, what is prescribed by law. Thus those who advise according to what law prescribes are the ones who have aristocratic dominion. This is the dominion by which the well-being of the citizens and human happiness is attained. Therefore, these [rulers] possess virtue and are capable of the actions that improve the city; and they possess discernment and are wary of whatever might corrupt the city from without or from within. (*Rhetoric*, 69:7–12; see also Aristotle, *Rhet.* I.8.1365b22–1366a22)

Averroes' comments expand upon Aristotle's observation that authority in an aristocracy is in the hands of those who possess a certain education and who follow the prescriptions of the law. But he does not go beyond the sense of law as Aristotle uses it here.[18]

Later, when commenting upon Aristotle's classification of just and unjust actions according to particular and common laws, Averroes is very assiduous about the divisions. He speaks of law particular to one group or another within the city as opposed to those common to all within the city. And, like Aristotle, he speaks also of written and unwritten laws, characterizing the latter as "those that are natural to all" (*Rhetoric*, 107:16–19). Here, too, the term Averroes uses is *sunna*.

In the *Commentary on Plato's Republic*, Averroes refers to several kinds of law, including divine law (Hebrew *tōrah*, clearly for an original Arabic *sharī'a*) (26:16).[19] Most interesting, however, is his reference on at least two occasions to something called human law or, more literally, human divine laws (*tōrōth enūshiyōth*, that is, *sharā'i' insāniyya*) (*Republic*, 26:16, 63:1). This human law seems to be something like basic natural law and is distinct from both conventional law (*nomos*) and divine law. Traditional law is never discussed, not even as an equivalent for *nomos*. Since the totally unprecedented human law or human divine law is presented with so little fanfare, it may be no more than the Hebrew translator's attempt to find an equivalent for *sunna*, that is, traditional law.

The only law Averroes is concerned with in *Decisive Treatise* is divine law (*sharī'a*). From the subtitle of the work, as well as from the opening words, it

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[18] What Aristotle denotes here as *nomos*, Averroes refers to as *sunna*. This is in keeping with the way the Arabic translation of Aristotle's *Rhetoric* renders the Greek *nomos*; see Aristotle, *Rhetoric*, ed. Badawī 1959, 36–8.

[19] Page and line references are to the edition of the Hebrew text, the Arabic not being extant; see the translation by Rosenthal 1956.

is manifest that he seeks to plead here the case of philosophy before the tribunal of the divine law:

Now the goal of this statement is for us to investigate, from the perspective of Law-based reflection, whether reflection upon philosophy and the sciences of logic is permitted, prohibited, or commanded—and this as a recommendation or as an obligation—by the Law. (*Decisive Treatise*, sec. 1)[20]

The first part of this treatise is devoted to that task, the second to explicating the intention of the divine law. To emphasize how much importance he attaches to this latter task, Averroes begins by declaring, for the first and only time in the *Decisive Treatise*, that here is something "you ought to know" (sec. 38), namely, that "what is intended by the Law is only to teach true science and true practice." Defining true science as "cognizance of God," of "all the existing things as they are," and of "happiness […] and of misery in the hereafter," he presents the Law as providing the all-important cognizance of the hereafter that philosophy has not been shown to provide. Moreover, insofar as the Law makes us acquainted with true practice, it brings about (or at least intends to bring about) unity between knowledge and action.

Addressed to all and intended to teach true science and practice to all, the Law contains different methods for achieving these ends. Too often, the primary intention of the Law—namely, "taking care of the greater number without neglecting to alert the select [few]"—is neglected (sec. 40). Given such disparity among the natural capacities of people, and thus the impossibility of all having the same degree of understanding or being open to the same methods of instruction, the Law must have different ways to speak to these dissimilar interlocutors. That is, the Law must admit of interpretation.

Why Averroes places such emphasis on the intention of the Law and the way it speaks to all the people comes to light once he begins to point out how those who fail to discern this intention and use the wrong kind of speech in speaking to the multitude actually lead them astray—that is, to unbelief—and that leading others to unbelief is itself a form of unbelief. Lest his goal here be misunderstood, Averroes resorts to a rhetorical image or parable of his own: He who declares interpretations to those not apt to receive them is like the one who dissuades people from following a physician; whereas the physician urges them to adopt actions for preserving health and avoiding sickness, this other person causes them to become sick. Like the physician, the Lawgiver seeks the health of the people, that is, the health of their souls. Hence to claim

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[20] In his justly famous manual of law, Averroes explains that the jurists acknowledge the judgments of the divine Law to fall into five categories: obligatory (*wājib*), recommended (*mandūb*), prohibited (*maḥẓūr*), reprehensible (*makrūh*), and permitted (*mubāḥ*). Here, however, he groups the first two under a more comprehensive category of "commanded" (*ma'mūr*) and—perhaps since it is not applicable to the present question—passes over "reprehensible" in silence; see *Bidāyat al-Mujtahid*, 1: 17–18.

that what he says is not true on the surface and can be interpreted amounts to dissuading the people from pursuing the health of their souls. Because those who make this claim neglect to add that only certain people under certain conditions may seek to interpret the Law, they lead the many into sickness. Part of their error is their failure to consider the intention of the Lawgiver. Putting their own intention first and failing to ask about that of the Lawgiver, they lead astray even when their interpretation and intention are sound. When these are unsound, they risk leading the people to doubt whether there is health or sickness, even whether there are things conducive to health and such as to avert sickness (*Decisive Treatise*, secs. 48–9).

Averroes insists that his image or parable is very accurate, even certain (sec. 50). What gives it this status is the link between the physician and the Lawgiver, for the health of souls to which the Lawgiver aspires is piety, namely, the piety that is linked with true practice, the teaching of which is said to be intended by the Law. How philosophy provides the best understanding of the intention of the Law and the Lawgiver, and ensures that it will be followed by the people, has now been shown. In addition, the critics of philosophy have been revealed to be incapable both of discerning this intention and of furthering it. Averroes now brings the argument full circle by affirming that knowledge of the health intended by the Lawgiver is precisely what is needed for happiness in the hereafter. As is now perfectly evident, only the philosopher proves himself able to speak to such happiness and to urge the many to seek it in accordance with the intention of the Lawgiver and the Law. And, according to Averroes, only the philosopher is capable of sound interpretation, that is, of "the deposit mankind was charged with holding and held" (*Decisive Treatise*, sec. 51; see Quran 33:22).

9.6. Maimonides

With this account of the lawgiver as physician of the soul and divine law as its medicine, Averroes brings us back to the suggestion made by Alfarabi in *Selected Aphorisms* that the true physician of the soul is the statesman or king and that for either to perform this task it is necessary to have philosophy. It is an account or suggestion with which Maimonides is in full agreement, but on which he does not dwell.

Moses Maimonides (Moshe Ben Maimon) (1135–1204) was a legal scholar, community leader, philosopher, and physician. Born in Cordoba, Spain, Maimonides and his family moved to Morocco and then Cairo, Egypt, to escape the harsh rule of the zealous Almohads. In Cairo, Maimonides became attached to the Sultan's court as a physician and divided his time between medical duties, scholarly pursuits, and tending to the Jewish community.

He is best known for his commentary on a rabbinic law code, the *Mishnah*; his codification of the whole of Jewish law, the *Mishneh Torah*; and his extraor-

dinarily complex and richly philosophical explanation of scripture and theology, *Guide of the Perplexed*, addressed to one of his favorite students. In addition, he is known for *Treatise on the Art of Logic*, based on Aristotelian premises, and for several epistles written in response to particular requests. These, like the *Mishnah* and the *Guide*, were written in Arabic. But since it was an Arabic composed in Hebrew letters, Maimonides' works were closed to Arabic readers who did not also know Hebrew. Though he was a highly accomplished student and exegete of Aristotle, he wrote no commentaries on Aristotelian works.

Maimonides' goal, both in *Guide of the Perplexed* and *Eight Chapters*, is to dispel the doubts arising from the study of philosophy that trouble the more thoughtful of his students. Its pursuit obliges Maimonides to interpret scripture as well as to point out the errors of his predecessors. Thus, Maimonides considers the philosophic teaching that the virtuous man is better than the continent man insofar as the latter "does good things while craving and strongly desiring to perform bad actions" or "does good things while being troubled at doing them" ("The Sixth Chapter," in *Eight Chapters*, 78–80). Though this agrees with what one finds in the divine law, it is questioned by some of the sages in the Jewish tradition. Thus, in contrast to the Biblical "a joy to the righteous is the doing of justice, but dismay to evil-doers" (ibid.), is the Rabbinic saying that "the reward is according to the pain." Indeed, the Rabbis go further and forbid any believer to claim not to want to commit a transgression. Following the precepts of the faith is burdensome and is to be considered as such. The reward of the pious is proportionate to the pain he endures for the sake of his piety.

To resolve the conflict, Maimonides points to the difference between the actions deemed bad by the philosophers—namely, the things "generally accepted by all the people as bad" (ibid.)—and those deemed bad by the rabbis—namely, the traditional laws. Of the former, it may be said "if they were not written down, they would deserve to be written down." The latter, however, concern matters that people of the faith deem themselves bound to obey, for example, religious statutes such as not eating meat with milk. Of these, the rabbis say that "statutes which I have prescribed for you, you have no permission to investigate," that is, to question. It is difficult to observe statutes like these, and there is no wrong in wanting to do what they forbid. On the other hand, it is wrong to want to murder another person, steal from him, hurt an innocent person, be disrespectful to parents, and so forth.

This explanation allows Maimonides to criticize those who call the generally accepted things (*al-mashhūrāt*) rational or intellectual laws (*sharā'i' al-'aqliyya*), on the grounds that they unduly confuse matters by such terminology. These are not rational or intellectual laws, says Maimonides. Rather, the statutes or commandments set forth in scripture are properly rational laws. Of note here is that the constant term used by Maimonides for "laws" is *al-sharā'i'*, even when something like traditional laws (*sunan*) would be more ap-

propriate. The term he does use for traditional laws, and which would not correspond to what rational laws signify, is *al-sharā'i' al-sam'iyya*, literally, "heard divine laws" or "aural divine laws."

For the reasons noted above with respect to Jewish philosophers in general, Maimonides stands apart from the Arab philosophers in that he has little to say about law and its relationship to political rule. In the introductions to the *Guide*, he is at pains to indicate that the work has two purposes and is directed toward a particular kind of addressee. It is, above all, a book the learned can use to overcome perplexity. Yet its goal is not to present the simply right view of the divine law, nor to reveal Maimonides' own personal views about it.

The first or primary purpose of the treatise is to provide an "explanation of the meanings of the names that occur in the books of prophecy." Such an explanation is not meant for everyone, but only for the kind of person whose faith is settled in his soul. About this Maimonides is adamant:

[T]he purpose of this treatise is to give an indication to a man of religion for whom the soundness of our Law has humbled his soul and been attained in his belief, he being perfect in his religion and moral habits and having speculated about the philosophical sciences and come to know their meanings. (*Guide* 2b–3a)

In other words, not "knowledge of the Law in truth," but something that points to the soundness of the divine law, perhaps because the former is too massive a goal. And it points to the soundness of the divine law for someone who has become perplexed about its superficial aspects, someone for whom there must be a deeper or hidden meaning. Problems arising from a surface reading will cause such a person to lose his faith if they are not corrected.

The second purpose of the work is "to explain exceedingly concealed examples occurring in the books of the prophets" (*Guide* 3a). The emphasis is on the books of the prophets as distinct from other parts of scripture because Maimonides has as his goal taking the thoughtful individual beyond the perplexity arising from superficial interpretation of these perplexing works. The Guide will attempt to remove most, but not all, of the difficulties in scripture, especially those concerning the account of the beginning, which has to do eventually with natural science, and the account of the chariot, which is divine science (*Guide* 3b–6a).

The discourse or discussion in the *Guide* is directed to "someone who engages in philosophy" and who "knows true sciences while believing in the matters of the Law and is perplexed about the meanings leading to perplexity with respect to the equivocal nouns and the examples" (*Guide* 6a). In other words, belief in the divine law is a basic condition for Maimonides' intended reader. This is not a book for philosophers as such, but for believers whose awareness of philosophy and the sciences leads to doubts about things they would otherwise accept without question in the faith. At no point does

Maimonides reach beyond society to polity. He is concerned with the things that he can influence, and politics is not one of them.

When Maimonides turns to the Book of Job, for example, he sees the story as "a parable to make clear the opinions of the people with respect to providence" (*Guide* 44b). For Maimonides, the story shows that moral virtue is not sufficient; wisdom is needed to understand the ways of the Lord. Job mistakenly equates piety with wisdom and righteousness with understanding. Righteousness, however, is not enough; rather, Job—and we—must come to the recognition that God does what He wills. Period. We must recognize the great disparity between us and God. From Maimonides' explanation, it appears that the whole purpose of the Book of Job is to explain how God's knowledge and providence differ from our knowledge and providence, yet to do so by arguing from natural phenomena (*Guide* 51a–b). In the end, then, the wisdom Job learns is not to question God or God's ways. He comes to see how insignificant he is in comparison to God and, more important, how little he can discern God's purposes. This explanation, like so many other passages in the *Guide*, sets Maimonides apart from all of his Arab predecessors with the possible exception of Averroes, just as it sets Hobbes and Melville apart from Maimonides. Indeed, insofar as they both try to tame Leviathan, to be his master, they have an entirely different—a completely modern—view of politics and law. For Maimonides, political power is out of reach for faithful Jews. Speculation on law, natural or conventional, is less important than understanding the basic law—divine law as given to the Jewish people at Sinai.

9.7. Conclusion

This examination of what jurists and philosophers within the medieval Jewish and Islamic traditions have to say about the philosophy of law shows that, for the most part, whatever term is used to denote law, it stands in for what ancient Greek philosophers termed *nomos*. The divine law is not questioned, not even by the philosophers. Rather, every attempt is made to understand what its purpose or goal is, that is, what the intention of the lawgiver might be. And the inquiry usually points to the conclusion that all lawgivers—those who claim to have divine inspiration as well as those who seem to be philosophically inspired—intend the same thing by their laws: the health of the soul.

Further Reading

For English readers, Lerner and Mahdi 1963 is far and away the best single source for excellent translations of texts by the philosophers in the Jewish and Islamic traditions. It is now supplemented by the translations of Alfarabi's *Philosophy of Plato and Aristotle* by Mahdi (2002) and political writings by

Butterworth (2001 and forthcoming), of Averroes' *Decisive Treatise* by Butterworth (2001) and *Averroes on Plato's "Republic"* by Lerner (1974), and of a number of ethical writings by Maimonides by Weiss and Butterworth (1975). The best translation of Maimonides' justly famous *Guide of the Perplexed* is by Pines (1963), and the introductions by both Pines and Strauss are invaluable.

Thanks to the careful work of Anawati (1952), Druart (1998), Mahdi (1968 and 1971), and Najjar (1971), and Najjar and Mallet (1999), excellent editions of the political writings of Alfarabi and Avicenna are now available. Atāy's painstaking 1974 Arabic edition of Maimonides' *Guide* is also an invaluable tool.

If any single individual is responsible for focusing learned attention on Alfarabi's importance as the founder of political philosophy within the Islamic tradition, it must be Strauss with his pathbreaking 1935; 1936a; and 1936b German and French studies, and with his rephrasing of the *Farabi's Plato* 1945 study and further exploration of the theme in 1952. The English translation of Strauss 1935 now permits a wider audience to judge the merit of those earlier insights. The recent study of Alfarabi by Mahdi 2001, the fruit of five decades of scholarly endeavor, makes evident Alfarabi's importance.

Hallaq (1993) and Khadduri (1961) have provided yeoman service through their translations of the juridic texts of Ibn Taimiyya and al-Shāfiʿī, respectively, as has Twersky (1980) with his introduction to Maimonides' compilation of the Law. To study Islamic jurisprudence with any hope of success, one must begin with Schacht 1964 and Coulson 1964, then move to Rahman 1968. The study by Lambton (1981) of the political thought set forth by the jurists is also of some value, and that by Black (2001) is less reliable.

Gibb 1955 and Lewis 1960 remain ever reliable preliminary informants, but it is to Hodgson 1974 and Hourani 1991 that we must eventually turn for the fullest and most complete account of the all too elusive medieval Islamic world, as well as for the place of Jews and Jewish authors within it.

THE REVIVAL OF ROMAN LAW AND CANON LAW

by Thomas M. Banchich, John Marenbon, and Charles J. Reid, Jr.[1]

10.1. The *Digest* of the Emperor Justinian

The *Digest* (or *Pandects*), promulgated at Constantinople on December 16, 533, by the Roman emperor Justinian (527–565, born ca. 482), is perhaps the most influential text in the history of Western legal thought. Together with Justinian's *Code* (promulgated on April 7, 529, with a second edition in 534), and his *Institutes* (533), it constituted what in the sixteenth century came to be known in Western Europe as the *Corpus of Civil Law* (*Corpus Iuris Civilis*). Justinian's *Novels* (or *New Constitutions*)—imperial pronouncements from 535, supplemented by post-Justinianic directives from as late as 575—together with the *Digest* and *Code* are our principal sources for the philosophical underpinnings of Justinian's conceptualization of his legislative activity; for the philosophy of law that animated Tribonian, architect of the actual codification; and for the philosophy of law implicit in the finished text of the *Digest* itself.

An appreciation of the first of these interrelated concerns requires the setting of Justinian's legislation within the framework of his reign. For about a decade before he became sole emperor in 527, Justinian was able to contemplate with reasonable certainty the prospect of his eventual rule, to identify what to him seemed to be the major challenges he would face, and to formulate responses to those challenges, all with a self-assurance based on the financial and military strength of the empire that would be his and on the conviction that the empire of Rome was an integral part of a Christian cosmic order (Browning 1971, 87–9). Once emperor, Justinian not only knew what the moment required, but knew that what was required was, in fact, possible (Honoré 1978, 20). Furthermore, Justinian believed that the impetus for his military and diplomatic policies, his push to define and impose an empire-wide Christian orthodoxy, and his activity with respect to law all derived equally from the Christian God (*Dig.*, *Const. Deo Auctore 2*; *Const. Tanta*; *Const. Dedôken*, Prologue).[2] In all three instances, Justinian viewed himself as God's agent.

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[1] Section 10.1 of this chapter was written by Thomas M. Banchich; Sections 10.2–4 by John Marenbon; and Section 10.5 by Charles J. Reid, Jr. All translations are by the authors unless otherwise indicated.

[2] These constitutions, each traditionally referred to by its opening words—*Deo Auctore*, *Omnem*, and *Tanta*, the third also in a Greek version, the initial word of which is *Dedôken*—precede Book I of the *Digest*. For translations, see *The Digest of Justinian*, ed. Watson 1998, vol. 1: xliii–lxxi.

But if such was the case, was the will of the emperor, linked as it was to God's will, to be presented as superior to existing law and as the font of future legislation? Was the emperor—God's legislator—to be above the law? Justinian's answer was to maintain that his legislative capacity rested not only on God's favor but also on Roman legal tradition itself, and that the former trumped any trace of dissent in the latter. Indeed, whatever authority resided in the writings of classical Roman jurists was now the result of imperial fiat, part of the *raison d'être* of the *Digest* itself being the arrogation of its contents to the will of Justinian. This had obvious implications, too, for the interpretation of law, future disagreements about which the emperor would resolve. *Codex Justinianus* I.14.12 (as quoted in Dvornik 1966, vol. 2: 720–1) of October 30, 529, is the earliest espousal of this position; *Novels* 105.2.4 is the pointed declaration of its logical correlate that God has dispensed the sovereign—or, in the prolix verbiage of the constitution, "the fortune of the sovereign"—to men as "law animate."[3] The emperor's legislative function was of necessity ongoing, for, while justice might be unchanging, laws, which were only approximations of justice, had to have their application in the realm of becoming, of change both contingent on historical processes and, indeed, inherent in nature itself.

Now things divine are entirely perfect, but the character of human law is to hasten onward, and there is nothing in it which can abide forever, since nature is eager to produce new forms. We therefore do not cease to expect that matters will henceforth arise that are not secured in legal bonds. Consequently, if any such case arises, let a remedy be sought from the Augustus, since in truth God has set the imperial function over human affairs, so that it should be able, whenever a new contingency arises, to correct and settle it and to subject it to suitable procedures and regulations. (*Const. Tanta* 18)

New imperial constitutions would be the vehicles for such changes. The *Digest*—"a handsome work, consecrating as it were a fitting and most holy temple of justice" (*Const. Deo Auctore* 5)—was to be sacrosanct. There were to be penalties for any alteration of its text, a prohibition extended even to the use of ligatures and sigla. Though allowance was made for literal translation from Latin to Greek, commentaries were forbidden (*Const. Deo Auctore* 12–13; *Const. Tanta* 21–2/*Dedôken* 21–2). Once created, the *Digest* was to remain "a single beautiful form" (*Const. Dedôken*, Prologue: "*mian … kallous idean*"), its multiple copies identical, its mandated number of fifty books reflective of perfection, its propaedeutic the *Institutes* (*Const. Omnem*).

Tribonian (d. ca. 542)—Justinian's "minister for legislation and propaganda" (Honoré 1978, 69) and who, as a devotee of the cultured Gaius and Ulpian, considered these classical jurists to be repositories of legal wisdom—

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[3] *Nomos empsychos* in the Greek version, see *Novels*, 507, lines 9–10; *lex animata* in the Latin, see *Novels*, 507, lines 7–8. For comment and translation, see Dvornik 1966, vol. 2: 722. On the history of the concept of a ruler as law animate, see Steinwenter and the references under *nomos empsychos* at Dvornik 1966, vol. 2: 965.

determined much of the selection and form of the *Digest's* content. In the process, he ensured the status of the law as an object of intellectual reflection, in consequence of which one could become *learned*, rather than simply *trained*, in law. The authority of Tribonian and his associates derived from Justinian's command, just as the command of former emperors had empowered earlier jurists to compose and interpret laws (*Const. Deo Auctore* 4 and 6). Part of Tribonian's charge was to formulate a canon of juristic authorities. Material in their texts which was "incorrectly written" (*non recte scriptum*) was to be emended and the emended text treated as though it was what had originally been written (*Const. Deo Auctore* 7). Though the stated motive was the removal of contradiction and ambiguity, evidence from the *Novels* suggests that Tribonian's editorial decisions were sometimes calculated to benefit his sovereign, and the degree to which this is so betrays a conception of law as a means of historical legitimization of a rule that, in reality, was based on wealth, privilege, and power (Maas 1986, 17–28). Tribonian's intellectualism may also lie behind a concern, most evident in the *Digest* and *Novels*, for the relationship between legislation as a reflection of eternal verities and the practical application of law in the mutable realm of becoming (Lanata 1984, 165–245; Maas 1986, 28–31).

Finally, the *Digest*, as text, gave to those who consulted and still consult it some intimations of its own about the meaning of law. Its Latin, in sixth-century Constantinople no less than today, afforded striking testimony of a conception of the formulation of law not so much as visionary progress, which leaves the past in its wake, as a backward-looking process: law is conservative. Furthermore, as reflected in the then-striking attention to chirography within each volume and between each copy, law is internally consistent. Yet this expectation created a problem; for, despite Justinian's injunction that there was to be "no antinomy […], but […] total concord, total consistency, with no one raising any opposition" (*Const. Deo Auctore* 8), real or simply perceived inconsistencies in the *Digest* remained. Most famously, there seemed to be two different views of the relationship between nature and law—that of Ulpian, for whom "natural law" (*ius naturale*) was "common to all animals" but "law of nations" (*ius gentium*) "only to human beings among themselves" (*Dig.* I.1.1), and that of Gaius, for whom *ius gentium* was "that law which natural reason [*naturalis ratio*] has established among all human beings [and is] among all observed in equal measure" (*Dig.* I.1.9). Likewise, though Justinian may have been convinced of his position with regard to law, the *Digest* preserved the notion of a consensual relationship between ruler and ruled (*Dig.* I.4.1). If one extrapolated from the *Digest* and accepted the principle that law should not admit of contradiction, some explanation was in order. One might, upon reflection, appeal to God's legislator; however, with the end in Western Europe of an *imperium* centered in Constantinople, the identification of that figure came to involve philosophical problems of its own. On the other hand, if contradiction within the *Digest* was illusory, one might expose underlying

concord through study and argumentation, a process upon which a broad range of interpretative approaches—for example, philological or historical—could be brought to bear. Whatever the reactions, whatever their results, they sprang partly from the contemplation of the *Digest* as text.

But all this was in the future. When, in 533, Justinian promulgated the *Digest*, he saw mirrored in its pages a Roman *imperium* situated more securely than ever in a divine cosmos and for which he, as sovereign, legislated as God's agent.

10.2. The Varieties of Medieval Law

During the early Middle Ages, especially the twelfth century, the study of law developed, changed, and grew so rapidly that some writers have spoken, with only slight exaggeration, of a "legal revolution." Legal historians have often been keen to find links between this rapid development of law and the philosophy and theology of the time; Peter Abelard (1079–1142), in particular, is frequently mentioned. Yet this attention to the early medieval philosophers has been focused on their role as influences and sources, or even as examples of a "mentality," that underlay the legal developments (Boureau 1992). The main aim here, by contrast, is to set these philosophical developments into the context of legal developments by looking at the different varieties of law in the period.[4]

When, from the fifth century onward, Germanic tribes took control of large parts of the Western Roman Empire and settled there, they brought with them their own customary laws, largely concerned with avoiding feuds by prescribing monetary compensations for injuries. At first, the application of these laws was personal: The Goths or Franks, for example, were subject to Gothic or Frankish law, but the Gallo-Roman inhabitants of an area would be judged according to Roman law. Indeed, the Burgundian and Visigothic kings in Gaul issued collections of Roman law, based on earlier Roman materials, such as the *Lex Romana Visigothorum* ("Breviary of Alaric") of 506, for their Roman subjects (Stein 1999, 30–2). By the end of the ninth century (in many places far earlier), law had become territorial, rather than personal: usually a version of customary law, more or less influenced by its contact with Roman law. Roman law continued to apply to Rome itself and Ravenna.

Customary law tended to be unwritten and local. But some rulers in the earliest medieval centuries had the laws of their people set down in writing: For example, the edict of Euric, king of the Visigoths (ca. 475), influenced by Roman models; the *Lex Salica* (ca. 500) and Charlemagne's revision of it nearly 300 years later; and the *Lex Barbara Visigothorum* of the mid-seventh

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[4] See Chapter 11 of this volume for the philosophical developments that took place in this legal context.

century. These codes were by no means systems of law. They were mainly concerned to list in minute detail the different monetary penalties for various sorts of harm done to different types of person. Between the late-ninth century and the late-twelfth century, little codification of customary laws took place in most of Europe. It was not until the later-twelfth century that, influenced by the developments in Roman law and canon law (see Sections 10.3 and 10.4 below), rulers began to see themselves, as they had not during the preceding centuries, as lawgivers. Codes of law for many countries and cities of Europe were subsequently issued in the thirteenth century; the first, large-scale example was Frederick II's codification of the laws of Sicily, the *Liber Augustalis* of 1231 (Wolf 1973; 1983).

Lombardy and England are, in different ways, exceptions to the general pattern. In the eleventh century there was a law school at Pavia, dedicated to glossing, often with reference to Roman law, the Lombard and Frankish capitularies contained in the eleventh century *Book of Pavia* (*Liber Papiensis*) (Weimar 1973, 165; Stein 1999, 45). England had a continuous tradition of written law, stretching back at least to the reign of Alfred (871–901). In 1066, upon conquering England, the Normans thus found a system of law vastly more sophisticated than their own. The conquerors' laws did not displace those of the Anglo-Saxons; rather, the two systems meshed (Lyon 1980, 180–99). The early Anglo-Norman kings were not great legislators, but during the reign of the Angevin Henry II (1154–1189), English customary law underwent a remarkable development, directed by the king and his advisers. As well as introducing new laws, in order to deal with unjust seizure of property and with succession, Henry instituted a system of regular visiting royal justices and introduced the system of returnable writs, which enabled any freeman to have access to the king's courts. He is also credited with establishing the jury system. In 1179, he ordered that defendants in cases involving property rights might opt for trial by jury rather than trial by battle. By the end of Henry's reign there existed the beginnings of English common law, deriving from customary law but subjected to central, royal authority (Pollock and Maitland 1923, 136–68; Stenton 1964, 22–87; Milsom 1981, 11–36).

Alongside the relics of vulgar Roman law, customary law, and royal law, there was also feudal law. In the years after 900, in the absence of central power after the break-up of the Carolingian Empire, there grew up a system of land-holding that, centuries later, was called "feudalism." It was characteristic of France, but also applied to parts of Italy, Spain, and Germany (and, though differently, to post-conquest England). Under feudalism, knights would hold land and certain powers as "fiefs" of a lord and be his "vassals." A vassal had to do military service for his lord, attend his court, and pay him money in emergencies. A vassal's descendant inherited the fief only on payment of a considerable sum to the lord. This pattern of relationships was repeated at a higher level, between the great lords and the king, but (outside

England) in a merely symbolic manner. Kings had little real control over the lords. Feudalism had its own laws, and these were codified (drawing on the Lombard legal tradition) in the *Libri Feudorum* (*Books of Fiefs*). The *Libri Feudorum* reached their vulgate form around 1250, but the original version was produced around 1150 in Milan (Weimar 1973, 166–7).

10.3. The Revival of Roman Law

The history of medieval, and indeed modern, law was profoundly influenced by the ambitious legislative project of Justinian (discussed in Section 10.1 above). Although his court was Greek-speaking, and his lands mainly (despite his reconquest of parts of Italy and North Africa) in Greece and the East, Justinian decided to revive Roman law not in the degenerate form in which it survived in areas of the West, but rather much as it had been in the third century, when great jurists such as Papinian, Paul, and Ulpian were writing.

Parts of the *Corpus of Civil Law* (*Corpus Iuris Civilis*)—the *Institutes*, most of the *Code*, and a Latin abbreviation of the *Novels*—were known in Italy throughout the early Middle Ages. But it was the *Digest* alone that, by transmitting a large body of the best Roman jurisprudence, was able to transform medieval thinking about law and make law into an academic discipline. The story of the rediscovery of the *Digest* is complicated and, in some respects, uncertain. There are occasional references to the earlier parts of the *Digest* (what came to be called the *Digestum Vetus*) in charters and legal sources from 1076 onward; there are citations from the later part of the *Digest* (the *Digestum Novum*) in a canonical text, Gregory of St. Grisogono's *Polycarpus* (ca. 1111–1113) (Müller 1990). By the middle of the twelfth century, the glosses and texts by Bulgarus show a detailed and sophisticated grasp of the *Digest*. Bulgarus is one of the "four doctors" (along with Martinus, Jacobus, and Hugo)—traditionally, the second generation of Bolognese scholars of Roman law.

Credit for introducing and mastering the *Digest*, and for beginning the tradition of teaching at Bologna based in it, is usually given to a figure traditionally called Irnerius (really Wernerius or Guarnerius), who appears in documents between 1112 and 1125. Recent, critical scrutiny of the evidence suggests, however, that Irnerius was a practicing lawyer, not a teacher (Southern 1995, 274–82), and it has even been argued that many of his supposed glosses to the *Digest* have been misattributed (Winroth 2000, 164–8).

Knowledge of Roman law, even in Bologna, may have been far more rudimentary early in the twelfth century than was once supposed. By the end of that century, however, scholarship on Roman law was flourishing. Bologna had become, and remained, the foremost legal university in Europe, but the teaching of Roman law had spread to France, Catalonia, and England, where the Lombard Vacarius in the late twelfth century produced an abbreviation of *Digest* and *Code* known as the *Paupers' Book* (*Liber Pauperum*) (that is, for

those who could not afford the complete texts) (Southern 2001, 155–66). Masters not only glossed the *Corpus* in detail; on the basis of their glosses, they also produced various other forms of legal writing by summarizing their findings, collecting the glosses on particular subjects, and presenting the disagreements between different teachers. They also tried to identify the general principles (or "brocards") underlying the discussion of individual cases, not restricting themselves to the list of general rules given in the *Digest* itself (Stein 1999). Between 1220 and 1240, Accursius at Bologna compiled what became a standard gloss to the whole *Corpus*.[5]

In one sense, Roman law (as found in the *Corpus*) occupied a position in medieval life and culture almost exactly antithetical to that of the customary or royal laws of individual lands. The customary and royal laws were never the objects of study in the universities (though the feudal law of the *Libri Feudorum* was appended to the *Corpus* and glossed by Accursius), while Roman law, as codified by Justinian and expounded by the medieval legal scholars, though widely influential on legal codes, was not straightforwardly adopted as the law of any particular medieval country. But Roman law had a profound effect on attitudes toward law in general and on the development of law in different lands—not surprisingly, since legal experts tended to be those who had been trained in Roman law. The example of Roman law moved rulers to codify the laws of their own countries and, more broadly, it encouraged them and their advisers to see law as a rational, coherent system that is built on underlying general principles.[6]

It is impossible to understand the development of medieval law without taking into account the rediscovery of Roman law and its transformation into an academic subject. By the mid-thirteenth century, Roman law would affect how philosophers and theologians thought about law (see Chapter 11 of this volume). Before then, however, its influence on them seems not to have been great.

10.4. Theoretical Foundations of Canon Law: Gratian's *Decretum*

From the early days of their religion, Christian communities had compiled sets of rules (canons) for their members, and soon papal decretals and the canons of church councils provided ample material for collections of church law, such as that made by Dionysius Exiguus, probably in the first half of the

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[5] The glossators and legal commentators made extensive use of ancient and medieval philosophers. On metaphysical thought in late medieval jurisprudence see the essay by Andrea Padovani in Volume 7 of this Treatise, and on the use of logic and metaphysics see the essay by Andrea Errera in the same volume.

[6] For fuller discussion of politics in western medieval jurisprudence see the essay by Kenneth Pennington in Volume 7 of this Treatise.

sixth century. By the early eleventh century, the canonist Burchard of Worms had compiled a twenty-book *Decretum*, containing canons ranging in their subject-matter from the procedure for church assemblies and church services, the sacraments, monastic life, fasts, homicide, the procedure in church courts, and a variety of theological topics. The Gregorian reform in the later part of the eleventh century also gave a new impetus and direction to canonical collections.

But canon law, as an academic subject studied from the twelfth century onward, was founded on another *Decretum*, the work of Gratian. The material in this *Decretum* is, for the most part, drawn from just a few older collections (Winroth 2000, 15–7). The novelty and importance of the work lies in how the canons are arranged and treated. As its proper title, *A Harmony of Conflicting Canons* (*Concordia Discordantium Canonum*) indicates, the *Decretum* is concerned to bring together apparently conflicting texts and to show how they can be reconciled. To this end, Gratian adds his own comments (*dicta*) to bring out an underlying train of argument from the texts he cites.

As a person, Gratian is only a little less mysterious than Irnerius. He used to be described as a Camaldolese monk, who taught at a monastery in Bologna. Modern research (Noonan 1979) has shown this identification to be groundless, and the only strong piece of documentary evidence names him as a wise man consulted by the papal legate on a case in Venice in 1143. Internal evidence, however, suggests that—*pace* Southern (1995, 303–4)—Gratian taught law, although he may well have been a practicing lawyer too (Winroth 2000, 7–8). Modern scholarship has also queried whether the *Decretum*, attributed to Gratian from the 1160s onward, was really all his own work, and whether the traditional dating to approximately 1140 is correct. Particular attention has been paid to the passages showing a knowledge of Roman law beyond that contained in the canonical collections used as sources, since they do not seem to fit into the original plan of the work (Vetulani 1946–1947; 1955). According to the most recent hypothesis (Winroth 2000), the *Decretum* exists in two recensions, both produced in Bologna. The first, which can be reconstructed from manuscripts, was indeed written by Gratian and completed around 1140. It contains only about half the number of canons found in the received text, and is without the final section *On Consecration* (*De Consecratione*). The *dicta* are more prominent in the first recension, and the argument is easier to follow. The second recension, the basis for the received text, was ready by 1158 at the latest; the additions, which show, among other things, a much more sophisticated grasp of Roman law than in the first version, were probably not due to Gratian himself.

Soon after the *Decretum* began to circulate, it was commented on. Two of the outstanding later-twelfth-century Bolognese "decretists" (as these commentators are called) are Rufinus and Huguccio, Stephen of Tournai was commenting on the *Decretum* in Paris in the late-twelfth century, and decretists

were also at work in the Rhineland and Oxford. From the thirteenth century onward, the study of canon law flourished not only in the university at Bologna, but also at those of Paris and Oxford. Unlike Roman law, canon law was not a fixed, finished body, and the *Decretum*, although always remaining authoritative, quickly became outdated, especially since, from the late-twelfth century onward, the popes were energetic makers of new laws through their decretals. These decretals, gathered together into collections such as Bernard of Pavia's *Breviarium Extravagantium* (*Abridgement of the New Decretals*) (1188–1192) and the *Liber Extra* (*Book of New Material*) (1234), provided fresh material for commentary. In another respect, too, the position of canon law differed from that of Roman law. Canon law was real, contemporary law. Certain classes of persons—principally clerics, crusaders, students, the poor, widows, orphans, Jews, and travellers—and certain areas—for example, the sacraments (including marriage), oaths, and wills—fell under the jurisdiction of canon law (Trusen 1973, 483–7), and there was an elaborate, hierarchical system of canonical courts and papal judges (Brundage 1995, 120–53).

The connections between canon law and the legal thinking of philosophers and theologians were close. For example, the earliest known user of the *Decretum* in its final form was Peter the Lombard, when in the late 1150s he composed the *Sentences*—a work which would become the standard university textbook of theology. Through the *Sentences*, aspects of the *Decretum* would become familiar to every trained university theologian. And one of the earliest commentators on the *Decretum*, Rolandus—not, as once thought, the Rolandus who became Pope Alexander III (Noonan 1977)—was also the author of a set of theological *Sentences* that was influenced by Peter Abelard. Nonetheless, claims about particular influences, especially that of Abelard on Gratian, need to be treated with caution (see Chapter 11, Section 11.3.5, in this volume for further discussion of this point).

10.5. Medieval Canon Law and Rights

The systematic study of canon law properly commenced around the year 1140 with the appearance of Gratian's *Decretum*. The sixty years following its appearance witnessed the emergence of a group of commentators, the "decretists," who made it their business to analyze the strengths and weaknesses of Gratian's work. The middle and later decades of the twelfth century also witnessed the issuance of massive numbers of decretal letters by the reigning popes, a process that continued throughout the thirteenth century. During the thirteenth century, these letters, whose combination of fact-specificity and articulation of general principle can be compared to the kind of judicial legislation found in a case like *Miranda v. Arizona* (384 U.S. 436 [1966]), came to be gathered into collections, which received their own band of commentators known as "decretalists." The great creative impulse represented by decretists

and decretalists continued through the mid-fourteenth century and has come to be known as the "classic age of canon law" (Brundage 1995).

It is in this classic age that one witnesses the first systematic association of the idea of an individual right with the Latin word *ius* (see Chapter 6, Section 6.6, of this volume for earlier uses). *Ius* is a notoriously difficult word to translate. In general terms, however, one can distinguish between an objective meaning, in which the term refers to a system of law or transcendent principles of justice, and a subjective meaning of individual right or power. This subjective understanding of *ius* also came to be seen as arising from a natural law foundation. Indeed, it has been demonstrated that the first usages of *ius naturale* (typically, "natural law") to signify a natural right of individuals can be traced to the decretist Rufinus, writing twenty years or so after the appearance of the *Decretum* (Tierney 1989, 615, 632–6; Tierney 1992).

The thirteenth-century decretalists explained this subjective right in terms of the capacities and powers of the human person, and thus associated the term *ius* with a wide variety of synonyms that brought it within a developing vocabulary of subjectivity. Consequently, the word *ius* sometimes came to be associated with "faculty" (*facultas*), sometimes with "power" (*potestas*), sometimes with "liberty" (*libertas*), and sometimes with "immunity" (*immunitas*) (Reid 1996, 295, 312–31).

The decretalists also distinguished between active and passive forms of rights. Bernard of Parma and Hostiensis, two of the most important of the thirteenth-century decretalists, distinguished between passive and active "rights of voting" (the *ius eligendi passive* and the *ius eligendi active*). The former was a right to stand for election while the latter was the actual right to vote with the attendant freedom that the exercise of such a right entailed (Reid 1996, 307–12). Tuck (1979, 13–5) claims that the canonistic rights system was built around the notion of a passive right. In fact, however, it is clear that the canonists were capable of making use of both active and passive aspects of rights in order to describe a wide range of juridic situations.

Canonistic rights usages can also be analyzed in terms of the categories and correlatives developed by Hohfeld (1923, 23–64). An example of the correlative between a duty and a right is the close correlation the canonists proposed between the obligation in Christian charity to provide for the needs of the poor and the right of the poor, in dire necessity, to take what was necessary to sustain life. The privilege/no right correlation can be illustrated by looking at canonistic election law, which conferred substantial protections on those who enjoyed the right to vote and rigorously excluded from participation those who lacked such a right. The power/liability correlative is seen in the development of agency law, in which the master (*dominus*) would cede certain rights to his representative, the proctor, whose choices and decisions would then bind the principal. The immunity/disability relation can be found in the grants of exemption conferred by the papacy on local monasteries. An

exemption from local control allowed monasteries to flourish under the patronage of the papacy, and were called variously a "right" or "liberty" (Reid 1991, 37, 59–72).

Rights were not a vague or subordinate concept for the canonists. Rather, they were a central organizing principle of large parts of the law. The scope and influence of the canonistic rights vocabulary can be identified in areas associated traditionally with both public and private law. Three examples illustrate this point: (1) elections, (2) the power to make war, and (3) domestic relations.

(1) Elections had been a part of ecclesiastical life from earliest times. The Acts of the Apostles (6:1–6) records that the primitive Christian community at Jerusalem elected deacons to minister to its Greek-speaking members. The election of bishops remained a prominent part of the life of the patristic church of the third through fifth centuries. St. Cyprian (d. 258) wrote that the choice of bishops required the participation of the people, a process he termed *suffragium* ("suffrage"), borrowing his choice of words from the practice of the voting assemblies of the Roman Republic (Reid 1998, 150, 154–5).

Popular participation could sometimes be quite vigorous, as in the case of the election of St. Martin as bishop of Tours. Martin was a holy man who enjoyed the reputation of being a miracle worker, and he resided in the environs around Tours. At a time of episcopal vacancy, around the years 370–372, he was lured into the city, whereupon he was proclaimed bishop in a kind of popular uprising. His biographer recounts that "an incredible multitude, not only from that city, but from surrounding communities, converged to bestow on him their *suffragia*" (Reid 1998, 150, 154–5). Through direct, popular participation, Martin was made bishop of Tours.

What is missing from both Cyprian's writing and the account of Martin's election, however, is any notion of an actual right to participate in elections. Elections might take the form of popular uprisings, but there is no evidence in the sources that persons were considered as enjoying an individualized right to vote. This changed dramatically in the twelfth and thirteenth centuries, when the theological requirement that bishops be elected merged with the emerging rights vocabulary to produce a juridically articulated "right to vote" (*ius eligendi*).

The community that enjoyed the exercise of this right came to be drastically narrowed. It now embraced not the community at large, but specialized collegial bodies within the church—the college of cardinals, which enjoyed the right to elect the pope, and the cathedral chapter, which enjoyed the right to elect bishops. But while the community came to be greatly constricted, the right itself came to be hedged in with all sorts of procedural safeguards, in the form of notice requirements and the requirement that electors be free of any kind of force or fear. Violence, and even, for that matter, intimidation, was sufficient to invalidate an election (Reid 1998, 160–9).

At the Council of Constance (1414–1418), convoked to repair the Great Schism, which had witnessed the rise of three competing claimants to the papal throne, at least one theorist looked to the right to vote as a means of resolving the crisis. Pierre d'Ailly, a cardinal and former professor of theology at Paris, confronting a situation in which there were not only competing popes but also competing colleges of cardinals, so that no one knew who had the right to vote for pope, proposed that in the final analysis this right rested variously with the Roman people and the universal church. The Council, acting under the inspiration of the Holy Spirit and as a representative of the entire church, then proceeded to elect the new pope. In this way, the canonistic right to vote came to be associated with developing theories of representation and consent (Reid 1998, 169–74).

(2) The juristic conception of the power to make war went through a similar transformation. Augustine had taught that there was fundamentally no right of personal self-defense. Violence, he maintained, involved *libido* (best translated as passionate, sinful desire), and should be strictly prohibited to individuals since we should prefer transcendent spiritual goods over the things of this world, even including our own lives. Augustine, however, allowed the public taking of life by reference to the principles of Christian charity: Government officials, moved by love of neighbor and the need to keep public order, might authorize killing in war, so as to restrain greater sinfulness. But war, on this "just war" account, was tragic necessity, not righteous or praiseworthy conduct (see Chapter 8, Section 8.6, of this volume).

The medieval jurists borrowed heavily from Augustine's analysis of just war principles, but the canonists, especially the decretists, synthesized his theology with a concept of a right of self-defense, which they had developed on the basis of Roman law jurisprudence. The authority to wage war itself came to be denominated a right— variously the "right of the sword" (*ius gladii*), the "right of waging war" (*ius inferendi bellum*), or the "right to war" (*ius ad bellum*).

The thirteenth-century decretalists used the category of rights to propose means of limiting warfare. Pope Innocent IV (1243–1254) attempted to restrict the right of war to princes without a feudal superior, thus prohibiting countless local feudal lords from taking up arms against one another (Russell 1976, 383, 386–8). Hostiensis, for his part, contended that the whole of European Christendom was bound together juridically by a certain right or law of familial relations (*ius cognationis*), and that individual princes lacked the capacity to renounce this right. Hence, on his account, it was forbidden generally to European princes to engage in fratricidal conflict without committing *diffidatio*, the feudal crime of disloyalty (*Summa* I.4), although some forms of warfare remained permissible, especially "Roman War," namely, crusades led by Rome, the "seat of faith" (*caput fidei*) against the faithless (*infideles*).[7]

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[7] See Hostiensis 1581, *De homicidio voluntario* c. 1, v. *diffidatus*.

As the reference to Roman war suggests, however, reliance on rights language also led to the justification of war as an affirmative good, not as a tragic necessity. This sort of rights-based thinking about war deeply colored subsequent analysis and contributed to a view of war as righteous conduct. Johannes de Legnano (ca. 1320–1383), the author of the first real treatise on the law of war, proposed that the right of waging war was given by God to humankind to serve certain affirmative goods, such as keeping the peace and punishing the wicked (Brundage 1995, 218). In this way, the right of war was consonant with both the divine plan and the natural law, in that it allowed society to purge itself of an excess of insurrection and discord. Indeed, Legnano even endorsed the idea that the ailments of society might be cured by "the medicine of an eradicative and exterminative war against evil-doers" (*De Bello, De Represaliis, et De Duello*, 85–6).

(3) The concept of rights also played an important part in the development of canonistic private law. One can take the example of domestic relations. According to canon law, the father was the "head" of his wife and enjoyed the right to govern his household, an authority called the "right of paternal power" (*ius patria potestatis*). The possession of this right, however, did not mean that the father was entitled to rule autocratically. He was constrained by countervailing claims of right on the part of his children and his spouse. Children, fundamentally, had a right of sustenance. They might not be set out in the elements to die (as was allowed under classical Roman law). They had a right, furthermore, to share, in some measure, in the division of their father's estate, a right that was spoken of as arising from nature (*ex natura*).

And while, in most respects, the divine plan called for the husband to be the master of his house and the loving but firm guardian and governor of his wife, an important exception was made where the conjugal debt was concerned. Paul, writing to the Christian community at Corinth, declared: "Let the husband render to the wife her due, and likewise the wife to the husband. The wife has no authority over her body, but the husband; the husband likewise has no authority over his body, but the wife" (1 Cor. 7:3–4).

Paul used the Greek term *opheile* ("obligation") to describe the conjugal debt owed by each of the parties. The *Vulgate* preserved this sense in translating the term as *debitum* ("debt"). The twelfth- and thirteenth-century canonists, however, transformed this moral obligation into a right (*ius coniugale*) and made this right a foundation-stone of their analysis of marital relations (Reid 2002, 471, 499–511).

The canonists disputed when this right came into being. In the process, they inquired whether there was a right forcibly to consummate a marriage. Formal equality, on this analysis, led to extremely one-sided and cruel results. Some canonists answered this question affirmatively, although Aquinas, borrowing juridical language, responded negatively. "Did forcible consummation amount to marital rape?" Aquinas asked. After all, a betrothed seems to have

some kind of right (*aliquod ius*) to his spouse. Aquinas ultimately concluded that such a husband sinned mortally by forcing himself on his spouse, but that recourse was before God's throne, not an earthly tribunal (Reid 2002, 501–5).

In other circumstances, however, the canonists understood the *ius coniugale* as conferring on husband and wife a radical equality in the sexual relationship. Husband and wife could demand sexual satisfaction from the other party, and the other party was not free to say no. Third parties, such as feudal lords, were forbidden to interfere with this right. Because the *ius coniugale* was a natural right that endured as long as the sacramental bond of marriage itself, it could not be lost, even where one of the spouses contracted leprosy. Indeed, the healthy spouse was obliged to see to the ill spouse's needs (Reid 2002, 505–11).

Rights served as a central organizing principle throughout much of the rest of medieval canon law. Infidels had a right of self-governance, according to some canonists. The whole ecclesiology of the church—its corporate structure of pope, bishops, abbeys, monasteries, confraternities, parishes, and so forth—was really a web of interlocking rights and duties. Much of the law of private economic dealings, from providing for the poor to agreeing to contracts of purchase and sale, lease, or usufruct, was also analyzed in terms of rights. The ways in which these concepts were deployed, and the patterns of argument that were laid down, would come to have enormous influence on the entire subsequent shape of the Western rights tradition.

Further Reading

The *Corpus Iuris Civilis* has often been reprinted: Volume 1 consists of Krueger's edition of the *Institutiones* and Mommsen and Krueger's edition of the *Digesta*; Volume 2 contains Krueger's edition of the *Codex Iustinianus*; Volume 3 contains Schoell and Kroll's edition of the *Novellae.* There are excellent translations of the *Institutes* by Birks and McLeod (with Latin text) and of the *Digest* by Watson (4 volumes with Latin text; 2 volumes without Latin text). Translations of the *Code* and *Novels* by Scott, while the only readily available English versions, are often unreliable. In addition, because Scott employs consecutive numeration but sometimes omits translation of Greek material, his numbering does not always correspond to the numbering of the Berlin edition.

Dvornik 1966 is a classic survey of early-Christian and Byzantine political philosophy. For the history of Roman law see Jolowicz and Nicholas 1972 and the further reading suggestions for chapter 6. There is much of value on late-Roman and on Byzantine law in Haldon 1997, 254–80, Liebs 2000, Nicol 1988, Pieler 1978, Scheltema 1967, and numerous entries in Kazhdan and Talbot 1991.

Lanata 1984 is a learned and provocative study of Justinian's code. For reservations, see Waldstein 1994. The wide-ranging account of *nomos empsychos*

by Steinwenter 1946 is excellent. Browning 1971 provides an authoritative and entertaining account of Justinian and his age. Honoré 1978 is a brilliant, groundbreaking study of Tribonian and of the entire Justinianic legislative corpus. Maas (1986) demonstrates the use of law for Justinian's own ends and discusses the relationship between Justinian's legislation and Christian thought with respect to nature.

On the varieties of medieval law, a comprehensive survey, quite technical, of the period after ca. 1100 is given in Coing 1973. Berman 1983 is more readable and wide-ranging, but is too concerned to present its thesis to offer a balanced, introductory account. On England, Pollock and Maitland 1923 is still valuable. Stein 1999 gives an authoritative and concise survey of Roman law. Kuttner 1982 offers a very short but masterly overview of Roman and canon law in the twelfth century. Brundage 1995 provides a good, short survey of canon law, and Gaudemet 1993 offers an excellent and convenient introduction to the sources and the latest bibliography. For the content of canon law, Le Bras, Lefebvre, and Rambaud 1965 remains the best general account. Winroth 2000 puts forward an important revisionary thesis about Gratian's *Decretum*. Rashdall 1936, vol. 1, chap. 4 describes the revival of jurisprudence at Bologna and other universities.

See Volume 7 of this Treatise for fuller discussion of topics touched on in this chapter: Peter Stein on the Roman jurists' conception of law, Andrea Padovani on the metaphysical thought of late-medieval jurisprudence, Andrea Errera on the role of logic in the legal science of the glossators and commentators, and Kenneth Pennington on politics in western medieval jurisprudence.

Chapter 11

THE RISE OF SCHOLASTIC LEGAL PHILOSOPHY
by John Marenbon[1]

11.1. Intellectual Sources of the Scholastic Tradition

11.1.1. The Main Sources for Philosophy and Theology: A Sketch

The main sources for medieval philosophy and theology fall into two groups: those which were in use by the twelfth century and, in most cases, had been available since 800 or earlier (I shall call these the "old sources"), and those which became available in the years from approximately 1130 to 1280 (I shall call these the "new sources").

The bulkiest part of the old sources consisted of the works of the church fathers (and, of course, the Bible). The writings of most of the Latin Fathers, and of some of the Greek Fathers in Latin translation, were widely copied from the beginning of the Middle Ages. Augustine, in particular, was studied carefully and had an enormous, though varied, influence. Patristic works, however, were not used as school textbooks. Rather, the school curriculum in the period up to the twelfth century was based on the late-ancient model of the seven liberal arts: the three verbal arts of the "trivium" (grammar, logic, and rhetoric), and the four mathematical arts of the "quadrivium" (arithmetic, geometry, music, and astronomy). In one of the most popular textbooks, the allegorical *prosimetrum On the Marriage of Mercury and Philology* (*De Nuptiis Mercurii et Philologiae*), written by a fifth-century pagan, Martianus Capella, each of these arts is briefly expounded. For the most part, however, the emphasis in the schools right through to the end of the twelfth century was on the trivium. Each of the three verbal arts had its very restricted number of ancient or late-ancient textbooks. For grammar, there were the works of Donatus and Priscian; rhetoric was studied on the basis of Cicero's *On Invention* (*De Inventione*) and the pseudo-Ciceronian *Rhetoric to Herennius* (*Rhetorica ad Herennium*). For logic, there were Porphyry's *Introduction* (*Isagoge*) and Aristotle's *Categories* and *On Interpretation*, translated by Boethius (d. ca. 524), along with Boethius' commentaries and his own logical textbooks. In addition, there were three philosophical texts that were often studied (along with the work of classical poets) as part of instruction in grammar: part of Plato's *Timaeus* in the translation by Calcidius and with his commentary, Boethius' *Consolation of Philosophy*, and Macrobius' commentary on Cicero's *Dream of Scipio*. All three works were important in transmitting Platonic doctrines: Macrobius was influenced by

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[1] All translations are by the author unless otherwise indicated.

Plotinus; and Boethius, although a Christian, writes in a manner which, at least superficially, could be that of a pagan Platonist.

Theology was not studied as such before 1100, although commentaries were written on the Bible, and doctrinal controversies (including one example discussed in Section 11.2 below) stimulated thinking about theological issues. Early in the twelfth century, scholars working at Laon and then at Paris began thinking more systematically about Christian doctrine. Beginning from the apparently contradictory texts in the Bible, they began to debate over the underlying doctrinal issues and to arrange their teaching systematically. By the later-twelfth century, theological questions were being discussed with immense logical sophistication; and although, in one sense, the Bible was the textbook for theology, some thinkers also turned to Boethius' short theological treatises as their guide.

The earliest of the new sources were the remaining logical works (*logica nova*) of Aristotle, which began to be read from around 1130 onward. Gradually, almost all the rest of Aristotle's works became available in Latin translation. The increasing availability of these new texts coincided with the development of the loosely arranged schools of Paris into a university, where students began in the arts faculty and then a few went on to a higher faculty: theology, (canon) law, or medicine. Oxford, the other great university north of the Alps in the thirteenth century, had a broadly similar structure. Although there were bans on the study of Aristotle's non-logical works in the arts faculty of Paris in the early-thirteenth century, by the middle of the century an Aristotelian curriculum had been adopted there and in Oxford. Linked to the newly available Aristotelian texts were Latin translations of the commentaries produced by the two greatest Aristotelians of the Islamic world: the eleventh-century Persian Avicenna, and the twelfth-century Cordoban Averroes (see Chapter 9 of this volume). Aristotle's non-logical works had been available in the Arab world long before they were known in the Latin West and, while the translations of some Aristotelian texts from the Arabic were soon replaced by versions from the Greek, Avicenna and Averroes were central influences on how Aristotle was understood. Indeed, in the early-thirteenth century, readers of Aristotle were far more prone to reflect Avicennian views than anything authentically Aristotelian. By contrast, there was little interest in any Arab philosophical works other than commentaries (or texts related to commentary); but the Jewish philosopher Maimonides' *Guide of the Perplexed* (written in Arabic) was translated and read by Latin theologians. Knowledge of Plato's work hardly progressed beyond the *Timaeus*, but some new neo-Platonic material became available, such as the *Book on Causes* (*Liber de Causis*), an adapted version of the beginning of Proclus' *Elements of Theology*, which was being read even in the late-twelfth century.

Christian doctrine was studied in the theology faculties by students who had already completed an arts course or its equivalent. There were two text-

books: the Bible and the *Sentences*, which Peter of Lombard wrote around 1155–1158. The *Sentences* drew together the work of the early Parisian theological schools and produced an orthodox and systematic discussion of all the main points of doctrine, based on extracts from the church fathers.

11.1.2. Sources for the Philosophy of Law

In this array there are not, as it turns out, many obvious sources for the philosophy of law. Among the old sources, there are some passages in the Bible and in the works of Augustine, Jerome, Ambrose, and other church fathers (cf. Section 11.3.2 below). The *Etymologiae*, a dictionary/encyclopedia by one of the latest Fathers, the seventh-century Isidore, Bishop of Seville, contains a section on law (V.1–27), although it was used far more by canon lawyers, especially Gratian, than philosophers or theologians. A passing comment in Calcidius' commentary on the *Timaeus* (see Section 11.3.3 below) would prove important. Some manuscripts of Cicero's work, including *On the Laws* and *On Duties*, date back to the early Middle Ages, but writers of the time were much more likely to be influenced by his brief discussion of law in *On Invention* (II.53.160–62).

Among the new sources were Aristotle's *Nicomachean Ethics*, *Rhetoric*, and *Politics*, all of which contain comments on law. But the *Politics*, probably the most important for this subject, was one of the latest of Aristotle's works to be translated into Latin, by William of Moerbeke in 1260–64. In general, Aristotelian influence on theories of law was only just beginning to be felt in the middle of the thirteenth century (see Section 11.5 below).

11.2. John Scottus Eriugena and the Idea of Law

John Scottus (or "Eriugena" as he called himself) gives his most interesting discussion of law in *On Divine Predestination*, a work written in the early 850s, before he encountered and developed the Greek Christian neo-Platonic thought that gives his later masterpiece, the *Periphyseon*, its distinctive character.

On Divine Predestination was written at the invitation of Hincmar, Archbishop of Rheims. Influenced by a reading of some of Augustine's late writings, a monk called Gottschalk was insisting that divine predestination is dual: of the blessed to heaven and of sinners to damnation. To Hincmar this view seemed heretical, but many churchmen remained unconvinced by his efforts to explain why. In 851 he asked Eriugena, who seems to have been a court intellectual who was teaching the liberal arts, to attack Gottschalk's position. Eriugena did so, but argued so vigorously against Gottschalk's oppressively deterministic picture that his treatise was found by many to be more objectionable than the writings it assailed.

Quite early on in *On Divine Predestination*, Eriugena introduces ideas about law (Cristiani 1976, 104–5). He asks Gottschalk what justice is, and Gottschalk replies, using a classic Roman definition that he probably took from Augustine (*Lib. Arb.* I.13, 27), that it is "to give to each his due." Gottschalk's view, he goes on to argue, would make God unjust since he would be rewarding people when they had no reward due to them. For how would a reward be due when they were unable to sin? What would have been the point of God's prohibiting sin when a "law of nature" made it impossible for them to sin in any case (*On Divine Predestination* V.8; 39:171–195)?

By this remark, Eriugena suggests that he is thinking of a law not as an imperative that should be obeyed but can be disobeyed, but rather as a constraining force that cannot be opposed (like a law of physics). But how can this idea be compatible with the other one he puts forward at the same time, namely, that justice requires freedom of choice for those being judged? At the end of his work (*On Divine Predestination* 18, 6–9; 114:109–17:223; cf. Cristiani 1976, 109–14), Eriugena manages with extraordinary deftness to reconcile these two ideas. God, he says, gives every being a nature that has certain bounds. Non-rational things neither are able nor wish to go beyond these bounds. Of creatures that have reason and intellect, some wish to stay within these bounds, and some do not wish to stay within them. But no one *can* go beyond them. The wicked wish to withdraw so far from God, the supreme essence, that they entirely cease to be and become nothing. But God's laws have set up a measure that prevents the wicked from realizing their wish. The eternal punishment of the wicked lies in their inability to gain what they want. They are unwillingly circumscribed by laws—the very same laws which, for the blessed, bring happiness. There is, Eriugena concludes, "one and the same law which disposes the republic in the justest order, as it brings life to those who wish to live well and death to those who desire to live badly," just as the same food tastes sweet to a healthy person and bitter to a sick one (*On Divine Predestination* 117:215–21). Precisely because eternal law, in Eriugena's view, cannot be disobeyed except in will, it not only sets down norms but also by its very existence inflicts punishments—or, rather, it is the instrument by which the wicked punish themselves. Although Eriugena uses the language of predestination, he does not think that God is actively involved in it; rather, having set up his law, God lets the free will of rational creatures bring about their own reward or punishment.

11.3. Abelard on Law and Punishment

11.3.1. Abelard and His Theological Project

Despite the sophistication and breadth of other thinkers of his time, such as William of Conches and Gilbert of Poitiers (see Dronke 1988), and his own

debts to predecessors he claims to have despised, such as Anselm of Laon and William of Champeaux, Peter Abelard (1079–1142) was the only twelfth-century thinker to develop a wide-ranging theory of law and punishment. The reason why he did so lies not just in his power and originality as a constructive thinker (Marenbon 1996, 332–49), but also in the nature of the theological project that dominated the second half of his working life.

Abelard had become a famous teacher of logic as a young man in the early 1100s. Over the next two decades his efforts went into thinking about formal logic and (on the basis of logical texts) about metaphysics. When, in 1117, his marriage to Heloise was ended by his castration and he entered the monastery of St. Denis, he did not give up logic. However, he became increasingly interested in Christian doctrine and, although not a rationalist in the way that Michelet and some nineteenth-century historians believed, he tried to give a rationally coherent, ethically centered explanation of the main elements of Christian belief, even at the cost of stretching and adapting dogma beyond what churchmen such as Bernard of Clairvaux thought acceptable. The idea of law, especially natural law, was central to this project in two ways (which the next subsection will clarify). First, Abelard saw the rationality of Christian belief as guaranteed by the way in which, even without revelation, pagan philosophers had anticipated much of it through reasoning, and he discussed this relationship in terms of laws—natural law and the old and new revealed laws. Second, he needed natural law to give a foundation to his ethical theory, which, without it, would have collapsed into an unsustainable subjectivism.

11.3.2. *Natural Law, Old Law, and New Law*

Abelard's starting point for his ideas about law was the thinking of Anselm of Laon (d. 1117), William of Champeaux (ca. 1070–1121), and their pupils in the School of Laon at the beginning of the twelfth century (Marenbon 1992, 608–12; 1996, 267–9). As Biblical exegetes, the masters of the School of Laon would have had constantly before them the distinction between the two revealed Biblical laws: the Old Testament and the New Testament. Study of scripture also posed a question that made them look more deeply into the idea of law. The early chapters of Genesis tell of men, such as Abel, who led virtuous lives and whose sacrifices were acceptable to God, and yet lived after the Fall, but before God had given Moses the Ten Commandments and even before he had commanded Abraham to circumcise himself and his male descendants—that is to say, before the old law. In order to explain how such morally good lives were possible, Anselm and William turned to the idea of natural law. The basis for their notion was provided by St. Paul (Rom. 2:14–15): "For since the Gentiles, who have no law, do naturally the things which are of the law, they themselves are in this way a law for themselves—they who show the work of the law written in their hearts."

Ambrose, Jerome, Origen, and Augustine had all discussed Paul's remark, and their discussions were systematized in the School of Laon. Three periods of sacred history, each with its own law, were distinguished: the period of natural law, which lasted until God gave special precepts to the Jews (circumcision, and then the Ten Commandments); the period of the old law; and the period of the new law, preached by Christ. The old law repeated natural law in its moral precepts (as, indeed, did the new law), but it also contained figural commandments (circumcision and the dietary laws, for instance) and promises (such as the prophecies of Christ's coming). Natural law and the old law did not just enable people to live good lives; these laws also allowed them to be saved (even if they had to wait until the Crucifixion to be allowed to enter heaven). Just as original sin could be remedied for Christians through baptism, so natural law (by its gifts and sacrifices to God) and the old law (through circumcision) contained the remedies needed to make people fit to be saved. The faith in Christ that a person also requires for salvation need be only, they added, a general ("implicit") faith in God as a just judge who will reward the good and punish the evil.

Abelard adopted his basic structure of thinking about law from the School of Laon. He too thought of each of the laws as providing a way of living well and being saved, and in the *Problemata Heloissae* (*Problems Raised by Heloise*) (no. 15; *PL* 703A–C) he speaks of the division between the moral precepts of the old law and its figural commandments. But the way he used this structure was affected by his unusual attitude toward pagan antiquity. Abelard held, following Augustine, that the pagan philosophers of ancient Greece had come to an understanding of God and his triunity by using their reason, and that they were therefore important witnesses to the doctrine of the trinity. When he was attacked for using pagan writers to support Christian teaching, Abelard replied (*Theologia Christiana* II, ca. 1126; cf. Marenbon 1996, 304–7) by claiming that the philosophers lived in an austere and virtuous manner by following the natural law, which should act as an example to the monks of his own day. The writers of the School of Laon had not been at all concerned with Greek antiquity in their discussion of natural law. For Abelard, by contrast, the Greek philosophers are the most important followers of this law. Consequently, natural law is no longer restricted to a particular chronological period, that is, to the time before the old law. Abelard's point of view emphasizes the idea, already expressed by Anselm of Laon, that the old law, even in the time before Christ, applied only to the Jews. And, instead of seeing a development from natural law to old law and then to new law, as his predecessors had done, Abelard suggests by his lavish praise for the virtues of the ancient philosophers that natural law is nearly on the level of the new law, and far better as a guide to living well than the old law, which the Jews followed slavishly from fear rather than from love (see, e.g., *Sermon* 5; *PL* 424AB).

The form and argument of the *Collationes* (*Comparisons* or *Dialogue between a Philosopher, a Jew, and a Christian*), written probably around 1130 (Marenbon and Orlandi 2001, xxvii–xxxii), bring out clearly these special features of Abelard's thought about law. In a dream, Abelard meets three figures, each of them a worshipper of the one God, but of different faiths: a Jew, a Christian, and a "Philosopher," who is a figure based on the pagan philosophers of ancient Greece (Marenbon and Orlandi 2001, l–liv)—but note that Abelard himself was called the *philosophus* by his close followers. Abelard is asked to act as a judge in their discussions, but in the work as it stands he delivers no verdict. There are two dialogues. In the first, the Philosopher argues with the Jew that the old law adds nothing of value to what he, the Philosopher, has from natural law. In the second, the Philosopher discusses with the Christian what is the highest good and the greatest evil. The immediate impression is that the Philosopher wins his case against the Jew, whereas in his more cooperative dialogue with the Christian, he is gradually brought to accept the Christian's positions, because they are more in accord with reason than his own. It may be, though, that a subtler view is intended, and the Jew is not so clearly defeated as it may seem (Marenbon and Orlandi 2001, lx–lxiii).

Abelard's ideas about natural law were closely integrated into the account of ethical action that he developed, especially in the 1130s (Marenbon 1996, 265–81). Abelard holds that sin consists in contempt for God. We show contempt for God, he says, by acting or intending to act in a way that we believe is forbidden by God. In *Scito Teipsum* (*Know Yourself*), sometimes called the *Ethics*, written around 1138, Abelard explained this intending in terms of "consent" (see, e.g., *Ethica* 10:241–4; cf. *Peter Abelard's Ethics* 16:6–8).[2] Such an analysis of sin raises an immediate problem. Sin, it seems, lies in the disparity between what a person does and what he *believes* God commands. Abelard must keep the word "believes" in this formulation, if he is to retain his fundamental idea that sin consists in contempt. (I show my contempt for you if my surprise birthday present is a night at *Parsifal* and I believe that you loathe Wagner, even if in fact you adore him; it would not be showing contempt if you did hate Wagner, but I did not believe you did.) But then Abelard must allow that whether I sin or not depends on what I happen to believe about God's commands. Abelard does indeed accept this consequence, but his notion of natural law makes it harmless. As a result of natural law, every mentally capable adult knows the fundamental moral laws that are laid down by God. No one, for instance, could murder, steal, or commit adultery and claim, except mendaciously, that he believed he was not doing what God has forbidden.

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[2] For *Scito Teipsum*, I give references both to the new edition in *CC* and to the older critical edition with translation and fuller notes.

Given this position, Abelard might have been expected to hold that natural law is derivable from some simple principle. Augustine had tried to derive the different precepts of natural law from the golden rule known in antiquity and cited both in Old Testament apocrypha and in the New Testament: "Do to others what you would have them do to you." The theologians of the School of Laon followed Augustine's lead, but Abelard thought differently (see *Problemata Heloissae*, no. XX; *PL* 708BC; *Commentary on Romans*, 291:180–201; cf. Marenbon 1992, 612–4). He saw that a person's wishes about what should be done to himself may be immoral, and so he thought that the golden rule needed qualifying. He seemed to be willing to assume that the basic moral commands are known, without trying to derive them from any more fundamental principle. He also assumes that there will be no conflict between them and the precepts of the new law, although he does leave unresolved problems about the relations between natural law and other religious laws (Marenbon, 1997, 271–2).

11.3.3. Positive Law

There is a passage on law in the *Collationes* that needs to be quoted in full in order to understand Abelard's views on positive law. It is the Philosopher in the dialogue who is speaking:

So far as justice is concerned, it is not just the bounds of natural justice, but also those of positive justice that ought not to be crossed. One sort of law is called "natural," the other "positive." Natural law is what the reason naturally innate in all people urges should be put into effect, and therefore remains the same among all people: such as, to worship God, to love one's parents, to punish the wicked, and to do whatever is necessary in the sense that without them no other merits whatever will be sufficient. To positive justice, however, belongs what is set up by humans so as to preserve usefulness and worth more safely and increase them. It rests either on custom alone or on written authority. An example of positive justice is provided by the sort of punishments given in retribution and the procedures of judges in examining accusations which have been made. Among some, there is trial by combat or hot irons are used, among others an oath puts an end to all dispute and everything in contention is put to witnesses. It is for this reason that, when we have to live among whoever it may be, we hold the laws they have set up (as I mentioned) just as we hold natural laws. The laws which you call divine—the Old Testament and the New Testament—also pass down some commands which are, as it were, natural (you call them "moral commands"), such as to love God and your neighbour, not to commit adultery, not to steal, not to murder; and some commands which belong, as it were, to positive justice. These commands apply to certain people at a certain time, like circumcision for the Jews and baptism for you and many other commands which you describe as "figural." Moreover, the Roman pontiffs and the church councils issue new decrees every day or dispense various indulgences, according to which, you say, what used to be lawful becomes illicit and vice versa—as if God put it in their power to make things good or evil which were not previously by their decrees and indulgences, and their authority could pass judgment on the law of nature. (Secs. 133–5; 145–7)

The end of this passage seems to anticipate the enormous growth in papal law-making that would take place later in the twelfth century. From the Phi-

losopher's point of view, papal decretals and church councils go beyond their authority in claiming to change the law of nature. The beginning of the passage has been cited (Kuttner 1936, 729–30; Marenbon and Orlandi 2001, lxxix) as the first use of the term "positive law,"[3] as the canonists would employ it, to distinguish laws set up by humans in particular times and places from natural law. Abelard almost certainly took the term from Calcidius' commentary to the *Timaeus*, where—with the sense of "positive" as "imposed" or "instituted" in mind—Calcidius used it in a broader sense to refer to any sort of human justice (as opposed to the ordering of the cosmos). Abelard had used it in this wider sense in his *Theologia Christiana* (*Christian Theology*). But Abelard was not alone—and very probably not the first—in adapting the term. In the prologue to his commentary on the *Timaeus* (139:11–16), probably written before 1125 (Dutton 1991 suggests 1100–1115), Bernard of Chartres identifies positive justice with Isidore of Seville's customary law (*Etymologiae* V.3.3). In his commentary on Cicero's *On Invention* (probably from the 1130s), Thierry of Chartres (*Commentary on Cicero's On Invention* 189:1–4) talks of positive law in much the same way, while in his commentary on the *Rhetoric to Herennius* (275:91) he puts it into the context of Roman law, saying that it embraces both civil law and the law of nations.[4]

Abelard's Philosopher is distinctive, however, in making "positive law" refer to the particular ways in which the general precepts of natural law are put into practice. It is part of natural law to put suspected criminals on trial and punish those who are found guilty, but *how* they are tried and punished is a matter of positive law. Positive law, then, is binding over people in a particular place, living under a particular set of laws; they must follow it, just as they must follow natural law, but their particular positive law does not bind those who are not living under it. The Philosopher's extension of his discussion to the sacrament of baptism and to circumcision (which was often considered to be an Old Testament sacrament) is, therefore, understandable. These are, in his view, examples of positive law that just apply to certain people at certain times. Abelard and his fellow Christians might have been willing to agree with this judgment of circumcision, but they could hardly have accepted it with regard to baptism. The attitude of Abelard, as author, to the figure of the Philosopher in his dialogue is, in general, a subtle one. It is probably over simple to think that any ideas put forward by the Philosopher that are not explicitly argued against by the Christian are ones that Abelard himself would endorse. Abelard may have expected his readers to do some more thinking for them-

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[3] The Philosopher talks of *iustitia positiva* ("positive justice") rather that *ius positivum* ("positive law"). But Kuttner was right to think that, in this context, *iustitia* is close enough in meaning to *ius* for the usage to have counted as the first, were it not for the contemporary or earlier examples cited below.

[4] I am grateful to Irène Rosier for pointing out this reference to me.

selves, and this passage may be one of the instances where the Philosopher is made to develop his ideas in a way that Christian readers are not supposed to accept (Marenbon and Orlandi 2001, liii–liv). Still, given Abelard's own views on baptism and salvation (Marenbon 1996, 327), perhaps Christian readers are also not supposed to reject them *outright*.

11.3.4. A Theory of Punishment

As mentioned above (Section 11.3.2), Abelard defined sin in terms of an internal state (contempt for God). Such a view of morality would seem to favor a theory of punishment where penalties are meted out carefully in accord with the degree of evil intended by an agent. But Abelard's thinking takes a quite different direction. Already, in his *Commentary on Romans* (172:622–30), he had raised as an analogy the case of a judge being forced to condemn a man he knows to be innocent because he cannot show that the witnesses brought against him are lying. In *Scito Teipsum*, Abelard repeats this example and adds another one:

Here is some poor woman. She has a baby who is suckling, and she does not have enough clothes for both herself and for the little one in his cradle. So, moved by pity for the baby, she takes him to herself so as to keep him warm too with her own clothes, and at length in her weakness overcome by the force of nature, she is made to smother the baby she is embracing with the greatest love. Augustine says: "Have charity and do what you will." Yet when she comes before the bishop for penitence, a severe punishment is imposed on her, not for a fault she has committed, but so that in future she and other women will take more care to anticipate such things. (*Scito Teipsum*, 25:65 –26:668; cf. *Peter Abelard's Ethics*, 39:13–22)

Both examples are used by Abelard to show that justice as practiced by humans should *not* aim to give punishment in accord with the guilt of the wrongdoer. Since the measure of sinfulness (which, for Abelard, is guilt in the proper sense) is internal, it is pointless, he believes, for humans to try to determine it. Instead, he advocates what, from the very few details given, seems to be a strictly consequentialist theory of punishment. By giving a severe punishment to the woman who, without any bad intention, but with a lack of due caution, smothers her child, the good consequence will be achieved that in the future women in the same position will take greater care to avoid such an accident. And, presumably, by condemning the innocent man who is proven guilty by due legal procedure, a judge upholds the institution of law in a way that serves generally to promote good behavior. Since Abelard is sure that God will recognize true guilt and innocence, and that the rewards and punishments of the life to come are incomparably greater than those on earth, he does not think that such a procedure does outrageous injustice to individuals. From a modern perspective, such a resort to the afterlife to solve—or rather dismiss—serious problems about earthly justice can seem peremptory (and at variance with Abelard's usual eagerness for thinking through rational solu-

tions). And medieval legal thinkers themselves preferred to follow a different approach (see the following subsection).

11.3.5. Abelard and Canon Law

Abelard is often mentioned in discussions of medieval law, not so much as a philosopher of law in his own right, but as an important influence on the development of canon law in general, and on Gratian in particular. How close, though, were the connections?

Abelard had completed almost all his work by around 1140, the earliest date thought possible for the first recension of the *Decretum*, and so influence is certainly chronologically possible (and even more so for the second recension). One of Abelard's works is his *Yes and No* (*Sic et Non*), a collection of passages mostly from the Fathers, arranged so as to show how, on one doctrinal question after another, some support one and others the opposite response (hence the title). The similarity to Gratian's method is striking, and even skeptical scholars mention a link as being possible (Winroth 2000, 17). But a careful study (Luscombe 1970, 214–22) has failed to find any passages in the *Decretum* that are clearly based on Abelard. Indeed, the resemblance between the *Decretum* and *Yes and No* may be rather superficial. Abelard does not add any *dicta* as Gratian does, probably because his book was designed, unlike Gratian's, as a resource for Abelard himself rather than as a textbook for general use.

Abelard did have an influence on some of Gratian's commentators (Luscombe 1970, 222–3). But, as emerges from Kuttner's great study (1935, especially 1–62) of canonistic teaching on guilt in the later-twelfth and early-thirteenth centuries, it was a strangely distorted influence. In his ethical theory, Abelard thought very carefully about guilt in terms of intention and, in his later work, consent. Yet, as explained in the previous subsection, he insisted that this type of assessment of guilt should play no part in human judgment and infliction of punishment, which should be based on the obvious, external features of acts. The canonists turned to Abelard's thinking about ethical acts in order precisely to refine their theory about the judgments to be given by human judges in clerical courts. Perhaps, as lawyers, they had a less brutal view of the processes of earthly justice than Abelard had come to hold. Or perhaps they learned about Abelard's ethical theory through his pupils and the collections of his *Sentences* (*Sententie*) (cf. Mews 1986), which circulated quite widely, but never knew of Abelard's distinctive views on judgment and punishment, which are put forward only in *Scito Teipsum*, a rarely copied work.

11.4. Natural Law in Early Scholasticism: William of Auxerre

11.4.1. *The Background in Canon Law*

The difference between the philosophical discussions of law in the work of early scholastics—the thinkers of the first half of the thirteenth century—and those of Abelard and his contemporaries has much more to do with these theologians' familiarity with the work of canon lawyers than with the new sources (see Section 11.1 above) that were then becoming available. The new sources would, however, also have their effect by the middle of the century (see Section 11.5 below).

Gratian took his account (dist. I.C.7) of natural law from Isidore of Seville's *Etymologies* (*Etymologiae*) V.4, where it is presented as an instinct that is common to all peoples. It includes not just the coupling of men and women and the upbringing of children, but also "the common possession of all things" and "one liberty for all." In his opening *dicta*, Gratian says that natural law is found in the Old Testament law and in the Gospels, and—like the writers of the School of Laon—he alludes to the golden rule. Commentators on Gratian in the later-twelfth century gave more complex discussions of natural law. They were aware of the treatment at the beginning of the *Digest* (I.2), according to which natural law is common to all animals, and not peculiar to humans. For example, Rufinus (*De Summa Decretorum*, 6–7) says that, although this is the view of the "legal tradition," "we" restrict natural law to the human race. Basing himself perhaps on Hugh of St Victor's distinction (*De Sacramentis* XI.7; *PL* 347A) between good deeds that must never be omitted, bad deeds that are always prohibited, and middle ones that "may be done or omitted, depending on the time and the place," Rufinus distinguishes orders, prohibitions, and "demonstrations." Some parts of natural law, such as the injunction to hold all things in common and one liberty for all, are demonstrations that have now been altered. By the early-thirteenth century, commentators such as John the German were trying to sort out the various ways in which natural law had been discussed by distinguishing various senses of the term (cf. Lottin 1948, 74–5).

11.4.2. *William of Auxerre's* Summa Aurea (Golden Textbook)

William of Auxerre (d. 1231) was one of the early masters of theology at Paris University. His most important work is the *Summa Aurea*, written between 1215 and 1229. He begins his treatment of natural law there (*Summa Aurea* III.18) by making a distinction (*Summa Aurea* 369:16–23)[5] in line with canon law tradition between Ulpian's "broader" definition of natural law as applying

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[5] All subsequent references are to this edition.

to all animals and the "narrower" view held by Gaius and Isidore and repeated by Gratian that restricts it to humans: "what natural reason without any or great deliberation dictates should be done, such as that God should be loved and similar things" (ibid.). It is the narrower sense of natural law that concerns William. He solves the difficulty posed by Isidore's view that, by natural law, all things should be held in common by using the canon lawyers' distinction between the commands and prohibitions of natural law, on the one hand, and its demonstrations, on the other (370:2–371:49). The injunction to hold all things in common is a demonstration, because it applies to the time before the Fall. Given man's corrupt nature after the Fall, neither is it nor should it be a command, because were it followed "the republic would be dissolved and the human race would perish as people slaughtered one another." Surprisingly, however, William (373:106–10) does maintain that common ownership is nonetheless an injunction that binds people at all times. The difference is in *how* it binds: In the state of innocence it was binding for all actions always; now it binds only "in time of necessity." Those who first had private property, William (374:23–8) goes on to explain, did not sin by doing so if they held it not out of greed, but because they saw that it would be harmful for everything to be in common once human nature had been corrupted by the Fall.

William then turns to the distinction between divine and natural commands. Unlike Gratian, but like most of the subsequent canonists, William is unwilling to identify natural law with divine law. He (376:44–5) does, however, say that the two laws are the same materially, that is, they do not differ in the particular contents of their commands. Divine law is distinguished from natural law because of a general requirement about how its commands are to be performed. People must follow divine law from charity, because divine law is given in order to allow humans to gain merit, and merit is gained only by acting from charity.

There is, though, an important objection (375:10–14) to this view that William needs to answer. Although it may be within our power to obey God's laws, it is not under our control whether we do so from charity or not. God would not command what it is impossible for us to fulfill, and so we cannot be required to follow divine laws out of charity. Consequently, there is no difference between divine law and natural law. William (376:46–55) replies by saying that it *is* within our power to act from charity, since charity—that is, God's grace—is offered to us. True, we cannot of ourselves act from charity; we need God to give it to us. But this does not mean that acting from charity is not possible for us. William compares our position to that of a boy who wants an apple that is too high on a tree for him to reach. He cannot *have* the apple *by himself*, but he can *have* it, because his father can reach up and hand it to him. William does not make it clear whether, as this line of reply would require in order to be convincing, God's grace is always available to anyone who wants it. What, then, is the purpose of natural law, if following it does

not gain merit? William (377:63–8) explains that it does, indirectly, lead us to merit, by helping us to cultivate the "political virtues." A distinction between political and higher virtues, going back to Plotinus, was transmitted by Macrobius, and had been long familiar among writers on ethics. By means of the political virtues, natural law leads us on to the theological virtues, including charity.

William (377:69–74) distinguishes two general rules (*regulae*) of natural law, from which the particular commands are derived. One is the golden rule, which he cites in its negative form: Do not do to others what you do not wish to be done to you. The other is the rule that you should love God. As Abelard had done, William realizes that the golden rule faces logical objections (378:94–101). If you are a thief, you do not wish to be hanged. Therefore, you are bound not to hang thieves, which cannot be right, since unless evildoers are punished, the republic will be destroyed. Moreover, we all wish what we seek to be granted to us by others, so do we not all transgress natural law if we do not give everybody what they request of us? The first objection forces William to qualify the golden rule so that it reads (in the positive version): "Whatever you *reasonably* wish should be done to you, do to others" (378:111–12). William first suggests that the second objection can be overcome by saying (most implausibly) that "if we seek something and we do not need it, then we do not wish it to be given to us" (378:114–15). But he (378:115–379:126) goes on to make the important point that commands to act (as opposed to prohibitions) do not oblige on every occasion; for example, I am not bound to give what someone in need requests, since I may be saving it for someone who is more in need or who belongs to my family or neighborhood. Indeed, it is not a matter of skill (*ars*) but rather charity to decide when to accede to a request or not. Charity will enable us to weigh up the different circumstances, says William, and he supports himself with not only a biblical quotation but also a comment from Aristotle's *Nicomachean Ethics*: "virtue is more certain and better than any skill [*ars*]" (II.6.1106b14–15). This out-of-context citation is the only reference William makes to Aristotle in this whole discussion, and a sign of how little Aristotle has influenced him here.

Further evidence of William's distance from the Aristotelian considerations that would guide speculation about natural law just a few decades later is provided by his discussion of how we know natural law: In what sense is it "written in the heart of man"? William's far from clear answer (*Summa Aurea* 381:44–54) is based on the idea that, because the rational soul is an image of God's essence, people can look into themselves and see God. When the soul sees God, it is delighted, and the good is that the apprehension of which gives delight, and so the soul is seeing "the first goodness in itself, according to the way in which it is the first goodness." The soul also sees that the first good is good from itself, not from anything else, and that it most greatly hates evil and so punishes it; and in seeing this, the soul sees "the first justice."

11.5. Legal Conceptions of Early Scholastics: The *Summa Fratris Alexandri*

The *Summa Fratris Alexandri* (*Brother Alexander's Textbook*) is a compilation, begun by 1236 and completed by 1245 (except for Book IV, added later), based in part on the work of Alexander of Hales (ca. 1185–1245), the secular master of theology at Paris who became a Franciscan and inaugurated the tradition of Franciscan theology at Paris University. Alexander may well have been involved in putting it together, but the redactor of Book III, where law is discussed, was Alexander's pupil John of La Rochelle. The discussion on law is based on earlier material that might itself have been Alexander's work or John's (Father of the College of St. Bonaventure 1948, ccxx–ccxxii, ccclvi–cclxx). (For convenience, I shall refer to the writer of the treatise on law [*Summa Fratris Alexandri* III.2] as "John.") This treatise is comprehensive and vast (amounting to nearly half a million words). John begins by looking at eternal law and natural law. There is a very extensive treatment of the old (or, as he calls it, "Mosaic") law and a slightly shorter treatment of the new ("evangelical") law, and between them a long discussion of the practice of law and judgment: judges, advocates, legal procedure, sentences, and punishments. This central part on legal practice shows a full familiarity with the writings of the canonists and also knowledge of Roman law. The opening section is more theoretical (*Summa Fratris Alexandri* III.2.1–2; 314–64).[6]

Most of the areas discussed by William of Auxerre are also considered here (except for questions about grace and charity, which are treated elsewhere in the *Summa*). For instance, the question of whether natural law extends to all animals, not just rational ones, is raised on several occasions and eventually dealt with by a distinction between natural law as innate (*nativum*), human, and divine (350). And there is a discussion about whether natural law requires all things to be held in common (362–3), where one of the solutions given limits this requirement, as William does, to the time before the Fall, "otherwise the good would be in need and human society would not stand, because the wicked would snatch everything." These topics are, however, incidental to the thrust of John's argument. Whereas William allowed his agenda to be set by the canonists, John—who clearly knows well the work of both civil and canon lawyers—has his own scheme and priorities.

John begins not by discussing natural law and considering to whom it applies and its relation to other sorts of law, but by looking at eternal law. He (314–15) shows that there is an eternal law (315–16) above the human mind, a notion of which is impressed on the mind. John gives three definitions of eternal law (316–19), all taken from Augustine, each of which shows it from a different perspective. Insofar as it concerns good and bad things in general, it is "that by which it is just that all things be ordained." Insofar as it concerns

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[6] All subsequent references are to this edition.

good things in general, it is "the law of all skills [*artes*] and the law of the omnipotent artificer." Insofar as it concerns the goods of rational creatures alone, the law is "the highest reason, to which everything is to be submitted, through which the evil merit a wretched life and the good a good life, through which what belongs to temporal life is rightly tolerated and rightly changed." All laws, both human laws, insofar as they are just and legitimate, and natural law, are derived from eternal law, "just as what is good in a creature is drawn from the first goodness and what is true from the first truth" (327).

The most striking aspect of John's whole discussion is his explanation of how natural law is innate in rational creatures, and its relation to conscience. John writes that the natural law is

in a rational creature. For just as the cognitive faculty has innate within it the principles of the true and the notion of them, as for example, "Every whole is greater than its parts" and "Of anything it is true either to affirm or deny that it is so," so the motive faculty has an innate rule, by which it is guided to the good, and this we call "natural law." (339)

In place of the golden rule (which plays only a minor part in his discussion) and William's ideas about humans finding God within their souls, John has a way of thinking about self-evident first principles that is clearly influenced by Aristotle, although Aristotle would not have thought of them as innate in the way John envisages. A little further on in his treatment (344–5), John explains in more detail how people come to act in accord with natural law. He draws on the thinking about conscience and *synderesis* ("spark of conscience"). The term *synderesis*, originally used by Jerome, had been introduced into theological and canonistic discussions in the second half of the twelfth century and, by the mid-thirteenth century, theologians such as Philip the Chancellor and William of Auxerre were giving detailed accounts of its relation to conscience (Lottin 1948, 103–349). John, however, is one of the first writers to use *synderesis* in a discussion of natural law. Natural law, he says, provides the rule about what should or should not be done. It is what principally regulates the motions of a rational creature with regard to what ought to be done, in the way that the weight of heavy thing guides its motion (*Summa Fratris Alexandri* 343). Conscience is formed as a result of natural law (345), when the person begins to reason and judge what should be done. Although John's discussion is not completely explicit, he suggests that natural law merely tells a person that "good is to be done and evil avoided," and so it is left to conscience to work out what course of action is good. *Synderesis* is what incites the will to perform the good action on which the conscience has decided.

11.6. Conclusion

From the ninth to the mid-thirteenth centuries (and especially from around 1100 onward), not only was law established as a discipline in medieval schools

with the rediscovery of the *Digest* and the work of Gratian and his followers in canon law, but also many of the important concepts of medieval legal philosophy were first fully developed, and some of the central arguments first explored. In particular, building on patristic foundations, Abelard and his successors investigated the relations between natural law and the revealed laws of the Old and New Testaments, while Abelard and his contemporaries were the first to use the notion of positive law. A very important development in the thirteenth century was the notion of *synderesis*, and its links with conscience and natural law. By the mid-thirteenth century, the discussion of *synderesis* was already being seen in terms of Aristotle's theory of knowledge—an indication, perhaps, of the direction that one important strand of legal thinking would take in the following decades.

Further Reading

Marenbon 1988 provides a general introduction with detailed bibliography to early medieval philosophy (480–1150) and Marenbon 1987 to the later period (1150–1350). See also Glauche 1970 for the early period, Dronke 1988 for the twelfth century, and Dod 1982 for the thirteenth century.

General studies of John Scottus Eriugena's contribution to the controversy on predestination include Schrimpf 1982 and Marenbon 1990. Cristiani 1976 looks in detail not only at Eriugena's ideas about law, but also at those of the other parties to the dispute. For general background on Abelard, see Marenbon 1996 and (with a strong emphasis on Abelard's philosophical importance and interest for contemporary philosophers) Brower and Guilfoy 2004. A fine, recent biography is Clanchy 1996. A very good study of Abelard's discussion of law is De Gandillac 1975. On the wider background to the notion of positive law, and the implications of the idea, see Gagnér 1960.

A general guide to the editions and manuscripts of early scholastic theological treatises is provided in Landgraf 1973. Natural law in medieval thought, including this period, is studied in Chroust 1946, and in more detail for the twelfth and early-thirteenth century in Lottin 1924 on the canonists and Lottin 1948, 71–100, on the theologians. Useful shorter background studies, going on to consider later medieval developments, are provided in Luscombe 1982 on natural law and Potts 1982 on conscience and *synderesis*.

Chapter 12

THE PHILOSOPHY OF LAW
OF THOMAS AQUINAS

by Anthony J. Lisska[1]

12.1. Life and Work

The great thirteenth-century philosopher and theologian Thomas Aquinas (ca. 1226–1274) played a pivotal role in the history and development of Western jurisprudence. During his productive but short life, Aquinas wrote extensively on moral matters, and as a corollary, on topics in political and legal philosophy. His exposition in *Summa Theologiae* on matters of law is often referred to as the classical canon of natural law theory.

Aquinas was born in 1226[2] of Italian noble parents of the family of Aquino. His birthplace was Roccasecca, which was not far from Naples in south central Italy. At an early age, while a beginning student at the University of Naples, he aspired to join the then newly formed mendicant friars known as the Order of Preachers or, more popularly, the Dominicans after their founder, Dominic de Guzman. Aquinas embarked upon this religious life voyage against his parents' wishes—for they had visions of their son becoming the reigning abbot of the wealthy monastery of Monte Casino near their ancestral home. Nonetheless, young Aquinas persevered in his decision to join the Dominicans. Sent first to Paris and then to Cologne in order to study under the Dominican friar Albert the Great, Aquinas soon showed great intellectual promise.

The Dominicans saw themselves above all else as preachers and teachers. Moving away from the pastoral conditions of the countryside, which traditionally had served as the setting for most Western religious orders, the Dominicans established priories in the large European cities, usually associating themselves with major universities. Under the tutelage of Albert the Great, Aquinas' intellectual star shone brightly. In fact, Albert accurately predicted that Aquinas would reach stellar intellectual achievements—the "bellow" of the "dumb ox" (as his fellow students at Cologne called him) would be heard around the world! He taught at the University of Paris on two distinct occasions; this institution was the leading center of academic and intellectual work in the thir-

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[1] All translations are by the author unless otherwise indicated.
[2] The exact year of Aquinas' birth has been contested for centuries. Tugwell (1988, 291–2) seems right in asserting that there is now sufficient evidence to assign 1226 as the correct year. Some documents state that Aquinas was forty-eight when he died in 1274. Torrell 1996 argues that 1225 is the appropriate year of Aquinas' birth.

teenth century. Albert the Great called it "a city of philosophers." Aquinas was also assigned to Rome and to Naples at various times during his life.

Aquinas' principal contribution to Western thought was his attempt to reconcile Aristotelian science and philosophy with the tenets of Western Christianity. He was a prolific writer; Kenny (1993, 10–1) claims that when one considers only the works generally acknowledged to be authentic, Aquinas' *omnia opera* total over eight and one half million words. Including the texts of questionable authenticity increases the number of words to eleven and one half million. Aquinas wrote several commentaries on Aristotle's texts, including his *Commentary on the Nicomachean Ethics* (*In X Libros Ethicorum*), which is important in the development of his own moral theory. Yet his greatest achievement was the composition, organization, and writing of his monumental *Summa Theologiae*.[3] While it is correct to say that Aquinas never wrote a specific, "stand alone" treatise devoted to law, one finds what is often referred to as his "Treatise on Law," which comprises Questions 90–97 of the *Prima Secundae* of the *Summa Theologiae*. He wrote the *Summa Theologiae* during the last few years of his scholarly life. It remained incomplete at the time of his death. Aquinas died at the premature age of forty-eight, probably due to a stroke. Tugwell (1988, 261) claims that today we would probably call Aquinas a "workaholic."

This section concludes with a brief overview of Aquinas' legal writings and their historical antecedents. McNabb (1929) traces many of the influences on Aquinas' work in legal matters, and he also discusses the influence that Aquinas' writings in turn had in the development of Western jurisprudence.[4] McNabb (ibid., 1048) writes that Aquinas rethought the ethical system of Aristotle, and even argues boldly that the *Nicomachean Ethics* "is so enriched in form and matter by Aquinas that it might be well disputed who is the real founder of Ethics as a Science." Aquinas' texts indicate that he undertook reflective studies on law throughout his scholarly life. His early *Commentary on the Sentences of Peter Lombard* demonstrates that the "Law of the Decalogue" was foremost in his mind. Even at this early date in his intellectual career, Aquinas refers often to Aristotle's *Nicomachean Ethics* and *Metaphysics*. Both

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[3] The *Summa Theologiae* is divided into three major parts, with the second part divided further into two sections. Hence, there is the *Prima Pars* (The First Part), the *Prima Secundae* (the First Section of the Second Part), the *Secunda Secundae* (the Second Section of the Second Part), and the *Tertia Pars* (the Third Part). There is also the *Supplementum*, which contains the final sections of this work, compiled from assorted earlier writings after Aquinas' death. The *Prima Pars* deals with God and the set of creatures that come from God. The *Prima Secundae* deals with human actions, moral theory, and law. The *Secunda Secundae* concerns the virtues in some detail. The *Tertia Pars* treats Jesus as the sacramental vehicle for human beings to return to God. The *Tertia Pars* is principally theology, then, while the other two parts are essentially philosophical approaches to questions about the human condition.

[4] Several historical references used in this analysis of Aquinas on natural law are dependent upon this thoughtful article by McNabb.

of these treatises influenced Aquinas' own construction of natural law moral and legal theory. His *Summa Contra Gentiles*, which was written five years after the commentary on Lombard, bears witness to the continued development of his legal insights. Nonetheless, his mature consideration on the nature and scope of law, *De Lege*, which is often translated as "The Treatise on Law," is found in the *Prima Secundae* of *Summa Theologiae*, where Aquinas discusses human action. Aquinas' references resemble a listing of the "Great Books" of ancient and medieval philosophy—the works of Plato, Aristotle, Cicero, Ulpian, John Chrysostom, Hilary, Jerome, the Pseudo-Dionysius, Augustine, Boethius, Isidore, and Moses Maimonides, among others. Aristotle the pagan philosopher, Augustine the Christian philosopher, and Moses Maimonides the Jewish philosopher are quoted most often. McNabb (ibid., 1055) notes that Maimonides served as a special influence on Aquinas' understanding of the nature and scope of law: "[H]ad Moses Maimonides not written his famous book, *Guide of the Perplexed*, there would never have been written a still more famous book, St. Thomas's treatise on Law."

Aquinas also discusses references to law in the Bible. His treatment of the "old law" and the "new law" is in *Summa Theologiae*, QQ. 98 to 114, where the *Prima Secundae* ends. For example, Aquinas considers the Torah in the following manner:

We must, therefore, distinguish three kinds of precepts in the old law: a) moral precepts, which are dictated by the natural law; b) ceremonial precepts, which are determinations of the divine worship; and c) judicial precepts, which are determinations of the justice to be maintained among human persons. (*STh* IaIIae.99.a.4)

In addition to the analysis of law in the *Summa Theologiae*, Aquinas wrote several political documents, one of which is his unfinished *Commentary on Aristotle's Politics*. He also authored selected notes on political leadership to the King of Cyprus, *On Kingship* (*De Regimine Principum*),[5] and a brief letter on political theory to the Duchess of Brabant.[6]

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[5] There is serious scholarly debate over the structure and content of this opusculum of Aquinas. Early manuscript collections conflate two texts; the first was Aquinas' *De Regno: Ad Regem Cypri* and the other *De Regimine Principum*, often attributed to Aquinas' confrere, Tolomeo of Lucca. See Aquinas *On Kingship*, ed. Eschmann 1982 for further discussion of this debate.

[6] *Epistola ad Ducissam Brabantiae*. Parts of this letter are translated in Bourke 1960, 248–51. Torrell 1996, 335, explains the importance and structure of this document, written at Paris in 1271. The letter responds to queries concerning the financial administration of the subjects of a prince. In this text, Aquinas justifies collecting taxes on the principle of the public good. Torrell notes that recent research suggests that the letter was written for Margaret of Constantinople, the countess of Flanders, and daughter of Baldwin, the Count of Flanders and the first Latin emperor of Constantinople.

12.2. The Treatise on Law

Aquinas' discussion on law is a component of his substantive treatise on human action, which is the topic of the *Prima Secundae*. His philosophy of law must accordingly be viewed as part of a more comprehensive philosophy of action. His analysis of law covers eight questions in the *Summa Theologiae*, and includes significant discussion of many topics germane to the study of Western jurisprudence:

Question 90: Considerations on Law
Question 91: The Different Kinds of Law
Question 92: The Effects of Law
Question 93: The Eternal Law
Question 94: The Natural Law
Question 95: Considering Human Law in and of Itself
Question 96: Concerning the Power of Human Law
Question 97: Concerning the Possibility of Changing the Law

Aquinas defines law in the following way: "Law of its very nature is an ordinance of reason for the common good, which is made by the person who has care of the community, and this rule is promulgated" (*STh* IaIIae.90.a.4). A suitable reading, as Finnis (1998, 226) suggests, for "common good" is the "public good." In his *Summa Contra Gentiles*, Aquinas writes that "in human affairs, there is a common good that is, in fact, the good of the state [*civitas* or *polis*]" (*SCG* III.80, no. 14). In many respects, what Aquinas meant by *civitas* is similar structurally to the Greek concept of *polis*.

Aquinas uses his definition of law for the four categories of law he discusses: eternal law, natural law, positive or human law, and divine law. It is necessary to pay careful attention to the distinctions between these four kinds of law. In particular, one must not conflate eternal law with divine law, a practice that happens frequently in discussions of Aquinas on law. Moreover, one must not equate natural law with divine law in Aquinas, even though these two categories of law are coextensive in several medieval treatises on law. The first three divisions of law—eternal, natural, and human or positive—are all interrelated yet distinct; all three are the result of a fairly rigorous philosophical analysis. Divine law, to the contrary, is in a class by itself and is entirely a matter of theological investigation.

12.3. Eternal Law

One issue that contemporary students of natural law must confront is the role that eternal law plays in Aquinas' general theory of natural law. Aquinas writes that the natural law in some way participates in the eternal law: "Hence, it is obvious that the natural law is nothing other than the participa-

tion of the eternal law in the rational creature or human being" (*STh* IaIIae.91.a.2). Many commentators assume that, according to Aquinas in *Summa Theologiae*, the existence of God is a necessary condition for understanding natural law. D'Entreves, for example, writes:

Now it seems to me that in our divided world the first and most serious stumbling block to the Thomist conception of natural law lies precisely in its premise [...] of a divine order of the world, which St. Thomas recalls at the very beginning of his theory of law, and from which he infers, with unimpeachable logic, the most detailed and specific consequences: *supposito quod mundus divina providentia regatur, ut in primo habitum est* [it is assumed that the world is ruled by divine providence, as we demonstrated in the first part of *Summa Theologiae*]. Once that premise is granted, the whole majestic edifice of laws can be established on it: eternal law, the natural law, human law, and divine law. All are ultimately based on and justified through the existence of a supreme benevolent being. (D'Entreves 1970, 153–4)

In addition, O'Connor (1967, 60) writes that "the nature of law depends upon establishing the existence of a provident God who planned and guides the universe. St. Thomas, of course, believed that he had done this"; and A. Ryan (1985, 180) argues that "a secular natural law theory is simply incoherent." The argument set forth in this chapter claims, to the contrary, that the eternal law is reducible to a Platonic archetype in the divine mind, which renders the objections articulated by D'Entreves, O'Connor, and A. Ryan, among others, moot.

Plato's analogy of the Demiurge in his *Timaeus* provides an instructive paradigm for understanding the function of eternal law. A consistent analysis elucidates the concept of eternal law as the set of divine ideas in the divine mind. One idea in this set is the archetype for human nature. Following Plato's suggestion offered in the *Phaedrus*, the archetypes in the divine mind "divide nature at its joints" (Plato, *Phaedrus* 265e). Aquinas uses this Platonic insight in rendering an interpretation of the following scriptural passage: "Let us make mankind in our image and likeness" (Gen. 1:26–8; New Catholic Edition). Aquinas argues that human nature is what it is, that is, the *quidditas* ("quiddity") or set of essential properties determined by *materia prima* ("prime matter") and *forma substantialis* ("substantial form"), because it is a reflection of the archetype of human nature in the divine mind. Working in a manner generally familiar to most medieval philosophers, Aquinas adopts insights from what he understood to be Platonic philosophy. In many ways, his was the received interpretation of Plato, which asserted that a subsistent world of the Forms existed in a transcendental realm. Aquinas situates these forms, which Plato articulated as freestanding, eternal, unchangeable essences, in the divine mind; most early medieval philosophers and theologians did likewise. Hence, a Platonic Form functions as a divine idea or archetype. This appropriation of Platonic Forms, which is rooted in Plotinus and Augustine, is accepted by most of the early medieval philosophers and theologians.

This Platonic schema serves as the philosophical basis for what Aquinas refers to as eternal law. The Renaissance philosopher Domingo de Soto (1494–1560) of early modern Scholasticism[7] at Salamanca in Spain, commenting on Aquinas' account of law, explained the role of eternal law in some detail. De Soto explains that the eternal law is the *ratio* ("explanatory principle") for understanding the order of the created world. Eternal law, as a formal cause, exists causally in the divine mind. A formal cause is that which provides the structure or organization for a natural object. For Aristotle and Aquinas, it refers more to a principle of explanation than to source of movement. De Soto writes:

> God [...] out of eternity conceived in his mind the order and dispensation and rule of the universe of things, in the likeness of which conception all laws are to be constituted: that ordainment and commandment therefore is called the eternal law in accord with its nature. (*De Iust. et Iure* I.3, Ad. 1 as quoted in Brett 1997, 142)

Since Aquinas writes that the natural law "participates" in the eternal law, many commentators (e.g., D'Entreves 1970) claim that the natural law depends on the eternal law. It would follow then that any understanding of the natural law requires the existence of God. This account entails a theological definist position for Aquinas (i.e., a metaethical position that defines the basic rightness or wrongness of an action by means of theological principles alone). Hence, in principle, it is in opposition to a natural law position, where the moral qualities of actions are determined by their connection with human nature rather than God. Such a position suggests the following puzzle: Must one understand the eternal law prior to coming to terms with the natural law?

There are two possible responses to this query, one metaphysical and the other epistemological. The metaphysical position articulated by Aquinas is that the archetype of human nature in the divine mind is the metaphysical principle after which all humans in the terrestrial realm are patterned. This is, to be sure, a rather rarefied ontological position, and the foundation for what the medievals often called "the truth in things," also referred to as "ontological truth." However, a human knower is able to determine the set of necessary properties that constitute an essence without understanding that this essence fundamentally is a copy of the archetype in the divine mind. In other words, one can understand the set of necessary properties that make up the content of human nature as just that—an essence of human nature—without realizing that this essence is patterned after the archetype in the divine mind. Now, how might this be explained? We must look to Aquinas' epistemological position to answer this question.

The epistemological position depends upon insights gleaned from Aquinas' philosophy of mind. Through the use of abstraction via the *intellectus*

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[7] This early modern or "second" scholasticism is discussed in Chapter 14 of this volume. De Soto is discussed in Section 14.4.

agens ("agent intellect"), a knower can determine the content of a human essence totally within the human sphere of awareness. One need not know that this essence depends on a divine archetype in order to flesh out the set of synthetic necessary properties that comprise the content of a human essence. Aquinas claims that human beings never have *propter quid* ("essential knowledge") of God but only *secundum quid* ("incidental knowledge"). To assert or imply that a human being needs to know the eternal law, which is an archetype in the divine mind, in order to understand the natural law is inconsistent with Aquinas' philosophy of mind, natural theology, and epistemology. The archetype of human nature is, to be sure, the foundation of human nature, which in turn is the foundation of natural law. Nonetheless, it is possible to understand the content of human nature without realizing its dependence on the divine archetype. This is an important point that Aquinas appropriated from Aristotle's doctrine of abstraction and used in his own philosophy of mind. Hence, what Aquinas needs for his theory of natural law is a theory of natural kinds rather than the existence of God. (This issue will be discussed further in the next section.)

12.4. The Natural Law

Recently, modern historians have advanced the theory that a revived sense of the study of nature occurred in the twelfth century in several cathedral schools, especially Chartres. This renewed interest in the natural world accompanied the introduction of a systematic order into the matters of learning inherited from an earlier time (Southern 1995, 4–5; Haskins 1927, 303–40 *passim*). Consequently, as the universities began to blossom in the early-thirteenth century, full sets of lectures on the philosophy of nature became part of the curriculum.

Given this renewed interest in the study of nature, philosophical and theological discussions ensued within the context of a better understanding of the natural world. These new studies demonstrated a rationale for the intelligibility of the natural world and advocated the intrinsic goodness of the realm of nature. As Porter (1999, chaps. 1 and 2) argues, nature and revelation, under the direction of reason, worked in tandem during the formative stages of the development of natural law theory.[8] Working with Albert the Great, Aquinas became immersed in these new studies, arguing that the development of a natural law theory in the Aristotelian mode followed coherently from the emerging studies in the philosophy of nature. Aquinas, furthermore, offered an interpretation of nature using the Aristotelian categories of matter and form. "Matter" refers to the material substratum or underlying "stuff" that is

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[8] Porter's analysis here of the formative stages of natural law theory provides a useful guide to this topic.

organized by the "form." "Form" is the principle of organization much like the "blueprint" for a building. Any individual natural thing in the world is made up of matter and form; neither exists separately by itself. In order to explain the causal structures of nature, Aquinas argues for the existence of natural kinds, which is a metaphysical theory of essence that claims that there is a set of properties that renders an individual a member of a class or natural kind. A substantial form is a set of dispositional properties that determines the content of a natural kind. A dispositional property is a "capacity" that something has to become more developed or brought to fruition. In *De Anima*, Aristotle writes that the soul, which is nothing more than the substantial form of a living organism, is "the first act of a body with the potency of life" (*de An.* 415b5–10). Using the categories of contemporary analytic philosophy, we might suggest that this set of dispositional properties is a synthetic necessary set. It is necessary because it determines the essence—in all possible worlds, one might argue—and it is synthetic because it has a referent beyond the use of language.[9] This synthetic necessary set is *de re*, or about the nature of things, and not *de dicto*, or only about the use of language. Aquinas' realist ontology is apparent in his discussion of the philosophy of nature.

The concept of human nature is a necessary condition for Aquinas' account of natural law to cohere consistently. What Aquinas needs, in turn, to account for his theory of human nature is a metaphysics of natural kinds. As noted above, human nature as elucidated by Aquinas is best analyzed as a natural kind. It follows that what Aquinas needs in order to explicate his account of natural law is the concept of a natural kind. The natural kind of human nature is defined as a certain set of dispositional properties.

In the latter part of the *Prima Secundae* of the *Summa Theologiae*, Aquinas delineates his exposition of the three generic categories of dispositional properties that determine what human nature is:

Insofar as good has the intelligibility of end and evil has the intelligibility of contrary to end, it follows that reason grasps naturally as goods (accordingly, as things to be pursued by work, and their opposites as evils and thus things to be avoided) all the objects which follow from the

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[9] Nelson (1967) refers to synthetic necessary properties as the means to distinguish what he takes to be "nomic universal propositions" from "accidental universal propositions." A nomic universal proposition is a general claim that will stand up under a counterfactual conditional: for example, "All water is H_2O." An accidental universal proposition, on the other hand, is the random assortment of things under a class term: for example, "All the chairs in this room are blue." A counter-example is used in the following way. It is true to say about a liquid that "If this were water, then it would be H_2O." This would indicate that there is a natural kind of water, which is interpreted as a set of essential properties that define the essence. On the other hand, it is not true to say of a blue chair, "If there were a chair in this room, then it must be blue." The contrary to fact conditional does not hold of accidental universal claims; however, it does hold in the area of essential properties determining a natural kind. See also Lisska forthcoming.

natural inclinations central to the concept of human nature. First, there is in human beings an inclination based upon the aspect of human nature which is shared with all living things; this is that everything according to its own nature tends to preserve its own being. In accord with this inclination or natural tendency, those things (actions, events, processes) by which human life is preserved and by which threats to human life are met fall under the natural law. Second, there are in human beings inclinations toward more restricted goods which are based upon the fact that human nature has common properties with other animals. In accord with this inclination, those things are said to be in agreement with the natural law (which nature teaches all animals) among which are the sexual union of male and female, the care of children, and so forth. Third, there is in human beings an inclination to those goods based upon the rational properties of human nature. These goods are uniquely related to human beings. For example, human beings have a natural inclination to know the true propositions both about God and those necessities required for living in a human society. In accord with this inclination arise elements of the natural law. For example, human beings should avoid ignorance and should not offend those persons among whom they must live in social units, and so on. (*STh* IaIIae.94.a.2)

Human nature as a generic set of dispositional properties might be rendered in the following manner: (1) The set of *living* dispositions (which humans share with plants), (2) the set of *sensitive* dispositions (which humans share with animals), and (3) the set of *rational* dispositions (which makes humans unique in the material world). Aquinas' analysis of human nature is dependent on philosophical claims found in Aristotle's *Nicomachean Ethics*, *Metaphysics*, and *De Anima.*

A living disposition is the capacity, active potency, or drive that all living beings possess that enables them to continue in existence. Had humans evolved or been created differently, there might be a different set of dispositions that comprise their set of essential properties. This living disposition is similar structurally to what Hart (1961, 190) calls the natural necessity of "survival." In a similar fashion, one of the rational dispositions is the capacity that humans exhibit to know, which is best described as an innate curiosity. Aquinas was familiar with the opening passage in Aristotle's *Metaphysics* indicating that "[a]ll human beings, by nature, desire to know" (*Metaph.* 980a25). Aquinas argues that this rational disposition is only developed when a human knows what is true. This "rational curiosity" is analogous to what Fuller (1964, 185) calls "communication."[10] Finnis (1998, 81) describes this structure in the following way: "The order Aquinas here has in mind is a metaphysical stratification: [1] what we have in common with all substances, [2] what, more specifically, we have in common with other animals, and [3] what is peculiar to us as human beings." C. Ryan (1965, 28) writes that these three general aspects of the human person are "the good of individual survival, biological good, and the good of human communication."[11] Golding (1974, 242–

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[10] In this part of his account of natural law, Fuller refers explicitly to Aquinas' *Summa Theologiae.*

[11] C. Ryan's analysis is one of the best overall succinct accounts of natural law theory, explicating many concepts in the writings of Aquinas.

3) refers to the living dispositions as the "basic requirements of human life," the sensitive dispositions as the basic requirements for the "furtherance of the human species," and the rational dispositions as the basic requirements for the "promotion of (a human person's) good as a rational and social being." The purpose of Aquinas' argument here is to elucidate and understand in a general fashion those dispositional properties that are central to the concept of a human being.[12]

Metaphysical realism, as Simon (1965, 7–8) argues so well, is a necessary condition for an adequate theory of natural law. Aquinas' account of natural kind is similar to what Kripke (1971, 144–6) calls the "metaphysically necessary," which is a truth that is dependent on reality. This concept is not a mere convention of human language. Hence, the "metaphysically necessary" is co-extensive with "synthetic necessity" (as discussed above). Kripke argues that the proposition "Water is H_2O" is a metaphysically necessary truth because something would not be water if it were not H_2O. This is the essence, or what Kripke calls the natural kind, of water. This structure is the nature of the kind of thing water is, and it is, Kripke argues, true in all possible worlds. Kripke's concept of the metaphysically necessary seems commensurate with what Aquinas holds.[13]

This account of a natural kind reflects Aquinas' claim that all human persons possess the quiddity of human nature, that is, they share the same set of fundamental properties that constitute human nature. This would hold, in principle, in all possible worlds. To help elucidate this claim, one might explain, for instance, how Aquinas refutes the Latin Averroists on the structure of human nature regarding the separated agent intellect. Aquinas argues that whatever we name by human intelligence—what Kripke would say we "rigidly designate"—is not part of what we name by a separated agent intellect. Of course, human knowers might be mistaken in their attempts to understand the specific set of properties that determine a natural kind. Aquinas often remarks about the difficulties encountered in this epistemological enterprise. That this is a difficult enterprise is, however, a different question in the philosophy of mind; it does not diminish the need for a set of causal properties in reality that serve as the foundation for the natural kind. In this regard, Aquinas is an essentialist in his theory of natural kinds. This is what underlies

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[12] Nussbaum (1993, 263–4) offers eight properties that she claims "we can nonetheless identify [as] certain features of our common humanity, closely related to Aristotle's [and Aquinas'] original list"; they are mortality, the body, pleasure and pain, cognitive capability, practical reason, early infant development, affiliation or a sense of fellowship with other human beings, and humor.

[13] Cf. Ayers 1981, 248, who argues that Kripke's view "is not at all unlike Aristotelian doctrine." For Aquinas, like Aristotle, an account of a human essence is more than a modal necessity. Aquinas intends a *de re* (about things) necessity and not a *de dicto* (about language) necessity, which entails that this is a synthetic necessary claim about the nature of reality.

the frequently made claim that Aquinas is a "moderate realist" in his theory of essences.[14]

Aquinas' account of natural law requires as a necessary condition an ontological theory of natural kinds because he must account for the regularity of the world. He accomplishes this through his theory of essence, which in turn is rooted in his account of substantial form (or formal cause). Once Aquinas has provided his theory of essence, he has the blocks in place needed to develop his moral theory of natural law. This suggests that Aquinas views moral theory as a "second order inquiry." It is second order because it follows from the primary ontological theory of the natural kind of human nature.

Natural law for Aquinas is thus best understood as rooted in the set of dispositional properties that comprise human nature. Following in the footsteps of British empiricism, most analytic philosophers consider a disposition to be a property like "fragility," understood as a fixed, closed set of mathematical properties. A disposition for Aquinas is more than this, though; it is a built-in property that tends toward the completion of its development in some way or other. It is not reducible to the capacity to be "acted upon." A disposition in the human essence is an Aristotelian "active potency" or an "active power." A biological disposition would be, for example, the built-in tendency of an acorn to grow into an oak tree. If certain material conditions are present, the thing will do X, which is to develop in a structured manner toward a certain end. In the case of a passive power like solubility, on the other hand, an external cause determines whether or not the thing does X (that is, dissolves).

When the set of dispositional properties has developed properly in human persons, this results in *eudaimonia*, *felicitas*, or *beatitudo*, all of which mean "happiness," "functioning well," or "flourishing."[15] Nonetheless, with any dispositional natural kind, to function well is to develop the dispositions or capacities according to the nature that it has. Using the hylomorphism concepts (i.e., concepts using matter and form as fundamental principles) common to Aristotelian texts, the development of the dispositional properties of the substantial form, which is the formal cause, is to reach the final cause.[16] In the case of human nature, the moral agent attains flourishing when the supreme set of dispositional properties determining the human essence—that is, the living, the sensitive, and the rational dispositions—is developed in a harmoni-

[14] For example, Copleston (1957, 151–4) provides an illuminating discussion of these issues dealing with the problem of universals in medieval philosophy.

[15] In contemporary discussions of Aristotle's moral theory, Anscombe 1958 and Foot 1978 began writing about Aristotelian *eudaimonia*, which they called "flourishing." Finnis 1998, 115, uses "integral human fulfillment" to elucidate a more contemporary reading of *eudaimonia*.

[16] Hochberg 2001 claims that the modern analytic philosopher Gustav Bergmann, near the end of his academic career, considered claims similar to the hylomorphic concepts found in Aristotle and Aquinas.

ous, self-actualized manner. This Aristotelian account of flourishing, in turn, is the very foundation of Aquinas' natural law theory of morality.

Aquinas' metaphysics and philosophy of mind are such that a human knower can determine, theoretically at least, the concept of an essence without any appeal to God's existence or God's providence. Knowers are aware of the content of a human essence just as they know any other natural kind, which is through the process of abstraction from phantasms[17] by means of the "active intellect" (*intellectus agens*). Finnis (1982, 400) offers a similar position on this issue: "For Aquinas, there is nothing extraordinary about man's grasp of the natural law; it is simply one application of man's ordinary power of understanding."[18] The important point is this: Knowing an essence is, in principle, a human activity undertaken in the normal human ways of knowing.[19]

Natural law is the foundation for moral development in Aquinas. Like Aristotle, Aquinas assumes that flourishing means that a human's nature has reached the development of the basic dispositional properties by which it is defined. It is this set of dispositional properties that comprise the basis for natural law. Natural law for Aquinas thus is not an unwritten set of commands built into the human conscience; it is not the unwritten law in the mind of God as Antigone seems to imply (see Chapter 1, Section 1.6.2 of this volume); nor is it the understanding of right reason articulated by the Stoics.

Because morality, for Aquinas, depends upon the development of these dispositional properties, the first principle of practical reason is "good is to be done and pursued, and evil avoided." Following Aristotle, Aquinas argues that the good by definition is defined in terms of an end. In *On the Nature of Truth* (*De Veritate*), Aquinas writes: "All things found to have the criterion of an end at the same time meet the criterion of a good" (21, I). Hence, the end, which is the good, is the development of the dispositional properties. There are as many goods as there are ends. Aquinas adopts a set of goods that are incommensurable, which means that one good or end is not reducible to an-

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[17] Often "phantasm" is rendered as "image." However, a consistent analysis of the concept of phantasm is more complicated. Each of the three internal sense faculties in Aquinas' philosophy of mind has its own unique phantasm. For further discussion, see Lisska forthcoming.

[18] In commenting on Finnis' work, Covell (1992, 222–3) writes: "In *Natural Law and Natural Rights*, [Finnis] claimed that the principles of natural law admitted of an entirely secular derivation, which involved no metaphysical assumptions regarding the existence, nature or will of God."

[19] While Finnis would agree on the role of God in Aquinas' account of natural law as developed in this chapter, nonetheless he would not accept the totality of the account of human essence and its relation to natural law theory articulated here. Finnis rejects basing natural law theory on what he calls "philosophical anthropology." Resolving this debate, however, is beyond the limits of this inquiry. For a complete analysis of these meta-philosophical differences in reading Aquinas on natural law, see Lisska 1996, chaps. 6–7; an earlier version of this argument is found in Lisska 1991. McInerny 1998 refers to Finnis' position as "doing natural law without nature."

other. Aquinas' analysis thus does not require that the good be defined in terms of a single natural property. This incommensurable character of goods is a necessary condition for understanding Aquinas' natural law theory.

Once Aquinas has determined the justification for his theory of natural kinds, two additional questions arise: (1) Is an instance of a natural kind itself self-explanatory and totally independent, or, in the ontological order, is it a dependent being? (2) How does one introduce a theory of obligation into what is a theory of ethical naturalism?

In response to the first question, what if a philosopher who adopted a theory of natural kinds accepted an evolutionary theory and offered the following retort: "Well, natural kinds are what they are through some evolutionary process, and we really cannot say anything more; they are just there!" At this particular juncture, Aquinas and the evolutionist philosopher are on the same level. Both could, eventually in response to the second question, articulate a theory of natural duties based on the developmental properties of a natural kind. The evolutionist philosopher, like Aristotle, believes that the development of a moral theory from his metaphysics is the best that one can do.

What does Aquinas do now? Aquinas, to use a favorite metaphor of Copleston (1965), must get the evolutionist philosopher on the metaphysical chessboard. Aquinas must convince the evolutionist philosopher that an analysis of human nature, even as a natural kind, requires that a human person is a dependent being. This requires the "essence/existence" distinction.[20] The essence/existence distinction requires that there is a radical difference between the set of defining properties of an instance of a natural kind—the essence—and the question of whether an individual with such an essence actually exists. Hence, there is a real distinction, Aquinas believes, between determining "what" a thing is and ascertaining "that" the thing exists. Here Aquinas must argue cogently that a dependent being, or "contingent being" in cosmological argument circles, requires a real relation with an independent, necessary being. God as the *actus purus* ("pure act of existence itself") provides a response to the dependency question. Aquinas would recommend that the evolutionist philosopher consider the "Third Way" in the *Prima Pars* of the *Summa Theologiae*, which is the argument that contingent beings entail a necessary being (*STh* Ia.2.a.3). Only at this juncture in Aquinas' metaphysical scheme does God enter the analysis. God, as a necessary being whose essence is existence, provides the response to this further question about the dependent character of individuals of natural kinds.

Any philosopher—theist, atheist, or agnostic—could still construct a theory of natural law based on natural kind theory rooted in dispositional

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[20] This is a distinction that Aristotle did not make. For a discussion of the difference between Aquinas and Aristotle on the essence/existence distinction, see Owens 1993. See also Wippel 2000.

properties. What Aquinas provides additionally is an explanation rooted in the concept of dependency. The moral theory proposed by the evolutionist philosopher would be similar structurally to the moral theory that Aristotle articulated in *Nicomachean Ethics*. Aquinas would remark that this theory is not a false moral theory but an incomplete one. Ultimately, the concept of essence depends for a complete metaphysical explanation on the archetype of human nature—the foundation for the natural kind—that subsists in the divine mind. If one asks about an interpretation of scriptural passages concerning human beings made in the image and likeness of God, Aquinas borrows the archetype language acquired from Augustine and Plato. If one asks the dependency question, then Aquinas introduces the essence/existence distinction. Both of these points go beyond the direct development of natural law theory based fundamentally on Aristotelian eudaimonism.

The second question Aquinas must address concerns the justification of a theory of obligation within the context of this account of ethical naturalism. The "metaphysics of finality" (see Gauthier 1959, 47–8; Veatch 1985, chaps. 1–2) claims that the concept of obligation can be derived from the very structure of a dispositional view of essence. The teleological analysis developed in Aquinas differs radically from any teleological analysis found in either nineteenth-century utilitarianism or twentieth-century naturalism rooted in utilitarianism. Utilitarianism is the moral theory that argues that an action is right if it produces the greatest amount of pleasure for the greatest number of people. Naturalism refers to the claim that moral values are reducible or definable in terms of naturally occurring qualities or properties. Bentham (1843) dismisses natural law and natural rights theory, claiming that it is "rhetorical nonsense—nonsense on stilts." For Aquinas, the "end" is built into the very ontological structure of the disposition. This is why a dispositional theory of essence is necessary for Aquinas' theory of natural law. The end to be attained is not a subjective desire or wish on the part of the agent; rather, it is determined ontologically by the dispositional property. It is the final cause determined by the formal cause. The human essence as a set of dispositional properties determines the ends to be attained. The ends are not determined by the arbitrary, subjective preferences or aspirations of the agent. The "final cause" in Aristotelian theory is determined by the metaphysics of human nature, which is based on the dispositional structure of the formal cause. The result is a natural law theory "without stilts."

An objection common in twentieth-century analytic philosophy (see Moore 1903, 13–20) to all forms of ethical naturalism is the so-called "naturalistic fallacy." This mistake allegedly occurs whenever one tries to derive a value statement (or an "ought" statement) from a factual statement (or an "is" statement), for example, "*X* is pleasant, therefore *X* is good." The assumption here is that any form of ethical naturalism is ensnared in this fallacy. In response, one must consider the structure of this purported fallacy, which is

rooted in the ontological and moral theories of Moore. Moore's ontological analysis of an object is reducible to a collection of simple properties. Given that the foundation is a simple natural property, a value property must be "added onto" this simple natural property—like a layer of paint put on a chair. Moore concludes that this "addition" is, by definition, fallacious.

The natural law response to Moore is that the fundamental properties are not simple but dispositional. Hence, the end—what Aquinas calls the final cause—is the development of the properties in the essence—what Aquinas calls the formal cause. Given this analysis, the end, which is the good, is not an additional property but the development or completion of an entity's dispositional property. The charge of the naturalistic fallacy brought against Aquinas's metaethics is thus met.

12.5. Human or Positive Law

Once Aquinas' view of natural law has been understood, articulating his account of positive or human law is a simple extrapolation from natural law. Positive law is the formulation and promulgation of statutes that "ensure the smooth running of the commonwealth" (*Comm. Eth.* V.2). Aquinas adopts Aristotle's concept of the common or public good, for he agrees with Aristotle that all humans are by nature political or social beings. The purpose of positive law is to establish and to enhance the general conditions that make the common or public good possible. In *On Kingship* I, Aquinas writes that "if by nature, human persons are to live together, then the community they form must needs be ruled [...]. Any organism would disintegrate were there no unifying force working for the common good of all the members" (Aquinas, *On Kingship*, I.1 no. 8). Hence, positive law is the set of prescriptions made, articulated, and promulgated by the person or persons in authority for the smooth functioning of the community for the common or public good.

What interested Aquinas is what we call criminal law; he is less concerned about procedural law. Aquinas appears to have no concept of what Hart (1961, 91–6) refers to as secondary rules of law. A secondary rule is a rule of procedure that helps eliminate problems in what Hart calls the primary—or moral—rules of a society. According to Hart, law is the union of primary and secondary rules, where the secondary rules are the rules of (1) recognition (to identify a law as a law), (2) change (to provide for an orderly process of change in the laws), and (3) adjudication (to remedy the problem of inefficiency in the legal system by conferring powers or abilities on a person in charge).

In matters regarding the extent and pervasiveness of the legal system, Aquinas is probably best categorized as a legal conservative. Sigmund (1993, 230) notes that "Lord Acton described Aquinas as 'the First Whig' or believer in the limitation of governmental power." Aquinas, quoting Isidore, writes that the primary purpose of law is to protect the innocent:

We remember what Isidore once wrote: "Human laws have been made so that human audacity might be held in check by their threat, and also so that the innocent might be protected from those exerting evil; and among those capable of doing evil, the dread of punishment might prevent them from undertaking harm." It should be noted, however, that these matters are most important and necessary for human beings. Therefore it is necessary that human laws should be made. (*STh* IaIIae.95.a.1, *sed contra*)

Hence, Aquinas does not appear to accept that the role of a legal system is to foster social change, or other more modern conceptions of the legal enterprise.

Although Aquinas maintains that laws should promote the common good, as a legal conservative he believes that they should have limited scope: "[H]uman law does not forbid all vices, from which virtuous persons keep themselves, but only the more serious vices, which the majority can avoid, and principally those that harm others, and which must be prohibited in order for human society to survive" (*STh* IaIIae.96.a.2). He also notes that "human law cannot forbid all and everything that is against virtue; it is sufficient that it forbids actions that go against community life" (*STh* IIaIIae.77.a.1, ad 1). These passages indicate, furthermore, that Aquinas would not accept a position of moral perfectionism in the law.[21] Note the following passage from *Summa Theologiae*:

So also in human government, it is right for those who are in authority to tolerate some evil actions so as not to hinder other goods or to prevent some worse evil from occurring. As Augustine writes in *On Ordination* (II. 4): "If one suppresses all prostitution, then the world will be torn apart by lust." (*STh* IIaIIae.10.a.11)

In addition, Aquinas agrees with Augustine that an "unjust law is no law at all":

A law is unjust when it is contrary to the human good and contrary to the things we have discussed above: Either from the end as when a person presiding imposes a law with undue burdens or prescribes a law which does not pertain to the commonweal of the society but rather to his own proper desires and glories. Or even on the part of the author, as when someone makes a law beyond the power commissioned to him. Or also from the very form, for example, as when burdens are dispensed unequally upon members for the community, even if they are ordained to the common good. Cases like this are more like acts of violence than laws, because, as Augustine writes, "A law that is not seen as just is no law at all." Hence, such laws do not oblige in the matter of conscience except perhaps in order to avoid scandal or a disturbance. (*STh* IaIIae.96.a.4)

This is the passage to which Martin Luther King, Jr. (1963) refers in his *A Letter from a Birmingham Jail*. Aquinas argues that if a positive law hinders the development of human flourishing, then that law basically is unjust. It follows

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[21] Commenting on these issues, Finnis (1998, 228) writes: "Aquinas's position remains firmly outlined [...]: Those vices of disposition and conduct which have no significant relationship, direct or indirect, to justice and peace are not the concern of state government or law. The position is not readily distinguishable from the 'grand simple principle' [...] of John Stuart Mill's *On Liberty*."

that an unjust law fails to meet the criteria for justification as articulated by the natural law. Nonetheless, while Aquinas did propose that an unjust law is no law at all, given his conservative bent, he argues that conditions must be extreme before even an unjust law ought to be overturned. In *On Kingship*, he writes the following about tyranny:

Finally, provision must be made for facing the situation should the king stray into tyranny. Indeed, if there be not an excess of tyranny, it is more expedient to tolerate the milder tyranny for a while than, by acting against the tyrant, to become involved in many perils more grievous than the tyranny itself [...]. This is wont to happen in tyranny, namely, that the second becomes more grievous than the one preceding, inasmuch as, without abandoning the previous oppressions, he himself thinks up fresh ones from the malice of his heart. (Aquinas, *On Kingship*, I.4 nos. 43 and 44)

12.6. Divine Law

In Aquinas' analysis of law, divine law and eternal law are neither identical nor coextensive. Divine law primarily reduces to the commandments of God, which are the prescriptive propositions found in the scriptures. This is part of what Aquinas would call "revelation." For Aquinas, like many medieval philosophers and theologians, faith is fundamentally propositional; part of what is meant by revelation consists in the set of propositions found in the scriptures. The passages in the scriptures are statements that are to be accepted and believed on the word of God. Faith is not reducible to a commitment, which is an understanding of faith that has pervaded religious discussions since the time of the Reformation.

Given this account, the role of divine law, as manifested in the propositions found in the scriptures, is conceived as a cognitive and prescriptive divine process by which God assists human beings to live morally appropriate lives. An analogy in Aquinas for the role of divine law is his requirement that God provide revelation—that is, scriptural passages—indicating his own existence. When discussing the proofs for the existence of God, Aquinas argues that there is a moral necessity on God's part for divine revelation (*STh* Ia.1.a.1), because the sustained philosophical analysis required to establish the existence of God is a difficult enterprise. Hence, those demonstrations can be mastered by only a few, only after much time and effort, with a genuine possibility of making serious conceptual mistakes in the process of developing a sophisticated metaphysical demonstration. Since it is immensely difficult to apprehend a metaphysical proof for the existence of God, Aquinas argues that revelation from God is morally necessary for nearly everyone because knowing that God exists is a necessary condition for human beatitude.

A similar argument holds for the role of divine law concerning the moral maxims that are necessary for embarking on the process of a complete moral life. Aquinas argues:

Because there is always an unclarity and lack of certitude in human judgments, especially on contingent and particular matters, it follows that different human beings will make different judgments about different kinds of actions; it sometimes happens that not only diverse but sometimes contrary laws come about. Therefore, so that a human person might be free from all doubt about that which must be done and that which must be avoided, it is necessary that in the matter of right actions, a human being should be directed by being given a divine law, from which law one is not able to go astray. (*STh* IaIIae.91.a.4)

Developing a moral system that is rooted in Aristotle's naturalistic philosophy would also require difficult and controversial arguments drawing on metaphysics, philosophy of mind, action theory, and philosophical anthropology. Hence, Aquinas proposes that the Ten Commandments are God's way of assisting limited human beings to understand the role and content of moral law. These moral maxims are necessary conditions for human well-being. From this analysis, it follows that Aquinas differs from several earlier medieval philosophers who suggested that the divine law and the natural law are co-extensive. For example, canonist Huguccio (d. 1210) writes: "Likewise, in a fourth sense, the divine law, that is, what is contained in the law of Moses and the evangelical law, is said to be a natural law" (Huguccio, as quoted in Porter 1999, 133). Aquinas rejects Huguccio's interpretation of natural law.

From the fact that the divine law helps illuminate what the natural law prescribes, it is impossible for divine law—or any form of theological definism— to be in opposition to natural law. In his metaethics of moral maxims, Aquinas is not an advocate of divine prescriptivism (i.e., a theory that asserts that an action is right by the very fact that God commands or prescribes such an action to be undertaken). Since human nature is a copy of the divine archetype in the divine mind, the maxims of natural law follow from this essence. If God were to command a moral maxim in opposition to the content of the human essence, this would render God an inconsistent being. What Aquinas suggests, furthermore, in opposition to an argument made by William of Ockham (*Rep*. IV.Q9, E–F), is that God, as a rational being, cannot command human beings to undertake actions that are in opposition to the precepts of the natural law. There are indications that ultimately Ockham is a proponent of divine prescriptivism in justifying the moral law.[22] If Ockham is a proponent of a form of divine prescriptivism, then moral prescriptions are justified principally from the will of God. If the foundation of a moral theory is the very prescription or command uttered by God, then it follows that it is the will of God commanding that provides the final metaethical justification for an act's moral quality. Hence, some form of voluntarism follows from prescriptivism, because prescriptivism removes any cognitive content that might serve as a foundation for a moral judgment. Aquinas would not accept this position because, for him, human nature plays the necessary cognitive role. At

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[22] A more thorough discussion of Ockham's position on moral theory is found in Chapter 13.

root level, a fundamental voluntarism runs through the Franciscan tradition, which Ockham upholds, that is in opposition to the preeminence of the intellectualist tradition to which Dominicans such as Aquinas adhere.

While Aquinas was a member of theology faculties most of his scholarly life, he was also a sophisticated philosopher in the Aristotelian tradition. One can structure a philosophical argument of natural law independently of Aquinas' system of theology (see Veatch 1971, 4; Lisska 1996, chap. 5). This is not, of course, to deny that there are theological elements in Aquinas' account of natural law. However, what one needs to do is develop the structure of the philosophical argument as far as possible in conceptual isolation from the theology. This entails that Aquinas' account of natural law, while certainly profiting from the theological milieu of the late-twelfth and thirteenth centuries, nonetheless can be held accountable on philosophical grounds. In addition, Aquinas always argued that theology complements philosophy. An important maxim he affirms is that "grace perfects nature." Hence, the natural order must be in a suitable condition before grace can have any application. That this concept is opposed by reformation theologians is not to be denied. In this dimension of what later historians would call the "faith/reason" problem, the thirteenth century philosophy of Aquinas is distinct categorically from Reformation theology.[23]

A puzzling item connecting Aquinas' theology and philosophy concerns the role of "natural" happiness in his system. There are two parts to this issue. First, Aquinas, as a theologian, postulates that full human happiness—what he calls "perfect happiness"—occurs only in the afterlife when the human intellect exercises a direct intuitive relationship with the Godhead (*STh* IaIae.3.a.6, 8). He argues, however, that this perfect happiness is not achieved without supernatural grace, which he calls "the light of glory." This is, to be sure, a theo-

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[23] Some recent scholarship on the writings of Aquinas proposes that Aquinas adopted more of a theological principle than a philosophical one. Jordan 1993 affirms this interpretation. Wippel 2000, to the contrary, argues that one can articulate independently and consistently a philosophical position, especially in metaphysics, from Aquinas' texts. Tugwell (1988, 257–8) provides probably the best succinct analysis of this issue: "Gauthier argues that Thomas' concern was always theological, even in his 'philosophical' writings, but his critics have pointed plausibly enough to signs that Thomas did have a serious philosophical purpose and that he was interested in clarifying Aristotelian philosophy in its own right. Probably there is no real contradiction between the two positions. As we have seen, Thomas' own theology drove him to recognize the importance of philosophy as a distinct discipline, if only because philosophical errors that might threaten faith need to be tackled philosophically. But his philosophical interests were not just apologetic. He was surely sincere in believing that the theological attempt to understand faith is essentially at one with the universal human attempt to understand reality. In his last years, as we have noted, the philosophers seem to have been more enthusiastic about Thomas than many of his fellow theologians were; it is quite likely that he in return found the philosophers more congenial than some of the theologians. He believed that the best way to discover the truth is to have a good argument, and in this he was being true to the tradition of Albert and indeed St. Dominic."

logical dimension beyond the philosophy of Aquinas' system. What Aquinas argues is that the natural law has limits, but that, like any philosophical theory, it can be judged satisfactory or not from a philosophical perspective. Second, even Aristotle (*EN* II.8.1101a19) argues that it is difficult for human agents to attain a complete degree of happiness in this life, which is the only life that Aristotle understood. Commentators like McInerny (1992, 39, 173–7) argue that Aristotle's position on happiness entails that human happiness is at best episodic. Aquinas considers this position when he argues that the complete happiness of a human person can be attained only in the afterlife. However, Aristotle also suggests in Book I of the *Nicomachean Ethics* that his system of moral theory is the best that one could do. Aquinas follows Aristotle in these judgments. Nonetheless, in this life, humans can attain only incomplete or imperfect happiness; only in the afterlife is complete or perfect happiness possible. Aquinas would be in full agreement with Adler, who proclaims: "Aristotle's *Nicomachean Ethics* is the only sound, practical and undogmatic moral philosophy in the whole Western tradition" (Adler 1990, 254).

12.7. Punishment

While many medieval philosophers appear to adopt some form of a retributivist theory of punishment, several texts indicate that Aquinas argues more for a consequentialist justification of punishment. A consequentialist theory of punishment bases the justification for punishment in some manner on the consequences of punishment. A retributive theory of punishment, on the other hand, bases the justification for punishment on the need to atone for the guilt arising from committing an immoral or illegal act. Aquinas considers the nature of punishment while elucidating his general account of the virtue of justice in *Summa Theologiae*, but writes sparingly about the nature and conditions of justice. Nonetheless, in considering divine justice, he adopts a retributivist position, suggesting that because a sin has been committed against God, it must be rectified through the bestowing of punishment by God. Yet when Aquinas considers punishment in the human legal sphere, he appears to adopt more of a consequentialist position. He is more interested in the effects that punishment will have. At times, he is interested in the reformation of the evildoer; at other times, punishment seems to be justified by appealing to the effectiveness of deterrence. Yet the consequentialist dimension always appears to require that the party to whom the punishment is administered is guilty. Hence, it would seem that Aquinas, in the matter of temporal punishment, adopts a mixed theory of punishment, which would be a middle ground between a strict consequentialist and a strict retributivist position.

Aquinas upholds capital punishment, and he appeals, strangely enough, to a sort of consequentialist utilitarian argument in defending it. His argument appears to be that criminals who undertake heinous crimes have violated the

conditions for the public good and have thus forfeited their rights to be members of the society. In the later sections of the *Summa Theologiae*, Aquinas writes: "In this life, there is no punishment for punishment's sake. The time of the last judgment has not yet come. The value of punishment is medicinal and insofar as it promotes public security or the cure of the criminal" (*STh* IaIIae.68.a.1). In "Letter to the Duchess of Brabant," Aquinas also writes, "In cases of extortion you should indeed punish severely, in order to deter others from undertaking such actions in the future" (*Letter to the Duchess of Brabant*, XIII).

These passages indicate that in matters of temporal human punishment, as opposed to divine punishment, Aquinas adopts a consequentialist model of justification. He maintains, though, what contemporary philosophers of law would consider a "mixed" consequentialist position. First, he appears to accept a general deterrence model of justification for punishment. In discussing the structure of human law, Aquinas notes that the fear of punishment is a motivation for obedience to the law, especially among the young. Punishment will deter others from undertaking criminal actions. Second, he adopts what we might call a reformative theory of punishment. In this case, punishment is to be administered so that the criminal might be "cured" and "reformed." The justification for imposing punishment on the guilty person is in terms of the end result, whether it be the deterrence of future criminal actions or the reform and rehabilitation of criminals. These determinations are matters of human law, for Aquinas writes that "to specify a punishment according to the condition of the person and his offense belongs to the province of positive law" (*STh* Suppl. 52, ad 3).

Even though Aquinas adopts a consequentialist form of justification, because of his concept of human nature and the requirement of guilt, it would never occur to him to justify what Rawls (1955, 9) calls "telishment," which is the punishment of an innocent person in order to achieve some social good. Aquinas argues that punishment is in some sense a part of the natural law. He writes that "the natural law decrees that a punishment should be inflicted for every offense, and furthermore it decrees that no one who is innocent should be punished" (*STh* Suppl. 52, ad 3).

12.8. The Virtue of Justice

Aquinas' treatment of *ius*, which is often translated as "right," begins in the *Secunda Secundae* of the *Summa Theologiae*, Question 57. This question immediately precedes the general discussion of justice (*iustitia*). The term *iustitia* is derived from *ius*, which suggests that justice is a derivative of the term for right. Thus, *ius* is rendered as "the just thing." Hence, a *ius* is a "right thing" that occurs among persons or between persons and things; in other words, it is the right thing that takes place in various human situations. Moreover, as

Villey (1983), McInerny (1992, 212), and Tierney (1997, 23) note, Aquinas' account of *ius* is more understandable in relation to Roman law than it is in the context of modern rights theory. Roman law, and its ecclesiastical expression found in canon law, exerted a significant influence on Aquinas' treatment of legal matters.

Aquinas writes that "it is proper to justice, in comparison with the other virtues, to direct human persons in their relations with others; this is true because justice denotes a kind of equality" (*STh* IIaIIae.57.1). In the second article of Question 57, Aquinas asks whether there is a *ius* that is natural and a *ius* that is positive. He responds affirmatively to both queries. A natural *ius* comes about by the very nature of the case, whereas a positive *ius* arises because of common consent either between private individuals or between the community and its citizens. Hence, a *ius* refers to an objective, relational state of affairs. This sense of *ius* is different from the account of a human right as articulated by late medieval canon lawyers and by several late medieval and Renaissance philosophers. Many of these lawyers and philosophers began to use the term *ius* for "a right" in the modern subjective sense. For example, Suárez (1548–1617) reports that "according to its strict signification *ius* is called a kind of moral power [*facultas*] which anyone has concerning his own property or something due to him. So the owner of a thing is said to have a right in the thing and a workman is said to have a right to his wages" (Suárez, *Leg.* I.1.2.5, 24, as translated in Tierney 1997, 50).[24]

Aquinas, it appears, no more than hints that from these natural properties rooted in human nature there might be developed what later philosophers would call natural rights. While Aquinas does not articulate a theory of natural rights, nonetheless one might propose a derivative theory; in this derivation, a right might be that which protects the development of dispositional properties. For instance, Aquinas argues that a principal living disposition is the sense of continuing in existence. This requires, so Aquinas writes, that it is immoral for one to engage in arbitrary killing. Hence, life is to be protected. This is what C. Ryan (1965, 28) calls the "biological good." It follows that killing is to be avoided not because it is a divine commandment, but because killing frustrates or hinders the continual development of the natural dispositional property to continue in existence. This is similar structurally to Hart's concept of "survival" as a "natural necessity" (1961, 190–5). This natural law analysis entails that evil—in this sense, a metaphysical evil—is the repression

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[24] The historical development of the modern concept of rights is controversial, but there seems to be a scholarly consensus that the concept of a subjective natural right was developed by canon lawyers, philosophers, and theologians during the later middle ages. See Chapter 10, Section 10.5, of this volume on medieval canon law and rights; Chapter 13, Section 13.4, on Ockham and natural rights; and Chapter 14 *passim* for early modern scholasticism and rights. See also Chapter 4, Section 4.8, and Chapter 6, Section 6.6, respectively, for controversies over possible ancient Greek and Roman antecedents of rights concepts.

of a natural dispositional property. The same holds for the development of sensitive and rational dispositions and their opposing repressions. Nonetheless, Aquinas did not himself develop a theory of individual human rights. While Aquinas contrasted a "natural right" (*ius naturale*) with a "positive right" (*ius positivum*), a natural right in the modern sense is either absent from his thought or present only in an inchoate way.[25]

Finnis (1998, 187–8) notes that Aquinas adopts almost identically the conceptual schema for justice as found in Aristotle's *Nicomachean Ethics*. Finnis further reflects on this situation, indicating that Aquinas' account of justice is limited because he tries to fit every aspect of the virtue of justice into the Aristotelian schema. Agreeing with Aristotle, Aquinas writes that justice "is a habit whereby a human person renders to each one what is due by a constant and perpetual will" (*STh* IIaIIae.58.a.1). Aquinas argues that justice, by its very name and function, implies equality. Hence, justice entails a relation to another, for anything is equal never to itself, but always to another. Justice is twofold: universal and particular. First, universal legal justice is the virtue that directs human persons immediately to the common good or the public interest of the community. In addition, there is a second category of justice, namely, particular justice, which directs the human person immediately in matters relating to particular goods and particular persons. In Question 61, Aquinas delineates two categories of particular justice: commutative justice and distributive justice. Commutative justice deals with the mutual dealings between two persons. Distributive justice deals with the relations between the community itself and the persons in the community. In effect, this part of the virtue of justice oversees the distribution of the common goods of the community proportionately to its citizens. Commenting on Aquinas' exposition of the virtue of justice, Gilby writes about universal legal justice (*iustitia generalis*) and the two subsets of justice—commutative and distributive:

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[25] While Aquinas does not consider the concept of natural right directly, nonetheless, contemporary natural law philosophers like Veatch and Finnis, among others, argue that a philosophical derivation of rights from Aquinas' moral theory of natural law is possible: see Veatch 1985; Finnis 1982 and 1998. According to Veatch, one determines a concept of "duty" based on the set of dispositions. A natural right becomes the "protection" of the duties that are derived from the natural kind of the human person. This proposed derivation, so Veatch suggests, limits the present debate on the nature and scope of rights. One source of contention in Veatch's analysis, however, is the discussion of positive and negative rights. Veatch argues that a theory of natural law can provide an analysis only of what he calls negative rights. A negative right is a protection (e.g., rights to property, life, and liberty). These are, Veatch writes, the "rights simply *not* to be interfered with" (Veatch 1990, 315). Positive rights, on the other hand, are entitlements (e.g., rights to education, health care, retirement benefits, and so forth). One might respond that Aquinas' account based on the fundamental dispositions of the human person could justify a limited set of positive human rights. Space constraints limit the explication of this argument here, but see Lisska 1996, chap. 9.

Justice is an analogical value pitched at various levels according as it renders what is due for the common good of the political community (*justitia generalis*), to one private person from another (*justitia commutativa*), and to one person from the political group (*justitia distributiva*). (Gilby, intro. to *STh*, xv)

Aquinas sounds a bit like Rawls (1971, 85–6) in suggesting that justice is primarily the fair dealings of the members of the society with one another and the fair dealing of the society itself with the members of the society. In some ways, Aquinas was ahead of his time in his rather sophisticated analysis of the virtue of justice as fairness.

A corollary of his account of justice is Aquinas' discussion of the criteria for a "just war." Aquinas writes on warfare in the Western Christian tradition, following in particular the insights of Augustine. Aquinas was never a pacifist, although he argues that waging war must be a last resort. In *Summa Theologiae*, Aquinas puts forward his influential writing on what has become known as his just war theory; interestingly enough, the title of this question asks whether engaging in a war is always a matter of sinfulness:

There are three conditions for a just war. First of all, the ruler under whom the war is to be engaged must have the authority to carry out the war [...]. Secondly, a just cause is required—this is necessary so that those against whom the war is waged deserve such a response because of some offense on their part [...]. The third condition of a just war necessitates that those in charge of the community have a right intention in this matter, which is to achieve some good or to avoid some evil. (*STh* IIaIIae.40.a.1)

On this account, war may be carried out, to be sure, but one must make it perfectly clear that the war is purely defensive. Aquinas' analysis seems to provide a retributive justification of war rather than a teleological justification.[26]

Aquinas was a thoroughgoing philosophical realist.[27] His moral and political theories depend necessarily on the essential properties that comprise natures and essences of things in the external world. The theory of natural law as developed by Aquinas is thus principally a second-order inquiry, which is dependent upon his analysis of Aristotle's theory of the human person. Knowing the structure of a human essence and developing a moral theory of natural law on this human essence demonstrates Aquinas' commitment to an intellectualist account of moral theory. His theory of natural law often serves as the para-

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[26] See Chapter 14 of this volume for discussion of further developments of just war theory by Vitoria and Suárez.

[27] One should note that in their analysis of Aquinas' account of truth, Milbank and Pickstock 1999 argue for a noncognitivist account of truth in Aquinas. In fact, Pickstock writes: "How should one respond to the death of realism, the death of the idea that thoughts in our minds can represent to us the way things actually are in the world? For such a death seems to be widely proclaimed by contemporary philosophers" (Pickstock 2000, 308). For a critical response to this postmodern interpretation of Aquinas' concept of truth, see Kenny 2001.

digm for an ontological theory of natural law moral and legal theory. Not only have scholars in jurisprudence recently re-discovered the texts and insights of Aquinas' account of natural law, but the late-twentieth century also witnessed the revival of what has been called "virtue ethics," and Aquinas' moral theory based on Aristotle's *Nicomachean Ethics* is a central part of those discussions. This adaptation of Aquinas' moral realism has been used to respond to some versions of postmodernism, which reject any possibility of a legitimate rational inquiry into moral and legal matters. Aquinas is a bulwark of ethical naturalism based on an ontological theory of human nature.[28]

Further Reading

The authoritative English translation (with Latin text, footnotes, and generally excellent appendices) of Thomas Aquinas' *Summa Theologiae* is the Blackfriars edition under the editorship of Gilby in sixty volumes (1964–1980). An earlier translation by Shapcote has been reissued often. Lisska 1996 includes a translation of Questions 90–97, without the objections and responses. A critical Latin edition of *Summa Theologiae*, with the commentary of Cajetan, was published by the Leonine Commission. The Leonine edition of Aquinas' *Commentary on the Nicomachean Ethics* appeared under the direction of Gauthier; the most recent English translation is by Litzinger (1964). The best shorter biography of Aquinas is Tugwell 1988. Two more thorough biographical accounts are Torrell 1996 and Weisheipl 1983. Finnis 1998 (chap. 1) is a short but reliable biographical narrative.

There is an extensive literature on Aquinas' philosophy of law and especially his theory of natural law. Two periodicals, *The American Journal of Jurisprudence* (formerly called *Natural Law Forum*) and *Vera Lex*, have published many articles on natural law moral and political theory. Important articles on Aquinas' approach to natural law theory are by C. Ryan (1965), Hittinger (1993), and George (1992). Golding 1974 discusses the jurisprudential dimensions of Aquinas' theory. Donagan 1982 and Finnis 1998 are good accounts of the theory of action underlying Aquinas' legal philosophy. Mitsis 2003 discusses Aquinas in relation to the Stoics on virtue and natural law.

Earlier interpretations of Thomistic natural law theory are Maritain 1951, Simon 1965, and D'Entreves 1970. Sigmund 1988 contains thoughtful commentaries together with a collection of twentieth-century analyses of Aquinas on natural law. Sigmund 1993 is a useful introduction to Aquinas and political thought.

The last half of the twentieth century saw a resurgence of interest in natural law moral theory and jurisprudence in English-speaking countries. Anscombe 1958 challenges analytic philosophers to reconsider natural law

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[28] The author is grateful to Marianne Lisska for excellent proofreading assistance.

theory in both Aristotle and Aquinas. MacIntyre 1984, 1988, and 1990 contain a reformulation of Aristotelian and Thomistic moral theory. Hart (1961) contributes to this general revival of natural law jurisprudence with his claim about the "core of good sense in natural law jurisprudence" and his discussion of natural necessities. Fuller 1964 introduced the concept of "procedural" natural law.

Two opposing approaches to natural law emerged in the latter part of the twentieth century. Veatch 1971, 1985, and 1990 defend a more traditional Aristotelian account, and McInerny 1992 and 1998 similarly offer a neo-scholastic account of natural law. This approach is defended by Lisska 1996 and Hittinger 1993. Opposed is the "new natural law theory," articulated by Finnis 1982, 1983, and 1998, drawing on the insights of Grisez (1965) who reformulated the notion of practical reason. The essays in George 1993 bring natural law theory into discussion with Rawls, Dworkin, and other American liberal theorists. George 1999 is a systematic defense of the new natural law theory with a reply to critics who favor the traditional approach. The debate between these two camps has encouraged a deeper examination of the natural law tradition and Aquinas' place in it.

Porter 1999 and Trainia 1999 bring together Aquinas' natural law theory with contemporary feminist philosophy. Dewan 2002 articulates some reservations about Porter's rendition of Aquinas.

Chapter 13

PHILOSOPHY OF LAW
IN THE LATER MIDDLE AGES

by Anthony J. Lisska and Brian Tierney[1]

13.1. Roger Bacon and John Duns Scotus

This chapter has a twofold purpose. First of all, it considers the development of natural law moral theory and jurisprudence in the work of certain philosophers who followed Thomas Aquinas (ca. 1226–1274), including Roger Bacon (1214–1294), John Duns Scotus (1274–1308), John of Paris (d. 1306), Marsilius of Padua (1280–1342), and William of Ockham (1280–1347). Second, there follows an elucidation of the development of natural human rights theory. This deals with recent work in the history of human rights theory, arguing that subjective human rights have an earlier appearance in Western jurisprudence than previous scholarship suggested.

Roger Bacon, possibly the most brilliant and independent of the Franciscan philosophers of the Middle Ages, is sometimes referred to as *Doctor Mirabilis* (the "Wonderful, or Marvelous, Doctor"). Greatly interested in the rise of natural philosophy occurring at this time,[2] Bacon developed several philosophical themes that influenced his later Franciscan brothers. Bacon endorsed the primacy of theology in matters of philosophy. He argued that metaphysics should be placed under moral theory, and that moral theory was subsumed under theology. The moral philosophy of Aristotle was inadequate, and moral theory was only rendered sufficient within the context of Christian theology. Theological issues thus became directive for philosophical matters, a position later Franciscans would also find attractive to a greater or lesser degree. One theological proposition concerns Adam's Fall through original sin; Bacon believed that the Fall so impaired human understanding that genuine philosophical knowledge in the Aristotelian sense was nearly impossible to attain (Sinkler 1998, 634). His principal work, the *Opus Maius* (*The Major Work*), was an encyclopedia of science.

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[1] Sections 13.1–3 and 13.5–6 were written by Anthony J. Lisska, and Section 13.4 was written by Brian Tierney. All translations are by the authors unless otherwise indicated.

[2] The important work of Moody 1975a, among others, offers original insights into the rise of science in the late-thirteenth and early-fourteenth centuries. There is some historical evidence that the condemnations in 1270 and 1277 by Bishop Stephen Tempier, the Archbishop of Paris, brought a chill to metaphysical and philosophy of religion efforts. He issued a set of prohibitions against holding certain philosophical propositions. While directed principally at various current interpretations of Aristotle, nonetheless several positions affirmed by Aquinas were included in this list. This less-than-friendly attitude toward ontological speculation forced philosophers to move toward empirical investigations of nature.

Duns Scotus is, to be sure, the most serious metaphysical philosopher of the three. Born in Scotland, Scotus, often called the *Doctor Subtilis* (the "Subtle Doctor") by historians of philosophy, exhibited such complicated arguments that most scholars agree that this appellation is by no means unmerited. Unlike Aquinas, Scotus did not write a commentary on the *Politics* of Aristotle. Scotus' ethical writings are scattered among his other works, and he appears not to have written any lasting treatises dedicated to political issues.

In Scotus' system, God's will is preeminent. The will is the source of love, and hence divine love is the important principle in Scotus' moral system. Given this, the first moral principle is that "God is to be loved" rather than "Good is to be done and evil avoided" (the latter of which Aquinas appropriated from Aristotle). The first two commandments of the Decalogue—and possibly the third commandment as well—are exemplifications of how divine love is to be followed by human persons. This is referred to by Scotus as the first tablet (*tabula*) of moral precepts. The metaphor here is the tablets on which Moses brought back the Ten Commandments from the mountaintop. Scotus argues that there is a category difference between the first three commandments on the one side of the tablet and the remaining seven, which he argues are on the second tablet. While the second tablet considers those actions that govern the actions of human beings among one another, the first tablet concerns a human person's relationship and obligations to God. These commandments on the second tablet, hence, have a different justification than do those on the first tablet.

As Scotus sees the function of natural law, the role of love or will is paramount, and the role of reason is secondary.[3] The first tablet, according to Scotus, followed necessarily from the fact that God exists. These precepts are independent of any divine command and cannot be changed or altered. The divine commandments in the second tablet are not self-evident (*per se nota*) to reason in the manner that the natural law principles of practical reason are in Aquinas' account in his *Summa Theologiae*. On the contrary, their necessity follows from the fact that God commands them. Hence, this appears to be the beginning of a late medieval theory of divine prescriptivism, which holds that the validity of a moral precept depends fundamentally on the issuance of the command by God. Scotus is concerned about how much of the Decalogue is contained within a philosophical analysis of the natural law. He offers a distinction between those commandments that pertain strictly to the natural law and those that pertain to the natural law only in an extended fashion. In *Ordinatio III* (*A Prescription III*), Scotus writes:

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[3] The scholarly debate on the exact nature of voluntarism in Scotus is beyond the scope of this analysis. Nonetheless, Cross 1999, 89–95, argues that Scotus is not a divine command theorist. Williams 1998, 214, on the other hand, holds that in some sense Scotus' moral theory is rooted in the voluntarism of a divine command theory. Ingham 1993, 128, notes that "the intricate dynamic between reason and willing constitutes the core of Scotist ethics."

First of all, we deny that all the commandments of the second table pertain strictly to the law of nature. Secondly, we admit that the first two commandments belong strictly to the law of nature. Thirdly, there is some doubt about the third commandment of the first table. Fourthly, we concede that all the commandments fall under the law of nature, but speaking broadly and in an extended sense. (*Ordinatio III* dist. 44; 294)

Scotus and Aquinas differ over which precepts found in the Decalogue pertain directly to the natural law and which precepts do not. For Aquinas, unlike Scotus, all of the commandments of the Decalogue pertain necessarily to the natural law, either in a self-evident manner or through a process of derivation by practical reason. Aquinas thinks that the commandments, as moral prescriptions, follow directly from a rational analysis of the content of human nature. Scotus, however, thinks that the rational analysis common to Aquinas' rendition of moral principles is never a sufficient condition to justify the philosophical content of natural law prescriptions.

A biblical issue prompted much if not all of this discussion. Scotus understood the Old Testament texts to report occasions when God commanded persons to undertake actions directly at variance with one or more of the commandments. God's command to Abraham to offer his only son, Isaac, as a sacrifice to God, is probably the best known of these cases, although other Old Testament passages that worried medieval theologians involved the polygamy of some of the Patriarchs and the fornication of Hosea (*Ordinatio III* Suppl. dist. 37; 198–9). Given Scotus' analysis, God could grant dispensations to the commandments contained on the second tablet. In addition, those commandments prescribing moral duties and obligations to one's neighbor have obligatory or moral force only because God prescribes them. The prescriptions are not based upon any dispositional property or relation found in human nature, which differs radically from the Aristotelian analysis put forward by Aquinas in his *Summa Theologiae* (see Chapter 12, Section 12.4, of this volume). For on Aquinas' account, the moral obligations found in the second tablet are derived necessarily from human nature. Just as God could not create a human person without the set of dispositional properties found in the human essence, so too God could not create a human person for whom moral obligations based on natural law do not apply. For Aquinas, good Aristotelian that he was, a dispensation from a moral rule could occur only when the circumstances had become altered to such a degree that the commandment did not apply. Scotus, on the other hand, denies that the only case for altering a moral command would be a change of circumstances. This position would apply to the precepts subsumed under the second tablet.

The difference between Scotus and Aquinas concerning the commandments is founded on the differing role of the intellect and the role of the will in their respective positions. In the *Prima Secundae* of *Summa Theologiae*, Aquinas writes as follows about the preeminence of the intellect:

It needs to be noted that, in the acts of the soul, the act that is essentially of one potency or habit, receives the form and species from the higher potency or habit; this is so because the inferior is ordained by the superior. Now it is obvious that, in a way, reason precedes the will, and reason ordains the act of the will: namely, insofar as the will tends to its object according to the order of reason, since the apprehensive power presents the object to the appetite. Therefore, the act by which the will tends toward some object or other that is proposed as good, in that it is ordained to the end by reason, is materially an act of the will, but formally is an act of the reason. (*STh* IaIIae.13.a.1)

While the importance of this distinction between the intellectualist and the voluntarist traditions has been downplayed in recent analysis of late medieval moral theory, nonetheless it appears that it is this distinction that forces Scotus to limit inclusion of the second tablet's commandments into his theory of natural law strictly considered. Scotus writes that "the divine will, which is the primary rule of everything that is to be undertaken and of all actions, and the action of the divine will, from which is the primary or first rule for action, are the principal source of moral rectitude" (*Rep.* IV, d.46, q.4, n. 8). Ultimately, an act is right and an object is good by the very fact that God wills the act to be right or the object to be good. Scotus writes that "the divine will is the cause of good objects and therefore by the very fact that something is willed by God, that very object is good [*ipsum est bonum*]" (*Rep.* I, d.48, q.unica). Scotus appeals to *recta ratio* ("right reason"), but right reason appears to be an awareness that something is reasonable because God wills it.

As a Franciscan friar, Scotus was interested in a proper analysis of the right to property and how such rights fit in with the vow of poverty that Francis of Assisi considered important for his friars. From these writings by Scotus and others emerged a more modern position on individual rights theory. Two questions direct the analysis that Scotus provides in *Ordinatio IV*: What is the justification for a person acquiring property in the first place? How can property, once obtained, be given or transferred to another person?

Scotus developed a response to the first query in the form of six conclusions. Developing a philosophical rationale for the requirements of poverty advocated by his spiritual father, Francis of Assisi, Scotus argued that in the state of original justice, which was before the Fall of Adam and Eve, no one held any property whatsoever.[4] On this matter, Scotus writes the following to support his first conclusion: "In the state of innocence, neither divine nor natural law provided for distinct ownership of property; on the contrary, everything was common" (*Ordinatio IV*, 220). In the *Acts of the Apostles*, one reads that "no one of them claimed anything as his own; rather, all things were held in common" (Acts 4:32). Scotus puts forward his second conclusion: "Our second conclusion is that after the Fall of man, this law of nature

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[4] Scotus refers often in these discussions to Augustine. This illustrates a common thread in historical discussions of Franciscan philosophers that they were much taken with the philosophical and theological analyses put forward by Augustine.

of holding all things in common was revoked" (*Ordinatio IV*, 220). Scotus then proceeds with the third conclusion: "Once this natural law precept of having all in common was revoked, and thus permission was given to appropriate and divide up what had been common, there was still no actual division imposed by either divine or natural law" (ibid., 221). He next argues that the following fourth conclusion is entailed by the third: "It would follow from this that the first division of property was brought about by some positive legislation. To see why this division was just, therefore, we must look at why such a positive law would be just" (*Ordinatio IV* dist. 15, q. 2; 221). Scotus then articulates for his fifth conclusion what we might take to be a form of a consent theory of the origin of political authority:

Political authority, however, which is exercised over those outside [the family], whether it resides in one person or in a community, can be just by common consent and election on the part of the community [...]. [This] has to do with those who live together, even though there is no consanguinity or close relationship between them. Thus, if some outsiders banded together to build a city or live in one, seeing that they could not be well governed without some form of authority, they could have amicably agreed to commit their community to one person or to a group, and if to one person, to him alone and to a successor who would be chosen as he was, or to him and his posterity. And both of these forms of political authority are just, because one person can justly submit himself to another or to a community in those things which are not against the law of God and as regards which he can be guided better by the person or persons to whom he has submitted or subjected himself than he could by himself. Hence, we have here all that is required to pass a just law, because it would be promulgated by one who possesses prudence either in himself or in his counselors and enjoys authority in one of the several ways mentioned in this conclusion. (*Ordinatio IV* dist. 15, q. 2; 221–2)

This fifth conclusion is important in understanding Scotus' political theory and his justification for positive law. His analysis of a "just law" upholds procedural rather than substantive natural law; a law is just only if a prudent person in power exercises due authority and promulgates the ruling.[5] Scotus' sixth conclusion is: "The first division of ownership could have been just by reason of some just positive law passed by the father or the regent ruling justly or by a community ruling or regulating justly, and this is probably how it was done" (*Ordinatio IV* dist. 15, q. 2; 222).

The fifth conclusion concerning political authority expounded by Scotus is justly famous in the development of Western political theory. Harris argues:

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[5] Fuller 1964 distinguishes between procedural and substantive natural law. The former indicates the process by which a law is determined and promulgated by the person in authority. Fuller lists eight "rational principles" that a ruler must follow in order to pass a just and reasonable law. Substantive natural law, on the other hand, is the claim that a law is just only if it is in accord with the moral principles determined by human nature. This is often called the requirement for a "thick" rather than a "thin" theory of human nature. Aquinas' account, discussed in Chapter 12 of this volume, is a substantive theory of natural law.

Scotus is important in the history of political science as one of the pioneers of modern social theory. His doctrines bear a strong resemblance to the later teaching of Locke. Scotus' account of the social contract is a philosophic analysis of the origin of society. Society, he held, was naturally organized into family groups; but when paternal authority was unable to enforce order, political authority was constituted by the people. Accordingly all political authority is derived from the consent of the governed. (Harris 1937, 282)

Scotus next responds to his second query, which concerns the legitimate transfer of property. In opposition to Aquinas, Scotus holds that private property is not a matter of natural law but is dependent on positive law. Transfer of property is thus reducible to someone having the proper authority to carry out such an activity. This analysis also upholds procedural natural law. Harris provides the following account of the importance of Scotus' treatment of property issues:

Concern for the public welfare is the basis of Scotus' economic doctrines. He regarded private property as a product of positive rather than natural law and insisted that property must not be administered in a way detrimental to the community. He formulated principles for the equitable employment of various commercial contracts, and while he accepted the current concept of a just price he recognized the social importance of a merchant class. (Ibid., 75)

Scotus argues that the question of happiness is determined ultimately by a divine principle. This is in opposition to the Aristotelian analysis adopted by Aquinas that happiness—*eudaimonia*—results in the fully functioning person developing the dispositional human properties. In effect, Scotus is moving beyond what he takes to be the philosophical rationalism in moral theory expounded by Aquinas; Scotus emphasizes the role of divine love and divine will. This emphasis is further developed by his Franciscan successor William of Ockham (see Sections 13.3 and 13.4 below).

13.2. John of Paris and Marsilius of Padua

Brief mention should be made of the Dominican friar John of Paris (d. 1306), who developed the concepts of his religious brother Aquinas. John of Paris can be regarded as a Dominican respondent to the early claims in the poverty debates mustered by the Franciscans.[6] It is unclear historically how any rivalry between the Dominicans and the Franciscans contributed to these sometimes heated discussions. Certainly the respective founders of these two highly regarded mendicant orders of friars in the early thirteenth century, Dominic de Guzman and Francis of Assisi, knew and respected one another. Furthermore, Aquinas and Bonaventure, while often offering differing theological positions, held academic chairs at the University of Paris and teamed together in the seemingly constant battles with secularists and with the faculty of arts at Paris.

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[6] For an extended discussion of the importance of John of Paris in the development of political theory, see Coleman 2000, vol. 2, chap. 3.

Whatever the state of these intramural debates, John of Paris wrote a series of essays entitled *On Royal and Papal Power* (ca. 1302) that exerted some degree of influence in the murky political and legal situations of the time, especially those dealing with debates between the papacy and various European monarchs.

John of Paris developed what has become known as the "Dominican position" regarding matters of poverty and rights to ownership and use of property. These concepts as spelled out by John are rooted in the texts of Aquinas. In his *Summa Theologiae*, Aquinas argued that the private ownership of a modicum of material things beyond the barest necessities is part of the natural law in the present temporal circumstances. Ownership is not reducible only to a positive right as Scotus claimed. Since Aquinas adopted the theological maxim that "grace perfects nature," his analysis of the natural world was always that it is a good, especially since it results from the creative forces of an all good God. There was, for Aquinas, a "truth in things," which is called "ontological truth." This means that things correspond to divine ideas in God's mind. Since Aquinas argued that "Truth, Being, and Goodness" are convertible—that is, they are reducible to each other—he believed that the material world possesses an innate dimension of goodness because it had an innate dimension of truth and being. Given this account of the material world and its contents, it is not surprising that Aquinas would hold that it is natural for human beings to own and use a modicum of these contents and that a proper use is a reflection of the glory of divine wisdom. It is here that the Dominicans and the Franciscans parted company on the issues of the ownership and use of property.

John of Paris defended Aquinas' view on property. Like Aquinas, John argued in *On Royal and Papal Power* that the interpretation of absolute poverty defended by the Franciscans was at least muddled conceptually if not outrightly false. John based his analysis of private property on the Aristotelian theory of matter and form as the fundamental principles determining things in the external world. Simply put, matter, as the Aristotelian principle of potentiality, is brought into act by form. What is true of the natural world, John argues, also applies to the world of human labor. Hence, material elements that are potentially products of manufacture or artifacts, only become artifacts by the agency of human persons. The importance of human agency in exercising a craft—what Aquinas called an art, or "productive reason"—justifies the ownership by the craftsperson of the object produced.[7] Hence, there is a "natural" reason and justification why one attains ownership over material things in the world.

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[7] Aquinas argued that practical reason is "ordained to do something" (*quae ordinatur ad opus*). This "something" is either the undertaking of an action, which is morality, or the producing of an object or artifact, which is the exercise of an art or a craft.

In the first quarter of the fourteenth century, Pope John XXII, in his battle with the Franciscans in general and William of Ockham in particular, sided with the Dominican position as articulated by John of Paris. One might surmise a bit of self-interest on the part of Pope John in his resolution of these issues. If the radical Franciscan position was correct and if a necessary condition for Christian perfection and purity was to emulate both Jesus (*imitatio Christi*) and the apostles in the renunciation of property ownership, then if the Franciscans attributed the ownership of their material goods to the pope, by definition the pope was a religious inferior.[8] It is not difficult to see why an argumentative pontiff on the papal throne, as John XXII certainly was, would disagree vehemently with the Franciscans and side with the Dominicans.

In addition, John, following Aquinas, claims that the common or public good has its source in the natural law and that human persons are, by nature, social beings. It follows, then, that living in community is prior to any common agreement among members of a community either about living together in community or in the establishment of rights and duties. Thus, for John of Paris, the role of the community and the public good, as derivable from the natural law and not dependent wholly on the positive law, are aspects of a theory of ethical naturalism (i.e., the metaethical theory holding that moral terms are reducible to some natural fact in the world), as they were for his philosophical forebears Aristotle and Aquinas.

An important legal and political theorist of the early-fourteenth century, Marsilius of Padua (1280–1342), often referred to as "Marsiglio," is best known for his *The Defender of the Peace* (*Defensor Pacis*), published in 1324. Educated both at Padua and Paris, Marsilius appears not to have been a religious cleric, although he was a canon of the Cathedral at Padua. First studying medicine, Marsilius journeyed to Paris and studied with the faculty of arts where he became interested in the pressing philosophical and theological issues connected with political problems. There is some evidence that Marsilius served briefly as rector of the University of Paris. Along with John of Jandun (1285–1328), Marsilius became a member of the court of Ludwig of Bavaria (d. 1347), who had himself crowned as the Holy Roman Emperor in direct opposition to the wishes of the Pope John XXII. Pope John was in extended conflict with both Marsilius and John of Paris, and later with William of Ockham. All three, as well as the emperor, were excommunicated. A theme that runs through the writings of Marsilius is the placing of limits on papal power; he argued that papal power is subject to and derived from the secular power rooted in the body politic.

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[8] All property comes from God through the act of creation. As Vicar of Christ on earth, by default the pope is the owner of all material goods. The pope permits the Franciscans to use property. That there appears to be a conceptual problem here with the pope being Vicar of Christ yet not being able to engage fully in the imitation of Jesus taught by Francis is not to be denied.

The concrete political situation of the early-fourteenth-century Italian city-states appears to be the backdrop against which Marsilius wrote *The Defender of the Peace*. Early in this text, he writes, "the fruits of peace or tranquility, then, are the greatest goods" (*The Defender of the Peace*, *Discourse* I.1; 5). Appalled with the lack of peace and concord then extant in the city-states, Marsilius judged that papal interference contributed causally to this political unrest. Hence, his disquisition is a bold attempt to place limits on what he perceived to be the theoretical and practical excesses of papal sovereignty.[9] It is highly probable that Marsilius deemed the structure of republican Rome to be the best of all possible political worlds, and his theory was an attempt to resurrect these ideals from what he perceived to be the muddled sea of scholastic church/state relations. Skinner (1978, 56) notes that for Marsilius, among others, "the attainment of peace and concord, *pax et concordia*, represents the highest value in political life."

The Defender of the Peace, which some critics suggest is a forerunner of the Protestant reformation, exhibits strong Aristotelian influences. Marsilius no doubt studied Aristotle's work while he was a Paris student; he quotes Aristotle's *Politics* extensively and much of the early sections of *The Defender of the Peace* reads like an Aristotelian commentary. William of Moerbeke translated Aristotle's *Nicomachean Ethics* and *Politics* in the 1260s; both treatises were well-known in Western university circles, and the Aristotelian passages in Marsilius' text are from Moerbeke. Referring to Aristotle's *Politics*, Marsilius discusses three forms of government: knightly monarchy, aristocracy, and the polity or city-state (*The Defender of the Peace*, I.8; 28). Marsilius, who appears worried about the Augustinian theory about the role of the church in state affairs, most notably present in Augustine's *City of God*, attempts to dissociate and redirect the Aristotelian concept of polity from any dependence on ecclesiastical control or influence. He does this through placing the legislative power for governing bodies directly in the hands of the people, which is an early account of a theory of "popular sovereignty." Marsilius notes that the issues of papal sovereignty were not part of Aristotle's political purview, and hence an expanded political theory derived from Aristotle was necessary.

The Defender of the Peace is divided into three sections or "discourses." The first discourse, based on Aristotle with a passing glance at Cicero, is a somewhat diffuse account of political sovereignty resting in the members of the polity, which included the male citizens. Using insights from Aristotle and Cicero, Marsilius argues that the state is a perfect polity that exists for the common good of its citizens. The ruler is in charge only by the authority of the body politic. The second discourse, based principally on the scriptures and the writings of the church fathers, is a bold exposition of a theory of ecclesiastical

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[9] Skinner 1990, 401, writes that Marsilius discussed this negative critique of papal power "with a boldness that won him instant excommunication and lasting notoriety."

power that is derived from the will of the people. Here Marsilius argues for a conciliar theory of papal rule with the power vested in the members of the church polity. Yet it is derived ultimately from the civil authority. Marsilius, by using New Testament passages like "My kingdom is not of this world," and "Render to Caesar the things that are Caesar's, and to God the things that are God's," and Paul's claim that "[n]o soldier of God entangles himself with secular affairs," argues that the person on the papal throne ought not be a temporal ruler but only a spiritual ruler. The church, while necessary for morals and education, should be under the secular ruler, who is in power through the will of the people. Of course, this account is directly opposed to the strong popes of the thirteenth century. The third discourse, which is a list of forty-two propositions, is a concise summary of the positions articulated in the first two discourses. The 1327 papal bull of John XXII condemned outright five of these propositions as heretical and referred to Marsilius as a "son of perdition."

In Chapter 10 of the first discourse, Marsilius defines law as "an ordinance made by political prudence, concerning matters of justice and benefit and their opposites, and having 'coercive force'" (*The Defender of the Peace*, I.10.36). Hence, a law requires a command conjoined with a sanction. However, right reason and justice are also necessary conditions for law, so this is not a reductionist version of legal positivism. (Reductionism entails that a term or proposition can be placed into a prior category on which it ultimately depends. Legal positivism is the theory that all law is fundamentally the articulation of commands by the person in power, who has the force or sanction to enforce the imperative.) Furthermore, "the human authority to make laws belongs to the whole body of the citizens or to the weightier part thereof" (ibid., 46).

Marsilius' "extraordinary tract" (Coleman 2000, vol. 2: 134) indeed exerted significant influence on late medieval and renaissance political theory. For example, Thomas Cromwell (1485–1540) supported the translation into English (1535) of Marsilius' treatise during Henry VIII's squabbles with Rome on church-state issues. Yet scholarly debate is vibrant on the exact nature of that influence, with interpretations ranging from ultramontane criticisms found in early-twentieth-century Roman Catholic writers to secular theorists suggesting that republican democracy and modern constitutionalism are rooted in this treatise. While the accounts rendered by several reformation theologians are structurally similar to Marsilius' work, nonetheless it is another question articulating the direct causal influence.

Marsilius of Padua's treatise certainly indicates that the late middle ages were more diverse theoretically than the typical "age of faith" label suggests. Here is found a treatise directly arguing for limited papal power derived from the popular sovereignty of the people. This is a far cry from the papal supremacy model that was articulated by several popes of the thirteenth century and reaffirmed in the mid-nineteenth century by Pius IX with his closely scripted First Vatican Council.

13.3. William of Ockham on Law

William of Ockham was born in Surrey in the last decade of the thirteenth century. Like Scotus, he entered the Franciscan order and eventually studied at Oxford. Much of his life was not that of the tranquil scholar. Involved in an ecclesiastical skirmish with Pope John XXII, Ockham fled to Germany and eventually was subjected to the censure of excommunication. Legend has it that he suffered and died in 1349 from the plague that ravaged Western Europe in the middle of the fourteenth century.

In the history of philosophy, Ockham traditionally is portrayed as a fourteenth-century empiricist and nominalist. Empiricism is the view in epistemology asserting that all knowledge is based on sense experience. Nominalism denies the possibility of essential properties or natural kinds existing outside the human mind. Some historians have even suggested that Ockham was fundamentally a late medieval precursor of the empiricist philosopher David Hume (e.g., Moody 1975b, 419). Recent scholarship has tempered this more radical interpretation of Ockham's role in the history of philosophy.

Ockham appears to have worried that the incorporation of Aristotelian metaphysics into Christian theology in the manner articulated and defended by Aquinas created theological impurities and conceptual muddles. According to Ockham, this Aristotelianism limits two claims that are important for Ockham's theology: divine freedom and divine omnipotence. Given Ockham's empiricist worries about rationalist metaphysics, he disregarded an Aristotelian theory of natural kinds. He also appears to have rejected the classical theory of divine ideas, which asserts that the ideas in the divine mind are archetypes, after which the essences of individual things in the created world are patterned or copied. Hence, it is no surprise that Ockham's development of natural law theory, with no natural kind theory and no account of divine ideas, would be in some rudimentary sense "command based" as opposed to "reason based." The concept of right reason functions differently in Ockham's moral and political theory than it did in Aquinas'. While appropriating a form of right reason, nonetheless Ockham adopts a divine prescriptivism in which the ultimate philosophical justification for a moral prescription is that God wills the action. A form of voluntarism thus takes hold in Ockham's philosophy. Human dignity, for instance, is based on the ability of a human person to be a free agent. The justification that "Act x is right" is dependent foundationally on the fact that God so wills this to be the case. (For Aquinas, in contrast, "Act x is right" because it is in accord with human nature.) In *Reportatio*,[10] Ockham writes, "By the very fact that God wills something, it is right for it to be done" (IV.q.9.E–F). While one can find such examples of the role of the

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[10] *Reportatio* is a written record by persons who attended the lectures that Ockham gave on the last three books of the *Sentences* of Peter Lombard.

will in early medieval philosophy, especially the work of Augustine, nonetheless it is in Ockham where divine voluntarism becomes significant.

Ockham does not accept the account put forward by Aquinas that God's commandments must be in accord with human nature as established in the divine idea of the human essence. Ockham argues: "Obligation does not fall on God, since God is not under any obligation to do anything" (*Rep.* III.q.5.H). In some ways, Ockham appears to be a modified legal positivist in his theory of morality and law, and he is willing to extend this voluntarism. He notes, in opposition even to Scotus, that God could command a human person to hate him. The present moral order is dependent ultimately on the will of God. Hence, God could have, had he so chosen, promulgated a different set of commandments. As Copleston once noted, Ockham, in placing emphasis on a divine command theory, preserved two key theological claims:

Ockham was not concerned with promoting disbelief in the moral law; he was concerned with [1] exalting the divine freedom and omnipotence and [2] drawing what he considered to be logical consequences of the divine omnipotence. (Copleston 1961, 133)

It is important to lay bare how Ockham develops the "logical consequences of the divine omnipotence." While it is problematic to argue that Ockham's position on divine command theory is reducible to Justinian's classic formulation of legal positivism as found in his *Institutes*—"What pleases the prince has the force of law" (1.2.6)—nonetheless, the exact role that the divine will plays in this theory requires detailed elucidation.

One perspicuous way to delineate the difference between Aquinas and Ockham on the issue of God's role in determining moral maxims is to consider the question that Socrates put to Euthyphro: Is something good because the gods love it, or do the gods love it because it is good? That is, does the act of divine love—or divine willing—entail that an act is right, or is the act right because it corresponds to another standard that determines the goodness or rightness of the act?[11] Ockham endorses the first half of the disjunct, while Aquinas accepts the second half. For Aquinas, then, an act is right and can be the prescriptive content of a divine command because it is in accord with the content of human nature existing in the mind of God as a divine idea. For Ockham, to the contrary, the very act of God commanding renders the act

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[11] This is what Veatch and Rautenberg 1991, 828, often call the "Euthyphro Principle." They use this methodological principle to determine whether a philosopher argues for a strong sense of natural law based on a "thick" theory of human nature or a weaker sense of natural law based on either a good-reasons account or a noncognitivist position. A good-reasons account attempts to justify a moral argument by means of consistency of propositions. There is not an attempt to ground the argument in any fact of reality. A noncognitivist position, for example, emotivism, holds that a moral claim is nothing more than the expression of an emotion in what might be considered a moral situation; as such, these sorts of claims have no truth value.

right. Aquinas' account is based upon a realist ontology of essences, while Ockham's account is consistent with a nominalist denial of essential properties. This is one ontological difference between a voluntarist and an intellectualist. An intellectualist also holds that the use of reason plays the predominant role, while a voluntarist holds that the will has precedence over reason. It appears that for Ockham the possibility of deriving a moral theory based sufficiently on ethical naturalism, and thus divorced from theological propositions, is beyond the pale of human reason. However, in his *Commentary on the Sentences*, Ockham writes: "By the very fact that the divine will commands this, right reason says that it is to be willed (by human persons)" (*In I Sent*. d.41, q.1.K). He further writes that "every will is right through its conformity with right reason." Of course, the question demanding a response is "How does one offer an analysis of 'right reason' in passages like this one in the texts of Ockham?"

Recent discussion on the political theory and the natural rights theory of William of Ockham draws attention to the role of "right reason" in Ockham's elucidation of the foundation of moral theory and a theory of rights (Tierney 1997; see also Section 13.4 below for further discussion). The argument suggests that the use of right reason by Ockham tempers what earlier scholars had understood as the radical voluntarism attributed to Ockham's foundation for moral theory. Hence, recent scholarship indicates that Ockham was not the extreme voluntarist that several twentieth-century historians of philosophy have suggested (including Copleston 1974, 253; Bourke 1968, 104–95; Maurer 1962, 285–6). In the passage from the *Commentary on the Sentences* noted above, Ockham argues that right reason is determined when the intellect understands what God wills. This would differ from Aquinas, who argued that reason is right only when it knows the essential properties of things in the world.[12] Attempts to understand the role that right reason plays in Ockham's account of moral theory need to take into account how Ockham differs from Aquinas in this regard. Even with this account of right reason, it appears that voluntarism is still paramount in Ockham's analysis.[13]

There are several difficult issues involved in Ockham's interpretation of natural law: the role of right reason, the role of the will, the role of human nature or human essence, and the role of final cause in a human essence. All of these issues are conflated in most discussions of Ockham on natural law. As we have seen, Ockham differs from Aquinas in that Ockham offers a limited

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[12] This is what Aquinas means by truth—a correspondence of idea and thing. In *Summa Theologiae*, Aquinas discusses the concept of truth in the following way: "Truth is defined by the conformity [*adequatio*] of mind and thing. Thus, to know this conformity is to know truth" (*STh* Ia.16.a.4).

[13] Adams 1999 may be the best overall account of both recent work and more traditional analyses on the relation between nature and moral theory in Ockham. In the end, Adams indicates how the role of the will is central to Ockham's analysis of moral and political theory.

use of right reason. He posits the will as an unlimited power that leads to what Adams calls a "liberty of indifference," which she describes as "[t]he notion that created willpower is power to will, to nill, or to do nothing with respect to any object" (Adams 1999, 262 and 245). He has a nominalist analysis of human nature and dismisses a role for final cause—that is, that there is a natural end that determines proper function—in his account of human nature. In contemporary philosophy, Ockham's use of right reason is at least analogous to if not coextensive with what twentieth-century philosophers called "a good-reasons" theory of moral justification.[14] With the good-reasons philosophers, what is required is consistency of application and not reference to natural kind properties external to the mind.[15]

The will is prominent in Ockham's theory. He rejects Aquinas' intellectualist position because he thinks that that position limits the will and subjects willing to the requirements of the intellect. In Aquinas' moral theory, both the practical reason and the will are inclined "naturally" to the good. The first principle of practical reason for Aquinas is "Good is to be done and pursued and evil avoided" (*STh* IaIIae.94.a.2). The will is a rational appetite that always undertakes actions under the guise of what is good, and this cognitive content depends on both speculative and practical reason. Ockham denies that such limits can be placed upon the will by reason (see Adams 1999).[16]

Ockham's view of law, while part of the natural law tradition, differs from that proposed by Aquinas, who adopted a stronger version of Aristotelian naturalism. Ockham's emphasis on voluntarism together with right reason develops a less stringent voluntarism than what many critics once attributed to him. Nonetheless, like Bacon before him, Ockham had theological concerns that directed his philosophical engagement. Ockham's disputes over the nature of the Franciscan vow of poverty that led to his work served as a harbin-

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[14] Coleman (2000, vol. 2: 190) writes, "Ockham's emphasis on rationally guided choice is central to what has come to be called his voluntarism […]. Right reason is an integral requirement of virtue and hence agents must intend to aim at what is most objectively rational." However, "what is most objectively rational" is similar structurally to the concept of rational consistency proposed on a good-reasons theory; it is not the right reason of an essentialist natural law position.

[15] McInerny 1998 calls this sort of theory "natural law theory without nature," where "nature" refers to a dispositional account of human essence.

[16] For a discussion of the limitations of such a strongly voluntarist good-reasons theory, see Lisska 1996, chap. 3, and Veatch 1985. Warnock 1967 offers an analysis of the good-reasons approach: Cruelty is not wrong because it is wrong, but because we decide that it is wrong. Warnock objects to this approach and writes: "[N]ot only […] [does the good-reasons approach hold that it is] for us to decide what our moral opinions are, but also that it is for us to decide what to take as grounds for or against any moral opinion. We are not only, as it were, free to decide on the evidence, but also free to decide what evidence is" (Warnock 1967, 47). Warnock's objection to the good-reasons approach is that it has no referent to reality on which to ground a moral judgment. It is unclear whether Ockham ever gets beyond Warnock's objection.

ger of the important subjective theory of human rights, which will be dis-
cussed in the following section.

13.4. Ockham and Natural Rights[17]

William of Ockham had an unusual career. As a young scholar and teacher he
was a brilliantly innovative philosopher and theologian, but he devoted the
whole latter part of his life to writing on issues of law and political thought. In
his philosophical teaching Ockham was a nominalist and a voluntarist. He
held that, in the external world, nothing actually existed except individual en-
tities; the general terms that humans apply to collections of like objects were
only mental constructs. As a voluntarist Ockham emphasized the absolute
freedom and omnipotent will of God, as well as human free will. His charac-
teristic teaching was that the whole universe, including the universe of moral
values, existed as it did simply because God willed that it be so. Everything
was contingent. If God had so willed, he could have created some other world
in which it would be virtuous to steal and lie. These considerations did not,
however, lead Ockham to a skeptical or relativist theory of morality. Precisely
because the human will could choose good or evil it needed a directing rule to
guide it; this rule, Ockham held, was right reason. As a Christian and a
Franciscan Ockham knew that God loved this world that he had chosen to
make and that he willed the good of humanity. Ockham thought that right
reason, reflecting on human experience, could discern moral norms in accord-
ance with that end.

   A major problem in addressing Ockham's work is to determine the rela-
tionship between his abstract philosophical positions and his practical politi-
cal conclusions. Scholars have never agreed about this. Some hold that
Ockham's later writing was essentially an extrapolation into the political
sphere of his underlying philosophical premises; others see little significant re-
lationship between the two sides of Ockham's thought. Arguing for the
former view, Villey (1975, 199–272, especially 228, 261) emphasizes Ockham's
teaching on natural rights. He maintains that Ockham instituted a semantic
revolution when he defined the word *ius* as a subjective right, that is, as a
power or faculty inhering in individual persons. Villey also maintains that
metaphysics always precedes jurisprudence, so that Ockham's nominalist phi-
losophy naturally led on to an individualistic theory of law and politics.

   Villey's argument is appealing but it is open to various objections. Some
critics have argued that in principle political conclusions cannot be derived
from metaphysical premises (Zuckerman 1973). Indeed, it is quite possible to
start out from nominalist and voluntarist premises and arrive at political con-

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[17] The views of Ockham considered in this section are discussed more fully, with detailed
references to the relevant texts in Ockham's works, in Tierney 1997.

clusions quite different from those of Ockham, as Thomas Hobbes (1588–1679) did centuries later. Ockham himself did not appeal to his philosophical doctrines in his political writings, but relied almost entirely on citations of scripture and canon law. Moreover, recent research has shown that the understanding of *ius* as a subjective faculty or power was quite common in earlier canonistic writings. It remains true, though, that the individualist strain in Ockham's political writings was entirely congruent with his philosophical principles even if not formally derived from them; in considering his work, it is one mind we have to deal with rather than two. Still, it seems clear that the actual content of Ockham's juridical and political thought was shaped primarily by the circumstances of the controversies in which he became involved.

Ockham's involvement in church politics came about as follows. In 1324 he was summoned from Oxford to the papal curia, then resident at Avignon, and there was accused of various doctrinal errors. While Ockham was in Avignon a bitter dispute broke out between Pope John XXII and the leaders of Ockham's Franciscan order. The Franciscans claimed that they lived—and should live—in absolute poverty, having renounced all ownership and all right of use related to material property; whatever they used they held by permission or license of an owner, not by any right of their own. Moreover, the friars claimed that, in living like this, they were faithfully imitating the perfect evangelical way of life instituted by Christ and the first apostles. Pope John XXII apparently found this doctrine subversive. He denounced the Franciscan position in a series of bulls, and in 1323 promulgated a formal dogmatic decree stating that henceforth it would be heretical to maintain that Christ and the apostles had nothing or that they had no rights in the things that they did have (*Corpus Iuris Canonici* 2: col. 1229). The pope's language ensured that the concept of a right would be at the center of the subsequent dispute.

Eventually nearly all the Franciscans reluctantly accepted the pope's decrees, but the minister-general of the order, Michael of Cesena, and a small group of adherents including Ockham, refused to do so. In 1328 they escaped from Avignon, denounced John XXII as a heretic, and took refuge at the court of the emperor Ludwig of Bavaria. Ludwig had his own quarrel with the pope and he welcomed the dissident Franciscans as allies.[18]

One of John XXII's arguments against the Franciscans asserted that there could be no licit use of anything without a right of using; to use without a right was simply to use unjustly. Ockham first employed the concept of a natural right in responding to this argument. His counterargument turned on a distinction between positive and natural rights. The kind of right that the friars had given up, Ockham argued, was every positive or legal right, every right for which one could sue in court. But, Ockham continued, there also ex-

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[18] Ludwig was elected by a majority of the German princes, but the pope refused to recognize the election as valid and excommunicated Ludwig in 1324.

isted an inalienable natural right of using things. No one, not even a Franciscan, could renounce this right; to do so would be tantamount to suicide, since the use of things was necessary to sustain life. According to Ockham, this natural right justified the Franciscan use of property without any ownership or legal right of use. "The Friars Minor have no positive right," Ockham writes, "but they do have a right, namely a natural right" (*Opera Politica*, vol. 2: 561).

To explain this further, Ockham turned to an old doctrine of the canonists. They had held that by natural law all things were common and that the natural right grounded in this natural law could still be exercised in case of extreme necessity. Ockham, however, had to explain how the friars could avail themselves of a natural right in their day-to-day living when they were not in a state of extreme need, so he added a refinement of his own. The natural right of common use could not be wholly abolished, he noted, but its exercise had been restricted by the human laws instituting private property; the ownership of property by one person was an impediment to its use by another. But, if an owner granted to another a license or permission to use his property, the impediment was removed. The license did not confer any new right; it merely allowed the exercise of a pre-existing natural right. And so, Ockham concluded, the friars could use property by natural right even outside the case of extreme necessity (*Opera Politica*, vol. 2: 578).

Ockham introduced the idea of a natural right into his work essentially as a debating tactic to respond to an argument of John XXII. But, as his work broadened into a more general critique of papal power, he evidently realized that the idea could have much broader implications. In his later works Ockham, like John Locke (1632–1704) in a later age, persistently used the idea of natural rights to attack the doctrine of divine right absolutism, though in Ockham's case it was papal absolutism rather than royal absolutism that was combated.

Ockham was especially concerned to refute the arguments of extreme papalist theologians who held that all *dominium*, that is, all rightful rulership and all rights of ownership, were derived from the pope as vicar of God. Ockham's response to such claims is set out most clearly and succinctly in a work appropriately called *A Short Discourse*, which begins with a robust assertion that the abuse of papal power is a threat to "the rights and liberties given by God and nature" (*A Short Discourse*, 3). Ockham goes on to argue that licit government and rights of property are not derived from the pope but from human reason. He explains that the power initially given by God to the human race in the person of Adam should be understood as "the power [...] that reason pronounces to be necessary, expedient, fit, or useful, not only for living but for living well" (ibid., 90). But, Ockham continues, right reason shows that among fallen men the institutions of private property and government are necessary for living well. Accordingly, individual property was instituted by

human laws, and imperial power was established "through men voluntarily subjecting themselves to an emperor" (ibid., 91, 93, 117). Such power does not come from the pope. It follows that rulers and others have rights that the pope is bound to respect.

Extreme papalists held that the pope's power was limited only by the express commands of divine and natural law. (Even they agreed that the pope could not command someone to commit adultery, incest, or murder.) But Ockham attacked this view. He holds that papal power is also limited by the rights of the faithful. In arguing for this, Ockham develops a novel synthesis of the old idea of Christian liberty with a canonistic doctrine asserting that no one can be deprived of a right "without fault or cause." He quotes the teaching of St. James that the law of the gospel is "a law of perfect liberty," and the words of St. Paul that "[w]here the spirit of the Lord is, there is freedom." But, Ockham argues, if the pope has the power to do anything not expressly forbidden by divine and natural law the Christian people will be reduced to a state of horrendous servitude, for this is exactly the kind of power that a master has over a slave. The pope would be able to deprive kings of their power and take others' goods just as a master can take anything from his slave—and all this without fault or cause. But this is absurd, Ockham insists (ibid., 22–4). Papal power was given for the common good, not for the pope's own advantage (ibid., 26). The pope can do anything necessary to sustain the faith or the common good, but only while "saving the rights and liberties of others" (ibid., 62).

In another argument, Ockham emphasizes the liberties granted by God and nature. He has in mind here the freedom to choose a way of life, for example, to take a vow of virginity, enter a religious order, or undertake a fast. Such decisions were certainly not contrary to divine or natural law, but the pope had no power to command such things; they had to be undertaken freely (ibid., 54–5). Ockham is concerned here to defend a right understood as a sphere of individual moral autonomy, which is outside the scope of government control.

Ockham was primarily concerned to attack papal tyranny and defend the rights of the emperor, but he did note that imperial power also has limitations. Commenting on a famous text of Roman law asserting that what pleased the emperor had the force of law, Ockham explains that it should be understood to mean what pleased him "reasonably and justly and for the common good" (*Dialogus in Monarchia S. Romani Imperii*, 2: 924). Ockham often mentions the common good alongside his emphasis on natural rights. He does not regard the two things as normally opposed to one another; rather, he holds that the private good of each individual redounds to the common good of all (ibid.). Ockham acknowledges that in case of urgent necessity or extreme peril the common good might override private rights. But even here there is a final reservation. If the ruler's command is just and useful it is to be obeyed; if

it is unjust and useless it is to be resisted. In the last resort, it is left to the individual conscience to resist or obey (*Opera Politica*, vol. 1: 152).

Ockham's ideas exercised a continuing influence—often unacknowledged—in the ensuing centuries. McGrade (1982, 745) observes that, if a history of political Ockhamism could be written, it would include "Peter of Ailly and John Gerson in the fifteenth century, James Almain and John Major in the sixteenth, and very likely a chapter on Locke."

13.5. The Beginning Stages of Absolutism

In the fourteenth century, there arose a tendency to appeal to the insights of earlier natural law theory in order to justify what might be called "royal absolutism." Accordingly, some of the issues central to jurisprudence became part of the discussions concerning political power. A new group of legal thinkers known as "the commentators" emerged on the scene (Zane 1998, 198). These students of the law began writing comments on legal problems rather than limiting themselves to the theoretical questions regarding the justification of law. In particular, the commentators attempted to resolve legal difficulties that arose in the emerging city-states, where local laws often were not consistent with one another across territorial boundaries.

Bartolus of Sassoferrato (1314–1357) was "the great man of this school of Commentators" (Zane 1998, 199). Writing in the context of the Italian city-states, Bartolus asserted rather boldly that the ruler is not obliged to follow the ordinary laws of the nation or the city-state. Nonetheless, it is "equitable" for the ruler to abide voluntarily by the dictates of the positive law. Despite this qualifier, it appears that Bartolus put the ruler on a pedestal beyond the requirements of the legal system. This appears to be a harbinger of the later legal positivist theory of jurisprudence. Bartolus argued that members of a community can formulate written laws; this makes the state itself a sovereign, and the state itself is in some way reducible to the sovereign himself (*civitas sibi princeps*).

Some historians of political theory claim that Bartolus developed a modern concept of property rights, though others argue against this interpretation (e.g., Brett 1997, 22).[19] Bartolus also discussed issues common to natural right (*ius naturale*) and the law of nations (*ius gentium*), and argued that natural right was common to all animals. Since only rational beings can be morally obligated and nonhuman animals lack rationality, natural right could not be

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[19] Brett 1997, 204, argues, however, that Bartolus importantly influenced later philosophers of law, especially the Spanish jurist Fernando Vazquez (b. 1512); Vazquez argues for an original absolute natural liberty. In fact, Vazquez argues that *dominium* is "a natural faculty [*naturalis facultas*] that permits someone to do something, unless this action is prohibited through force or by law" (Tuck 1979, 51).

the source of or justification for a theory of obligation. Next, Bartolus divided the law of nations into two categories:

> It should be known that the *ius gentium* is two-fold. The first category comes through natural reason, without any agreement, such as that a free person should keep faith or promises, etc. And under this primitive *ius gentium* the free status of a slave was not destroyed, indeed all men were free [...]. The other *ius gentium* was what all *gentes* used by agreement, not following natural reason [...] such as wars, imprisonment, servitude and distinct *dominium*. (Tuck 1979, 35, n. 5)

Bartolus' account of rights contained the seeds of a theory of absolute liberty, which the Spanish Dominicans of early modern scholasticism would develop (see Chapter 14 of this volume).

Another political theorist in this era of early absolutism is Lucas de Penna (1320–1390). Lucas claimed that the justification for any prince's rule was founded upon divine authority. It follows, so Lucas suggests in his *Corpus Iuris*, that the ruler answers only to God. The members of the community have no recourse to the legal utterances of the person in power. Whatever law might be, its foundation is not reducible to the will of the persons in the society, however such a general will might be construed. This legal theory appears to be a form of divine prescriptivism, yet the ruler in turn appears to have a privileged awareness of what counts for the divine law. An unjust law is one that goes contrary to the divine law, and its obligatory force is thus removed. It is unclear how any rationally determined set of moral concepts could apply to a set of rules, although such language appears in the discussions.

The seeds of what later developed as legal positivism, especially in the writings of Jean Bodin (1530–1596) and John Austin (1790–1859), seem all too apparent in these discussions by the royal absolutists of the fourteenth century. In his *Six Books of the Commonwealth*, Bodin writes that the "law is nothing else than the command of the sovereign in his exercise of sovereign power" (I.5). Austin (1832, V note) is famous for his claim that "the law is one thing; its merit or demerit is another." Both Bodin and Austin adopt a form of command theory of law, which is rooted in the voluntarism first articulated by Ockham in the early-fourteenth century. This Bodin-Austin position is rightly characterized as one of "unlimited sovereignty" of the law. The philosophical problems common to legal positivism would apply equally, it would seem, to these theories of royal absolutism.

13.6. Conclusion

Several changes occur in natural law theory during this period, which contrast with natural law as articulated by Aquinas. First, there is the emergence of a strong voluntarist tradition, especially in the writings of the Franciscan philosophers. Scotus and Ockham, to varying degrees, insist that in understand-

ing the human condition, the will must be considered as superior to the intellect. Beginning with Bacon, there is less optimism about determining the content of human nature on which a theory of natural law might be constructed. This was also applied to a human understanding, as far as possible, of God. God was now seen as above all limits. Ockham's "liberty of indifference" begins to play a pivotal role here. The will is determined by nothing outside of itself, especially not by the intellect. Hence, at an ultimate level of explanation, the divine will becomes paramount. The fourteenth century witnessed the rise of absolutism with Bartolus' and Lucas' further emphasis on the role of the will, thus extending the voluntarist tradition. This voluntarism is again emphasized in the early-nineteenth century with the rise of legal positivism in the writings of legal theorists such as John Austin (see Volume 8, Chapter 6 of this Treatise for further discussion).

Ockham and Aquinas differ also over the nature of society and the person's place in society. For Aquinas, following Aristotle, human beings are by nature social beings; hence, the development of social forms of community is a natural occurrence among humans. For Ockham, to the contrary, the need for a society and its corresponding rules began only after the Fall of Adam with original sin. Hence, prior to the Fall there was no need for human society. The same holds for private property. John of Paris, following Aquinas, argued that private property is fundamental for humans working in the world. Ockham, on the other hand, held that private property came about only after the Fall under the auspices of positive law. Where Aquinas attributed moral traits to human nature as human nature, Ockham distinguished human persons prior to the Fall from how they existed following original sin.

The groundbreaking work of Tierney on the role of the origin of subjective human rights, especially in the writings of Ockham, has influenced a general reconsideration of the history of rights theory. Ockham's analytic consideration of the right to property sets the stage for the development of what came to be known as subjective human rights. This subjective human right, which is a power or ability possessed by a human person, goes beyond Aquinas' view of right as the "just thing."

In the sixteenth century, the role of the intellectualist tradition received a revived stimulus with the advent of early modern Scholasticism with the Dominican and Jesuit jurisprudence writers at Salamanca. The intellectualist tradition rooted in Aquinas has seen a renewed interest in the twentieth century with the writings of John Finnis. The intellectualist tradition of the late-thirteenth century and the voluntarist tradition of the early-fourteenth century have clearly influenced later developments in the history of jurisprudence.

Like Joseph's coat of many colors, the theory of natural law found in the writings of philosophers in the Middle Ages is far from a seamless web. Nonetheless, the importance of reason, the discussion of the human good, the centrality of the human person and human needs, and the development of a

theory of human rights all suggest the importance of these philosophers and their arguments in coming to terms with the history of jurisprudence.

Further Reading

Coleman 2000, vol. 2, provides an excellent introduction to political thought from the Middle Ages to the Renaissance. Following an overview of medieval political ideas and medieval society, she has valuable chapters on Aquinas, John of Paris, Marsilius of Padua, and Ockham, concluding with a chapter discussion of the Italian Renaissance, arguing for the dependence of Machiavelli on his medieval predecessors. Canning 1996 is another valuable introduction of medieval political thought. Black 1992 also surveys political thought from 1250 to 1450. Kretzmann, Kenny, and Pinborg 1982 contains essays by leading scholars on the entire period, some of which focus on political and legal philosophy. A companion volume by McGrade, Kilcullen, and Kempshall 2001 provides excellent translations of important texts by philosophers of the thirteenth and fourteenth centuries. Burns 1988 also contains valuable material, including several chapters devoted to legal issues. Tierney 1955 is an informative account of the relationship between canon law and the conciliar movement. Tierney 1982 is also a valuable discussion of legal and constitutional thought from 1150 to 1650.

Excellent collections of translations of and commentary of Duns Scotus include those of Wolter (1975; 1987 and 1997). The recent work by Cross 1999 is a readable introduction to Scotus. Cross 1998 also offers a sustained analysis of Scotus' physics and metaphysics. Lee 1982, 1985, and 1997 provide comparative analyses of moral theory in Aquinas and Scotus. Wolter (1993) was special editor of an issue of *American Catholic Philosophical Quarterly* devoted to Scotus.

The translation of Marsilius of Padua's *Defender of the Peace* (*Defensor Pacis*) by Gewirth along with a critical introduction, helped to reestablish Marsilius as a major political and legal thinker. Nederman 1995 is a valuable study of Marsilius' secular political theory.

Ockham's *Letter to the Friars Minor* and other political writings are translated by McGrade and Kilcullen. Boehner 1958 is a collection of essays on Ockham by a premier twentieth-century scholar, while Adams 1987 may be the best recent general study of Ockham. Spade 1999 is a valuable collection of essays on Ockham, including essays by Adams, McGrade, and Kilcullen dealing with Ockham's moral and political theory and the tensions between intellectualism and voluntarism. McGrade 1974 is a good introduction to Ockham's political and legal theory. On Ockham's political theory, Coleman 2000 is always instructive; her extensive writings (cited in her bibliography) on Ockham and the development of rights theory are also very illuminating. On Ockham and the study of the origin and development of subjective natu-

ral rights theory, Tierney 1997 is an exceptional study of the development of natural rights, especially the discussion on Ockham; Tierney also questions whether Ockham was a radical voluntarist. Pennington 1998 offers a reflective account of Tierney's work. Brett 1997 is a compendious study of the evolution of rights theory in the late Middle Ages; in addition to her discussion of Scotus and Ockham, Brett's analysis of fifteenth-century Thomism, especially the early modern scholasticism at Salamanca, is informative and useful. Tuck 1979 is an earlier work that is a wide-ranging and readable discussion of issues in the development of rights theory. Skinner 1990 is a thorough discussion of this period of political philosophy and rights theory. Schmitt and Skinner 1990 is a general collection of essays on Renaissance philosophy from 1400 onward.

Chapter 14

THE NATURE AND SIGNIFICANCE OF LAW
IN EARLY MODERN SCHOLASTICISM

by M. W. F. Stone[1]

14.1. Introduction

Scholasticism was an important feature of early modern philosophical thought. Before giving way to self-styled "modern" movements in the second half of the seventeenth century, scholastic philosophy was ever present in many universities, colleges, academies, and religious houses that supported philosophical learning throughout the early modern period. An eclectic intellectual phenomenon, scholasticism embraced various positions that looked to ancient authorities like Aristotle and Augustine, as well as to medieval thought in the persons of Thomas Aquinas and John Duns Scotus, and intellectual movements such as the *via antiqua* and *via moderna*. In the years after the Reformation the methods and arguments of scholastic philosophy were common to thinkers on both sides of the confessional divide (see Trueman and Clark 1999; Van Asselt and Dekker 2001). A pan-European enterprise, scholasticism helped to facilitate several innovations in logic, metaphysics, natural philosophy, and psychology, and proved itself especially adept in the fields of ethics, politics, and jurisprudence (Giacon 1944; 1956; Quinto 2001).

Despite the achievements and industry of scholastic thinkers in other parts of Europe,[2] it was in the universities, colleges, and religious houses of sixteenth-century Spain and Portugal that scholasticism reached new levels of accomplishment. Of all the subjects addressed by Iberian scholastics it is probably in the areas of ethics, political theory, and jurisprudence that they made a lasting contribution to European thought. Due to a serendipitous convergence of intellectual talent, clerical support, royal patronage, and political stability, as well as a multitude of topical issues generated by the Spanish conquest of the Americas, the philosophical study of subjects like law was able to

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[1] As there is little by way of scholarly consensus concerning the appropriate nomenclature of this period in the history of philosophy, I have chosen to refer to scholastic philosophers from the sixteenth and seventeenth centuries as "early modern" rather than "late." My reasons for adopting this terminology are spelled out in Stone 2006. All translations are by the author unless otherwise indicated.

[2] Here one thinks of influential works published in places like Rome, Paris, and Louvain, by Robert Bellarmine (1542–1621); Leonardus Lessius (1554–1623); Giles De Coninck (1571–1633); Eustachius a Sancto Paulo (d. 1640); Johannes Caterus (1590–1655); Juan De Lugo (1583–1660); Bartolomeo Mastri (1602–1673); Juan Caramuel y Lobkowitz (1606–1682); Sylvester Maurus (1619–1687); and Franciscus Toletus (1534–1590).

flourish in conditions rarely matched by other European centers of learning. In the Iberian universities of Salamanca, Alcalá, Valladolid, Coimbra, and Évora, thinkers from Francisco de Vitoria (1483–1546), Domingo de Soto (1495–1560), and Luis de Molina (1535–1600) to Francisco Suárez (1548–1617) advanced original views on natural and civil law, human freedom, individual rights, and the structure of political society. Other thinkers, such as Bartolomeo De Las Casas (1484–1576), Melchior Cano (1509–1560), Bartolomé de Medina (1527–1581), Domingo Bañez (1582–1604), the "Coimbra Commentators" (1592–1598), Gabriel Vázquez (ca. 1549–1604), Juan de Mariana (1535–1624), and Fernando Vázquez (b. 1512), further helped to shape the direction of practical philosophy up to the second half of the seventeenth century, with the consequence that Iberian thought was studied and debated well beyond the borders of Spain and Portugal (see Fernández-Santamaria 1977; Truman 1999; Belda Plans 2000; Stone forthcoming). Quite astonishingly, all of these thinkers wrote something pertinent about ethics, political philosophy, and jurisprudence, and it is for this reason that Iberian philosophers and theologians will be treated in this chapter as the best exemplars of early modern scholastic thinking about law.

14.2. Renaissance and Humanist Background

Before analyzing particular authors, it is necessary to consider the questions that early modern scholastics posed and the diverse influences that conditioned their answers. Among the prominent issues addressed by scholastic thinkers in sixteenth-century Spain, the topics of natural law, individual rights, the problem of political authority, and the origins of human society were perceived to be issues of pressing concern (see Belda Plans 2000). Like their medieval predecessors, Iberian scholastics often broached the questions of the natural law tradition either in the context of commenting on Aristotle's moral and political writings or else by working through the pages of Aquinas' *Prima Secundae* or *Secunda Secundae*. This is not to say, however, that only Aristotle or Aquinas served to stimulate philosophical reflection on ethics, law, and politics. Other aspects of the Christian tradition, in particular, the distinctive heritage of medieval Augustinianism (see Stone 2001), as well as other late medieval schools such as Scotism (see Schmutz 2002) and the *via moderna* (Espinel 1978), also contributed to debates about the state of nature, human dignity, and the rights of individuals.

Iberian philosophers also inherited the concerns of Renaissance and Humanist authors whose distinctive approach to the problems of moral and legal theory would help to shape the Iberians' discussion of natural and human law (see Skinner 1978, vol. 1; Hankins 1996). One figure who exercised a degree of influence on Spanish discussions was Tommaso de Vio, or Cardinal Cajetan (1468–1534). An Italian Dominican educated at Rome who later taught at

Padua, Cajetan produced an extensive corpus of writing designed to promote and reflect his own distinctive understanding of the thought of Aquinas. No ordinary or servile Thomist, Cajetan's moral and political views often contained ideas that departed not just from the spirit but also from the letter of Aquinas' texts. His influential account of the origins of political authority can be found in his *Commentaria in Summa Theologiae Sancti Thomae Aquinatis* and *De Auctoritate Papae et Consilio*. While Cajetan often repeats Aquinas' theory of law (see *STh* Ia–IIae.90–7), and expresses himself in conservative terms on the subject of the pope's relationship to the church, he was quite explicit in attributing authority to the people in the establishment of political rule. Notwithstanding his commitment to upholding papal authority, his statement on the role of the populace in the establishment of a government not only set down a conventional contrast between ecclesiastical and temporal forms of authority, but also provided a specific statement on the origins of political society that would be reiterated by later Iberian scholastics like Suárez (Skinner 1978).

Cajetan further argued that all humans have a right (*ius*), derived from natural law, to choose both their own form of government and those on whom they confer political authority. Furthermore, he maintained that the community's selection of its government precedes any choice from among three basic forms of governance (namely, democracy, monarchy, or aristocracy). Accordingly, Cajetan was minded not to attribute democracy to the state of nature or natural law since he believed that the "natural state" of human beings was neutral with respect to endorsing any one kind of government over any other (see Bowe 1955, 37–49).

Other sixteenth-century writers who helped to shape the moral, political, and legal questions that Iberian scholastics would discuss included the Trinitarian monk Alonzo de Castrillo (fl. 1520) and the humanist Juan Luis Vivés (1492–1540). In his *Tractado de Republica* (1521), Castrillo holds that while men and women were created as solitary individuals, they eventually became social beings due to the development of the God-given gift of reason. By arguing in this manner, Castrillo upholds an idea central to the medieval Aristotelian tradition, namely, that there is an evident connection between the gregarious nature of human beings and their use of rationality. That said, he endorses an Augustinian account of the origins of political society, which holds that political society arose as a consequence of the sinful condition of postlapsarian human beings. Somewhat surprisingly, he then goes on to graft (by means of an allegiance to certain aspects of the Thomist tradition) an Aristotelian branch onto this Augustinian trunk, by making reference to natural law as a sanction for society while heavily distinguishing the social realm from the political. Alongside humanist thinkers such as Vivés, Castrillo considered the voluntary association of human beings to be effected by a necessary command of God. Political society, however, was not so ordained; it was to be con-

structed out of a process of self-serving reasoning whereby human beings came to the salutary realization that, given the extent of moral depravity, the only reasonable course was to obey the monarch in order to avoid greater evils (see Maravall 1960, 235–45).

Vivés agreed with Castrillos's neo-Augustinian observation that existing political societies were the result of the human reaction to the ubiquity of sin; but beyond that he formulated a distinctive theory reflecting both his own humanist inclinations and the influence of Erasmus (see Bataillon 1991). Describing the original state of human nature as perfect, Vivés followed other humanists in identifying it with the classical "golden age" and went on to distinguish sharply between the social and political spheres. Not as precise in his arguments as scholastic writers, Vivés seems to have been speaking of the "golden age" as the early pre-lapsarian condition of the immediate offspring of the first human beings, in which case his classical predilections are implicitly at odds with the Christian doctrine of original sin. In *De Concordia et Discordia in Humano Genere* IV.3, he argues that human nature was created with a social propensity inasmuch as all individuals were born to live together in a single universal society.

For Vivés, "society"—or the concrete expression of an innate disposition among human beings to associate and to construct partnership—was prior to "politics," since after man had brought about the ruination of the natural order, he formed various artificial groupings, the best and greatest of which was the city (*civitas*). Considered in themselves, cities are imperfect since they initiate division and fragmentation among humans thereby alienating yet further man from his original perfection. As a concrete entity, the state comes into existence by means of the discord embedded in all human beings, a discord that has its foundation in the moral failing of original sin inherited from Adam. Useful only in the matter of protecting its citizens from further depravity, the state is the chief impediment that hinders any attempt on the part of humanity to return to its proper condition. Indeed, given Vivés' view that the Christian religion provides a possible return to the original golden age by means of its message of brotherly love and universal peace, his argument implies that the state is no longer necessary given God's revelation through the Gospels. For Vivés, the eclipse of political society occurred with the incarnation of God as Christ and not, as Castrillo maintained, with the last judgment (see Fernández-Santamaria 1977, 53–8; Fernández-Santamaria 1998).

14.3. Francisco De Vitoria OP

Our period begins with the so-called "Spanish Socrates." Vitoria (1483–1546) was born at Burgos and entered the Dominican order in his hometown in 1504. Going to Paris to study at the College of St. Jacques in 1506, he remained there for nearly eighteen years, first as a student and then as a teacher

of theology. In Paris Vitoria was exposed to the last advocates of Jean Gerson's (1363–1429) mystical theology as well as to the humanism of the times, and was instructed in the works of Aquinas by the Flemish Dominican Peter Crockaert (ca. 1460/1470–1514). It was Crockaert who in 1507 inaugurated at Paris a practice that German Dominicans at Cologne such as Konrad Köllin (ca.1476–1536) and Italians such as Cajetan and Francesco de Silvestri (a.k.a. "Ferrara") (ca. 1474–1528) were following at roughly the same time: that of employing the *Summa Theologiae* of Aquinas as the basis for their lectures (see Villoslada 1938). Returning to Spain in 1523, Vitoria brought this practice with him and introduced it to the universities of Valladolid and Salamanca where he was to teach. Publishing nothing directly himself—hence Domingo Bañez's description of Vitoria as "another Socrates"—he is known through a series of *relectiones* ("transcriptions") prepared by former students of his public lectures on topics of current interest, and through a voluminous commentary, prepared in the same manner, on the *Secunda Secundae* of the *Summa Theologiae*. The entire set of transcriptions was published in 1557, appearing in a modern edition in 1933–1936. Of these, two are recognized as classics in the history of law: *De Indis Recenter Invenitur Relectio Prior*, delivered as a formal public lecture in 1538, and *De Indis Sive de Iure Belli Hispanorum in Barbaros Relectio Superior*, delivered as a lecture in 1539.

Vitoria's account of law, though influenced by Aquinas and his medieval interpreters, is very much of his own creation. In accordance with the Thomist tradition, law is to be understood by reference to a fourfold distinction between the divine and eternal law (*lex divina*, *lex eterna*; see Chapter 12, Sections 12.2–3 and 12.6, of this volume for a discussion of the differences between divine law and eternal law), natural law (*lex natura*), human law (*lex positiva*), and the law of nations (*ius gentium*). The divine and eternal law was the creative *ratio*, or "principle of divinity" itself, and was conceived by late medieval theologians as a set of norms (*regulae*) used by God at the creation of the universe. According to these principles, the entire point and purpose of the created order can be adduced by means of a description of its underlying structure that is intelligible to human reason and that bears the imprint of its benevolent creator.

According to Vitoria, the natural law concerns our most basic knowledge of the principles of morality that can be revealed by a simple description of practical reasoning. When asked what made him think that it is a part of the law of nature for parents to bring up their children, he replied:

Although this objection is raised it does not mean anything; it is just for the sake of argument and is not meant seriously, for no one could really hold the idea that a father is not bound to bring up his children. That fact that everyone agrees is evidence in itself. So, whoever raises this objection and says that the evidences of nature are not the same as the law of nature, though he may utter the words, he cannot refuse to agree with our view. We hold and know this because everyone agrees to it. (*Comm. STh.* IIa–IIae.57.a.2)

The moral requirement that parents should bring up their children is sanctioned by the natural law because everyone (provided they are reasoning correctly) can assent to such a principle. Seen thus, the basic precepts of natural law are taken to be "self-evident" (*per se nota*) first principles implanted by God at the creation in the "hearts of men." The natural law is not an office of the will but issues from enlightenment and reason (*ratio*) (see Soder 1955; Hamilton 1963, 11–30; Noreña 1973, 75–100; Fernández-Santamaria 1977, 58–119; Deckers 1991, 70–144; Brett 1997, 124–37; Belda Plans 2000, 365–98).

The natural law consists of two major components. The first are the *prima praecepta* ("first principles") such as the one concerning parents bringing up their children, whose force a fully rational being could not fail to appreciate. The simplest of these include: "Do unto others as you would have them do unto you" and "Good is to be done and pursued and evil avoided." By a process of practical reasoning, such principles are then translated to the level of action in the form of secondary, tertiary, or quaternary principles, thereby providing the rational underpinning of all law. The "general consensus of men," Vitoria argued, would ensure an accurate translation of these principles to the concrete circumstances of human action. Such a consensus was thought to work in the following way: If all rational beings consider a particular moral statement to be true and it is not so, then God, who implanted in their minds the first principles of the natural law by which they form their moral understanding of the world, must be deceiving them. This cannot possibly be the case, he claims, for a benevolent God would never act in such a manner. Knowledge, therefore, must be "that thing on which all men are in agreement"; if all men can readily assent to the truth of a particular moral principle it must be because the natural law reveals this principle to be true (see *Comm. STh.* Ia–IIae.94–8).

For Vitoria, as for all later scholastics who followed Aquinas, the natural law was the efficient cause that underpinned an individual's relationship to the world around him and that governed every practice within the contours of human society. Considered thus, it enabled a theologian to describe and explain the world of morality, and our place within it, in terms set down by reason. The verities of the Gospel and of the Decalogue, and with it the rectitude and justice of the political and social institutions of Europe as described by the traditions of Roman and canon law, could all be defended without recourse to revelation, as the inescapable conclusions of the rational mind drawing upon self-evident first principles.

Human, civil, or positive law (*lex humana*, *civilis*, *sive positiva*) is constituted by those laws enacted by human beings. In order to be binding on practical conduct these have to be derived from the natural law, since they are concrete expressions at the level of action (*in foro externo*) of what all human beings know "in conscience" (*in foro interno*). Unlike the natural law, the dictates of positive law can be abrogated, revised, and even suspended, since

their authority derives from human legislators and not from God. Seen thus, it was unsurprising, Vitoria thought, that positive laws vary, sometimes radically, from community to community.

Occupying a *via media* between the natural and positive law is the law of nations (see Fernández-Santamaria 1977, 97–113; Deckers 1991, 344–58). The law of nations addresses itself to the whole world, irrespective of the local customs and legislative beliefs of individual communities. Unlike Aquinas, who had argued that it was a distinct entity in its own right, Vitoria held that the law of nations is a part of the positive law "grounded in reason." Additionally, he considered that it is so close to the natural law that non-European (or "barbarian") societies might be bound to the law of nations, whereas they could not be subject to any positive law other than that of their own customs. It was Vitoria's reflections on this argument (so often used by supporters of the Spanish conquest of the Americas) that has earned him the title of "father of international law." Despite the very best efforts of several commentators to see him as such (see Scott 1934), it should be remarked that the concept of "international law" (at least as we presently understand this term) has its origins in the work of so-called "modern natural law" theorists, such as Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), and John Selden (1584–1654), whose ideas were very different from those of Vitoria (see Tuck 1979; Haakonssen 1996; Hochstrasser 2000; Lobban, Volume 8, Chapter 3, and Riley, Volume 10, of this Treatise).

Vitoria's theory of rights and moral duties is based on a distinctive philosophical anthropology. Given the constancy that characterizes human nature, all rights and duties are the same for all men. One of the fundamental characteristics of the rights of human beings is that of equality. Every human being has a right to moral dignity, as well as to those things necessary to guarantee it, precisely because they are human beings. Proceeding from this, Vitoria holds that political equality follows from the equality of men as such. The state enjoys by a divine privilege the power to govern and administer itself, but before natural law is expressed concretely in principles of positive law:

> There is no reason why power should reside in one or another subject [...] because before men came together, nobody was superior to another, nor is there a reason why in the same society somebody should attribute to himself power over others. (*De Pot. Civ.*, 59)

The rights of the person as expressed in terms of liberty, equality, and solidarity are illustrated in the most primordial form of human association: marriage and the family. This last point led Vitoria to vindicate the necessity of love within marriage, for "the mutual duties and service of matrimony cannot be done if they are not done through, and only through, love" (*De Mat.*, 864).

Vitoria also emphasizes the social dispositions of human beings: *homo natura est animale civile et sociale*. Following Aristotle and Aquinas, he seeks to establish a natural foundation for political society. The fundamental nature

of humans is such that he thinks that they cannot subsist without the help and support of each other. The justification of all forms of social interaction and political association stems from this basic fact. Vitoria says:

It is clear that the source and origin of the city and of republics are not of human invention, nor should one consider them as something artificial, but rather as something that proceeds from human nature to defend and preserve itself it suggested this reason to mortals. (*De Pot. Civ.*, 157)

This is why, of all forms of social interaction, political society "is the most natural to man" and the "most fitting."

These observations on the natural law and political society play a central role in Vitoria's famous discussion of the Spanish conquest of America (see Hanke 1970; Pagden 1982). The dispute over the political legitimacy and moral probity of the colonization began in 1513 when King Ferdinand called a commission (*junta*) of theologians and civil and canon lawyers to discuss the matter. This resulted in the first piece of colonial legislation, the Law of Burgos of 1513. Far from settling these issues, however, the Law of Burgos only served to stimulate heated debate and discussion, tensions that were further exacerbated by the conquest of Mexico in 1520–1522 and Peru in 1531–1532. Vitoria first mentioned the "affairs of the Indies" in his lecture course of 1534–1535 on Aquinas' *Summa Theologiae* IIa–IIae.10, raising the question "Should unbelievers be forcibly converted?" He answered that it was the supposed cannibalism of the Amerindians that conferred upon the sovereign the right to coerce them to Christianity. The emperor had such a right because the crime of cannibalism was "harmful to our neighbors" and the "defense of our neighbor" is "the rightful concern of each of us." What is striking about this argument is Vitoria's unequivocal admission that the Indians are "our neighbors"; being such, they are entitled to many safeguards under the natural and civil law.

When Vitoria returned to this topic some years later in *De Indis* he sought to answer another question: "By what right [*ius*] were the barbarians subject to Spanish rule?" (*De Ind.* 1). The answer to this question, he thought, turned upon another: "Had the Indians possessed dominion [*dominium*] over their own affairs and over the lands they occupied before the arrival of the Spaniards?" Since it was evident to Vitoria that the Indians had been in undisputed possession of their property before the advent of the conquistadors, there were only four possible considerations that could support the claim of the Spanish crown that the Indians did not enjoy dominion: The Indians were (1) sinners, (2) pagan, (3) madmen (*amentes*), or (4) insensate. Vitoria objected that the first two considerations could not justify the conquest. Man, he argued, is a rational creature and he does not lose his God-given grace of reason through sin, any more than he can willingly renounce his natural rights (*De Ind.* 1.2; cf. *De Pot. Civ.* 1.6–7). Dominion is inalienable; and this applies to pagans since they too are subject to the same natural law (*De Ind.* 1.3).

From this it follows that Christians cannot use either of these considerations to dispossess pagan peoples of their goods and lands.

Having dispatched the first two considerations, Vitoria turned his attention to the last two. Fully irrational beings (*insensati*) do not have dominion because they are not truly human. Such beings cannot be capable of suffering injustice because they are not subject to the law, and those outside the law do not possess any form of rights. Echoing a thought familiar to the time, Vitoria argued that those persons who cannot receive *iniuria* cannot possess *iura*. Madmen have rights but cannot exercise dominion. In Vitoria's view since there is no empirical evidence to suggest that the Indians were mad or insensate, they undoubtedly possessed true dominion. This made any claim to rights of conquest on behalf of the Spanish invalid; they could not claim to be occupying previously unoccupied territory.

In the course of advancing these points, Vitoria introduces one of his most famous arguments. In 1510 the Parisian-based Scottish philosopher John Mair (1467–1550) had argued that the American Indians might be "slaves by nature," citing Aristotle's *Politics* Books I and III as his authority. Early supporters of the Spanish conquest such as the Bishop Juan de Quevedo O.F.M. (d. 1519) made use of arguments very similar to Mair's, urging that as "natural slaves" the Indians were incapable of initiating commands because they had no practical reasoning. Bereft of the ability to frame and pursue goals, plans, and projects, they could be subjugated and their lands confiscated since they had never exercised dominion.

Vitoria rejected these claims on the grounds that the Indians clearly did have some order (*ordo*) in their affairs. They lived in cities, had a recognized form of marriage, magistrates, overlords, laws, industries, and commerce, all of which implied the use of reason and its application to the regulation of human behavior (*De Ind.* I.6). Despite being in a state of semi-rationality because of their "evil and barbarous education"—one should keep in mind that even in the context of defending Indian rights Vitoria still expressed views common to his time—the Indians were in full possession of their rights even though they might lack the capacity to exercise them. Their status was similar to that of children. Children have dominion because they can suffer injury, and because in law their goods are held independently from those of their guardians. As they cannot make contracts they own these goods only as their inheritance (*De Ind*. I.5). In the light of these reflections, Vitoria conceded that the Spanish crown might be able to claim a right to hold the Indians and their lands in tutelage until they reached an age of rational maturity. "Such an argument could be supported," he claimed, "by the requirements of charity, since the barbarians are our neighbors and we are obliged to care for their goods" (*De Ind*. III.8).

Regardless of his grave reservations concerning the legitimacy of the conquest, Vitoria was more willing to entertain specific claims made by the crown

under the heading of the law of nations. Under this title, the Spaniards possessed the right to travel to the Indies and to trade with their inhabitants (*De. Ind*. III.1). For Vitoria, seas, shores, and harbors are necessary to man's survival as a civil being, and were thus exempt from the original division of property. This right of travel (*ius peregrinandi*) afforded the Spanish the right of access to the Indies. Furthermore, under the legal definition given to "communication" (*communicatione*) there was an implied right to trade. If it could be said that the Spaniards had originally arrived in the Americas as ambassadors, travelers, and traders, they had to be treated with respect and be permitted to trade with all those who wished to trade with them, just as the French must, in Vitoria's view, lawfully be permitted to trade in Spain (*De Ind*. III.1). Vitoria further argued that the law of nations granted the Spaniards the right to preach their religion (*ius praedicandi*) without interference (*De Ind*. III.2), and also that it permitted them to wage a just war in defense of the innocent against tyranny (*De Ind.* III.5). Seen thus, Vitoria left his sovereign with only a slender claim to jurisdiction (*dominium iurisdictionis*) in the Americas and with no real property rights. Any rights that the crown might claim under the law of nations would be valid only if, in fact, the Indians had "injured" the Spaniards. If, however, as seemed obvious to Vitoria and other impartial observers, they had not, all that remained were more pragmatic issues concerning the cost and administrative burden of the new colonial adventure.

What so troubled Vitoria about the Spanish conquest of the Americas was its flagrant denial or casual disregard of the dignity of the human person. As we have seen, he thought that the rights and duties of each person arise from their basic nature, which one discovers by reflection on human experience accrued in the history of moral conduct. The natural law, which finds concrete expression in human law, and out of which issues the law of nations, sets down an unconditional set of moral requirements both with respect to the honor that is due to any human being created in the image of God, and to the rights they enjoy as a result of inhabiting the earth. The conquistadors had fallen short of those standards, and it fell to Vitoria to point this out.

14.4. Domingo De Soto OP

Domingo de Soto (1495–1560) was born Francisco de Soto at Segovia to a family of modest means. He received his early education at the University of Alcalá, gaining his masters of arts degree in 1516, and from there moved on to Paris, initially attaching himself to the school of John Mair, before switching to the teaching of Vitoria at the Dominican convent of St. Jacques. Soto returned to Alcalá in 1519–1520 where he was elected to a professorship in the Arts Faculty, a post he subsequently resigned when he joined the Dominican order in 1524. On taking the friar's habit, Soto assumed the name Domingo and transferred to the convent of San Estebán in Salamanca, where once again

he came under the influence of Vitoria. At Salamanca, Soto enjoyed a full academic career that was only interrupted for a period of seven years when he was seconded to the Council of Trent (1545–1563) by order of Emperor Charles V. From 1550–1551 he was a member of the famous commission appointed to decide the case of Juan Ginés de Sepúlveda (1490–1573) against Bartolomeo De Las Casas. In 1552 he rejoined the University of Salamanca, and was elected to the *cátedra de prima* ("first chair"), a post he held to the end of his life in 1560 (see Beltrán de Heredia 1931a, 1931b, 1938, 1960).

Soto's most profound work of practical philosophy is *De Iustitia et Iure Libri Decem.* It was first published in Salamanca in 1553, and reprinted throughout the course of the sixteenth century (see Carro 1943). Central to this treatise is a discussion of law (*lex*) and right (*ius*). Book I of *De Iustitia et Iure* constitutes a commentary on Aquinas' *Summa Theologiae* Ia–IIae.90–108, and concerns the general topic of law. Like Aquinas, Soto begins with a treatment of the eternal law, the underlying principle of creation that exists causally in God (see Ramos 1972). The natural law differs from the eternal law in that the natural law is solely connected to reason and is applicable to human activity alone. Soto says:

Because [...] God is the author of nature, he placed in individual things their own instinct and drive by which they may be directed toward their ends: but on man He impressed a natural norm into his mind that would rule him according to reason which is natural to mankind: and this is the natural law: viz., of those principles which without discursive reasoning are self-evident by natural illumination. (*De Iust. et Iure* I.3.a.1)

The thought here is that God bequeaths instincts and primal drives to nonrational creatures so that they are moved to their natural ends. Hence the "bee may make honey, the swallow may build a nest, and the earth may bring forth crops." In rational creatures, however, God impresses a natural law rule upon their noetic structure (i.e., intellect), by which such creatures move themselves to their ends (*De Iust. et Iure* I.3.a.4). Rational creatures are thus free in ways in which nonrational beings are not. Standing between fully rational creatures such as angels and nonrational creatures such as beasts, mankind has its share of natural instincts and primal drives, as can be observed in fundamental actions such as feeding, growing, and the like. Yet unlike the beasts and other living things within the created order, mankind is blessed with reason and through reason is endowed with the natural law.

Soto posits a distinction between two modes by which human beings are subject to the eternal law: cognition and inclination, with the former being within the range of the eternal law (*De Iust. et Iure* conc.3a). With respect to mankind's cognition of the ends of his action, every human being has an inclination to pursue his proper good, namely, virtue. He says:

[J]ust as other things (pursue) their ends, so even more is there implanted in man a natural inclination, which is the work of God, and a force toward that by which he conforms to the eter-

nal law. For we are born to the virtues as is laid down in Book II of the *Ethics* of Aristotle. (*De Iust. et Iure* conc.3)

Because of a natural desire for virtue, all human action is subject to the eternal law of God. Natural law for Soto is thus a series of precepts that direct mankind toward its naturally ordained end, that is, union with its creator. As an animal, mankind possesses the basic inclinations of conservation, nutrition, and growth that enable him to flourish as a living thing. As a rational entity, however, mankind has an inclination toward the good, to virtue, and thence to union with God (see Ramos 1972).

The topic of right (*ius*) forms the subject of Book III. On the question whether right is an object of justice, Soto follows in the tradition of Aquinas and argues that right is "the equality of things" and is the very object of justice itself. As such, the claims of right can only be applicable to rational creatures living in political society. With regard to natural rights, Soto says:

Every right of nature is necessary *simpliciter* [...]. But the necessity of a thing is to be considered according to its nature. For if the nature of a thing is immutable, then its right also will be immutable: for example, because the sky is an immutable thing, its motion is also immutable. (*De Iust. et Iure* III.1.a.2.ad.1)

In this way, objective natural right is the same for all creatures (see Brett 1997, 151).

In Book IV Soto defines dominion as "the proper faculty and right of a person in any thing which he can usurp for his own profit in any use whatsoever permitted by law." Seen thus, dominion is for the sake of use, but importantly, its use is solely for those living things that can recognize an end for that use, and because of this only rational beings can have dominion over things. As with the natural law, it is those controlled and directed human acts (so suggestive of rational agency) that designates dominion. No irrational or insensate being can have dominion over another thing.

For some commentators the upshot of Soto's discussion in Book IV is to split the notion of right into two levels (Brett 1997, 154–6). The first level concerns an idea of right—that right of which all *dominia* are species—to creatures possessed of reason (*ratio*) and will (*voluntas*) who, being made in the image of God, are set apart from the rest of creation. Here dominion of action, or free decision (*liberum arbitrium*)—the result of reason and will working in unison—is itself the primary dominion, and upon it rests human dominion over artifacts and other living things. However, Soto also specifies a second level, at which the natural proclivities and actions of all created beings—including humans—have the nature of right through their innate desire for the good that constitutes the natural law. Unlike freedom of decision and dominion, this sense of right is susceptible to a juridical analysis.

It is this second sense of right that Soto addresses when he discusses the genesis of *respublica* or *civitas*. He says:

God through nature gave to individual things the faculty of conserving themselves and resisting their contraries, not only with regard to that safekeeping of their temporal well-being, but also through His grace with regard to the prosperity of their spiritual health. But since in their scattered state they were not able to exercise this faculty commodiously, He added to them the instinct to live communally, so that united they might be sufficient for each other. However, the commonwealth thus constituted could in no way govern itself, drive off enemies and check the impudence of miscreants, unless it selected magistrates, to whom it granted its faculty: for otherwise the collectivity, without order to guidance, would not represent one body, nor could it provide for things that were expedient. (*De Iust. et Iure* IV.q.4.a.1)

The main determining feature in the construction of political society is the right of each man to conserve his own existence, which is taken to involve living not just as an animate creature but as a *rational* human being. According to the natural law as an inclination to pursue the good, it is the right of all men that they can pursue such an existence. It is this right (*ius*) and not any dominion that legitimates the *respublica*; dominion cannot generate a civic commonwealth.

For Soto the *respublica* exists *ad prosperitatem spiritualis*, and enables its inhabitants to realize moral virtue, "which alone perfects the good man" (*bonum autem virum sola perfecit moralis virtus*) (*De Iust. et Iure* I.2.a.1). He continues by explaining that those who live in cities are governed by laws that "are all instituted for the good of the soul, in which our happiness consists [...]. For the citizens cannot maintain a well-ordered state in their external actions, unless they are strengthened with the internal habits of virtue." Moreover, the inhabitants of civil society are in a position through teaching and example to help each other toward realizing their ultimate aim. While that proper end is blessed union with God (*beatitudo*), it is important to stress that the city and its role in the general cultivation of moral virtue is by no means of instrumental value. Soto's account of the eternal and the natural law implies that civic society is that arena in which rational individuals can pursue their good and advance (albeit incrementally, due to their fallen nature) toward union with their creator (see Carro 1943, 20–45; Pereña Vicente 1954, 50–75; Ramos 1972, 618–22; Belda Plans 2000, 487–98).

14.5. Bartolomeo De Las Casas OP

Throughout the sixteenth century, several of the natural law arguments advanced by Vitoria and Soto were applied by later thinkers to the continuing controversy that surrounded the Spanish conquest of the Americas. One of the most famous participants in these debates was the Dominican friar Bartolomeo De Las Casas (1484–1576). Born in Seville, Las Casas left Spain at the age of eighteen in order to participate in the conquest of Cuba, and witnessed firsthand a full-scale massacre of an Indian community. Thereafter, he became a secular priest and later joined the Dominican order. Consecrating himself to the protection and defense of the Indians, Las Casas wrote in 1542

A Short Account of the Destruction of the Indies. Dedicated to Philip II, the book was intended to inform the Spanish crown of what was happening in America, as a warning that if the atrocities continued God would destroy Spain as a punishment. A frank yet informed account of the anatomy of genocide, Las Casas' work was translated into every major European language. The friar also produced several other important works in defense of the Indians, including *The Apologetic History of Indies* and *History of the Indies* (see Hanke 1951; Carro 1966; Pérez Fernández 1984).

Central to Las Casas' defense of the Indians was a philosophical anthropology constructed out of the very same Aristotelian and Thomist sources used by Vitoria and Soto. All human beings, he reasoned, are a psycho-physical composite having a material body and a spiritual soul. From this composite there arise some essential qualities that confer on all human beings specific rights and duties. According to Las Casas, all human beings, without qualification, belong to the category "rational animal," and from this it follows that there are no substantial differences among men but only accidental ones. Each man has the same attributes of knowledge and will, and his freedom is derived from his rationality. Such freedom is the conscious and responsible exercise of the will. Las Casas writes:

From the beginning, mankind, all men, all lands, and all other things, were free and allodial, due to the right of nature and people. Rational human nature endows men with freedom; as rational they are born free. All men share this rational nature; it follows then that God did not create slaves; He conceded equal freedom to all men. (*De Regia*, 16)

While man is permitted to dominate things inferior to himself within the created order, he is never allowed to treat other human beings as slaves, since slavery is a denial of a human being's God-given rational agency.

Taking human nature as a foundation, Las Casas postulated a "natural right" (*ius naturae*) upon which all human law is based. Here the natural right is nothing other than *iustitia*. Las Casas understood law in terms of rational order and justice in terms of virtue, or those behavioral dispositions that enable each individual to afford others their due. Justice also requires that human action be regulated by a full knowledge of the rights of others. Working from this idea of justice, Las Casas argued that injustice exists whenever a law is broken, a previously established and honored statute is violated, or an inapplicable law is applied to a particular situation (*Del Úncio*, 514). Significantly, he concluded that all three examples of injustice are to be found in the conquest of the Americas. First, the natural law that required the Spaniards to respect the freedom of the Indians was not followed. Second, inapplicable laws were obeyed (which is why Las Casas argued for radical reform of the colonial administration). Third, unjust laws were followed, which helped to undermine the autonomy of the Indians—a fact that was denounced by many eyewitnesses to the conquest, such as missionaries.

Las Casas' more theoretical reflections on justice led him to consider its application to political society. He argued that the moral values that inhere in justice become concrete in a legal corpus or in public law in direct and indirect ways. A ruler or governor is subject to the unconditional requirements of the natural law, but he must take account of the manner in which the claims of justice are applied to everyday life. While justice and law are the same in kind, Las Casas argued that the former is more abstract while the latter is concrete. The law channels human action toward the "highest good" (*summum bonum*) and seeks to deter, by means of more specific legislation, that which is opposed to it. For this reason all individuals are subject to law since it is a rationally ordered attempt to articulate the highest good (*De Regia*, 37–53). The highest good is the goal of political society, and any ruler or governor "is obliged to order his regime according to the common good and to govern according to this" (*Tratados*, vol. 2: 1257).

Despite many important differences in points of theological detail, the moral and legal thinking common to Vitoria, Soto, and Las Casas was continued by later Salamancan Dominicans such as Melchior Cano, Bartolomé de Medina, and Domingo Bañez (see O'Meara 1994; Belda Plans 2000). What stands out in the approach of these quite distinctive thinkers is their fundamental commitment to addressing the problems of moral and legal theory from a perspective on natural law that sees it as a divine gift implanted in the human mind. Given this belief, the requirements of the natural law as they relate to human action are unassailable, since (in principle) they can be known by all men. The natural law dictates the point and scope of the moral life, and invites all rational beings to further the common good through individual acts of virtue; neither monarchs nor conquistadors are exempt from its requirements. As the natural law serves to protect the rights and duties of every human being, even peoples in distant lands belonging to seemingly exotic civilizations can appeal to it in order to safeguard their liberty against unlawful enslavement and their property against illegal appropriation.

14.6. Luis De Molina SJ

From the Dominicans of Salamanca we pass on to thinkers of the Society of Jesus or "the Jesuits." Among the most important of the Jesuit thinkers of the Iberian peninsula was Luis de Molina (1535–1600). Born in Cuenca, he went at the age of 12 to the University of Salamanca, which he left—for some unknown reason—a year later for the University of Alcalá. There, Molina joined the Jesuits and was sent to Coimbra where he would spend the next twenty-nine years as a student and teacher. In 1568 he became Professor of Theology at Évora, holding the chair as a bachelor until 1571 when he took his doctorate. From that time until 1574 he held the Prime Chair and lectured on the *Summa Theologiae* of Aquinas. His major contribution to moral and political

theory, a six volume work entitled *De Iure et Iustitia*, is the outcome of courses given between 1577–1578 and 1581–1582.[3] During this period he also gave two *relectiones* on hope (*De spe*) (see Aldama 1938) and war (*De bello*) (see Lamadrid 1939). Molina taught at Évora for the next fifteen years before returning to Spain in 1591. Passed over for the Prime Chair at Coimbra in favor of Suárez, he returned to Cuenca before being summoned to Madrid in 1600 to teach theology at the new Imperial College. He died in the capital later that year (see Stegmüller 1935; Rabeneck 1950a).

Despite being a humble man of a studious disposition, Molina's career was blighted by controversy. Frequently attracting the displeasure of both the Portuguese and Spanish censors, his infamous *Concordia* (on grace and free will) created an enduring theological controversy. In this work Molina argued that God gives man sufficient grace to act, and if man does act the grace will become effective. Additionally, God knows, through his *scientia media* ("middle knowledge") of the possibilities, which course of action man will take (see Freddoso 1988; Gaskin 1994). Molina's book was licensed in 1588 and, notwithstanding a chilly reception from the Governor of Portugal, was warmly received by fellow Jesuit theologians, despite the efforts of the Coimbran thinker Pedro de Fonseca (1528–1599) to claim the doctrine of middle knowledge as his own (see Rabeneck 1950b).[4] The *Concordia*, however, made little impression on the Salamancan Dominicans who, under the leadership of Bañez, waged a concentrated polemic against Molina's thesis. The resulting acrimony and dissension caused by these attacks helped to polarize an entire generation of Iberian theologians, placing Dominicans and Jesuits at loggerheads. Given the situation, the issue was eventually referred to Rome, where despite numerous commissions and the intervention of cooler heads such as Bellarmine, the issue remained unresolved. In 1611 Pope Paul V finally prohibited the publication of any more books on the "*De auxiliis*" affair, as it was known, and it was not until the end of the seventeenth century that the ban was removed.

The basic teaching of the *Concordia* is relevant to any study of Molina's philosophical reflections on law, because it introduces us to one of the central features of *De Iure et Iustitia*: his description and defense of human liberty (see *Concordia* IV.14.a.13, disp. 2, sec. 3). For Molina, what helps to define a human being as a rational creature is the power to act freely. The faculty of *liberum arbitrium* ("the ability to make reasoned choices") distinguishes hu-

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[3] The first volume was published in 1593, the second in 1597, and the third in 1600. The first complete edition of Molina's major work was not published until 1659 in Mainz. The following editions of this work have been used: vols. I–II, Moguntiae (1602); vol. III, Antwerp (1615); vol. IV, Cologne (1614); vol. V, Antwerp (1609).

[4] For further aspects of the quarrel between Fonseca and Molina, see Oliveria Dias 1954; 1955; and Tavares 1955.

man beings from other animals and living things. Under the doctrine of middle knowledge, the ability of human beings to make reasoned choices is not affected by divine causality or by God's foreknowledge of future contingent events; free actions shape and mold the direction of any human life because they are undertaken in conditions exempt from all coercion and constraint.[5]

It is against this background of a libertarian account of human action that Molina discusses the idea and function of law. In the last twenty-seven disputations of the fifth tract of *De Iure et Iustitia*, he provides a definition of law and its divisions, and accounts of the natural law and the law of nations (see Díez-Alegría 1951; Hamilton 1963; Gómez-Camacho 1985; Stone forthcoming), and then proceeds to discuss the positive law in relation to some economic and political problems concerning taxation, price, and commercial monopolies (see Kleinhappl 1932; Zalba 1934).

Molina defines law as follows:

It is a command or precept of the legislative authority in a perfect society permanently promulgated; not for one or another member, but for all, either without qualification, or for all those, by reason of the status, place, time and other circumstances, for whom its observance is intended; and accepted by them when, to have any effect, it needs their consent. (*De Iure et Iust.* V.46.3055)

The above definition applies to human law but Molina adds that, properly understood, it would apply to all law (*De Iure et Iust.* V.46,3056–7). Law is primarily an act of the intellect, which he understands to accord with Aquinas' famous definition: "[L]aw is nothing other than an ordinance of reason for the common good made by the authority who has care of the community and promulgated" (*STh* Ia–Iiae.90.a.4). The act of the intellect—ordination and precept—supposes an antecedent act of will (*De Iure et Iust.* V.46.3054). It was Soto who had substituted *respublica* for *communitas* in order to remove any doubt that Aquinas had meant his definition of law to be applied to a perfect society and not just any legislative community. For Molina, the statutes and legislative acts of any society that fall below the standards of a perfect commonwealth are not to be considered laws in the strict sense of that term.

Concerning the division of law, Molina begins his account by stating that he will consider the term *ius* ("right" or "law") in a much wider sense than that proposed by Aquinas, adding that *ius* stands not only for the object of law but for the law itself. After explaining its various divisions, he explains the taxonomy he prefers (*De Iure et Iust.* I.3.9). First of all, *ius* is divided into natural and positive. Positive law is subdivided into divine and human. Hu-

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[5] Apart from the *Concordia*, Molina addresses the theme of human liberty in his polemical writings against the Protestants. See his *Summa Haersium Maior*, written against the Lutherans (see Stegmüller 1935, 394–438), and *Summa Haersium Minor*, written against the Calvinists (see Stegmüller 1935, 439–50). Central to Molina's case in these tracts is his argument that, by diminishing the scope of human liberty, the Protestants depict God as a tyrant.

man law is of three kinds: law of nations, civil law, and canon law. Natural law is defined as that which everywhere has the same force, whose obligation derives from the nature of that which is commanded, and whose action-guiding force is known by the light of reason (I.4.10). The obligation of positive law arises from the *imperium* and will of the legislator. Those acts proscribed by the natural law are prohibited because they are evil; they are not evil because they are prohibited, but rather because they are evil in themselves (*in se*). Acts of positive law are not prohibited because they are evil in themselves, but rather, because they are contrary to the intention of the legislator.

The "rule of thumb" (*regula generalis*) that Molina furnishes to determine whether something pertains to natural or positive law is this: If an obligation arises from the nature of the thing commanded, then it belongs to the natural law; if an obligation does not arise from the nature of the thing but from the precept and will of the legislator, it pertains to positive law (*De Iure et Iust.* I.4.10–11). Certain acts are so clearly contrary to nature that they are seen to be in themselves evil and illicit, for example, stealing, adultery, and lying. But, Molina warns, in other matters "nature" is not such a clear teacher; it is always possible to make mistakes when deducing conclusions from the natural law in more equivocal aspects of our moral experience. Given the circumstances and contingent nature of human action, there will always be a genuine need for casuistry (Stone forthcoming).

Besides those acts commanded or prohibited by the natural law, there is the institutional framework of society. Marriage, the family, and political government flow from the natural law. Positive law comprises all the precepts derived from the legislative power given by God (*De Iure et Iust.* I.5.14). The law of nations is positive human law that all or almost all nations use. As with Vitoria, Molina explains this by reference to a "natural consensus" among all men and most political societies, which enables the law of nations to be upheld and respected. The civil law is to be considered as that part of law which is proper to each state or commonwealth over and above that which is outside the purview of the natural law and the law of nations (I.3.10; cf. V.46.3046). Canon law is that which is approved of by the sovereign pontiffs and pertains to the government of the universal church (I.3.10).

For Molina, the natural law is related to God's essence embodied in the eternal law. He distinguished between two aspects of the eternal law. The first aspect is the eternal law as it exists in God and by which God judges what is in conformity with His nature and what is not (*De Iure et Iust.* V.46.3039). The second aspect is that by which God provides and governs all things, directing them to their appropriate end. The natural law is derived from the eternal law, and its very action-guiding force lies in its role as an exemplification of the eternal law. Molina believes that the natural law is so dependent on the existence of the eternal law that in the impossible hypothesis of God's nonexistence, the dictates of reason would not be codifiable by means of a

formal notion of law, and acts presumed to be contrary to nature would not be culpable (*De Iure et Iust.* V.46.3036–7; see Gómez-Camacho 1985).

Díez-Alegría (1951) has carefully traced the development of Molina's thinking at the University of Évora about the natural law. His study clearly shows that the professors at Évora were in great part preoccupied with the problem of the mutability or otherwise of the natural law. Molina first began to discuss this question in his 1570 lectures on *Summa Theologiae* Ia–IIae.98–108. There, he adopts a position familiar to earlier thinkers, such as Vitoria (*Comm. STh. IIa–IIa*, V, 210) and Soto (*De Iust. et Iure* I.2.3), that while the principles of the Decalogue and other valid moral principles do not admit of exceptions, it is a matter of judgment to determine how and when they apply to a particular case. For this reason the principle that "one ought to return borrowed goods" would not oblige in a case where one could endanger one's life by returning what one had borrowed (see Díez-Alegría 1951; cf. Plato, *Rep.* 331c).

Some years later Molina returned to the immutability of natural law in the first part of *De Iure et Iustitia*. Here he argued that there is a marked difference between variations in the natural law and positive law. Changes in the natural law do not come about because of a mutation in the law itself, but rather because of the circumstances to which a precept of natural law must be applied. Positive law, on the other hand, may bring it about that something that is contrary to the teaching of the natural law can be made to be licit in certain specifiable circumstances. The example Molina uses to illustrate this point is the law of prescription, by which an individual who in good faith possesses some object belonging to another for a set period of time, takes ownership of the object after that period has lapsed. Likewise, a ruler may take what belongs to one of his subjects and transfer it to another when the common good demands it (*De Iure et Iust.* I.4.12).

By classifying the law of nations under the human law, Molina believes himself to have settled the ambiguity concerning its status, which had originated in Vitoria's earlier emendation of Aquinas' view. For Molina, the division of the goods of the earth into private property is an example of the law of nations (I.5.14). With regard to the civil law this is defined as an act of political prudence, derived from the eternal and immutable law of God, which is consonant with "right reason" (*recta ratio*) and accommodated to the "common good" (*commune bonum*). The civil law also depends on the will and disposition of the legislator, though it should conform to the indigenous customs of a country (V.46.3047–8, 68.3212–13, 69.3217).

An important application of Molina's philosophical understanding of law to the arena of practical politics concerns his remarks on taxes. Taxes are considered to be a natural obligation incumbent upon all members of society so that each member can contribute his share toward the common good. Molina says:

The people are not for the prince, but the prince is for the people, since he has been set upon his throne for the good and benefit of the people. For this reason, taxes are not to be measured by the will and benefit of the prince but by the public good and the needs of the community, as whose administrator, defender, and watchman and ruler he was constituted. The prince must, therefore, be satisfied with a proper maintenance and the means for his own expenditure as the prosperity and dignity of the commonwealth warrant. He must content himself with what is sufficient for common need; nor are his subjects obliged to contribute any more. (II.667.220)

If taxes are necessary to defray the costs incurred in promoting the stability and welfare of society, it follows that only those who have charge of the common good—usually a sovereign or a republic—can impose them. Although a sovereign has the right to increase taxes, Molina contends that he or she should only do this when other means of raising expenditure have failed and a pressing, legitimate need for extra revenue exists. Whether they have their origin in exceptional or ordinary circumstances, taxes can only be imposed upon the people for a just reason (see Widow 1997).

Other important aspects of Molina's teaching on law would concern its application to two further issues of moral concern: warfare (see Anselmo 1943) and slavery (see Mateos 1960). With regard to warfare, Molina clarifies traditional teaching about the moral probity and legal legitimacy of warfare as it came down to him from medieval writers like Aquinas and other Iberian thinkers such as Vitoria and Soto. True to the spirit of these sources, he attempts to pinpoint and explain the moral issues that impinge upon any study of the morality of warfare, especially the twin notions *ius in bello* and *ius ad bellum* that are central to the so-called "just war" tradition. With regard to the ethics of slavery, Molina's views put him at odds with more modern sensibilities. Though harshly critical of the practices of slave owners, Molina (in keeping with the views of his time) thought it licit that in a just war innocent members of an enemy population could be enslaved as a form of punishment. An exception, however, was to be made for all Christians—such persons were never to be enslaved when captured by other Christians (see Mateos 1960).

Quite different in approach to Dominican thinkers like Las Casas—though it should be noted that Las Casas did in fact advocate the use of black African slaves as an economic alternative to the enslavement of the American Indians— Molina's discussion of slavery is of intrinsic interest. For, unlike the Dominicans, he addressed the question quite pragmatically in the light of accepted and emerging facts of the Portuguese colonial situation and was only prepared to draw provisional conclusions (see *De Iure et Iust.* II.33–5). Molina reviews the known condition of slavery in São Tomé, Angola, Sofala, Monomotapa, Goa, Asia, Japan, and China. Throughout his survey, he considers the legitimacy of the slave trade in each of these territories and arrives at very different conclusions depending upon the justice (or otherwise) of the original conquest of these lands. He does not presume to speak the last word on this thorny issue and hopes that his investigations may stimulate future reflections (II.33).

His defense of aspects of slavery and its onerous trade notwithstanding, Molina set down a speculative treatment of the law that aimed to defend the dignity, liberty, and freedom of the human person. His doctrine of middle knowledge in the *Concordia* aimed to show how divine grace can coexist with human freedom, while his arguments in *De Iure et Iustitia* advanced a practical philosophy committed to an analysis and evaluation of the actual lives of human beings. Free human actions form the basis of those areas that concern the state, society, and economy. "The people are not for the prince, but the prince is for the people," Molina repeats throughout *De Iure et Iustitia*. One implication to be drawn from this statement is the idea that state and society exist through the efforts of men to secure their mutual benefit under the auspices of the common good (*commune bonum*). Seen thus, state and society, and indeed all economic activity, derive their sense and purpose from the existence and requirements of the natural law that upholds the common good.

14.7. Francisco Suárez SJ

The greatest of all early modern Jesuit theologians, Francisco Suárez (1548–1617), referred to as "*Doctor Eximius*," was born in Granada. He belonged to an ancient family who had played a role in the reconquest of Andalucia from the Moors. In 1561 he went to the University of Salamanca, and in Lent 1564 presented himself as a candidate for the Jesuit noviciate. Originally refused entry, Suárez persisted and was admitted on June 16, 1564. After spending a period as a novice at Medina del Campo, he returned to Salamanca to read philosophy at the Jesuit College. By no means an able student initially, Suárez had great difficulty keeping up with his peers and at one time was thought to be in danger of completely failing his course. As is the stuff of legends, however, Francisco eventually became the "star pupil" and proceeded to the study of theology, this time in the university under the tutelage of the holder of the *cátedra de prima*, the Dominican Juan Mancio (1497–1597), who had been a former pupil of Vitoria.

As his career gathered momentum, Suárez rose in 1575 to become a professor of philosophy at the Jesuit College at Segovia, before being promoted to a chair in theology at Valladolid in 1576. In 1580, he was appointed to one of the highest posts in the Society of Jesus, the chair of theology in the Jesuit College at Rome. He held this post for five years before returning (for health reasons) to Alcalá by means of exchanging positions with his antagonist Gabriel Vazquez (ca. 1549–1604). Less than a total success at Alcalá—his rather formal teaching style was not greeted with enthusiasm by the students who had become accustomed to Vazquez's vivacious personality—Suárez returned to Salamanca in 1593. Later that same year he was sent by Philip II to take the Prime Chair of Theology in Coimbra. There he remained teaching and participating in theological discussions, until his retirement at the end of the aca-

demic year 1614–1615. He died two years later in Lisbon (see de Scorraille 1911–1913; Fichter 1940).

From 1590 onward Suárez's literary production was considerable, with volume after volume appearing in his own lifetime or published posthumously by his friend and literary executor Baltasar Alvarèz (1561–1639). One can judge the extent as well as the quality of Suárez's industry in any of the several editions of his *Opera Omnia* published after 1617.[6] While the great majority of his extant writings are of a theological character, the topic of practical philosophy, and more specifically the subject of law, is treated in many important works, most notably in *De Legibus Sue de Deo Legislatore*, published at Coimbra in 1612, and *Defensio Fidei Catholicae*, written against James I of England and again published in Coimbra in 1613.

Before going on to explicate the philosophical basis of his theory of law, it is important to clarify the meaning of Suárez's use of the concept of law. Throughout his writings, he is careful to distinguish between law as a norm and law considered as the eternal and natural law or foundation of morality. At *De Legibus* I.7, n. 5, normative law is defined along traditional Thomist lines as a "common, just and stable precept, which has been sufficiently promulgated." At I.1, n. 8, Suárez also says that normative law takes the form of a precept (*praeceptum*) rather than a counsel (*consilium*). The nature of this contrast becomes clearer in his subsequent analysis of laws that grant "permission" or the right to perform a certain action. In these cases there is a precept that stipulates that something should be done or avoided (II.14, n. 17). Other features of Suárez's account of normative law are his theses that the law is made by the agent who has "coercive power" (*vis cogendi*) (I.8, n. 1), the law is imposed upon a community (I.6, n. 8), and the law is made for the sake of the "common good" (*commune bonum*) (I.7, n. 1). As we shall see, these remarks about the normative character of law are different from Suarez's other main contention that the eternal and natural law regulate human conscience and all morality. This thought is at the very heart of his philosophical anthropology, his theory of human freedom, and account of moral practice (see Rommen 1926; Sischens Recaséns 1927; Dumont 1936; Wilenius 1963; Skinner 1978, 149–54; Courtine 1999; Knebel 2000, 488–518).

If we are to understand Suárez's account of the law as the basis of morality we need to take seriously his precise discussion of how the concept of law is to be divided and subdivided. In *De Legibus*, he divides law into eternal and temporal domains (I.3, n. 6). He then divides temporal law into natural and positive law (I.3, n. 7), and positive law in turn is split into human law and

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[6] Early modern editions of Suárez's *Opera Omnia* were published at Lyons, Salamanca, Madrid, Coimbra, Mayence, Cologne, Paris, Évora, and Genoa. The most accessible edition, and the one to which I refer throughout, is comprised of twenty-eight volumes. *De Legibus* is the fifth volume of *Opera Omnia*.

divine law (I.3, n. 15). Human law is either civil or canon law, and divine positive law is either that of the Old or New Testament (I.3, n. 17). All law, however, emanates from the "eternal law," which Suárez considers to be a

free decree of the will of God establishing the order to be observed either generally by all parts of the universe in relation to the common good [...] or especially to be observed by intellectual creatures in their free actions [*operationes*]. (*Leg.* II.3, n. 6)

By emphasizing this dimension of the eternal law, Suárez deliberately distances himself from Aquinas who had earlier identified the eternal law with the divine *ratio*, inasmuch as it governed the created universe (see *STh*, Ia–IIae.91.a.1).

With regard to the natural law, Suárez endorsed Aquinas' idea that it is a rational creature's participation in the eternal law of God. He then interprets this notion to mean that the natural law resides in the human mind in order to discern what is morally good and evil (*Leg.* I.3, n. 10). He further agrees with Aquinas that the natural law is proportionate to human beings in the manner in which natural instincts are intrinsic to nonrational creatures. For Suárez, while humans do not wholly adhere to the natural law in the same manner in which animals might follow their instincts, natural law is a primordial feature of human nature, since it has been implanted in the minds of men by God. Following accepted tradition and citing Augustine's *Confessions* II.4, Suárez regards the natural law as God's law written in the hearts of men.

A full and complicated treatment of natural law is to be found in *De Legibus* Book II.5–16. In chapter six, Suárez suggests that natural law is not only indicative of good and evil, but with regard to these concepts it is also prescriptive and proscriptive. Chapter seven concerns itself with the content of the natural law, which is now subdivided into three classes of moral principles. Suárez identifies the first type of moral principle with highly general precepts of the form "Good must done and evil avoided" and "Do not do unto others what you would not want done to you." Next come moral principles determined by more specific content, but still self-evident from their very terms, such as "Justice should be observed" and "One should live with self-control." In the third instance, the natural law facilitates the promulgation of practical principles that can be easily or broadly known by all rational agents. Examples of this type, Suárez thinks, would concern the moral turpitude of acts of theft or adultery. Requiring a more developed moral conscience, however, are those principles that are not easily known to all humans. These include precepts such as "Illicit sexual behaviour is intrinsically evil," "Usury is unjust," and "Lying can never be justified."

In the eighth chapter, Suárez asserts that the natural law obliges all men, in all conditions, in all times, and in all places. Expanding upon this thesis, he goes on to suggest that no individual can be invincibly ignorant about the first principles of natural law. However, he allows that more specific precepts, in-

cluding those within the purview of the second class of natural law principles (such as "Justice should be observed"), could be unknown by certain persons. This remark is then qualified by the statement that such individuals can escape moral censure for their ignorance, but only for a short period of time. His reason for adding this rejoinder has its origins in his idea that nature itself, as well as conscience, so urged these precepts upon all rational agents that any man could not remain ignorant of their requirements without courting profound moral error. As for those practical directives that can be inferred from the natural law, Suárez holds that they can be invincibly unknown, at least by the common people (*a plebe*), who he presumably thought (in common with other exponents of early modern Aristotelian-Thomist ethics) would be lacking in education and the subtleties of moral argument.

In the thirteenth chapter of Book II, Suárez sets down his view that the natural law is intrinsically immutable. As a "quasi-property" of human nature, it remains the same as long as human beings remained free and rational. Considered extrinsically, however, the natural law can change because of what it must confront in its application to concrete circumstances, namely, the variable and contingent nature of human action, or what scholastic thinkers understood as changes of material conditions (*mutatio materiae*) (see *Leg.* II.13, nn. 6–10; Stone 2004, Stone forthcoming). In chapter fourteen Suárez asks whether there is any human power or authority sufficient to change the natural law, or else to dispense moral agents from its requirements. By way of reply, he endorses the "common teaching" (*sententia communis*) of his fellow theologians that in its true precepts, the natural law can never be revised, abridged, or suspended, nor can it be altered by any human law or agency.

In order to illustrate this point, Suárez considers in the fifteenth chapter whether God, using his "absolute power" (*potentia absoluta*), could overturn the requirements of the natural law in a particular case. Tellingly, his discussion of this issue helps to clarify the nature and scope of his putative "voluntarism," a position that in modern times has been strongly associated with his work. Before offering his own view on the matter, Suárez surveys other theories. First, he states the position of William of Ockham and others, who held that God could dispense with all the commandments of the Decalogue. Suárez thinks that such theorists believed that God could abrogate all of natural law. He then asserts that he and other theologians believe this position to be false and absurd (see Álvarez 2000). A second possible answer is then considered from the work of Duns Scotus, the Subtle Doctor, and his early modern followers. The Scotists believed that while God could not dispense with the precepts contained in the first tablet of the Decalogue, God could (if He so wished) dispense with the seven precepts in the second tablet since these concerned human beings and other creatures. Significantly, Suárez rejects this position and argues in chapter sixteen for the view that all the precepts of the

Decalogue are indispensable, despite the absolute power of God. It is clear, then, that Suárez was not a radical voluntarist.

Suárez's resistance to the views of Ockham and Scotus is instructive, since it enables us to emphasize an important strand in his thinking about the natural law. This concerns its intimate relation to the eternal law as that which reflects God's plan for His creation. An intrinsic property of any rational creature, the natural law has its source in the light of reason and judgment itself. Because it designates and affirms the very standard of "right reason" (*recta ratio*) the natural law cannot be overturned even by an act of God's absolute power (see Fernández Castaneda 1968). For God to grant a dispensation from the natural law would be equivalent to His permitting an instance of irrationality and wrongdoing, injustices that, for Suárez, would contradict the divine nature itself.

Lest we conclude that Suarezian natural law theory is nothing more than a deductive model of reasoning that aims to identify what is and what is not in conformity with idea of "human nature" by means of divine commands, we should be aware that Suárez's account of the natural law is much more responsive to the requirements of practical reasoning and the exigencies of human action than has been commonly assumed (see Finnis 1980; May 1984). Even though the natural law in itself is unchangeable and unchanging, Suárez is fully cognizant of the fact that the circumstances of human action to which it must be applied are not. By changing the material conditions or circumstances of an action, it is sometimes possible to bring it under the jurisdiction of different aspects of the natural law. Suárez says: "We cannot deny that God sometimes brings it about that those material actions may be licit which otherwise, without God himself and his power intervening, cannot be licitly done" (*Leg.* II.15, n. 19). The point here is that changes of the material conditions of human action (*mutatio materiae*) are not dispensations from the natural law. In these instances God is not acting as a lawgiver.

Seen thus, a dispensation in the strictest sense is the act of a legislator who deliberately suspends a law in a case where it could not possibly apply. There are two other forms of divine authority that Suárez uses to account for instances of seeming dispensation. Beyond being the supreme lawgiver, God "is also the supreme Lord, who can change or establish dominion. He is also the supreme judge who can punish or render to anyone what he is owed" (*Leg.* II.15, n. 19). If some act is to be counted a genuine dispensation on God's part, it must be the act of a legislator working to change the law. In those cases that involve judging or simply transferring or altering dominion, God is changing the material that is subject to the natural law rather than the content of natural law itself.

As supreme Lord and supreme judge, God can alter situations that are, humanly speaking, unalterable. This point becomes clear in Suárez's examination of the scriptural examples from Genesis 22; Hosea 1:1–3; and Exodus

3:21–2, 11:2–3, and 12:35–6 (see Bainton 1930). The events recorded in these passages took place following a direct command on God's part, yet each seems to contradict a precept of the Decalogue. With regard to Genesis 22, where Abraham is commanded to kill his innocent son Isaac, Suárez reasons that the command came from one who is the master (*magister*) of life and death. If God had wished to kill Isaac by divine agency, there would have been no dispensation. In any case, he continues, Abraham served as God's instrument in this situation and the sixth commandment ("You shall not kill") does not prohibit that. In the case of the prophet Hosea in the second passage, Suárez finds no proof that he was ordered to have intercourse with a prostitute, which would have violated the seventh commandment ("You shall not commit adultery"), but simply that he was ordered to marry one.[7] Even if Hosea had received such an imperative, it would not be a dispensation from the natural law. God enjoys an authority over men and women, by means of his status as supreme Lord, which no other being can possess. What God has joined together let no human separate; God acts by His own lights for reasons human beings can never fully appreciate. Viewed in this context, the Hebrew looting of Egyptian property, mentioned at Exodus 3:21–2, is readily explicable and does not contravene the eighth commandment ("You shall not steal"). It is not a question of theft but of distributive justice (*distributiva iustitia*), for God caused the Egyptians to bequeath their possessions to the Hebrews as a just compensation for the latter's former servitude and distress. In the light of these reflections Suárez concludes:

It should be said that properly speaking, God does not dispense from any natural precept, but changes its material or circumstances without which the selfsame natural precept does not obligate of itself and apart from dispensation. (*Leg.* II.15, n. 26)

The natural law can never be abrogated, but it can adapt itself to meet the circumstances of human action.

Following his treatment of eternal and natural law, Suárez considers the law of nations. This is defined as a "quasi-medium" between the natural and the positive law of individual states (see *Leg.* II.17, n. 1; Doyle 2001). Having the character of positive law, the precepts of the law of nations differ markedly from those of the civil law inasmuch as they are unwritten and have their basis in human custom. Here "custom" (*consuetudo*) is not that of a single state or province but of almost all nations (II.19, n. 3). For just as custom establishes a law in one state or province, so over the whole human race it intro-

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[7] In this remark Suárez endorses a well known position that can be traced back to the Latin church fathers; see Augustine, *Faust.* 22.80–89; Jerome, *Epistolae* 123.13; and Irenaues, *Haer.* 4.47. On Suárez's use of the work of the Latin Fathers and his debt to Augustine, see Sischens Recaséns 1927. Bainton 1930 discusses the more general issue of early modern commentary on the putative "immortality" of the Patriarchs.

duces the "law of nations" (II.19, n. 3). In this way, the state (*civitatis*) itself, like the law of nations, had its origin in human consensus (II.17, n. 8). Importantly, Suárez adds that just as customs evolve over time, so too the consensus can change due to its dependence on the human will.

Suárez understands the law of nations in a twofold manner. In the first instance, it is the law of nations *inter se*, that is, a law that different nations should maintain and are obliged to observe vis-à-vis one another (*Leg.* 11, 19, n. 10; cf. Vitoria, *De Pot. Civ.* q. 3, n. 3). Under this heading, which effectively includes most of international law, is included the right to exchange ambassadors, the right to engage in free commerce, and the "right of war" (*ius belli*). In the second instance, the law of nations amounts to a law of nations *intra se*, or a law that individual states and kingdoms commonly observe within themselves. Practices such as religious sacrifices and sacerdotal customs fall under this classification (*Leg.* II.19, n. 10).

Returning to Suárez's account of the normative basis of law, we can note that he links the concept of "civil power" (*potestas civiliis*) with positive civil law. Laws, he says, are made by the agent who has civil power, since the most basic function of civil power is the making of laws. The principal elements of civil power are "directive power" (*potestas directiva*) and "coercive power" (*vis cogendi*). Directive power is concerned with the making of laws and the issuing of precepts, and had sufficed in the state of nature before the Fall of man. Since that unhappy event, Suárez holds that coercive power is needed in order for recalcitrant moral agents to comply with the law; legal order is the coercive power (III.1, nn. 9–10, 12). He emphasizes the significance of coercive power in the post-lapsarian condition of mankind by adding that "the law is made by the agent who has coercive power" (I.8, n. 1). However, he holds that the power to judge does not always reside in the person who has legislative power but in those persons, such as magistrates, who can interpret the meaning of the law.

Suárez makes an interesting comparison between civil power and the "power of dominion" (*potestas dominativa* or *potestas oeconomica*). Civil power applies only to a perfect community, while the power of dominion is intended for an imperfect one (I.8, n. 5). Civil power has a greater coercive power than does the power of dominion, because a greater power is required to safeguard the perfection of a community than, for example, an individual's possession or standing within a household. (Suárez often has the *paterfamilias* as his exemplar of one who yields power of dominion or power in the household [I.8, n. 5]). In addition, the power of dominion is of greater benefit to the person exercising it than to the persons on whom it is imposed, whereas civil power exists for the benefit of the community on which it is exacted. In general terms, the "proper end" (*propter finem*) of civil power is the "common good" (*commune bonum*) of the state, and its legitimate exercise must always have this end in view.

The concept of the common good is central to understanding Suárez's views on political society and of the role of civil law. In the first instance, *commune bonum* refers to "common goods," or to those possessions that a society communally holds. Such goods, however, can be divided into two kinds. First, there are goods that are not in the possession of any private individual but are held in common use, such as common pastures, etc. Second, there are common goods in the sense of the sum total of private goods possessed by the inhabitants of a state. These goods are directly subordinate to the dominion of private individuals. Suárez says:

Yet it is also said to be a common good; either because the state has a certain higher right over the private goods of individuals, so that it may make use of these goods when it needs them, or also because the good of each individual, when that good does not redound to the injury of others, is to the advantage of the entire community, for the very reason that the individual is a part of the community. (*Leg.* I.7, n. 7)

In its second sense the common good refers to the welfare of society as a whole. The common good must be the "aim" (*intentio*) of civil legislation. By the aim of the law Suárez does not mean the subjective intention that the legislator has in mind when he promulgates a law. Rather, he means that the law must strive to safeguard in its actual effects (namely, its concrete statutes and precepts) the common goods within the state. Thus, it is a necessary condition of the law "that its subject-matter be advantageous to, and suitable for, the common good at the time and place involved, and with respect to the people and community in question" (I.7, n. 9).

Suárez's remarks on the common good are best understood against the background of a sharp distinction he draws between the ends of ecclesiastical and secular power. Unsurprisingly for a theologian dubbed "*Doctor eximius ac pius*" by Pope Paul V, the function of ecclesiastic power and legislation is to provide for the spiritual welfare of human beings, the salvation of souls, and the life of virtue that such activities presuppose. Provision for the material welfare of human beings belongs within the range of functions assigned to the state; in itself the state has nothing to do with the spiritual well-being of men and women. The church is the custodian of morals, and the state by means of civil legislation can only concern itself with the moral care of its inhabitants insofar as it obtains permission from the church. The main functions of civil legislation and the exercise of secular government are the regulation and protection of the social relations and goods of society (see Rommen 1926; Lacerte 1964).

Other topics that relate to an exposition of Suárez's philosophical account of the law would have to include his theoretical discussion of the rights of indigenous peoples (see Doyle 1991–1992), his theory of objective and subjective rights as they issue from his account of human freedom (see Mullaney 1950; Doyle 2001), and his views on political obligation (see Wilenius 1963). What has emerged, though, from this relatively brief survey is a portrait of

Suárez's thinking about law that reveals it to be concerned with two general issues. The first concern has to do with how the institution of human morality is made possible by natural law when that is viewed as an exemplification of the eternal law of God. In articulating his second concern, Suárez argues that human law and its statutes are directly related to the will of the legislator, who with due and legitimate authority is able to promulgate laws that will meet the needs of justice and uphold the common good. Despite his motivation to keep these reflections upon the law distinct, it is clear that in his account of the natural and human law Suárez is eager to emphasize that all law must be answerable to the divinely commissioned tribunals of reason, justice, and charity. For the *Doctor eximius*, the boundless charity of God as expressed in the eternal law nourishes the natural and positive law, thereby making them redolent of God's providential plan for His creation.

14.8. Conclusion

Much more could and should be said about writers from the *Siglo de Oro* ("golden age") and their description and evaluation of the notion of law.[8] When viewed as part of a coherent intellectual movement, the achievements of the scholastic writers of sixteenth-century Spain were palpable. Not only did they manage to refresh the tradition of natural law theory as it had come down to them from writers like Aquinas, but they also managed to say something new about its scope and requirements, which in turn had clear implications for the future direction of Western political theory. The work of scholastic writers was more varied and complex than many contemporary commentators are inclined to credit, and for this and other reasons listed above, they are an essential component in any story of the development of that discipline we now know as "the philosophy of law."

Further Reading

For synoptic studies of early modern scholasticism, see Giacon 1944 and 1956, Trentmann 1982, Blum 1998, Quinto 2001, and Stone 2006. Other studies that treat particular aspects of the ethics, political philosophy, and le-

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[8] The following should be named if only in passing. Fernando Vázquez's *Controversiarum Illustrium Usuque Frequentium Libri Tres* (1564) is a fecund resource for reflecting on late-sixteenth-century juristic notions of natural liberty and rights (see Seelmann 1979; Brett 1997, 165–204). While one of the more notorious books of the entire period, Juan de Mariana's *De Rege et Regis Institutione* (1599), continues to provoke serious thought due to its application to its genre (that is, "advice to princes") of certain ideas about the natural law that had their origin in the works of the scholastics (see Lewy 1960; Truman 1999, 315–60). Suárez's great rival within the Jesuits, Gabriel Vázquez, also had much to say on the natural law and its applications to everyday life.

gal theory of sixteenth- and seventeenth-century scholasticism are provided by Todescan 1973, Skinner 1978, Maclean 1992, Tierney 1997, Brett 1997, and Stone forthcoming.

Andrés 1976 and Lynch 1981 describe the political and intellectual situation in Spain during the sixteenth century. One of the few anthologies of texts from this period is provided (in modern Spanish translation) by Fernández 1986. Helpful commentary on scholastic writers in Spain, Portugal, and the new colonies is provided by Pérez Beneyto 1949, Carro 1950, Maravall 1960, Hamilton 1963, Fernández-Santamaria 1977, Beuchot 1996, White 1998, Truman 1999, and Grundert and Seelmann 2001. For discussions of the religious orders, especially the Dominicans, at the University of Salamanca and their impact on the religious and intellectual life of the period, see Espinel 1978, O'Meara 1992 and 1994, and Belda Plans 2000. Vitoria's treatment of the rights of the Indians is discussed by Hanke 1970.

The principal works and career of Vitoria are considered by Getino 1930 and Urdanoz 1960. Detailed studies of his moral, political, and legal thought can be found in Soder 1955, Noreña 1973, and Deckers 1991. See also Stegmüller 1934 for a study of his theological anthropology, and Scott 1934, Hamilton 1963, Fernández-Santamaria 1977, and Brett 1997 for an account of his ideas about the natural law, the law of nations, and individual rights.

The life and work of Soto is discussed in a series of articles by Beltrán de Heredia 1931a, 1931b, 1932, and 1938, while his legal thought is the subject of an important study by Carro 1943. Pereña Vicente 1954 discusses Soto's political thought in the context of surveying other Salamancan thinkers, as does Belda Plans 2000. For different interpretations of Soto's account of the natural law and political theory see Ramos 1972 and 1976 and Brett 1997. The intriguing figure of De Las Casas is the subject of engaging monographs by Hanke 1951 and Pérez Fernández 1984; Carro 1966 provides a detailed study of his legal and political thought.

For a general account of the intellectual culture of the early Jesuits, see O'Malley 1994. The impact and deeds of the order in Spain is the subject of a seven-volume study by Astrain 1902–1925, while Alden 1996 very capably relays the story of the Jesuits in Portugal. Molina's account of "middle knowledge" (*scientia media*) is discussed by Freddoso 1988 and Gaskin 1994, while his theory of human freedom is the subject of studies by Pegis 1939, Smith 1966, and Queralt 1975 and 1976. Other aspects of Molina's moral and political thought are examined by Kleinhappl 1932 and Zalba 1934. His teaching on the natural law is discussed by Díez-Alegría 1951, Hamilton 1963, Gómez-Camacho 1985, and Stone forthcoming. Kleinhappl 1935, Anselmo 1943, and Fraga 1947 provide commentary on his views on the ethics of warfare and human slavery.

The standard account of the life and work of Suárez is by Scorraille 1911–1913, with a shorter account available in English by Fichter 1940. Gracia

1991 edited a special issue of the *American Catholic Philosophical Quarterly* devoted to Suárez. The basic aspects of Suárez's jurisprudence and philosophy of law are treated by Rommen 1926, Sischens Recaséns 1927, Mullaney 1950, Wilenius 1963, and Soder 1973. More recent studies are provided by Courtine 1999 and Knebel 2000. Different interpretations of Suárez's account of the natural law and his political theory are advanced by Skinner 1978, Finnis 1980, and May 1984. Other important components of Suárez's practical philosophy are examined by Fernández Castaneda 1968, Pérez Modesto 1994, Doyle 1991–1992 and 2001, and Stone 2004.

BIBLIOGRAPHY

Compiled with the assistance of Mahesh Ananth

Note that in the text, except where otherwise indicated, quotations from the Hebrew Bible (or Old Testament) are taken from *Tanakh: The Holy Scriptures*. Philadelphia, PA: The Jewish Publication Society, 1985; the quotations from The New Testament and from Apocrypha are taken from *The Revised English Bible*. Oxford: Oxford University Press, 1989; and quotations from the Quran are taken from *The Holy Qur'an: Text, Translation and Commentary*, Abdullah Yusuf Ali (Beirut: Dar al-'Arabiyya li-al-T.iba'a wa al-Nashr wa al-Tawzi', 1963).

Adams, Marilyn McCord. 1987. *William Ockham*. 2 Vols. Notre Dame, IN: University of Notre Dame Press.
———. 1999. Ockham on Will, Nature, and Morality. In *The Cambridge Companion to Ockham*. Ed. Paul Vincent Spade, 245–72. Cambridge: Cambridge University Press.
Adler, Mortimer. 1990. A Sound Moral Philosophy. In *Reforming Education: The Opening of the American Mind.* Ed. Geraldine Van Doren, 254–62. New York, NY: Macmillan.
Aeschylus. *Eumenides*. Trans. Richmond Lattimore. In *Aeschylus I*. Ed. David Grene and Richmond Lattimore, 151–90. New York, NY: Random House, 1942.
Aesop. *Fables.* In *Early Greek Political Thought from Homer to the Sophists*. Trans. Michael Gagarin and Paul Woodruff, 145–9. Cambridge: Cambridge University Press, 1995.
Alcinous. *Didaskalikos*. In *Alcinous. The Handbook of Platonism*. Trans. John Dillon. Oxford: Clarendon Press, 1997. (*Alcinoos: Enseignement des doctrines de Platon*. Ed. John Whittaker, trans. P. Louis. Paris: Budé, 1990.)
Aldama, J. A. 1938. Luis de Molina S.J. De spe: Comentario a la 2a 2ae, 17–22. *Archivo teologico Granadino* 1: 111–212.
Alden, Dauril. 1996. *The Making of an Enterprise: The Society of Jesus in Portugal, Its Empire and Beyond 1540–1750*. Stanford, CA: Stanford University Press.
Alexander of Hales. *Summa Fratris Alexandri*. In *Alexander of Hales: Summa Theologica, III*. Trans. Father of the College of St. Bonaventure. Quaracchi: Collegium S. Bonaventurae, 1948.
Alfarabi. *Attainment of Happiness*. In *Alfarabi's Philosophy of Plato and Aristotle*. Trans. Muhsin Mahdi, 11–50. Ithaca, NY: Cornell University Press, 2002.
———. *Book of Religion*. In *Alfarabi, The Political Writings: "Selected Aphorisms" and Other Texts.* Trans. and annot. Charles E. Butterworth, 85–113. Ithaca, NY: Cornell University Press, 2001. (Arabic text in *Kitāb al-Milla wa Nuṣūṣ Ukhrā*, edited, with an introduction and notes, by Muhsin Mahdi. Beirut: Dār al-Mashriq, 1968.)
———. *Enumeration of the Sciences*. In *Alfarabi, The Political Writings: "Selected Aphorisms" and Other Texts.* Trans. and annot. Charles E. Butterworth, 69–84. Ithaca, NY: Cornell University Press, 2001.
———. *L'Harmonie Entre les Opinions de Platon et d'Aristote*. Ed. and trans. Fauzi Mitri Najjar and Dominique Mallet. Damascus: Institut Français de Damas, 1999.
———. *Philosophy of Aristotle*. In *Alfarabi's Philosophy of Plato and Aristotle*. Trans. Muhsin Mahdi, 69–130. Ithaca, NY: Cornell University Press, 2002.
———. *Philosophy of Plato*. In *Alfarabi's Philosophy of Plato and Aristotle*. Trans. Muhsin Mahdi, 51–67. Ithaca, NY: Cornell University Press, 2002.
———. *Political Regime.* In *Alfarabi, The Political Writings: "Political Regime" and Other Texts.*

Trans. and annot. Charles E. Butterworth. Ithaca, NY: Cornell University Press, forthcoming.

———. *Principles of the Opinions of the Inhabitants of the Virtuous City*. In *Al-Farabi on the Perfect State*: *Abū Naṣr al-Fārābī's Mabādi' Ārā' Ahl al-Madīna al-Fāḍila*. Revised text. Ed. and trans. Richard Walzer. Oxford: Clarendon, 1985.

———. *Selected Aphorisms*. In *Alfarabi, The Political Writings: "Selected Aphorisms" and Other Texts.* Trans. and annot. Charles E. Butterworth, 1–67. Ithaca, NY: Cornell University Press, 2001. (Arabic text in *Fuṣūl Muntaza'a* [Selected Aphorisms]. Ed. and introd. Fauzi M. Najjar. Beirut: Dār al-Mashriq, 1971.)

———. *Summary of Plato's Laws*. In *Alfarabi, The Political Writings: "Political Regime" and Other Texts*. Trans. and annot. Charles E. Butterworth. Ithaca, NY: Cornell University Press, forthcoming. [Arabic text in *Le Sommaire du Livre des "Lois" de Platon* (*Jawāmi' Kitāb al-Nawāmis li-Aflāṭūn*) by Abū Naṣr al-Fārābī. Ed. and intro. Thérèse-Anne Druart. *Bulletin d'Études Orientales* 50 (1998): 109–55.]

Algra, Keimpe, Jonathan Barnes, Jaap Mansfeld, and Malcolm Schofield. 2000. *The Cambridge History of Hellenistic Philosophy*. Cambridge: Cambridge University Press.

Allen, R. E. 1980. *Socrates and Legal Obligation*. Minneapolis, MN: University of Minnesota Press.

Álvarez, Mariano. 2000. La omnipotencia de Dios y el principio de contradicción en Francisco Suárez. In *Potentia Dei. L'omnipotenza divina nel pensiero dei secoli XVI e XVII*. Ed. Guido Canzani et al., 173–93. Milan: Franco Angeli.

Ambrose of Milan. *De Jacob and Vita Beata. PL* vol. 14.25.

———. *De Officiis Ministrorum*. In *Ambrose. De Officiis*. Ed. and trans. Ivor J. Davidson. Oxford: Oxford University Press, 2001.

———. *Epistles.* In *The Letters of S. Ambrose, Bishop of Milan*. Translated with Notes and Indices. Oxford: James Parker, 1881.

Ambrosiaster. *Expositions of Romans* (*In Epistulam ad Romanos*). In *Commentarius in Epistulas Paulinas.* Ed. Heinrich Josef Vogels. Vienna: Hoelder-Pichler-Tempsky, *CSEL* vol. 81.1.

Andrés, M. 1976. *La teólogía española en el siglo XVI*. Madrid: BAC.

Annas, Julia. 1981. *An Introduction to Plato's Republic*. Oxford: Clarendon.

———. 1989. Cicero on Stoic Moral Philosophy and Private Property. In *Philosophy Togata: Essays on Philosophy and Roman Society*. Ed. Miriam Griffin and Jonathan Barnes, 151–73. Oxford: Clarendon.

———. 1993. *The Morality of Happiness*. Oxford: Oxford University Press.

Anscombe, Elizabeth. 1958. Modern Moral Philosophy. *Philosophy* 33: 1–19.

Anselmo, B. 1943. Gli elementi di una giusta pace nella dottrina di Ludovico Molina S.J. *Civiltà Cattolica* 4: 307–16.

Antiphon. Truth. In *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 244–7. Cambridge: Cambridge University Press, 1995.

Aristotle. *Analytica Priora* (*Prior Analytics*). Trans. A. J. Jenkinson. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 39–113. Princeton, NJ: Princeton University Press, 1984.

———. *Athênaiôn Politeia* (*Constitution of Athens*). Trans. F. G. Kenyon. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 2341–83. Princeton, NJ: Princeton University Press, 1984. (*Aristotle. Constitution of Athens and Related Texts*. Ed. and trans. Kurt von Fritz and Ernst Kapp. New York, NY: Hafner, 1950. *Aristotle. Constitution of the Athenians*. Ed. and trans. P. J. Rhodes. Harmondswoth: Penguin, 1984.)

———. *De Anima* (*On the Soul*). Trans. J. A. Smith. In Aristotle, *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 641–92. Princeton, NJ: Princeton University Press, 1984.

———. *De Caelo* (*On the Heavens*). Trans. J. A. Stocks. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 447–511. Princeton, NJ: Princeton University Press, 1984.

———. *De Generatione Animalium* (*Generation of Animals*). Trans. A. Platt. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1111–218. Princeton, NJ: Princeton University Press, 1984.

———. *De Motu Animalium* (*Movement of Animals*). Trans. A. S. L. Farquharson. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1087–96. Princeton, NJ: Princeton University Press, 1984.

———. *De Partibus Animalium* (*Parts of Animals*). Trans. W. Ogle. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 994–1086. Princeton, NJ: Princeton University Press, 1984.

———. *Eudemian Ethics*. Trans. J. Solomon. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1922–81. Princeton, NJ: Princeton University Press, 1984.

———. *Magna Moralia*. Trans. St. G. Stock. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1868–921. Princeton, NJ: Princeton University Press, 1984.

———. *Metaphysics*. Trans. W. D. Ross. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1552–728. Princeton, NJ: Princeton University Press, 1984.

———. *Nicomachean Ethics*. Trans. W. D. Ross, rev. J. O. Urmson. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1729–867. Princeton, NJ: Princeton University Press, 1984.

———. *Physics*. Trans. R. P. Hardie and R. K. Gaye. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 315–446. Princeton, NJ: Princeton University Press, 1984.

———. *Politics*. Trans. B. Jowett. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 1986–2129. Princeton, NJ: Princeton University Press, 1984. (*The Politics of Aristotle*. Trans. and ed. E. Barker, rev. R. F. Stalley. Oxford: Oxford University Press, 1995. *Aristotle Politics Books I and II.* Trans. and ed. Trevor Saunders. New York, NY: Oxford University Press, 1995. *Aristotle. Politics: Books III and IV.* Trans. and Ed. Richard Robinson. Oxford: Clarendon, 1995. *Aristotle. Politics Books V and VI.* Trans. and Ed. David Keyt. Oxford: Clarendon, 1999. *Aristotle. Politics Books VII and VIII.* Ed. and trans. Richard Kraut. Oxford: Clarendon, 1997. *The Politics of Aristotle, 4 vols.* Ed. W. L. Newman. Oxford: Clarendon, 1887–1902.)

———. *Problemata* (*Problems*). Trans. E. S. Forster. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 319–1527. Princeton, NJ: Princeton University Press, 1984.

———. *Rhetoric*. Trans. W. Rhys Roberts. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 2152–269. Princeton, NJ: Princeton University Press, 1984. (*Arisṭūṭālīs, al-Khaṭāba, al-Tarjama, al-ʿArabiyya al-Qadīma* (*Aristotle, Rhetoric, The Old Arabic Translation*). Ed. ʿAbd al-Raḥmān Badawī Cairo: Maktabat al-Nahḍa al-Miṣriyya, 1959.)

——— (pseudo). *Rhetoric to Alexander.* Trans. E. S. Forster. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 2270–315. Princeton, NJ: Princeton University Press, 1984.

———. *Sophistici Elenchi* (*Sophistical Refutations*). Trans. W. A. Pickard-Cambridge. In *The Complete Works of Aristotle*. Ed. Jonathan Barnes, 278–314. Princeton, NJ: Princeton University Press, 1984.

——— (pseudo). *To Alexander on Kingship*. Trans. S. M. Stern, in *Aristotle on the World State*. London: Bruno Cassirer, 1968.

———. *Topics*. Trans. W. A. Pickard-Cambridge. In *The Complete Works of Aristotle.* Ed. Jonathan Barnes, 167–277. Princeton, NJ: Princeton University Press, 1984.

Arnaoutoglou, Ilias. 1998. *Ancient Greek Laws: A Sourcebook*. London and New York, NY: Routledge.

Assmann, Jan. 1996. *Maʿat: Gerechtigkeit und Unsterblichkeit im Alten Ägypten*. Munich: Carl Hanser.

———. 1997. *Moses the Egyptian: the Memory of Egypt in Western Monotheism*. Cambridge, MA: Harvard University Press.

———. 2002. *The Mind of Egypt.* Trans. A. Jenkins. New York, NY: Henry Holt Metropolitan.

Assmann, Jan, Bernd Janowski, and Michael Welker, eds. 1998. *Gerechtigkeit: Richten und Retten in der abendländischen Tradition und ihren altorientalischen Ursprüngen.* Munich: Wilhelm Fink.

Astrain, Antonio. 1902–1925. *Historia de la Compañia de Jesús en la Asistencia de España*. Madrid: Sucesores de Rivadeneryra.

Athenaeus. *Deipnosophistae*. In *The Deipnosophists*. Trans. Charles Burton Gulick, 7 vols. Cambridge, MA: Harvard University Press, 1927–1941.

Atkins, E. M., and R. J. Dodaro, eds. 2001. *Augustine: Political Writings*. Cambridge: Cambridge University Press.

Atkins, Margaret. 2000. Cicero. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Malcolm Schofield, 477–516. Cambridge: Cambridge University Press.

Augustine of Hippo. *Confessionum Libri Tredecim. In Confessions.* Trans. Henry Chadwick. Oxford: Oxford University Press, 1991.

———. *Contra Academicos. In Against the Academics*. Trans. Peter King. Indianapolis, IN: Hackett, 1995.

———. *Contra Faustum Manichaeum* (*Against Faustus the Manichean*)*.* Trans. R. Stothert. In *A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church,* vol. 4. Ed. P. Schaff, 151–345. New York, NY: The Christian Literature Co., 1886–1888.

———. De *Bono Conjugali* (On the Good Marriage). *PL* vol. 40.20.

———. *De Civitate Dei*. In *The City of God against the Pagans.* Trans. R. W. Dyson. Cambridge: Cambridge University Press, 1998.

———. *De Diversis Quaestionibus. PL* vol. 40.2.

———. *De Libero Arbitrio*. In *On Free Choice of the Will*. Trans. T. Williams. Indianapolis, IN: Hackett, 1993.

———. *De Opere Monachorum. PL* vol. 40.27.

———. *De Praedestinatione Sanctorum* (*On the Predestinations of Saints*). Trans. R. E. Wallis. In *Basic Writings of Saint Augustine*. Ed. W. Oates, vol. 1, 775–817. New York, NY: Random House, 1948.

———. *De Trinitate*. In *The Trinity*. Trans. Stephen McKenna. Washington, DC: Catholic University of America, 1963.

———. *De Vera Religione* (*On True Religion*). In *Augustine: Earlier Writings.* Trans. J. H. S. Burleigh, 218–83. London: SCM Press, 1953.

———. *Enarratione in Psalmos. PL* vol. 36.11 and 37.11.

———. *Epistolae. PL* vol. 33.9.

———. *In Ioannis Evangelium Tractatus.* In *Homilies on the Gospel of John*. Trans. J. W. Rettig. Washington, DC: Catholic University of America, 1988–1995.

———. *Sermones. PL* vol. 46.13 and 47.12.

———. *Soliloquia* (*Soliloquies*). Trans. C. C. Starbuck. In *Basic Writings of Saint Augustine*. Ed. W. Oates, vol. 1, 257–97. New York, NY: Random House, 1948.

Austin, John. 1832. *The Province of Jurisprudence Determined and the Uses of Jurisprudence*. London: John Murray.

Avalos, Hector. 1995. Legal and Social Institutions in Canaan and Ancient Israel. In *Civilizations of the Ancient Near East*. Ed. Jack M. Sasson, 615–31. New York, NY: Simon & Schuster Macmillan.

Averroes (Ibn Rushd). *Averroes' Commentary on Plato's Republic*. Trans. E. I. J. Rosenthal. Cambridge: Cambridge University Press, 1956. (*Averroes on Plato's Republic*. Trans. Ralph Lerner. 1974. Ithaca, NY: Cornell University Press, 1974.)

———. *The Book of the Decisive Treatise, Determining the Connection Between the Law and Wisdom and Epistle Dedicatory*. Trans. Charles E. Butterworth. Provo, UT: Brigham Young University Press, 2001.

———. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (*The Legal Interpreter's Beginning and the Mediator's Ending*). Ed. 'Abd al-Ḥalīm Muḥammad 'Abd al-Ḥalīm and 'Abd al-Raḥmān Ḥasan Maḥmūd. Cairo: Dār al-Kutub al-Ḥadītha, 1975.

———. *Averroès, Commentaire Moyen à la Rhétorique d'Aristote, Édition critique du texte arabe et traduction française*. 3 Vols. Ed. and trans. Maroun Aouad. Paris: Vrin, 2002.

Avicenna (Ibn Sīnā). *La Métaphysique* (*al-Ilāhiyyāt*). 3 Vols. Trans. George Chehata Anawati. Montreal: Institut d'Études Médiévales, 1952.

———. *Risāla fī Aqsām al-'Ulūm al-'Aqliyya* (*Epistle on the Division of the Intellectual Sciences*). In *Tis' Rasā'il* (*Nine Epistles*), 104–18. Cairo: publisher unlisted, 1908.

———. *Kitāb al-Shifā', al-Ilāhiyyāt* (*Book of Healing: Metaphysics*). Ed. al-Ab Qanawātī and Sa'īd Zāyid. Cairo: al-Hai'a al-'Āmma li Shu'ūn al-Maṭ ābi' al-Amīriyya, 1960.

———. *Kitāb al-Shifā', al-Ṭabī'iyyāt, al-Nafs* (*Book of Healing, Physical [Sciences], The Soul*). Ed. al-Ab al-Duktūr Gūrg al-Qanawātī and Sa'īd Zāyid. Cairo: al-Hai'a al-Miṣriyya al-'Āmma li-al-Kitāb, 1975.

Axelrod, Robert. 1985. *The Evolution of Cooperation.* New York, NY: Basic.

Ayers, Michael. 1981. Locke versus Aristotle on Natural Kinds. *The Journal of Philosophy* 78/5: 247–72.

Badawī, 'Abd al-Raḥmān, ed. 1959. *Arisṭūṭālīs, al-Khaṭāba, al-Tarjama al-'Arabiyya al-Qadīma* (*Aristotle, Rhetoric, The Old Arabic Translation*). Cairo: Maktabat al-Nahḍa al-Miṣriyya.

Bagnall, R. 1987. Church, State and Divorce in Late Roman Egypt. In *Florilegium Columbianum: Essays in Honour of P.O. Kristeller.* Ed. K.L. Selig and R. Somerville, 41–61. New York, NY: Italica.

Bainton, Ronald, H. 1930. The Immoralities of the Patriarchs According to the Exegesis of the Late Middle Ages and Reformation. *Harvard Theological Review* 23: 39–49.

Barker, Ernest. 1918. *Greek Political Theory.* London: Methuen.

———. 1931. The Life of Aristotle and the Composition and Structure of the Politics. *Classical Review* 45: 162–72.

———. 1946. *The Politics of Aristotle.* Oxford: Oxford University Press.

———. 1959. *The Political Thought of Plato and Aristotle.* New York, NY: Dover.

Barnes, Jonathan, ed. 1984. *The Complete Works of Aristotle: The Revised Oxford Translation.* Princeton, NJ: Princeton University Press.

Barnes, Timothy D. 1981. *Constantine and Eusebius.* Cambridge, MA: Harvard University Press.

Barnett, Randy. 1998. *The Structure of Liberty: Justice and the Rule of Law.* Oxford: Oxford University Press.

Bataillon, Marcel. 1991. *Érasme et l'Espagne.* 3rd. ed. Geneva: Droz.

Bauman, Richard A. 1971. *Lawyers in Roman Republican Politics: A Study of Roman Jurists in their Political Setting, 316–82 B.C.* Munich: Beck.

———. 2000. *Human Rights in Ancient Rome.* London: Routledge.

Bava Mesia. In *Tractate Bava Mesia.* Trans. Jacob Neusner. Atlanta, GA: Scholars, 1990.

Belda Plans, Juan. 2000. *La Escuela de Salamanca y la renovacíon de la teología en el siglo XVI.* Madrid: BAC maior.

Beltrán de Heredia, V. 1931a. El maestro Domingo (Francisco) de Soto en la Universidad de Alcalá. *Ciencia tomista* 43: 357–573.

———. 1931b. El maestro Domingo (Francisco) de Soto en la Universidad de Alcalá. *Ciencia tomista* 44: 28–51.

———. 1932. El maestro Domingo de Soto en la controversia de Las Casas con Sepúlveda. *Ciencia tomista* 45: 35–49.

———. 1938. El maestro Domingo de Soto, Catedrático de Vísperas en la Universidad de Salamanca. *Ciencia tomista* 57: 38–67, 281–302.

———. 1960. *Domingo de Soto: Estudio Biográfico Documentado.* Salamanca: Biblioteca de teologos espanoles.

Bentham, Jeremy. 1843. *Anarchical Fallacies.* Edinburgh: Bowring.

Berman, Harold J. 1983. *Law and Revolution. The Formation of the Western Legal Tradition.* Cambridge, MA: Harvard University Press.

Bernal, Martin. 1987. *Black Athena. Vol. 1: The Fabrication of Ancient Greece 1785–1985.* Brunswick, NJ: Rutgers University Press.

Bernard of Chartres. *Commentary on the Timaeus.* In *The Glosae Super Platonem of Bernard of Chartres.* Ed. Paul E. Dutton. Toronto: Pontifical Institute of Mediaeval Studies, 1991.

Beuchot, Mauricio. 1996. *Historia de la filosofia en el Mexico Colonial.* Barcelona: Herder.

Birks, P., ed. 1989. *New Perspectives in the Roman Law of Property.* Oxford: Clarendon.

Birley, Anthony Richard. 1966. *Marcus Aurelius.* London: Eyre & Spottiswoode.

———. 1987. *Marcus Aurelius: A Biography.* New Haven, CT: Yale University Press.

Black, Antony. 1992. *Political Thought in Europe, 1250–1450*. Cambridge: Cambridge University Press.

———. 2001. *The History of Islamic Political Thought: From the Prophet to the Present*. Edinburgh: Edinburgh University Press.

Blum, Paul Richard. 1998. *Philosophenphilosophie und Schulphilosophie: Typen des Philosophierens in der Neuzeit*. Stuttgart: Franz Steiner.

Bobonich, Christopher. 1992. Persuasion, Compulsion and Freedom in Plato's *Laws. Classical Quarterly* 41: 365–88.

———. 1994. Akrasia and Agency in Plato's *Laws* and *Republic. Archiv für Geschichte der Philosophie* 76: 3–36.

———. 1995. The Virtues of Ordinary People in Plato's *Statesman*. In *Reading the Statesman: Proceedings of III Symposium Platonicum.* Ed. Christopher Rowe, 313–29. *Sankt Augustin: Acadamia*.

———. 2002. *Utopia Recast: Plato's Later Political Philosophy*. Oxford: Oxford University Press.

Bobzien, Susanne. 1998. *Determinism and Freedom in Stoic Philosophy*. Oxford: Oxford University Press.

Bodin, Jean. *Six Books of the Commonwealth* (*Les Six Livres de la Republique*). In *The Six Books of a Commonweale.* Ed. K. D. McRae. Cambridge, MA: Harvard University Press, 1962. (Partial trans. *Jean Bodin. On Sovereignty: Four Chapters from the Six Books of the Commonwealth.* Ed. and trans. Julian H. Franklin. Cambridge: Cambridge University Press, 1992.)

Boecker, Hans Jochen. 1980. *Law and the Administration of Justice in the Old Testament*. Minneapolis, MN: Augusburg Publishing House.

Boegehold, Alan L. et al. 1995. *The Lawcourts at Athens: Sites, Buildings, Equipment, Procedure, and Testimonia*. Princeton, NJ: The American School of Classical Studies at Athens.

Boegehold, Alan L., and Adele C. Scafuro, eds. 1994. *Athenian Identity and Civic Ideology*. Baltimore, MD: The Johns Hopkins University Press.

Boehner, Philotheus. 1958. *Collected Articles on Ockham*. Ed. Eligius M. Buytaert. St. Bonaventure, NY: The Franciscan Institute.

Bonner, Gerald. 1986. *St. Augustine of Hippo, Life and Controversies*. 2nd. ed. Norwich: Canterbury.

Borkowski, Andrew. 1997. *Textbook on Roman Law*. 2d ed. Oxford: Oxford University Press.

Boureau, A. 1992. Droit et Théologie au XIIIe Siècle. *Annales ESC* 47.6: 1113–25.

Bourke, Vernon. 1960*. The Pocket Aquinas*. New York, NY: Washington Square Press.

———. 1968. *History of Ethics*. Garden City, NY: Doubleday and Company.

Bowe, Gabriel. 1955. *The Origins of Political Authority: an Essay in Catholic Political Philosophy*. Dublin: Clonmore and Reynolds.

Bowman, Alan K. 1989. *Egypt After the Pharaohs: 322 B.C.–A.D. 642: From Alexander to the Arab Conquest*. Berkeley, CA: University of California Press.

Brandwood, Leonard. 1990. *The Chronology of Plato's Dialogues*. Cambridge: Cambridge University Press.

———. 1992. Stylometry and Chronology. In *The Cambridge Companion to Plato*. Ed. Richard Kraut, 90–120. Cambridge: Cambridge University Press.

Branham, R. Bracht, and Marie-Odile Goulet-Cazé. 1996. *The Cynics: The Cynic Movement in Antiquity and Its Legacy*. Berkeley, CA: University of California Press.

Breasted, James. 1906–1907. *Ancient Records of Egypt*. Chicago, IL: University of Chicago Press.

Brett, Annabel. 1997. *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*. Cambridge: Cambridge University Press.

Brewer, Douglas J., and Emily Teeter. 1999. *Egypt and the Egyptians.* Cambridge: Cambridge University Press.

Briant, Pierre. 2002. *From Cyrus to Alexander: A History of the Persian Empire*. Trans. P. T. Daniels. Winona Lake, IN: Eisenbrauns.

Brickhouse, Thomas C., and Nicholas D. Smith. 1989. *Socrates on Trial*. Princeton, NJ: Princeton University Press.

———. 1994. *Plato's Socrates*. New York, NY: Oxford University Press.

———. 2000. *The Philosophy of Socrates*. Boulder, CO: Westview Press.

———. 2002. *The Trial and Execution of Socrates: Sources and Controversies*. Oxford: Oxford University Press.

Brower, Jeffrey, and Kevin Guilfoyle. 2004. *The Cambridge Companion to Abelard*. Cambridge: Cambridge University Press.

Brown, Peter. 1967. *Augustine of Hippo, A Biography.* London: Faber.

———. 1972. *Religion and Society in the Age of St. Augustine*. London: Faber.

———. 1989. *The Body and Society: Men, Women and Sexual Renunciation in Early Christianity*. London: Faber.

Browning, Robert. 1971. *Justinian and Theodora*. Washington, DC: Praeger.

Brundage, James A. 1995. *Medieval Canon Law*. London: Longman.

Buckland, W. W. 1931. *The Main Institutions of Roman Law*. Cambridge: Cambridge University Press.

———. 1939. *Studies in the Glossators of the Roman Law*. Cambridge: Cambridge University Press.

Buckland, W. W., and Peter G. Stein. 1975. *Textbook of Roman Law from Augustus to Justinian*. 3rd ed. Cambridge: Cambridge University Press.

Bürge, Alfons. 1999. *Römisches Privatrecht: Rechtsdenken und Gesellschaftliche Verankerung; eine Einführung*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Burns, J. H, ed. 1988. *The Cambridge History of Medieval Political Thought c. 350–c. 1450*. Cambridge: Cambridge University Press.

Burns, J. P. 1980. *The Development of Augustine's Doctrine of Operative Grace*. Paris: Etudes Augustiniennes.

Burns, Tony. 1998. Aristotle and Natural Law. *History of Political Thought* 19: 142–66.

Burnyeat, M. F. 1984. The Sceptic in His Place and Time. In *Philosophy in History*. Ed. R. Rorty, J. B. Schneewind and Q. Skinner, 225–54. Cambridge: Cambridge University Press.

Butterworth, Charles E. 2000. The Political Teaching of Avicenna. *Topoi* 19: 35–44.

Calcidius. *Platonis Timaeus* (*Commentary on Plato's Timaeus*). Ed. J. H. Waszink. London: Warburg Institute, 1962. (*Timaeus*. A Calcidio translatus commentarioque instructus [editio altera]. Ed. J. H. Waszink. London and Leiden; Warburg Institute and Brill, 1975.)

Canning, Joseph. 1996. *A History of Medieval Political Thought, 300–1450*. New York, NY: Routledge.

Carey, Christopher. 1996. *Nomos* in Athenian Rhetoric and Oratory. *Journal of Hellenic Studies* 116: 33–46.

———. 1997. *Trials from Classical Athens*. New York, NY: Routledge.

Carlyle, R. W., and A. J. A. Carlyle. 1936. *History of Mediaeval Political Theory in the West*. New York, NY: Barnes and Noble.

Carro, Venancio. 1943. *Domingo de Soto y su Doctrina Juridical*. Madrid: CISC.

———. 1950. *La Controversias Teólogico-Juristas en el Siglo XVI*. Salamanca: Universidad Salamanca.

———. 1966. *Los Postulados Teológico-Jurídicos de Bartolomé de las Casas. Sus Aciertos, sus Olvidos y sus Fallas, ante los Maestros Franciso de Vitoria y Domingo de Soto*. Seville: Escuela de Estudios Hispanoamericanos/CSIC.

Cartledge, Paul. 1997. Introduction to *Hiero*. In Xenophon, *Hiero the Tyrant and Other Treatises*. Trans. Robin Waterfield, vii–xx, 3–6. London: Penguin.

Cartledge, Paul, Paul Millett, and Stephen Todd. 1990. *Nomos: Essays in Athenian Law, Politics, and Society*. Cambridge: Cambridge University Press.

Charlton, David. 1988. *Weakness of Will*. Oxford: Basil Blackwell.

Cherniss, H. 1957. The Relation of the *Timaeus* to Plato's Later Dialogues. *American Journal of Philology* 78: 225–66.

Christ, Matthew R. 1998. *The Litigious Athenian*. Baltimore, MD: Johns Hopkins University Press.

Chroust, Anton-Hermann. 1946. The Philosophy of Law from St. Augustine to St. Thomas Aquinas. *The New Scholasticism* 20: 26–71.

Cicero. *De Finibus*. In *On Moral Ends*. Ed. Julia Annas, trans. Raphael Woolf. Cambridge: Cambridge University Press, 2001. (*M. Tulli Ciceronis De Finibus Bonorum et Malorum.* Ed. L. D. Reynolds. Oxford: Oxford University Press, 1998.)

———. *De Inventione* (*On Invention*). In *Cicero II.* Trans. H. M. Hubbell, 1–346. Cambridge, MA: Harvard University Press, 1949.

———. *De Legibus* (*On the Laws*). In *Cicero. On the Commonwealth and On the Laws*. Ed. and trans. James E. G. Zetzel, 105–75. Cambridge: Cambridge University Press, 1999. (*M. Tulli Ciceronis De Legibus*. Ed. Konrat Ziegler, rev. W. Goerler. Freiburg: Ploetz, 1979.)

———. *De Natura Deorum*. Ed. and trans. H. Rackham. Cambridge, MA: Harvard University Press, 1933.

———. *De Officiis*. In *Cicero. On Duties.* Ed. and trans. M. T. Griffin and E. M. Atkins. New York, NY: Cambridge University Press, 1991. (*M. Tulli Ciceronis De Officiis*. Ed. Michael Winterbottom. Oxford: Oxford University Press, 1994.)

———. *De Re Publica* (*On the Commonwealth*). In *Cicero. On the Commonwealth and On the Laws*. Ed. and trans. James E. G. Zetzel, 1–103. Cambridge: Cambridge University Press, 1999. (*M. Tulli Ciceronis De Re Publica*. Ed. C. Ziegler. Leipzig: Teubner, 1969.)

———. *Letters to Atticus*. Trans. E. O. Winstedt. Cambridge, MA: Harvard University Press, 1962–1967. (Trans. D. R. Shackleton Bailey. Harmondsworth: Penguin, 1978.)

———. *Tusculan Disputations.* Trans. J. E. King. Cambridge, MA: Harvard University Press, 1927.

Clanchy, Michael T. 1996. *Abelard: A Medieval Life*. Oxford: Blackwell.

Clark, Gillian. 1993. *Women in Late Antiquity, Pagan and Christian Lifestyles*. Oxford: Oxford University Press.

Clement of Alexander. *Stromateis*. In *Clemens Alexandrinus. Stromata*. 3 vols. Ed. Otto Stahlin and Ludwig Fruchtel. Berlin: Akademie Verlag, 1970. (Stoic fragments drawn from this work are contained in *Stoicorum Veterum Fragmenta*. 4 vols. Ed. J. von Arnim. Leipzig: Teubner, 1924.)

Cohen, Abraham. 1995. *Everyman's Talmud: The Major Teachings of the Rabbinic Sages*. New York, NY: Schocken.

Cohen, David. 1991. *Law, Sexuality and Society: The Enforcement of Morals in Classical Athens*. Cambridge: Cambridge University Press.

———. 1995. *Law, Violence and Community in Classical Athens*. Cambridge: Cambridge University Press.

Cohen, Edward E. 2000. *The Athenian Nation*. Princeton, NJ: Princeton University Press.

Coing, Helmut, ed. 1973. *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte. I. Mittelalter (1100–1500). Die Gelehrten Rechte und die Gesetzgebung.* Munich: Beck.

Colaiaco, James A. 2001. *Socrates against Athens: Philosophy on Trial*. London: Routledge.

Coleman, Janet. 1992. *Ancient and Medieval Memories. Studies in the Reconstruction of the Past*. Cambridge: Cambridge University Press.

———. 1994. The Christian Platonism of St Augustine. In *Platonism and the English Imagination*. Ed. Anna Baldwin and Sarah Hutton, 27–37. Cambridge: Cambridge University Press.

———. 2000. *A History of Political Thought from Ancient Greece to Early Christianity*. 2 Vols. Oxford: Blackwell.

Colish, Marcia. 1985. *The Stoic Tradition from Antiquity to the Early Medieval Ages*. Leiden: Brill.

Connolly, William E. 1993. *The Augustinian Imperative: A Reflection on the Politics of Morality*. London: Verso.

Cooper, John. 1999. Notes on Xenophon's Socrates. In *Reason and Emotion: Essays on Ancient*

Moral Psychology and Ethical Theory. Ed. John Cooper, 3–28. Princeton, NJ: Princeton University Press.

Cooper, John, and J. F. Procopé. 1995. *Seneca. Moral and Political Essays*. New York, NY: Cambridge University Press.

Copleston, Frederick. 1957. *A History of Philosophy. Vol. 2: Medieval Philosophy*. Westminster: Newman.

———. 1961. *Medieval Philosophy*. New York, NY: Harper.

———. 1965. Copleston and Bertrand Russell. 1948 BBC Third Programme Debate: The Existence of God. In *A Modern Introduction to Philosophy*. Rev. ed. Ed. Paul Edwards and Arthur Pap, 474–81. New York, NY: The Free Press.

———. 1974. *A History of Medieval Philosophy*. New York, NY: Harper and Row.

Corbin, Henri. 1964. *Histoire de la Philosophie Islamique: 1. Des Origines jusqu'à la Mort d'Averroës (1198)*. Avec Seyyed Hosseïn Nasr et Osman Yahya. Paris: Gallimard.

Coulson, Noel James. 1964. *A History of Islamic Law*. Edinburgh: University Press.

Courtine, Jean-François. 1999. *Nature et Empire de la Loi. Études Suaréziennes*. Paris: Vrin-EHESS.

Courtois, C. 1985. *Les Vandales et L'Afrique.* Paris: Presses Universitaires de France.

Covell, Charles. 1992. *The Defence of Natural Law*. New York, NY: Macmillan.

Cranfield, C. E. B. 1970. St. Paul and the Law. In *New Testament Issues*. Ed. Richard A. Batey, 148–72. New York, NY: Harper & Row.

Crawford, M. H. 1996. *Roman Statutes*. London: Institute of Classical Studies, School of Advanced Study, University of London.

Cristiani, Marta. 1976. La Notion de Loi dans le "De Praedestinatione" de Jean Scot. *Studi Medievali* 17.1: 81–114.

Critias [?]. *Sisyphus Fragment*. In *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 260–2. Cambridge: Cambridge University Press, 1995.

Crook, John. 1967. *Law and Life of Rome*. Cambridge: Cambridge University Press.

Cross, Richard. 1998. *The Physics of Duns Scotus: The Scientific Context of a Theological Vision*. Oxford: Oxford University Press.

———. 1999. *Duns Scotus*. New York, NY: Oxford University Press.

Crowe, Michael B. 1977. *The Changing Profile of Natural Law*. The Hague: Nijohoff.

Curren, Randall R. 2000. *Aristotle on the Necessity of Public Education*. Lanham, MD: Rowman & Littlefield.

Daube, David. 1969. *Roman Law: Linguistic, Social, and Philosophical Aspects*. Edinburgh: Edinburgh University Press.

———. 1981. *Ancient Jewish Law*. Leiden: Brill.

Davidson, Ivor J. 2001. *Ambrose. De Officiis*. Oxford: Oxford University Press.

Deckers, Daniel. 1991. *Gerechtigkeit und Recht. Eine Historisch-Kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)*. Freiburg: Universitätverlag.

Decleva Caizzi, Fernanda. 1996. Pirroniani ed Accademici nel III secolo a.C. In *Aspects de la Philosophie Hellénistique.* Fondation Hardt. Entretiens sur l'antiquité classique 32: 147–83.

DeFilippo, Joseph G., and Philip T. Mitsis. 1994. Socrates and Stoic Natural Law. In *The Socratic Movement*. Ed. Paul A. Vander Waerdt, 252–71. Ithaca, NY: Cornell University Press.

De Gandillac, Maurice. 1975. Intention et Loi dans l'Ethique d'Abélard. In *Pierre Abélard, Pierre le Vénérable*. Ed. Centre national de la recherche scientifique, 585–608. Paris: CNRS.

Demos, Raphael. 1964. A Fallacy in Plato's *Republic*? *Philosophical Review* 73: 395–98.

Demosthenes. *Against Aphobus* (Orations 27–29). In *Demosthenes IV*. Ed. and trans. A. T. Murray, 1–123. Cambridge, MA: Harvard University Press, 1936.

———. *Against Leptines* (Oration 20). In *Demosthenes I*. Ed. and trans. J. H. Vince, 485–603. Cambridge, MA: Harvard University Press, 1930.

———. *Against Timocrates*. (Oration 24). In *Demosthenes III*. Ed. and trans. J. H. Vince, 370–511. Cambridge, MA: Harvard University Press, 1935.

D'Entreves, Alexander P. 1970. *Natural Law*. 2nd. rev. ed. London: Hutchinson.

De Romilly, J. 1971. *The Law in Greek Thought*. Paris: Les Belles Lettres.

———. 1991. *The Great Sophists in Periclean Athens*. Oxford: Oxford University Press.

Derrett, J. Duncan M. 1970. *Law in the New Testament*. London: Darton, Longman, and Todd.

De Salvo, L. 1993. Nolo Munera Ista (Aug. Sermo 355,3): Eredità e Donazioni in Agostino. *Atti dell' Accademia Romanistica Costantiniana IX, 1989, convegno internazionale*: 139–86.

Dewan, Lawrence. 2002. Jean Porter on Natural Law: Thomistic Notes. *The Thomist* 66: 275–309.

Díez-Alegría, José M. 1951. *El Desarrollo de la Doctrina de la ley Naturale en Luis de Molina y en los Maestros de la Universidad de Évora de 1565 a 1591: Estudio Histórico y Textos Inéditos*. Barcelona: Consejo superior de investigaciones científicas.

Dillon, John. 1977. *The Middle Platonists: A Study of Platonism 80 B.C. to A.D. 220*. Ithaca, NY: Cornell University Press.

Dio Chrysostom. *Orationes*. In *Dio Chrysostom*. Trans. J. W. Cohoon. Cambridge, MA: Harvard University Press, 1971–1986.

Diogenes Laertius. *Vitae Philosophorum* (*Lives of the Philosophers*). In *Diogenes Laertius I and II*. Trans. R. D. Hicks. Cambridge, MA: Harvard University Press, 1925.

Diogenes of Oenoanda. *Fragments*. In *Diogenes Oenoandensis*. Ed. C. W. Chilton. Leipzig: Teubner, 1967.

Dod, Bernard G. 1982. Aristoteles Latinus. In *The Cambridge History of Later Medieval Philosophy. From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600*. Ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg, 45–79. Cambridge: Cambridge University Press.

Dodd, C. H. 1953. *New Testament Studies*. Manchester: University of Manchester Press.

Dodds, E. R. 1959. *Plato. Gorgias*. Oxford: Oxford University Press.

Donagan, Alan. 1982. Thomas Aquinas on Human Action. In *The Cambridge History of Later Medieval Philosophy.* Ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg, 642–54. Cambridge: Cambridge University Press.

Doyle, John P. 1991–1992. Francisco Suárez: On Preaching the Gospel to People Like the American Indians. *Fordham International Law Journal* 15: 879–951.

———. 2001. Francisco Suárez SJ on Human Rights. In *Menschenrechte: Rechte und Pflichten in Ost und West*, Band 9. Ed. Konrad Wegmann, 105–32. Münster: LIT.

Driver, Godfrey Rolles, and John C. Miles, eds. and trans. 1935. *The Assyrian Laws*. Oxford: Clarendon Press.

———, eds. and trans. 1960. *The Babylonian Laws.* Oxford: Clarendon.

Driver, S. R. 1902. *A Critical and Exegetical Commentary to Deuteronomy*. 3rd. ed. Edinburgh: T & T Clark.

Dronke, Peter. 1988. *A History of Twelfth-Century Western Philosophy*. Cambridge: Cambridge University Press.

Düll, Rudolf. 1972. Seneca Iurisconsultus. In *Aufstieg und Niedergang der Römischen Welt*. Ed. Hildegard Temporini and Wolfgang Haase, II 15: 365–380. Berlin: de Gruyter.

Dumont, Paul. 1936. *Liberté Humaine et Concours Divin d'après Suárez*. Paris: Beauchesne.

Duns Scotus, John. *God and Creatures; the Quodlibetal Questions*. Trans. with introd., notes, and glossary by Felix Alluntis and Allan B. Wolter. Princeton, NJ: Princeton University Press, 1975.

———. *Ordinatio* III and IV. In *On the Will and Morality*. Trans. Allan B. Wolter. Ed. William A. Frank. Washington, DC: Catholic University of America Press, 1997.

———. *Philosophical Writings*. Trans. with introd. Allan B. Wolter. Indianapolis, IN: Hackett Pub. Co., 1987.

———. *Reportatio Parisiensis*. In *Opera Omnia. Editio nova iuxta editionem Waddingi XII tomos continentem*. Ed. L. Wadding, vol. 11. Paris: L. Vives, 1891.

Dutton, Paul E., ed. 1991. *The Glosae Super Platonem of Bernard of Chartres*. Toronto: Pontifical Institute of Mediaeval Studies.

Dvornik, Francis. 1966. *Early Christian and Byzantine Political Philosophy*, 2 vols. Washington, DC: Dumbarton Oaks Center for Byzantine Studies.

Dyke, Andrew R. 2004. *A Commentary on Cicero, De Legibus*. Ann Arbor, MI: University of Michigan Press.

Eder, Walter. 1991. Who Rules? Power and Participation in Athens and Rome. In *City-States in Classical Antiquity and Medieval Italy.* Ed. Anthony Molho, Kurt Raaflaub, and Julia Emlen, 169–96. Ann Arbor, MI: University of Michigan Press.

Eissfeldt, O. 1975a. The Hebrew Kingdom. In *The Cambridge Ancient History*. Vol. 2. Pt. 2. Ed. I. E. S. Edwards, C. J. Gladd, N. G. L. Hammond, and E. Sollberger, 537–605. Cambridge: Cambridge University Press.

———. 1975b. Palestine in the Time of the Nineteenth Century. In *The Cambridge Ancient History*. Vol. 2, Pt. 2. Ed. I. E. S. Edwards, C. J. Gladd, N. G. L. Hammond, and E. Sollberger, 307–37. Cambridge: Cambridge University Press.

Elon, Menachem. 1994. *Jewish Law: History, Sources, Principles*, 4 vols. Trans. Bernard Auerbach and Melvin J. Sykes. Philadelphia, PA: Jewish Publication Society of America.

Elster, Marianne. 2003. *Die Gestze der Mittleren Römischen Republik: Text und Kommentar.* Darmstadt: Wissenschaftliche Buchgesellschaft.

Engberg-Pedersen, Troels. 1990. Stoic Philosophy and the Concept of the Person. In *The Person and the Human Mind. Issues in Ancient and Modern Philosophy*. Ed. Christopher Gill, 109–35. Oxford: Clarendon.

Epictetus. *Dissertationes* (*Discourses*). In *Epictetus. The Discourses as Reported by Arrian, and Fragments*. Ed. and trans. W. A. Oldfather, 2 vols. Cambridge, MA: Harvard University Press, 1925.

———. *Enchiridion* (*Handbook*). In *Epictetus. The Discourses as Reported by Arrian, and Fragments*. Ed. and trans. W. A. Oldfather, vol. 2, 479–537. Cambridge, MA: Harvard University Press, 1925.

Epicurus. *De Natura* (*On Nature*). In *Epicuro: Opere*. 2nd ed. Ed. Graziano Arrighetti, 119–37. Turin: Giulio Einaudi Editore, 1973. (In *The Epicurus Reader*. Trans. and ed. Brad Inwood and L. P. Gerson, 75–7. Indianapolis, IN: Hackett, 1994.)

———. *Kuriai Doxai* (*Key Doctrines*). In *Epicuro: Opere*. 2nd ed. Ed. Graziano Arrighetti, 119–37. Turin: Giulio Einaudi Editore, 1973. (In *The Epicurus Reader*. Trans. and ed. Brad Inwood and L. P. Gerson, 32–6. Indianapolis, IN: Hackett, 1994.)

———. *Sententiae Vaticanae* (*Vatican Sayings*). In *Epicuro: Opere*. 2nd ed. Ed. Graziano Arrighetti, 139–57. Turin: Giulio Einaudi Editore, 1973. (In *The Epicurus Reader*. Trans. and ed. Brad Inwood and L. P. Gerson, 36–40. Indianapolis, IN: Hackett, 1994.)

Erskine, Andrew. 1990. *The Hellenistic Stoa: Political Thought and Action*. Ithaca, NY: Cornell University Press.

Espinel, J. L. 1978. *San Estebán de Salamanca, Historia y Gúia, Siglos XIII–XX*. Salamanca: Editorial San Estebán.

Euripides. *Bacchae*. Trans. Paul Woodruff. Indianapolis, IN: Hackett, 1998.

———. *Ion*. Trans. Ronald Frederick Willetts. In *Euripides II*. Ed. David Grene and Richmond Lattimore, 265–348. New York, NY: Random House, 1958. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 67–8. Cambridge: Cambridge University Press, 1995.)

———. *The Suppliant Women*. Trans. Frank William Jones. In *The Complete Greek Tragedies*, vol. 6: *Euripides II*. Ed. David Grene and Richmond Lattimore, 405–50. New York, NY: Random House, 1958. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 62–5. Cambridge: Cambridge University Press, 1995.)

Eusebius. *Ecclesiastical History*. In *Eusebius. The History of the Church.* Trans. G. A. Williamson. Harmondsworth: Penguin, 1965.

———. *Life of Constantine*. In *Eusebius' Life of Constantine*. Trans. Averil Cameron. Oxford: Oxford University Press, 1999.

Evans, Gillian. 1982. *Augustine on Evil*. Cambridge: Cambridge University Press.

Faruki, Kemal A. 1971. *The Evolution of Islamic Constitutional Theory and Practice From 610 to 1926*. Karachi: National Publishing House Ltd.

Fassò, Guido. 2001. *Storia della filosofia del diritto*, vol. 2. Rome-Bari: Laterza.

Father of the College of St. Bonaventure, trans. 1948. *Alexander of Hales: Summa Theologica, III*. Quaracchi: Collegium S. Bonaventurae.

Fernández, Clemente, ed. 1986. *Los Filósofos Escolásticos de los Siglos XVI y XVII. Seleccíon de texts*. Madrid: Bac.

Fernández Castaneda, Jaime. 1968. Right Reason in Francisco Suárez. *Modern Schoolman* 45: 105–22.

Fernández-Santamaria, J. A. 1977. *The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1559*. Cambridge: Cambridge University Press.

———. 1998. *The Theatre of Man: J. L. Vives on Society*. Philadelphia, PA: Transactions of the American Philosophical Society.

Ferrary, J.-L. 1995. The Statesman and the Law in the Political Philosophy of Cicero. In *Justice and Generosity: Studies in Hellenistic Social and Political Philosophy.* Ed. André Laks and Malcolm Schofield, 48–73. Cambridge: Cambridge University Press.

Fichter, Joseph. 1940. *Man of Spain, Francis Suárez*. New York, NY: Macmillan.

Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Oxford University Press.

———. 1982. *Natural Law and Natural Rights*. Oxford: Oxford University Press. (Corrected edition.)

———. 1983. *Fundamentals of Ethics*. Oxford: Oxford University Press.

———. 1998. *Aquinas: Moral, Political, and Legal Theory*. Oxford: Oxford University Press.

Fitzmyer, Joseph A. 1981. *To Advance the Gospel: New Testament Studies*. New York, NY: Crossroad.

———. 1993. *Romans: A New Translation with Introduction and Commentary*. New York, NY: Doubleday.

Flach, Dieter. 1994. *Die Gesetze der Frühen Römischen Republik: Text und Kommentar*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Foot, Philippa. 1978. *Virtues and Vices and Other Essays in Moral Philosophy*. Berkeley, CA: The University of California Press.

Fornara, Charles W. 1977. *Archaic Times to the End of the Peloponnesian War*. Baltimore, MD: Johns Hopkins University Press.

Fortenbaugh, William W. 1993. Theophrastus on Law, Virtue, and the Particular Situation. In *Nomodeiktes: Greek Studies in Honor of Martin Ostwald.* Ed. Ralph M. Rosen and Joseph Farrell, 447–58. Ann Arbor, MI: University of Michigan Press.

Fortenbaugh, William W., and Eckart Schutrümpf, eds. 2000. *Demetrius and Phalerum: Text, Translation, and Discussion*. New Brunswick, NJ: Transaction.

———. 2001. *Dicaearchus of Messana: Text, Translation, and Discussion*. New Brunswick, NJ: Transaction.

Fortenbaugh, William W., P. M. Huby, R. W. Sharples, and D. Gutas, eds. 1992. *Theophrastus of Eresus: Sources for His Life, Writings, Thought and Influence*. Leiden: E. J. Brill.

Foucault, Michel. 1985. *The History of Sexuality. Volume 1: The Use of Pleasure*. Trans. Robert Hurley. New York, NY: Pantheon.

———. 1986. *The History of Sexuality. Volume 2: The Care of the Self*. Trans. Robert Hurley. New York, NY: Pantheon.

Fox, Robin Lane. 1986. *Pagans and Christians in the Mediterranean World: From the Second Century AD to the Conversion of Constantine*. Harmondsworth: Penguin.

Foxhall, L., and A. D. E. Lewis, eds. 1996. *Greek Law in Its Political Setting: Justifications not Justice*. Oxford: Clarendon.

Fraga, Iribarne. 1947. *Luis de Molina y el Derecho de la Guerra*. Madrid: CISC.

Frankfort, Henri, John Albert Wilson, Thorkild Jacobsen, and William Andrew Irwin. 1946. *The Intellectual Adventure of Ancient Man: An Essay on Speculative Thought in the Ancient Near East*. Chicago, IL: University of Chicago Press.

Freddoso, Alfred J. 1988. *Luis de Molina: On Divine Foreknowledge*. Ithaca, NY: Cornell University Press.

Friedberg, Emil, ed. 1879. *Corpus Juris Canonici*. Leipzig: Tauchnitz.

Friedrich, Carl J. 1958. *The Philosophy of Law in Historical Perspective*. Chicago, IL: University of Chicago Press.

Frier, Bruce W. 1985. *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina*. Princeton, NJ: Princeton University Press.

Fuller, Lon. 1964. *The Morality of Law*. New Haven, CT: Yale University Press.

Gagarin, Michael. 1986. *Early Greek Law*. Berkeley, CA: University of California Press.

———. 2000. The Legislation of Demetrius of Phalerum and the Transformation of Athenian Law. In *Demetrius of Phalerum: Text, Translation and Discussion*. Ed. William W. Fortenbaugh and Eckart Schütrumpf, 347–66. New Brunswick, NJ: Transaction.

———. 2002. *Antiphon the Athenian: Oratory, Law, and Justice in the Age of the Sophists*. Austin, TX: University of Texas Press.

Gagarin, Michael, and Douglas MacDowell. 1998. *Antiphon and Andocides*. Austin, TX: University of Texas Press.

Gagarin, Michael, and Paul Woodruff, eds. 1995. *Early Greek Political Thought from Homer to the Sophists*. Cambridge: Cambridge University Press.

Gagnér, S. 1960. *Studien zur Geschichte der Gesetztgebung*. Stockholm: Göteborg.

Gaius. *Institutes*. In *The Institutes of Gaius.* Ed. and trans. W. M. Gordon and O. F. Robinson. Ithaca, NY: Cornell University Press, 1998.

Gaskin, Richard. 1994. Molina on Divine Foreknowledge and the Principle of Bivalence. *Journal of the History of Philosophy* 32: 551–71.

Gaudemet, Jean. 1957. *La Formation du Droit Séculier et du Droit de l'Eglise aux IVe et Ve Siècles*. Paris: Sirey.

———. 1958. *L'Église dans l'Empire Romain (IVe–Ve S.)*. Paris: Sirey.

———. 1983. Les Constitutions Constantiniennes du Code Theodosien. *Atti dell'Accademia Romanistica Costantiniana V, 1981, convegno internazionale*. (Università degli studi di Perugia, Facoltà di Giurisprudenza), 136–55.

———. 1993. *Les Sources du Droit Canonique, VIIIe–XXe Siècle*. Paris: Editions du Cerf.

Gauthier, R-A. 1959. *La Morale d'Aristote*. Paris: Presses Universitaires de France.

Gellius, Aulus. *Attic Nights* (*Noctes Atticae*). Trans. John C. Rolfe, 3 vols. Cambridge, MA: Harvard University Press, 1960. (1st ed. 1927.)

George, Robert, ed. 1992. Natural Law and Human Nature. In *Natural Law Theory: Contemporary Essays*. Ed. Robert George, 31–41. Oxford: Oxford University Press.

———. 1993. *Making Men Moral*. Oxford: Oxford University Press.

———. 1999. *In Defense of Natural Law*. Oxford: Clarendon.

Getino, Luis Alonso. 1930. *El Maestro Fray Francisco de Vitoria. Su Vida, su Doctrina e Influencia*. Madrid: Imperenta Catolica.

Getty, M. M. 1931. *The Life of the North Africans as Revealed in the Sermons of Saint Augustine*. Washington, DC: The Catholic University of America.

Gewirth, Alan, ed. and trans. 1951–1956. *Marsilius of Padua, The Defender of Peace*, 2 vols. New York, NY: Columbia University Press.

Giacon, Carlo. 1944. *La Seconda Scholastica*. Vol. 1. Milan: Bocca.

———. 1956. *La Seconda Scholastica*. Vol. 2. Milan: Bocca.

Gibb, Hamilton A. R. 1955. *Mohammedanism, An Historical Survey*. New York, NY: New American Library.

Gilby, Thomas, ed. and trans. 1964–1980. Thomas Aquinas, *Summa Theologiae*, 60 vols. New Blackfriars Edition. New York, NY: McGraw-Hill Book Company.

Gill, Christopher. 1995. Rethinking Constitutionalism in *Statesman* 291–303. In *Reading the Statesman: Proceedings of III Symposium Platonicum.* Ed. Christopher Rowe, 292–305. Sankt Augustin: Academia.

Ginzberg, Louis. 1941. *A Commentary on the Palestinian Talmud*. New York, NY: Jewish Theological Seminary.

Glauche, Gunter. 1970. *Schüllekture im Mittelalter. Entstehung und Wandlungen des Lektürekanons bis 1200 nach der Quellen Dargestellt*. Munich: Arbeo.

Glucker, J. 1988. Cicero's Philosophical Affiliations. In *The Question of Eclecticism: Studies in Later Greek Philosophy*. Ed. J. M. Dillon and A. A. Long, 34–69. Berkeley, CA: University of California.

Golding, Martin. 1974. Aquinas and Some Contemporary Natural Law Theories. *Proceedings of the American Catholic Philosophical Association* 48: 254–64.

Gómez-Camacho, Francisco. 1985. Luis de Molina y la Metodología de la Ley Natural. *Miscelánea Comillas* 43: 155–94, 437–63.

Goodblatt, D. 1971. The Babylonian Talmud. In *Aufstieg und Niedergang der Römischen Welt*. Ed. Wolfgang Haase, II.19.2: 257–336. Berlin: De Gruyter.

Goodenough, E. R. 1933. Philo's Exposition of the Law and His *De Vita Mosis*. *Harvard Theological Review* 26: 109–25.

———. 1940. *Introduction to Philo Judaeus*. New Haven, CT: Yale University Press.

Gordley, James R. 1999. Tort Law in the Aristotelian Tradition. In *Aristoteles: El Pensamiento Político y Jurídico*. Ed. Salvador Rus Rufino, 71–97. León and Seville: University of León and University of Seville.

Gordon, W. M., and O. F. Robinson. 1988. *The Institutes of Gaius*. Ithaca, NY: Cornell University Press.

Gorgias. *Funeral Oration* (fragments). In *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 202–3. Cambridge: Cambridge University Press, 1995.

Gottschalk, Hans B. 2000. Demetrius of Phalerum: A Politician Among Philosophers and a Philosopher Among Politicians. In *Demetrius of Phalerum: Text, Translation and Discussion*. Ed. William W. Fortenbaugh and Eckart Schütrumpf, 367–80. New Brunswick, NJ: Transaction.

Goulet-Cazé, Marie-Odile. 1982. Un Syllogisme Stoïcien sur la Loi dans la Doxographie de Diogène le Cynique—a propos de Diogène Laërce. VI 72. *Rheinisches Museum* 125: 214–40.

———. 1996. Who Was the First Dog? In *The Cynics: The Cynic Movement in Antiquity and Its Legacy*. Ed. R. Bracht Branham and Marie-Odile Goulet-Cazé. Berkeley, CA: University of California Press.

Gracia, Jorge. 1991. Francisco Suárez. Special Issue. *American Catholic Philosophical Quarterly* 65: 3.

Gratian. *Decretum*. In *Gratian. The Treatise on Laws (Decretum DD. 1–20)*. Trans. Augustine Thompson; with Ordinary gloss, trans. James Gordley; introd. Katherine Christensen. Washington, DC: Catholic University of America Press, 1993.

Greengus, Samuel. 1995. Legal and Social Institutions of Ancient Mesopotamia. In *Civilizations of the Ancient Near East*. Ed. Jack M. Sasson, 469–84. New York, NY: Scribner.

Greenstein, Edward L. 1984. Biblical Law. In *Back to the Sources*. Ed. Barry W. Holtz, 83–104. New York, NY: Summit.

Griffin, M. T. 1976. *Seneca: A Philosopher in Politics*. Oxford: Clarendon.

Griffin, M. T., and Jonathan Barnes, eds. 1989. *Philosophy Togata: Essays on Philosophy and Roman Society*. Oxford: Clarendon.

———, eds. 1997. *Philosophy Togata II: Plato and Aristotle at Rome*. Oxford: Clarendon.

Grimaldi, W. M. A. 1980. *Aristotle, Rhetoric I, A Commentary*. New York, NY: Fordham University Press.

Grisez, Germain. 1965. The First Principle of Practical Reason. *Natural Law Forum* 10: 168–96.

Grubbs, Judith Evans. 1993. Constantine and Imperial Legislation on the Family. In *The Theodosian Code*. Ed. J. Harries and I. Wood, 120–42. Ithaca, NY: Cornell University Press.

Gruen, Erich S. 1993. The Polis in the Hellenistic World. In *Nomodeiktes: Greek Studies in Honor of Martin Ostwald.* Ed. Ralph M. Rosen and Joseph Farrell, 339–54. Ann Arbor, MI: University of Michigan Press.

Grundert, Frank, and Kurt Seelmann, eds. 2001. *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik.* Tübingen: Niemeyer.

Gurney, O. R. 1990. *The Hittites.* 2nd ed. Harmondsworth: Penguin.

Guthrie, W. K. C. 1975. *History of Greek Philosophy: 4.* Cambridge: Cambridge University Press.

———. 1978. *History of Greek Philosophy: 5.* Cambridge: Cambridge University Press.

Haakonssen, Knud. 1996. *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment.* Cambridge: Cambridge University Press.

Hahm, David E. 1995. Polybius' Applied Political Theory. In *Justice and Generosity: Studies in Hellenistic Social and Political Philosophy. Proceedings of the Sixth Symposium Hellenisticum.* Ed. André Laks and Malcolm Schofield, 7–47. Cambridge: Cambridge University Press.

Haldon, J. F. 1997. *Byzantium in the Seventh Century.* Cambridge: Cambridge University Press.

Hall, Robert W. 1981. *Plato.* London: Allen & Unwin.

Hamburger, Max. 1951. *Morals and Law: The Growth of Aristotle's Legal Theory.* New Haven, CT: Yale University Press.

Hamilton, Bernice. 1963. *Political Thought in Sixteenth Century Spain. A Study of the Political Ideas of Vitoria, De Soto, Suárez and Molina.* Oxford: Clarendon.

Hanke, Lewis. 1951. *Bartolomé de las Casas: An Interpretation of His Life and Writings.* The Hague: Nijhoff.

———. 1970. *Aristotle and the American Indians: A Study in Race Relations in the Modern World.* Bloomington, IN: Indiana University Press.

Hankins, James. 1996. Humanism and the Origins of Modern Political Thought. In *The Cambridge Companion to Renaissance Humanism.* Ed. Jill Kraye, 118–41. Cambridge: Cambridge University Press.

Hansen, Mogens Herman. 1996. The Ancient Athenian and the Modern Liberal View of Liberty as a Democratic Ideal. In *Demokratia.* Ed. J. Ober and C. Edrick, 91–104. Princeton, NJ: Princeton University Press.

Hardie, W. F. R. 1980. *Aristotle's Ethical Theory.* 2nd. ed. New York, NY: Oxford University Press.

Harries, Jill. 1999. *Law and Empire in Late Antiquity.* Cambridge: Cambridge University Press.

Harries, Jill, and Ian Wood. 1993. *The Theodosian Code.* Ithaca, NY: Cornell University Press.

Harris, C. S. R. 1937. Duns Scotus, John. In *Encyclopedia of the Social Sciences.* vol. 3. Ed. Edwin Robert Anderson Seligman and Alvin Saunders Johnson, 282ff. New York, NY: Macmillan.

Harrison, A. R. W. 1998. *The Law of Athens.* Indianapolis, IN: Hackett. (1st ed. 1968–1971.)

Hart, H. L. A. 1961. *The Concept of Law.* Oxford: Oxford University Press.

Harte, Verity. 1999. Conflicting Values in Plato's *Crito. Archiv für Geschichte der Philosophie* 81: 117–47.

Haskins, Charles Homer. 1927. *The Renaissance of the Twelfth Century.* Cambridge, MA: Harvard University Press.

Hayek, Friedrich A. 1973. *Law, Legislation, and Liberty, Volume I: Rules and Order.* Chicago, IL: University of Chicago Press.

Hegel, Georg Wilhelm Friedrich. 1930. *Grundlinien der Philosophie des Rechts.* Ed. Georg Lasson. Leipzig: Felix Meiner.

———. 1991. *Elements of the Philosophy of Right.* Ed. Allen W. Wood. Trans. H. B. Nisbet. Cambridge: Cambridge University Press.

Herodotus. *History.* In *Herodotus The History.* Trans. David Grene. Chicago, IL: University of Chicago Press, 1988. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists.* Trans. Michael Gagarin and Paul Woodruff, 77–85. Cambridge University Press, 1995.)

Herrin, Judith 1987. *The Formation of Christendom*. Princeton: Princeton University Press.

Herrmann, Frank R., and Brownlow M. Speer. 1994. Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause. *Virginia Journal of International Law*. 34:3, 481–552.

Hesiod. *Fragments.* In *Fragmenta Hesiodea*. Ed. Reinhold Merkelbach and Martin L. West. Oxford: Clarendon, 1967.

———. *Theogony.* In *Hesiod. The Homeric Hymns and Homerica*. Ed. Hugh G. Evelyn-White, 78–155. Cambridge, MA: Harvard University Press, 1914. (*Hesiodi Theogonia Opera et Dies Scutum.* Ed. Friedrich Solmsen, 5–48. Oxford: Oxford University Press, 1970. Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 9–20. Cambridge: Cambridge University Press, 1995.)

———. *Works and Days*. In *Hesiod. The Homeric Hymns and Homerica*. Ed. Hugh G. Evelyn-White, 2–65. Cambridge, MA: Harvard University Press, 1914. (*Hesiodi Theogonia Opera et Dies Scutum.* Ed. Friedrich Solmsen, 49–85. Oxford: Oxford University Press, 1970. Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 9–20. Cambridge: Cambridge University Press, 1995.)

Hilary of Poitiers. *Tractatus on Psalms*. In *Sancti Hilarii Pictaviensis Episcopi Tractatus super Psalmos*. Ed. J. Doignon. Turnholti: Brepols, 1997.

Hippocrates. *Airs, Waters, Places*. In *Hippocrates I*. Ed. and trans. W. H. S. Jones, 65–137, 224–419. Cambridge, MA: Harvard University Press, 1931. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 164–6. Cambridge: Cambridge University Press, 1995.)

———. *De Victu* (*Regimen*). In *Hippocrates IV*. Ed. and trans. W. H. S. Jones, 224–419. Cambridge, MA: Harvard University Press, 1931.

Hittinger, Russell. 1993. Natural Law and Virtue. In *Natural Law Theory: Contemporary Essays*. Ed. Robert George, 42–70. Oxford: Oxford University Press.

Hochberg, Herbert. 2001. The Radical Hylomorphism of Bergmann's Aristotelian Metaphysics and the Ontology of Relations. *The Modern Schoolman* 78: 257–88.

Hochstrasser, T. J. 2000. *Natural Law Theories in the Early Enlightenment*. Cambridge: Cambridge University Press.

Hodgson, Marshall G. S. 1974. *The Venture of Islam: Conscience and History in a World Civilization*. Chicago, IL: University of Chicago Press.

Hoffner, Harry A. Jr. 1997. *The Laws of the Hittites: A Critical Edition*. Leiden: Brill.

Hohfeld, Wesley N. 1923. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. New Haven, CT: Yale University Press.

Homer. *Iliad*. Trans. A. T. Murray; rev. William E. Wyatt, 2 vols. Cambridge, MA: Harvard University Press, 1999. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 3–7. Cambridge: Cambridge University Press, 1995.)

Honoré, Tony. 1962. *Gaius*. Oxford: Clarendon.

———. 1978. *Tribonian*. London: Duckworth.

———. 1981. *Emperors and Lawyers*. London: Duckworth.

———. 1982. *Ulpian*. Oxford: Oxford University Press.

———. 1994. *Emperors and Lawyers*. 2nd ed. Oxford: Oxford University Press.

Horsley, R. A. 1978. The Law of Nature in Philo and Cicero. *Harvard Theological Review* 71: 35–59.

Hostiensis. 1581. *Super Sexto Decretalibus*. Venice. Reprint by Turin in 1965.

Hourani, Albert. 1991. *A History of the Arab Peoples*. Cambridge, MA: Harvard University Press.

Hume, David. 1751. *Enquiry Concerning the Principles of Morals*. London: A. Millar.

Hunt, D. 1993. Christianising the Roman Empire. In *The Theodosian Code, Studies in the Imperial Law of Late Antiquity*. Ed. J. Harries and I. Wood, 143–60. London: Duckworth.

Ibn Taimiyya, Takī al-Dīn Ahmad. *Ibn Taimiyya, Against the Greek Logicians*. Trans. Wael B. Hallaq. Oxford: Clarendon, 1993.

———. *Mukhtaṣar Naṣīḥat Ahl al-Īmān fī al-Radd ʻalā Manṭiq al-Yūnān* (*Abridgement of the Counsel to the People of the Faith Concerning the Response to the Logic of the Greeks*). In *Majmūʻ Fatāwī Shaikh al-Islām Aḥmad ibn Taimiyya* (*Collection of the Legal Opinions of the Islamic Eminence, Ahmad Ibn Taimiyya*), vol. 9. Ed. ʻAbd al-Raḥmān ibn Muḥammad ibn Qāsim al-ʻĀṣīmī and Muḥammad ibn ʻAbd al-Raḥmān ibn Qāsim al-ʻĀṣīmī, 82–255. Rabāṭ: Maktabat al-Maʻārif, 1961.

Ierodiakonou, Katerina, ed. 1999. *Topics in Stoic Philosophy*. New York, NY: Oxford University Press.

Ingham, Mary Elizabeth. 1993. Scotus and the Moral Order. In *Duns Scotus*. Special Issue. *American Catholic Philosophical Quarterly* 67: 127–50.

Inwood, Brad. 1985. *Ethics and Human Action in Early Stoicism*. Oxford: Oxford University Press.

———. 1986. Goal and Target in Stoicism. *Journal of Philosophy* 83: 547–56.

———. 1995. Seneca in His Philosophical Milieu. *Harvard Studies in Classical Philology* 97: 63–76.

———. 1996. L'*oikeiôsis* sociale chez Epictète. In *Polyhistor*: *Studies in the History and Historiography of Ancient Philosophy*. Ed. K. Algra, P. van der Horst, and D. Runia, 243–64. Leiden: Brill.

———. 1999. Rules and Reasoning in Stoic Ethics. In *Topics in Stoic Philosophy.* Ed. Katerina Ierodiakonou, 95–127. Oxford: Oxford University Press.

———. 2003. Natural Law in Seneca. In *The Studia Philonica Annual* 15. Ed. David T. Runia, Gregory E. Sterling, and Hindy Najman, 81–99. Providence, RI: Brown University.

———. 2004. Moral Judgment in Seneca. In *Stoicism: Traditions and Transformations, Proceedings of the Second Loemker Conference*. Ed. J. Zupko and S. K. Strange. Cambridge: Cambridge University Press.

Inwood, Brad, and L. P. Gerson, eds. and trans. 1994. *The Epicurus Reader: Selected Writings and Testimonia*. Indianapolis, IN: Hackett.

Irenaeus of Lyons. *Against the Heresies* (*Adversus Haereses*)*.* Trans. Dominic J. Unger, rev. John J. Dillon. New York, NY: Paulist Press, 1992.

Irwin, Terence H. 1975. *Plato. Gorgias*. Oxford: Oxford University Press.

———. 1985. Moral Science and Political Theory in Aristotle. In *Crux: Essays in Greek History Presented to G. E. M. de. Ste. Croix on his 75th Birthday*. Ed. Paul A. Cartledge and F. D. Harvey, 150–68. London: Duckworth.

———. 1992. Socrates the Epicurean. In *Essays on the Philosophy of Socrates*. Ed. Hugh H. Benson, 198–219. Oxford: Oxford University Press.

———. 1997. *Plato's Ethics*. Oxford: Oxford University Press.

Isidore. *Etymologies.* In *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*. Ed. Oliver O'Donovan and Joan Lockwood O'Donovan, 209–11. Grand Rapids, MI: Eerdmans, 1999.

———. *Sentences*. In *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*. Ed. Oliver O'Donovan and Joan Lockwood O'Donovan. Grand Rapids, MI: Eerdmans, 1999.

Jacobsen, Thorkild. 1946. Mesopotamia. In *The Intellectual Adventure of Ancient Man: An Essay on Speculative Thought in the Ancient Near East*. Ed. Henri Frankfort et al., 125–202. Chicago, IL: University of Chicago Press.

Jasnow, Richard. 2003. Egypt: Middle Kingdom and Second Intermediate Period. In *A History of Ancient Near Eastern Law*. Ed. Raymond Westbrook, 255–88. Leiden: Brill.

Jeffery, L. H. 1961. *The Local Scripts of Archaic Greece*. Oxford: Oxford University Press.

Jerome (Hieronymus Stridonensis). *Epistolae. PL* vol. 22.18.

John of Paris. O*n Royal and Papal Power* (*De Potestate Regia et Papali*). In *John of Paris on Royal and Papal Power*. Trans. A. P. Monahan. New York, NY: Columbia University Press, 1974.

John Scottus Eriugena. *On Divine Predestination* (*De Divina Praedestinatione Liber*). Ed. Goulven Madec. Turnhout: Brepols, 1978.

Johnson, Allan Chester, Paul Robinson Coleman-Norton, and Frank Card Bourne. 1961. *Ancient Roman Statutes: A Translation, with Introduction, Commentary, Glossary, and Index*. Austin, TX: University of Texas Press.

Johnston, David. 1999. *Roman Law in Context.* Cambridge: Cambridge University Press.

———. 2000. The Jurists. In *The Cambridge History of Greek and Roman Political Thought.* Ed. Christopher Rowe and Malcolm Schofield, 635–60. Cambridge: Cambridge University Press.

Johnstone, Steven. 1999. *Disputes and Democracy: The Consequences of Litigation in Ancient Athens*. Austin, TX: University of Texas Press.

Jolowicz, H. F. and Barry Nicholas. 1972. *Historical Introduction to the Study of Roman Law*. 3rd ed. Cambridge: Cambridge University Press.

Jordan, Mark D. 1993. Theology and Philosophy. In *The Cambridge Companion to Aquinas*. Ed. Norman Kretzmann and Eleonore Stump, 232–51. Cambridge: Cambridge University Press.

Josephus. *Jewish Antiquities.* In *The Works of Josephus*. Trans. William Whiston, 27–542. Peabody, MA: Hendrickson, 1987.

Justin Martyr. *Dialogue with Trypho.* Trans. Thomas B. Falls; rev. Thomas P. Halton; ed. Michael Slusser. Washington, DC: Catholic University of America Press, 2003.

Justinian. *Code.* In *Corpus Iuris Civilis*. Ed. Paul Krueger, Rudolf Schoell, and Wilhelm Kroll. Berlin: Weidmann, 1970–1973. (*The Civil Law.* Trans. S. P. Scott. Cincinnati, OH: The Central Trust Company, 1932.)

———. *Corpus Iuris Civilis*. Ed. Paul Krueger, Rudolf Schoell, and Wilhelm Kroll. Berlin: Weidmann, 1970–1973.

———. *Digest*. In *Corpus Iuris Civilis*. Ed. Paul Krueger, Rudolf Schoell, and Wilhelm Kroll. Berlin: Weidmann, 1970–1973. (*The Digest of Justinian*. Ed. and trans. Alan Watson. Philadelphia, PA: University of Pennsylvania Press, 1985. *The Digest of Justinian*. 2 vols. Ed. and trans. Alan Watson. Philadelphia, PA: University of Pennsylvania Press, 1998.)

———. *Institutes*. In *Corpus Iuris Civilis*. Ed. Paul Krueger, Rudolf Schoell, and Wilhelm Kroll. Berlin: Weidmann, 1970–1973. (*Justinian's Institutes*. Trans. Peter Birks and Grant McLeod. Ithaca, NY: Cornell University Press, 1987.)

———. *Novels*. In *Corpus Iuris Civilis*. Ed. Paul Krueger, Rudolf Schoell, and Wilhelm Kroll. Berlin: Weidmann, 1970–1973. (*The Civil Law.* Trans. S. P. Scott. Cincinnati, OH: The Central Trust Company, 1932.)

Kahn, Charles. 1981a. Did Plato Write Socratic Dialogues? *Classical Quarterly* 31: 305–20.

———. 1981b. The Origin of Social Contract Theory in the Fifth Century BC. In *The Sophists and Their Legacy*. Ed. G. B. Kerferd, 92–108. Wiesbaden: Steiner.

———. 1988. Discovering the Will: From Aristotle to Augustine. In *The Question of Eclecticism: Studies in Later Greek Philosophy.* Ed. J. M. Dillon and A. A. Long, 234–59. Berkeley, CA: University of California Press.

———. 1995. The Place of the *Statesman* in Plato's Later Work. In *Reading the Statesman: Proceedings of III Symposium Platonicum*. Ed. Christopher Rowe, 49–60. Sankt Augustin: Academia.

———. 1996. *Plato and the Socratic Dialogue*. Cambridge: Cambridge University Press.

———. 1997. Greek Religion and Philosophy in the Sisyphus Fragment. *Phronesis* 42: 247–62.

Kaser, Max. 1996. *Das Römische Zivilprozessrecht*. 2nd ed. Munich: Beck.

Kazhdan, Alexander P., and Alice-Mary Talbot, eds. 1991. *The Oxford Dictionary of Byzantium*. Oxford: Oxford University Press.

Kelly, John M. 1992. *A Short History of Western Legal Theory*. Oxford: Clarendon.

Kelsen, Hans. 1957. Aristotle's Doctrine of Justice. In *What Is Justice?* Ed. Hans Kelsen, 110–36. Berkeley, CA: University of California Press.

Kenny, Anthony. 1975. *Will, Freedom, and Power.* Oxford: Oxford University Press.

———. 1993. *Aquinas on Mind*. London: Routledge.

———. 2001, October 5. Aquinas and the Appearances of Bread. Review of Milbank and Pickstock. *Times Literary Supplement* 5140: 14.

Kent, Bonnie. 2001. Augustine's Ethics. In *The Cambridge Companion to Augustine*. Ed. E. Stump and N. Kretzmann, 205–33. Cambridge: Cambridge University Press.

Kerferd, G. B. 1982. *The Sophistic Movement*. Cambridge: Cambridge University Press.

Keyt, David. 1991. Aristotle's Theory of Distributive Justice. In *A Companion to Aristotle's Politics*. Ed. David Keyt and Fred D. Miller, Jr., 239–78. Oxford: Blackwell.

———. 1999. *Aristotle. Politics. Books V and VI. Trans. with commentary*. Oxford: Clarendon.

Keyt, David, and Fred D. Miller, Jr., eds. 1991. *A Companion to Aristotle's Politics*. Oxford: Blackwell.

Kidd, Ian G. 1979. Moral Actions and Moral Rules in Stoic Ethics. In *The Stoics.* Ed. John M. Rist, 247–58. Berkeley, CA: University of California Press.

Kilcullen, John. 1997. The Political Writings. In *The Cambridge Companion to Ockham*. Ed. Paul Vincent Spade, 302–25. Cambridge: Cambridge University Press.

King, Martin Luther, Jr. 1963. A Letter from a Birmingham Jail, June 12, 1963. *The Christian Century* 80: 767–73.

King, P. D. 1988. The Barbarian Kings. In *The Cambridge History of Medieval Political Thought: c. 350–c. 1450*. Ed. J. H. Burns, 123–53. Cambridge: Cambridge University Press.

Kleinhappl, Johann. 1932. Die Eigentumslehre Ludwig Molinas. *Zeitschrift für Katholische Theologie* 52: 46–66.

———. 1935. *Der Staat bei Ludwig Molina*. Innsbruck: F. Rauch.

Klosko, George. 1986. *The Development of Plato's Political Theory*. London: Methuen.

———. 1988. The Nocturnal Council in Plato's Laws. *Political Studies* 36: 74–88.

Knebel, Sven. 2000. *Wille, Würfel und Wahrscheinlichkeit. Das System der Moralischen Notwendigkeit in der Jesuitenscholastik 1550–1700*. Hamburg: Meiner.

Köhler, Ludwig. 1956. *Hebrew Man*. Trans. P. R. Ackroyd. New York, NY: Abingdon.

Kramer, Samuael Noah. 1963. *The Sumerians: Their History, Culture, and Character*. Chicago, IL: University of Chicago Press.

Kraut, Richard. 1984. *Socrates and the State*. Princeton, NJ: Princeton University Press.

———, ed. 1992. *The Cambridge Companion to Plato*. Cambridge: Cambridge University Press.

———. 2002. *Aristotle: Political Philosophy*. Oxford: Oxford University Press.

Kretzmann, Norman, Anthony Kenny, and Jan Pinborg, eds. 1982. *The Cambridge History of Later Medieval Philosophy*. Cambridge: Cambridge University Press.

Kripke, Saul. 1971. Identity and Necessity. In *Identity and Individuation*. Ed. Milton K. Muniz, 135–64. New York, NY: New York University Press.

Kruchten, Jean-Marie. 2001. Law. In *The Oxford Encyclopedia of Ancient Egypt.* Vol. 2. Ed. Donald B. Redford, 277–82. Oxford: Oxford University Press.

Kuttner, Stephan. 1935. Sur les Origines du Terme "Droit Positif." *Revue Historique de Droit Français et Etranger* 15: 728–40.

———. 1936. *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX*. Vatican City: Biblioteca Apostolica Vaticana.

———. 1982. The Revival of Jurisprudence. In *Renaissance and Renewal in the Twelfth Century*. Ed R. L. Benson and G. Constable, 299–323. Oxford: Oxford University Press.

Lacerte, Henry. 1964. *The Nature of Canon Law According to Suárez*. Ottawa: University of Ottawa Press.

Lactantius. *De Mortibus Persecutorum* (*On the Deaths of the Persecutors*). Ed. and trans. J. L. Creed. Oxford: Clarendon, 1984.

———. *Divine Institutes* (*Institutiones*). Trans. Anthony Bowen and Peter Garnsey. Liverpool: Liverpool University Press, 2003.

Laks, André. 1991a. Legislation and Demiurgy: On the Relation between Plato's Republic and Laws. *Classical Antiquity* 9: 209–29.

———. 1991b. L'Utopie Législative de Platon. *Revue Philosophique* 4: 417–28.

———. 1995. Prodige et Méditation: Esquisse d'une Lecture des *Lois*. In *D'une Cité Possible. Sur les* Lois *de Platon*. Ed. J-F. Balaude, 11–28. Paris: Universite Paris X-Nanterre.

———. 2000. *The Laws*. In *The Cambridge History of Greek and Roman Political Thought*. Ed.

Christopher Rowe and Martin Schofield, 258–92. Cambridge: Cambridge University Press.

Laks, André, and Malcolm Schofield, eds. 1995. *Justice and Generosity. Studies in Hellenistic Social and Political Philosophy*. Cambridge: Cambridge University Press.

Lamadrid, R. S. de. 1939. Luis de Molina S.I. – *De Bello*: Commentario a Ia 2.2, Q. 40. *Archivo Teológico Granadino* 1: 155–231.

Lambton, Ann K. S. 1981. *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*. Oxford: Oxford University Press.

Lanata, Giuliana. 1984. *Legislazione e Natura nelle Novelle Giustinianee*. Naples: Edizioni Scientifiche Italiane.

Landgraf, Artur Michael. 1973. *Introduction à l'histoire de la littérature théologique de la scolastique naissante*. Trans. Louis-B. Geiger. Montreal: Institut d'études médiévales, 1973. (Orig. *Einführung in die Geschichte der theologischen Literatur der Frühscholastik unter dem Gesichtspuhkte der Schulenbildung*. Regensburg: Gregorius, 1948.)

Lane, Melissa. 1995. A New Angle on Utopia: The Political Theory of the *Statesman*. In *Reading the Statesman: Proceedings of III Symposium Platonicum*. Ed. Christopher Rowe, 276–91. Sankt Augustin: Academia.

———. 1998. *Method and Politics in Plato's Statesman*. Cambridge: Cambridge University Press.

———. 2000. Socrates and Plato: An Introduction. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Martin Schofield, 155–63. Cambridge: Cambridge University Press.

Las Casas, Bartolomeo De. *De Regia Potestae o Derecho de Autodeterminación*. Ed. L. Perena. Madrid: CSIC, 1969.

———. *Del Úncio Modo de Atraer*. In *Del Úncio Modo de Atraer a Todos los Pueblos a la Verdadera Religion.* Ed. A. Millaers Carlo. Mexico City: FCE, 1942.

———. *Tratados*. Ed. L. Hanke, J. Tudela, and A. Millaers Carlo, 2 Vols. Mexico City: FCE, 1965.

Le Bras, G. C. Lefebvre, and J. Rambaud. 1965. *Histoire du Droit et des Institutions de l'Église en Occident. VII. L'Âge Classique, 1140–1378. Sources et Théorie du Droit*. Paris: Sirey.

Lee, Patrick. 1982. Aquinas and Scotus on Liberty and Natural Law. *Proceedings of the American Catholic Philosophical Association* 56: 70–8.

———. 1985. The Relation between Intellect and Will in Free Choice according to Aquinas and Scotus. *The Thomist* 49: 321–42.

———. 1997. Is Thomas's Natural Law Theory Naturalist? *American Catholic Philosophical Quarterly* 71: 567–87.

Lefkowitz, Mary. 1996. *Not Out of Africa: How Afrocentrism Became an Excuse to Teach Myth as History*. New York, NY: Basic Books.

Legnano, Giovanni de. *De Bello, De Represaliis, et De Duello*. Ed. Thomas Erskine Holland. Washington, DC: Oxford University Press, 1917.

Lenel, O. 1889. *Palingenesia Iuris Civilis*. Leipzig: Tauchniz.

Leoni, Bruno. 1991. *Freedom and the Law*. 3rd ed. Indianapolis, IN: Liberty Fund.

Lerner, Ralph, and Mushin Mahdi. 1963. *Medieval Political Philosophy: A Sourcebook*. Glencoe, IL: Free Press of Glencoe.

Levy, Ernst. 1949. Natural Law in Roman Thought. *Studia et Documenta Historias et Juris* 15: 1–23.

———. 1951. *West Roman Vulgar Law: The Law of Property*. Philadelphia, PA: American Philosophical Society.

Lewis, Bernard. *The Arabs in History*. 1960. New York, NY: Harper & Row.

Lewittes, Mendell. 1987. *Principles and Development of Jewish Law: The Concepts and History of Rabbinic Jurisprudence from its Inception to Modern Times*. New York, NY: Bloch.

Lewy, Guenter. 1960. *A Study of the Political Philosophy of Juan de Mariana SJ*. Geneva: Droz.

Lichtheim, Miriam. 1973. *Ancient Egyptian Literature*. Vol. 1. Berkeley, CA: University of California Press.

———. 1976. *Ancient Egyptian Literature*. Vol. 2. Berkeley, CA: University of California Press.

———. 1980. *Ancient Egyptian Literature*. Vol. 3. Berkeley, CA: University of California Press.

Liebs, Detlef. 2000. Roman Law. In *The Cambridge Ancient History*. Ed. Averil Cameron, Bryan Ward-Perkins, and Michael Whitby. Vol. 14: 238–59. 2nd ed. Cambridge: Cambridge University Press.

Lintott, Andrew. 1997. The Theory of the Mixed Constitution at Rome. In *Philosophia Togata II: Plato and Aristotle at Rome.* Ed. Jonathan Barnes and Miriam Griffin, 70–86. Oxford: Clarendon.

Lisska, Anthony J. 1991. Finnis and Veatch on Natural Law in Aristotle and Aquinas. *The American Journal of Jurisprudence* 36: 55–71.

———. 1996. *Aquinas's Theory of Natural Law: An Analytic Reconstruction*. Oxford: Clarendon.

———. Forthcoming. Thomas Aquinas on *Phantasia*: Rooted in but Transcending Aristotle's *De Anima*. In *Aquinas's Sources*. Ed. Timothy L. Smith. South Bend, IN: St. Augustine.

Livy. *The Rise of Rome* (*Ab Urbe Condita*). Trans. T. J. Jones. Oxford: Oxford University Press, 1998.

Long, Anthony A. 1996. The Socratic Tradition: Diogenes, Crates, and Hellenistic Ethics. In *The Cynics: The Cynic Movement in Antiquity and Its Legacy*. Ed. R. Bracht Branham and Marie-Odile Goulet-Cazé, 28–46. Oxford: Clarendon.

———. 2002. *Epictetus: A Stoic and Socratic Guide to Life*. Oxford: Oxford University Press.

Long, Anthony A. and D. N. Sedley. 1987. *The Hellenistic Philosophers: Translations of the Principal Sources with Philosophical Commentary, vol. 1*. New York, NY: Cambridge University Press.

Long, Roderick T. 1996. Aristotle's Conception of Freedom. *Review of Metaphysics* 49: 775–802.

———. 2000. *Reason and Value: Aristotle versus Rand.* Poughkeepsie: Objectivist Center.

———. Unpublished Manuscript. *Passionate Amnesia: Xenophon's Solution to the Socratic Paradox.*

Lorton, David. 1995. Legal and Social Institutions of Pharaonic Egypt. In *Civilizations of the Near East.* Ed. Jack. M. Sasson, 345–62. New York, NY: Simon & Schuster Macmillan.

Lottin, Odon. 1924. Le Droit Naturel Chez Saint Thomas d'Aquin et ses Prédécesseurs, I. *Ephemerides Theologicae Lovanienses* 1: 369–88.

———. 1948. *Psychologie et Morale aux XIIe et XIIIe Siècles. II. Problèmes de Morale*. Gembloux: Duculot.

Lucretius. *De Rerum Natura* (*On the Nature of Things*). Trans. Martin Ferguson Smith. Indianapolis, IN: Hackett, 2001.

Luscombe, David E. 1970. *The School of Peter Abelard*. Cambridge: Cambridge University Press.

———. 1982. Natural Morality and Natural Law. In *The Cambridge History of Later Medieval Philosophy. From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600*. Ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg, 705–19. Cambridge: Cambridge University Press.

Luther, Martin. 1961. *Lectures on Romans*. Philadelphia, PA: Westminster Press.

Lynch, John. 1972. *Aristotle's School: A Study of a Greek Educational Institution*. Berkeley, CA: University of California Press.

———. 1981. *Spain under the Habsburgs. Volume One: Empire and Absolutism, 1516–1598*. 2nd. ed. Oxford: Basil Blackwell.

Lyon, B. 1980. *A Constitutional and Legal History of Medieval England*. 2nd. ed. New York, NY: Norton.

Lysias. *Funeral Oration* (Oration 2). In *Lysias*. Trans. S. C. Todd, 25–41. Austin, TX: University of Texas Press, 2000.

Maas, Michael. 1986. Roman History and Christian Ideology in Justinianic Reform Legislation. *Dumbarton Oaks Papers* 40: 17–31.

MacCormack, Geoffrey. 1998. Sources. In *A Companion to Justinian's Institutes*. Ed. Ernest Metzger, 1–17. Ithaca, NY: Cornell University Press.

MacDowell, Douglas M. 1978. *The Law in Classical Athens*. Ithaca, NY: Cornell University Press.

MacIntyre, Alasdair. 1981. *After Virtue*. Notre Dame, IN: University of Notre Dame Press.

———. 1984. *After Virtue*. 2nd ed. Notre Dame, IN: University of Notre Dame Press.

———. 1988. *Whose Justice, Which Rationality?* Notre Dame, IN: University of Notre Dame Press.

———. 1990. *Three Rival Versions of Moral Enquiry*. Notre Dame, IN: University of Notre Dame Press.

MacKendrick, Paul Lachlan, and Karen Lee Singh. 1989. *The Philosophical Books of Cicero*. London: Duckworth.

Mackenzie, M. M. 1981. *Plato on Punishment*. Berkeley, CA: University of California Press.

Maclean, Ian. 1992. *Interpretation and Meaning in the Renaissance: The Case of Law*. Cambridge: Cambridge University Press.

Maguire, J. P. 1947. Plato's Theory of Natural Law. *Yale Classical Studies* 10: 151–78.

Mahdi, Muhsin. 2001. *Alfarabi and the Foundation of Islamic Political Philosophy*. Chicago, IL: University of Chicago Press.

Maimonides. *Eight Chapters*. In *Ethical Writings of Maimonides*. Trans. Raymond L. Weiss and Charles E. Butterworth. New York, NY: NYU Press, 1975.

———. *The Guide of the Perplexed*. Trans. Shlomo Pines. Chicago, IL: University of Chicago Press, 1963. (Arabic text: *Maimonides. Dalālat al-Ḥā'irīn* [*Guide of the Perplexed*]. Ed. Ḥusayn Atāy. Ankara: Ankara Üniversitesi Basimevi, 1974.)

———. *Treatise on the Art of Logic*. In *Ethical Writings of Maimonides*. Trans. Raymond L. Weiss and Charles E. Butterworth. New York, NY: New York University Press, 1975.

Maine, Henry Sumner. 1861. *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*. London: J. Murray.

Maravall, José Antonio. 1960. *Carlos V y el Pensamiento Politico del Renacimiento*. Madrid: Instituto de Estudios Politicus.

Marcian. *Institutes* (*Institutiones*). In *Stoicorum Veterum Fragmenta*. Ed. J. von Arnim, vol. 3, 314. Leipzig: Leipzig, 1921–1924. (Partial trans. in *The Hellenistic Philosophers: Translations of the Principal Sources with Philosophical Commentary,* vol. 1, 432. Ed. and trans. Anthony A. Long and D. N. Sedley. New York, NY: Cambridge University Press, 1987.)

Marcus Aurelius Antoninus. *Meditations*. In *Marcus Aurelius*. Ed. and trans. C. R. Haines. Cambridge, MA: Harvard University Press, 1916.

Marenbon, John A. 1987. *Later Medieval Philosophy (1150–1350): An Introduction*. London: Routledge.

———. 1988. *Early Medieval Philosophy (480–1150): An Introduction*. 2nd ed. London: Routledge.

———. 1990. John Scottus and Carolingian Theology: From the *De Praedestinatione*, Its Background and Its Critics, to the *Periphyseon*. In *Charles the Bald: Court and Kingdom*. Ed. M. Gibson and J. Nelson, 303–25. Aldershot: Variorum.

———. 1992. Abelard's Concept of Natural Law. In *Mensch und Natur im Mittelalter*. Ed. A. Zimmermann and A. Speer. Vol. 2: 609–21. Berlin: De Gruyter.

———. 1996. *The Philosophy of Peter Abelard*. Cambridge: Cambridge University Press.

———, ed. 1997. *The Routledge History of Philosophy. III. Medieval Philosophy*. London: Routledge.

Marenbon, John A., and Giovanni Orlandi, eds. and trans. 2001. *Peter Abelard, Collationes*. Oxford: Clarendon and New York, NY: Oxford University Press.

Maritain, Jacques. 1951. *Man and the State*. Chicago, IL: University of Chicago Press.

Markus, Robert A. 1970. *Saeculum: History and Society in the Theology of St. Augustine*. Cambridge: Cambridge University Press.

———, ed. 1972. *Augustine: A Collection of Critical Essays*. Garden City, NY: Anchor.

———. 1988. The Latin Fathers. In *The Cambridge History of Medieval Political Thought: c. 350–c. 1450*. Ed. J. H. Burns, 99–122. Cambridge: Cambridge University Press.

———. 1990. *The End of Ancient Christianity*. Cambridge: Cambridge University Press.

Marsilius of Padua. *The Defender of the Peace* (*Defensor Pacis*). In *Marsilius of Padua, The Defender of Peace*. Trans. and intro. Alan Gewirth. Afterward and bibliography by Cary J. Nederman. New York, NY: Columbia University Press, 2001.

Martin, W. C. 1974. The Bible and Natural Law. *Restoration Quarterly* 17: 193–221.

Martyn, J. Louis. 1997. *Galatians* (*Anchor Bible*). New York, NY: Doubleday.

Marx, A., ed. 1935. Ibn Maimūn, Mūsā (Maimonides): "Letter to Samuel Ibn Tibbon." *Jewish Quarterly Review* N.S. 25 4: 371–428.

Mateos, Francisco. 1960. El Padre Luis de Molina y la Trata de Negros. *Estudios Eclesiásticos* 35: 209–67.

Mattha, Girgis. 1975. *The Demotic Legal Code of Hermopolis*. Le Caire: Institut français d'archéologie orientale du Caire.

Matthews, John. 1993. The Making of the Text. In *The Theodosian Code*. Ed. J. Harris and I. Wood, 19–44. Ithaca, NY: Cornell University Press.

———. 2000. *Laying Down the Law, A Study of the Theodosian Code*. New Haven, CT: Yale University Press.

Maurach, Gregor. 1991. *Seneca: Leben und Werk*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Maurer, Armand A. 1962. *Medieval Philosophy*. New York, NY: Random House.

May, William E. 1984. The Natural Law Doctrine of Francis Suárez. *New Scholasticism* 58: 409–23.

McGrade, Arthur Stephen. 1974. *The Political Thought of William of Ockham*. London: Cambridge University Press.

———. 1982. Rights, Natural Rights, and the Philosophy of Law. In *The Cambridge History of Later Medieval Philosophy.* Ed. Norman Kretzman, et al., 738–56. Cambridge: Cambridge University Press.

McGrade, Arthur Stephen, John Kilcullen, and Matthew Kempshall, eds. 2001. *The Cambridge Translations of Medieval Philosophical Texts*, Vol. 2: *Ethics and Political Philosophy*. Cambridge: Cambridge University Press.

McInerny, Ralph. 1992. *Aquinas on Human Action: A Theory of Practice*. Washington, DC: Catholic University of America Press.

———. 1998. Review of Lisska: *Aquinas's Theory of Natural Law. The Medieval Review*. Online at: http://www.hti.umich.edu/t/tmr/ (TMR ID: 98.01.10). Kalamazoo, MI: The Medieval Institute.

McKenzie, J. L. 1964. Natural Law in the New Testament. *Biblical Research* 9: 3–13.

McNabb, Vincent. 1929. St. Thomas Aquinas and Law. *Blackfriars* 10: 1047–1067.

Meeks, Wayne A, ed. 1972. *The Writings of St. Paul*. New York, NY: Norton.

Meiggs, Russell, and David Lewis. 1988. *Selection of Greek Historical Inscriptions to the End of the Fifth Century B.C.* Revised Edition. Oxford: Oxford University Press.

Mélèze-Modrzejewski, Joseph. 1995. Law and Justice in Ptolemaic Egypt. In *Legal Documents of the Hellenistic World*. Ed. Markham J. Geller, Herwig Maehler, and A. D. E. Lewis, 1–19. London: The Warburg Institute, University of London.

Mews, Constant J. 1986. The *Sententie* of Peter Abelard. *Recherches de Théologie Ancienne et Médiévale* 53: 130–84.

Milbank, John, and Catherine Pickstock. 1999. *Truth in Aquinas*. London: Routledge.

Miller, D. L. Carey. 1998. Property. In *A Companion to Justinian's Institutes*. Ed. Ernest Metzger, 42–79. Ithaca, NY: Cornell University Press.

Miller, Eugene F. 1979. Prudence and the Rule of Law. *American Journal of Jurisprudence* 24: 181–206.

Miller, Fred D. Jr. 1991. Aristotle on Natural Law and Justice. In *A Companion to Aristotle's Politics*. Ed. David Keyt and Fred D. Miller, Jr., 279–306. Oxford: Blackwell.

———. 1995. *Nature, Justice, and Rights in Aristotle's Politics*. Oxford: Clarendon.

Milsom, S. F. C. 1981. *Historical Foundations of the Common Law*. 2nd. ed. London: Butterworths.

Mishnah. In *The Mishnah: A New Translation*. Ed. Jacob Neusner. New Haven, CT: Yale University Press, 1987.

Mitchell, T. C. 1991. Judah Until the Fall of Jerusalem (*c.*700–586 B. C.). In *The Cambridge Ancient History*. Ed. John Boardman et al. Vol. 3, part. 2: 371–409. Cambridge: Cambridge University Press.

Mitsis, Phillip. 1988. *Epicurus' Ethical Theory: The Pleasures of Invulnerability*. Ithaca, NY: Cornell University Press.

———. 1993. Seneca on Reason, Rules and Moral Development. In *Passions & Perceptions.* Ed. Jacques Brunschwig and Martha C. Nussbaum, 285–312. Cambridge: Cambridge University Press.

———. 1994. Natural Law and Natural Right in Post-Aristotelian Philosophy: The Stoics and Their Critics. In *Aufstieg und Niedergang der Römischen Welt*. Ed. Wolfgang Haase, II 36.7: 4812–50. Berlin: W. de Gruyter.

———. 1999. The Stoic Origin of Natural Rights. In *Topics in Stoic Philosophy*. Ed. Katerina Ierodiakonou, 153–77. Oxford: Oxford University Press.

———. 2003. The Stoics and Aquinas on Virtue and Natural Law. In *The Studia Philonica Annual* 15. Ed. David T. Runia, Gregory E. Sterling, and Hindy Najman, 35–53. Providence, RI: Brown University.

Moles, John L. 1995. The Cynics and Politics. In *Justice and Generosity: Studies in Hellenistic Social and Political Philosophy. Proceedings of the Sixth Symposium Hellenisticum*. Ed. André Laks and Malcolm Schofield, 129–60. Cambridge: Cambridge University Press.

———. 1996. Cynic Cosmopolitanism. In *The Cynics: The Cynic Movement in Antiquity and Its Legacy*. Ed. R. Bracht Branham and Marie-Odile Goulet-Cazé, 121–35. Oxford: Clarendon.

Molina, Luis de. *Concordia Liberi Arbitrii cum Gratiae Donis, Divinia Praescientia, Providential, Praedestionatione, et Reprobatione, ad non Nullus Primae Partris D. Thomae Articulos*. Paris: P. Lethielleux, 1876.

———. *De Iure et Iustitia*. Vols. 1–2: Moguntiae, 1602; vol. 3: Antwerp, 1615; vol. 4: Cologne, 1614; vol. 5, Antwerp, 1609.

Mommsen, Theodor and Paul M. Meyer. 2002–2005. *Codex Theodosianus*. 3 vols. Hildesheim: Olms.

Moody, Ernest A. 1975a. *Studies in Medieval Philosophy, Science and Logic: Collected Papers: 1933–1969*. Berkeley, CA: University of California Press.

———. 1975b. William of Ockham. In *Studies in Medieval Philosophy, Science and Logic: Collected Papers: 1933–1969*. Ed. Ernest A. Moody, 409–39. Berkeley, CA: University of California Press.

Moore, G. E. 1903. *Principia Ethica*. Cambridge: Cambridge University Press.

Moore, G. F. 1927–1930. *Judaism in the First Centuries of the Christian Era. The Age of the Tannaim*. Cambridge, MA: Harvard University Press.

Morrison, Donald. 1987. On Professor Vlastos's Xenophon. *Ancient Philosophy* 7: 9–22.

———, ed. 1988. *Bibliography of Editions, Translations, and Commentary on Xenophon's Socratic Writings, 1600–Present*. Pittsburgh, PA: Mathesis.

———. 1995. Xenophon's Socrates on the Just and the Lawful. *Ancient Philosophy* 15: 329–47.

Morrow, Glenn. 1941. Plato and the Rule of Law. *Philosophical Review* 50: 105–26.

———. 1993. *Plato's Cretan City*. 2nd ed. Princeton, NJ: Princeton University Press.

Moser, Simon. 1952. Platons Begriff des Gesetzes. *Österreichesches Zeitschift für öffentliches Recht* NF 5: 135–58.

Muirhead, James. 1880. *The Institutes of Gaius and Rules of Ulpian*. Edinburgh: T & T Clark.

Mullaney, Thomas U. 1950. *Suárez on Human Freedom*. Baltimore, MD: Carroll.

Müller, Wolfgang P. 1990. The Recovery of Justinian's Digest in the Middle Ages. *Bulletin of Medieval Canon Law* 20: 1–29.

Murphy, Jeffrie G., and Jules L. Coleman. 1990. *Philosophy of Law: An Introduction to Jurisprudence*. Boulder, CO: Westview.

Najjar, Fawzi Mitri, and Domonique Mallet, ed. and trans. 1999. *L'Harmonie entre les Opinions de Platon et d'Aristote/Al Farabi*. Damas: Institut Français de Damas.

Najman, Hindy. 1999. The Law of Nature and the Authority of Mosaic Law. *The Studia Philonica Annual* 11. Ed. David T. Runia and Gregory E. Sterling. Atlanta, GA: Scholars Press.

———. 2003. A Written Copy of the Law of Nature: An Unthinkable Paradox? In *The Studia Philonica Annual* 15. Ed. David T. Runia, Gregory E. Sterling, and Hindy Najman, 54–63. Providence, RI: Brown University.

Nederman, Cary J. 1995. *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis*. Lanham, MD: Rowman & Littlefield.

Nelson, Everett J. 1967, October. The Metaphysical Presuppositions of Induction. In *Proceedings and Addresses of the American Philosophical Association* 40: 19–33. Yellow Springs, OH: The Antioch Press.

Nemesius. *De Natura Hominis* (*On the Nature of Man*). In *Cyril of Jerusalem and Nemesius of Emesa*. Trans. William Telfer. Philadelphia, PA: Westminster, 1955.

Neufeld, E., trans. 1951. *The Hittite Laws*. London: Luzac.

Neusner, Jacob, ed. 1981. *The Study of Ancient Judaism*. New York, NY: Ktav.

———, ed. 1992. *The Study of Ancient Judaism*. Atlanta, GA: Scholars Press.

New Catholic Edition of the Holy Bible. New York, NY: Catholic Book Pub. Co., 1954.

Newman, W. L. 1887–1902. *The Politics of Aristotle*. Oxford: Clarendon.

Nicholas, Barry. 1962. *An Introduction to Roman Law*. Oxford: Clarendon.

Nicol, D. M. 1988. Byzantine Political Thought. In *The Cambridge History of Medieval Political Thought c. 350–c.1450*. Ed. J. H. Burns, 51–79. Cambridge: Cambridge University Press.

Nims, C. F. 1948. The Term *Hp*, "Law, Right," in Demotic. *Journal of Near Eastern Studies* 7: 243–60.

Noonan, John T. 1977. Who was Rolandus? In *Law, Church, and Society. Essays in Honour of Stephan Kuttner*. Ed. K. Pennington and R. Sommerville, 21–48. Philadelphia, PA: University of Pennsylvania Press.

———. 1979. Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law. *Traditio*: 145–72.

Noreña, Carlos. 1973. *Studies in Spanish Renaissance Thought*. The Hague: Nijhoff.

Noth, M. 1984. *The Laws in the Pentateuch*. London: SCM.

Nussbaum, Martha C. 1993. Non-Relative Virtues. In *The Quality of Life*. Ed. Martha Nussbaum and Amartya Sen, 242–69. Oxford: Oxford University Press.

———. 1994. *The Therapy of Desire: Theory and Practice in Hellenistic Ethics*. Princeton, NJ: Princeton University Press.

Obbink, Dirk. 1999. The Stoic Sage in the Cosmic City. In *Topics in Stoic Philosophy*. Ed. Katerina Ierodiakonou, 178–95. Oxford: Clarendon.

Ober, Josiah. 1989. *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*. Princeton, NJ: Princeton University Press.

O'Connor, D. J. 1967. *Aquinas and Natural Law*. London: Macmillan.

O'Daly, Gerard. 1989. Predestination and Freedom in Augustine's Ethics. In *The Philosophy in Christianity*. Ed. G. Vesey, 85–97. Cambridge: Cambridge University Press.

O'Donovan, Oliver, and Joan Lockwood O'Donovan, eds. 1999. *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*. Grand Rapids, MI: Eerdmans.

Oliveria Dias, José de. 1954. En Torno do Duelo Fonseca-Molina: Uma Argumentação Suicida. *Verbum* 11: 37–63.

———. 1955. Fonseca e Molina: Os Ultimos Ecos dum Litigio Plurissecular. *Revista Portuguesa de Filosofia* 11: 54–67.

Olmstead, A. T. 1948. *History of the Persian Empire*. Chicago, IL: University of Chicago Press.

O'Malley, John W. 1994. *The First Jesuits*. Cambridge, MA: Harvard University Press.

O'Meara, Thomas. 1992. The Dominican School of Salamanca and the Spanish Conquest of America: Some Bibliographical Notes. *The Thomist* 56: 555–82.

———. 1994. The School of Thomism at Salamanca and the Presence of Grace in the Americas. *Angelicum* 71: 321–70.

Oppenheim, A. Leo. 1977. *Ancient Mesopotamia: Portrait of a Dead Civilization*. Revised edition. Chicago, IL: University of Chicago Press.

Origen. *Contra Celsum* (*Against Celsus*). Trans. Henry Chadwick. Cambridge: Cambridge University Press, 1953.

Ostwald, Martin. 1969. *Nomos and the Beginnings of the Athenian Democracy*. Oxford: Oxford University Press.

———. 1973. Was There a Concept of *Agraphos Nomos* in Classical Greece? In *Exegesis and Argument*. Ed. N. E. Lee, A. P. D. Mourelatos, and R. M. Rorty, 70–104. Assen: Van Gorcum.

———. 1986. *From Popular Sovereignty to the Sovereignty of Law*. Berkeley, CA: University of California Press.

———. 1990. *Nomos* and *Phusis* in Antiphon's *Peri Alêtheias*. In *Cabinets of the Muses; Essays on Classical and Comparative Literature in Honor of Thomas G. Rosenmeyer*. Ed. Mark Griffith and Donald J. Mastronarde, 293–306. Atlanta, GA: Scholars.

———. 1996. Shares and Rights: "Citizenship" Greek Style and American Style. In *Demokratia*. Ed. J. Ober and C. Edrick, 49–61. Princeton, NJ: Princeton University Press.

Owen, G. E. L. 1953. The Place of the *Timaeus* in Plato's Dialogues. *Classical Quarterly* 3: 79–95.

Owens, Joseph. 1993. Aristotle and Aquinas. In *The Cambridge Companion to Aquinas*. Ed. Norman Kretzmann and Eleonore Stump, 38–59. Cambridge: Cambridge University Press.

Pagden, Anthony. 1982. *The Fall of Natural Man*. Cambridge: Cambridge University Press.

Patrick, Dale. 1985. *Old Testament Law*. Atlanta, GA: John Knox.

Pegis, Anton C. 1939. Molina and Human Liberty. In *Jesuit Thinkers of the Renaissance*. Ed. Gerard Smith, 75–130. Milwaukee, WI: Marquette University Press.

Pelikan, Jaroslav. 1971–1978. *The Christian Tradition*. Chicago, IL: University of Chicago Press.

Pennington, Kenneth. 1998. The History of Rights in Western Thought. *Emory Law Journal* 47: 237–52.

Pereña Vicente, L. 1954. *La Universidad de Salamanca, Forja del Pensamiento Político en el Siglo XVI*. Salamanca: Universidad de Salamanca.

Pérez Beneyto, J. 1949. *Los Orígenes de la Ciencia Politica en España*. Madrid: Instituto de Estudios Politicos.

Pérez Fernández, I. 1984. *Fray Bartolomé de Las Casas*. Caleruega: OPE.

Pérez Modesto, Lewis. 1994. *The Common Good as a Fundamental Principle of the Law According to Suárez*. Rome: Gregorian University.

Peter Abelard. *Collationes*. Ed. and trans. John A. Marenbon and Giovanni Orlandi. Oxford: Clarendon and New York, NY: Oxford University Press, 2001.

———. *Commentary on Romans*. In *Peter Abelard. Opera Theologica I*. Ed. E. Buytaert. Turnhout: Brepols, 1969.

———. *Problemata Heloissae*. PL 78, col. 677–730.

———. *Scito Teipsum*. In *Peter Abelard. Opera Theologica IV*. Ed. R. M. Ilgner. Turnhout: Brepols, 2001. (*Peter Abelard's Ethics*. Ed. David E. Luscombe. Oxford: Oxford University Press, 1971.)

———. *Theologia Christiana*. In *Petri Abaelardi Opera Theologica II*. Ed. E. M. Buytaert, 69–372. Turnhout: Brepols, 1969. (*Corpus Christianorum, Continuatio Mediaevalis* 12.)

Peters, Rudolph, ed. and trans. 1977. *Jihad in Mediaeval and Modern Islam: The Chapter on Jihad from Averroes' Legal Handbook "Bidāyat al-Mudjtahid" and The Treatise "Koran and Fighting" by the Late Shaykh al-Azhar, Maḥmūd Shaltūt*. Leiden: E. J. Brill.

Pharr, Clyde. 1952. *The Theodosian Code*. Princeton, NJ: Princeton University Press.

Phillips, Anthony. 1970. *Ancient Israel's Criminal Law: A New Approach to the Decalogue*. New York, NY: Shocken.

Philo. *De Opificio Mundi* (*On the Creation*). In *The Complete Works of Philo: Complete and Unabridged.* Trans. C. D. Yonge, 3–24. Peabody, MA: Hendrickson, 1993.

———. *De Specialibus Legibus* (*On the Special Laws*). In *The Complete Works of Philo: Complete and Unabridged.* Trans. C. D. Yonge, 534–639. Peabody, MA: Hendrickson, 1993.

———. *De Vita Mosis* (*On the Life of Moses*). In *The Complete Works of Philo: Complete and Unabridged*. Trans. C. D. Yonge, 459–517. Peabody, MA: Hendrickson, 1993.

———. *Legum Allegoriae* (*Allegorical Interpretation*). In *The Complete Works of Philo: Complete and Unabridged.* Trans. C. D. Yonge, 25–79. Peabody, MA: Hendrickson, 1993.

———. *Quod Omnis Probus Liber Sit* (*Every Good Man Is Free*). In *The Complete Works of Philo: Complete and Unabridged.* Trans. C. D. Yonge, 682–97. Peabody, MA: Hendrickson, 1993.

Philodemus of Gadara. *Academicorum Index* (*History of Philosophers*). In *Filodemo: Storia dei Filosofi: Platone e l'Academia Storia dei Filosofi (PHerc. 1021 e 164)*. Ed. Tiziano Dorandi. Naples: Bibliopolis, 1991.

———. *Index Stoicorum* (*On the Stoics*). In *Index Stoicorum Herculanensis*. Ed. Augustus Traversa. Genoa: Instituto di filologia classica, 1952.

Photius. *Bibliotheca* (*Library*). In *Photius. Bibliothèque*. Ed. and trans. René Henry, 9 vols. Paris: Société d'Édition Les Belles Lettres, 1959–1977. (*Photius' Bibliotheca: A Selection Translated with Notes*. Trans. N. G. Wilson. 1994.)

Pickstock, Catherine. 2000. Imitating God: The Truth of Things According to Thomas Aquinas. The 1999 Aquinas Lecture. *New Blackfriars* 81: 308–26.

Pieler, Peter E. 1978. Byzantinische Reichsliteratur. In *Die Hochsprachliche Profane Literatur der Byzantiner*. Ed. Herbert Hunger. Vol. 2: 341–480. Munich: Beck.

Pindar. *Fragments*. In *Pindar II.* Trans. William H. Race, 221–413. Cambridge: Harvard University Press, 1997. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 40–1. Cambridge: Cambridge University Press, 1995.)

Plato [?]. *Alcibiades*. Trans. D. S. Hutchinson. In *Plato: Complete Works*. Ed. John M. Cooper, 557–95. Indianapolis, IN: Hackett, 1997.

———. *Apology*. Trans. G. M. A. Grube. In *Plato: Complete Works*. Ed. John M. Cooper, 17–36. Indianapolis, IN: Hackett, 1997.

———. *Clitophon.* Trans. Francisco J. Gonzalez. In *Plato: Complete Works*. Ed. John M. Cooper, 965–70. Indianapolis, IN: Hackett, 1997.

———. *Cratylus*. Trans. C. D. C. Reeve. In *Plato: Complete Works*. Ed. John M. Cooper, 101–56. Indianapolis, IN: Hackett, 1997.

———. *Crito*. Trans. G. M. A. Grube. In *Plato: Complete Works*. Ed. John M. Cooper, 37–48. Indianapolis, IN: Hackett, 1997.

——— (pseudo). *Eryxias*. Trans. Mark Joyal. Ed. John M. Cooper, 1718–33. Indianapolis, IN: Hackett, 1997.

———. *Euthydemus*. Trans. Rosamond Kent Sprague. In *Plato: Complete Works*. Ed. John M. Cooper, 708–43. Indianapolis, IN: Hackett, 1997.

———. *Euthyphro*. Trans. G. M. A. Grube. In *Plato: Complete Works*. Ed. John M. Cooper, 1–16. Indianapolis, IN: Hackett, 1997.

———. *Gorgias*. Trans. Donald J. Zeyl. In *Plato: Complete Works*. Ed. John M. Cooper, 791–869. Indianapolis, IN: Hackett, 1997. (*The Gorgias*. In *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff. Cambridge: Cambridge University Press, 1995. *Plato, Gorgias*. Trans. Terence H. Irwin. Oxford: Oxford University Press, 1979.)

——— [?]. *Hipparchus*. Trans. Nicholas D. Smith. In *Plato: Complete Works*. Ed. John M. Cooper, 609–17. Indianapolis, IN: Hackett, 1997.

———. *Hippias Major* (*Greater Hippias*). Trans. Paul Woodruff. In *Plato: Complete Works*. Ed. John M. Cooper, 898–921. Indianapolis, IN: Hackett, 1997.

———. *Laws*. Trans. Trevor J. Saunders. In *Plato: Complete Works*. Ed. John M. Cooper, 1318–

1616. Indianapolis, IN: Hackett, 1997. (*The Laws of Plato.* Trans Thomas L. Pangle. New York, NY: Basic, 1980. *Plato, Laws*. Trans. R. G. Bury. Cambridge, MA: Harvard University Press, 1926.)

———. *Letters.* Trans. Glenn R. Morrow. In *Plato: Complete Works*. Ed. John M. Cooper, 1634–76. Indianapolis, IN: Hackett, 1997.

——— (pseudo). *Minos*. Trans. Malcom Schofield. In *Plato: Complete Works*. Ed. John M. Cooper, 1307–17. Indianapolis, IN: Hackett, 1997.

——— (pseudo). *On Justice*. Trans. Andrew S. Becker. In *Plato: Complete Works*. Ed. John M. Cooper, 1687–93. Indianapolis, IN: Hackett, 1997.

———. *Phaedo*. Trans. G. M. A. Grube. In *Plato: Complete Works*. Ed. John M. Cooper, 49–100. Indianapolis, IN: Hackett, 1997.

———. *Politicus* (*Statesman*). Trans. C. J. Rowe. In *Plato: Complete Works*. Ed. John M. Cooper, 294–358. Indianapolis, IN: Hackett, 1997.

———. *Protagoras*. Trans. Stanley Lombardo and Karen Bell. In *Plato: Complete Works*. Ed. John M. Cooper, 746–90. Indianapolis, IN: Hackett, 1997. (*Protagoras*. Trans. C. C. W. Taylor. Oxford: Clarendon, 1976. In *Early Greek Political Thought from Homer to the Sophists*. Partial trans. Michael Gagarin and Paul Woodruff, 173–85. Cambridge: Cambridge University Press, 1995.)

———. *Republic.* Trans. G. M. A. Grube, rev. C. D. C. Reeve. In *Plato: Complete Works*. Ed. John M. Cooper, 971–1223. Indianapolis, IN: Hackett, 1997. (*The Republic of Plato*. Trans. Allan Bloom. New York, NY: Basic, 1968.)

———. *Timaeus.* Trans. Donald J. Zeyl. In *Plato: Complete Works*. Ed. John M. Cooper, 1224–91. Indianapolis, IN: Hackett, 1997.

Plautus. *Bacchides.* Trans. Douglass Parker. In *Plautus and Terence. Five Comedies*. Ed. Deena Berg and Douglass Parker, 185–294. Indianapolis, IN: Hackett, 1999.

Plescia, Joseph. 1995. *The Bill of Rights and Roman Law*. Bethesda, MD: Austin & Winfield.

Plotinus. *Enneads.* Trans. A. H. Armstrong, 7 vols. Cambridge, MA: Harvard University Press, 1966–1988.

Plutarch. *Contra Epicuri Beatitudinem* (*Against Epicurean Happiness*). In *Plutarch Moralia 14.* Trans. Benedict Einarson and Phillip H. De Lacy, 2–149. Cambridge, MA: Harvard University Press, 1967.

———. *De Alexandri Magni Fortuna aut Virtute* (*On the Luck or Virtue of Alexander*). In *Plutarch Moralia 4.* Trans. Frank Cole Babbitt, 380–487. Cambridge, MA: Harvard University Press, 1936.

——— (pseudo). *De Fato* (*On Fate*). In *Plutarch Moralia 7.* Trans. Phillip H. De Lacy and Benedict Einarson, 303–59. Cambridge, MA: Harvard University Press, 1959.

———. *De Stoicis Repugnantiis* (*On Stoic Self-Contradictions*). In *Plutarch Moralia 13, Part 1.* Trans. Harold Cherniss, 367–603. Cambridge, MA: Harvard University Press, 1976.

———. *Life of Lycurgus.* In *Plutarch Lives 1.* Trans. Bernadotte Perrin, 203–303. Cambridge, MA: Harvard University Press, 1914.

———. *Life of Solon.* In *Plutarch Lives 1.* Trans. Bernadotte Perrin, 403–99. Cambridge, MA: Harvard University Press, 1914.

Pollock, Sir Frederick Bart, and Frederic W. Maitland. 1923. *The History of English Law before the Time of Edward 1.* 2nd. ed. Cambridge: Cambridge University Press.

Polybius. *The Histories.* Trans. W. R. Paton, 6 vols. Cambridge, MA: Harvard University Press, 1922–1927.

Porphyry. *On Abstinence* (*De Abstinentia*). In *Porphyry. On Abstinence from Killing Animals*. Trans. Gillian Clark. Ithaca, NY: Cornell University Press, 2000.

Porter, Jean. 1999. *Natural and Divine Law*. Grand Rapids, MI: William B. Eerdmans.

Post, Gaines. 1973. Ancient Roman Ideas of Law. In *Dictionary of the History of Ideas*. Ed. Philip Wiener**,** 685–90. New York, NY: Scribner.

Postgate, J. N. 1992. *Early Mesopotamia: Society and Economy at the Dawn of History.* London: Routledge.

Potts, Timothy. 1982. Conscience. In *The Cambridge History of Later Medieval Philosophy. From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600*. Ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg, 687–704. Cambridge: Cambridge University Press.

Powell, J. G. F., ed. 1995. *Cicero the Philosopher: Twelve Papers*. Oxford and New York, NY: Clarendon.

Pritchard, James B., ed. 1958. *The Ancient Near East.* Princeton, NJ: Princeton University Press.

———. 1975. *The Ancient Near East, Volume 2: A New Anthology of Texts and Pictures.* Princeton, NJ: Princeton University Press.

Pugliese, Giovanni. 1954. "Res Corporales," "Res Incorporales" e il Problema del Diritto Soggettivo. In *Studi in Onore di Vincenzo Arangio-Ruiz*, 223–60. Naples: Jovene.

Queralt, Antonio. 1975. Libertad Humana en Luis de Molina. *Archivo teológico Granadino* 38: 5–155.

———. 1976. Libertad Humana en Luis de Molina: Sus Elementos Constitutivos y Posibilidades en un Orden Natural. *Archivo teológico Granadino* 39: 5–100.

Quinto, Riccardo. 2001. *Scholastica. Storia di un Concetto*. Padua: Il Poligrafo.

Raaflaub, Kurt A. 2000. Poets, Lawgivers, and the Beginnings of Political Reflection in Archaic Greece. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Martin Schofield, 23–57. Cambridge: Cambridge University Press.

Rabeneck, Joannes. 1950a. De Vita et Scriptis Ludovici Molina. *Archivum Historicum Societatis Jesu* 19: 75–145.

———. 1950b. Quis Prior Proposuerit Doctrinam de Scientia Media, Fonseca an Molina. *Archivum Historicum Societatis Jesu* 19: 141–5.

Rahman, Fazlur. 1968. *Islam*. New York, NY: Doubleday.

Ramos, D. Lisson. 1972. La Ley Natural en Domingo de Soto. *Persona y Derecho* 2: 605–26.

———. 1976. *La Ley Según Domingo de Soto*. Pamplona: Eunsa.

Rashdall, Hastings. 1936. *The Universities of Europe in the Middle Ages*. Rev. F. M. Powicke and A. B. Emden. 3 vols. Oxford: Oxford University Press.

Rawls, John. 1955. Two Concepts of Rules. *The Philosophical Review* 64: 3–13.

———. 1971. *A Theory of Justice*. Cambridge, MA: Harvard University Press.

Rawson, Elizabeth. 1975. *Cicero: A Portrait*. London: Allen Lane.

Reeve, C. D. C. 1989. *Socrates in the Apology*. Indianapolis, IN: Hackett.

Reid, Charles J. Jr. 1991. The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry. *Boston College Law Review* 33: 59–72.

———. 1996. Thirteenth-Century Canon Law and Rights: The Word *ius* and Its Range of Subjective Meanings. *Studia Canonica* 30: 312–31.

———. 1998. Roots of a Democratic Church Polity in the History of Canon Law: The Case of Elections in the Church. *Proceedings of the Canon Law Society of America* 60: 154–5.

———. 2002. "So It Will Be Found that the Right of Women in Many Cases Is of Diminished Condition": Rights and the Legal Equality of Men and Women in the Twelfth- and Thirteenth-Century Canon Law. *Loyola (Los Angeles) Law Review* 35: 499–511.

Rhodes, P. J. 1981. *A Commentary on the Aristotelian Athenaion Politeia*. Oxford: Clarendon.

Richardson, M. E. J. 2000. *Hammurabi's Code: Text, Translation and Glossary*. Sheffield: Sheffield Academic Press.

Richardson, P., and S. Westerholm. 1991. *Law and Religious Communities in the Roman Period: The Debate over Torah and Nomos in Postbiblical Judaism and Early Christianity*. Waterloo: Laurier.

Rist, J. M. 1969. Augustine on Free Will and Predestination. *Journal of Theological Studies* 20: 420–47.

———, ed. 1979. *The Stoics*. Berkeley, CA: University of California Press.

———. 1994. *Augustine, Ancient Thought Baptized*. Cambridge: Cambridge University Press.

Ritchie, David G. 1895. *Natural Rights: A Criticism of Some Political and Ethical Conceptions*. London: S. Sonnenschein.

Robinson, O. F. 1997. *The Sources of Roman Law: Problems and Methods for Ancient Historians*. London: Routledge.

Robinson, T. H., and O. F. Oesterly. 1937. *Hebrew Religion. Its Origin and Development*. 2nd ed. New York, NY: Macmillan.

Rommen, Heindrich. 1926. *Die Staatslehre des Franz Suárez*. Münchengladbach: Volksvereins.

Roth, Martha T. 1997. *Law Collections from Mesopotamia and Asia Minor*. 2nd. ed. Atlanta, GA: Scholars.

Rowe, Christopher, ed. and trans. 1995a. *Plato's* Statesman. Warminster: Aris and Phillips.

———, ed. 1995b. *Reading the Statesman: Proceedings of III Symposium Platonicum*. Sankt Augustin: Academia.

———. 2000. The *Politicus* and Other Dialogues. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Martin Schofield, 233–57. Cambridge: Cambridge University Press.

Rowe, Christopher, and Martin Schofield. 2000. *The Cambridge History of Greek and Roman Political Thought*. Cambridge: Cambridge University Press.

Rudebusch, George. 1999. *Socrates, Pleasure, and Value*. Oxford: Oxford University Press.

Rufinus. *De Summa Decretorum*. In *Die "Summa Decretorum" des Magister Rufinus*. Ed. H. Singer. Paderborn: Schöningh, 1902.

Runia, David T. 2001. *Philo of Alexandria. On the Creation of the Cosmos According to Moses*. Introduction, translation, and commentary. Leiden: Brill.

Russell, Frederick H. 1976. Innocent IV's Proposal to Limit Warfare. In *Proceedings of the Fourth International Congress of Medieval Canon Law*. Ed. Stephan Kuttner, 386–88. Vatican: Biblioteca Vaticana.

Rutherford, R. B. 1989. *The Meditations of Marcus Aurelius: A Study*. Oxford: Clarendon.

Ryan, Alan. 1985. Utility and Ownership. In *Utility and Rights*. Ed. R. G. Frey, 175–95. Oxford: Blackwell.

Ryan, Columba. 1965. The Traditional Concept of Natural Law. In *Light on the Natural Law*. Ed. Iltud Evans. 13–37. Baltimore, MD: Helicon.

Sachs, David. 1963. A Fallacy in Plato's *Republic*. *Philosophical Review* 72: 141–58.

Saggs, H. W. F. 1968. *The Greatness That Was Babylon; A Sketch of the Ancient Civilization of the Tigris-Euphrates Valley*. New York, NY: Mentor.

———. 1989. *Civilization Before Greece and Rome*. New Haven, CT: Yale University Press.

Saller, Richard P. 1994. *Patriarchy, Property and Death in the Roman Family*. Cambridge: Cambridge University Press.

Sanders, E. P. 1977. *Paul and Palestinian Judaism*. Philadelphia, PA: Fortress.

———. 1983. *Paul, the Law, and the Jewish People*. Philadelphia, PA: Fortress.

Santas, Gerasimos. 1979. *Socrates: Philosophy in Plato's Early Dialogues*. London: Routledge & K. Paul.

———. 2001. *Goodness and Justice: Plato, Aristotle, and the Moderns*. Malden: Blackwell.

Saunders, Trevor J. 1970. *Plato. The Laws*. Trans. with intro. Harmondsworth: Penguin.

———. 1981. Protagoras and Plato on Punishment. In *The Sophists and Their Legacy*. Ed. G. B. Kerferd, 129–41. Wiesbaden: Steiner.

———. 1991. *Plato's Penal Code*. Oxford: Oxford University Press.

———. 1992. Plato's Later Political Thought. In *The Cambridge Companion to Plato*. Ed. Richard Kraut, 464–92. Cambridge: Cambridge University Press.

Saunders, Trevor J. and Luc Brisson. 2000. *Bibliography on Plato's Laws*. Sankt Augustin: Academia.

Schacht, Joseph. 1964. *An Introduction to Islamic Law*. Oxford: Clarendon.

Schäfer, Peter. 2003. *The History of the Jews in the Greco-Roman World.* London: Routledge.

Scheltema, H. J. 1967. Byzantine Law. In *The Cambridge Medieval History*, Vol. 4, pt. 2. 2nd ed. Ed. J. M. Hussey, 55–77. Cambridge: Cambridge University Press.

Schmitt, Charles B., and Quentin Skinner, eds. 1990. *The Cambridge History of Renaissance Philosophy.* Cambridge: Cambridge University Press.

Schmutz, Jacob. 2002. L'Heritage des Subtils. Cartographie du Scotisme de l'Age Classique. *Les Études Philosophiques* 1: 52–81.

Schofield, Malcolm. 1991. *The Stoic Idea of the City*. Cambridge: Cambridge University Press.

———. 1995. Two Stoic Approaches to Justice. In *Justice and Generosity: Studies in Hellenistic Social and Political Philosophy. Proceedings of the Sixth Symposium Hellenisticum*. Ed. André Laks and Malcolm Schofield, 191–212. Cambridge: Cambridge University Press.

———. 1999a. The Disappearing Philosopher King. In *Saving the City*: *Philosopher-Kings and Other Classical Paradigms*. Ed. Malcolm Schofield, 31–50. London: Routledge.

———. 1999b. Social and Political Thought. In *The Cambridge History of Hellenistic Philosophy.* Ed. Keimpe Algra et al., 739–70. Cambridge: Cambridge University Press.

———. 2000a. Approaching the *Republic*. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Martin Schofield, 190–232. Cambridge: Cambridge University Press.

———. 2000b. Epilogue. 2. Augustine. In *The Cambridge History of Greek and Roman Political Thought.* Ed. Christopher Rowe and Malcolm Schofield, 665–71. Cambridge: Cambridge University Press.

———. 2000c. Plato and Practical Politics. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Martin Schofield, 293–302. Cambridge: Cambridge University Press.

Schofield, Malcolm, and Gisela Striker, eds. 1986. *The Norms of Nature: Studies in Hellenistic Ethics*. Cambridge: Cambridge University Press.

Schrimpf, Gangolf. 1982. Der Beitrag des Johannes Scottus Eriugena zum Prädestinationsstreit. In *Die Iren und Europa im frühen Mittelalter*. Ed. Hienx Löwe, 819–65. Stuttgart: Klett-Cotta.

Schroeder, Donald N. 1981. Aristotle on Law. *Polis* 4: 17–31.

Schulz, Fritz. 1967. *History of Roman Legal Science*. Oxford: Oxford University Press.

———. 1992. *Classical Roman Law*. Aalen: Scientia.

Schwartz, Seth. 2001. *Imperialism, 200 B. C. E. to 640 C. E.* Princeton, NJ: Princeton University Press.

Schwenk, Cynthia J. 1985. *Athens in the Age of Alexander: the Dated laws and Decrees of "The Lykourgan Era" 338–322 B.C.* Chicago, IL: Ares.

Scorraille, Raoul de. 1911–1913. *François Saurez de la Compagnie de Jésus: D'après ses Lettres, ses Autres Ecrits Inédits et un Grand Nombre des Documents Nouveaux*. Paris: P. Lethielleux.

Scott, James Brown.1934. *The Spanish Origin of International Law. Francisco Vitoria and his Law of Nations*. Oxford: Clarendon.

Sedley, David N. 1983. The Motivation of Greek Scepticism. In *The Skeptical Tradition*. Ed. Myles F. Burnyeat, 9–30. Berkeley, CA: University of California Press.

Seeck, Otto. 1919. *Regesten der Kaiser und Papste für die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit*. Stuttgart: Metzler.

Seelmann, Kurt. 1979. *Die Lehre des Fernando Vázquez de Menchaca vom "Dominium"*. Cologne: Graz.

Segal, M. H. 1967. *The Pentateuch: Its Composition and Its Authorship*. Jerusalem: Magnes, Hebrew University.

Seidl, Erwin. 1942. Law. In *The Legacy of Egypt*. Ed. S. R. K. Glanville, 198–217. Oxford: Clarendon.

Seneca. *De Beneficiis* (*On Favours*). In *Seneca. Moral and Political Essays*. Ed. John M. Cooper; trans. J. F. Procopé, 181–308. New York, NY: Cambridge University Press, 1995.

———. *De Brevitate Vitae* (*On the Shortness of Life*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 2, 286–355. Cambridge, MA: Harvard University Press, 1932.

———. *De Clementia* (*On Mercy*). In *Seneca. Moral and Political Essays*. Ed. John M. Cooper; trans. J. F. Procopé, 117–64. New York, NY: Cambridge University Press, 1995.

———. *De Consolatione ad Helviam* (*To His Mother Helvia on Consolation*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 2, 416–89. Cambridge, MA: Harvard University Press, 1932.

———. *De Consolatione ad Marciam* (*To Marcia on Consolation*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 2, 2–97. Cambridge, MA: Harvard University Press, 1932.

———. *De Ira* (*On Anger*). In *Seneca. Moral and Political Essays*. Ed. John M. Cooper; trans. J. F. Procopé, 1–116. New York, NY: Cambridge University Press, 1995.

———. *De Otio* (*On Leisure*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 2, 180–201. Cambridge, MA: Harvard University Press, 1932.

———. *De Providentia* (*On Providence*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 1, 2–47. Cambridge, MA: Harvard University Press, 1928.

———. *De Vita Beata* (*On the Happy Life*). In *Seneca. Moral Essays*. Trans. John W. Basore, vol. 2, 198–179. Cambridge, MA: Harvard University Press, 1932.

———. *Epistulae* (*Moral Epistles*). In *Seneca. Epistles.* Trans. Richard M. Gummere, 3 vols. Cambridge, MA: Harvard University Press, 1917–1925.

———. *Naturales Quaestiones* (*Natural Questions*). Trans. T. H. Corcoran, 2 vols. Cambridge, MA: Harvard University Press, 1971–1972.

Sextus Empiricus. *Adversus Mathematicos* (*Against the Professors*). Trans. R. G. Bury. Cambridge, MA: Harvard University Press, 1949.

———. *Outlines of Pyrrhonism*. Trans. R. G. Bury. Cambridge, MA: Harvard University Press, 1933.

Shāfi'ī, Muḥammad Ibn Idrīs al-. 1961. *Islamic Jurisprudence: Shāfi'ī's Risāla*. Trans. Majid Khadduri. Baltimore, MD: Johns Hopkins Press.

Sharples, Robert W. 1998. Theophrastus as Philosopher and Aristotelian. In *Theophrastus: Reappraising the Sources.* Ed. Johannes M. van Ophuijsen and Marlein van Raalte, 267–80. New Brunswick, NJ: Transaction.

Shaw, B. 1987. The Family in Late Antiquity: The Experience of Augustine. *Past and Present* 115: 3–51.

Shellens, Salomon M. 1959. Aristotle on Natural Law. *Natural Law Forum* 4: 72–100.

Sigmund, Paul. 1988. *St. Thomas Aquinas: On Politics and Ethics*. New York, NY: W. W. Norton and Company.

———. 1993. Law and Politics. In *The Cambridge Companion to Aquinas*. Ed. Norman Kretzmann and Eleonore Stump, 217–31. Cambridge: Cambridge University Press.

Simon, Yves. 1965. *The Tradition of Natural Law*. Ed. Vulkan Kuic. New York, NY: Fordham University Press.

Sinkler, Georgette. 1998. Roger Bacon. In *Routledge Encyclopedia of Philosophy*. Ed. Edward Craig, vol. 1: 632–6. London: Routledge.

Sischens Recaséns, L. 1927. *La Filosofía del Derecho de Francisco Suárez, con un Estudio Previo Sobre sus Antecedentes en la Patrística y en la Escolástica*. Madrid: V. Suárez.

Skinner, Quentin. 1978. *The Foundations of Modern Political Thought*. Cambridge: Cambridge University Press.

———. 1990. Political Philosophy. In *The Cambridge History of Renaissance Philosophy*. Ed. Charles B. Schmitt and Quentin Skinner, 389–452. Cambridge: Cambridge University Press.

Smith, Gerard. 1966. *Freedom in Molina*. Chicago, IL: Loyola University Press.

Smith, J. P. M. 1960. *The Origin and History of Hebrew Law*. Chicago, IL: The University of Chicago Press.

Snell, Daniel C. 1997. *Life in the Ancient Near East 3100–322 B.C.E.* New Haven, CT: Yale University Press.

Soden, Wolfram von. 1994. *The Ancient Orient: An Introduction to the Study of the Ancient Near East*. Grand Rapids, MI: William B. Eerdmans.

Soder, Josef. 1955. *Die Idee der Völkergemeinschaft: Francisco de Vitoria und die Philosophischen Grundlagen des Völkerrechts*. Frankfurt am Main: Metzner.

———. 1973. *Franz Suárez und das Völkrecht. Grundgedanken zu Staat, Recht und Internationalen Beziehungen*. Frankfurt am Main: Metzner.

Sophocles. *Antigone*. In *Sophocles I.* Trans. Elizabeth Wyckoff. Ed. David Grene and Richmond Lattimore, 185–236. New York, NY: Random House, 1960. (Partial trans. in *Early*

Greek Political Thought from Homer to the Sophists. Trans. Michael Gagarin and Paul Woodruff, 50–2. Cambridge: Cambridge University Press, 1995.)

———. *Oedipus Tyrannus*. In *Sophocles I.* Trans. Elizabeth Wyckoff. Ed. David Grene and Richmond Lattimore, 15–90. New York, NY: Random House, 1960.

———. *Tereus* (fragment). In *Sophocles Fragments.* Trans. Hugh Lloyd Jones, 291–301. Cambridge, MA: Harvard University Press, 1996. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Trans. Michael Gagarin and Paul Woodruff, 56–7. Cambridge: Cambridge University Press, 1995.)

Sorabji, Richard. 1993. *Animal Minds and Human Morals: The Origins of the Western Debate.* Ithaca, NY: Cornell University Press.

Soto, Domingo de. *De Iustitia et Iure Libri Decem* (*On Justice and the Law*). Salamanca: Apud Ioannem Baptistam Terranoua, 1569. (In *De la Justicia y del Derecho en Diez Libros*. Trans. Marcelino González Ordóñez. Madrid: Sección Teólogos Juristas, Instituto de Estudios Políticos, 1967–1968.)

Southern, Richard W. 1995. *Scholastic Humanism and the Unification of Europe. I. Foundations.* Oxford: Blackwell.

———. 2001. *Scholastic Humanism and the Unification of Europe. II. The Heroic Age.* Oxford: Blackwell.

Spade, Paul Vincent, ed. 1999. *The Cambridge Companion to Ockham*. Cambridge: Cambridge University Press.

Stalley, R. F. 1983. *An Introduction to Plato's Laws*. Oxford: Blackwell.

———. 1994. Persuasion in Plato's *Laws*. *History of Political Thought* 15: 157–77.

———. 1995a. Punishment in Plato's *Laws*. *History of Political Thought* 16: 469–87.

———. 1995b. Punishment in Plato's *Protagoras*. *Phronesis* 40: 1–19.

———. 1996. Punishment and the Physiology of the *Timaeus*. *Classical Quarterly* 46: 357–70.

Stamm, J. J., and M. E. Andrew. 1967. *The Ten Commandments in Recent Research*. Naperville, IL: A. R. Allenson.

Ste. Croix, G. E. M. de. 1981. *The Class Struggle in the Ancient Greek World*. 2nd. ed. London: Duckworth.

Stegmüller, Friedrich. 1934. *Francisco de Vitoria y la Doctrina de la Gracia en la Escuela Salamanca*. Balmes: Barcelona.

———. 1935. *Geschichte des Molinismus*. Münster: Aschendorffschen Verlagsbuchhandlung.

Stein, Peter. 1988. *The Character and Influence of the Roman Civil Law: Historical Essays*. London and Rocheverte: Hambledon.

———. 1999. *Roman Law in European History*. Cambridge: Cambridge University Press.

Steinwenter, Artur. 1946. *NOMOS EMPSYCHOS*. Zur Geschichte einer politischen Theorie. *Anzeiger der Akademie der Wissenschaften in Wien. Philosophisch-Historische Klasse* 83: 250–68.

Stenton, Dorothy M. 1964. *English Justice between the Norman Conquest and the Great Charter, 1066–1215*. Philadelphia, PA: The American Philosophical Society.

Stern, S. M. 1968. *Aristotle on the World State*. London: Bruno Cassirer.

Stobaeus. *Eclogues.* In *Ioannis Stobaei Anthologium.* Ed. Curt Wachsmuth and Otto Hense, 5 vols. Berlin: Weidmann, 1884–1923.

Stone, M. W. F. 2001. Augustine and Medieval Philosophy. In *The Cambridge Companion to Augustine*. Ed. Eleonore Stump and Norman Kretzmann, 253–66. Cambridge: Cambridge University Press.

———. 2004. The Scope and Limits of Moral Deliberation: Recta Ratio, Natural Law, and Conscience in Francisco Suárez. In *Imagination in the Later Middle Ages and Early Modern Period*. Ed. Lodi Nauta and Detlev Pätzold (Groningen Studies in Cultural Change, 2), 37–59. Leuven: Peeters.

———. 2006. Scholastic Schools and Early Modern Philosophy. In *The Cambridge Companion to Early Modern Philosophy*. Ed. Donald Rutherford, 34–76. Cambridge: Cambridge University Press.

———. Forthcoming. *The Subtle Arts of Casuistry: The Casuistical Tradition in Moral Philosophy from Aristotle to Kant*. Oxford: Oxford University Press.

Strack, Hermann Leberecht, and Günter Stemberger. 1992. *Introduction to the Talmud and Midrash*. Trans. Markus Bockmuehl. Minneapolis, MN: Fortress. (Revised Edition.)

Strauss, Leo. 1935. *Philosophie und Gesetz: Beiträge zum Verständnis Maimunis und seiner Vorläufer*. Berlin: Schocken. (New edition in: *Leo Strauss: Gesammelte Schriften. Philosophie und Gesetz: Frühe Schriften*. Ed. Heinrich Meier with Wiebke Meier. Stuttgart: J. B. Metzler, 1997. Vol. 2. English trans. in *Philosophy and Law: Contributions to the Understanding of Maimonides and His Predecessors*. Trans. E. Adler. Albany, NY: State University of New York Press, 1995.)

———. 1936a. Eine Vermisste Schrift Farabis. *Monatsschrift für Geschichte und Wissenschaft des Judentums* 80: 96–106.

———. 1936b. Quelques Remarques sur la Science Politique de Maïmonide et de Farabi. *Revue des Études Juives* 100: 1–37.

———. 1945. Farabi's Plato. In *Louis Ginsberg Jubilee Volume on the Occasion of His Seventieth Birthday*. American Academy for Jewish Research, 357–93. New York, NY: American Academy for Jewish Research.

———. 1952. *Persecution and the Art of Writing*. Glencoe, IL: The Free Press of Glencoe.

———. 1953. *Natural Right and History*. Chicago, IL: University of Chicago Press.

———. 1972. *Xenophon's Socratic Discourse: An Interpretation of the Oeconomicus*. Ithaca, NY: Cornell University Press.

Striker, Gisela. 1983. The Role of Oiekeiosis in Stoic Ethics. In *Oxford Studies in Ancient Philosophy 1*, 145–67. New York, NY: Oxford University Press.

———. 1996a. *Essays on Hellenistic Epistemology and Ethics*. Cambridge: Cambridge University Press.

———. 1996b. Origins of the Concept of Natural Law. In *Essays on Hellenistic Epistemology and Ethics*. Ed. Gisela Striker, 209–20. Cambridge: Cambridge University Press.

Stump, Eleonore. 2001. Augustine on Free Will. In *The Cambridge Companion to Augustine*. Ed. Eleonore Stump and Norman Kretzmann, 124–47. Cambridge: Cambridge University Press.

Stump, Eleonore, and Norman Kretzman, eds. 2001. *The Cambridge Companion to Augustine*. Cambridge: Cambridge University Press.

Suárez, Francisco. *Defensio Fidei Catholicae*. In *Francisco Suárez: Opera Omnia*. Ed. Carlos. Berton. Paris: Vivés, 1856–1866 and Supp. 1878.

———. *De Legibus sue de Deo Legislatore. In Francisco Suárez: Opera Omnia*. Ed. Carlos Berton. Vol. 5. Paris: Vivés, 1856–1866 and Supp. 1878.

Symmachus, Quintus Aurelius. *Relationes*. In *Prefect and Emperor: The Relationes of Symmachus, A.D. 384*. Trans. R. H. Barrow. Oxford: Clarendon, 1973.

Tacitus. *Annals*. Trans. John Jackson. In *Tacitus 3*. Trans. Clifford H. Moore and John Jackson, 225–643. Cambridge, MA: Harvard University Press, 1931.

———. *Dialogus de Oratoribus* (*Dialogue on Oratory*). In *Tacitus. Dialogus, Agricola, and Germania*. Trans. W. Hamilton Fyfe. Oxford: Clarendon, 1908.

Tavares, Serveriano. 1955. A Questão Fonseca-Molina: Reposta a uma Crítica. *Revista Portuguesa de Filosofia* 11: 78–88.

Taylor, C. C. W. 1976. *Plato. Protagoras*. Oxford: Clarendon.

Taylor, John H. 2001. *Death and the Afterlife in Ancient Egypt.* Chicago, IL: University of Chicago Press.

Tellegen-Couperus, Olga. 1993. *A Short History of Roman Law*. London: Routledge.

Temporini, Hildegard, and Wolfgang Haase. 1972. *Aufstieg und Niedergang der Römischen Welt; Geschichte und Kultur Roms im Spiegel der Neuren Forschung*. Berlin: de Gruyter.

Tertullian. *Against Marcion.* (*Adversus Marcionem*). Ed. and trans. Ernest Evans. Oxford: Clarendon, 1972. (*Adversus Marcionem.* Ed. A. Kroymann, vol. 1, 437–730. Turnhout: Corpus Christianorum Series Latina, 1954.)

———. *Against the Jews* (*Adversus Judaeos*). In *The Writings of Tertullian*. Trans. S. Thelwall, vol. 3, 201–58. Edinburgh: T&T Clark 1870. (*Adversus Judaeos*. Ed. A. Kroymann, vol. 2, 1337–98. Turnhout: Corpus Christianorum Series Latina, 1954.)

———. *On the Soul* (*De Anima*). In *The Writings of Tertullian*. Trans. Peter Holmes, vol. 2, 410–541. Edinbugh: T&T Clark 1870. (*De Anima*. Ed. J. H. Waszink, vol. 2, 779–870. Turnhout: Corpus Christianorum Series Latina, 1954.)

———. *Prescription of Heretics* (*De Praescriptione Haereticorum*). In *The Writings of Tertullian*. Trans. Peter Holmes, vol. 2, 1–54. Edinburgh: T&T Clark 1870. (*De Praescriptione Haereticorum*. Ed. A. Kroymann, vol. 70, 1–58. Vienna: Corpus Scriptorum Ecclesiasticorum Latinorum, 1942.)

Théodoridès, Aristide. 1971. The Concept of Law in Ancient Egypt. In *The Legacy of Egypt*. 2nd ed. Ed. J. R. Harris, 291–322. Oxford: Clarendon.

Thierry of Chartres. *Commentary on Cicero's On Invention*. In *The Latin Rhetorical Commentaries by Thierry of Chartres*. Ed. Karin M. Fredborg. Toronto: Pontifical Institute of Mediaeval Studies, 1988. (Studies and Texts 84.)

———. *Commentary on the Rhetoric to Herennius*. In *The Latin Rhetorical Commentaries by Thierry of Chartres*. Ed. K. M. Fredborg. Toronto: Pontifical Institute of Mediaeval Studies, 1988.

Thomas Aquinas. *Commentary on Nicomachean Ethics*. Trans. C. I. Litzinger. Chicago, IL: Regnery, 1964.

———. *De Veritate* (*Quaestiones Disputatae de Veritate*). In *Omnia Opera Sancti Thomae Aquinatis Doctoris Angelici*. Leonine Edition. Vol. 22. Rome: Polyglot Press, 1960. (Trans: *Truth*. Trans. Robert W. Mulligan et al. Indianapolis, IN: Hackett, 1994.)

———. *Letter to the Duchess of Brabant.* In *The Pocket Aquinas*. Ed. Vernon Bourke. New York, NY: Washington Square Press, 1960. (Latin text: *Epistola ad Ducissam Brabantiae*. In *Omnia Opera Sancti Thomae Aquinatis Doctoris Angelici*. Leonine Edition. Vol. 42. Rome: Polyglot Press, 1960.)

———. *On Kingship, to the King of Cyprus.* Ed. I. K. Th. Eschmann, trans. Gerald B. Phelan. Toronto: Pontifical Institute of Mediaeval Studies, 1982. (Latin text: *De Regimine Principum*. In *Omnia Opera Sancti Thomae Aquinatis Doctoris Angelici*. Leonine Edition. Vol. 42. Rome: Polyglot Press, 1960.)

———. *Summa Contra Gentiles*. In *Omnia Opera Sancti Thomae Aquinatis Doctoris Angelici*. Leonine Edition. Vols. 13–15. Rome: Polyglot Press, 1918–1930. (Translation: A.C. Pegis, et al. Notre Dame, IN: University of Notre Dame Press, 1975.)

———. *Summa Theologiae*. Latin Text and English Translation, Introductions, Notes, Appendices, and Glossaries. Ed., trans., and intro. Thomas Gilby. New Blackfriars Edition. New York, NY: McGraw Hill, 1964–1980.

Thucydides. *History*. In *Thucydides. History of the Peloponnesian War*. Trans. Charles Forster Smith, 4 vols. Cambridge, MA: Harvard University Press, 1921–1930. (Partial trans. in *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff. Cambridge: Cambridge University Press, 1995.)

Tierney, Brian. 1955. *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*. Cambridge: Cambridge University Press.

———. 1982. *Religion, Law and the Growth of Constitutional Thought, 1150–1650*. Cambridge: Cambridge University Press.

———. 1989. Origins of Natural Rights Language: Texts and Contexts, 1150–1250. *History of Political Thought* 10: 632–36.

———. 1992. *Ius* and Metonymy in Rufinus. In *Studia in Honorem Eminentissimi Cardinalis Alfonsi Stickler*. Ed. R. J. Castillo Lara, 549–58. Rome: LAS.

———. 1997. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625*. Atlanta, GA: Scholars.

Tkacz, Michael W., and Douglas Kries. 1994. *Augustine: Political Writings*. Indianapolis, IN: Hackett.

Tobin, Thomas H. 1983. *The Creation of Man: Philo and the History of Interpretation*. Washington, DC: Catholic Biblical Association of America.

Tobin, Vincent. 1987. *Ma'at* and *Dike*: Some Comparative Considerations of Egyptian and Greek Thought. *Journal of the American Research Center of Egypt* 24: 113–21.

Tod, Marcus N. 1948. *Greek Historical Inscriptions*. Oxford: Oxford University Press.

Todd, Stephen C. 1993. *The Shape of Athenian Law*. Oxford: Oxford University Press.

Todescan, Franco. 1973. *Lex, Natura, Beatitudo. Il problema della legge nella Scolastica spagnola del secolo XVI*. Padua: Cedam.

Torrell, Jean-Pierre. 1996. *Saint Thomas Aquinas: The Person and His Work*. Vol. 1. Trans. Robert Royal. Washington, DC: Catholic University of America Press.

Tracy, Stephen V. 2000. Demetrius of Phalerum: Who Was He and Who Was He Not? In *Demetrius of Phalerum: Text, Translation and Discussion*. Ed. William W. Fortenbaugh and Eckart Schütrumpf, 331–46. New Brunswick, NJ: Transaction.

Trainia, Cristina. 1999. *Feminist Ethics and Natural Law*. Washington, DC: Georgetown University Press.

Treggiari, Susan. 1991. *Roman Marriage*. Oxford: Oxford University Press.

Trentmann, John A. 1982. Scholasticism in the Seventeenth Century. In *The Cambridge History of Later Medieval Philosophy*. Ed. Norman Kretzmann, Jan Pinborg, and Anthony Kenny, 818–37. Cambridge: Cambridge University Press.

Troeltsch, Ernest. 1960. *The Social Teaching of the Christian Churches*. Trans. Olive Wyon. New York, NY: Harper.

Trueman, Carl, and R. L. Clark. 1999. *Protestant Scholasticism: Essays in Reassessment*. Carlisle: Paternoster.

Truman, Ronald W. 1999. *Spanish Treatises on Government, Society and Religion in the Time of Philip II: The "de regime principum" and Associated Traditions*. Leiden: Brill.

Trusen, Winifried. 1973. Die Gelehrte Gerichtsbarkeit der Kirche. In *Handbook der Quellen und Literatur der Neueren Europäischen Privaterechtsgeschichte*. Ed. Helmut Coing, 467–504. Munich: Beck.

Tuck, Richard. 1979. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press.

Tugwell, Simon, trans. and ed. 1988. *Albert and Thomas*: *Selected Writings*. Mahwah, NJ: The Paulist Press.

Twersky, Isadore. 1980. *Introduction to the Code of Maimonides (Mishneh Torah)*. New Haven, CT: Yale University Press.

Tyrtaeus. *Poems*. In *Early Greek Political Thought from Homer to the Sophists*. Ed. Michael Gagarin and Paul Woodruff, 23–4. Cambridge: Cambridge University Press, 1995.

Ullmann, Walter. 1975. *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas*. Ithaca, NY: Cornell University Press.

Urdanoz, Teofilo. 1960. Introducción Biográfica. In *Relecciones Teológicas*. Ed. Obras Francisco de Vitoria, 1–107. Madrid: BAC.

Van Asselt, Willem J., and Eef Dekker. 2001. *Reformation and Scholasticism: An Ecumenical Enterprise*. Grand Rapids, MI: Baker Academic.

Van Den Eynde, D. 1949. The Terms Ius Positivum and Signum Positivum in Twelfth-Century Scholasticism. *Franciscan Studies* 9: 41–9.

Van Effenterre, Henri, and Françoise Ruzé, eds. 1994–1995. *Nomima: Recueil d'Inscriptions Politiques et Juridiques de l'Archaïsme Grec*. Rome: Ecole Française de Rome.

Van Ophuijsen, Johannes M., and Marlein van Raalte, eds. 1998. *Theophrastus: Reappraising the Sources*. New Brunswick, NJ: Transaction.

Vander Waerdt, Paul A. 1994a. Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural Law. In *Aufstieg und Niedergang der Römischen Welt*. Ed. Wofgang Haase and Hildegard Temporini, II 36.7: 4851–900. Berlin: de Gruyter.

———, ed. 1994b. *The Socratic Movement*. Ithaca, NY: Cornell University Press.

———. 1994c. Zeno's *Republic* and the Origins of Natural Law. In *The Socratic Movement.* Ed. Paul A. Vander Waerdt, 272–308. Ithaca, NY: Cornell University Press.

———. 2003. The Original Theory of Natural Law. In *The Studia Philonica Annual* 15. Ed. David T. Runia, Gregory E. Sterling, and Hindy Najman, 17–34. Providence, RI: Brown University.

Vasunia, Phiroze. 2001. *The Gift of the Nile: Hellenizing Egypt from Aeschylus to Alexander.* Berkeley, CA: University of California Press.

Veatch, Henry B. 1971. *For an Ontology of Morals*. Evanston, IL: Northwestern University Press.

———. 1985. *Human Rights: Fact or Fancy?* Baton Rouge; LA: Louisiana State University Press.

———. 1990. *Swimming Against the Current in Contemporary Philosophy*. Washington, DC: Catholic University of America Press.

Veatch, Henry B., and Joseph Rautenberg. 1991. Does the Grisez-Finnis-Boyle Moral Philosophy Rest on a Mistake? *Review of Metaphysics* 44: 807–30.

Vetulani, Adam. 1946–47. Gratien et le Droit Romain. *Revue Historique de Droit Français et Etranger* 24–25: 11–48.

———. 1955. Nouvelles Vues sur le Décret de Gratien. In *La Pologne au Xe Congrès International des Sciences Historiques à Rome*. Ed. Instytut Historii, 83–105. Warsaw: Pań stwowe Wydawnictwo Naukowe.

Villey, Michel. 1946. L'Idée du Droit Subjectif et les Systèmes Juridiques Romains. *Revue Historique de Droit* 24: 201–27.

———. 1953–1954. Les Origines de la Notion de Droit Subjectif. *Archives de Philosophie du Droit* 2: 163–87.

———. 1975. *La Formation de la Pensée Juridique Moderne*. 4th ed. Paris: Éditions Montchrestien.

———. 1983. *Le Droit et Les Droits de l'Homme*. Paris: Presses Universitaires de France.

———. 1996. Questions of Legal Logic in the History of the Philosophy of Law. In *European Legal Cultures*. Ed. Volkmar, Gessner, Armin Hoeland, and Csaba Varga, 111–5. Aldershot: Dartmouth.

Villoslada, Ricardo. 1938. *La Universidad de Paris durante los Estudios de Francisco de Vitoria*. Rome: Gregorian University.

Vitoria, Francisco de. *Comentarios a la Secunda Secundae de Santo Tomás.* Ed. Vincente Beltrán de Heredia. 6 vols. Salamanca: Universidad de Salamanca, 1932–1952.

———. *De Indis*. In *Relectiones XII in Duos Tomos Duisiae*. 2 vols. Lyon: Jacobus, Boyerius, 1557. (Trans. in *Franciscus de Vitoria De Indis et de Iure Belli Relectiones*. Ed. Ernest Nys; trans. John Pawley Bate. Washington, DC: Carnegie Institution, 1917. Partial trans. of QQ. 1–3 in *Vitoria. Political Writings*. Ed. and trans. Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press, 1991.)

———. *De Matrimonio*. In *Relectiones XII in Duos Tomos Duisiae*. 2 vols. Lyon: Jacobus, Boyerius, 1557.

———. *De Potestate Civile* (*On Civil Power*). In *Relectiones XII in Duos Tomos Duisiae*. 2 vols. combined. Lyon: Jacobus, Boyerius, 1557. (In *Leçon sur le Pouvoir Politique.* Trans. Maurice Barbier. Paris: Vrin, 1980. Partial trans. of QQ. 1 and 3 in *Vitoria. Political Writings*. Ed. and trans. Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press, 1991.)

———. 1991. *Political Writings*. Ed. and trans. Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press.

Vivès, Juan Luis. *De Concordia et Discordia in Humano Genere.* In *Opera Omnia*. Ed. G. Mayans y Siscar, 8 vols. (*Obras Completas.* Trans. Lorenzo Riber. Madrid: Aguilar, 1947–1948.)

Vlastos, Gregory. 1971. Justice and Happiness in the *Republic*. In *The Philosophy of Socrates*. Ed. Gregory Vlastos, 111–39. London: Macmillan.

———. 1977. The Theory of Social Justice in the Polis in Plato's *Republic*. In *Interpretations of Plato: A Swarthmore Symposium*. Ed. Helen North, 1–40. Lugduni Batavorum: Brill.

———. 1988. Socrates. *Proceedings of the British Academy* 74: 89–111.

———. 1991. *Socrates: Ironist and Moral Philosopher*. Cambridge: Cambridge University Press.

Voegelin, Eric. 1956. *Israel and Revelation*. Volume 1 of *Order and History*. Baton Rouge, LA: Louisiana State University Press.

Volterra, E. 1958. Intorno ad alcune costituzioni di Costantino. *Rendiconti dell'Accademica Nazionale dei Lincei* 3–4: 61–89.

Von Fritz, Kurt, and Ernst Kapp. 1950. *Constitution of Athens and Related Texts*. New York, NY: Hafner.

Waldron, Jeremy. 1995. The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's *Politics*. *Political Theory* 23: 563–84.

Waldstein, Wolfgang. 1994. *Ius Naturale* im Nachklassischen Römischen Recht und bei Justinian. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, *Romanistische Abteilung* 111: 1–65.

Warmington, E. H. 1967. *Remains of Old Latin*. Rev. ed. Cambridge, MA: Harvard University Press.

Warnock, G. J. 1967. *Contemporary Moral Philosophy*. New York, NY: St. Martin's.

Watson, Alan. 1974. *Law Making in the Later Roman Republic.* Oxford: Oxford University Press.

———. 1975. *Rome of the XII Tables*. Princeton, NJ: Princeton University Press.

———. 1995a. *The Spirit of Roman Law*. Athens, GA: The University of Georgia Press.

———. 1995b. *Jesus and the Jews: The Pharisaic Tradition in John*. Athens, GA: University of Georgia Press.

———. 1996. *Jesus and the Law*. Athens, GA: University of Georgia Press.

Watson, G. 1971. The Natural Law and Stoicism. In *Problems in Stoicism.* Ed. Anthony A. Long, 216–38. London: Athlone.

Weimar, Peter. 1973. Die Legistische Literatur der Glossatorenzeit. In *Handbook der Quellen und Literatur der Neueren Europäischen Privaterechtsgeschichte*. Ed. Helmut Coing, 129–260. Munich: Beck.

Weinfeld, Moshe. 1991. *Deuteronomy 1–11* (Anchor Bible). New York, NY: Doubleday.

Weisheipl, J. A. 1983. *Friar Thomas D'Aquino*. 2nd Ed. Washington, DC: Catholic University of America Press.

Weiss, Rosalyn. 1998. *Socrates Dissatisfied*. New York, NY: Oxford University Press.

Weithman, Paul. 2001. Augustine's Political Philosophy. In *The Cambridge Companion to Augustine*. Ed. E. Stump and N. Kretzmann, 234–52. Cambridge: Cambridge University Press.

Westbrook, Richard. 2003a. *A History of Ancient Near Eastern Law*. Handbuch der Orientalistik 72. Leiden: E.J. Brill.

———. 2003b. Old Babylonian Period. In *A History of Ancient Near Eastern Law*. Ed. Richard Westbrook, 360–430. Leiden: E.J. Brill.

White, Kevin, ed. 1998. *Hispanic Philosophy in the Age of Discovery*. Washington, DC: Catholic University of America Press.

Widow, Juan Antonio. 1997. The Economic Teachings of Spanish Scholastics. In *Hispanic Philosophy in the Age of Discovery*. Ed. Kevin White, 130–44. Washington, DC: Catholic University of America Press.

Wilenius, Reijo. 1963. *The Social and Political Theory of Francisco Suárez*. Helsinki: Acta Philosophica Fennica.

William of Auxerre. *Summa Aurea*. In *William of Auxerre, Summa Aurea, III, vol. 1*. Ed. J. Ribaillier. Paris: Centre National de la Recherche Scientifique, 1986.

William of Ockham. *Dialogus in Monarchia S. Romani Imperii*. In *Dialogus in Monarchia S. Romani Imperii.* Ed. M. Goldast. *Dialogus in Monarchia S. Romani Imperii*. Frankfurt: Conrad Bierman, 1614.

———. *A Letter to the Friars Minor, and Other Writings*. Ed. Arthur Stephen McGrade and John Kilcullen; trans. John Kilcullen. New York, NY: Cambridge University Press, 1995.

———. *Opera Politica*. Vol. 1. Ed. J. G. Sikes et al. Manchester: Manchester University Press, 1960. Vol. 2. Ed. R. F. Bennett and H. S. Offler. Manchester: Manchester University Press,

1963. Vol. 3. Ed. H. S. Offler. Manchester: Manchester University Press, 1966. Vol. 4. Ed. H. S. Offler. Oxford: Oxford University Press, 1997.

———. *Reportatio* = Books 2–4 of *Commentary on the Sentences* (*In Libros Sententiarum*). In *Guillelmi de Ockham Opera Philosophica et Theologica*. Ed. Gedeon Gál et al. St. Bonaventure, NY: The Franciscan Institute Press, 1967–1988.

———. *A Short Discourse on Tyrannical Government*. Ed. Arthur Stephen McGrade and trans. John Kilcullen. Cambridge: Cambridge University Press, 1992.

Williams, Thomas. 1998. The Libertarian Foundations of Scotus's Moral Philosophy. *The Thomist* 62: 193–215.

Wilson, A. N. 1997. *Paul: The Mind of the Apostle*. New York, NY: Norton.

Wilson, John A. 1946. Egypt. In *The Intellectual Adventure of Ancient Man: An Essay on Speculative Thought in the Ancient Near East*. Ed. Henri Frankfort et al., 31–93. Chicago, IL: University of Chicago Press.

Wilson, S. G. 1983. *Luke and the Law*. Cambridge: Cambridge University Press.

Wiltshire, Susan Ford. 1992. *Greece, Rome, and the Bill of Rights*. Norman, OK: University of Oklahoma Press.

Winroth, Anders. 2000. *The Making of Gratian's Decretum*. Cambridge: Cambridge University Press.

Wippel, John. 2000. *The Metaphysics of Thomas Aquinas*. Washington, DC: Catholic University of America Press.

Wolf, Armin. 1973. Die Gesetzgebung der Enstehenden Territorialstaaten. In *Handbook der Quellen und Literatur der Neueren Europäischen Privaterechtsgeschichte*. Ed. Helmut Coing, 517–800. Munich: Beck.

———. 1983. Gesetzgebung und Kodifikationen. In *Die Renaissance der Wissenschaften im 12.Jahrhundert*. Ed. Peter Weimar, 143–71. Zurich: Artemis.

Wolff, Hans Julius. 1951. *Roman Law: An Introduction*. Norman, OK: University of Oklahoma Press.

Wolter, Allan B. 1993. *Duns Scotus*. Special Issue. *American Catholic Philosophical Quarterly* 67.1.

Woodruff, Paul. 1993. *Thucydides on Justice, Power, and Human Nature*. Indianapolis, IN: Hackett Publishing Company.

Woozley, A. D. 1971. Socrates on Disobeying the Law. In *The Philosophy of Socrates: A Collection of Critical Essays*. Ed. Gregory Vlastos, 299–318. Garden City, KS: Doubleday.

———. 1979. *Law and Obedience: The Arguments of Plato's Crito*. London: Duckworth.

Wormuth, F. 1948. Aristotle on Law. In *Essays in Political Theory Presented to George H. Sabine*. M. R. Konvitz and A. E. Murphy, 45–61. Ithaca, NY: Cornell University Press.

Xenophon. *Anabasis*. Trans. Carleton L. Brownson; rev. John Dillery. Cambridge, MA: Harvard University Press, 1998.

———. *Cyropaedia* (*Education of Cyrus*). Trans. Walter Miller. Cambridge, MA: Harvard University Press, 1914.

———. *De Vectigalibus*. In *Xenophon 5.* Ed. E. C. Marchant and G. W. Bowersock. Cambridge, MA: Harvard University Press, 1968.

———. *Hiero*. Trans. E. C. Marchant. In *Xenophon 5.* Ed.. E. C. Marchant and G. W. Bowersock. Cambridge, MA: Harvard University Press, 1968.

———. *Historia Graeca* (*Hellenica*). Trans. Carleton L. Brownson, 2 vols. Cambridge, MA: Harvard University Press, 1918–1921.

——— (pseudo) = "The Old Oligarch." *The Constitution of the Athenians.* Trans. G. W. Bowersock. In *Xenophon 5.* Ed. E. C. Marchant and G. W. Bowersock. Cambridge, MA: Harvard University Press, 1968. (*Early Greek Political Thought from Homer to the Sophists.* Ed. and trans. Michael Gagarin and Paul Woodruff, 133–44. Cambridge: Cambridge University Press, 1995.)

———. *Memorabilia*. Trans. E. C. Marchant. In *Xenophon 4.* Ed. E. C. Marchant and O. J. Todd, 3–359. Cambridge, MA: Harvard University Press, 1923.

———. *Oeconomicus*. Trans. E. C. Marchant. In *Xenophon 4*. Ed. E. C. Marchant and O. J. Todd, 363–525. Cambridge, MA: Harvard University Press, 1923.

———. *Respublica Lacaedemoniorum* (*Constitution of the Lacedaemonians*). In *Xenophon 5.* Ed. E. C. Marchant and G. W. Bowersock. Cambridge, MA: Harvard University Press, 1968.

———. *Symposium*. Trans. O. J. Todd. In *Xenophon IV*. Ed. E. C. Marchant and O. J. Todd, 527–635. Cambridge, MA: Harvard University Press, 1923.

Yack, Bernard. 1990. Natural Right and Aristotle's Understanding of Justice. *Political Theory* 18: 216–37.

Yaron, Reuven. 1988. *The Laws of Eshnunna*. 2nd. rev. ed. Leiden: Brill.

Young, Frances. 2000. Christianity. In *The Cambridge History of Greek and Roman Political Thought*. Ed. Christopher Rowe and Malcolm Schofield, 635–60. Cambridge: Cambridge University Press.

Zalba, Marcelino. 1934. Molina y las Ciencias Jurídico-Morales. *Razón y Fé* 127: 530–43.

Zane, John Maxcy. 1998. *The Story of Law*. Reprint ed. Indianapolis, IN: The Liberty Fund.

Zeller, Eduard. 1903. *Die Philosophie der Griechen in Ihrer Geschichtlichen Entwicklung.* Leipzig: O. R. Reisland.

Zetzel, James. 1999. *Cicero On the Commonwealth and On the Laws*. Cambridge: Cambridge University Press.

Zohar, Noam J. 1998. Halakhah. In *Routledge Encyclopedia of Philosophy*. Ed. Edward Craig. Vol. 4: 204–7. London: Routledge.

Zuckerman, Charles. 1973. The Relationship of Theories of Universals to Theories of Church Government in the Middle Ages. *Journal of the History of Ideas* 35: 579–90.

Zuckert, Michael P. 1989. "Bringing Philosophy Down from the Heavens": Natural Right in the Roman Law. *Review of Politics* 51: 70–85.

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A NOTE ON THE AUTHORS

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num: Genere letterario e forma di classificazione delle azioni nella dottrina dei Glossatori (Bologna, Monduzzi Editore, 1995); *Processus in causa Fidei: L'evoluzione dei manuali inquisitoriali nei secoli XVI–XVIII e il manuale inedito di un inquisitore perugino* (Bologna, Monduzzi Editore, 2000); and *Il concetto di scientia iuris dal XII al XIV secolo: Il ruolo della logica platonica e aristotelica nelle scuole giuridiche medievali* (Milan, Giuffrè, 2003). He is also Professor at LUISS University and at Pontifical University of Saint Thomas Aquinas ("Angelicum") in Rome.

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PREFACE

There is no body of legal norms, however produced, that is not in some way predetermined by a vision of the world and of human society. From the beginnings of civilization, human beings have given law the function of ensuring a peaceful coexistence and tranquillity within their communities. The notion of order carries within it the concept of proportion. In the words of Dante Alighieri, "law is the proportion between man and man in relation to things and people [*realis et personalis hominis ad hominem proportio*], and this proportion, if kept in balance, will keep human society healthy, and if spoiled will spoil the well-being of society [*servata hominum servat societatem et corrupta corrumpit*]." This means that relationships among people, or among people and things, must share the values specific to their time and place. Any set of values that prevail in the collective consciousness (whether these values are religious, or ethical in a broad sense, or economic) will receive wider protection than other values that are considered to be less important. The distinction between individual goods and collective goods will produce a hierarchical order capable of guiding decisions when conflicting interests are at play.

Even though ethics and law constitute two distinct spheres of human knowledge and activity—at least they do so in Western civilization—they have appeared for millennia to be bound up by a necessary relationship. Ethics served as a guidepost, showing the way for law and pointing out the ends to be sought. We have historical evidence that this was going on even before the Greeks framed the organically structured discipline that would take the name of "ethics." Even in the most ancient civilizations, and in those that followed—some of them incapable of working out complex theoretical systems, as was the case in Europe during the early Middle Ages—precise moral dictates were set forth (often drawing inspiration from religious precept) that informed norms more properly describable as legal. Even here, law cannot be said to have escaped the reach of philosophy. Indeed, for humans, to exist is to philosophize, even though philosophizing does not always mean doing philosophy. For us to philosophize is to face our destiny with eyes open, and clearly setting out the problems arising out of our relationship with ourselves, with other people, and with the world. It is not so much a matter of developing concepts or theoretical systems as it is a matter of making choices and committing ourselves by living a true, genuine, and reasoned life. If, as Plato would have it, we cannot live as humans without living as philosophers, then philosophy accompanies us from the beginning, when we first get the light of consciousness. Certainly, in this necessary "philosophizing" that we do, we are helped out a great deal by the professional philosophers, by the technical

work they do—we can rely on centuries of tradition, experience, and myth. The doctrines developed over the centuries have provided the indispensable tools with which to understand ourselves and the world around us, enabling us to come to a clearer perception of the tasks we must accomplish, both as individuals and as members of a social organism. If we look at the recent efforts made to deny the guiding force that ethics exerts on law, we will find that, whatever the reason for such a denial, there is always a theoretical argument—and hence a philosophical basis—offered in justification. Nor could it be otherwise, considering that in thought lies the specific nature of humans.

If, then, every legal system, every set of values, written or unwritten, is modelled on a certain set of ideal norms that precede it, the same can be said to be true in the science of law. Certain lawgivers like Justinian have wished that their work be forever free of interpretation and commentary (Tanta, 21: "nemo [...] audeat commentarios isdem legibus adnectere"), but their wishes have proved ineffective and fallacious. Any text that others must understand will necessarily have to be interpreted. Hermeneutics is the inescapable light in which human knowledge is bathed. Thus, jurists have had to explain every collection of legal norms. They must determine their applicability to the matter at hand—to the facts presented by life, facts themselves requiring interpretation in their own turn. Indeed, when events happen that are relevant to law, the jurist must extract a meaning from them—the meaning attributed to them by the social environment—and then must bring that to the legal case in point. This interpretation which the jurist is entrusted with does not confine itself to figuring out the meaning the norm initially had in the historical and social context where it was conceived. The jurist must also find out whether the norm took on a further social meaning (even if unintentionally). Can it, for example, be applied to other conflicts or situations beyond those the norm was initially designed to settle. This kind of interpretation—evolutional interpretation—has always characterized Western law and continues to do so. In the age of *ius commune*, from the 14th to the 16th century, the jurists' activity became even freer and more creative. For it became the practice to interpret concrete facts by turning to Justinian's *Corpus Iuris* on the one hand and canon law on the other. Sometimes the two would converge in their interpretation. Sometimes they would go their separate ways. Justinian's compilation, authoritative and venerable, was nonetheless the mature fruit of a bygone society, individualistic and still pagan (despite the touchups made by Justinian); canon law was the new legal system introduced by Christianity—it brought along the spirit of a world bristling with lively new social aggregations and unforeseen economic forms. The law of the Church could certainly not do away with the law of ancient Rome. It continued, rather, to shape and influence the law because of its unquestionable technical sophistication, as well as for its comprehensiveness. Justinian's *Corpus Iuris* treated a vast number of legal problems and regulated many legal institutions, from marriage to contracts

("omnia inveniuntur in corpore iuris"). Many institutions, such as matrimony, contracts, trials, and inheritance, regulated matters in which the moral teachings of the Church had to be taken into consideration. In these cases the popes and the jurists introduced norms different from those found in Justinian's *Corpus Iuris*. It was precisely on these points that the jurists focused their effort, ready to "freeze" Roman law and usher in canon law, deemed more equitable, modern, and flexible. The dialectic internal to the *utrumque ius* system—in which there coexist two universal systems of law in force—can be likened to that which operated under the Roman praetorship or the Court of Chancery: the one tempered *ius civile* with *ius praetorium* and the other common law with equity. But unlike the praetor and the chancellor, the continental jurist in medieval and protomodern Europe was not invested with any public function. Rather, the continental jurists created a new law. They did so on the basis of the scientific knowledge they were credited with having, and without in principle striving for any office, magistracy, or official position. They attempted instead to achieve an *opinio communis*, a convergence, the widest that could be had, with the opinions of other jurists, whether prominent or not. They generally showed a great sense of responsibility in their interpretation of the law, because they realized that there was no such thing in Europe as a single, supreme lawmaking body capable of filling the gaps and fixing the problems of interpretation and fact in the *ius commune*. They took pride in their work, knowing as they did that they belonged to a group that was honoured and heeded by emperors, kings and princes.

These reflections on the *ius commune* are sketchy, but they constitute an indispensable premise without which we would not be able to understand the relationship that took shape between jurisprudence and philosophy. The jurists of the day found they had made themselves into philosophers: They had to guarantee that the freedom they exercised in formulating the law rested on a critical reflection on the methods of argumentation and on the values to be affirmed in deciding cases one way or another. Judges had to distinguish the honest (*honesta*) from the useful (*utilia*) and could not bypass the jurists' interpretation and its philosophical backing; they couldn't choose not to rely on it, said the humanist Leon Battista Alberti († 1472): "ea re fit ut philosophum esse iudicem oporteat" (De iure, 2). Even those interpreters who seemed less interested in theory and who staunchly defended the strictest conformity to the law showed (at least in deed, by the outcome of their activity) that they adhered to a specific view of their task as jurists and of the ends entrusted to law. Iohannes Bassianus is the glossator who in the latter half of the twelfth century caused the science of law in Bologna and Europe to do an about-face; he did so condemning his predecessors for their metaphysical flourishes, and propounding a self-referential knowledge: "legistis [...] non licet allegare nisi Iustiniani leges" (the jurists are not allowed to allege anything but the laws of Justinian); and yet neither he nor his followers, Azo and Accursius above all,

could help proclaiming that jurisprudence is itself philosophy. In fact they did more than that: They proclaimed, taking their cue from Dig. 1.1.1, Inst. 1.1, and Dig. 1.1.10.2, that jurisprudence is true philosophy, the science of right and wrong. That being the case—jurisprudence is "philosophy," it is "science"—it will have to show it can proceed by the soundest methodology. It is little wonder, then, that Bassianus himself, as the sources reveal, was well versed in the arts of the trivium (comprising grammar, rhetoric, and dialectic) and used these disciplines in the service of law ("extremus in artibus").

Certainly, the Roman jurists had begun to organize their juristic opinions using logical and conceptual instruments at least as early as Quintus Mucius Scaevola (ca. 140 to 82 B.C.). The method of formulating definitions and then rules, and grouping legal phenomena under different types, seemed to satisfy the Ciceronian ideal of taking the *ius Quiritium*, the ancient law of the farmers and shepherds who had settled along the Tiber's riverbanks, and imparting an order to this venerable repository (*in artem reducere*), a prescientific law that had grown up as an incoherent assemblage.

With the Bolognese rebirth of the early twelfth century, the dialectic method made its way ever more profusely and penetratingly into the work of the jurists. As the new logic was revived, the Platonic method of division gave way to the Aristotelian syllogism, a methodology that was capable of much greater coherence and insight. In the second half of the 13th century and throughout the 14th century, the Aristotelian epistemology expounded in the *Posterior Analytics* forced every science, including jurisprudence, to address the preliminary question of its *principia propria*, the principles proper to it and from which would issue all further knowledge. The jurists committed themselves to the task of putting a definition on every legal concept and ascertaining the *ratio* and *sensus* of each *regula*, its grounding principle beyond the letter of Justinian's text. They tried to build a strictly deductive knowledge and sought to emulate the certainty of the physical and mathematical sciences. This became the stuff on which Italian jurisprudence would focus until the late 17th century, and Andrea Errera provides a detailed, perspicuous analysis of the endeavour. Meanwhile, in the rest of Europe, and especially in France and Germany, there began a lively debate of a different sort, but a debate that has no mention here. While some interpreters, such as Sebastian Derrer and Johann Nicolaus Frey, seemed in large part to follow in the footsteps of the commentators, others polemicized against them and their intransigent Aristotelism. They took up Italian humanism and the writings of Pierre De la Ramée, a method more adherent to the ordinary processes of knowledge, to philology and historiography, in rejection of all abstract, formalistic forms of knowledge.

It is not by any accident that we have omitted to treat those scholars here, who formed what would come to be known as the rational school of natural law. True, this school must be credited with affording the best innovation that

juristic reflection would see in seventeenth-century Europe. But then an en-
quiry into the doctrines of the natural-law theorists would take us too far
from our main focus, which is the jurists' philosophy of law. Now, it is well
known that not only the jurists contributed to bringing out the new natural
law, but also philosopher-jurists and philosophers tout court. Exemplary in
this regard is Hugo Grotius. He was not a philosopher and had no philo-
sophical interests properly so called, yet he grounded the validity of his
thought on a whole series of speculative questions that cannot be ignored. In
short, given any problem, such as defining "just war," the solution for it had
to be forged on philosophical grounds, and only then would it find confirma-
tion or validation through the authority of the *ius commune*. This procedure
was common to the entire modern school of natural law. In fact, as Norberto
Bobbio has keenly observed, the exponents of this scientific movement for-
sook all interpretive activity (no longer deemed useful) devoting themselves
instead to the effort of "discovering" a new law, a law capable of sustaining
each nation, and the family of nations, in its future course. The natural-law
theorists found that the source of law no longer lay in the *Corpus Iuris Civilis*
or the *Corpus Iuris Canonici*, but rather lay in the "nature of things," the only
standard, certain and constant, by which to assess human behaviour. Thus, we
no longer see in their treatises any mention of the methods of textual interpre-
tation—no *argumenta* or *loci* devoted to that subject—which for three centu-
ries had been the focus of the commentators and their exegesis. And not just
anciently, either: most of the modern European jurists who practised law con-
tinued to be faithful to the canons of that long tradition.

The need for setting jurisprudence on a scientific foundation had occupied
the jurists from the outset, with Jacques de Révigny († 1286) and Pierre de
Belleperche († 1308) in France and Cino da Pistoia († 1336) in Italy. But it
wasn't long before their work would meet opposition: A few decades thence,
in the course of the memorable "dispute of the arts," medical doctors and
some humanists entered the fray. If the laws, they objected, have their founda-
tion in the will and their end in utility, how, then, can our knowledge of them
be argued to be in any strict sense scientific? Indeed, for Aristotle, science
seeks to know that which is eternal and necessary, rather than changeable, con-
tingent, and particular—which is what human facts are. Until that time, the
jurists had striven to attain rigour in law by using and by refining the rules of
logic. The certainty of their conclusions had to be attained purely propo-
sitionally and linguistically, and hence formally. This approach was clearly in-
spired by the contemporary masters of logic and speculative grammar who had
been increasingly ignoring the question of homogeneity or of the correspond-
ence between knowledge and being. Against this background, when the ques-
tion of the truth of legal knowledge arose, this knowledge found its way back
into the internal structure of reality. If the truth of a proposition is given by a
correspondence (*adaequatio*) between discourse and the object of discourse,

then the highest form of certainty, in any discipline, can no longer be made to consist exclusively in the correctness or rigour of logical argumentation.

From this premise proceeded the example of the Perugian jurist Baldus De Ubaldis († 1400), who did more than anyone else to impart to the science of law an organization based on the methodology that was typical of Scholastic philosophy. Firmly opposed to the whole notion of Ockhamist nominalism (which, contrary to what is widely thought to be the case, cannot be detected in any form in the thought of the late medieval and early modern thinkers), Baldus shared with the earliest glossators a concern to base jurisprudence on sound metaphysical premises. But whereas Baldus stayed true to the Thomist teaching, the glossators who came before him based their philosophy on Saint Augustine and John Scotus (Eriugena). But beyond these cultural affiliations, the basic concern remained the same: The effort was to ensure the soundness of the premises by grounding them in the Absolute Being, in God. In Him, or rather in his Son, in the eternal Logos, lie the immutable, true ideas of every institution and concept of law and of all possible relations among humans and between humans and things. Here, in the Word, reality exists with a fullness superior to that of anything that can be experienced through the senses. Now, the first condition of science is precisely that its object exist: But to speak of existence is to invoke "substance" and "truth." When founded on the essence of things, juridical logic can return to us an even more strictly demonstrative truth, a truth homologous to the order and structure of being. By recovering a long and well-established tradition that endowed the institutions of law with a substantive weight, Baldus legitimated, in the midst of opposition, the scientific nature of juridical thought.

According to a teaching reiterated throughout the Middle Ages—the teaching of Isidore of Seville—philosophy divides into three branches: metaphysics, logic, and ethics. For the jurists of the middle period, to deal in ethics is by and large to deal in politics. The nexus between the two disciplines had already been observed by Aristotle in the *Nicomachean Ethics* (1.9), to be sure, but it then found its own development independently of Aristotle: at least it did so in the first two centuries of the Bologna School. Not until the second half of the 14th century, with Giovanni da Legnano († 1383) and his disciples, did the jurists cite Aristotle more frequently and use him more accurately. But even then, the masters of the civil law continued to interlard their doctrines with citations drawn for the most part from Justinian's *Corpus Iuris*: From the very start of the legal renaissance that got underway in the twelfth century, then, this great repository of Roman juridical knowledge supplied the choice material for the political projects undertaken in the Middle Ages. The *Corpus Iuris Civilis* served the glossators, who used it to legitimize the imperial ideology of Frederick Barbarossa, and afterwards it served the commentators, who used it to sustain, with ever-increasing boldness, the claims advanced in the effort to gain autonomy from the Holy Roman Empire—so we

have here yet more evidence of the intellectual freedom with which the jurists of the early Middle Ages proved they could bend their sources to respond to the new historical circumstances that were coming up.

The canonists were different: They were not as attached to the juridical legacy of imperial Rome. They could draw extensively on the pronouncements of the popes who were engaged in a power struggle with the Germanic emperors. They also could utilize material drawn from pro-papal polemical writers. Valuable in this regard is Kenneth Pennington's contribution to this volume, which shows up the decisive role that medieval canon law and commentary played in giving shape to political doctrines destined to achieve widespread and lasting currency. Many of the questions to which the early interpreters of canon law devoted themselves would later engage the jurists of civil law, too, forcing them to confront the new, unforeseen problems that had emerged.

At the beginning of the thirteenth century the jurists developed an entirely new way of looking at the law. Until then, jurists focused on the content of law when they decided whether a law was just or not. They presumed that law must be moral, ethical, equitable, and, most importantly, reasonable. As new theories of legislation emerged from *ius commune*, the jurists began to look at the sources of human law and the institutions that produced positive law. They discovered the will of the prince. In particular, Laurentius Hispanus († 1248) asserted that reason was not the only standard by which law should be judged. He argued that the will of the prince must be supreme. Following his footsteps, Cardinalis Hostiensis (Henry of Susa, † 1271) blazed a further path for the jurisprudence of sovereignty. With his *potestas ordinata* the pope had the authority to exercise jurisdiction over positive law. *Potestas ordinata*, on the other side, enabled the pope to exercise extraordinary authority and jurisdiction. Later jurists defined the prince's power with these terms and sometimes concluded that the prince could take the rights of subjects away when he exercised his absolute power. Of course these assumptions touched off a wide and deep debate in the jurisprudence of the day, and in that which followed, a debate on the limits of sovereign power in relation to the sovereign's subjects and the inviolable dictates of natural law.

Another question which the canonists brought into focus was the fundamental principles sustaining corporate law and the nature of legal persons (*universitates*). They defined the relationship of the head of the corporation to the members. As the jurists explored and developed a jurisprudence that governed the *universitas*, they created norms that regulated the political life of medieval and early modern society. Perhaps, the most significant norm that they established was "What touches all, ought to be approved by all" (*Quod omnes tangit, ab omnibus approbari debet*).

The few examples so far produced, in very broad strokes, lead to a concluding consideration. There emerges clearly enough from the foregoing pages

the image of a science of law which, at every step of the way—from Roman to early modern times—presents itself as unattached from the other forms of thought. To speak of a philosophy of jurists is precisely to clarify the relationship that jurisprudence clinched with the different endeavours of the mind. As a form of thought bent on action, juristic reflection is led to respond to the stimuli and suggestions coming from different fields of enquiry, however specialized, and to take up their methods. To chart a course for itself, and seize from up close the object against which it is constantly measuring itself, jurisprudence will eagerly welcome any light coming from fields of research close or far removed from it. And the converse is true as well, with movement flowing in the opposite direction. Consider, for example, the legal notions that philosophers from Ockham onward took up to convince themselves of them, notions such as that of ordered and absolute *potestas*, of legal personality, and of principles of majority rule. Consider, too, Jean Bodin's doctrines, how well they resonated with political philosophers. All these things are widely known. Less known—although it is beginning to be discussed in the scholarly literature—is the response that the techniques of reasoning in wide use among jurists is receiving from logicians tout court, or again that the metaphysics of the masters of law stimulated interest among medieval theologians and philosophers.

Of course there is still much work to do in this direction, just as there still remains much to say about the questions treated in this volume, which does not pretend to any exhaustiveness. But the fundamental proposition of this volume should hold up: the assumption that there was a necessary and constant rapport between the science of law and philosophy. This assumption might also be expressed as the essential and irreplaceable historical dimension of law and of the science devoted to it.

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ABBREVIATIONS

Alexander de Hales

HalesGl Magistri Alexandri de Hales *Glossa in quatuor libros Sententiarum Petri Lombardi*

HalesSTh *Doctoris irrefragabilis* Alexandri de Hales *ordinis minorum Summa Theologica*

Augustine of Hippo

DCD S. Aurelii Augustini Hipponensis episcopi *De civitate Dei*

DDQ S. Aurelii Augustini Hipponensis episcopi *De diversis quaestionibus LXXXIII liber unus*

ENPS S. Aurelii Augustini Hipponensis episcopi *Enarratio in Psalmum 109*

Baldus de Ubaldis

QBS *Quaestio Baldi de schismate*

TP Baldi Ubaldi Perusini *Tractatus de pactis*, *cum adnotationibus Benedicti a Vadis Forosemproniensis i.u.d.*

Bartolus of Sassoferrato

TT Bartolus a Saxoferrato, *Tractatus testimoniorum*

BA *Tracta. De alveo do. Bar.*

BSDB *Sermo do. Bartoli in doctoratu Do. Bonaccursii fratris sui*

Bernard of Clairvaux

TID S. Bernardi Abbatis Primi Clarae-Vallensis *Tractatus de interiori domo seu de conscientia aedificanda*

Boethius

BCA An. Manl. Sev. Boetii *In Categorias Aristotelis libri quatuor*

BoeTrin An. Manl. Sev. Boetii *De Trinitate*

BP An. Manl. Sev. Boetii *in Porphyrium dialogi a Victorino translati*

St. Bonaventura

BonHe *Seraphici Doctoris* S. Bonaventurae *Collationes in Hexaëmeron, sive illuminationes Ecclesiae*

BonSCh	*Seraphici Doctoris* S. Bonaventurae *Quaestiones disputatae de scientia Christi, de mysterio SS. Trinitatis, de perfectione evangelica*
BonSent	*Doctoris seraphici* S. Bonaventurae *Commentaria in quatuor libros Sententiarum Magistri Petri Lombardi, II*

Lactantius

LDI	Lucii Caecilii Firmiani Lactantii *Divinarum institutionum liber secundus de origine erroris*

Pseudo-Augustinus

SA	Ps. Augustini *De spiritu et anima liber unus*

Thomas Aquinas

CG	Sancti Thomae de Aquino *Summa contra Gentiles*
ThB	Sancti Thomae de Aquino *super Boetium De Trinitate*
ThC	Sancti Thomae Aquinatis *super Librum de causis expositio*
ThMet	Sancti Thomae Aquinatis *in duodecim libros Metaphysicorum Aristotelis expositio*
ThQP	Sancti Thomae de Aquino *Quaestio disputata de potentia*
ThQV	Sancti Thomae de Aquino *Quaestio disputata de veritate*
ThSeI	Sancti Thomae de Aquino *super Evangelium Iohannis reportatio*
ThSent	Sancti Thomae de Aquino *in libros Sententiarum*
STh	Sancti Thomae de Aquino *Summa Theologiae*
EE	Sancti Thomae de Aquino *De ente et essentia*
ThSS	Sancti Thomae Aquinatis *de substantiis separatis ad fratrem Reginaldum socium suum*

Zabarella, Jacopo

ZTP	Iacobi Zabarellae Patavini *Liber de tribus praecognitis*

Chapter 1

THE ROMAN JURISTS' CONCEPTION OF LAW

*by Peter G. Stein**

1.1. Introduction

The Roman jurists were the first professional legal specialists. They appeared in the second half of the Roman Republic and they were required because of the technicality of the Roman legal process.

The recorded history of Rome begins around the year 500 B.C., when Rome was a small settlement on the left bank of the river Tiber. It was originally governed by kings, who were expelled and replaced by a republic dominated by an aristocracy of well-born families. Government was in the hands of the Senate, a body consisting of the heads of the chief families and former office-holders. The main office-holders were the two consuls, elected annually, who took the place of the expelled kings.

Law for the Romans begins as a set of unwritten customs, passed on orally from one generation to the next, which were regarded as part of their heritage as Romans. These customs applied only to those who were Roman citizens; *ius civile*, civil law, means law for *cives*, citizens. Wherever there was doubt as to the application of these customs, the matter was referred to the college of pontiffs, a body of aristocrats responsible for the maintenance of the state religious cults and the repository of traditional learning in general.

The citizens as a body were divided between the patricians, a relatively small group of wealthy families of noble birth, and the plebeians, numerically larger but disadvantaged in various ways. The pontiffs responsible for interpreting the unwritten law were exclusively patrician and the plebeians naturally suspected that their pronouncements, which did not give reasons for their decisions, were not disinterested. The plebeians wanted the law written down in advance of cases arising, since that would curb the powers of interpretation of the pontiffs. As a result of plebeian agitation a commission was appointed which produced a collection of written legal pronouncements

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* All English translations are by the author unless otherwise indicated. Sections 1.7, 1.10–1.11, 1.13–1.14, reproduce and reframe revised versions of excerpts taken, respectively, from the following essays by P.G. Stein: Equitable Principles in Roman Law, in *Equity in the World's Legal Systems*, ed. R.A. Newman, Brussels, Etablissements Emile Bruylant, 1973; Elegance in Law, *Law Quarterly Review* 77 (1961): 242–56; The Digest Title, *De diversis regulis iuris antiqui*, and the General Principles of Law, in *Essays in Jurisprudence in Honor of Roscoe Pound*, ed. R.A. Newman, Indianapolis, Bobs-Merrill, 1962. There are instances where we have been unable to trace or contact the copyright holder. If notified, the publisher will be pleased to rectify any errors or omissions at the earliest opportunity.

which became known as the Twelve Tables. It was formally proposed to the assembly of all citizens and accepted by them as law. In giving their approval the assembly did not feel that it was making new law in place of old law; rather it was expressing more precisely what had always been, in general terms, the law (*ius*). Now, as the public and authoritative statement of what was *ius*, it became *lex* (from *legere*, to read out) (Stein 1966; Wieacker 1988, 277ff.).

The original text of the Twelve Tables has not survived but its contents have been substantially reconstructed from quotations. They ranged over the whole field of law and included both public law and sacral law as well as private law, with a special emphasis on procedure.

The interpretation of the law, whether it be unwritten *ius* or written *lex*, remained in the hands of the pontiffs (Stein 1995a). They could "interpret" the law in a progressive way, even to produce a new institution unknown to the previous law. An example is the emancipation of children from their father's power. Under traditional customary law the power of a family head over his descendants in his power lasted for life and there was no legal means whereby he could voluntarily sever the relationship. He could exploit his sons by selling them into forced labour and the Twelve Tables contained a provision, apparently aimed at curbing abuse of this power, to the effect that if the father sold the son three times into forced labour, the son was to be free of his father's power. As a result of pontifical interpretation, a father could make three successive "sales" of the son to a friend, who each time released him. After the third sale he was free by virtue of the Twelve Tables rule (Gaius, *Institutes* 1.132).

So far interpretation has used that rule for a purpose different from that originally intended. Formalistic pontifical interpretation, however, went further. The Twelve Tables referred only to sons; doubtless the family head was originally quite unrestricted in his treatment of daughters and grandchildren. Once the rule was understood to refer to voluntary emancipation, it was held to mean that three sales were needed to free sons, but one sale was sufficient for daughters and grandchildren. Legal conservatives would be comforted by the thought that emancipation could be seen as something at least implicit, if not expressed, in the Twelve Tables and therefore not really an innovation (Jolowicz and Nicholas 1972, 88).

1.2. Legal Procedure

In the early republic there were few state officials and in many situations, recognized in the Twelve Tables, the aggrieved citizen was left to pursue his case by self-help. In cases which the parties were unable to settle for themselves, they had to appear before a magistrate. Initially this meeting was to inquire whether the dispute raised an issue which was recognized by the civil law and if so, how it should be decided. Normally the issue was referred to a private citizen, or sometimes a group of citizens, chosen by the parties and magistrate.

This private citizen, known as the *iudex*, presided over the second stage of the action, hearing evidence of the facts, listening to the arguments of the parties, and finally delivering a judgment condemning or absolving the defendant.

While the second stage of the action before the *iudex*, the time-consuming stage, was informal from the beginning, the first stage before the magistrate was originally highly technical; it required the plaintiff to recite a set form of words, and could only be brought on set days. A plaintiff who did not follow the precise wording might lose his claim. Once again it was the pontiffs, as the custodians of the Roman traditions, who were familiar with the details of the wording of these *legis actiones* and the calendar of court days. They were not published until about 300 B.C., when membership of the college of pontiffs was opened to plebeians.

At first the magisterial function fell, like all government business, to the two consuls, but in 367 B.C. a special magistrate, the *praetor*, was established to deal specifically with the administration of justice. About 242 B.C. a second *praetor*, known as the *praetor peregrinus*, was introduced to deal with cases involving *peregrini*, non-citizens, to whom the *ius civile* did not apply. Neither *praetor* had any prior legal training. The *praetor*'s task was to supervise the first stage of a legal action. The task was facilitated by an important change in procedure.

The parties who appeared before the *praetor* were now allowed to express their claims and defences informally in their own words instead of in set forms. Then the *praetor*, having learned from the parties what the issue was, set it out in hypothetical terms in a written document, called a formula. This instructed the *iudex* to condemn the defendant, if he found certain allegations of fact to be proved, and to absolve him, if he did not. The *iudex* derived all his authority from the formula and could only act within its terms.

The *praetor* could grant a formula whenever he felt that the claimant ought to have a remedy. At the beginning of his year of office, the *praetor* published an edict in which he stated the various circumstances in which he was prepared to grant a remedy and appended the appropriate *formulae*. Prospective litigants would consult the edict and could demand as of right any formula promised in it. A defendant who disputed the plaintiff's allegations would not be prejudiced so long as the *iudex* did not believe them to be true.

In the early republic the parties spoke on their own behalf, but now there was a tendency to be represented by advocates. The Roman advocate was not a jurist (Crook 1995). He was professionally trained, to be sure, but in rhetoric, in the art of presenting a case in the most effective way. In both civil and criminal trials, it is not the law but the facts which are most in dispute and trained advocates were much in demand. Only occasionally would an advocate need assistance from a specialist in legal technicalities. He might be asked to explain the legal implications of a formula or advise on which formula was best adapted to the plaintiff's needs.

1.3. The Rise of the Jurists

The secular jurists who took on this advisory role came to prominence in the second century B.C. Their work replaced that of the pontiffs. Unlike the latter, they took personal responsibility for their opinions; they were not paid but hoped to gain prestige, which would help them when they stood for election to public offices. Their main concern was private law and they did not deal with public law or sacral law, or even to any significant extent with criminal law. They came to see themselves as the guardians of the principles and rules on which private property was built. This civil law was conceived as a set of "enduring principles, institutions and rules that remain valid despite personal influence and power. The jurists are the custodians of this law, and to undermine their authority is to weaken law itself" (Frier 1985, 119).

The jurists showed a remarkable ability to isolate private secular law from other types of law. There was a good deal of sacral law in ancient Rome and in the Twelve Tables it is intermingled with secular law. Even at the end of the Republic there were specialist practitioners of sacral law, who paid little attention to secular law, but their writing has not survived. The anonymous pontiffs did not publish their opinions (Schulz 1946, 6ff.), but the new secular jurists, who followed them in giving opinions on the application of the customary or statutory law in individual cases, published them, at first in the form of collections of answers to specific inquiries, including the names of the parties involved. Cicero observes that in the works of two of the earliest secular jurists, Cato and Brutus, a legal opinion was generally accompanied by the parties' names, so that the reader gained the impression that the reason for the dispute was to be found in the character of the parties rather than in the objective circumstances. Thus, since the parties to disputes are innumerable, we are discouraged from learning the law (Cicero, *De Oratore*, 2.142).

Very little juristic writing has survived directly and our main source is the Digest, part of the codification of Roman law carried out under the orders of the Byzantine emperor Justinian in the sixth century A.D. The Digest is an anthology of extracts from juristic writing from republican times until the third century A.D., but with the emphasis on the great synthesizing jurists of the early third century, Paul and Ulpian. It is about one and a half times the size of the Bible, but represents, according to Justinian, only one twentieth of the material with which its compilers began (Mommsen, Krueger, and Watson 1985). Their work took three years to complete, but not only did they have to abbreviate many arguments, but they were instructed to avoid repetitions and eliminate all contradictions. As a result much evidence of disagreement among the jurists has been cut out and the jurists have been made to seem more of the same mind with each other than they were in fact. Apart from the Digest, a second century A.D. students' manual, the *Institutes* of Gaius (Gordon and Robinson 1988) has survived and is an invaluable source.

By the end of the second century B.C. much of private law was covered by juristic opinions, delivered piecemeal, usually in actual cases, but occasionally in hypothetical cases. The next step was to generalize the opinions, and although the material remained Roman, the methods by which it was organized were Greek (Stein 1966, 36). The key step in passing from the accumulation of particular cases to universals is induction (*epagōgē*). This process produces certain propositions, of which the most basic are so-called definitions (*horoi*).

The earliest work to make an attempt at such a process was the *liber horōn* of Quintus Mucius Scaevola, who was consul in 95 B.C. and died in 82. Mucius included in his book both explanations of terms and simple propositions of law. He was fixing the precise limits (*horoi*, *fines*) of legal institutions, which in a more general way had long been familiar. His choice of a Greek word for the title of his work shows that he recognized it as something new and unprecedented in Roman legal literature. It has been attacked as not genuine but there are no real grounds for that idea.

Apart from making definitions, the other Greek dialectical technique used by Mucius was *divisio in genera*, classifying into different types, and he is said by Pomponius (Dig. 1.2.2.41) to be the first to arrange the law in that way, in a work of eighteen books. He identified five *genera* of tutorship. Having divided the civil law into classes, he had to put them into some sort of order. He began with wills, legacies and intestate succession, which together formed about a quarter of the whole work. Succession on death was the key institution of the family, ensuring the transfer of family property from one generation to the next, and was the area of private law in which the bulk of disputes arose. The remaining topics of private law are arranged approximately in the order in which they appear in the Twelve Tables.

Despite Mucius's achievements in defining and classifying the civil law, he did not make it sufficiently scientific to satisfy Cicero. In *De Oratore* 1.190, the latter observed that geometry, astronomy and grammar had all, like law, once consisted of disparate elements, but they had been classified systematically and so could claim to be organized sciences. Cicero seemed to assume that law too was a coherent body of finite rules that were waiting to be identified by a jurist equipped with the requisite training in Greek dialectic. According to Aulus Gellius (*Attic Nights*, 1.22.7), Cicero himself drafted a "civil law reduced to a science" (*ius civile in artem redactum*), but it seems to have made no lasting impact since no trace of it has survived.

1.4. The Arrival of Legal Theory

The earliest theorising about the nature of Roman law was probably inspired by contemporary studies of the character of language (Stein 1971). Some grammarians argued that language derives from convention (*thesis*) and that it was an orderly product, whose elements could be set out systematically.

Nouns and verbs could be classified into declensions and conjugations on the basis of similarities of form, which were known as *analogiae*, and the grammarians who alleged them were called analogists. The opposing school of grammarians, supported by the Stoics, argued that language derives not from convention but from nature and pointed to the large number of exceptions to the regularities identified by the analogists. They denied that language was governed by general principles and asserted the dominance of anomaly. These anomalists asserted the individuality of each word in its flexion.

The Roman antiquarian Varro, in his treatise on the Latin language, discussing the basis of Latinitas, the observance of correct speech in Latin, identifies four basic elements: nature, analogy, custom, and authority (Funaioli 1969, I.289). The republican jurists conceived of law as something given, waiting to be discovered and declared. Mucius's definitions included not only the meaning of terms but also propositions of law, which had been reached by a process of induction. When they began to think about the nature of law and its rules, the jurists frequently used Varro's elements of language, although not always in exactly the same sense as Varro. Custom, *consuetudo*, was an obvious basis of any legal institution which had existed for a long time and could not be traced to a *lex*. Even the remedies set out in the *praetor*'s edict were often said to be based on custom. When there was, exceptionally, a more specific source, such as a statute, the rule would be attributed to authority.

As long as the function of jurisprudence was to describe the existing law, there was no place for analogy. It was only when the jurists became conscious of the fact that law is not outside human control, when they regarded it as capable of being guided in a certain direction, that the method of induction, generalising from a number of similar cases, was seen to be inadequate. The propositions are now intended to persuade rather than merely to demonstrate. It is at this point that legal analogy makes its appearance in juristic reasoning.

It seems likely that it was the jurist Labeo, at the time of the emperor Augustus, who introduced analogy into legal discourse, along with other innovations (*plurima innovare instituit*; Pomponius, Dig. 1.2.2.47). Labeo was known to be an expert grammarian and he tended to be an analogist in matters of language. Aulus Gellius, 13.10.1, tells us that he was well-versed in the origins and principles (*rationes*) of Latin words and used that knowledge to solve knotty points of law. It was the mark of the analogist to seek the *ratio* which lay behind similar word forms and then apply that *ratio* to cases of doubtful language, and Labeo followed that technique in law.

There are several examples of reasoning by analogy in Labeo's work, and such reasoning is not found in the writings of his predecessors. They asserted what they understood to be the law, whereas Labeo was prepared to argue in favour of a particular conclusion. One of his principal works was entitled *Pithana*, which means Conjectures or Probabilities.

Another of Labeo's innovations was the use of the term *regula* in place of *definitio*. *Regula* (and its Greek equivalent *kanōn*) had superseded *analogia* in grammatical discourse to describe the rules of inflection. There was a subtle difference between *regula* and *definitio*. A *definitio iuris*, as understood by Mucius, was essentially descriptive. A *regula iuris* went further; it was a normative proposition which governed all the situations which fell under its *ratio* or underlying principle. It looked to the future as much as to the past.

There are traces of a later controversy over the nature of legal rules, based on the distinction between *definitio* and *regula* (Stein 1966, 67ff.). This question is expanded upon in Sections 1.13 and 1.14 of this chapter.

1.5. Jurist-law

Jurist-law, the law developed by legal experts, became established in the last century of the Republic. Its characteristics may be summarised as follows: first, there was a continuous succession of individuals, all dedicated to the civil law, in the sense of private law, and all building on the work of their predecessors; secondly, they were intimately concerned with the day to day practice of the law; thirdly, they enjoyed freedom to express their opinions; and fourthly, they alone had a comprehensive knowledge of the civil law (Schiller 1958 and 1968). The *praetor* held office for one year only; the *iudex* was concerned only with the case in which he had been chosen to preside; the advocates tended to despise a concentration on legal niceties. Specialist legal knowledge was the exclusive preserve of the jurists.

The jurists expressed their views in *responsa*, answers to specific legal problems which had been submitted to them, and collections of their *responsa* were the main early form of legal literature. They had neither the opportunity nor, it seems, the inclination to speculate about the nature of law and its relation to society. Legal philosophy was something that in general they left to the Greeks. "There is no attempt to elaborate a philosophy of law and the Roman Jurists owe their fame to their success in solving practical problems. Though they might not be able to define the concepts with which jurisprudence must work, those concepts were present to their minds in sufficient numbers and with sufficient clarity for their practical purposes" (Jolowicz and Nicholas 1972, 374–5).

1.6. The *Ius gentium*

It has been noted that a separate *praetor* was introduced to exercise jurisdiction over non-citizens, to whom the civil law did not apply. After Rome acquired provinces, whose residents did not become Roman citizens, the number of non-citizens increased and the problems of dealing with their legal disputes became acute. The peregrine *praetor* issued edicts, as did also provin-

cial governors in respect of their provinces, in which they promised remedies to non-citzens, which tended to be based on the civil law, stripped of its technicalities.

The rules that grew up to deal with the problems of non-citizens came to be seen as applying to all nations (Jolowicz and Nicholas 1972, 102ff.). Law common to all mankind must be part of Roman law and so Roman law was now seen as made up of two elements, the *ius civile*, which applied exclusively to citizens and the *ius gentium*, which applied both to citizens and to non-citizens. This is *ius gentium* in the "practical" sense, and several established institutions of civil law were now recognized by the jurists to be part of the *ius gentium*. For example, all specific contracts which were informally created, whether by the delivery of a thing or by consent of the parties alone, were now classified as belonging to the *ius gentium*.

There was at this stage a tendency to merge this practical sense of *ius gentium* with a theoretical sense, derived from Greek philosophy. In the *Nicomachean Ethics* (5.7.1), Aristotle distinguished between law which was natural, which was the same everywhere and was universally valid, and law which was man-made, which applied only to a particular state and dealt with matters on which Nature was indifferent (Cicero, *De Officiis*, 3.69; Gaius, *Institutes*, 1.1).

The jurists generally adopted the identification of *ius gentium* with natural law and used the two terms indiscriminately. There was one case, however, in which the two ideas could not be seen as the same and that was slavery. Slavery was universally recognized in antiquity and, being common to all peoples, was clearly part of the *ius gentium*, but many thinkers, other than Aristotle, considered that by nature man was free and therefore slavery could not be part of the law of nature (Justinian, *Institutes*, 1.2.2).

Although the majority of jurists held to the dichotomy between *ius gentium* (equated with *ius naturale*) and *ius civile*, there is one influential text, attributed to the early third century jurist Ulpian, which states that the law of nature is what the natural instincts of men and animals lay down (Dig. 1.1.1.2,3 = Inst. 1.1.4), and therefore distinguishable from the dictates of man's natural reason.

1.7. Equity from *Ius honorarium* to the Postclassical Age

It was through the jurisdiction of the *praetor peregrinus* that the ideas of the *ius gentium* were first introduced into Roman Law. The process was facilitated when, towards the end of the second century B.C., the flexible formulary procedure, which was devised for the peregrine *praetor*'s court, was made available also in cases in which both parties were citizens. Such cases came within the jurisdiction of his colleague, the urban *praetor*, and had previously been dealt with by a rigid procedure—that of the *legis actio*—in which the role of the magistrate was severely limited by custom and the only initiative

open to him was to deny an action to an unmeritorious suitor by refusing to co-operate in carrying out the procedural forms (*denegatio actionis*).

The formulary procedure, on the other hand, conferred a wide discretion on the *praetor* to grant remedies when he thought it appropriate to do so, and he thus became the instrument for the introduction of equitable notions.[1] As in the *legis actio* procedure, every action was divided into two stages, the first *in iure*, at which the issue was settled in the presence of the *praetor*, and the second *apud iudicem*, at which proof was made before a private citizen chosen by the parties for the purpose and the issue decided by him. In the formulary procedure, once the parties had settled precisely what was the issue between them, it was set out by the *praetor* in a written document, the *formula*, addressed to the *iudex*. The *formula* was always expressed in hypothetical terms: If it appears to you ..., condemn, if it does not appear, absolve. The *praetor* could grant such a formula even though there was no precedent or specific legal authority for giving a remedy in the particular circumstances. He usually exercised this power on the advice of jurists, because he himself normally was not a lawyer and might only be associated with the administration of justice for his one year of office. Thus, though the constitutional agent of legal development was the *praetor*, his activities were in practice controlled and inspired by the professional lawyers. The *praetor* stated what remedies he was prepared to give in an edict, published when he took up office, and normally he would take over most of the remedies promised in his predecessor's edict. The law which came into being as a result of the remedies promised in the praetorian edict was known as *ius honorarium* in contrast to the civil law to be found in custom and statute.

The function of the *ius honorarium*, said the jurist Papinian, was to aid, supplement, or correct the civil law (Dig. 1.1.7.1; cf. Jolowicz 1952, 98). It aided by offering more convenient remedies to persons who already held rights of action at civil law, such as the interdict by which an heir at civil law could obtain possession of the deceased's goods. It supplemented by granting remedies to persons who did not have rights of action at civil law. For example the law of succession did not recognize any claim in the widow of a man who died intestate, leaving no children or other blood relations (since she was strictly not in his family). The *praetor* allowed her to claim the deceased's property, although she was not and could not be called his heir. Again, the statute dealing with damage to property (the *lex Aquilia*) gave an action for damages to the owner. The *praetor* gave an action in similar circumstances to one who was not owner, but who had an interest in the safety of the thing, such as a *bona fide possessor* or pledge-creditor. Finally the *ius honorarium* corrected the civil law by giving a person a remedy, where someone else was entitled at civil

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[1] For comparison between the Roman *praetor* and the English chancellor, cf. Buckland 1939.

law, because the praetor considered his grantee more worthy of protection. An example was the person nominated heir in a will which failed to satisfy the formalities required by the civil law but which was recognised by the *praetor*.

The remedies promised by the praetor included not only actions, but also defences, *exceptiones*, to actions brought by others and orders of *restitutio in integrum*. The latter had the effect of annulling the result of some transaction which the *praetor* considered inequitable by restoring the party prejudiced by the transaction to his original position, notwithstanding that the transaction in question had complied with the law. If the *praetor* had used this power of ordering *restitutio in integrum* too enthusiastically, he would have undermined public confidence in the law and its forms. It is a testimony to his restraint that the power was only exercised in certain classes of cases and then only after the praetor himself had investigated the circumstances and satisfied himself of the truth of the complainant's allegations (*causa cognita*).

The formulary procedure applied throughout the classical period of Roman law (roughly the first two centuries A.D.) so that apart from such exceptional cases, the magistrate under classical law did not hear evidence or argument on the facts but confined himself to settling the terms of the formula by which the *iudex* was authorised to adjudicate. In the postclassical period, however, this procedure was superseded by the *cognitio* procedure, in which a judge, who was a salaried imperial official, conducted the whole case both deciding the legal issues and hearing the evidence. Whereas most of the equitable principles in Roman law were introduced through the praetorian edict, some applications of equity can be traced to resolutions of the senate during the principate or to imperial constitutions. The rulings found in the sixth century *Corpus Iuris* of Justinian thus date from various stages in the development of the law.

Although the postclassical legal texts are replete with references to equity, they have little to do with the equitable principles, mentioned earlier, which gave form and structure to the classical law. Such appeals to equity were usually aimed at ensuring that the rules of classical law should not be applied if the results would be unpleasant, despite the cost of the uncertainty thereby generated. The strength of the classical law was, in part at least, due to the jurists' recognition of the limitations of law, and of the fact that, although the scope of rules can be extended or narrowed, all possible cases cannot be foreseen in advance and that the need for legal certainty may occasionally produce hard cases. The classical jurists recognised the equitable principles which have been mentioned, and they incorporated equitable standards in the formulation of certain rules, thus taking advantage of the practical experience of the world enjoyed by the *iudices* who applied them. By the beginning of the third century A.D., when Roman law was set forth in the great synthesising works of Paul and Ulpian, the jurists probably realised that there was little more that they could do by way of introducing fresh equitable principles or standards

into Roman law. They knew when to call a halt; and that is one of the reasons why we call their law classical.

1.8. The Proculians and the Sabinians

At the beginning of the Principate there were two opposing schools among the Roman jurists, the Proculians, who were founded by Labeo but took their name from their second leader Proculus, and the Sabinians, founded by Capito who took their name from Capito's successor Sabinus. There is little consensus among scholars as to the basis of their disagreements, but recently there has been a tendency to see it as a difference of method (Stein 1972; Liebs 1976; Falchi 1981). In the present writer's view, the Proculians pressed for more rationalism in law, for a coherent set of rules and greater use of logic in the application of those rules, and for remedies with precisely defined limits. The Sabinians, on the other hand, rejected too much precision and logic and concentrated on achieving satisfactory solutions in individual cases.

For example, there was a famous school dispute over whether in a contract of sale, the price had to be in money, or whether barter, the exchange of one thing for another, could be treated as a form of sale (Gaius, *Institutes*, III.141; Dig. 18.1.1.1). Sabinus held that barter and sale were the same contract, basing his view on ancient custom and authorities such as Homer who had used the Greek word for sale to describe what was clearly a barter. Sabinus' argument seems to have been that if, in daily life, ordinary people had traditionally treated barter and sale as one transaction, the law would be unnecessarily artificial if it treated them differently. Proculus argued that the two transactions were distinct. The law imposed certain duties on the seller and other duties on the buyer and these duties were enforced by separate actions with distinct *formulae*. In barter it was usually impossible to distinguish between seller and buyer, since both parties fulfilled both roles at the same time. Therefore neither the seller's action nor the buyer's action applied to barter and the *praetor* had to grant special actions with *formulae* setting out the facts.

In cases involving a written text, whether it was the text of a statute, a procedural formula, a private contract or a testamentary document, the Proculians consistently advocated a strict objective interpretation of the words of the text, whatever may have been the intention of its author, and whatever the consequences. The same words should be understood in the same way in whatever context they occur. By contrast, the Sabinians favoured a less rigid approach to textual interpretation, more in line with what was intended by the author.

When asked to interpret the terms of a legacy in a will, Sabinus did not look for the objective meaning of the words used by the testator but rather at what the testator intended. Thus, for Sabinus, the same expression could

mean one thing in one will and something different in another will. A term was understood by one testator as a broad category and by another as a limited one. What mattered was not consistency but finding a reasonable solution to a particular problem. The law of delicts provides a useful area to see the attitudes of the two schools in action (Stein 1982).

Theft (*furtum*) was part of the traditional customary law and, although it was regulated by the Twelve Tables, there was no statutory definition of it. During the Republic the notion of theft was gradually expanded to the extent that the jurists were recommending the grant of the victim's remedy, the *actio furti*, for any dishonest interference with another's property, even if the thing "stolen" was not moved. Indeed it has been well said, "with the single word *furtum* to interpret, the lawyers had a free hand and there is probably no other institution in which the shaping hand of the jurist, untrammeled by legislation, is so evident as it is here" (Buckland 1931, 327).

Labeo was critical of some of the wide extensions of the notion of theft urged by the republican jurists. In his view criteria had to be established to define the limits of the *actio furti*, and to distinguish between theft, fraud, and damage to property. If a man waves a red rag at an animal to make it run away, is that theft? Labeo held that, if he did it in order that the beast should be taken by thieves, then the *actio furti* should be given against the rag-waver. If, however, the act, although deliberate, was part of a silly game (*ludus perniciosus*), then it was not theft, and the praetor should grant an action in *factum*, based on the specific facts. In Labeo's view, for theft it must be shown that the thief intended the thing to be taken by someone other than the owner, whether the original thief or a third party (Dig. 47.2.50.4).

Sabinus was reluctant to limit the broad scope of theft laid down by the republican jurists. Most jurists thought that theft was confined to moveables, Sabinus held that a tenant farmer who sold the land that he was renting, committed theft against the land-owner (Aulus Gellius, *Attic Nights*, 11.18.13). Indeed, unlike Labeo, Sabinus did not even seem to require actual subjective dishonesty on the part of the thief, since he asserted that "anyone commits theft who has handled another's thing, when he ought to know that he does so against the owner's will" (Aulus Gellius, *Attic Nights*, 11.18.20).

Damage to property was governed by a statute of the third century B.C., the *lex Aquilia*, and in interpreting it the jurists were limited by the words of the statutory text. The first chapter gave an action to the owner of a slave or larger animal against anyone who had killed it without justification, allowing a claim for the highest value in the previous year. The word for kill was *occidere* (from *caedere*, to cut). Labeo, as has already been noted, was an expert on etymology and held that *occidere* covered only killing by violence and with a weapon. So, where a midwife gave a slave woman a drug which the slave took, consumed and then died, Labeo argued that the action under the statute did not lie and that the praetor should grant an *actio in factum*, specifying the

facts which the plaintiff had to prove (Dig. 9.2.9 pr.). The *actio in factum* was not subject to certain procedural limitations of the statutory action and offered the defendant more scope to deny liability.

Sabinus took a more relaxed view of statutory interpretation than did Labeo. The third chapter of the *lex Aquilia*, which dealt with damage to a thing, imposed a penalty based on its value in the nearest month. Sabinus argued that, since Chapter 1 referred to the "highest," Chapter 3 should be understood as if it too contained that word, even though it did not. His explanation was rather lame, viz., that the legislator must have considered it sufficient to use the word in regard to the penalty in Chapter 1 (Gaius, *Institutes*, 3.218) and took no account of the possibility that the legislator intended a different assessment of value in the two chapters.

1.9. Unwritten Law

In cases which did not involve the interpretation of a fixed text, the Proculians tended to assume that the law was based on certain basic principles, which they sought to apply even when the cases could be distinguished on the facts. Most lawyers probably distinguished between theft and damage to property on the ground that one was derived from ancient custom and the other from a statute. Labeo noted that they were both civil wrongs and that liability should be governed by similar principles in both cases. Where damage to property was caused by a child under seven years of age, who did not understand what he was doing, Labeo held that there was no liability. Where, however, the damage was caused by a child over seven, an *impubes*, there was liability, because, says Labeo, an *impubes* was liable for theft (Dig. 9.2.5.2). It would be irrational to have different principles of liability for the two delicts of theft and damage to property and the law must be rational.

The Proculians applied the criterion of rationality even between different fields of law. They observed that there was no essential difference between the duty of an heir to deliver to a legatee what had been bequeathed to the legatee in a will and the duty of a promisor under the formal contract of stipulation to deliver what he had promised. Where the testator had made the legacy subject to an impossible condition, the Sabinians held that the heir was bound to deliver it as if it had been given unconditionally. The Proculians, on the other hand, noted that a promise by stipulation which was subject to an impossible condition was regarded as void and that there was no justifiable reason to treat legacy differently from stipulation. Gaius, *Institutes*, III.98, who reports the dispute, was himself a Sabinian but had to admit that there was no rational basis for making a distinction between the two cases.

On occasion the Proculians were able to rely on rationality to reach a more liberal decision than that favoured by their opponents. Roman wills were only valid if they instituted an heir to the testator's estate and normally therefore

the institution was the first clause in the will. It was generally agreed that the grant of a legacy or the manumission of a slave, which was written before the institution of the heir, was void. The Sabinians argued that the same rule must also be applied to the nomination of a guardian for the testator's children, which preceded the institution. The Proculians responded by asking what was the reason for making void a legacy or manumission which preceded the institution and found that they both reduced the amount of the residuary estate that went to the heir. Thus it was logical that they should appear in the will after the institution of the heir. But this reason did not apply to the nomination of a guardian and so, in the Proculian view, such a nomination was valid even when it preceded the institution (Gaius, *Institutes*, 2.231).

In situations in which the Proculians applied the criterion of reason, the Sabinians preferred to rely on past practice and authoritative precedents. Sabinus is said to have continually approved the opinions of the republican jurists (Dig. 12.5.6) and Aulus Gellius (*Attic Nights*, 5.19.3) notes that he was concerned that the antiquity of the law should be maintained. The Sabinians were prepared to tolerate with equanimity a certain level of irrationality in the law. As Javolenus, a Sabinian, put it, "Labeo's opinion has reason in its favour but the rule that we follow is this" (Dig. 40.7.39.4).

The dispute over the age of puberty exemplifies the two contrasting approaches. An adolescent acquired legal capacity when he attained puberty, but, as the Sabinians observed, physical development varies from one adolescent to another. In their view, legal capacity must also vary, and in the case of an impotent person, the normal age will be applied. The Proculians replied that the need for certainty in the law required that there be one age for legal capacity for everyone and that for a young man it should be fourteen years, irrespective of his physical development. The Proculian view prevailed.

Where there was no previous practice to rely on, the Sabinians referred to "the nature of things," by which they implied that the decision they favoured should be obvious to everyone and therefore need no specific justification. The texts suggest that it was Sabinus who introduced the term "natural reason" (*naturalis ratio*) into legal discourse with the meaning of common sense (Stein 1974). The term occurs in non-legal texts to counter supernatural explanations suggested for unusual events and assert that they occur rather "in a natural way." In law it was intended to be a counterweight to what Sabinus regarded as the over-legalistic type of reasoning, characteristic of the Proculians, and known as *civilis ratio*. As with the English phrase "it stands to reason," there was the clear indication that the conclusion was self-evident and that no specific argument was required to justify the conclusion.

The dispute over specification, where *A* makes a new thing out of material belonging to *B*, is an example (Gaius, *Institutes*, 2.79; Dig. 41.1.7.7). The Proculians held that the new thing belonged to *A*, the maker; the Sabinians that it belonged to *B*, the owner of the material (Wieacker 1954). The differ-

ence of opinion has sometimes been attributed to a difference in philosophical approach. Aristotelians would have said that the maker of the thing gave it its form, whereas the Stoics, emphasizing its nature, would have said that its substance was the material of which it was made. Probably the Proculians' decision was the result of their insistence that the plaintiff in the *vindicatio* action, by which one claimed ownership of a thing, had to give a precise description of what he was claiming. If the description had changed, the owner of the material, *B*, could no longer claim it by its former description; the new thing never belonged to *B*. So it must belong to its maker, *A*. The Sabinians held that "natural reason" dictated that the owner of the material be owner of the thing made from it. A thing is a thing, even when its form is changed and purely legal reasoning cannot alter nature.

Similar arguments were deployed in a dispute over the ownership of a large rock, embedded in the ground, partly on *A*'s land and partly on *B*'s land. As long as it is in the ground, it is part of the ground, and *A* and *B* each own the part of the rock which lies on their side of the boundary. But what is the position when the rock is removed from the ground? The case is reported in two texts, both from the jurist Paul (Dig. 10.3.19 pr. and Dig. 17.2.83), which show signs of abbreviation. The latter text states that natural reason indicates that *A* and *B* each retain the same part of the rock after its removal from the ground as they had before; it is common sense that ownership cannot be affected merely by removing it from the ground. However, the decision in both texts, as they stand, is that once the rock is out of the ground, it is owned by *A* and *B* in common in undivided shares, which bear the same relation to each other as their former separate portions, a practical solution to the problem.

The Proculians consistently championed rationality, and the Sabinians countered with a variety of arguments, precedents, natural reason and later "general convenience" (*utilitas communis*). Neratius and Celsus were both leaders of the Proculian school in the late first and early second century. Neratius was a traditionalist who required the law to be precise and certain, *ius finitum* (Dig. 22.6.2), whereas Celsus was more pragmatic and more inclined to take into account ethical considerations (Scarano Ussani 1989). At the beginning of the second century A.D, Salvius Julianus remarked that "in innumerable cases it can be proved that rulings have been accepted by the civil law contrary to logic for general convenience" (Dig. 9.2.51.2). As an example, he cited the case where several persons, intending to steal, carry off a timber beam, belonging to another, which (was so heavy that) none of them could have carried it off by himself. They are all liable for theft, although by subtle reasoning (*subtili ratione*) it could be argued that none of them is liable, because no one person actually removed the beam.

The contrasting attitudes of the schools grew less marked in the second half of the second century and then disappeared. The leading jurists of the early third century seem to combine in their work elements of the thought of

both schools. Indeed part of the attraction of later classical law may be traced to the combination of rational thought with traditional attitudes which characterize many of its main exponents.

Almost without exception and whatever their sympathies in the Proculian-Sabinian debate, the jurists lay great stress on authority, in that they rely on the *auctoritas* of a previous writer as an argument for its correctness. Cicero ridiculed the cult of authority but recognized its force. The jurists were not obliged to follow each other's views; but to a degree they were absolved from providing reasoned arguments when they could quote an eminent name on their side, and certain emperors attempted to improve consistency in the giving of legal opinions by laying down that where the opinions of earlier writers were agreed on a particular line, a *iudex* had a duty to follow that line.

1.10. Elegance in Language and Law

A particular feature of classical writing is a predilection for elegance (Stein 1961). The notion of elegance for many people today has degenerated into an advertiser's catchphrase, intended to connote that gracious living to which civilised people should aspire. In the context of the law elegance is a more precise idea, but even in this limited field it is susceptible of a number of meanings.

Etymologically, elegance is connected with *eligere*, to choose, and essentially it suggests choice, a discriminating choice, choice governed by a nicety of feeling. The attribution of elegance is thus to some extent bound to be a relative matter, partly dependent on trends in fashion and on individual taste.

Elegance in legal contexts is treated most frequently in discussions of Roman and Civil law and so we will begin with the Roman notion of *elegantia*. Sir Henry Maine, in a well-known passage in *Ancient Law*, described the Roman jurisconsults as surrendering themselves to their "sense of simplicity and harmony—of what they significantly termed 'elegance'" (Maine 1935, chap. 4, 65). As a result of Maine's dictum, elegance is generally accounted a characteristic mark of the classical jurists. They were certainly familiar with the notion themselves. Although they never use the word *elegantia*, the adverb *eleganter* appears in the Digest forty-six times.[2] But it may be questioned whether the jurists' own idea of elegance is best described as simplicity and harmony.

The jurists did not invent the idea of *elegantia*. It was already current in the schools of rhetoric (cf. Ernesti 1797, s.v. "Elegantia," 143), where it was considered to be one of the characteristics of a good style. (It was connected with the Greek *eklogē onomatōn*, choice of words.) The *Auctor ad Herrenium* (4.12) explains that *elegantia* is the expression of each topic *pure et aperte*,

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[2] The passages are collected together in Radin 1930.

and it has two aspects, first, *Latinitas*, the correct use of language, and secondly, *explanatio*. *Explanatio* is what makes the language plain and intelligible, *quae reddat apertam et dilucidam orationem*. This clarity and intelligibility is achieved by the use of *usitata verba* and *propria verba*, *usitata verba* being terms current in everyday speech, *propria verba*, terms peculiar to the subject-matter of the discourse, used in their technical meaning. Thus the rhetorician thought of *elegantia* as clarity and correct choice of words with avoidance of mere emotional appeal. It was language directed at the mind rather than at the heart.

Rhetoric was the main training of the orators who did the actual pleading in Roman courts. So the elegant advocate at Rome was advised to avoid the exotic and ornamental in his choice of expressions, and rather seek to project his own personality through ordinary words properly used.

This precise and accurate use of ordinary language was not enough in itself to win cases. Where there is no emotional language to attract the jury, more attention has to be paid to the argument. For success in advocacy, therefore, elegance of language must be supplemented by elegance of reasoning. Cicero recognised that, as well as the *elegantia* of style, there was a kind of *elegantia* which consisted in *subtiliter disputare* (*Brutus*, c. 22–3; *Pro Plancio*, c. 58). He associated this subtle reasoning especially with the legal way of thinking at its best. When he wanted to compliment the jurist Servius Sulpicius, he spoke of his *subtilitas et elegantia* (*Epistolae ad diversos*, IV, 4).

The jurists themselves learned both these ideas of *elegantia* as schoolboys, but in their own writings they gave the notion a particular twist. In view of the connection between the rhetoricians' notion of *elegantia* and everyday language, it is significant that in the earliest recorded reference to *elegans* by a jurist (Dig. 45.1.137.7, Venuleius lib. i stipulationum; Sciascia 1948, 376), *elegans* is coupled with *usitatus*—this being in fact the only occasion when it, or *eleganter*, is found with another epithet in legal writings. The jurist in question was Labeo, who says that if we stipulate for something to be done, it is both more usual and more elegant to add a penalty in case the promise is not fulfilled. Labeo then quotes the various formulation of the penalty, "if it shall not be done so," "if it shall be done contrary to this," and so on. Although, as Labeo notes, it had become the practice to add a penalty clause of this kind, it was not necessary for the efficacy of the stipulation. But the addition of such a clause reinforced the obligation, saved the promisee the trouble of proving his interest, and allowed him to bring the *condictio certi* in place of the *actio ex stipulatu*. Such a penalty clause involved only the addition of a few everyday words to the stipulation; and it was functional in that it enabled the obligation to be enforced more efficiently. Thus it was elegant in substance.

In the majority of cases, elegance to the jurists was not a matter of words but of ideas. An opinion was elegant if it combined simplicity of application with an awareness of the realities of the situation. For example, where a

debtor who owed money to his creditor on several accounts made a payment, could the creditor appropriate it to any of the debts? Julian (Dig. 46.3.103; Sciascia 1948, 383; cf. Dig. 46.3.8) considered that the payment could be credited against any debt which the debtor could have been compelled to pay at the time when he made the payment. This sensible solution appeared to Marcian to be very elegant.

To a certain extent what was elegant to a Roman jurist was a matter of individual judgment. A jurist who was particularly fond of using the term *eleganter* was Ulpian. No less than forty of the forty-six texts in which it appears are his. In a few of these cases, admittedly, he means little more than that he approves of the ruling which he dubs elegant. Thus, in discussing legacies, he raises the question whether the bequest of a library (*biblioteca*) covers merely the shelves and fittings or includes the books as well (Dig. 32.52.7). Nerva said that it depends on the intention of the testator, a somewhat trite remark which Ulpian rather surprisingly qualifies as elegant. In this instance, Ulpian can have meant little more than good. It is worth noting that Ulpian is also responsible for eleven out of the fifteen texts in which *belle* or *bellissime* describes a juristic opinion.

Even a cursory examination of the texts, however, shows that in most cases Ulpian meant something rather more precise by the word *eleganter*.

Sometimes he used it in the standard rhetorical sense to describe a felicitous expression. Provincial governors were not obliged to refuse all gifts which were offered to them, but they were not to accept an excessive amount. The notion was relatively simple, but it was not easy to find the formula which would adequately express it. An imperial rescript (Dig. 1.16.6.3) of Severus and Caracalla put it this way: "There is an old Greek proverb: 'not everything, nor everyday, nor from everybody.' It is quite uncivil (*inhumanum*) to accept gifts from no-one, but equally it is most sordid to be greedy for everything." Ulpian says this opinion was given *elegantissime*. His reason was not merely that it emanated from the imperial chancellery but that it struck exactly the right note. By its reference to a familiar proverb it conveyed more aptly than an elaborate formula would have done that the true test was reasonableness. Its form thus made it an elegant opinion.

More frequently, Ulpian uses *eleganter* to characterise acuteness of thought as shown by the ability to transcend traditional categories. The jurist Pedius (Dig. 2.14.1.3) observed that despite the various ways in which a contract could be made, there was no contract which did not have in itself a *conventio*, an agreement. Ulpian called the statement elegant. Here the elegance consisted in discerning the constant element which marked all the divers Roman contracts (Philonenko 1956, 516). This is elegance of reasoning, but reasoning leading to synthesis, to system.

1.11. The Aesthetics of Juristic Reasoning

The most characteristic form of Roman juristic elegance was displayed in the discussion of cases. When a husband and wife had been divorced, the ex-wife sometimes had to sue the ex-husband for the recovery of her dowry. In such an action the ex-husband was entitled to the *beneficium competentiae*, i.e., judgment could be given against him only up to an amount that he was able to pay. Suppose, says Pomponius (Dig. 24.3.14.1), that the husband had previously agreed that he should be able to be condemned in full—to waive the *beneficium*—would such an agreement have any effect? Pomponius thinks not, because it is surely *contra bonos mores* in that it conflicts with the respect which a wife ought to show her husband. A most proper decision, but the interesting point is that what Ulpian finds elegant in this case is not Pomponius' decision but the question itself. By putting that case, the jurist gave his readers a new insight into the scope and purpose of the rule.

A question or a distinction is elegant when it pinpoints in a dramatic or subtle way the exact limits of a rule, or when it shows by a nicely chosen example that a rule is not as tidy as it seems.

A jurist whom Ulpian held in special regard as his work was marked by an off-beat elegance touched occasionally with mischief, was Celsus (see Roby 1884, CLXff.). My remaining examples of juristic elegance will be his.

If the parties to a dispute agree to submit it to an arbitrator, they are bound under penalty to attend the arbitration (Dig. 4.8.21.11; Sciascia 1948, 384). If the parties themselves have not indicated the place of the arbitration, the arbitrator has power to summon them to a convenient place. But if he orders them to convene in a low spot such as a tavern or brothel, Vivianus holds that he can be disobeyed with impunity. Celsus now enters the debate. Suppose, he says, the place designated by the arbitrator is one at which one of the parties could appear without loss of face, but not the other. The party who could have come without disgracing himself fails to turn up, while the other, steeling himself to withstand the ignominious circumstances, does appear. Can the latter then collect the penalty on the ground of the first party's non-appearance? Celsus says, no. It would be absurd that the order should be good when applied to one of the parties and not to the other. The particular case thus neatly indicates the basis and scope of the rule, and so Ulpian describes Celsus' contribution to the debate as elegant. There Celsus' elegance was constructive. It was not always so.

In *negotiorum gestio* (unauthorised act of administration on behalf of another), the rule enunciated by Labeo (Dig. 3.5.9(10).1; Sciascia 1948, 384, note 19) is that the *gestor* can claim his expenses if he has acted *utiliter*, beneficially, even though ultimately his act produced no lasting result. So if he has repaired a house which was in danger of falling down, he was acting *utiliter*, and the fact that the house is later destroyed by fire will not deprive him of his

action for expenses. Proculus qualifies Labeo's statement as being too wide. There may, he says, be cases where a man has acted *utiliter* but does not have the action. For example, if the *gestor* has repaired a house which the owner had already abandoned, to allow the *gestor* an action would lay an unfair burden on the owner. This opinion is then "elegantly" ridiculed by Celsus, who shows that in Proculus' example the requirement of *utilitas* was lacking. To repair a house which the owner has already abandoned is to do something that is not beneficial even at the time when it is done. Thus Labeo's principle can be upheld without modification.

Even in Ulpian's plain account, some of Celsus' delight in tripping up the great Proculus comes through. Celsus hated anything that suggested loose or sloppy thinking. He once remarked[3] of a certain problem that it depended on *bonum et aequum*—a category, he said, in which as a rule disastrous mistakes are made in the name of jurisprudence.

It was Celsus who was responsible for the most famous of all elegant remarks in Roman law—the definition with which Justinian begins the Digest (Dig. 1.1.1 pr.): *Ius est ars boni et aequi*. Fritz Schulz (1946, 136) dismissed this as "an empty rhetorical phrase." But in view of the Roman jurists' well-known reluctance to coin definitions and the fact that this is the only definition of law they have left us, it is worth looking at it more closely. It is not really as vague as it at first appears to modern ears.

In the first place, *bonum et aequum* does not refer merely to a nebulous notion of justice. The peregrine praetor by the use of such notions as *bona fides* gradually built up a body of rules based on *aequitas*. *Aequitas* here connotes a social ethic derived from the common recurring experience of human life and from common moral feeling. *Bonum et aequum* is thus the material out of which law, *ius*, is made. The relationship between the two may be used either because the law is defective—too narrow in its formulation—or because social circumstances have changed and the law has not changed with them.

Secondly, *ars* should not be translated "art," but rather "craft" or "systematic technique"—it is the Greek *tekhnē*. In his definition, Celsus showed that he saw the jurist as a craftsman, whose function was to integrate the law and keep it in line with social conditions. By its crisp, epigrammatic formulation, the definition is elegant in the rhetorical sense. It has that *elegans et absoluta brevitas* which Caecilius (Aulus Gellius, *Attic Nights*, 20.1.4; Marouzeau 1959, 435) admired in the Twelve Tables. But its substance must also have given Celsus' contemporaries cause for speculation as to their role in society. It presented their vocation in a new light, and it was as much a product of Celsus' acute appreciation of realities as his most subtle legal rulings.

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[3] Dig. 45.1.91.3, *Paulus*, *lib. xvii ad Plautium*, where Celsus is described as *adulescens* when he gave the opinion.

Elegance for the Roman jurist meant the technical mastery of the substance of the law, manifested without any apparent effort or ostentation and directed towards improving the working of the law. Such an effortless demonstration of professional expertise produces an aesthetic satisfaction in those who know enough about the subject to appreciate its quality.

The Roman jurists experienced this aesthetic pleasure. It was stronger in some, like Ulpian, than in others; but it was general. Radin (1930, 323) is puzzled because we never find Paul using the word *eleganter* in spite of the large number of excerpts from his works in the Digest. He overlooked the fact that Paul three times (Dig. 35.1.81; 46.3.8; 50.16.25.1.) qualifies an opinion by *non ineleganter*. Paul was less calm and detached and also more subtle than Ulpian. He himself excelled in just those ingenious points which Ulpian found so elegant, and he was, perhaps, less impressed by that quality in others. But he was nonetheless aware of it.

The elegance of the jurists is not the only form of elegance associated with Roman law. There is also the elegance of the legislator (Philonenko 1956, 522ff.). Gaius (Inst. I. 84–85), discussing the legal position of children born of parents of differing status, says that by the rule of the *ius gentium* the child follows the status of the mother, but that in particular cases that rule has been altered by legislation. Thus by the S.C. Claudianum, if a free Roman woman cohabited with somebody else's slave with the owner's consent, she herself remained free, but her children were slaves. The Emperor Hadrian, moved, says Gaius, by the inelegance of the law, *inelegantia iuris motus*, restored the rule of the *ius gentium* (Hoetink 1959, 153). Again, where the anomalous result of legislative interference with the *ius gentium* was that the children of a certain type of union were free if they were boys, but slaves if they were girls, Vespasian was similarly said to be *inelegantia iuris motus*. He therefore restored the rule of the *ius gentium*, so that the children were thereafter slaves in every case.

The Emperor's reaction to this form of *elegantia* was also an aesthetic experience, but it was an experience produced not so much by subtlety of reasoning as by the orderly arrangement of legal rules in a harmonious system. The cases mentioned by Gaius were anomalies which disfigured the logical symmetry of the legal structure and therefore demanded direct intervention to remove the anomaly. The elegance of the legislator is thus elegance of form and is akin to the architectural elegance of a Greek temple. It is this notion of elegance—or a combination of this notion and the rhetoricians' elegance of expression—which I think Maine had in mind when he spoke of elegance as "simplicity and harmony." But it is something quite different from the elegance of the jurists.

1.12. The Institutional Scheme

One of the most influential features of Roman jurisprudence has been the institutional scheme, which first appeared in the middle of the second century in the work of Gaius, a law teacher who seems to have been rather obscure in his own time (Stein 1983). The arrangement of his students' manual, the Institutes, is based on a classification of all private law into three parts, relating respectively to persons, things, and actions. The first category is concerned with different kinds of personal status, regarded from three points of view, namely freedom (is the individual a freeman or a slave?), citizenship (is he a citizen or a peregrine?) and family position (is he a *paterfamilias* himself or is he in the power of an ancestor?).

The second category, things, bore the main brunt of the classification. It included everything to which a money value could be attributed. Originally it was confined to physical things, both moveables and immoveables, but Gaius extended it to include incorporeal things (Bretone 1996). Under this head Gaius put collectivities of things, which pass en bloc (*per universitatem*) from one person to another, such as an inheritance which passes as a whole from the testator to his heirs. Such collectivities may include corporeal things but they are themselves incorporeal. The other main component of incorporeal things was obligations. The notion of obligation had long been recognized to include the various ways in which one person could become indebted to another and looked at the relationship from the point of view of the debtor who was bound because he had entered into a formal promise to pay another money, or because he had received something by way of loan from another, which he had to return. In certain cases the praetor treated parties as obligated to each other merely on the strength of an agreement between them. The main example of this group of "consensual contracts" was sale. As soon as the parties committed themselves to the contract of sale, in that the seller agreed to deliver the thing sold and the buyer to pay the price, they were held to be obligated to each other in law.

Jurists before Gaius had seen that obligations could be created in various ways, in many cases requiring something more than mere agreement, but that there was a common thread uniting them, namely a prior informal arrangement between the parties indicating what they intended. It was this prior arrangement that created the category of contracts. They were all voluntary assumptions of a burden by a debtor. Gaius now viewed obligations in a new way, not as burdens on the debtor but as assets in the hands of the creditor. By treating the latter's right to sue the debtor as an asset, Gaius was able to expand the notion of obligation to include not only contracts, but also civil wrongs, delicts, as sources of obligations.

The third part of the law was concerned with civil actions, not so much the procedure for suing in court but rather different kinds of action, such as those

that can be brought against anyone, for example an owner's action to claim his property, and those that can be brought only against particular persons, for example, a creditor's action to enforce an obligation.

Gaius' institutional scheme thus contained several novel features. He included actions at law among the phenomena to be classified, alongside persons and things; he recognised incorporeal things as things alongside physical things. He classified inheritances and obligations as incorporeal things and he recognized both contracts and delicts as sources of obligation. All these innovations were destined to have enormous influence on the form of the law in the future, although they made little impact on Gaius's practice-oriented contemporaries.

Gaius's scheme gained in popularity in the late Empire and Justinian included a modified version of it in his codification (Birks and McLeod 1989).

In another elementary institutional work, Ulpian, around 200 A.D., drew for the first time a clear distinction between private law and public law. Hitherto the term "public law" had been used in a variety of senses, frequently to indicate those civil law rules which could not be altered by private agreement between the parties, by contrast with those that could be so altered. Ulpian now applied the term to a distinct body of rules of public concern, such as the powers of magistrates and the state religion, by contrast with the law that concerned the interests of private individuals. His purpose can only be conjectured, but it may have been connected with the recent enactment of the *constitutio Antoniniana*, which, although probably promulgated for fiscal reasons, had the effect of turning most of the residents of the empire into Roman citizens, and as such subject to the civil law. Ulpian probably wanted to reassure the new citizens that the civil law was private law, quite distinct from public law and therefore less likely to be modified by imperial intervention.

In the same institutional work, Ulpian derived the word *ius* from *iustitia*, justice, and quoted the famous definition of Celsus (again called "elegant") that law was the art of goodness and fairness. This definition has been dismissed as a mere rhetorical flourish but recently there has been a tendency to take it more seriously (Cerami 1985; Gallo 1987; Scarano Ussani 1989). The law has an ethical purpose; it is concerned with what ordinary people regard as good, as opposed to bad, and fair in the sense of equal. The law must treat like cases alike. Law is not, however, a vague, imprecise expression of what people approve of, but the product of a specific technique. It is a human creation (*artificialis*), by contrast with a natural phenomenon; the recognised methods convert what is equitable into law. The values of justice may not be capable of being realised in every case through law, because of the necessary limitations to which as an *ars* it is subject. These limitations are based on other values, such as certainty, regularity and predictability. Law cannot be just a set of individual cases. It was Celsus who said that laws are not established in matters which occur only in one case (Dig. 1.3.4); so law is a compromise between the claims of morality and those of science.

Similar issues were raised by the jurists when they discussed the relations between custom and law (Stein 1994). Already in the Republic it was seen that many institutions of private law were of customary origin, in the sense that they had existed from time immemorial and enjoyed popular approval. What made them law, however, was not their ancient origin but their specific recognition as law by one of the standard sources, viz., *lex*, magisterial edict, imperial rescript, the consistent opinions of jurists. Before it was filtred through one of these recognized sources of law, a custom remained for the jurists merely a practice.

A custom could have limited legal effects, if it was of purely of local ambit. Gaius says that where land has been sold, the seller must give the buyer security against eviction from the land "according to the custom of the region in which the transaction was concluded" (Dig. 21.1.6). The general rule was that it was for the parties to agree the conditions of the sale, but where there was a local custom on the matter it could be assumed that the parties were contracting with that custom in mind. The custom could be viewed as supplementing, but not contradicting, the general law.

When they speculated on the basis of the authority of such local custom, the jurists concluded that it must derive its authority from the same source as a statute, namely, the will of the people. The second century jurist Julian holds that in matters in which we do not have written laws, the rule should be followed which was established by usage and custom, and if that rule is incomplete, it should be extended by analogy (Dig. 1.3.32). Custom and statutes are both based on popular judgment, which may be expressed either formally by legislation; or informally by practice. For what difference does it make whether the people declares its will expressly in writing or silently by its conduct? The text ends with the logical conclusion that even written laws may be repealed not only by vote of the legislator but also by the silent agreement of all, through desuetude, that is, a general practice which counters the legal rule.

After the passing of the *constitutio Antoniniana*, the newly enfranchised citizens throughout the empire were expected to conform to the forms of the civil law; but in practice they continued to follow their own local laws and the imperial authorities were forced to accept the practice. The result was that Roman law now began to appear in different versions in different provinces and a general rule was required to control the recognition of local custom. In 319 A.D., the emperor Constantine laid down that the authority of custom and long usage was not insignificant (*non vilis*), but was valid only to the extent that it did not override reason or the text of a general law (Cod. 8.52.2).

1.13. The Digest Title, *De diversis regulis iuris antiqui*, and the General Principles of Law

Justinian ended his Digest with two titles which he clearly intended to round off the work in a suitably general manner: 50.16, *De verborum significatione*, in which are collected 246 juristic opinions on the meanings to be ascribed to particular words and phrases, and 50.17, *De diversis regulis iuris antiqui*, which consists of 211 short fragments from juristic writings, ranging in length from a three-word sentence to a couple of paragraphs, and each containing one or more *regulae*. The comprehensive character of the latter collection and its prominent position at the end of the most important part of the *Corpus Iuris Civilis* ensured that the special attention of lawyers would be lavished on it through the centuries that followed the revival of Roman law studies in the eleventh century. It provided them with a manageable and easily memorised, if rather ill-arranged, set of principles to which they could turn when the richness of detail in other parts of the Digest became too indigestible for them (Dekkers 1958).

The influence of title 50.17 was two-fold. First, the very inclusion of a rule in the title *De regulis*, as it came to be known, suggested that Justinian regarded it as specially important and so conferred on it a distinctive cachet, as being in some way superior to other rules. Secondly, the title provided an opportunity for the discussion of the very notion of general principles and of the relation of such principles to the rest of the legal system.

In this section it is proposed to consider first the contents of the title and the nature of its composition, and then trace in outline its treatment at the hands of the jurists of later ages.

In the opening fragment of the title (fr. 1) the jurist Paul explains the nature of a *regula*: "A *regula* briefly sets out the matter in hand. The law is not derived from the *regula*, but the *regula* is made from the existing law. So by means of a *regula* a brief statement of the matter is passed on, and, in Sabinus' words, constitutes a kind of summary of the matter which loses its force if it is vitiated in any particular." The difficulty of formulating a rule to which there are no exceptions and which is applicable in every case is taken up again by the jurist Javolenus in another fragment (fr. 202), "Every maxim (*definitio*) in the civil law is dangerous; for it is rare that it cannot be overturned."

Despite the note of caution sounded by these opinions, however, Justinian's compilers produced an impressive array of *regulae*. Most of them are broad principles applying to legal transactions generally. Some deal, for example, with matters of status. We learn that although, according to natural law, all human beings are equal, yet at civil law slaves have no standing at all (fr. 32). Again, an insane person has no will (fr. 40) and so cannot perform legal transactions. An infant who is not yet able to speak lacks understanding as much as does an insane person, but their position in law differs in that the infant can perform transactions *tutore auctore* (fr. 5).

The basic rule that what is ours cannot be transferred to another without our act is laid down in fragment 11. An act must be voluntary, but consent may be nullified by force or fear or error (fr. 116). The extent to which an act done under superior orders is voluntary is the subject of fragment 4 and fragment 169. The nature of legal obligation is further expounded by rules such as that no obligation to do what is impossible is binding (fr. 185).

Several fragments deal with the interpretation of wills and documents. Some give general advice, e.g., where there is obscurity, the course to be followed is that which is least obscure (fr. 9), or that which is the most likely or the most usually done (fr. 114), or that which is better adapted to the circumstances of the case (fr. 67). In everything fairness (*aequitas*) should be the prime consideration (fr. 90). The aim of interpretation is to discover the intention of the parties responsible for the ambiguous language (fr. 96). In contracts, the test is what was decided, *quod actum est*, and if that is not clear, the custom of the region is to be followed. lf there is no such custom, then whatever interpretation puts the obligation at its minimum should be adopted (fr. 34).

The title also contains certain general canons of interpretation derived from rhetoric, such as that the greater includes the less (fr. 110, cf. fr. 21); that the whole includes the parts (fr. 113), and that special cases are covered by general (fr. 147). In one text (fr. 178) it is said that when the principal does not exist, the accessories have no place. But the statement loses its normative force by adding the word "generally" (*plerumque*).

Other texts deal with more specific points of interpretation. Whenever the time for the performance of an obligation is not expressed, it is deemed to be due now (fr. 14). Where "two months" are prescribed, the sixty-first day is considered to be within the period (fr. 101).

Many of the *regulae* are applicable to particular branches of the law, e.g., no one can die partly testate and partly intestate (fr. 7); a marriage is formed not by cohabitation but by consent (fr. 30); a sale is not fictitious when the price is agreed (fr. 16). Some rules are concerned with procedure rather than with substantive law, e.g., a person sued on a voluntary obligation is entitled to be condemned only up to an amount which he can afford to pay (fr. 28).

All the fragments in the title are short, but some are formulated so crisply and succinctly that they are in fact maxims or brocards. Since they have been particularly influential in the history of legal thought, some of the more famous will be quoted:

No one can transfer to another a better right than he has himself (fr. 54).
No one can lose what is not his (fr. 83).
No one commits fraud who exercises his own right (fr. 55, cp. fr. 151).
No benefit is conferred on one who is unwilling (fr. 69).
In an equal cause the possessor must be considered the stronger (fr. 128 pr.).
It is less to have an action than the thing (fr. 204).

Lack of skill is equivalent to fault (fr. 132).

He who suffers loss from his own fault is not considered to suffer loss (fr. 203).

1.14. The Historical Formation of *Regulae iuris*

In a few cases the text found in the title has provided the materials for a more succinct maxim. Thus fragment 206 reads *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*. The maxim which expresses the same idea is usually rendered: *Nemo locupletior esse debet alterius detrimento* ("No one ought to be enriched to the detriment of another").

Where did the compilers of the Digest get these *regulae* from? The majority derived from two jurists of the first part of the third century A.D., extracts from whose works comprise half the whole Digest, Paul (69 fragments) and Ulpian (62 fragments). Next in order come two jurists of the second century A.D., who were exceptional in that they were especially interested in the teaching rather than the practice of law, Gaius and Pomponius (17 fragments each). This interest in legal education naturally encouraged them to favour the formulation of succinct rules in an easily memorised form.

The remainder of the fragments in the title come from the works of various Roman jurists, ranging in time from the early part of the first century B.C. to the fourth century A.D. The earliest author to be quoted is Quintus Mucius Scaevola, the most distinguished of the *veteres*, as the Republican jurists were called. He is represented by a single fragment which appears to be a conflation of a number of rules taken from his book *Horōn*. Quintus Mucius represents the earliest attempt in the development of Roman law to generalise particular decisions and so formulate the law in an abstract way.[4] He was, Pomponius (Dig. 1.2.2.41) tells us, the first to arrange the civil law under heads (*generatim*). The techniques he used were those of Greek dialectic which at that time permeated Roman intellectual life. An example of Quintus Mucius' generalisation is, "No one can appoint a tutor to anybody except one who was his *suus heres* when he died or who would have been if he had lived" (fr. 73.1).

The latest jurist to be quoted is Hermogenian, who is represented by a pair of fragments from his *Epitome*. This work, like that of Quintus Mucius, is also characteristic of its time. The fourth and fifth centuries A.D., the postclassical period, saw a decline in legal science, in which the jurists strove to preserve a few basic ideas from the unsystematic mass of classical decisions.

Most of the *regulae* in the title date from the classical period and did not originally have the broad application which their position in the title confers

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[4] P. Jörs (1888, vol. 1, 283ff.) named this movement *Die Regularjurisprudenz*; cf. Schulz 1936, 49ff. and Schulz 1946, 66ff.

on them. The classical jurists did not share the propensity towards generalisation which characterised the Republican jurists. They thought in narrow categories and were content to give a series of decisions which harmonised into a system of law, while in general avoiding abstract formulations (cf. Stein 1960, 488). For them a *regula* was still not an independent principle of law, but rather, as Paul's description in fragment 1 of our title shows, a short statement summing up the effect of a series of decisions, and not necessarily intended to have normative force.

The Byzantine jurists of the post-classical period on the other hand, loved maxims (Pringsheim 1927, 248ff.). The notion of ending the Digest with a title consisting of general principles was part of the original plan for the work, and the compilers were instructed to look out for statements which could be lifted from their context and become general rules. In some cases the *regulae* of the title *De regulis* appear also in their original context in other titles. In fact there are thirty-three examples of these *leges geminatae* in *De regulis*. Even where we do not have the rule reproduced in its original setting, we can often deduce what that setting was from the inscription of each fragment, which not only gives the name of the jurist and the title of the work, but even the number of the *liber* from which the fragment is taken; this allows comparison with other fragments taken from the same *liber* and thus indicates the subject under discussion when the rule was laid down. Thus the famous maxim, "A judicial decision must be taken as the truth" (fr. 207), was originally stated in connection with the question whether a particular individual was of free or of servile birth. Once a court had adjudicated on this question, it could not thereafter be challenged. This appears from the context in which the statement is made in Dig. 1.5.25.

The isolation of a rule from its context in this way may merely deprive it of its point rather than increase its scope. It is difficult to see the application of "No one ought to be expelled from his own home" (fr. 103), until it is realised that the statement was originally made in connection with the *in ius vocatio*, or summons beginning a legal action, which in classical law had to be undertaken by the plaintiff himself calling on the defendant to accompany him into court (Dig. 2.4.21). Again, the rule in isolation may be too cryptic, as in the case of "In doubtful matters the more benevolent solution should always be preferred" (fr. 56), which at once raises the question, more benevolent to whom? When it is seen that this maxim is derived from a discussion of legacies, it becomes clear that it meant more favourable to the legatee (Berger 1951, 36ff.).

A cursory survey of the title shows that in general cases maxims occurring in one part of the title are paralleled by other maxims, expressing the same thought in somewhat different words, occurring in another part (ibid., 44ff.). Thus, the maxim last quoted (fr. 56), which is from Gaius, is paralleled by a similar rule from Marcellus (fr. 192.1 = Dig. 28.4.3 pr.). This duplication and the lack of any intelligible order for the fragments are due to the method by

which the Digest was compiled. The compilers appointed by Justinian were divided into three sub-committees, each of which was entrusted with a group or "mass" of classical writings. As they worked through their "mass," the members of the sub-committee would pick out general statements which they considered suitable for insertion in the last title. This title they then created by simply sticking together the three lists without any rearrangement of the fragments. In fact it was the peculiar order of the fragments in the title *De regulis* which provided the German scholar, Bluhme (1820, 257), with the clue which enabled him to work out the theory of masses which is now generally accepted.

The compilers, doubtless due to the extreme haste in which they worked, did not always choose the most suitable *regulae*. As we have seen, some which they picked out lost their point in isolation. Others were overlooked. For example, in Dig. 22.6.9 pr., Paul says that ignorance of the law harms everyone, but ignorance of fact does not, and actually prefaces the remark with the words *Regula est*. Yet the compilers, if indeed they did not themselves interpolate it in Paul's text, failed to copy it for the title *De regulis*, for which it seems ideal.

1.15. Conclusion

Roman civil law reached its most sophisticated state in the so-called classical period, approximately from the first century A.D. to the third or from the reign of Augustus to that of Diocletian. This period was the hey-day of the jurists, whose work reached its zenith in the commentaries of Paul and Ulpian in the early third century.

The Roman jurists had a high opinion of their calling. In a passage which Justinian placed at the opening of his Digest, Ulpian says that the jurists were rightly called priests of the science of goodness and fairness; for they not only distinguish between what is lawful and what is unlawful, but they aim to make men good by fear of penalties and by promise of rewards (Dig. 1.1.1.1).

Ulpian also refers to the jurists having a genuine rather than a sham philosophy. By this phrase he seems to refer to certain ethical values enshrined in Roman private law. Among the most prominent of these values was good faith (*bona fides*). *Fides*, in the sense of "keeping one's word," was generally pervasive in many aspects of Roman life, such as its international relations, but its application in private law as *bona fides* depended to a large extent on the lay element in Roman legal procedure (Lombardi 1961). Good faith is a standard, which involved a moral judgement on the parties' behaviour; it was applied by a *bonus vir*, the Roman equivalent of the "reasonable man" of the common law. Since it is not formulated absolutely but is relative to time and place and circumstances, it is specially suited to be applied by laymen rather than by professionals. When the praetor made the main commercial contracts, such as

sale, hire and partnership, enforceable, the content of the duties which they imposed on the parties was determined by the standard of good faith. In a dispute arising out of such a contract, the formula instructed the lay *iudex*, who was advised by a *consilium* of other laymen, to condemn the defendant in whatever sum he ought "in good faith" to pay the plaintiff. This deceptively simple phrase was never precisely defined, so that its value was not diminished. Public opinion, expressed in the decisions of successive generations of laymen acting as *iudices*, required increasingly higher standards of conduct from Roman business men.

Some formulae instructed the *iudices* to award whatever seemed *bonum et aequum* to them (Watson 1974, 175). The *praetor* issued an edict on *iniuria* which gave this flexible measure of damages in place of the fixed penalties provided by the Twelve Tables. The procedure thus allowed laymen to give effect to their moral ideas of fairness.

Although they were very conscious of the ethical dimensions of the civil law, the jurists studiously ignored all extra-legal matters, such as the economic context of a legal institution. The usual example is the position of the lessee. "The lessor could, during the life of the contract and in contravention of the same, deprive him of the use of the thing leased [...] The classical jurists simply state the legal rule: The lessee is not the possessor of the thing, and therefore cannot insist on its enjoyment in the face of prohibition by the lessor. But why is the lessee not possessor while the pledgee, the tenant at will (*precario*) and the sequester are *possessores*? This question is not put at all" (Schulz 1936, 24–5).

This separation of the law from what was not strictly legal remained a feature of the civil law. The jurists, having established what was the civil law, wanted to preserve and re-state it rather than reform it. When the empire became Christian in the fourth century, very little change in the civil law was needed to accommodate the new orthodoxy.

Chapter 2

THE METAPHYSICAL THOUGHT
OF LATE MEDIEVAL JURISPRUDENCE

by Andrea Padovani[*]

2.1. Foreword

Whereas the Roman jurists of Antiquity, in line with the pragmatism of their law, were not inclined to address complex questions of natural philosophy, the glossators and commentators of late medieval jurisprudence displayed a radically different attitude. In doing so, they implemented a change of greatest importance in the history of juridical thought. What follows is an attempt to identify some of the metaphysical queries faced by the medieval jurists. I am aware that, for the moment, the intricacy and novelty of the argument, as well as the massive number of juridical works produced between the twelfth and sixteenth centuries, do not allow me to offer definitive conclusions. For each of the themes and questions to be discussed in the present essay, I have therefore consulted only a limited number of sources. In my mind, the selected documentation is particularly apt to illustrate the principal issues. Still, there is much that remains to be done. My interpretations do not preclude further investigation, nor do they cover many of the different approaches.

2.1.1. Why Metaphysics?

Irnerius and his followers took as their starting point the basic observation that the events of nature unfold with constant regularity. From the human perspective, the universe seems to be moving, continuously and uniformly. In the skies, the stars move through their orbit which is always the same; on earth, the seasons change from year to year with identical rhythm, thereby determining the life cycles of plants and animals. Every living species, moreover, reproduces individual beings of the same type, the same family, without exception. The repetitiveness of nature leads to an inquiry that does not spare

anyone who is capable of wondering and, for the love of wisdom, detests numb indifference: "Which is the principle, the cause of such movement, always in pursuit of the same direction and always uniform (*uni-verse/universum*)?" This far-reaching question had pushed the Greeks since the sixth century B.C. toward the philosophical investigation of the highest principle (*arkhē*), responsible for the state of things and the modes of their actual existence. Since then, everyone who has tried to penetrate, through the use of rational means, the causes determining the structure of the universe has turned himself into a philosopher: literally, a lover of knowledge, a student of reality. Once the medieval jurists, guided by a long and authoritative tradition, began to explain the harmonious regularity of the world, they themselves became philosophers of sorts. They did not launch an unwarranted invasion into the field, a bizarre attempt to go beyond their specific competence, as it might appear to us today, who are used to respect the compartmentalization of academic discourse. At least in the twelfth century, the clear distinction of different intellectual disciplines, so familiar to us, was still unknown. It will be sufficient to cite as proof protagonists like Irnerius,[1] Peter Abelard, Thierry of Chartres, and John of Salisbury. But there were additional queries, too. The force which moves things in orderly fashion affects inanimate beings as well as animated ones, including, among the latter, man himself. That impulse operates within nature as the inescapable principle. The observation was immediately evident, confirmed not only by day-to-day experience, but also by the authoritative voice of Ulpian:

Natural law is that which nature has taught all animals; for it is not a law specific to mankind but it is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.[2] (Dig. 1.1.1.3; Inst. 1.2 pr.)

The Stoic philosophy inspiring this fragment (Fassò 1966, 151) did not pose an obstacle to further elaboration of a different kind. If man is composed of soul and body, it is easy to concede that he possesses an instinctive capacity also shared by the other animals. People, Azo (†1230) once remarked, are right when they say that "the most elementary motions are beyond our manipulation," due to the fact that they are directed "by natural instinct (*per instinctum nature*)" (Azo 1596, 1050 ad Inst. 1.2). The attraction between the genders, the desire to procreate, the raising of offspring are tendencies

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[1] A theological treatise has recently been attributed to him, Mazzanti 1999.

[2] "Ius naturale est, quod natura omnia animalia docuit: Nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: Videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri."

within us, forming part of our physical self to the same degree as they deter-
mine the behavior of every other animal in possession of a sensitive soul.
Many voluntary acts, the same jurist adds, are not anything but the instru-
ments through which the law of nature manifests itself. Contrary to the other
animals, however, man reveals longings of his own. Some of them are more
elevated, as, for example, the love of God, of relatives, and of the region of
birth; others are tied to his existence so profoundly immersed in this world:
the formation of political communities, the freeing of slaves, the right of le-
gitimate defense and war, property, the mutual exchange of goods and serv-
ices (Dig. 1.1.2–5; Inst. 1.2). The impulse sustaining these and other forms of
behavior is guided by reason, common to all human beings. The medieval in-
terpretation turns that which the ancient Roman jurists had called the law of
the people (*ius gentium*) into rational natural law, a law recommended by
natural reason.

The simple observation that all things, animate and inanimate, are kept in
motion by an innermost driving force which directs them toward various ac-
tivities, does not satisfy the mind of the thinker who wishes to find out what
causes various events. What, in fact, provokes the impulse and what ac-
counts for its regularity? Nature cannot completely explain nature: One
needs to surpass the confines of natural science to uncover what is truly the
primary cause. Above and beyond the laws of physics, there is a level of
knowing that is more extensive, deeper, and in a certain way, more definitive,
that of metaphysics. Already Aristotle, who in a first instance had identified
science (*sophia*) with physics, later reformulated his philosophical agenda
upon observing that the primary causes of reality extend, so to speak, be-
yond nature and are located outside of it. To comprehend the things in exist-
ence and their mode of being, one must look at the totality of what is reality,
which simultaneously contains them and places them in this world. Insofar
as the query approaches the divine, it was defined by the Stagirite as the sci-
ence of theology; insofar as it was directed toward the first being and the
multitude of beings deriving from the first, it was called metaphysics (or, in
modern times, ontology).

For the late medieval jurists, transcending the concrete world toward
metaphysics did not mean that they indulged in dilettantism. If all things ex-
isting in this world appear as regular and harmonious, and if there is order
inherent in them, it is mandatory either to search for their cause or to con-
clude that the order is the result of an accident. In order to exclude the latter
hypothesis, it was sufficient to rely on Platonic and Aristotelian philosophy,
patristic tradition and Revelation, all of which agreed on directing their
thought toward God, the primary cause and highest form of reason. In ad-
dition to these justifications of a philosophical or religious nature (certainly
influential), medieval legal interpreters found in the text of the Institutes
(1.2.11) an explicit reference: "Now," it stated, "natural laws which are fol-

lowed by all nations alike, *deriving from divine providence*, remain always constant and immutable."[3]

The identification of a force that operates within things animate and inanimate, the rational inclination toward what is good, and sociability, all turn the attention toward God. Stable and unchangeable, the said tendencies share the same characteristics of eternity and immutability which belong, first and foremost, to the primary and eternal being (Dig. 1.1.11). He who truly tries to understand the nature of man—for whom alone legal institutions are in existence—must consider the whole of which he is part and which is firmly rooted in God. To explain the reciprocal connection tying the various beings of the universe together, to account for the harmonious coexistence of things and for the capacity of the human mind to associate, unify, and deduct, one must presume a mind which, from the beginning, has arranged every particle of reality according to a plan by no means accidental. The world, regulated by permanent principles, seems orderly to us: Yet the order is generated by the mind. "Order is the mode of being of everything that is," Baldus de Ubaldis remarked at the end of the fourteenth century (Baldus 1586a, *Proemium*, 2rb, n. 4), adding that "nature is a certain capacity with which the divine intellect has endowed everything [...] , or nature is a certain divine predisposition determining the order and state of things," animate and inanimate.[4] The divine providence invoked by the Institutes is in fact a mind that orders and directs toward a specific purpose the countless number of beings, as they find themselves interrelated in time on earth and in the celestial space. Such rationality inherent in each being explains the capacity of the human mind to comprehend, foresee, and dissect many single occurrences. There is nothing more surprising than this realization. Our rational capacity is congenial to the world, traversing it in each direction. Our mental activity does not encounter any resistance to efforts of measuring, structuring, and clarifying. Being is based on the mind: Being that is mind, and mind that is being.[5] In this way, the mind proceeds on its path from tangible phenomena to the origin of everything, uncovering at last the principle, *arkhē*, which is the foundation of all

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[3] "Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent."

[4] Baldus 1586a, 7va, n. 16: "Ordo [...] est modus entium"; "Natura rerum dicitur quaedam proprietas inserta rebus ab intellectu divino in rebus animatis secundum intellectum, vel a sideribus in plantis et brutis: Vel natura est divina quaedam dispositio et ordo rerumque status"; Baldus 1586f, 62rb, n. 7 ad Cod. 4.21.16: "Ordo facti significat ordinem intellectus." On the concept of *ordo*, which reflects divine justice, see *STh*, I, q. 21, a. 1 ad 3m; I, q. 47, a. 3, resp.; I, q. 103, a. 2 ad 3m; II.II, q. 154, a. 12 ad 1m: "Sicut ordo rationis rectae est ab homine, ita ordo naturae est ab ipso Deo"; *CG*, II, c. 39, 2, 5; III, c. 97. Cf. also Ermini 1923, 84–5.

[5] Since we cannot perceive being as such apart from those beings known to us, we cannot perceive it as something other than intelligible. Moreover, if intelligibility exists only as a function of the intellect, then being as such will also be intelligent. One could add: An absolute cause, self-sufficient and intelligent, is not something, it is Someone.

recognizable reality. To that extent, at least, Plato, Aristotle, and Christian philosophy prove to be compatible. In fact, none of them could exist without the activity of a mind that foresees, distinguishes, and directs toward an end. Given that there is an order to things, it is necessary to associate order with a determining reason: divine reason, supreme and beyond measure, it is true, but not entirely inaccessible to man. The reality we experience is in fact analogous to the first being, the primary truth, and the supreme good of which it is part. Again, the level of physics must be transcended through the adoption of a more elevated point of view (*meta-phusis*).

To this consideration of a generic kind, another one can be added. Without a doubt, the law is an existing reality: The legal institutions and norms shaping it are in fact something, and not just nothing (Olgiati 1944, 54; cf. Aristotle, *Metaphysics*, 1005a19–b2). They are entities which are related and subordinate to that "general grammar of being," applicable in its principles to the prime substance (of God) as well as to all of the other, inferior substances (Aristotle, *Metaphysics*, 1003b19–22; 1004a2–9).

The object of metaphysics is therefore unique—being as being—yet at the same time it is bipolar, given the dual path on which reason proceeds toward the recognition of principles. In terms of mental intentions, the itinerary leads toward the contemplation of the common being and its properties (substance, matter, form, essence); in terms of the efficient cause, it leads to God. Departing from differing perspectives, one arrives at the same goal.

As a result, the first part of this study will discuss the nature of the objects treated by jurisprudence; the second part, forming a necessary extension of the preceding one, will explore the ultimate, theological foundations.

The order of treatment will become clear on the basis of distinguishing between these levels. The point of departure is indeed established by the obvious statement that "something exists" in the world around us. Once the existence of this "something" is determined, the inquiry becomes a question of understanding how we are necessarily drawn beyond the "something" itself, being forced to recognize that if "something" exists, this "something" comes from God. Reason attaches properly to God because He thinks, and because of the impossibility that existing things should make themselves understood by themselves. For this very reason Aristotle assumed that the science of being culminates in theology (*Metaphysics*, 1026a19). On the other hand, our mental representations undeniably exist and among these (the more important for us) are juridical concepts (see Padovani 2003).

Their foundation, though distinct from that of material and tangible things, reveals itself to be subordinate to the laws of being. Moreover, in thinking, man reveals his similarity to God in the highest degree. Indeed, human ideas presuppose divine ideas. While divine ideas, however, are the cause of the universe, human ideas, conceived by man, are merely their effect, because they reflect the innermost structure of things. Considered then under

this aspect also, philosophy leads to a theology. The analysis of reality, of any reality, concrete or not, arrives at a like result.

Therefore, if the jurist wanted to remain faithful to truth (or to being, which is the same thing), he could not succeed without opening himself, as the philosopher had done, to theology. After Aristotle, theology was understood as the summit and end point of metaphysics. But the moment the medieval jurist attempted to insert the natural tendency of man toward the good, that is, toward truth and justice, the moment he endeavored to explain the universal harmony which the positive law also had to obey, his theology sought other points of reference. The jurist sought out not only Plato and Aristotle but also the full Revelation of Jesus Christ as the Fathers of the Church had transmitted that Revelation.

The second part of this study will be devoted to this complex and fascinating vision, which places the metaphysics of the Greeks alongside a Christian tradition nourished by faith.

2.2. The Objects of Jurisprudence

2.2.1. Being and Essence. The Concept of Substance

What is being? The philosopher can try to answer this question by beginning to observe the things he encounters in day-to-day experience, in the hope that they will carry him progressively toward uncovering the primary realities (*EE*, *prooemium*, 2).[6] On a daily basis, we enter into contact with entities, concrete things of which we try to identify the constitutive principles turning them into what they are. We are thus confronted with things that exist: But they exist in widely different fashion. Some exist by themselves, being called primary substances, such as this man and this book. Others instead appear always somehow tied to a substance, for example, a certain color or a specific dimension. These are known as accidents. As the latter exist as part of something else and never by themselves, it follows that being as such pertains first and foremost to the substance and merely in a subordinate sense to those terms related to it. Without their substrate, the accidents would disappear. The same observations renders evident the multiplicity of meanings attached to being. "Being" does not imply a single notion, but comprises numerous concepts that figure under a single denomination (Aristotle, *Metaphysics*, 998b22–27; cf. De Rijk 1972, 18–9).

The essential priority of the substance is apparent from the use of language: "The subject—the primary substance—is that which predicates other things while not being predicated by anything else" (Aristotle, *Metaphysics*, 1029b1, my translation). As a subject, the substance can acquire a great

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⁶ Already prior to Aristotle, this had been Plato's approach to the problem.

number of attributes that qualify it according to various aspects: color, quantity, length. There is, however, a predicating relationship which admits only those characteristics that a certain substance must necessarily possess in order to be what it is. If I ask Socrates "What are you?," and he responds to me "A philosopher," his answer does not express that which he is by himself, necessarily and permanently, namely, in his substance. Indeed, he might just as well not be a philosopher or, upon having become one, he might cease to be one. By saying instead that he is "a rational animal," he expresses that which he cannot avoid being and is necessarily by being human. He consequently refers to his essence and defines himself in terms of what he is by necessity. There is no methodological difference between the jurists and the natural philosophers. The question we find repeated for centuries in the works of the leading jurists ("*Quid sit ius*," "*hereditas*," "*actio*," "*ususfructus*": "What is law, inheritance, an action, usufruct.") pursues the goal of capturing the essence, the "*quidditas*" or nature of the realities—or rather, the substances—treated by jurisprudence.[7] *Quidditas*, insofar as the expression answers to the query of "*quid est?*": "Which is the reality I have before my eyes?" (*EE*, 1.2). Simultaneously, essence can also refer to form, due to the fact that in Aristotelian usage, form is the determining element of the thing, that because of which a thing is what it is, distinct from anything else. Matter, on the other hand, is the undifferentiated element, common and potential.

As intelligence finds its measure in being as such, what thing appears primarily to intelligence must also be of primary importance from the perspective of being as such.[8] Thus, when we say that the essence of the human being is "the rational animal," we indicate, firstly, the genus, and then the difference. The genus refers to multiple things distinct from one another; in terms of species, the difference is what characterizes the various species of each genus.[9] Whereas things subject to the senses are individual, genus and species

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[7] Cynus 1578, II, 520va, n. 3 ad Cod. 8.52(53).2: "In diffinitione debent comprehendi essentialia rei deffinitae"; Bartolus 1570c, 89vb, n. 2 ad Dig. 28.1.1: "Definitio [...] debet ponere substantialia rei definitae"; 1570e, 80va, n. 6 ad Dig. 41.2.1: "Discamus a Physicis, qui dicunt homo est animal rationale, etc., [...] et predicti in diffinitione ponunt [...] quid est in substantia"; Albericus de Rosate 1585a, 9va, n. 1 ad Dig. 1.1.1: "Cum diffinitio dicat essentiam rei." Cf. *ThSent*, II, d. 35, q. 1, a. 2 ad 1m: "Quia ens per prius de substantia dicitur, quae perfecte rationem entis habet, ideo nil perfecte definitur nisi substantia: Accidentia autem, sicut incompletam rationem entis participant, ita et definitionem absolutam non habent."

[8] Baldus 1586e, 229vb, n. 2 ad Cod. 3.34.7: "Sicut se habet in ordine rei, ita videtur se habere in ordine intellectus." Cf. *QBS*, 118va, n. 16: "Apud intellectum nostrum prius est esse quam operari"; cf. 120rb, n. 13. This echoes a principle widely disseminated by the Thomistic teachers ("Illud quod intellectus concipit quasi notissimum et in quo omnes conceptiones resolvit est ens"; *ThQV*, I.9. Cf. *ThQP*, IX, 7 ad 15).

[9] Bartolus 1570e, 80vb, n. 7 ad Dig. 41.2.1: "Differentia in substantia [...] facit diversam speciem. Nam hoc, quod est rationale, facit nos differre a brutis: Et hoc, quod est mortale, facit differre ab angelis."

are universal and intelligible realities. To denote them, Aristotle uses the ambiguous expression of "secondary substances" (*Metaphysics*, 1017b1, 13, 20–5; *Topics*, I, 5, 102b3; *Categories*, V, 2a, 11–9). Along with the primary substances, they can appear as subjects in a given statement (e.g., "the animal is an organized body"); simultaneously, they participate in the essence of individual entities and lack an autonomous existence. The genus "animal" does not exist. There are only single animals to which the genus "animal" conveys the properties it encompasses as a subject.

This again reveals the complexity of meanings attributed to the term "being." Aristotle is entirely convinced that only the individual is or exists; at the same time and the more his thought reaches maturity, he becomes aware that the individual can only become intelligible through the essence: the universal as explained in the definition above (genus and difference). No entity without identity. If, as I have noted, that which appears as primary and fundamental to the intelligence must be the same also from the perspective of being as such, then essence must precede existence. In turn, essence constitutes substance, "secondary" only with regard to factual existence. This is the vindication of Plato and the fundamental ambiguity Aristotelian thought proves unable to overcome: to the point of triggering the medieval debate on the universals, as is well known (Gilson 1962, 59–60).

I have already mentioned that, in the primary substance, essence is form: "I understand the form as essence"—Baldus remarks (*TP*, 2va, nn. 27–8)[10]— "because the form confers being to the thing and maintains it. As it maintains, the form is identical with the essence." Or, to put it differently: The form, insofar as it is essence, provides the things with the cause or reason for being, that because of which a thing is what it is.[11] All of the particular entities we notice are identifiable insofar as they consist of matter and a form. Within this composite, which is that of the primary and individual substances, the form nevertheless provides the principle prevailing over the rest. There is indeed

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[10] "Accipio formam pro essentia, quia forma est, quae dat esse rei et rem conservat et in quantum conservat est idem forma, quod essentia"; Baldus 1586c, 92ra, n. 6 ad Dig. 28.6.15: "Certum est, quod identitas formae arguit identitatem essentiae." And Azo: "Fit enim secundum formam actionis, idest secundum eius essentiam" (Otte 1971, 51); Errera 1995, 175. Cf. *EE*, I.2: "[Essentia] dicitur etiam forma, secundum quod per formam significatur perfectio seu certitudo uniuscuiusque rei [...] sed essentia dicitur secundum quod per eam et in ea res habet esse."

[11] Caprioli 1961–1962, 282–3, n. 264: "Interdum ratio, i(dest) causa quia quid dicatur," "Causam, si placeat, appellamus rationem que habetur de rebus." Probably for the same reasons, Bulgarus did not hesitate to identify *res* with *causae*: The thing seems to fuse with what conveys being to it (ibid., 341). Also interesting is a passage to be found in *QBS*, 120rb, n. 13: "Nec est aliud verbum ita substantificum in mundo sicut verbum sum, es, est [...] substantiam rei perfectissime includens." This means, for example, that in the sentence "Socrates is a human being," the humanity in Socrates appears as the form, as the necessary and substantial essence. Cf. Bellomo 1969, 276, 58; 273, 60.

no doubt that, whenever we ask about an object we face: "What is it?," the response ("a horse, a tree") depends primarily on the outward appearance (*eidos*) presented to us. On the form, that is to say.[12]

If the form allows us to distinguish entities of the same genus from one another, matter permits the distinction between entities of the same species (e.g., a golden statue from one made of wood). In this way, matter and form are pre-requisites for the experience of multiplicity and change. Matter in fact expresses that which is potentially, that which can assume different forms. The form, on the other hand, is to be identified with the realization of a specific possibility. The form endows things with being. It changes things from something indistinct into something distinct, while maintaining the stability of their existence: that is the meaning of the passage from Baldus cited above.

To summarize: For Aristotle, the examination of being as such requires the study of substance. Everything relates to this primary term "that stands or subsists by itself."[13] It applies to the cosmic order centering upon substance;[14] it also applies to the spoken language, in which the meaningful use of the words hinges upon the permanence of definitions. The substances in their various appearances likewise furnish the objects for each of the single sciences. To discuss being as such and to identify principles is equivalent to looking for the principles of the substance. And since being, vested as substance, pertains to every single thing, investigations into the principles of the substance imply a search for the principles of all things, as well as the one presupposition common to all of the sciences, law included.[15]

To become the mark of Western Scholasticism this theoretical approach to the problem of being as such did not require the rediscovery and diffusion of the Aristotelian *Corpus*. The writings of the Stagirite, once they were available in their entirety, certainly contributed to the deepening of metaphysical reflection. Still, previous research had been fairly successful in drawing significant inspiration from translations, from commentaries on Aristotle and on Porphyry, and from the various *Opuscula theologica* composed by Severinus Boe-

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[12] Baldus 1586e, 74vb, n. 5 ad Cod. 1.18.10: "Illa est forma substantialis, per quam datur deffinitio. Unde dicit Aristo(teles) et Boetius quod diffinitio claudit essentiam."

[13] Baldus 1580a, 228rb, n. 37 ad X 2.20.37: "Dicitur autem substantia, quasi per se stans, seu subsistens […] apud iuristas vero substantia incorporea est contractus, obligatio, actio, dominium et omne intellectuale, puta testamentum […]. Substantia autem corporea patet sensu: ut ager, fundus, mancipium." Cf. De Rijk 1956, 331.

[14] *QBS*, 118rb, n. 7: "Ordo est figura substantiae cuiuscumque rei et nihil constat sine ordinis dispositione."

[15] Cagnolus 1586, 33rb, n. 1 ad Dig. 1.1: "Quemadmodum Physicorum primo ultramondanus scribit Aristoteles, tunc unumquodque cognoscere arbitramur quum causas cognoscimus primas et principia prima usque ad elementa, ex quo manifeste ostendit in scientiis esse processum ordinatum, prout proceditur a primis causis ad proximas causas, quae sunt elementa constituentia essentiam rei." This approach is common to jurists and *naturales philosophi* (n. 4).

thius. In any case, the juristic glossators and, even more so, the commentators were in a position to adopt for themselves the concept of substance as an interpretive tool of fundamental importance.

This approach of the medieval jurists to the techniques and to the lexicon in use among the contemporary schools of philosophy is a fact which turns out to be confirmed more and more by recent studies. To be sure, the propensity of the medieval masters of law to avail themsleves of the fruits of Scholasticism had been pointed out long ago, beginning with Friedrich Carl von Savigny, but only in a one-sided way, with a generally negative tone. Indeed, legal historians had completely disregarded the medieval establishment of juridical problems on a metaphysical foundation. If this was noticed at all, it concerned for the most part, the influence of dialectic on the medieval jurists. In the wake of the cutting criticisms of the humanists, this influence was often felt to be ill-fated because of its excess subtlety, which was treated as an encumbrance, and because in practice it was completely unproductive. Although it was difficult, these historiographical postures have now been vanquished by the need to reconstruct the entire intellectual horizon of those medieval lawyers. "True understanding, itself also a unity, cannot occur without an understanding of the whole," said Hugh of St. Victor (Baron 1955, 113), a sentiment to which many medieval jurists would have undoubtedly subscribed.

2.2.2. The Concept of Substance in Jurisprudence. Acts of Ethical Relevance

In an attempt to capture the gist of the problems discussed by the medieval jurists, let us begin with some observations related to the use of language. It is possible to say: "This is an action," "This is usufruct," or: "An action is the right to pursue in court that which is owed to us," "Usufruct is the right to use and take advantage of things belonging to someone else, while leaving them intact in their substance" (Inst. 4.6.1; 2.4.1) In the first two phrases, "action" and "usufruct" are predicates of x; in the following two phrases, the same terms are the subjects of a predicative relationship. From a logical viewpoint, coupled statements are identical with those frequently proposed by the philosophers: "Socrates is a human being," in one case, and "The human being is a rational animal," in the other. "Socrates" is, to employ Aristotelian terminology, primary substance and "man," the name of the species which, in the first example, serves as a predicate. In the second, it rather provides the subject or secondary substance, by which "animal" is predicated. In addition, we already know that—contrary to the primary substances—the secondary substances are capable of being used as subjects as well as predicates. This having been said, it becomes necessary to find out what is understood by x in sentences such as the ones mentioned earlier: "x is an action," "x is a usufruct," and so on and so forth. I can in fact assert that the open parchment before me on the table is a testament, or that, in formally identical terms, that

it is testament a certain fact which has really occurred: On his death-bed, my friend Peter summoned the notary and a certain number of witnesses to dictate loudly and clearly this last will, subsequently rendered in a document. Obviously, the ontological nature of x in the two cases is entirely different. On the one hand, I refer to the material substance (the written parchment), on the other to various human acts serving a pre-established end and distributed over a certain period of time (the summoning of the notary and the witnesses, the dictating of the dispositions). Language provides room for both types of assumptions. If the judge asked me to show the testament, I would certainly produce the parchment in my possession; if the adversary claimed that Peter's testament was invalid due to the lack of substantial requirements, the objection would relate to the appropriateness of the acts leading to the drafting of the given document. The claim of invalidity in fact cannot refer to the parchment in its material consistency, but rather challenges its content or the form in which the content appears. To repeat the words of Francesco Mantica (1534–1614): "It is the form which confers being to the testament. The form embraces the testament in its totality so as to give it perfection and precision; the form of the testament is a certain indivisible transaction [*actus individuus*], which is completed with the last period and the final letter of the text" (Mantica 1580, 16vb, n. 2).

The passage by Mantica contains reflections that are fairly important. Following a scientific tradition reaching back to the beginnings of the Bolognese school of law, he reaffirms that it is the form which confers being on a juridical act.[16] The influence of Aristotelian metaphysics is manifest: The tangible substances come about through the fusion (*sunolon*) of matter and form. In the present instance, however, the object to which the jurist refers is certainly different from a natural entity (a tree, an animal), or from an artificial one (a book, a statue). These entities have a corporeal existence that is, so to speak, specific and permanent, as long as the aggregation of matter and form lasts: Barring unforeseeable events, I will see this tree and that statue again tomorrow or in a year. In the case of the testament, we are confronted with an act that, as Mantica observes, consists in chronological terms of different actions (*actus*) directed toward a single goal. Once they have been performed, human activities of this kind will forever remain inaccessible to direct observation. Their memory will be consigned to the witnesses and the parchment, which can be called a testament only in equivocal fashion. In spite of this, a consistent scientific tradition treated the single juridical act (or rather: each

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[16] The gl. acc. *forma* ad Dig. 41.1.7.5, repeating an earlier remark by Martinus, comments on "desiit esse, amissa propria forma": "Id est esse rei"; Bellomo 1969, 273, 60; 276, 58: "Res dicitur esse illud cuius formam habet et illud non esse vel desinere cuius interempta est forma." Cf. ms. Barb. lat. 1400, 20v: "Nulla res est nisi per formam in materia subiacente." Conversely, by changing the form "debet mutari esse rei": Romano 1977, CXLII, 304–7; CXLIV, 350.

transaction concretely concluded between identifiable subjects) as substances that could be assimilated, by their innermost structure, to natural ones.

The problem we therefore have to tackle is the following: Under which conditions and in which ways is it possible to maintain, from a metaphysical standpoint, that a human act represents a substance? The question was debated by the theologians, particularly with regard to the sacraments of the Church and to sin: two topics certainly of interest to the canonists and, as far as sin was concerned, to the interpreters of Roman law as well (due to its structural affinity with matters of crime). The parallel between things and human acts of ethical relevance is stated in various instances by Thomas Aquinas: "One has to speak of the good and evil in acts as much as of the good and evil in things […] As regards things, each of them holds as much of the good as it contains being"[17] (*STh*, I–II, q. 18, a. 1, resp.).

Things as well as acts *are* to the degree to which they are good: *Ens et bonum convertuntur.* "If being and the good did not exist, nothing could be called evil or good" (*STh*, I–II, q. 18, a. 1, resp.; I–II, q. 8, a. 1, resp.). Or, to put it briefly: Every human act, insofar as it is, is good. Hence, sin itself (or, in a juridical context, crime as such) is not purely negative, but a defect of good and being which still retains in its consistency a positive core that cannot be eliminated: "Sin is not sheer privation, but rather an act deprived of its proper order"; "the act of sin is being as well as act. Sin, however, implies an entity and an act with a certain defect" (*STh*, I–II, q. 72, a. 1, resp.)[18]

Let us keep this first conclusion in mind: Human acts *are*. But what kind of being are we dealing with? To respond to this query we can refer to the example of sin (or crime) which, among the human acts, greatly suffers from the reduction of being that is proper to evil. The conclusion reached in this case will be valid to an even greater degree when applied to all the other acts in which the good (or the conformity to the law) is integral. Alexander of Hales, St. Bonaventure, Thomas Aquinas, and Egidius Romanus uniformly concur in their respective commentaries on the second book of Peter Lombard's *Sentences*, when they define sin—as far as act—as essence, entity, nature, and thing, endowed with *quidditas* or intelligibility of its own: "In being act, [sin] is substance" (*ThSent*, II, d. 37, q. 1, 1 *sed contra*; Cf. *STh*, I–II, q. 10, a. 1,

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[17] "De bono et malo in actionibus oportet loqui sicut de bono et malo in rebus […] In rebus autem unumquodque habet de bono quantum habet de esse"; *STh*, I–II, q. 1, a. 3, resp.: "Ea quae sunt composita ex materia et forma constituuntur in suis speciebus per proprias formas. Et hoc etiam considerandum est in motibus propriis"; *STh*, I–II, q. 18, a. 10, resp.: "Sicut species rerum naturalium constituuntur ex naturalibus formis, ita species moralium actuum constituuntur ex formis, prout sunt a ratione conceptae" (with an interesting example drawn from the law); *ThMet*, 775.

[18] "Peccatum non est pura privatio, sed est actus debito ordine privatus"; I–II, q. 79, a. 2, resp.: "Actus peccati et est ens et est actus […]. Sed peccatum nominat ens et actionem cum quodam defecto." Cf. *HalesSth* 1930, 3, q. 1, resp.; Iansen 1926, 352, q. 352.

resp.; *HalesGl* 1952, 357, II.XXXVI; 362–3, II.XXXVII.2; *BonSent* 1885, 877, d. 37, *dubium* 4; Columna 1581, 546a–8b, dist. XXXVII, q. 1, a. 1).

However, the substantive nature of every ethically relevant act must be understood with the necessary specifications in mind. The act, it is true, exists in a reality that is part of the world and recognizable; in the realm of language, too, it can function as a subject within an indicative phrase (e.g., "Peter's marriage is invalid").[19] We can organize the various actions into species and place the latter again under a genus. Similar to the natural substances, acts also encompass accidental elements—the external circumstances—which qualify them and give them precision.[20]

From an analytical point of view, each act, whether good or bad, consists of a formal and a material principle. The latter can be identified with the nature (*naturalis species*) of the act brought into being: words or human behavior. For Thomas Aquinas (*STh*, I–II, q. 72, a. 6, resp.), the matter in a homicide consists of the strangulation (*iugulatio*), the stoning (*lapidatio*), or the hit with a cutting weapon (*perforatio*). The goal toward which all of these operations, so different from one another, are directed remains nevertheless identical: the killing of a human being. The objective qualifies the action, not the mode in which it is performed. Just as the form specifies the entity as it exists in nature, human acts "obtain their proper specificity from their purpose," imposed by reason and pursued by the will (*STh*, I–II, q. 18, a. 2, resp.; I–II, q. 1, a. 3, ad 3m). In the same context, the distinction between matter and form can be clarified through a case scenario frequently invoked by medieval interpreters: "Although the city statute prescribes in general terms that whoever sheds blood on the square be punished with the amputation of his hand, the surgeon who causes bleeding on the square in the course of a phlebotomy will not be punished according to that norm" (Everard 1587, 186, n. 4; cf. *HalesSTh* 1930, 55, inq. I, tract. III, q. I; *STh*, I–II, q. 1, a. 3, ad 3m.).

In this instance, the matter of the two acts is the same: Different is instead the intention of the agent giving form—and thus meaning, specificity and intelligibility—to the event materially taken into consideration. That is why Thomas Aquinas can write: "Matter does not attain form apart from the motion imposed by the agent" (*STh*, I–II, q. 1, a. 2, resp.).[21]

In full coherence with these premises, Baldus affirms that the matter of the law consists of human activities (*facta hominum*). Sheer potentiality, an indis-

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[19] Dal Pra 1969, 265–6: "Nam furtum vel homicidium quasi specialia et substantialia nomina sunt factorum et eorum causae circa iudicia et distinctas distributiones habent quod non habent justum vel injustum vel similia quae sunt accidentalia." Cf. *HalesSTh* 1930, 55–6, inq. I, tract. III, q. I; Iansen 1926, 216, q. XCI; Cursus 1678, 90, tr. XIII, disp. VI, dub. II, 18.

[20] In particular, differing circumstances modify the punishment for each crime: cf. *STh*, I–II, q. 18, a. 10, resp.; I–II, q. 18, a. 3 resp., ad 3m.

[21] "Materia non consequitur formam, nisi secundum quod movetur ab agente"; Lottin 1954, 51; 98; 115.

tinct something which, in conformity with the primary matter as defined by Aristotle, "is not yet" relevant for the law.[22]

In other words, and in more detail, in the physical world, matter awaited the impression of a form in order to become knowable. So too the facts which the jurist contemplated and which made up the "matter" of his work awaited a form. These juridical facts had to be qualified within the preconstituted categories of the law. Sometimes a similar event can lend itself to different evaluations, even to all evaluations which are possible in the abstract. When the jurist decides, he cuts (*decido* in Latin = I cut) the knot of uncertainty. The different possible qualifications of the fact under examination reduce themselves to one, which the jurist in fact chooses. The potential becomes act, matter is subjected to a form, the darkness is illumined, the understanding is made clear. The event which has been juridically delineated has the appearance and the consistency of a substance, a compound (*sunolon* in Greek) of matter and form.

2.2.3. The Different Substantiality of Human Acts and Natural Things

While distinguishable, in the abstract, according to its material and formal principles, we have already noted that the human act cannot be viewed as completely identical with any natural substance (*ThSent*, II, d. 37, q. 1, 1, *sed contra*).[23] There is a real difference between Peter and the actions he undertakes. "The being of an action is not superior to that of the substance to which the action pertains,"[24] Alexander of Hales states peremptorily (*HalesGl* 1952, 1, I.1), aware of the fact that the substances are ordered hierarchically and reflect the degree of perfection of each in the order of being. There is no doubt that man, for example, is substance to a lesser degree than an angel or God Himself.[25]

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[22] Baldus 1586a, 3va, n. 6 ad *Nomen et Cognomina*: "Hoc ius quod non potest tunc intelligi specifice sed solum in confuso et non est clarum, sed est aptum natum suscipere lumen claritatis per dispositionem legis et dicimus quod forma sicut lumen est susceptivum luminis istius, sit sicut materia et quod istius materiae materia sit factum"; 1580a, 60rb, n. 24: "Actus ex quibus inducitur consuetudo non sunt consuetudo, sed materia consuetudinis. Porro causa efficiens consuetudinis est consensus populi, causa formalis est forma actuum ex quibus surgit, causa materialis sunt ipsa negocia et controversia in quibus imprimit, causa finalis est utilitas." Cf. Ioannes ab Imola 1575, 3va, n. 11, *praefatio*: "Primo modo potest dici unam esse materiam omnium rerum materialium et hanc philosophi dicunt materiam primam, de qua primo Physicorum et haec est ipsa res prout consideratur absque forma: Et hoc modo materia non est hoc aliquid, idest aliqua res per se subsistens, sed per formam fit hoc aliquid, ipsa ergo res prout est in potentia ad suscipiendam formam dicitur materia prima"; Aristotle, *Metaphysics*, 1036a 8; 1037a 27; 1049a 18; *Physics*, 192a 31. Cf. Kriechbaum 2000, 321, but especially Bellomo 2000, 642–4, 655.

[23] "Primo ergo modo accipiendo substantiam [secundum quod significat rationem primi praedicamenti], nullo modo dubium est peccata substantias non esse."

[24] "Non […] nobilius est esse actionis quam substantiae cuius est actio."

[25] Or "magis est substantia species quam genus, quia species est propinquior prime substantie quam genus" (De Rijk 1972, 30).

In spite of being placed at different levels of perfection, the entities we experience display the same structure: "Just as, in the genus of natural things, a specific conglomerate is composed of matter and form (for instance, man, who represents a single natural entity in the unity of body and soul, but is nevertheless made of many parts), the same applies to the human acts" (*STh*, I–II, q. 17, a. 4, resp.).[26]

Let us try to verify this proposition with regard to juridical acts. Their unity consists of parts, actions which are coordinated among themselves for a certain period of time. We have already seen how one accomplishes the drafting of a testament. We might equally consider the complex ritual of celebrating a wedding, of making a sales contract, and so on, by citing an almost infinite number of examples. Still, not all of these operations have the same significance, for theologians and jurists alike. Some of them constitute the matter of the act, others the form. Yet since primacy belongs essentially to the latter, with being depending on it, we can understand the efforts made by jurists and theologians (as far as it was within their respective competence), to distinguish the material element from the formal or accidental one.[27] It is therefore necessary to differentiate between the various formal requirements. Some underline the solemnity of the act, while others are necessary to serve as proof.[28]

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[26] "Sicut in genere rerum naturalium aliquod totum componitur ex materia et forma, ut homo ex anima et corpore, qui est unum ens naturale, licet habeat multitudinem partium; ita etiam in actibus humanis."

[27] Otte 1971, 54, wrongly claims that the doctrine of the *substantialia* and *accidentalia contractus* echoes only superficially ontological terminology. When, as the German scholar maintains, certain *substantialia* (*pretium*, *res*, and *consensus*) are lacking in a sales agreement, the contract is void and cannot retain validity in any other form, just as, if in a human being (whose definition is that of being a "rational animal") rationality is absent, we are simply confronted with an animal. In actual fact, Boethius says precisely the opposite: "Homini enim huiusmodi differentia [i.e., *rationalitas*] per se inest, idcirco enim homo est, quia ei rationabilitas adest; quae si discesserit, species hominis non manebit"; "Cum ea quae substantialiter dicuntur pereunt, necesse est ut simul etiam ea interimantur quorum naturam substantiamque formabant […]. Si ab homine rationabilitatem auferamus […] statim perit hominis species" (Boethius, *in Isagogen Porphyrii commenta*, 250, IV.4, 281, IV.17). Reasoning distinguishes humanity from other animate beings. Without that characteristic there would not be any human species within the genus "animale." The same applies implicitly to individuals. An insane person does not cease to be human, nor would a God (deprived, to say the impossible, of his immortality) step down to the level of man. Bartolus de Sassoferrato agrees: The *res animata* indeed possesses a *forma substantialis* that is *anima* "et cum ipsa perdiderit, desinit esse illud et vocatur cadaver"; "Si non haberet [homo] illam formam, diceremus quod non est homo" (*BA*, 145rb, nn. 4, 11, *Stricta ratione*). Cf. Bellomo 1998b, 110.

[28] Baldus 1586e, 74vb–5ra, n. 6 ad Cod. 1.18.10: "Triplex est forma, quaedam quae requiritur ad esse et ad probationem esse, ut in testamento et ista est forma substantialis et probatoria, quaedam requiritur ad esse tantum, ut in stipulatione et ista est forma substantialis, non probatoria, ut l. I, § I, ff., de const. pec. (Dig. 13.5.1.1), quaedam quae requiritur ad solam probationem, non ad essentiam: Et ista est forma probatoria." Cf. Padovani 1993, 184–6; Hopper 1584, 93rb; Mantica 1580, 16rb, II.IV, n. 1–2.

Only those *ad substantiam*, however, confer existence on the transaction in which they inhere (Antonius a Butrio 1578f, 12ra, n. 10 ad X 4.1.26; 1578a, 154va, n. 25 ad X 1.7.2; Panormitanus 1582, 12rb, n. 10 ad X 4.1.26; Baldus 1586e, 74vb, n. 5 ad Cod. 1.18.10; 1586h, 73ra, n. 3 ad Cod. 7.53.5).

"Note"—Antonius a Butrio (†1408) remarks with regard to marriage— "that substance of the act is called that which, once performed, is equivalent to the performance of the whole act; if it is omitted, the act itself is omitted, too. To be sure, only consent confers substantiality" (Antonius a Butrio 1578f, 12ra, n. 11 ad X 4.1.26).[29]

This conclusion was unassailable theoretically, given that in the human acts the will, guided by reason as the structuring faculty, provides form.[30] By using and partly adapting the Aristotelian scheme of the causes that endow the substance with being, Baldus on his part writes: "The formal cause in marriage is the consent, because it conveys being to the thing; the spouses are the material cause, because they are the subject; the words are the formal cause, the offspring and the sacrament supply the final cause" (Baldus 1586a, 7ra, n. 23 ad Dig. 1.1).[31]

"The laws […] imitate nature in producing effects,"[32] Antonius a Butrio clarifies, still referring to the four Aristotelian causes (1578a, 130va, n. 17 ad X 1.6.33). This is an observation of great significance. By underlining the nature of juridical acts, Antonius confirms the analogous (not equal) relationship they maintain with the natural substances. Even to a mind not especially trained in philosophical subtleties, it appears as evident that the matter of ethically or juridically relevant human acts, albeit recognizable by the senses (I see and listen to Peter while he dictates his last will), do not have an extension in three-dimensional space (unlike Peter himself: Suarez 1751, 254, sec. I). Nor does the separation of form and matter (which signals the end of whichever living organism) follow the physiological laws of nature. A decretal by Innocent III states with regard to the same issue: "We observe the following difference between corporeal and spiritual things, namely, that the corporeal ones are more easily destroyed than preserved; the spiritual ones instead are more easily constituted than they are destroyed" (X 1.7.2).[33]

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[29] "Dicitur de substantia actus, quo posito actus ponitur, et quo dempto actus deficit. Consensus ergo solus est de substantia." Cf. Antonius a Butrio 1578a, 154va, n. 25 ad X 1.7.2; Lapus 1571, 52va, n. 7, all. 56; Capistranus 1584, 78vb, n. 3.

[30] The debate on the matter and form of marriage (a juridical transaction as well as a sacrament) involved jurists and theologians for centuries, with interesting discrepancies. Cf. Soto 1598, 92–4, dist. 26, q. 2, a. 1.

[31] "Sic in matrimonio consensus est causa formalis, quia dat esse rei; personae sunt causa materialis, quia sunt subiectum; verba sunt causa formalis, proles et sacramentum sunt causa finalis."

[32] "Iura […] imitantur naturam in producendo effectum." In general, Kriechbaum, 2000, 311–3.

[33] "Inter corporalia et spiritualia eam cognoscimus esse differentiam quod corporalia facilius destruuntur quam conserventur: Spiritualia vero facilius construuntur quam destruantur."

2.2.4. The "Iura" Are Incorporeal Things and Secondary Substances

Whatever the state of affairs in that respect (and the argument would deserve to be studied attentively), the chief difference to be found between the substances existing in nature and those forming the object of law consists of the forms to which they are subordinated. It is obvious that the forms depend on the activities of human beings and constitute as such an *artificium*. We will return to this aspect shortly (see below Section 2.2.6). Suffice it to note, for the moment, that whether natural or artificial, the essences of things find their manifestation in a predicating relationship. That is what is confirmed by Accursius in his gloss on the words of Gaius:

Furthermore, some things [*res*] are corporeal, others incorporeal. Corporeal things are those which can be touched, such as land, a slave, a garment, gold, silver, and, in short, innumerable other things. Incorporeal things are things which cannot be touched, being of the sort which exist only *in contemplation of law*, such as the estate of a deceased person, a usufruct, and obligations however taken on […] The fact is that the right of succession and the right to use and to fruits correlative to the obligation is in each case incorporeal. (Dig. 1.8.1.1; Inst. 2.2)

In contemplation of "ius." That is, subsumed under the term "*ius*," which can be predicated. In defining each incorporeal thing, it is in fact always necessary to supply [the term] "*ius*." For example, "inheritance is the right [*ius*] to succeed […] The usufruct is the right [*ius*] to use […] The obligation is the bond of law [*iuris vinculum*] […] The action is the right [*ius*] to pursue in court."[34]

If the concrete circumstance can only be known through abstraction, it follows that the philosopher and the jurist must transcend the level of immediate experience to grasp the ideal, necessary, and unchangeable consistency of the single phenomenon. The definition of the various institutions is imposed by the necessity to obtain knowledge that is authentically scientific:

Granted that each definition is risky in law and can easily be refuted (Dig. 50.17.202 (203)), the result seems to be that law is not a science: That conclusion, however, is contradicted by Dig. 1.1.10. (Medici 1584, 283va, n. 1)[35]

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[34] "*In iure*. Id est, sub hoc predicabili ius, continetur, nam in definitione cuiuslibet rei incorporalis oportet assumere ius: Ut ecce, hereditas est ius succedendi […] ususfructus est ius utendi […] obligatio est iuris vinculum […] actio est ius persequendi." Cf. gl. acc. *in iure* ad Inst. 2.2: "Sub hoc predicabili ius, continetur: In quorum diffinitionibus ponitur hec dictio in praedicato." An analogous solution can be found in Odofredus: "Ius est genus," which subordinates to itself "duas partes principales de aliis praedicantes," the public and private law (Odofredus 1550, 6rb, n. 10 ad Dig. 1.1.1.2). Cf. Bartolus 1570b, 2va, n. 8 ad Dig. 12.1.1: "Volens scire iura particularia, ante omnia debet scire quid sit ius in genere."

[35] "Si definitio omnis in iure periculosa est et facile subverti potest, sequitur quod ius civile non sit scientia, quod est contra, l. iustitia, in fin., ibi, ff. de iust. et iu."

The first and most important function of the definition is that of revealing the essence of the things; the second is that of providing the point of departure for the demonstration of the accidents pertaining to the defined thing. (Medici 1584, 283va, n. 8)[36]

It is hardly surprising that, for centuries, the jurists began their commentaries almost regularly by defining the institutions they wished to treat.[37] Knowing indeed means knowing the causes of whichever phenomenon: yet the first and fundamental cause of the substance, of that which causes it to be and operate in a certain way, is its essence.[38] The jurist, not unlike the natural scientist, relies on empirical, factual data, but always arrives at abstract and universal notions. That is his mandatory assignment, leaving no alternative. Bartolus recognizes it openly:

Science is therefore a speculative habit capable of demonstration that considers the inferior causes with true reason: This is what pertains to the natural sciences. The same science, which treats universals and things that cannot be anything other than what they are, is attributed by Justinian to us jurists, too, […] and quite rightly so, because jurisprudence also considers the inferior causes [in so far as] […] it is concerned with universals. The *iura*, in fact […] also relate to things that are by necessity. (*TT*, 165vb, n. 70)[39]

These affirmations show the close ties in medieval philosophy between metaphysics and logic. I will not focus on the subject any further, considering that another section of the present book deals with the relationship between jurisprudence and dialectics. For the jurist who intends to provide a metaphysical basis for his own intellectual discipline, it is important to define the nature of the concepts used in his theoretical explanations. To elaborate on this point, it is possible to depart from the passage of Gaius mentioned above (Dig. 1.8.1.1;

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[36] "Primus enim ac praecipuus usus definitionis est ut demonstret essentiam rei: Alius usus est ipsius, ut sit principium ad demonstranda accidentia rei definitae." Cf. *EE*, 1.2.

[37] A few examples may be sufficient: Baldus 1580b, 2vb, n. 8; 1586a, 7rb–va, nn. 6–7 ad Dig. 1.1.1.1. Cf. Horn 1967, 115.

[38] Aristotle, *Parts of Animals*, 639b14; *Physics*, II.9, 200a35; *Posterior Analytics*, 71b8; 87b28–88a17; 89b36–90a34; Baldus 1580a, 202rb, n. 3 ad X 2.19.5. Cf. Bartolus 1570a, 5vb, n. 1 ad Dig. 1.1.1: "Ad sciendum aliquid non est necesse scire principium ex quo […] sed principium propter quod." Cf. Cortese 1962, 184, n. 2; Bellomo 1998b, 123: "Diffinitio esse rei per substantialia sua significat"; Bellomo 2000, 604.

[39] "Scientia autem est habitus speculativus demonstrativus ratione vera considerans causas inferiores et haec ad scientias naturales spectat. Haec quidem de universalibus et necessariis se habentibus hoc nomine et iuri nostro attribuitur per principem […] et merito: Quia etiam causas inferiores considerat […] De universalibus iudicat. Iura enim […] sunt etiam de necessario se habentibus." Coluccio Salutati, who had a good knowledge of law, expressed himself very similarly: "Concluditur leges, quoniam ipsarum scientia de universalibus rationibus humanorum actuum, potentiarum, habituum et passionum anime considerant, inter speculabilia numerandas" (Garin 1947, 136); "[Legum ministri atque latores] licet aliquando de singularibus agant, semper tamen in bonum commune rationibus universalibus diriguntur" (ibid., 132). He who maintained, therefore, that "legum non esse scientiam" would surely be wrong "cum [leges] diffiniendo dividendoque procedant et cum habeant universalia sua, que non possint aliter se habere" (ibid., 240).

Inst. 2.2), relative to the distinction between things (*res*) that are either corporeal or incorporeal. The medieval jurist is left without a choice, once it has been established, in line with Boethius (*BCA*, I, 185C),[40] that "every thing is either substance or accident and among the substances there are primary and secondary ones. The result is a triple partition, with every thing being either accident, or secondary, or primary substance." Each *ius* is a secondary substance, as is confirmed from the beginnings of the school, by Rogerius (… 1162 …).[41] Two centuries later, Baldus de Ubaldis reiterates the same point of view: "Among the jurists, the incorporeal substance is the contract, the obligation, property, and all that which is of an intellectual nature, as, for instance, the testament […] The corporeal substance, on the other hand, is immediately exposed to our senses. For example, a field, a cottage, a *mancipium*" (cf. above n. 13).

The distinction between corporeal and incorporeal substances was certainly well known among scholastic thinkers, since it had already been formulated by Porphyry and Boethius. But whereas the primary ones are of immediate accessibility thanks to experience which reveals them to us, it is more difficult to arrive at an adequate depiction of the secondary substances. Placentinus had written on the subject:

Incorporeal are those things that cannot be touched, nor perceived by the other senses of the body, such as the inheritance, the usufruct, the use, the obligation, and the action. But there are also other things which do not have any consistency in the legal sphere: Among the incorporeal things there are the genera, the species, the evil spirits [*cacodaemones*], the human soul, and the soul of the universe […] In similar vein, the rights of landowners, such as the servitude of things. (Placentinus 1535, 27 ad Inst. 2.2)[42]

A few decades later, Azo expresses himself almost in the same terms: In addition to the *iura*, there are incorporeal substances which "do not have any consistency in the legal sphere, such as the genera, the species, the spirits, the hu-

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[40] "Cum omnis res aut substantia sit aut accidens et substantiarum aliae sint primae, aliae secundae, fit trina partitio, ita ut omnis res aut accidens sit, aut secunda substantia, aut prima." Cf. also 169D: "Omnis enim res aut substantia est, aut quantitas, aut qualitas […] et haec est maxima divisio." Faithful to the text of Gaius (as well as to Ulpianus, Dig. 50.16.23: "Rei appellatione et causae et iura continentur"), the glossators commonly repeated that the *iura* are *res*. Cf. gl. acc. *rem* ad Dig. 50.17.1 ("Regula est, quae rem quae est, breviter enarrat"): "Idest ius." Further examples in Caprioli 1961–1962, 313, n. 409, 343, 368, 373–4; Otte 1971, 52; Errera 1995, 214, 249.

[41] Palmieri 1914, 57: "Res dicitur ipsum ius incorporale quod vocatur substantia obligationis." Cf. also Otte 1971, 51: "Obligationum […] substantia, id est esse et natura" (Azo); 83, n. 75, 95; Errera 1995, 233, cf. 177 ("Secundum substantiam actionum"), 320 ("Divisio prima fit secundum quod sunt, id est secundum essentiam quod habent. Subdivisio fit secundum accidens").

[42] "Incorporalia sunt quae tangi non possunt, nec aliis corporeis sensibus subiacent, ut haereditas, ususfructus, usus, obligatio, actio. Sed et ea quae in iure non consistunt, ut genera, et species, et cacodaemones et anima hominum et anima mundi […]. Item res incorporales sunt praediorum iura, id est servitutes rerum."

man soul, and the soul of the universe" (Azo 1596, 1072 ad Inst. 2.2). More succinctly, Accursius poses the question: "And what about the good and bad angels and the human soul? Say that they are incorporeal, even though that is not within our competence" (gl. *ius obligationis* ad Dig. 1.8.1.1).[43]

The philosophical sources inspiring the two earliest glossators most likely had their origins in the school of Chartres: the *Philosophia mundi* and the *Dragmaticon philosophiae* of William of Conches (Gratarolus 1567).[44] In both works, we find among the incorporeal substances which exist invisibly God, the soul of the universe, the spirits (*calodaemones* and *cacodaemones*), and the soul of the universe.[45] Compared to the French models, Placentinus and, in his wake, Azo omit God and insert the genera and species instead. An addition that could be explained through Platonic realism, according to which the ideas—as incorporeal forms—have a real existence (in conformity with the other entities simultaneously considered). When Accursius reexamines the whole question, the eclipse of Neo-Platonism and the hostility of the theologians has already led to the elimination of the mention regarding the soul of the universe (Padovani 1997, 199). Parallel to that, the criticism directed against exaggerated realism also recommends, for the sake of avoiding risks of ambiguity, the elimination of the reference to genera and species. As regards the nature of the angels and of the human soul, Aristotelian texts (particularly the *Metaphysics* and *On the Soul*), along with their respective Arabic commentaries, lead to reflections that are different from traditional ones. Notwithstanding the different points of view, which came to the fore among theologians from early on, there is full agreement on one issue: angels and the soul are incorporeal substances not subject to the senses.[46] This was enough to place both entities in the same category as the incorporeal *iura* of Dig. 1.8.1.1 (Inst. 2.2). It could not have been otherwise as long as the fundamental distinction, outlined by Porphyry, opposed the corporeal to the incorporeal substances. To quote the translation by Boethius: "The substance, therefore, is the most general genus. It predicates itself upon all of the other ones, its first two species being corporeal and incorporeal" (*BP*, 103).[47]

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[43] "Quid de angelis bonis et malis et anima. Dic incorporalia: Licet de his nihil ad nos." Almost identical is the gl. acc. *vocantur* ad Inst. 2.2, though without the final remark.

[44] I have consulted the Italian translation, Maccagnolo 1980, 213, I.2; 219, I.14–6; 222, I.21; 249–50.

[45] Referring to Azo by name, the *calademones* are invoked again by Odofredus 1550, 24vb, n. 3 ad Dig. 1.8.1.1. On the ties between the Bolognese school and that of Chartres, cf. Padovani 1997.

[46] For St. Bonaventure, the incorporeal nature of the angels does not coincide with the notion of immateriality (*BonSent* 1885, d. 3, pars 1, art. 1, q. 2 ad 3m). Thomas Aquinas is in total disagreement by assuming that "matter" and "body (*corpus*)" are equivalent (*CG*, II.XLIX). The complexity of the problem had led William of Conches to exercise prudence and withhold judgment.

[47] "Substantia igitur generalissimum genus est: Hoc enim de cunctis aliis praedicatur, ac

And yet, when viewed from a different angle, the soul and the angelic nature on the one hand, and the single *iura* on the other, had little in common. The former exist in nature and perpetually, owing to a creative act of God; the latter are the product of human ingenuity and endowed with an existence that is extremely peculiar. Let us briefly consider this aspect. In this very regard, the accomplishment of the medieval jurists is revealed fully. These jurists outlined the ontological consistency of the objects with which they occupied themselves. If these objects are not mere nothingness (which is out of the question), they too must exist. "There is no third way" ("*Tertium non datur*"). The alternative is radical. To decide where and how these objects exist, or what could their origin be, is however a problem which cannot be resolved on the basis of Justinian's texts or juridical techniques. The answer can only come from that science which concerns itself specifically with being, that is, metaphysics.

Recourse to the works of the earlier school of Chartres, and to the writings of Aristotle and his interpreters, then, proves to be completely justified. As soon as the medieval masters of the law decided to investigate the foundations of their knowledge, "first philosophy" became their inseparable companion and master.

2.2.5. The "Iura" Are Products of the Imagination. The Mathematical Paradigm

By attributing substantial essence to each *ius*, Accursius follows the path already traced by metaphysical reflection. In line with every other scholastic thinker, the jurist treats the universals (genus and species) by having recourse to phenomena familiar to his expertise. In the human acts, the universals correspond to the immanent form that gives them existence for the law. Apparently, there is an affinity between the natural substances as considered by the physicist and those contemplated by the jurist, in that they both result from combinations of matter and form. The remaining difference is hardly irrelevant, however. When looking at a pine tree, for example, I perceive its essence immediately by saying: "It is a tree."[48] Participating, conversely, in the

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primum huius species duae sunt, corporeum et incorporeum"; cf. ibid., 20. The discrepancy between him and Cicero is evident: "Esse enim dicit ea quorum subiacet corpus […] non autem esse illa intelligi voluit quibus nulla corporalis videtur esse substantia"; ibid., 898–9. Also of interest is the comment by Baldus, ad Inst. 2.2, as in Vatican, Barb. Lat. 1411, 49r: "Ait Porfirius quod substantia est duplex, scilicet corporea et incorporea et de istis duabus substantiis seu rebus trattat iste titulus et dicit quod res corporalis est illa que potest tangi, sed res incorporalis est illa que non potest tangi sed solo intellectu percipitur […]. De incorporalibus vero talis datur regula quod omnis res cuius diffinitione ponitur ius est res incorporalis."

[48] Ms. Barb. lat. 1400, 20v: "Recto quidem modo cognoscimus […] per formam aceptam: A re cognosco lapidem visu." Cf. *ThB*, q. 6, a. 2, resp.

signing of a contract of emphyteusis, I behold a certain number of people involved in various activities and, at last, a written text. To be sure, it all proceeds in orderly fashion, following a specific ritual. The perception of what happens in essence remains nevertheless far from immediate, and certainly so for a person ignorant of the law. Yet it is not even clear to the expert. Prior to understanding, he must reconstruct in his mind all of the phenomena he has observed, so as to reduce them to conceptual unity. In short, the reality before my eyes is artificial in the strict sense of the word: Not only because everything occurs in accordance with specific technical requirements, but even more so because the final result forms an entity existing in the law and for the law, escaping, for the most part, the senses.[49] The statue, once it has left the hands of the sculptor, enters physical reality as a work of art and remains in it. The emphyteusis (to adhere to the example already given) is not the parchment documenting it: It is rather an intellectual reality, a mental configuration known to the interested parties and obliging them to conduct themselves according to pre-established patterns.

"Although, under the term of testament, one commonly understands the written document [*scriptura*]"—Bartolus de Sassoferrato (1314–1357) observes—"it is something pertaining to the intellect [*quid intellectuale*]" (Bartolus 1570c, 90rb, n. 7 ad Dig. 28.6.1). In a yet more general sense, actions and obligations, being as it were artificial realities, exist merely in the imagination.[50] Other interpreters arrived at the same conclusion as well. Late in the period, for example, Francesco Mantica says of the testament that "it is not found outside of the intellect, forming something imagined [*imaginatio*]" (Mantica 1580, 4va, I.IV, 2).[51]

It is necessary to note here that, from Boethius to Thierry of Chartres and Thomas Aquinas, the imagination was viewed as the faculty facilitating mathematical judgments (*BoeTrin*, II.10–9; *ThB*, q. 6, a. 2, resp.; *ThC*, prop. 6; Maccagnolo 1976, 107–8). It is in fact worthwhile considering how the mathematician or the geometer relate to the primary objects of their expertise: bronze circles, straight sticks, surfaces of land. To calculate their length or extension, they disregard the material composition of each, concerning themselves solely with the formal data, with numbers, that is to say. "The mathema-

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[49] Lapus 1571, 110va, n. 9, all. 91: "Genera sunt in intellectu, non in sensu, unde tange si potes"; Baldus 1586a, 7vb, n. 5 ad Dig. 1.1.1 pr.: "Tu dic quod ars, idest opus artificis, unde formae huius artis dicuntur formae artificiales, sicut forma stipulationis, sunt quaedam formae fabriles, sicut forma cultelli, et domus"; 7va, n. 17, l.c.: "Ars in suis dispositis accomodat iuri quandam, quam dicimus, artificialem naturam."

[50] Bartolus 1570a, 187ra, n. 1 ad Dig. 8.2.32: "Artificialia […] aut componuntur ex rebus elementatis et non possunt esse perpetua, ut hic, aut non componuntur ex his, ut actiones et obligationes, quae sunt simplices imaginationes, et istae possunt esse perpetuae ad nutum principis."

[51] "Non invenitur extra intellectum, cum sit imaginatio intellectus."

tician, by abstracting, does not consider the thing apart from what it is: He in fact does not claim that a line lack tangible matter, but focuses on the line and its properties without taking tangible matter into account" (*ThB*, q. 5, a. 3, ad 1m).

This characteristic, already pointed out by Plato, Aristotle, and Boethius, reveals that which distinguishes the three branches of theoretical philosophy: Physics examines forms that are inseparable from matter, theology forms that are completely separable from matter and movement (God and the angels), and mathematics forms that are immanent in matter *as if* separate from matter and movement. Moreover, whereas the objects of physics and theology are entities which exist in nature, in mathematics there is a division between the object of science and the reality to which it relates. The former exists only in the mind, the latter in matter (*STh*, I, q. 5, a. 3, ad 4m; *ThMet*, 2162–3; cf. 157–8; 1161).

Still, the mathematician is not only concerned with entities existing in nature. It often occurs that he freely imagines figures or relations without any reference to tangible data: his mind creates, for example, the notion of a point without dimensions, of lines which extend infinitely, or of perfect circles. In that case, the separation from matter as known through experience is most evident. The abstraction involved nevertheless regards tangible, not intellectual, matter, the latter of which does not make its appearance if not in the definition of mathematical entities. Thomas Aquinas states that "mathematical entities are not abstracted from just any matter, but exclusively from that which is subject to the senses," while maintaining the intelligible matter that is mentioned in the same context by the *Metaphysics* of Aristotle (*ThB*, q. 5, a. 3, ad 4m).[52] In the definition of mathematical entities there consequently appears something that is almost matter and something that is almost form. In the definition of the mathematical circle, "the *circle* is a superficial figure, with the *surface* representing matter and the *figure* representing form" (*ThMet*, 1761).[53] Accordingly, intelligible matter retains the potential quality that generally characterizes it when understood in the metaphysical sense. The surface is indeed capable of accommodating any geometrical form.

2.2.6. *The Scientific Nature of Jurisprudence*

The preceding digression concerning the objects and methods of mathematics is of fundamental importance in order to understand the meaning of a gloss in

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[52] Cf. Aristotle, *Metaphysics*, 1036a, 9–12: "Matter is either subject to the senses or intelligible: The one subject to the senses is like bronze or wood, and all matter that is in motion; intelligible matter is that which is part of tangible things, though not subject to the senses by itself, as, for example, the mathematical entities"; Suarez 1751, 9, I, sec. II.

[53] "Aliquid quasi materia et aliquid quasi forma. Sicut in hac definitione circuli matematici: *Circulus est figura superficialis*, superficies est quasi materia et figura quasi forma." Moreover, "forma circuli vel trianguli est in tali materia, quae est continuum vel superficies, vel corpus."

the margins of the Vatican ms. Barberinus latinus 1400, 20v, which echoes indirectly, if not directly, the thought of Baldus:

Note that certain matters and forms are subject to the senses; others are intellectual and abstract, so that the intellect can construct by itself a form and create a matter. In this way, jurisprudence is similar to mathematics which imagines abstract substances.[54]

The passage from Baldus repeats a conclusion already known to us through different channels. The objects of jurisprudence are constructions of the intellect and exist properly in the sphere of the science conceiving them. "The *iura* are purely incorporeal. In addition, they are conceived and exist only to convey the understanding the law has of them" (Baldus 1580a, 152vb, n. 3 ad X 2.1.3).[55] The *iura* undoubtedly have an existence: not, however, in the physical world, but in the soul and through the activity of the legislator. Iohannes Faber, a French jurist active in the first decades of the fourteenth century, expresses himself on the matter in the clearest of terms:

You can ask yourself why the incorporeal things are called *iura* or why they have a consistency of their own in the law. You must know that the legislators gave being to the law and called "beings" those *iura* which one can neither see nor touch physically. They nevertheless have a consistency and are considered notions of the mind or the result of an activity exercised by the mind. Therefore, when we read that the incorporeal things can neither be seen nor be touched, but are merely recognized by the mind and have consistency only in the sphere of thought, we understand why they are called *iura.* For good reason, because they have a substance given to them by the law, just as they are created and named by the law. (Faber 1546, 26va, ad Inst. 2.2)[56]

Like points without extension and infinite lines that exist only in the imagination, juridical concepts do not have a place in the tangible world, either. A real right (such as property) cannot be seen by the material eye, but it can be perceived. It can be seen with the eyes of the intellect, surpassing the perception of the senses (*ThB*, q. VI, a. 2, resp.).

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[54] "Nota quod quedam sunt materie et forme sensibiles, quedam intellectuales et abstracte et intellectus potest sibi fabricare formam et creare materiam et sic scientia legum deservit metamatice que imaginatur substantias abstractas." With regard to this passage, at least two clarifications are necessary. *Deservit* needs to be interpreted in the sense of "obedience that consists of the assimilation of certain modes, or of the imitation of pre-established processes." *Intellectus* obviously stands for *phantasia*: Chenu 1926; 1946. Cf. Aristotle, *Metaphysics*, 1078a, 21; *On the Soul*, III, and the late (yet most illuminating) observations by Zabarella 1587, I, X, 48va; I, XV, 72rb; I, XXIII, 96rb.

[55] "Iura mere incorporalia, quae solo iuris intellectu percipiuntur et subsistunt."

[56] "Sed quare incorporalia dicuntur iura, seu in iure consistere: Scire debes, quod legislatores nominaverunt et posuerunt esse in iure et esse iura illa, que videri non possunt, nec tangi corporaliter, sed consistunt et habentur pro animi notitia et ex animo […] unde cum hic, incorporalia videri non possunt, nec tangi: Sed in sola cognitione animi sunt et per solam cognitionem consistunt, iura vocantur et merito, quia per ius substantiantur, creantur et nominantur." The first part of the paragraph is repeated almost word for word by Angelus de Gambilionibus (Angelus a Gambilionibus 1574, 71ra, n. 6 ad Inst. 2.2).

To be sure, in mathematics as well as in law, it is possible to choose as the point of departure factual situations and material data. In the field of science, however, it is also possible—and even necessary—to move beyond concrete constellations and accidental characterizations in order to concentrate on elements that are entirely formal. Once physical reality has been left behind, things in mathematics remain imaginable all the same. In law as well, nothing prevents the characteristics of institutions and transactions from being deduced in completely abstract fashion. The intelligible matter to be found in the mathematical entities (surface, unit) can be encountered equally in the definitions of inheritance, obligation, and action. Accursius, as we have seen (cf. above, n. 34) writes about them: "[The incorporeal things exist only *in contemplation of* ius]. That is, subsumed under the term 'ius,' which can be predicated. In defining each incorporeal thing, it is in fact always necessary to supply [the term] 'ius.'" Wherever *ius* "serves as an indication of the genus," it must be assumed as if it were matter (Placentinus 1535, 28 ad Inst. 2.4).[57] Matter understood, of course, in the metaphysical sense, as potential (the genus, indeed, is modified by addition of the species). As the surface is potentially a circle or a triangle, *ius* can manifest itself as inheritance, usufruct, obligation, or something else.

Although apparently surprising, the attention paid by the jurist to the operative modes of mathematics has a specific reason. The triple division by Boethius of the speculative sciences (physics, mathematics, theology) is based on their respective processes of reasoning. Still, the interpretive pattern is not understood in rigid fashion. The method of each is not exclusively reserved to the science it is assigned to, but rather proper to it to a particular degree. Nothing prevents other disciplines from adopting it as well. This is the case with law which, in many aspects, can be compared in its procedures and organization to the mathematical *ideal type* (or *prototypus*). The same argument deserves to be explored in greater detail.

For the medieval commentators of *De Trinitate* by Boethius (and especially for Thomas Aquinas), mathematics represents the one science capable of guaranteeing the highest degree of certainty. More than the natural sciences, because it abstracts from matter and movement which always imply a component of instability and contingency; and also more than theology, considering that mathematics offers the advantage of examining realities less removed from the senses and the imagination. The abstraction from sensual impression—characteristic of mathematical analysis and, on the highest level, also of

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[57] "Ususfructus est ius, hoc nomen ponitur tamquam genus et ut secernatur a venditione, puta, quae facti est: et quia actio est ius, additur utendi et quia nudus usus est ius utendi, additur utendi fruendi." Cf. Palmieri 1914, 107: "Videndum est quid sit accio, qualiter dividatur secundum substantiale esse, secundum qualitates seu accidentia [...] Accio est ius"; *EE*, III.2: "Unde genus sumitur a materia, quamvis non sit materia."

law—permits access to unchanging and yet undeniable realities. Those are in fact the objects with which science in the strict sense is concerned (*ThB*, q. V, a. 1, resp.; a. 2, resp., ad 4m.). The possibility of using the appropriate procedures of definition and proof is based precisely on those premises. Insofar as jurisprudence deals with abstract forms, universal concepts, or secondary substances (genera and species), it is considered, rightfully and in line with Aristotelian standards, a theoretical science, to be placed in the sphere of speculative philosophy. The goal jurisprudence proposes for itself is knowledge of truth, of the nature of the legal institutions, and of the relationships between them. The substantial consistency of each *ius* assures the scientific quality of the logical operations. For Aristotle, the necessity of proof is indeed identical with the necessity of the substance expressed in the definition (*Prior Analytics*, 43b, 21; 7b, 30; *Metaphysics*, 1010b, 28; 1078b, 24; *On the Soul*, 402b, 25). For this reason, Bartolus again emphasizes (cf. above, n. 39) the scientific character of jurisprudence when he repeats the definition of science given by Aristotle in his *Posterior Analytics* I.2, 71b9, word for word: Proven knowledge is obtained when "one finds the cause of an object, that is, one knows why the object cannot be different from what it is" (my translation). In brief: Scientific knowledge can be identified as knowledge of the necessary essence or substance which forms the object of the investigation, be it for the jurist, the mathematician, or the physicist (*Metaphysics*, 1031b5).[58]

2.2.7. *Jurisprudence Is a Theoretical as well as a Practical Science. The "Debate of the Arts"*

The open acknowledgement of the speculative character of jurisprudence does not by any means eliminate the practical dimension of the discipline. The jurists recognized this by attributing to their activities the characteristics of the arts (*ars*):

The arts form a habit that is by nature directed toward practice. Consequently, one is confronted with a certain task which through this habit is transformed into external matter: such as a specific work, a house, or a book. [...] The same designation [*ars*] is also appropriate for the law, whence the ancient Roman jurist affirms that "the law is the art of the good and equitable" (Dig. 1.1.1.1); and rightly so, given that our juridical norms relate for the most part to external acts. (*TT*, 165vb, n. 72)[59]

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[58] The essence is the object of investigation by the physicist insofar as he considers the form and the essential reasons of things in themselves, apart from their motions (although they are always in motion). Only in this respect, his procedures do not differ from those of the mathematician: *ThB*, q. V, a. 2, resp. For Aristotle, moreover, medicine as a science is subordinate to mathematics.

[59] "Ars vero est habitus ratione naturae factivus, unde per talem habitum inspicitur opus faciendum, quod transit in materiam exteriorem, ut aliquod opus, domus, liber [...] quod nomen etiam iuri per Iurisconsultum tribuitur dum dicit ius est ars boni et aequi et merito, cum iura nostra, ut plurimum, actum extrinsecum intuentur."

The knowledge of the jurist, in other words, is *ars* when it involves doing (*facere*), an action which introduces into the world new (artificial) realities. "Doing" is to be understood neither casually, nor in a random fashion, but in accordance with the principles of correct reasoning.[60] The conclusion to be drawn from these considerations is that jurisprudence, simultaneously and without contradiction, represents a speculative as well as a practical science. From the age of the commentators onward, statements such as these follow one upon the other: "Ours is a science as speculative as it is practical." "This science of law is not only practical, but in part practical, in part speculative" (Baldus 1586a, 7ra, n. 23 ad Dig. 1.1).[61]

It needs to be remembered that the proud affirmation of the scientific character of jurisprudence gained strength through contact with the Aristotelian sources.[62] It was further consolidated during the "debate of the arts," which erupted between the jurists on one side and humanists and physicians on the other.[63] To a broad front of detractors, anxious to view law as a discipline entirely dedicated to action, the mere result of the legislator's will, mutable, sheer opinion, lacking speculative character, and devoid of veritable proof—the jurists (supported by Coluccio Salutati) presented the image of a doctrine rigorously deduced from necessary and permanent principles. Had it not been Aristotle who taught that each science proceeded from a certain number of basic premises proper to itself? Now, the civilian commentators maintained, the legal discipline possessed such primary principles in the form of the laws: "You know that the jurist finds his science in the written laws.

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[60] The same Bartolus adds that the jurist, as a practitioner, shows his *prudentia* (*habitus activus*). In this regard, see Piano Mortari 1976, 158–71, and Coopland 1925–6, 65–88. Several authors, including Paulus Venetus, prefer to use the word *ars* for *habitus activus* as well as *factivus*: Paulus Venetus 14.., 1vb.

[61] Idem in ms. Barb. lat. 1410, 332r: "Apparet igitur quod scientia nostra est vera philosophia, idest amor sapientie quam protoplaustus didicit in pabulo pomi vetiti. Hec enim scientia est scientia proficui et nocivi, practice vero est electiva boni et confutativa mali. O igitur mirabilis scientia"; Ioannes ab Imola 1575, *praefatio*, 4rb, n. 17; Piano Mortari 1976, 160, n. 24; 162, n. 30. Cf. Coras 1584, 64rb: "Iurisprudentia […] et in cognitione et in operatione posita est […] scientiae nomen, Iurisprudentia sibi suo iure vindicat: Quoniam vero certis theorematibus et praeceptibus clauditur: Quorum usus et observantia pro utilitatum praesentium rationibus: Et variis rerum humanarum circumstantiis flecti saepe et mutari solet, ars quoque nec immerito dicitur"; Vulteius 1598, 9–10: "Quemadmodum omnium scientiarum et disciplinarum, ita et iurisprudentiae vis omnis atque studium in duobus illis positum est, in cognitione nimirum, eiusdem usu"; Piano Mortari 1966, 526.

[62] From the second half of the thirteenth century, the question of the scientific character of knowledge is also central to theology: Chenu 1957; Biffi 1992.

[63] I limit myself to referring to the most recent bibliography on the subject: Padovani 1983, 507–12; 1995, 207–9; Cortese 1992a, 92; Rossi 1999, 79–81; Kriechbaum 2000, 323. Contrary to what is commonly maintained, the dispute began in the first decades of the fourteenth century and continued on until the middle of the fifteenth (cf. Nevizzanus 1573, 584, V.74–607.V.85). I hope to return to the argument in a future publication.

[They] are the first principles a science must presuppose as self-evident and true."[64]

A reply and defense in truth rather weak, given that the laws, far from being known by their own virtue, are received in authoritative fashion through the texts of Justinian.[65]

2.2.8. *The Knowledge of the Primary Principles and the Hierarchy of the Sciences*

Whatever the answer to this particular point, it was clear to the jurists that the law is not solely based on the evidence afforded by disciplinary specificity and scientific autonomy. As a regulator of human activities, the law cannot do without ethical standards of general character which, from a medieval perspective, are decidedly more important than any other consideration. The claim according to which the law "is inferior to ethics [*supponitur ethice*]," repeated at the beginning of the exegetical works since the days of the school of Pavia,[66] acquires, after the rediscovery of Aristotle's *Posterior Analytics*, a different and speculatively more sophisticated meaning (Chenu 1957; *ZTP*, 505–6, 518). Previously, the common phrase referred to the placement of law in one of the three branches into which philosophy was usually subdivided (ethics, logic, physics), "insofar as it treats the habits of human beings" (*quia loquitur de hominum moribus*). Henceforth, it referred to the fact that the law borrowed some of its principles from ethics, relative to which it was a subor-

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[64] Andrea Gammaro, cited in Piano Mortari 1956, 11, n. 24: "Sciatis […] iurisconsultum habere scientiam, quoniam leges scriptae sunt […] tamquam prima principia quae in qualibet scientia pro claris et veris ponuntur"; Piano Mortari 1976, 208. The passage was repeated literally by Nevizzanus 1573, 584, V.74, on whom see Brugi 1921b, 21–2. Cf. also Piano Mortari 1978, 283–5, 287, 388, 411.

[65] The challenge had already been addressed, in a substantially similar context (Holy Scripture), by the theologians: Biffi 1992. An interesting idea in that respect can be found in ms. Barb. lat. 1410, 332r (331v: "Compositum per dominum Baldum de Perusio"): "Dixit insipiens in corde suo *ars civilis legum humanarum non est scientia* eo argumento utens quia non est perpetua cum iuris civilis statuta sint mutabilia. Preterea omnis scientia procedit ex principiis per se notis circa que non contingit error, ut patet secundo methaphisice, sed scientia nostra procedit ex voluntate statuentis que voluntas non est per se nota. Sed contra eos est quod scribitur Sapientie X° *dedit illi scientiam sanctorum* (*Song of Sol.* 10.10). Nam, ut ait ille Demostenes summus stoyce sapientie philosophus: *lex est inventio et donum Dei cui omnes homines obedire docet dogma omnium sapientum* et Crisippus philosophus ait *lex est omnium rerum divinarum et humanarum notitia quam oportet preesse bonis et malis et principem et ducem esse*. Item Ar(istoteles) primo ethycorum *quanto comunius, tanto divinius*." More sophisticated is the defense of the discipline by Giovanni da Legnano: Donovan and Keen 1981, 329–33. On the *propositiones per se notae*, *STh*, I–II, q. 94, a. 2, resp. About the problem in general, cf. Otte 1971, 183–5; 219; Wieacker 1967, 59–60.

[66] Crescenzi 1990, 1 ad Inst. 1.1: "Quodam modo ad ethicam hic liber spectat." Cf. Fitting 1965, 95–9; Kuttner 1940; Calasso 1954, 275; Diurni 1976–7, 17; Pace 1992, 222.

dinate science.[67] In general terms, the relationship of subordination is explained as follows by Thomas Aquinas:

The inferior sciences, which are subordinate to the superior ones, are not derived from principles autonomously known, but presuppose [*supponunt*] conclusions already proven [*probatae*] in the superior sciences. Those principles in reality are not known autonomously, but have been demonstrated in the superior sciences on the basis of their own principles. (*ThSent*, I, prol. a. 3, sol. 2)[68]

This refers to the problem of the "dignity" (*principium*) guiding the operations of practical reason: "The good is that which all things seek" (*STh*, I–II, q. 94, a. 2, resp.).[69] "Our law"—Baldus concludes—"applies to itself the whole of moral philosophy" (Baldus 1586a, 7ra, n. 20 ad Dig. 1.1),[70] due to which "the learned who study the law can choose someone who lectures in moral philosophy, the mother of, and gate to, the laws" (Horn 1967, 108; 1968, 7; Ermini 1923, 82, 151): ulterior proof (if still needed) of the fact that the law owns the principles it adopts from another discipline, namely, ethics. In addition, the law assumes a certain number of "dignities" from ethics, as both belong to the practical sciences. The nature of the latter requires, however, that the same "dignities" be directed toward ulterior ends instead of representing an end in themselves. Thus the law, to the degree to which it is oriented toward practice and to the service of human beings, "is not pursued as an end, but rather leads to an end" (Ullmann 1942, 388): The most sublime end consists in the contemplation of truth.[71] Truth is the goal of the speculative sciences and to an even higher degree of metaphysics. The practical arts hence serve the speculative ones, which, in turn, are subordinate to primary philosophy as they receive from it their guiding principles. As in fact all of the particular sciences focus on distinct aspects of being, only metaphysics studies being insofar as being, uncovering its

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[67] The novelty introduced by the commentators is not noted by Horn 1967, 107–8; Kriechbaum 2000, 308–9.

[68] Continuing with these words: "Similar to perspective, which deals with visual lines and is subordinate to geometry." Cf. *ThB*, q. II, a. 2, ad 5m. In general, Biffi 1992.

[69] "Bonum est quod omnia appetunt." But cf. Garin 1947, 44: "Legum principia sunt […] tres certissime, quibusque dissentire nullus valeat, equitates: Ut quod nobis fieri volumus alteri faciamus, quod nobis fieri nolumus nemini faciamus et illud tertium, quod quisque iuris in alium statuerit ipse eodem iure utatur […]. Nec puto […] hec principia posse negari […] quam prima physice vestra [sc. *medicorum*] principia"; ibid., 234.

[70] "Ius nostrum applicat sibi totam moralem philosophiam"; Ullmann 1942, 387; Le Bras 1960, 198.

[71] The passage by Baldus has to be understood in the context of *Metaphysics*, I.1–2. Cf. 982b24–27: "It is therefore clear that we do not seek this knowledge for any ulterior use. Just as we call man free when he exists for himself and not for some other person, we pursue this science as that which is unique in that it serves as an end to itself." The same line of thought is followed by Iulianus Duciensis 1492, 9: "Per quam [legem] causam causantem, idest Deum cognoscere docemur […] ipsum Deum esse legem asseremus." Important considerations in this regard can be found in *CG*, III.25.6.

principles and highest causes (Aristotle, *Metaphysics*, IV.1). For this reason it deserves to be called by the name of wisdom, "which encompasses the intellect and science, and judges the conclusions reached by the sciences and their principles" (*STh*, I–II, q. 57, a. 2, resp.; cf. Aristotle, *Metaphysics*, 981b28–82b9). Since the law deals with things that are, it follows necessarily that law, in studying its objects, must refer to the supremacy of philosophy which examines being in principle and in abstract fashion. All knowledge is structured in an orderly way and consequentially according to fundamental presuppositions: "He who wishes to learn about the effect must first uncover the antecedent. He who wants to detect the essence of a thing must know about its principles" (Baldus 1586a, 7ra, pr. ad Dig. 1.1.1),[72] namely, the substantial and immutable essence: "The order pertaining to the substance of a thing or its form is unchangeable" (Baldus 1586a, 4va, n. 14 ad const. *Omnem*, pr.).[73]

The exercise of jurisprudence thus implies respect for the priorities existing in ontological terms and their reproduction in the cognitive processes (Baldus 1586a, 1rb, nn. 1–3, *Proemium*). In other words: the necessity and the universality of sciences reflect the need and the universality attributed by metaphysics to being as such.[74]

Based on these premises, at least two consequences can be discerned. Theoretically, jurisprudence is subordinate to metaphysics: "Legal science"— Baldus states—"is immediately subjected to theology."[75] The term "theology" is understood in its Aristotelian sense here, first science or metaphysics. The latter stands for the wisdom which, in the words of Bartolus, is "a speculative habit considering the highest causes. The same habit pertains primarily to theology and metaphysics, which consider the first causes and pass judgment on the principles employed by the other sciences" (*TT*, 165vb, n. 70).[76]

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[72] "Qui vult scire consequens debet primo scire antecedens. Qui vult scire quid rei debet scire principia rei." Cf. Bellomo 2000, 644, 35 (Azo).

[73] "Ordo tendens ad substantiam rei vel ad formam est immutabilis."

[74] There is an interesting critical comment in Baldus 1586a, 7rb, nn. 6–7 ad Dig. 1.1.1, on gl. acc. *Prius*, l.c. ("Sic econtra decet pro oportet"): "So. Dicit gl. quod exponitur oportet, idest decet, nam in materia probabili oportet, idest congruit: Sed in materia necessaria ponitur praecise: Sed tu dic, quod oportet, stat pro praecisa necessitate, nam scire dicimur, quando res per causas cognoscimus, item ius noscitur ex una causa, praesertim essentiali et intrinseca: Sed iustitia est causa intrinseca iuris."

[75] Following the passage cited above, n. 65: "Item scientia legum immediate subalternatur theologie, de quo scribit Ysaye, LXIIII, penultima, *super sensu hominis ostensa sunt tibi* (*Eccli.* 3.25)." Cf. *BSDB*, 188ra: "Excepta sola sacra theologia, cui hanc scientiam fateor esse suppositam."

[76] "Est enim sapientia habitus speculativus considerans causas altissimas: Et hoc pertinet principaliter ad Theologiam et Metaphysicam, quae Deum et primas causas considerant et de principiis omnium aliarum scientiarum iudicant et etiam de ista ad iuristas, unde merito dicitur *est enim res sanctissima ista civilis sapientia* ut Ulpia(nus) ait; ipsa enim causas altissimas considerat: Quia est divinarum atque humanarum rerum notitia et cognitio, iudicat de principiis aliarum scientiarum."

The habit of wisdom is not completely foreign to the jurist, though it does not pertain to him "primarily": only partly and to a limited extent.

At the same time, the jurist cannot avoid paying attention to those primary, divine realities from which law takes its origin: "Many things become clear to us when we investigate the principles from which law originates. Many things in fact become evident through the principles of that which is explored. Because he who does not know the principles, does not master the art" (Baldus 1586a, 7va, n. 1 ad Dig. 1.1.1, *additio*).[77]

The recognition of the harmonious and immutable order that exists among beings presupposes the justice of the Creator, "which was from eternity, before the world was created." In spite of being pagan, Ulpian "spoke of nature constituted in the heavens, that is, of the order and disposition of animated things." As was also noted: "He spoke thereof as a natural philosopher" (Baldus 1586a, 7rb, n. 3 ad Dig. 1.1),[78] whose supposed metaphysical digression did not rely on Revelation ("the [ancient Roman] jurist did not attempt to make reference to that celestial justice which remained inaccessible to him").

The science of being as such necessarily leads to the science of the supreme being and the separate substances as principles of being in general. With that additional aspect of metaphysical investigation among the glossators and commentators we must deal in the following section.

2.3. Theology and Law

2.3.1. *Greek* Logos *and Christian* Logos

In the beginning was the Word [*En arkhē ēn ho logos*],
and the Word was with God,
and the Word was God.
The same was in the beginning with God.
All things were made by him;
and without him was not any thing
made that was made. (John, 1.1–3)

The magnificent prologue to the Gospel of John was rightly understood over the centuries as the reply of Christianity to the question posed by Greek

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[77] "Multa manifesta fiunt ab origine iuris ab investigatione principiorum. Multa namque manifesta fiunt per principia eorum quae quaeruntur, et quia non perfecte novit artem, qui non novit principia artis."

[78] "Item nota quod ius descendit, idest nascitur a iustitia et sic iustitia fuit prius, quam ius et hoc non est dubium de iustitia Creatoris, qui fuit ab aeterno antequam orbis crearetur, sed iurisconsultus non intellexit de illa iustitia, nec posuit os in caelum, sed sicut naturalis philosophus loquutus est de natura in caelo constituta, idest de ordine et dispositione rerum animatarum." The natural theology "proper to the philosophers which is called physics" is discussed by St. Augustine, *DCD*, VI.5.2.

thought from the very beginning: Which was the initial cause (*arkhē*) of everything real. It was certainly not by sheer coincidence that the fourth Gospel was originally written in Greek, the common language among the learned in the Hellenistic world. The longing of human wisdom finally found reassurance in the unforeseeable revelation God had made of himself, in history, through Jesus Christ. The passage from the Greek *logos* to the Christian one, furthered by the reflections of Justinus and Origenes (Marchesi 1984), found its most mature expression in the philosophical and theological works of St. Augustine. For the bishop of Hippo, the Word/*Logos* makes possible an ultimate understanding of the world, because *logos* created it in the first place and then recreated it through His incarnation and redemption, accomplished in the mystery of Easter. In the son, the world of ideas actually becomes comprehensible. Plato had sensed the latter to be the authentic reality, the full and eternal being, but he had tried in vain to tie it in some way to the tangible world. Having acquired from Revelation the concept of creation and the identity of *logos* and God, St. Augustine was able to turn the realm of the archetypes into the object of a thought, conceived by the Father from all eternity (*ab aeterno*), the model from which all things had subsequently flowed.

"The ideas are fundamental forms or stable and immutable reasons of the things. Being eternal and always identical, they are contained in the divine intelligence. Although they neither are born nor die, everything that can be born and dies is grafted upon their model" (*DDQ*, 29). For St. Augustine, the doctrine of ideas is essential to philosophy and even more so to religion. He who is religious, in fact, claims that all things have been created by God:

Now, granted all of this, who would dare say that God has created all things irrationally? If that cannot be maintained nor believed, it follows that everything has been created in accordance with reason. But it would be absurd to think that Man was created according to the same reason or idea as a horse. As a result, everything has been created following its own reason or idea. [...] If, moreover, these reasons for all things created or to be created are contained in the divine intelligence, and if there cannot be anything that was not eternal and immutable, and if these fundamental reasons for the things are those which Plato calls ideas, then there are not only ideas, but the ideas are the true reality, because they are eternal and immutable and everything that exists does exist through participation in them, regardless of its mode of being. (*DDQ*, 29)

The passage explains sufficiently the reason why none of the Christian thinkers, prior to the advent of Nominalism, maintained that it was possible to abandon this Platonic residue: not even those who, like Thomas Aquinas, took Aristotle for their guide. In addition, the doctrine seemed to be perfectly adaptable to the holy texts: To begin with *Proverbs*, 8.22–30, where divine wisdom (subsequently identified with *logos* and the Son), talks about itself in these terms:

I was set up from everlasting, from the beginning, or ever the earth was.
When there were no depths, I was brought forth; when there were no fountains abounding with water.

Before the mountains were settled, before the hills was I brought forth.
While as yet He had not made the earth, nor the fields, nor the highest part of the dust of the world.
When He prepared the heavens, I was there, when He set a compass upon the face of the depth:
When He established the clouds above: When He strengthened the fountains of the deep:
When He gave to the sea His decree, that the waters should not pass His commandment:
When He appointed the foundations of the earth:
Then I was by Him, as one brought up with Him: And I was daily His delight, rejoicing always before Him.

And again in the words of St. Paul, in his letter to the Colossians (1.15–20):

He [Christ Jesus] is the image of the invisible God, the firstborn of every creature. For by Him were all things created, that are in heaven, and that are in earth, visible and invisible. […] All things were created by Him and for Him. And He is before all things, and by Him all things consist […] for it pleased the Father that in Him should all fullness dwell.

Read in a Neo-platonic light, these texts manifest the priority of divine thought in relation to any created reality. In a certain way, the sublime quality of the divine operations can be understood on the basis of human experience, which carries the imprint of God's similitude (Genesis, 1.26: "Let Us make man in Our image, after Our likeness"). Nothing in fact can be produced by us without one or several ideas, without a project previously conceived by the mind and present therein in greater perfection than in its concrete realization, in what reflects the limits imposed by matter. The truth of every single thing exists first and foremost in the mind: Or, rather, in the divine mind which preserves the perfect model of it. Rightly, therefore, St. John the Evangelist writes that all has been brought forth through the *logos*, the original idea of everything present, past, and in the future. "In the beginning"—that is, in the Son, in eternal thought, or principle—"God created the heaven and the earth" (Genesis, 1.1–2). The Old and New Testaments present themselves in full and suggestive concordance.

2.3.2. *Equity and Justice, Names of God. The Influence of St. Augustine*

This speculative core element, presuming that God is being and thought, and hence truth, life, wisdom, beauty, order, will, and love to the highest degree, is transferred to the Middle Ages with lasting authority. From the twelfth century onward, perhaps in the wake of Irnerius himself, the work of St. Augustine also becomes part of the reflections by the Bolognese jurists on the themes of justice and equity. I have already treated these arguments in an earlier publication (Padovani 1997, 35–86; 241–8). Here, I will limit myself to a brief summary of the principal conclusions. The point of departure is provided by statements that can be found in the works of the first glossators. For instance, "equity is nothing other than God"; "we call justice the divine will";

"equity is also justice, whenever directed by the will. Everything, in fact, that is equitable, is also just if brought forth by will."[79] The key to harmonizing these glosses with one another, to revealing their unifying inspiration, is given to us by theology. Equity and justice are names that man can attribute to the persons of the Son and the Spirit in the divine Trinity, respectively. The *logos* is the thought of the Father, containing the archetypes of the things created. The archetypal ideas, of course, do not subsist without being interrelated, without an order that encompasses them in unity. The Supreme Maker, in ways not very different from those of an architect, has arranged in a single cosmos, from eternity, the existence of every single being. The harmonious proportion we sense in the world gives a faint reflection of the perfect correspondence, which mutually ties together the archetypes in the divine mind. The project conceived in God's mind, called eternal law or providence by the Fathers of the Church, Irnerius and his pupils was usually invoked as equity. The contemporary philosophers from Chartres instead called it equality (*equalitas*), echoing a term employed by St. Augustine in his *De doctrina christiana*. Just as the terms are corresponding ("*dicitur equitas quia equalitas*"), their significance is identical as both *equitas* and *equalitas* provide denominations (or, technically speaking: appropriations) of the Word/*Logos*. Equity/ Equality manifests itself equally in the things and their orderly distribution ("*equitas in rebus ipsis percipitur*"), for it partakes in God the Creator: More precisely, it *is* God in the second person of the Trinity. Representing the supreme law governing animate and inanimate beings alike, the notion of equity further coincides with that of natural law. The former merely underlines the intrinsic equilibrium and harmonious correspondence among the forms of life.

The impact of St. Augustine's *De Trinitate* is similarly manifest in the conception of justice. Justice *is* God as well: no longer, however, perceived as reason, but as will that confers on the world the order conceived by the Son and in the Son. If the Holy Spirit is the will to do good, His name is justice. In human affairs, related by analogy to those divine, is it not that we call someone just when he puts the good perceived in his mind into effect? The dual relationship of identity and distinction between equity and justice, formulated by Irnerius ("justice is called here the good and the equitable. But equity differs from justice. In fact, equity can be grasped within the things themselves and when it flows from will, it becomes, once it assumes form, justice")[80] and again put forward by his pupils, finds its proper explanation in the light of the

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[79] "Nihil aliud est equitas quam Deus"; "Divinam voluntatem vocamus iustitiam"; "Equitas […] que et iustitia ita demum, si ex voluntate redacta sit: Quicquid enim equum, ita demum iustum si est voluntarium." Cf. Padovani 1997, 42; 67–9, for references to the sources and parallels in other testimonies.

[80] "Bonum et equum vocat hic iusticiam. Differt autem equitas a iusticia; equitas enim in ipsis rebus percipitur que, cum descendit ex voluntate, forma accepta, fit iusticia."

Trinitarian dogma. Equity and justice are one and the same thing in relation to God; they are different as the Son is a person distinct from the Holy Spirit.

The connection established between the most elevated juridical notions and Trinitarian speculation is not surprising. Whoever is somewhat familiar with the philosophical thought of the twelfth century knows that the study of the divine substance and the precise relations within the Trinity held a place of central importance in the scientific debates of the schools.[81]

2.3.3. From Equity in General to the Juridical Norm. The Influence of Iohannes Eriugena

Apart from Augustinian themes, my previous examination of the philosophy of the Bolognese glossators has also revealed elements of reflection typical of Iohannes Scotus Eriugena, for whom all reality is a manifestation of God, a theophany, like a cascade that flows from a principle mysterious and inaccessible in itself. What appears to our senses is an authentic and divine substance, which after having surged, still shapeless (and hence beyond knowledge), from its original fountain, gradually descends while taking on forms that define it and turn it into an object. This grandiose image inspired the first teachers of the law to construct an orderly hierarchy among the juridical concepts. The words used by Eriugena, alluding to the secret folds in which God is hidden ("*in occultis naturae sinibus*"), are taken up by the glossators to indicate crude equity (*rudis equitas*), which is at the origin of every normative event in the world. Originally lacking all form (in line with Eriugena's God), equity,

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[81] *De Trinitate* continued to be cited frequently in the writings of later jurists; the refined treatment of Azo in his *Summa Codicis*, 7, nn. 1–5 ad Cod. 1.1, for example, seems to follow closely V.9. The same work also inspired the distinction of the faculties of the soul into memory, intellect, and will, modeled after the three divine persons, which we encounter again in Henricus de Segusio 1963, 13ra, nn. 1–2 ad X 1.1. In addition to the tripartite scheme of St. Augustine, however, Henricus provides a variation of his own: "Tria reperiuntur in ea [anima], scilicet intellectus, qui praeconcipit, et hoc comparatur Patri, primo operanti, ratio quae discernit et hoc comparatur Filio discernenti, qui est sapientia Patris in caelo et terra, omnia disponens sua virtute et memoria, quae conservat et hoc comparatur Spiritui Sancto, qui omnia bona corroborat." Similar modifications appear in Baldus 1586f, 68ra, n. 2 ad Cod. 4.24.5: "Sunt tres potentiae animae, scilicet intellectus, voluntas, memoria. Intellectus praecedit, deinde sequitur voluntas, quia voluntas est movens motum ab appetibili intellectu: Unde nihil prius est in voluntate, quin sit prius in intellectu, secundum sanctum Thom(am). Memoria habet se ad utrunque, scilicet ad intellectum et voluntatem"; Baldus 1580a, 8rb, n. 9 ad X 1.1.1 (with reference to *TID*, 547, c. XXXVIII: "Et sicut in Deo tres sunt personae, Pater, Filius et Spiritus Sanctus: Sic et tu habes tres vires, scilicet intellectum, memoriam et voluntatem"): "Tria reperiuntur in anima, scilicet intellectus praeconcipiens et ratio discernens et memoria conpraehendens ac retinens, secundum Bernardum"; *QBS*, 120ra, n. 8: "Tria sunt in anima, intellectus, ratio et voluntas. Intellectus namque examinat et illuminat: Ratio determinat et voluntas acceptat." A copy of St. Augustine's *De Trinitate* is extant in the rich library of Giovanni Calderini (Cochetti 1978, 981. IV). In general, cf. Padovani 1997, 74–5.

coming forth from itself, becomes *constituted* and gains precision in a form. "*Manens quod erat, incipit esse quod non erat*": Remaining that which it was (that is, equity), it starts being what it was not, namely, law that is recognizable to human beings. If crude equity is at first, like God, beyond expression ("*nondum quicquam dictum erat*"), it finally becomes manifest and defines itself. It is, according to an appropriate formulation by Rogerius, captured by a string of words ("*Iuris laqueis innodata*"; Padovani 1997, 193) giving expression to the juridical norm. The gush of water, so to speak, freezes and turns into a tangible thing, while remaining the same all along. It continues to be water ("*manens quod erat*"), but it is now locked into something else, rendered rigid, and no longer alive and fluid. It begins to be something new ("*incipit esse quod non erat*"), inferior.

Leaving the suggestive terrain of the metaphor behind, all this means that each positive norm constitutes an expression of lesser potency, weakened in comparison with the mysterious harmony which is in God, or rather, is God Himself. The perfection of the *iura*, the norms contained in the eternal *logos*, is obscured and diminished at the moment when man, living in the vicissitudes of history, takes hold of them and applies them to the world of intersubjective relations. Such is the case, to cite but a few examples, with individual freedom and property, which equity would demand to be extended to all, but which in actual fact remain subject to necessary limitations, be it in the law of the peoples, be it in civil law.

Whether they feel inclined toward metaphysics of an Augustinian stamp, or prefer to dwell on the thought of Eriugena, the first glossators follow the mainstream of Platonic tradition, which characterizes the Western philosophy of the time.

2.3.4. *The Abandonment of Meta-Juridical Analysis after Accursius*

The rediscovery of the Aristotelian texts, becoming available in translation since the mid-twelfth century, affects only in part the scenario just outlined. As is well known, there were numerous apocryphal writings which added to or supplanted the works of the Stagirite, commentaries, and lectures of the Peripatetic school of the Arabs laced with Neo-platonic elements. They included observations we will see reemerge in the comments of several fourteenth-century jurists and their successors.[82] Nevertheless, remarks on metaphysical questions tend to grow less and more vague from about 1250 until the first decades of the following century. This turn of events seems to reflect

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[82] Cf. also Section 3.9. Among the canonists, the references by Iohannes Andreae to the Ciceronian tradition of Plato's *Timaeus* are worth noticing ("Tullius de creatione mundi"), as well as those to Porphyry and to the *Theological Elements* of Proclus ("Arist. Element."). See Ioannes Andreae 1581, 10va, n. 12 ad X 1.1.1.

a trend favoring the methods of the Terminists and Modists, who led medieval logic into new directions. In the footsteps of their colleagues teaching in the schools of the *artes*, the jurists are attracted by the prospect of conferring on their conclusions solidity through a greatly extended use of the dialectical technique. This is not the point to elaborate on the argument, examined in another section of the present book. The recourse to the *modi arguendi in iure* and the diffusion of *quaestiones* (inserted into the narrative of the lectures) are indeed eloquent signs of a change in the scientific orientation. The triumphal advent of logic in the juristic literature was certainly favored by the tendency, reinforced by Iohannes Bassianus and his highly influential school, to indulge in an increasingly technical exegesis of Justinian's text (Padovani 1997, 199). However it might be interpreted in its motivations, this turning point entailed far-reaching consequences. From the early fourteenth to the fifteenth centuries, we are confronted with jurists hardly or not at all interested in metaphysical problems. Others—a minority, indeed—were keen on building their own investigations on the sound premises of speculation, in many aspects merely reiterating themes and considerations already touched by the glossators.

Our attention will now turn to several of these interpreters and identify the points tying them to the venerable tradition of the first Bolognese masters.

2.3.5. *The Doctrine of the Ideas of God. A Neo-Platonic Residue Indispensable to Medieval Philosophy*

We have just mentioned that the spread of Aristotelian philosophy did not eliminate altogether certain elements characteristic of Platonism. This observation is valid for the philosophers as much as for the theologians of the period. Suffice it to think, in particular, of the doctrine of the ideas. To abandon the doctrine of the ideas would have meant to revert to an element of metaphysical reflection that was incompatible with Christian revelation. Aristotle, on his part, had taken the opposite direction, challenging Plato all along the way: but his resistance was precisely the reason why, according the judgment of St. Bonaventure, the cardinal aspect of his metaphysical thought remained shrouded in obscurity. The God of Aristotle does not know Himself, nor is He in need of knowing a single thing; He is not even required to set things in motion, because He does not act upon them as the efficient cause. Aristotle's God moves them only in His quality of being the final cause, as a necessary ingredient and object of longing and affection. God, to put it differently, does not know particulars. From this suppression of the divine ideas derives, as if from a primordial error, a whole series of other mistakes. First of all, there is the fact that God cannot have foreknowledge nor providence of the things because He does not carry within Himself the ideas that would allow Him to have knowledge. Such an assumption, of course, appeared unacceptable not

only to the Franciscan doctor, but also to Thomas Aquinas, otherwise so quick to profess his adherence to the doctrines of Aristotle.[83]

If the doctrine of the ideas, prior to the crisis brought on by Ockham, forms an indispensable aspect of metaphysics, we must ask ourselves whether and to which degree it is present in the writings of the jurists. In fact, the same concept of equity, interpreted as the harmonious project of creation, implies the presence in the *logos* of archetypes on which all things are modeled. In the first decades of the thirteenth century, William Vasco, canonist and civilian of both Parisian and Bolognese training, formulates his viewpoint, inspired by Plato's *Timaeus*, with admirable conceptual precision:

God Father, preparing Himself to send into the world His only begotten Son, wished the archetypal world to be contained in the tangible universe in such a way that the latter conformed itself to the former in fraternal likeness with the first model (as Plato affirms in his *Timaeus* at the beginning of the second book). He thus created the tangible world and called into existence the things of the world, subject as they are to inconsistency and perdition, arranging them in perfect order according to the eternal nature of the archetypal world. The permanent structure of the latter in fact informs, with the perpetual law of immutability, the ideas of the things which appear in the world from day to day. The philosophers have called this archetypal world the divine mind, a mind that we identify with the divine Word and the wisdom of the Father. The ancient Roman jurist, inspired by God or perhaps guided by the profundity of his own study, has called it *nature in which all things have been created*, arriving in this way at the apex of truth. Thus, as Plato says in the second book of his *Timaeus*, the highest artisan, contemplating the various ideas of the intelligible world and among them, as if from a higher perspective, the ideas of equity and the difference between the equitable and the unjust, went about to endow with existence their ideal models by laying first the foundation of merit and demerit. Since equity refuses to be associated with a reality lacking reason, however, God, in creating, chose to enhance, of all he intended to create, the rational things by conferring on them greater dignity.

And further on:

In this fashion man was made, capable of reason, to the effect that his ability to discern led him to seek equity and detest iniquity. God, to be sure, who is true equity, shaped man in such a way as to leave him the freedom to choose by himself at the crossroads of the equitable and the unjust. (Aimone Braida 1983, 33; cf. Padovani 1997, 117–9)

Three hundred and fifty years later and in a completely different scientific context, a jurist like Joachim Hopper (1523–1576) formulated, in typically humanistic terms, a doctrine that was substantially similar:

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[83] *BonHe* 1891, 360–1, VI.2–3: "Aliqui negaverunt, in ipsa [causa prima] esse exemplaria rerum; quorum princeps videtur fuisse Aristoteles, qui et in principio Metaphysicae et in fine et in multis locis execratur ideas Platonis. Unde dicit, quod Deus solum novit se et non indiget notitia alicuius alterius rei et movet ut desideratum et amatum. Ex hoc ponunt, quod nihil, vel nullum particulare cognoscat […] Ex isto errore sequitur alius error, scilicet quod Deus non habet praescientiam nec providentiam, ex quo non habet rationes rerum in se, per quas cognoscat […] Et ex hoc sequitur, quod omnia fiant casu, vel necessitate fatali" and that there is no final retribution. Cf. Gilson 1953, 84, 121, 133; *STh.*, I, q. 15, a. 3, *contra*: "Sed omnium quae cognoscit, Deus habet proprias rationes. Ergo omnium quae cognoscit, habet ideam."

Having revealed in us and almost consecrated the image of God the Supreme, who can doubt that we must ascend to the same God, the creator and artisan of all things, to seek to comprehend ourselves and this world? Once we have absorbed Him with all of our mind, we will doubtlessly no longer find shadows and approximations of the things, but the exact forms and species which are called the ideas: Those that, impressed and embedded in our souls, bring forth the recommendations and precepts of nature we usually call premises and common notions. (Hopper 1584, 83vb)[84]

Meanwhile, a single purpose is attributed to the soul and the mind of man: "To raise the eyes toward the divine substance and majesty and admire in it those primary species of the visible things that are known as ideas or forms, removed from any physical contact in the likeness of God Himself" (Hopper 1584, 84rb).[85]

2.3.6. The "Iura" Are Encompassed in the Divine Word

Given that the ideas preexist in God, "highest summit of the things according to His simple being" (*STh*, I, q. 57, a. 1, resp.),[86] it is necessary to ask whether we must understand the archetypes of the single laws elaborated by jurisprudence as being included among them as well. Even from a purely theoretical viewpoint, the response cannot be but in the affirmative. If it were not the case, it would be necessary to admit that God does not know the realities known to man and that He lacks the criteria of just and unjust. The opposite is true. In the Word, the models not only of the tangible realities, but also of the intelligible ones, as for example the ideal forms of the laws and the virtues, are joined. "Indeed, if we are to believe that the ideas of the other things are in God"—we read in a French *Summa*—"this applies even more so to the virtues" (Legendre 1973, 24).[87]

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[84] "Nam, cum Dei Optimi Maximi effigiem, dedicatam in nobis, et quasi consecratam, habeamus: Quem quidem si tota mente prehenderimus, inveniemus profecto, non umbras rerum et simulachra, sed ipsas formas et species, quae Ideae nominantur: Quaeque impressae ac consignatae in animis nostris, efficiunt illas perpetuas commendationes ac praescriptiones naturae, quae anticipationes et communes notiones vocari solent."

[85] "Divinam substantiam et maiestatem suspicere admirarique in ea, primas illas rerum adspectabilium species, quae Ideae sive formae dicuntur, quaeque longissime absunt ab omni contagio corporis, quemadmodum est ipse Deus."

[86] Cf. Antonius a Butrio 1578a, 6vb, n. 15 ad X 1.1.1: "Dic quod [Deus] est principium principians, non principiatum. Et quod sit dare unum principium increatum, patet ex eo, quia alias iretur in infinitum. Ubi enim ponis unum creatum aliquid, ponis creatorem: Et ascendendo ires in infinitum, nisi dares unum principium increatum. Item si Deus inceperit, esse oportet, quod exiverit de potestate essendi ad actum. Sed, ut dixi, non potest esse, quod alius eum duxerit, nec quod ipse se ipsum, secundum quod sequeretur, quod ipse praecessisset suum esse, vel seipsum: Quod non est intelligibile. Concluditur ergo, quod non incepit esse." The use of the first approach by Thomas Aquinas, already adopted by Iohannes Andreae, is obvious (Iohannes Andreae 1581, 8ra, n. 18 ad X 1.1.1).

[87] "Nam si aliarum rerum, multomagis virtutum ideas esse in Deo credendum est." The conclusion shows the influence, at least indirect, of Plotinus: "Dico ergo, quod illa lex aeterna

In God, the ideas are the object of an eternal thought that defines the nature and truth of their being much more than the norm of positive law is able to do, the school of Bulgarus (†ca. 1168) maintains: "The broad reach of justice extends to transactions already in existence. It also encompasses those that will come to light in the future. The actual law instead does not even admit within its framework many of the ones already extant."[88] In full agreement with these affirmations, Baldus follows Azo when he writes: "In justice, all of the *iura* are contained along with those it still carries in the womb" (Baldus 1586a, 7vb, n. 4 ad Dig. 1.1.1).[89] And again: "The *iura* come forth due to a divine suggestion. They draw their origin from heaven and are promulgated by the mouth of the princes. The most just laws and the sacred canons proceeded from a single womb or divine source" (*QBS*, 118ra, n. 3).[90]

The Neo-platonic inspiration of these passages is manifest not only due to the metaphor of the source and the use of the verb "to proceed," but also through the invocation of the divine Word, viewed as the fertile matrix (*uterus*) of the experienced realities. A passage by St. Bonaventure comes to mind: "In eternal wisdom, it is the reason of fertility that conceives, nourishes, and gives birth to every universal law. All of the exemplary reasons are in fact conceived from eternity in the womb [*utero*] of eternal wisdom" (*BonHe* 1891, 426, XX.5).[91]

2.3.7. Reasons for the Criticism of Plato

The doctrine of the ideas thus remains a core element of metaphysical and theological speculation, and also whenever jurisprudence becomes involved in investigations regarding the principles on which it is based. Nevertheless, Franciscus Zabarella (1360–1417) and Baldus de Ubaldis reject Platonic thought almost simultaneously by using terms from Aristotle. Let us listen to the teacher from Padova:

Outside of the soul, the universals have no existence, due to which the Philosopher reproaches Plato who places the ideas of the universals outside of the soul. Plato's opinion, however, is sal-

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est exemplar omnium […] In illa ergo primo occurrunt animae exemplaria virtutum. Absurdum est, ut dicit Plotinus, quod exemplaria aliarum rerum sint in Deo et non exemplaria virtutum" (*BonHe* 1891, 361, VI.6).

[88] Padovani 1997, 178 ("Iustitia, latius patens, negotia et ea que sunt et que futura sunt comprehendit, ius vero nec omnia ea que sunt, suis laqueis apprehendit"), also citing a parallel passage from Iohannes Eriugena.

[89] "In ea [iustitia] stant omnia iura et omnia iura gestat in utero." Cf. *ENPS*, 16.

[90] "Divino […] nutu iura processerunt […] De coelo enim originem ducunt et per ora Principum promulgantur […] iustissimae leges et sacri canones ex uno utero vel fonte divino processerunt."

[91] In reference to *Eccl.* 26.16: "In sapientia aeterna est ratio fecunditatis ad concipiendum, producendum et pariendum quidquid est de universitate legum. Omnes enim rationes exemplares concipiuntur ab aeterno in vulva aeternae sapientiae seu utero."

vaged by many theologians interpreting it in acceptable fashion. For the moment, we leave the discussion of the issue to them. (Zabarella F. 1517, 46rb, n. 6 ad X 5.3.30)[92]

And Baldus adds:

Note that this is said against Plato, who puts the being of the ideas, insofar as sources of the forms, in heaven or in the clouds in the air. He understands the ideas as the primary causes for all entities endowed with form: He does not say that they are in God, though, but rather that they were created by God, as images and models of the species, including, for example, that of man, of the dog, and of other things, in predicative function. This assumption is rejected by Aristotle in the first book of his Ethics. (Baldus 1580a, 8rb, n. 10 ad X 1.1.1)[93]

Looking closely, neither of the two jurists denies the existence of the ideas and the role played by them in relation to the tangible world. Zabarella limits himself to rejecting the claims of exaggerated realism; Baldus, on his part, criticizes a certain interpretation of Plato, which turns the ideas into just as many creatures (*a Deo creatas*). Granted that the pupil of Socrates never professed such a doctrine (with the Christian concept of creation from nothing, among other things, unavailable to him), one must conclude that Baldus misses the mark on this point. It obviously posed an unresolved problem for some time, as John of Salisbury had written two hundred years earlier:

In the work of the six days, the single things created are recorded minutely, without any mention of the creation of the universals. And there is no attempt to see whether they are essentially united to the single things or whether Plato was right. Besides, I do not recall to have ever read from where the ideas received being or when they began to exist. (John of Salisbury, *Metalogicon*, 95, II.20)[94]

It is likely that the polemic can be traced to John Eriugena, an author who, as we have seen, certainly influenced the first generations of glossators. In any case, for John of Salisbury as well as for Baldus, the ideas, far from being created or from forming an autonomous realm, distinct from God, were to be viewed as consubstantial with the Word: "The universals will disappear entirely, unless they are tied to God" (John of Salisbury, *Metalogicon*, 95, II.20).[95]

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[92] "Universalia non sunt quid extra animam, unde reprobat Philosophus Platonem, ponentem ideas universalium extra animam. Tamen opinio Platonis salvatur a multis theologis ad sanum intellectum: Quod pro nunc dimittamus eorum disputationi."

[93] "No(ta) contra Platonem, qui posuit ideas, tanquam principium formarum esse in coelo, vel nubibus aeris. Et ideas intelligit primarias causas entium formalium quas non dicebat esse in Deo sed a Deo creatas: Tanquam imagines et exemplaria specierum, ut hominis, canis et caeterorum, quae suo praedicamento sunt subiecta, quod reprobat Aristo(teles) in primo ethicorum (*Eudaemonian Ethics*, I. 1217b)." Cf. Horn 1967, 121.

[94] "In operibus sex dierum in genere suo bona singula creata memorantur, nec tamen creationis universalium mentio aliqua facta est. Nec oportuit si essentialiter singularibus unita sunt, aut si Platonicum dogma optineat. Alioquin unde esse habeant aut quando coeperint, nusquam memini legisse."

[95] "Dispereant universalia, si ei [i.e., *Deo*] obnoxia non sunt."

2.3.8. The Archetypes of the "Iura" Are in God

The Trinity, Baldus explains, as being "the sole source of the universals," is "the universal cause of all the general forms and cause of the individuals."[96] If the archetypes are in God, they share one and the same essence with Him, according to the principle that what is in God, is God.[97] The error of Plato with regard to our subject does not lie in his having proposed the doctrine of the ideas, but in having endowed them with a reality other than, and distinct from, God.[98] In that respect, Baldus does not depart in any way from a consolidated and uniform strand of thought, which runs from St. Anselm to St. Bonaventure and Thomas Aquinas[99] (to mention only the major representatives) among the theologians, and from Irnerius to the first generations of the glossators among the jurists. St. Thomas, for instance, writes: "Just as in the mind of the Father there are the reasons and ideas of all the creatures God has brought forth, the reasons of the things we must accomplish are also contained in there. Just as the reasons of all things derive from the Father and the Son, who is the wisdom of the Father, the same applies to the reasons of all the acts that will occur" (*ThSeI*, 12.8.1723).[100]

As a result, we find in God the reasons, the eternally true and stable criteria to which human activity is bound in the realm of inter-subjective relationships. "The moral rationalism of Christianity"—Gilson rightly observed (Gilson 1969, 310–1)—"is ultimately integrated into a metaphysical understanding of the divine law." The divine order, innermost structure of the universe, indeed dominates and defines the moral order. In conformity with these premises and in accordance with Bartolus (see above, n. 76), a manuscript from the school of Baldus affirms: "This light (of the intellect) is acquired through the sciences, especially those divine, just as our most sacred law which, while being subordinate only to theology, surpasses all of the other sci-

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[96] *QBS*, 118vb, n. 22: "Deus, qui est universalis causa omnium generalium formarum, et causa individuorum."

[97] *CG*, I.45. Cf. Boland 1996, 197. Cf. *STh*, I, q. 15, a. 1 ad 3m: "Idea in Deo non est aliud quam Dei essentia."

[98] Perhaps, the passage already cited from Francesco Zabarella must be understood in this sense: "Tamen opi. Platonis salvatur a multis theologis ad sanum intellectum." Cf. above, n. 92.

[99] For St. Anselm, cf. Vanni Rovighi 1949, 112–3, and in particular his *Monologion*, 9.24, 12–4; 10.24, 24–7; 12.26, 26–31; for St. Bonaventure, cf. Vanni Rovighi 1974, 53–4, and especially *BonHe* 1891, 386, XII.12; *BonSCh* 1891, 8, q. 2, resp.; for Thomas Aquinas, Boland 1996, 206, 209–12, 236, and particularly *STh*, I, q. 15, a. 1, resp.; ad Im; ad IIIm.

[100] "Sicut ergo in mente Patris sunt rationes omnium creaturarum quae a Deo producuntur, quas ideas vocamus, ita et in ea sunt rationes omnium per nos agendorum. Sicut ergo a Patre derivantur in Filium, qui est sapientia Patris, rationes omnium rerum, ita et rationes omnium agendorum." A similar argument can be found in Coluccio Salutati (Garin 1947, 136): "Concluditur leges, quoniam ipsarum scientia de universalibus rationibus humanorum actuum, potentiarum, habituum et passionum anime considerant, inter speculabilia numerandas." Their necessity reflects the absolute necessity that is in God (ibid., 148).

ences." "The laws, in fact, are supreme philosophy or wisdom, regulating and ruling the human souls by sanctifying them. Arranging in this way life in the inferior spheres in order to attain the superior one, (the laws) participate to a high degree in the divine (natures) or separate substances" (ms. Barberinus latinus 1400, 20v).[101]

2.3.9. Perpetuity of the "Iura": The Impact of the Book on Causes

To clarify the meaning of these words, it will be appropriate to analyze several passages from the *Tractatus de successionibus* of 1391, with which Philippus de Cassolis challenged the same Baldus de Ubaldis and his pupil Christopherus de Castiglionibus in a memorable *querelle* (Vaccari 1957, 23; Dillon Bussi 1978, 522). The jurist from Reggio resolutely states that the civil law accompanies (*comitatur*) natural law in both of the accepted meanings: the law of nature *naturata* and of nature *naturans*. Adoption, for example, follows *natura naturata* (the created order) when requiring a difference of at least eighteen years of age between the adopting and the adopted party. Speaking more generally and from a different perspective, it can be said that the creations of civil law (actions, obligations, sentences, stipulations, testaments) provide imitations of the *natura naturans*: that is to say, of divine reason.[102] Now, positive law has invented (*adinvenit*) its own institutions "as incorporeal creatures, after the example of the nature *naturans*, that is, God" (Philippus de Casolis 1584, 108va, n. 11),[103] acquiring, in this fashion, a perpetual existence. "Perpetual" is that which has a beginning and no end, as the soul, the sun, or the moon (Philippus de Casolis 1584, 108va, n. 11).[104] If, for example, obligations and actions were not capable of surviving their holder, it would occur that "corporeal and perpetual entities would come to an end." That would be con-

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[101] "Istud lumen acquiritur per scientias maxime divinas sicut sunt sacratissime leges nostre que, soli t[h]eologie ancillantes, omnes alias trascendunt leges. Sunt enim leges suprema phylosophia seu sapientia, ff. de var. et extraor. cognitio, l. prima (Dig. 50.13.1) que regulant et regunt hominum animas, C. de sacro. eccl., sancimus (Cod. 1.2(5).22(19)) et sanctificant eas. Cum enim ita vitam inferiorem ordinent ut ad superiorem usque trascendant, magis participant cum diis sive substantiis separatis." Continuing as follows: "Adeo quod anima separata a corpore remanet recordatio scientie sanctarum legum. Sophismatum autem vel medicine nulla est rememoratio." One notes, on the one hand, the recourse to a classical Platonic theme (*rememoratio*) and, on the other, a polemical attitude with regard to physicians and philosophers.

[102] For the expressions *natura naturans* and *naturata*, cf. Alighieri, *De vulgari eloquentia*, I.VII.4; *Monarchia*, II.II.3; Padovani 1997, 211–2.

[103] "Et has ius civile velut incorporales creaturas ad similitudinem naturae naturantis, idest Dei, adinvenit."

[104] "Tales sunt et dici possunt creaturae iure civili et tamen sunt perpetuae, quia perpetuum est, quod habet initium et non habebit finem, ut est anima, sol et luna." Cf. Bellomo 1993, 453–4; Bellomo 2000, 635–6.

trary to the *natura naturans*, to the providential and highly necessary order of being (*summa necessitas*). In the same order, the incorporeal entities, albeit not included among the four elements (air, earth, fire, and water), retain the mark of perpetuity.

The excerpt just presented would seem to contradict the line of reasoning most common among medieval jurists. If the archetypes of the single *iura* were indeed consubstantial with the Word, they would be eternal and not perpetual. They would exist from all time, just as God has always been and persisted without beginning. In reality, we find ourselves confronted with an elaboration of the doctrine of ideas that is not opposed to the premises from which we departed, but forms a development in line with the fundamental arguments to be found in the *Book on Causes* (*Liber de causis*). This little volume, attributed by the Pseudo-epigraphers to Aristotle and accepted as such throughout the Middle Ages, offers a collage of texts of varying provenance—though consistent in their inspiration: the *Theological Elements* of Proclus, the *Enneads* of Plotinus, and the work of Pseudo-Dionysius. Translated into Latin by Gerardus Cremonensis toward the end of the twelfth century, the *Book on Causes* began to circulate quickly and widely. Cited for the first time, as it appears, by Alanus ab Insulis and, in extracts, by William of Auxerre and Philippus Cancellarius, it was frequently consulted by the major philosophers of the thirteenth century, including St. Bonaventure, Albert the Great, and Thomas Aquinas. In his commentary, St. Thomas tried to blend the fundamentally Neo-platonic outlook of the *Book* with the Aristotelian views so dear to him.

Without entering into the problem of how the jurists became aware of the *Book on Causes*,[105] and without detailing the basic arguments of its 32 propositions, we will focus on those points that are of immediate interest in the present context. The primary cause, preceding all of the causes and their effects, is necessarily beyond definition (even though it can be called the One or

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[105] To my knowledge, the text was already known to Hostiensis (Henricus de Segusio 1963, 14rb ad X 1.1.1), who attibutes it, as was usual, to Aristotle: "Et secundum Arist(otelem) prima causa superior est narratione et non deficiunt linguae a narratione eius, nisi propter narrationem causae ipsius, quoniam ipsa est super omnem causam: Et narratur nisi per causas secundas, quae illuminantur a lumine primae causae, quod est, quoniam prima causa non cessat illuminare suum causatum et ipsa illuminatur a lumine suo, quoniam ipsa est lumen et supra quod non est lumen" (cf. Pattin 1966, 57–9). The immediately preceding passage offers a collection of arguments drawn from the same source: "Unde Philosophus, ipsum principium, quod est Deus, non est contentum sub genere, neque sub diffinitione, nec subest demonstrationi, expers est qualitatis, quotitatis, ubi et quando et motus sibi: Nec est aliquid simile nec communicans, nec contrarium." Cf. Baldus 1580a, 228rb, n. 37 ad X 2.20.37: "Ut dicit Ari(stoteles) in liber de causis, ens igitur est praedicamentum praedicamentorum et dividitur in X praedicamenta." In addition to Iohannes Calderinus (Cochetti 1978, 972. XXVI), Girolamo Cagnoli was also fascinated by the work much later on: "Causa prima, ut in libro de Causis Philosophus ait, est omni narratione superior, non cessat illuminare creatum suum et ipsa non illuminatur lumine aliquo, quoniam ipsa est lumen purum, super quo non est lumen aliud" (Cagnolus 1586, 33rb, n. 1 ad Dig. 1.1).

the Good), because it transcends, like the One of Plotinus, being as well as the intelligible. Being merely appears as the first effect, as pure intelligence, encompassing the total of the intelligible forms. Every other intelligence, brought forth by the first and hence hierarchically subordinate to it, is similarly "replete with forms" (*Propositio* 10), forms that endow the inferior causes with existence. All there is depends on the One, which provides the single truly creative cause. Everything derives from the One through a chain of descending intelligences and intelligible forms, which in turn cause effects only due to the causality of the One. As a result, the efficacy of the forms is of an "informing" nature, rather than a creation in the proper sense of the term.[106]

2.3.10. Traces of Averroism?

Although this system was introduced under the false label of Aristotle's supreme authority, it could not be accepted by the Christian thinkers in its integral format. Thomas Aquinas nevertheless took it upon himself to supply an interpretation compatible with the promises of Revelation. To put it briefly, he appeared convinced that the primary Intelligence, the most eminent among the creatures, consisted of being and intelligence. It possessed them, however, as reflections of the primary Cause, namely God, who in essence is nothing but pure being and pure intelligence.[107] Every intelligence that is distinct and hierarchically ordered from high to low, identified by Aquinas with the various groups of angels, provides the basis for forms that mirror the Word and are coessential with it (*CG*, II. 98). In the angels, the forms are created: more precisely, they are created along with the angelic nature. Granted that they cannot exist eternally, but only perpetually, they have a beginning and no end.

With this having been said, the reason why Baldus de Ubaldis and Philippus de Cassolis claim that each *ius* has perpetual consistency becomes clear. Their fountainhead is in God and coincides with the second person of the Trinity. There they are eternal yet intangible, due to their absolute transcendence. They enter into contact with the life of man on a lower level, upon assuming their angelical nature made "in the likeness of the *natura naturans*," i.e., God (cf. *STh*, I, q. 57, a. 1, resp.; I, q. 55, a. 2, resp., ad Im; I, q. 105, a. 3, resp.; *ThSS*, c. 15, 135).[108] The forms, reproduced in the angelical natures, rule the souls and inspire human beings to seek sanctity. Here Baldus seems to adopt an argument of Thomas Aquinas, for whom it is the purpose of the

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[106] Although Avicenna understood the activity of the primary substance in terms of a creation: *STh*, I, q. 4, a. 5, resp.; ad Im.

[107] *ThC*, especially in commenting on the *propositiones* 3 and 16; *ThSS*, c. 14, 1, 120: "Dei substantia est ipsum eius esse, non est autem aliud esse, atque aliud intelligere."

[108] The concept reappears in his *Monarchia*, II.2–4; *Purgatorio*, 32, 67; *Paradiso*, 18, 109–11; also in Holland 1917, 90.

separate intelligences to lead the creatures toward their perfection.[109] The doctrine of the divine ideas, which include the archetypes of the laws, is by no means contradicted by references to forms that exist in separate intellects. The two assertions relate to different levels of being: If the jurists sometimes prefer to insist on the intermediate position of the intelligences between God and man, it serves only the purpose of underscoring the providential and redeeming function of the laws in the human sphere (*STh*, I, q. 103, a. 6, resp.; I, q. 104, a. 2, resp.; I, q. 105, a. 5, resp.; I, q. 111, a. 1, resp., ad IIIm; *CG*, III.80; *SS*, c 14, 1, 132). This is a transfer into the realm of juridical realities of a metaphysical vision, which Dante had contributed to disseminate in his works, led by Avicenna and the already mentioned *Book on Causes*. The angelical intelligences, aiming at the "intentional example" in God, "forge with heaven the things here on earth" (*Convivio*, III.VI, 4–6). As intermediaries of the divine cause, they fix and render individual the generic shape perceived by them in the first light, thereby adapting it to the material world (Nardi 1967, 101; 1992, 37–52; Vasoli 1970; Capasso and Tabarroni 1970). Ernst Kantorowicz excessively simplified the thought of the medieval theologians and jurists, when he stated that "the created Intelligences—Spirits without a material body—were the created Ideas or Prototypes of God" (Kantorowicz 1957, 281). In fact, the separate intelligences, in adopting the divine ideas, reduce them from eternal to perpetual ones. This occurs because the angelical nature is the first among all of the creatures, and whatever is part of it also partakes in its ontological structure. It is doubtless erroneous to maintain that the jurists embraced an Averroist "double truth," conceding, on the one hand, as Christians, the impermanence of the realities of this world, and on the other, as Aristotelians, a "quasi infinite continuity" (Kantorowicz 1957, 283, 300–1). It is rather evident that, when Philippus de Cassolis compares actions and obligations to the perpetuity of the soul, the sun, and the moon, he refers to the angelical forces which, according to the medieval vision, move the spheres of the sun and the moon. He does not speak of the stars in the physical sky, for it is said that they will perish (Matthew, 5.18; 24.35). If it were otherwise, we would also have to suspect Pope Honorius III of Averroism, who in his bull, *Super specula*, alludes to the doctors as "destined to remain like stars in perpetual eternity" (X 5.5.5).[110] "The doctrine of the immortality and continuity of *genera* and *species*," accurately pointed out by Kantorowicz (1957, 300),[111]

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[109] *SThC*, comment on *propositio* 9.

[110] "Qui velut stellae in perpetua aeternitate mansuri [sunt]." The perpetuity of the soul was, of course, never called into question: "Initium habet, finem non habet" (*SA*, 796, 24). Cf. Baldus 1586a, 15rb, n. 1 ad Dig. 1.1.10: "Anima est immortalis ac perpetua […] nam anima est quid divinum et immortale."

[111] The doctrine is based on an old tradition, dating back to the earliest beginnings of the Bolognese school. Cf. Fransen and Kuttner 1969, 1. 9, 33: "Sicut Bulgarus ait: ius naturale in generibus et speciebus suis immobile, in indiuiduis non sic." As we have seen, Bartolus 1570a,

can only be explained in the light of the doctrine of ideas and their presence in the separate intelligences.[112]

2.3.11. Conclusion

This view of ideas, adopted from the beginnings of the Bolognese school yet sometimes passed over in silence due to the prevalence of other scientific interests, was essentially never forgotten. On the contrary, it was defended against skeptics and the uninformed of any variety:

The *Decretum* [of Gratian, C. 16, q. 3, c. 17] states that the laws are divinely promulgated. But many ignorant people laugh at this and say: "Or you claim that the laws are made by God without mediation, which is not true for the civil laws; or you say that they are made by God through some mediating agency, which, however, could be said about any other things as well, and not only of the laws." Those speaking similarly do not know what they are talking about, because discerning just from unjust is not given to man if not in obedience to divine indications. (Cynus 1578, 444vb, n. 2 ad Cod. 7.33.12)[113]

In fact, the criterion of the good and the bad is not in the primary possession of man, but resides from eternity to eternity in divine reason. Prior and perfect model of any law, His reason judges the laws by promoting an ever higher form of justice in the societies inspired by Him, "since all of the effects reach their apex of perfection when they attain the highest degree of similitude relative to the cause producing them" (*CG*, II.46.1).

In this vision, the spirit of medieval civilization can be summed up. The medieval, as perhaps no other civilization, attempted to conform nature and history to a supernatural, invisible, but above all perfect, reality because reality was divine. Medieval man, also conscious of his misery and sin, tried in every way to make his own age an image of the eternal, beginning with those laws by which man was called to reign over the world in justice and peace. That ideal, a thousand times sought out and a thousand times defeated, was nevertheless the main characteristic of a millenium in which Western man conceived of himself as *anthropos*, the being who, according to the suggestive

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187ra, n. 1 ad Dig. 8.2.32 (cf. above, n. 50), distinguishes the *artificialia*, which by virtue of being composed "ex rebus elementatis" cannot be perpetual, from the realities that are not composed "ut actiones et obligationes, que sunt simplices imaginationes et istae possunt esse perpetuae ad nutum principis."

[112] Moreover, Baldus derides the Averroist doctrine about the unity of intellect: Padovani 1983, 274.

[113] "Et decretum dicit, quod leges sunt divinitus etc., sed de hoc derident nos laici, arguendo sic. Aut dicis, quod leges sunt factae a Deo immediate et hoc est falsum de legibus civilibus: Aut dicis quod mediate et tunc idem est in quibuscumque rebus, non tantum legibus, tamen nesciunt quid loquantur: Quia discernere iustum ab iniusto non competit humanae naturae, nisi quatenus divinus nutus hoc facit." The passage is reproduced almost literally in Albericus de Rosate 1585h, 105vb, n. 1 ad Cod. 7.33.12.

image of Plato and of Philo (later revived by Lactantius[114]) "looks upwards" (in Greek, *anathrein*).

As such, man—"an upward-looking being"—proves himself to be naturally and originally devoted to metaphysics.

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[114] *LDI*, II.I, 257B: "Hinc utique *anthropon* Graeci appellarunt quod sursum spectet […] spectare nos caelum Deus voluit."

Chapter 3

THE ROLE OF LOGIC IN THE LEGAL SCIENCE OF THE GLOSSATORS AND COMMENTATORS

Distinction, Dialectical Syllogism, and Apodictic Syllogism: An Investigation into the Epistemological Roots of Legal Science in the Late Middle Ages

by Andrea Errera[*]

3.1. The First Half of the 12th Century: The *Logica vetus* and Recourse to the *Distinctio*

3.1.1. The Logic and School of the Glossators

Between the end of the 11th and the beginning of the 12th century a school of law was created in Bologna dedicated to the study of Justinianian texts, that is to say to the examination of that assemblage of Roman law (collectively known in the Middle Ages as the *Corpus iuris civilis*) that had been compiled in Byzantium in the 6th century on the initiative of the Emperor Justinian. After a long and almost complete absence in the early Middle Ages, apart from some brief summaries, the texts reappeared in the course of the 11th century in northern Italy and from then on gradually began to be recognised and used not only by judges and notaries but also as subject matter in the preparation and training of jurists (Cortese 1993). Various aspects of the more distant past of the Bologna school are still unknown, but the determining impulse for the creation of a *Studium* (i.e., a school) aimed at the teaching of Roman law was probably due to the activity of a legal scholar by the name of Irnerius, who started lecturing on and explaining the Justinianian sources to his pupils in the early years of the 12th century.[1] The teaching carried out in Bologna by Irnerius was undoubtedly innovative and original not only for its content (previously largely neglected), but also for the way chosen to present the teaching, in so far as the exclusive and specialised study of Roman law brought with it a substantial change in the traditional encyclopaedic approach that had

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[1] New studies have recently tried to throw light on the possible links between Irnerius and theology: cf. Mazzanti 2000; Spagnesi 2001. In general on the connections between legal and theological studies of the glossators cf. Padovani 1997.

been a typical element of scientific study in the past. Until the innovations introduced by Irnerius, the study of law had been seen as just one element in a much wider course of study that was centred on seven different disciplines—the liberal arts—that represented the totality of knowledge. Within this overall framework the teaching of law, deprived of scientific autonomy, was completely regarded as one of those concepts to be acquired through the study of rhetoric which, together with grammar and debate (*artes sermocinales*: i.e., the art of discourse), was one of the arts of the *trivium*.[2]

Irnerius had initially been a teacher of the liberal arts before beginning his specialist teaching of the sources of Roman law, and this explains why, as founder of the Bologna school, he was able to use the methodological tools characteristic of the *artes sermocinales* to draw up some ingenious explanatory glosses to the Justinianian legal compilation.[3] On the other hand, the study of the liberal arts constituted the ineluctable cultural basis needed for access to the higher faculties, so that the pupils and teachers of the Bolognese school of law also needed a general knowledge, even if only at an elementary level, of the set of principles and collection of ideas taught in the *trivium* and *quadrivium* disciplines.[4] The necessary familiarity that the Bolognese glossators had to have acquired with the techniques taught in the liberal art schools also implied, therefore, their close knowledge of the cultural inheritance of logic, which constituted the specific subject matter of the *trivium* art known as *dialectica* (dialectic).[5] Besides all this, a knowledge of dialectic was made absolutely necessary by the fact that this art represented not only a distinct science, but also an arsenal of discursive and hermeneutic techniques that was indispensable to the correct epistemological development of all the other sciences. Logic, as *scientia rationalis* (i.e., the science of reason), showed all the other disciplines the road to follow in the construction of valid arguments and in the avoidance of errors of reasoning.[6]

[2] On the organisation of studies based on the liberal arts and in general on the problem of basic teaching in the Middle Ages cf. Pini 1999, 481–501. As regards logic in particular in the context of the *trivium* disciplines cf. Köhn 1986, 257–65.

[3] For some examples of Irnerius' dominating mastery of the tools of logic see Errera 1995, 127–50. In general on the use of dialectic in the glossators' school refer to Otte 1971.

[4] Concerning the nature of preparatory learning for the liberal arts so as to follow studies at a higher level see Cobban 1975, 9–13 (in particular cf. ibid., 9, where the liberal arts are defined as the "theoretical basis of medieval education"); Corvino 1976, 132–6; Verger 1981, 296; Luscombe 1989, 81, where we read that "the seven liberal arts provided the basis of all the teaching given in the schools during the eleventh and twelfth centuries as they had done in earlier centuries."

[5] About placing dialectic among the arts of the *trivium* and on the synonymous nature of logic and dialectic up to the 13th century, when a rigorous semantic specification of the two terms together with the delimitation of dialectic is imposed in the field of arguments that are merely probable cf. Garin 1969; Michaud-Quantin and Lemoine 1970, 61; Padellaro 1970, 14; Blanché 1973, 152; Scholz 1983, 17–8; Kahn 2000, 491–2.

[6] For medieval logicians, dialectic was "at the same time a science and a tool of science":

As regards content, the dialectic taught at the time of Irnerius consisted of a well defined set of conceptual rules that had been handed down almost unchanged since the 6th century under the name of the *logica vetus* (i.e., ancient logic). The unchanging nature of the principles and methods that characterised the teaching of logic from the 6th to the 12th century depended on a cultural standpoint—typical of the early Middle Ages and of the early years of the late Middle Ages—whereby philosophers were convinced that all the fundamental ideas for a complete and exhaustive knowledge of every subject had already been harmoniously formulated and laid out by the classical authors in a set, defined and unchangeable number of authoritative works handed down from antiquity (Ebbesen 1999, 1).

In particular the sole dialectic texts that were actually known and studied in the context of the *logica vetus* were Porphyry's *Isagoge*, Boethius' translations of the *Categories* and of *De interpretatione* (*On Interpretation*) by Aristotle, and Cicero's *Topica*, plus a few others written by Boethius, Marius Victorinus, Martianus Capella, Cassiodorus, and Isidore of Seville (Prantl 1937, 3–8; Padellaro 1970, 17; Blanché 1973, 160; Grabmann 1980, vol. 2: 84; Ebbesen 1999, 5–9).

The rigidity of the fundamental rules of *dialectica* derived from the unassailable conviction that this set of classical and early medieval texts contained all possible wisdom on the subject of logic and, for that reason, these source materials constituted a collection of writings and doctrine which were not open to expansion or alteration. This made it inevitable that during the entire period in which the *logica vetus* was actively in use, and that was until about the middle of the 12th century, these sources were not subject to any substantial change.[7]

3.1.2. The Dichotomous Technique

The specific list just indicated of works of logic that were known and actually used from the 6th to about the middle of the 12th century formed the exclu-

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Blanché 1973, 153. On the standing of *scientia scientiarum* (i.e., science for the development of other sciences) of dialectic cf. Preti 1953, 683–5; Gregory 1992, 23; Jacobi 1994. The importance of logic in medieval thought "extends itself universally to every part and to all parts of knowledge: to those with secular knowledge no less than to those with religious knowledge": Alessio 1994b, 87. On the relationship between the study of dialectic and the system of legal studies cf. Otte 1971, 9–10, 17–32; Gualazzini 1974, 31–5.

[7] In the period of the *logica vetus* dialectic "remains centred on the content of *Isagoge*, of the *Categories* and of the *Ermeneia*" (Blanché 1973, 161), which remained the main works available up to the third decade of the 12th century: cf. Vignaux 1990, 13. At the beginning of the 12th century, for example, Peter Abelard still based his entire knowledge of dialectic on the "seven codes"—Porphyry's *Isagoge*, Aristotle's *Categories* and *De interpretatione* (*On Interpretation*), and Boethius' *Liber divisionum*, *Topics*, *De syllogismis categoricis* and *De syllogismis hypotheticis*—and the fundamental Aristotelian works on inferential reasoning did not appear among them: cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 169. On Peter Abelard cf. Louis, Jolivet and Châtillon 1975.

sive object of dialectic learning in the teaching of the liberal arts. This indicates that the *logica vetus* was significantly characterised by a scarce and underdeveloped knowledge of syllogism, i.e., by the limited attention it paid to one of the principal gnostic techniques conceived in classical antiquity. In fact, the Aristotelian texts that are essential to a complete and correct understanding of the rules of inferred reasoning (i.e., *Prior Analytics* and *Posterior Analytics*, the *Topics*, and the *Sophistici elenchi*) do not appear among the sources mentioned. Furthermore, even in those few elementary versions compiled above all in the 6th century by Boethius and disseminated during the *logica vetus* period to give a synthetic illustration of the main dialectical criteria inherited from classical times, syllogism was not dealt with in any particular depth.[8]

On the contrary, in the limited number of early medieval manuals dedicated to logic, a decidedly fundamental and determining role was assumed by those works that gave a detailed illustration of the operation of the other basic heuristic method of Greek philosophy in the cultural heritage handed down to the Middle Ages, that is, *distinctio* (distinction).[9]

The oldest description and use of the *distinctio* method as a general cognitive tool comes from the works of Plato who had given a fundamental role to the technique of διαίρεσις (division or separation) so as to permit a full and thorough understanding of all fields of knowledge.[10] The usefulness of the logic of διαίρεσις—a term then translated by Latin-speaking logicians, by the expressions *divisio* (division) or *distinctio* (distinction)—was based in Plato's eyes on the cognitive efficacy of dichotomy. It is based on the heuristic value inherent in the operation by which a general concept (genus) is subject to division and separates itself into a pair of contrasting concepts (species) (Nörr 1972; Colli 1990, 237). The antithesis between the species comes from the identification of a discriminatory element (a διαφορά, i.e., a difference) that makes it impossible for elements that make up the genus to belong to both the antithetic species at the same time. In other words, the presence or ab-

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[8] The elementary synoptic works by Boethius (the fragmentary tract *Introductio ad syllogismos categoricos*, *De syllogismis categoricis* and *De syllogismis hypotheticis*) were the unique sources of knowledge about Aristotelian syllogistic technique at the time of the *logica vetus* and ceased having an influential role only from the 13th century on: cf. Minio-Paluello 1972, 749–63; Blanché 1973, 160–1; Reade 1980, 379–89; Roncaglia 1994, 284; Chenu 1999, 161–73. On the scant knowledge of the Aristotelian doctrine of logic at the time of the *logica vetus* cf. Fumagalli Beonio Brocchieri 1996a; Ebbesen 1999, 26–7; De Libera 1999a, 290. For a detailed description of the phases that covered the gradual reacquisition of the logical works contained in Aristotle's *Organon* within the context of the medieval Christian culture in the West, see De Ruggiero 1946b, 70–5; Minio-Paluello 1972, 743–66.

[9] On the mechanism of *distinctio* cf. Slattery 1958; Bocheński 1972, 55–9. The method of division concerns the entire philosophical cultural tradition, to which all the classical philosophical schools made different contributions: cf. Pozzi 1974, 1.

[10] As regards dialectical method in Plato cf. Viehweg 1962, 75–6; Talamanca 1977, 20–8; Abbagnano 1993, 125–6.

sence of a determined or specific characteristic in each object of the genus—taken as a discreet element of the *distinctio*—necessarily makes that object inherent in one of the species and totally extraneous to the other. We can think, for example, of the contrast between the two qualities (clearly antithetic) of mortal and immortal, which induced medieval writers to construct a division of the genus of rational beings, separating it into two species antinomically represented by mortal rational beings (we are talking about the species which man belongs to) and immortal rational beings.[11]

The technique of dichotomy therefore allows us to acquire a more detailed and precise knowledge of the elements that belong to the genus and that are divided (by virtue of *distinctio*) into differing species. This is because it offers an interpretation that claims that some of these elements possess a typical and specific characteristic distinguishing them from others belonging to the same genre and that, in reality, do not have that particular characteristic.[12] On the basis of the example cited above, a teacher of *logica vetus* would teach that, as a result of the dichotomy of rational beings between mortal and immortal, our range of scientific knowledge about reality would undoubtedly be enriched. This is because it would be possible, by means of this *distinctio*, to identify with certainty that some rational beings (including man) belong to the species of mortal rational beings and to radically exclude their connection with the antonymic species of immortal rational beings (where the concept of divinity comes in).[13]

The heuristic usefulness of *distinctio* induced Plato to give a pre-eminent value to dichotomy as a general tool for the acquisition of knowledge, to the point that the use of dichotomous criteria became common practice in the exercises of the Academy, as is shown by the narrative contained in *Politicus* and in *Sophista*.[14] Aristotle also valued and used διαίρεσις (difference) at the beginning—especially in the early *Historia animalium*, evidently influenced by Plato's thoughts—but later disputed the value and use of dichotomy as a logi-

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[11] "The differences used to divide a genus must be opposing in such a way as to exhaust the extension of the genus, so that no individual item belonging to the genus exists that does not belong to only one of the species into which the genus was divided": Pozzi 1992, 21.

[12] Every species is less extensive and more comprehensive than the genus, where by the term *extensive* we mean "the number of subjects of which it is predicable" and by *comprehensive* "the set of characters contained in the term itself": Vanni Rovighi 1962, 54. Species, really because it is more conceptually defined, regards a number of objects that are necessarily less than the genus, which is instead more "extensive" because it includes all the objects belonging to the different species of which it is made up: cf. Jolivet 1959, 67–8; Sordi 1967, 12.

[13] *Distinctio* allows one to obtain an exhaustive definition of every species through the conjunction of ideas that describe, on the one hand the genus, and on the other hand the difference that underlies the division of the genus: cf. Padellaro 1970, 42.

[14] Plato, *Politicus*, 258ᵉ–267ᶜ; *Sophista*, 218ᵉ–221ᶜ. On these extracts cf. Kneale and Kneale 1972, 16.

cal and general heuristic tool, contrasting it with the gnostic superiority of the syllogistic method. He did not, however, completely deny the merit of dichotomy as an effective means of organising things in the natural world.[15]

3.1.3. *Knowledge of* Distinctio *in the Context of the* Logica vetus*: Porphyry's* Isagoge

The importance of methodological reflection in Greek philosophy and the relevance of its philosophical disputes were, however, completely unknown to the teachers of medieval *logica vetus*, who had no direct knowledge of the works of Plato and Aristotle and could not therefore evaluate their teachings in an appropriate way.[16] The only knowledge of dichotomy and syllogism that was available until the 12th century was based on the scant theories set out in those few works from the late Roman period or the early Middle Ages still in existence. These filtered the earlier rich philosophical tradition, re-working it and, for many reasons, simplifying it (Evans 1996, 41; Wieland 1987, 64–6). Despite the unanimous recognition given to Aristotle as a master *par excellence* of dialectic,[17] it was the brief abstracts from the *logica vetus* dedicated to the revelation of classical philosophical teaching that were primarily to predominate as the fundamental works of logic, at least until the beginning of the 12th century. The Platonic criterion of dichotomy, which showed a greater completeness and comprehensibility with respect to syllogism in these texts, was elevated to a point where it became a privileged technique for the acquisition of scientific knowledge.[18]

In particular, the learning of *distinctio* was greatly helped by the simple explanation of the relationship between genus and species contained in a short and elementary book—*Isagoge*—written in the second half of the 3rd century A.D. by the neo-Platonic philosopher Porphyry of Tyrus.[19] The undoubtedly

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[15] On the dialectical method in *Historia animalium* cf. Vegetti 1971b, 104–13; on the Aristotelian criticism of the Platonic dialectical method cf. Viano 1955, 55–7; Vegetti 1971a, 519–24; Pozzi 1974, 12–5.

[16] As regards the conviction of the masters of the *logica vetus* that an indirect knowledge of ancient culture was sufficient cf. Bianchi 1997a, 2.

[17] On Plato's and Aristotle's authority at the time of the *logica vetus* cf. Maierù 1972, 10; van Steenberghen 1980a, 936–9; Reade 1980, 380–1; Wieland 1987, 65–6; Jacobi 1988, 236. As regards Gratian's knowledge of Plato cf. Kuttner 1976.

[18] Apropos of the general prevalence of the Platonic gnostic system over that of Aristotle in the context of the *logica vetus*, it has been written that "Platonism in its different forms, transmissions, and variations is until the twelfth century an obvious and basically little doubted part of what we call Christian doctrine or Christian wisdom. [...] It is therefore easy to understand that it is Plato and not Aristotle who dominated the thinking of the Christian world so effectively and for so long a time": Wieland 1987, 65.

[19] Concerning the writing of *Isagoge* cf. Bidez 1913, 51–64; Maioli 1969, 3–12; Pepin 1975, 325–8.

simple commentary and the immediate and effective explanation given by Porphyry's work guaranteed it a wide readership for centuries. In fact, the specifically introductory and preparatory approach of *Isagoge* (a literal Latin translation of the original Greek title meaning "Introduction") allowed the reader to understand complicated philosophical concepts by setting them out in a way that was specifically intended to explain and teach them. It was these characteristics of simplicity and clarity that produced an immediate success for Porphyry's book.[20] These aspects of the work likewise explain why the Latin translation of *Isagoge* produced by Boethius in the 6th century—of all the writings of the *logica vetus* explaining how the dichotomous technique operated—played a fundamental role in revealing the diairetic method. It was in substance the simplicity of Porphyry's work that determined the unrivalled good fortune and widespread diffusion of the *distinctio* criterion as a heuristic method of general value.[21]

More precisely, the proposition that Porphyry intended to advance in his writings was the harmonisation of neo-Platonic speculation with the teachings of Aristotle. The objective of reconciling the two great philosophical systems (that of Plato and that of Aristotle) induced the author first of all to describe and explain the five concepts—*genus*, *species*, *differentia* (difference), *proprium* (particular property), *accidens* (accident)—essential for an understanding of Aristotle's *Categories*. The intention to simplify, which had motivated Porphyry to write an introduction to Aristotle's philosophy, induced him in addition to insert a simple explanation in the second chapter of *Isagoge* that made for an intuitive and easy familiarisation with the Aristotelian philosophical approach as set out in the *Categories* (McKeon 1975, 167; Schulthess and Imbach 1996, 56). The distinctiveness of this preparatory teaching model lies in the repeated application of the *distinctio* method in a connected and coordinated series of subsequent *subdistinctiones* (sub-distinctions) which are ever more detailed and specific.

The *subdistinctio* in fact consists of a logical operation by which one of the species created by *distinctio* is, in turn, subject to division in order to generate new dichotomous species; this repeated analytical activity necessarily brings with it an expansion of knowledge of the new species. The gnostic investigation depends on the fact that, with every subsequent dichotomous division, the categories originating from the *distinctio* are enriched with a new specific and particular quality. This quality corresponds to the presence or absence in each species of a new discrete element that forms the *differentia specifica* (spe-

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[20] On the care of the masters in the schools of liberal arts about using teaching expedients and books of an elementary nature, so that such materials be made "accessible to mediocre minds" cf. Blanché 1973, 169.

[21] On the fundamental role of Porphyry's works as a preparation for the study of Aristotelian logic in the Middle Ages, cf. Pozzi 1974, 28, n. 85; Stump 1978, 238; Chadwick 1986, 165.

cific difference) from which the next *distinctio* arises.[22] This mechanism, therefore, allows the provision of a more and more detailed description of the objects contained in the *species infima* (or rather, in the final category produced by the various *subdistinctiones*) so that, in the end, it is possible to obtain a meticulous and particular definition from the totality of all the characteristics that distinguish the species involved in this process of progressive sub-distinction. This, as the outcome of the entire analytical reasoning process, forms the sum of all the distinctive qualities of the various species subjected to subdivision (this concept can be summarised in the Latin idiom: *Definitio fit per genus proximum et differentiam specificam*).[23]

The heuristic utility inherent in the mechanism of sub-division thus allows Porphyry to insert a series of *subdistinctiones* in *Isagoge* that serve to clarify the meaning and extension of the Aristotelian category of Substance. This type of genus is raised to a higher grade of diairetic reasoning and is gradually subjected to a meticulous deconstruction that breaks down the genus into pairs of antonymous species; subsequently one of these two species is subject to a further dichotomous *distinctio*, which in its turn becomes the genus of two new species.[24] In this way it was possible to follow a course of successive specification that led from the complex undifferentiated genus of Substance until one arrived at the *species infima* that coincided with mankind. The particularly ramified form assumed by the process of sub-division in the *Isagoge* manuscripts caused its medieval interpreters to give it the name *arbor porphyriana* (i.e., Porphyry's tree).[25] The final result of this "tree-like" process of discretion is the irrefutable demonstration that man—*species infima* of the chain of Porphyrian *subdistinctiones*—belongs to the genus of Substance.

The ramified course of *subdistinctiones* that leads from the genus (Substance) to the *species infima* (man), however, also allows one to obtain a detailed definition of the final category in the reasoning process. In this case it is the idea of "man" that can, as a consequence of the heuristic enrichment provided by the various *subdistinctiones*, be defined with scientific certainty as "bodily substance, living, sensitive, rational, and mortal." This description

[22] Differences or essential qualities combined with genus form the species and, therefore, "essential differences need to be considered in order to divide the genus into species. These differences must be such as to be reciprocally exclusive: they must be reciprocally opposite": Pozzi 1969, 11.

[23] On the descriptive function of *distinctio*, it has been said that "division has as its purpose the art of defining or of describing: it defines the species and it describes the individual things," because definition "is composed of direct genus and specific difference" (Pozzi 1992, 25); on this topic cf. Vanni Rovighi 1962, 69–70.

[24] A graphic model of the chain of sub-distinctions that occur in *Isagoge* is contained in Errera 1995, 19, n. 28, and in Schulthess and Imbach 1996, 57.

[25] "*Isagoge* suggests the idea of a tree only in a verbal sense, but the medieval tradition laid the project out visually": Eco 1993, 57. On the ramified tree-like method of sub-distinctions cf. Pozzi 1992, 16–25; Henry 1999, 35.

comes from the relationship that exists between the various species created by the progressive distinctions in the Aristotelian category of Substance, according to which man, as a rational mortal animal, belongs to the general category of bodily substances and to the sub-category of sentient animate bodies (Errera 1995, 19–20).

From the point of view of the gnostic system, the cognitive usefulness of an individual *distinctio* is, therefore, greatly enlarged and increased by the repetition of divisions, in so far as the linking of *subdistinctiones* constitutes an important logical mechanism of general applicability that is capable of offering a specialised definition of every element included within the *species infima* of a particular "tree" of distinctions.[26] This dichotomous mechanism, whose basic methods were clearly and easily explained by Porphyry, saw to it that the Latin translation of *Isagoge* became the best known and most widespread tract on the subject of *distinctio*—even the most important and authoritative book on logic—in use in the schools of liberal arts until the middle of the 12th century.[27]

3.1.4. The Epistemological Relevance of Distinctio at the Time of the Logica vetus

Distinctio and all the other logical structures based on it—like for example the chain of *subdistinctiones* of the *arbor porphyriana*—made up the most authoritative and powerful conceptual tool for acquiring knowledge present in the cultural inheritance of medieval civilisation before the method of syllogistic inference was reacquired and taken up as the basic system of scientific reasoning during the course of the 12th century. As already noted, knowledge of Aristotelian writings dedicated to syllogism was fragmentary at the time of the *logica vetus* and they were known about only through the indirect and incomplete tradition of the Stagirite's teaching contained in the works of Boethius. This lack leads us to the conclusion that the teachers of logic who were active in the schools of liberal arts until the middle of the 12th century (and that is those teachers who taught the rudiments of logic to the first Bolognese glossators, laying the basis of their cultural education) did not consider the difficult and little known discipline of syllogism as the principal technique for achieving a certainty that had the benefit of scientific value.[28] Rather, they pri-

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[26] On the relationships between the technique of division and the possibility of arriving at a definition of an object that is subject to *distinctio* cf. D'Onofrio 1986, 183–91.

[27] For the determining role played by Porphyry's *Isagoge*—in the translation and with comments by Boethius—in the study of logic cf. Prantl 1937, 14 (where it is stated that the *Categories* and *Isagoge* "became the principal medieval scholastic texts on logic"), 297–9; Kneale and Kneale 1972, 264; Simondo 1976, 11–2; Gibson 1982, 58–9; Gilson 1983, 165–6; Fumagalli Beonio Brocchieri and Parodi 1996b, 12, 169; Maierù 1993, 286–7; Leff 1992, 314; Ashworth 1994, 352–6.

[28] The explanation offered by Boethius of hypothetical syllogism (the only explanation

vileged the gnostic efficacy of *distinctio*, which was simpler and more intuitive than the syllogism of Aristotle. For these reasons division was the most comprehensible and versatile tool for the acquisition of knowledge that could be made available to the sciences by the limited number of philosophical sources then known and studied.[29]

The logical method of *distinctio* in its Platonic format was essentially clearer and more accessible than Aristotle's syllogism, which instead was associated with complex operational rules aimed at avoiding the creation of logical aberration and paralogism. This fact, connected with the general decadence of culture and study in the early Middle Ages and the already noted disappearance of almost all of the Stagirite's works of logic, inevitably meant less propensity for the schools of liberal arts to deepen their knowledge of syllogism. Greater attention was paid by the teachers of the *logica vetus* to the easier diairetic method, which then came to be considered and described as the heuristic tool *par excellence*. In the 10th century, for example, Gerbertus of Aurillac (enthroned as Silvester II) re-echoed the words of Johannes Scotus by saying that "the art that divides the *genera* into *species*, and resolves the *species* into *genera*, is not the product of laborious human study, but has been identified by the sage in the nature of things themselves, where the Creator of all arts had put it."[30] At the start of the 12th century Peter Abelard, unanimously recognised as the most authoritative exponent of the *logica vetus* (Tweedale 1999, 51) dedicated only a small amount of space to syllogism when writing *Dialectica*: a manual that had been expressly conceived and written as a basic teaching aid for the study of logic.[31]

The undisputed pre-eminence of the dichotomous criterion, certainly known to all students of the liberal arts and generally applicable in every field of knowledge as a basic epistemological canon for all scientific disciplines,[32] thus imposed *distinctio* as the most efficacious tool of formal logic that the

available in the context of the *logica vetus*) has been judged "not without ambiguity": Weinberg 1985, 181. Knowledge of Aristotelian logic until the 12th century cannot therefore be anything but "limited and corrupted": Evans 1996, 42.

[29] "Aristotle had argued that Plato's method of division was no proof, and he sought principles of demonstration in causes rather than definitions. But the tradition of the logic which Abelard received from Boethius had been so thoroughly Platonised that demonstration had become division and definition": McKeon 1975, 176. With reference to the conflict between support for Plato's and Aristotle's theories, it has been underlined that "philosophy oriented itself mainly if not exclusively on Platonism until the twelfth century": Wieland 1987, 64.

[30] The passage cited in the text comes from Reade 1980, 382.

[31] Cf. De Ruggiero 1946a, 243; Blanché 1973, 161–2. On the limited knowledge Peter Abelard had of Aristotle's system cf. Ballanti 1995, 174.

[32] Porphyry's work on *distinctio* was held to be "indispensable in the schools," so that "one can well understand how, both for teaching and for study, one always began with *Isagoge*, which one of the Greek commentators had even indicated as a preliminary condition for eternal bliss": Prantl 1937, 14.

early glossators—deeply influenced by the culture of logic studied in the liberal arts cycle—could avail themselves of. At the beginning of the 12th century it was this tool that was used to build the new legal doctrine that was destined to develop with the explanation and interpretation of the rediscovered sources of Roman law.[33]

3.1.5. *The Role of* Distinctio *in the Field of Legal Science*

The earliest application of *distinctio* for the study of Justinianian legal texts took place in the scientific reflections produced for teaching purposes by the early teachers at the Bologna *Studium* and were handed down in explanatory notes (i.e., the glosses: a term that gave its name to the entire school) written on the parchment sheets of the *Corpus iuris civilis* (Weimar 1973, 170–1, 227; Dolezalek 1994). The use of dichotomy is already evident in the older layers of glosses, where glosses exist that are believed to be by Irnerius and his pupils. These are based on a lucid use of *distinctio* and allow the building of a doctrinal structure inside which the conglomeration of rules and principles contained in the fragmentary Justinianian legal collection could be placed.[34] On this point, we need to remember that the *Corpus iuris civilis* was a gigantic compendium in which the Byzantine editors of the 6th century had collected and put together the many dissimilar and heterogeneous source documents resulting from a Roman legal tradition that covered many centuries. Consequently, the endless collection of texts that were compiled on Justinian's orders from the laws, ended by suffering not only from redundancy and incoherence, but above all from the absence of an overall doctrinal organisation of their various legal institutes. The treatment of every argument therefore remained fragmented in numerous different passages within the same compilation, with the effect that similar or closely connected laws—which would have needed a uniform doctrinal treatment and one single classification—were located in remote and unrelated parts of the same Byzantine anthology of sources.

However, the jurists held an unshakable theoretical conviction that they would be able to find all the legal knowledge assembled in a harmonious and

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[33] "The scholars of logic in the Middle Ages took full advantage of Porphyry's text, grasping the distinction that the predicates contributed to an understanding of categories as much as they were of use to the advancement of division and definition, and in the end to scientific demonstration": Padellaro 1970, 45. As regards Porphyry's tree in particular, we need to consider that "all of the Middle Ages were dominated by the belief (even if unconsciously) that the tree mimicked the form of what was real": Eco 1993, 68. In general on the preparatory role played by the study of the *trivium* arts for the training of medieval jurists cf. Otte 1971, 30; Gualazzini 1974, 31–5, 41; Piano Mortari 1979, 57; Wieacker 1980, 59, 66–7, 71; Gaudemet 1980, 11; Cortese 1982a, 219–20; Paradisi 1994, 873, n. 26.

[34] Cf. Wieacker 1980, 72–4. A detailed examination of the use of *distinctio* in the glosses of the earliest Bolognese teachers can be found in Meyer 2000.

coherent set of irrefutable normative principles. The fragmentary and disjointed nature of Justinianian work made it necessary for the interpreters to invent a rational classificatory system to make it easier to study and memorise the complex normative system contained in the *Corpus iuris civilis* (Grossi 1997, 157).

The glossator's intention was to identify and indicate any analogies or differences that existed between the many Justinianian institutes if they bore such a significant affinity (or a direct and explicit similarity) as to require the use of systematic classification, even if these institutes were found in completely different passages of the collection. Not only all the homogeneous aspects of the different laws on the argument under consideration, but also all possible discrepancies existing between them could find an organic and coherent place in these systems of classification (Errera 1999, 55–60).

The logical method that the jurists regarded best adapted to this systematic restructuring was *distinctio*. Using this method the interpreter subjected the legal principle contained in the source document to a process of division. This made it possible to emphasise the difference between the institutes contained in the glossed legal text and the other institutes in the *Corpus iuris civilis* which, although belonging to the same general legal category, had elements of incompatibility or a directly antithetic character (Otte 1971, 73–97; Otte 1997). In brief, the use of *distinctio* allowed the identification and specification of the differences between those legal precepts intended to regulate analogous, but not entirely similar, legal concepts. The most suitable way of achieving this systematic re-construction of the Justinianian institutes proved to be the drawing up of classifications which, using a few clear conceptual distinctions, provided a clear overall organisation of the discipline in question. On this subject, the *Magna Glossa* produced by Accursius (about the middle of the 13th century) clearly stated that "*divisio est innumerabilis materie brevis compositio.*"[35]

From the very beginning the teachers of the glossators' school in Bologna had conceived different series of *distinctiones* aimed at setting out an exhaustive systematic framework for all that material in the Justinianian collection that had been so completely without an appropriate classificatory system.[36] To cite only some of innumerable possible examples, the Bolognese teachers ap-

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[35] "Division is the creation of a synthetic scheme for a wide subject": Accursius 1489, 42*va*, gl. *divisio* ad Inst. 3.13.1. This definition of *divisio*, however, comes from pre-Bolognese times: cf. Errera 1995, 111, n. 52.

[36] The *distinctio* criterion had always been applied in the glossators' school from the beginning: cf. Seckel 1911, 284, 286–8. On *distinctio* as a criterion for drawing up glosses cf. Genzmer 1935, 345–58; Kuttner 1937, 208–11; Paradisi 1962, 302–6; Bellomo 1963, 115–20; Legendre 1965, 365; Paradisi 1968, 629–30; Paradisi 1976, 226–8; Kantorowicz and Buckland 1969, 215; Weimar 1969, 62; Weimar 1973, 142–3; Piano Mortari 1976, 18–9; van Caenegem 1981, 27; Cortese 1982a, 251–2; Fransen 1982, 143; García y García 1994, 230.

plied *distinctio* to give an appropriate order to the doctrine of possession (distinguishing between *possessio naturalis*, natural possession, and *possessio civilis*, civil possession), to title (with the division between *dominium directum*, direct or outright title, and *dominium utile*, effective title), to usufruct (*distinctio* between *usufructus formalis*, usufruct without declared cause, and *usufructus causalis*, usufruct with declared cause), to tenure (*emphyteusis propria*, regular tenure, and *emphyteusis impropria*, irregular tenure), to the law of contract (with a distinction between *pacta nuda* and *pacta vestita*, that is, between "bare" and "enforceable" contracts), and to the subject of legal cause (through the dichotomy between *causa impulsiva*, impelling cause, and *causa finalis*, final cause).[37]

Distinctio had a highly taxonomic effectiveness as can be seen from the extent and importance of its application. This is confirmed by the presence—above all in the older layers of glosses—of synoptic tables where the logical procedure of division is shown graphically instead of verbally. In this type of annotation, which the historians labelled distinction tables, the classification is achieved by a drawing intended to illustrate the theoretical concept. *Distinctio* is expressed by placing all the categories in a drawing where the interconnecting relations between the genus and the species are shown by lines drawn in ink. From a teaching point of view, the changing of a descriptive *distinctio* into a graphical model gave the diairetic method an even greater teaching strength vis-à-vis the already recognised usefulness of division. As a result, the immediate comprehensibility and clarity of the synoptic table gave the graphic portrayal of *distinctio* a most important and significant role among the various explanatory techniques in use at the time by the early Bolognese teachers.[38]

The pre-eminent position of *divisio* among the hermeneutic tools at the disposal of the glossators is also shown by the intention to preserve the results of its use and hand them down in a separate form from that of the graphic glosses. This was done by creating a specific class of works entirely for this purpose. All the numerous *distinctiones* that arose from reflections on the text of the *Corpus iuris civilis* (and originally expressed in the form of notes in the margin of the legal text) were in fact, in time, reunited and transcribed in their own distinct and homogeneous collections. *Distinctiones* were thus able

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[37] An overall picture of the importance of *distinctio* for the systematic reconstruction of all these institutes in the glossators' school is found in Wesenberg and Wesener 1999, 54–64. On the importance of the dichotomy between *dominium directum* (or *dominium plenum*) and *dominium utile* cf. Grossi 1968, 144–59; Grossi 1992, 61–3.

[38] The expression "loose distinction - tabular distinction" was used by Besta 1925, 811; Brugi 1936, 29–30. On tabular distinctions cf. also Seckel 1911, 281; Genzmer 1934, 397–403. Apropos of the form of distinctions, Kantorowicz stressed that "if the subject-matter was a legal concept, the form of the distinction was often, especially in the oldest times, that of a genealogical table": Kantorowicz and Buckland 1969, 215.

to acquire their own dignified place among the various works in use in Bologna.[39] The presence of the many collections of distinctions that were created in the course of the 12th century supplies further confirmation of the usefulness that the early glossators recognised in the dichotomous method as a basic tool for the study of and classification of law.

In essence, the application of the logical technique of *distinctio* created by the Bolognese jurists made it easy for the interpreter to master the rich and chaotic mass of legal remedies offered by the Justinianian collection. This was done by breaking down the legal material into an articulate, rigorous and schematic sequence of clear and elementary divisions. Each of these was suitable for illustrating both the link each institute had with the overall category it belonged to, and the particular difference that same institute had with respect to the other (and different) legal instruments in the same general legal category.

3.1.6. *The Highpoint of the Doctrinal Development of* Distinctio *at the Glossators' School: The "Tree" of* Subdistinctiones

For the entire 12th century the Bolognese school of law knew about and were accustomed to using dichotomy for drawing up glosses and creating appropriate collections of *distinctiones*.[40] But certainly the most daring and complicated application of *divisio* occurred only at the end of that same century in the work of Johannes Bassianus, who refined a method of classifying legal actions based on the technique of *subdistinctio*.

The difficulty of classifying the numerous *actiones* (i.e., legal actions) found in the Justinianian compilation had been a matter that the Bolognese teachers had turned their attention to from the very moment the school had started. In fact, the *Corpus iuris civilis* indicated some categories of actions resulting from a series of general divisions, but this limited categorisation very soon proved to be insufficient for providing a complete and correct view of the subject. This therefore induced Irnerius and some of his pupils to invent a more articulate and complex taxonomic system founded on the application of *subdistinctio*.[41] The attempts to reach an exhaustive classification of legal *actiones* had followed uninterruptedly one after the other with an ever more consistent use of the *subdistinctio* tool. Eventually Bassianus, taking note of the models already created by his predecessors and developing the method further, arrived at a general classificatory system capable of capturing all the

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[39] Indexes of the glossators' *distinctiones* were drawn up by Seckel (cf. Seckel 1911) and by Pescatore (cf. Pescatore 1912). A listing of the main *distinctiones* and of the collections of *distinctiones* that have survived, as well as those given in their own modern editions, can be found in Weimar 1973, 229–37.

[40] As regards the glossators' predilection for dichotomous *distinctio* cf. Carcaterra 1972, 291–3.

[41] On *subdistinctio* and on the *subdistinctiones* pyramid cf. Otte 1971, 87–95.

actiones of Roman law in a single, great, all-inclusive scheme that was given the name of *arbor actionum* (i.e., the tree of legal actions).[42]

The operation of the *arbor actionum* is exactly the same as in the chain of *subdistinctiones* that characterises Porphyry's *arbor*, mentioned above: It consists of a progressive subdivision of general categories that allows one to arrive, at the end, at a *species infima* that coincides exactly with each of the Justinianian *actiones*. The heuristic efficacy of the *arbor porphyriana*, applied in this case to the Roman law of legal procedure, therefore allows one to obtain an exhaustive description of every individual *actio* from the chain of sub-divisions that make up the *arbor*. The assembly of information so recovered—usefully synthesised by Bassianus using an original system of symbols—is ideal for establishing a satisfactory overall classification of the entire subject of procedural *actiones*.[43]

The taxonomic aspect that governs the structure of the *arbor actionum* shows that the most complex and advanced gnostic precept applied by the scientific disciplines in the cultural context of the *logica vetus*, namely, the *arbor* of *subdistinctiones*, was also ingeniously used by the Bolognese jurists to make it easier to study and to create the doctrine of the Roman law of legal procedure. Indeed, we should emphasise that not only Bassianus (defined by his contemporaries as an expert in the liberal arts: *extremus in artibus*), but also the earlier glossators (for example, Irnerius and Martinus Gosia) easily mastered and freely applied diairetic methodology. This is shown by the many types of classification that followed one another in the course of the 12th century which provided a satisfactory classification of legal *actiones* using the *subdistinctio* criterion. This criterion was the most refined technique for acquiring knowledge that the *logica vetus*—the one form of logic known about until the middle of the 12th century—could put at the disposal of scientific research. From all this we can see how the earliest generations of Bolognese teachers had already fully acquired and taken shrewd advantage of the heritage of *distinctio*-based technical tools that the *dialectica* of the liberal arts schools of their time had offered, by ably and shrewdly adapting the basic gnostic criteria to legal studies.[44]

3.1.7. The Eminent Role of Distinctio *in the Formulation of Doctrine in the Early Decades of the Glossators' School: The* Quaestiones legitimae

As has just been highlighted, the powerful taxonomic quality of *distinctio* had made the glossators appreciate diairetic technique for its systematic effective-

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[42] For all this doctrinal evolution refer to Errera 1995, 121–316.

[43] The complete reconstruction of the classificatory method in Johannes Bassianus' *arbor actionum* can be found in Errera 1995, 290–310.

[44] For example, on Irnerius' competence in the use of the *dialectica* tools cf. Meyer 2000, 88–94.

ness and use it widely in the course of the 12th century. They appreciated its usefulness in delineating and organising classificatory categories, which helped in the systematic reconstruction of the Justinianian legal institutes. All this led to a general application of the *divisio*-based conceptual procedure as a criterion of general classificatory use to help in the learning and memorising of legal principles and also using synoptic schemes. We might recall the Bologna school maxim "*Qui bene distinguit, bene docet*" ("Who distinguishes well, teaches well") as evidence of the use made of *distinctio* for teaching purposes.[45]

However, besides this strictly taxonomic role, dichotomy also had a valuable and powerful hermeneutic efficacy, summed up by the glossator Placentinus with the phrase: "*Quanto magis res omnis distinguitur, tanto melius aperitur*" ("the more a thing is subject to distinction, the better it is understood").[46] In other words, in cases where the qualification of a legal principle was a problem, recourse to *distinctio* allowed the argument in dispute (genus) to be resolved into its different individual aspects (species) so as to help solve the problem of explanation by the identification and differentiation of the terms in conflict.

In the early period of the glossators' school's activities, this hermeneutic use of division showed itself to be the determining factor in the development of Bolognese scientific reflection and allowed the glossators to achieve significant doctrinal advances. The anthological nature of *Corpus iuris civilis* already noted had in fact generated—despite the attempts made by its Byzantine compilers to harmonise it—a flood of contradictions between the different sources, and the presence of these legal antinomies greatly worried the glossators who regarded any contrast between passages in the Justinianian collection of texts as unthinkable. On this point, it has already been said that the study of legal texts from the Roman era was characterised by the Bolognese teachers' resolute confidence in the fundamental coherence and absolute agreement of all the rules described in the various parts of *Corpus iuris*. Every declaration was considered endowed with an unchallengeable *auctoritas* deriving both from its antiquity and, above all, from the divine inspiration that permeated the imperial legal choice. Since all the legal principles contained in *Corpus iuris civilis* had necessarily to be considered beyond criticism (and for that reason also perfectly harmonious), it followed that the discovery of any contradiction between the sources was inevitably attributed to the ignorance of the legal interpreter, who had not, as yet, managed to reveal the necessary systematic connection between the apparently conflicting norms (Errera 1999,

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[45] The maxim is cited by Brugi 1921a, 55; Brugi 1936, 30.

[46] Placentinus 1535, 18, II.1 (*De rerum divisione*); the passage is also published in Seckel 1911, 373, n. 5. The same passage by Placentinus is restated substantially unchanged by Pillius: "*Verum quia res omnis quanto magis distinguitur, tanto melius aperitur, multiplex a nobis subiciatur divisio*" ("In reality, since the more one subjects each thing to distinction the better one understands it, we propose an articulated division of the matter under examination": cf. Seckel 1911, 373).

77–81). Consequently, the problem of resolving the incoherencies present in the Justinianian compilation became an ineluctable necessity for the school. Without first resolving every problem of internal cohesion in the assemblage of laws being studied, they would not have been able to progress in the construction of a complete and homogeneous doctrinal system based on the *Corpus iuris civilis*.[47] Furthermore, towards the middle of the 12th century, the same need to resolve legal antonyms also inspired reconciliation between the *auctoritates* (authoritative sources) of Church law that then led to the compilation of Gratian's *Decretum*. This work became the foundation on which—again in Bologna—a school was created centred on the study of canonical law through the explanatory method provided by the gloss.[48]

The attention the glossators dedicated to the problem of doubt in Romano-canonical law led to the birth of a specific hermeneutic activity directed towards reconciling the *contraria* (of the antonymous sources) by the identification of suitable *solutiones contrariorum* (solutions to contrasts among the sources) capable of resolving the inadmissible contradictions present in the legal texts.[49] The work from the glossators' school that conserves the records of this specific activity is the *quaestio legitima*, which both mentions the contrasting dialectical positions between the sources (the identification of the *contraria*) and indicates the *solutio* used to resolve the dilemma and the problem of legal coherence the dispute was about.[50]

The identification of the suitable *solutio* in a *quaestio legitima*, however, involved finding an explanation of the legal contrast so as to reconcile the

[47] At the start of the 12th century, Peter Abelard had become involved with the problem of the method of removing apparent contradictions between equally authoritative texts. In *Sic et non* he indicates the logical tools (of a prevalently Platonic nature) needed to uniformly and rigorously overcome the discrepancies between the *auctoritates* and so to arrive at a construction of truth founded on basic criticism. See in this regard Reade 1980, 388–91, who indicates (on page 390) that for Abelard, the main tool for resolving doubts was to "bear in mind the different meanings of words and their various use by different authors." Also on this topic cf. Codignola 1954, 286–7; Garin 1969, 55–6; Alessio 1994b, 96–7.

[48] The first part of Gratian's *Decretum* in fact consists specifically of *Distinctiones* aimed at showing the *concordia* (harmony) existing between the sources of apparently discordant canon law: cf. Stickler 1950, 208–9. Finally on the *Decretum* cf. Winroth 2000. The same *distinctio* method (although with necessary differences) also forms the basis of Peter Lombard's *Liber sententiarum* produced towards the middle of the 12th century, a text that would become fundamental to the study of theology: cf. McKeon 1975, 185; Alessio 1994c, 130–6. On the relationship between the logic of Abelard and jurisprudence cf. Giuliani 1966, 183–216.

[49] Cf. Cortese 1992b, 468–9. About the *contrarietates* in Byzantine legal texts cf. Pringsheim 1921, 212–9.

[50] Cf. Kantorowicz 1939, 2–31; Stickler 1953, 580–1; Weimar 1973, 222–3; Schrage and Dondorp 1992, 33. For a recent synthesis of doctrinal reflections on the *quaestio* method and on the *quaestio legitima* works cf. Errera 1996, 510–3, n. 30. Finally, as regards the particular type of *quaestio legitima*, called *quare*, which has its own classification in the glossators' school cf. Schulz 1953.

antonymous sources. This explanation indicated the irrelevance (or even more the non-existence) of any conceptual conflict, even if at first sight apparently irresolvable, that existed between the texts being examined.[51] The most effective tool that the glossators had for resolving the contrast without negating the *auctoritas*—and therefore the legal validity—of both conflicting sources, was once again, the use of dichotomy. The interpreter was able to go back to *distinctio* to explain how the two apparently contradictory institutes, while belonging to the same common legal genus, were in reality two different species of that same genus, distinguished by a *differentia specifica* that justified the diverse discipline: "*Contraria tolluntur legis divisione*," that is, "the solution of the contrasts between the sources lies in the conceptual division of the legal text" (Paradisi 1962, 302–5; Otte 1971, 168; Piano Mortari 1979, 59). For this reason *distinctio* on the one hand permitted the preservation of harmony and a reconciliation of the sources (inasmuch as recourse to *divisio* confirmed that both the conflicting institutes belonged in reality to the same common genus), but on the other hand it allowed the distinctiveness of each legal principle to be highlighted. This was really because dichotomy, typical of logical tools, demanded that the contrasting institutes be necessarily antithetic and irreconcilable, insofar as antonymic species are born from a *distinctio* and are therefore characterised by an ineluctable discrete *differentia*.

In conclusion, recourse to the *distinctio* method allowed the glossators of the 12th century to use a tool that was valid both hermeneutically and taxonomically and which showed it possible to harmonise and co-ordinate legal sources that, besides often being contradictory, were also lacking an overall systematic organisation of their institutes. In short it was the use of the versatile diairetic method offered by the *logica vetus* that allowed the early Bolognese jurists to create an effective doctrinal system. Thanks to this they were able to use epistemological rigor and accuracy to analyse and co-ordinate the innumerable legal institutes in Roman and canon law that lacked agreement and an adequate taxonomic order. *Distinctio* therefore represents the cornerstone used by the earliest civil and canon law glossators to build the fundamental dogmas of the science of law and to transform—respectively—the thitherto unrelated source documents of the Justinianian *Corpus* and the het-

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[51] In this sense the Bolognese *quaestio legitima* corresponds exactly with the *quaestio* technique applied in the schools of philosophy and theology: cf. Bellomo 1974a, 76. For example, Gilbertus Porretanus (1076–1154) in the first half of the 12th century considered *quaestio*, that he had learnt at the Laon school, as "composed of an affirmation and a negation that contradicts it, each of which seems true. The solution consists in examining the two positions, showing how they are ambiguous; once reformulated in an unequivocal way, the affirmation and the negation will not be contradictory any longer": Puggioni 1993, 39. Peter Abelard said on this that "*Dubitando ad inquisitionem venimus; inquirendo veritatem percipimus*" ("Through doubt we arrive at the question, and thanks to the question we perceive the truth": this passage is cited by Garin 1969, 55).

erogeneous canonical legislation into a structured, harmonious and coherent unitary legal system.[52]

3.2. The Advent of the *Logica nova* in the Second Half of the 12th Century and the Evolution of the *Quaestio* Works

3.2.1. The Rediscovery of Aristotle's Works on Logic and the Birth of the Logica nova

The cultural background and epistemological approach resulting from the use of the methods provided by the *logica vetus* were radically transformed towards the middle of the 12th century when the content of the *dialectica* known and studied in the schools of liberal arts underwent profound changes.[53] This decidedly abrupt and disruptive change was produced by the rediscovery of a vast quantity of Greek philosophical works that had been completely unknown in the Latin world (or little known), but that had on the other hand inspired a lively doctrinal discussion in the Byzantine, Arabic and Jewish worlds and had, consequently, helped the scientific development of those cultures (Vignaux 1990, 46–7). The longing to fill the gap created in the Christian West by the ignorance of the valuable classical writings had the effect of giving birth to an impressive scientific movement directed to the study and teaching of the ancient philosophical doctrines that had fallen into oblivion in the early Middle Ages. A crucial role in the achievement of this was played by the gradual translation that took place, above all in Sicily and the Iberian peninsula, of the original Greek writings (or of their subsequent Arabic versions) into Latin.[54] In fact, a general ignorance of Greek in the schools

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[52] We need to bear in mind that some of the earlier glossators were particularly well versed in *dialectica* and also used the Aristotelian technique of syllogism with a certain familiarity (certainly in Irnerius's case), but Irnerius' ability to use inferential logic was not common among his contemporary glossators, to the extent that only the teachers at the end of the 12th century managed to equal the Aristotelian-type argumentative technique of the school's founder: cf. Otte 1971, 140–1.

[53] As generally regards the transformation of the scientific knowledge produced in the 12th century, it has been written that "the traditional frameworks within which medieval thinkers had organised their own knowledge are not capable of accepting and ordering the new doctrines and the new material that came to enrich Western culture in a systematic way": Fumagalli Beonio Brocchieri and Parodi 1996b, 213. The novelty in the study of logic therefore signalled "a moment of profound transformation in the methods and structure of knowledge, a running crisis in cultural ideals": Garin 1969, 28.

[54] "Thirst for knowledge," "desire for redemption," and "sense of cultural inferiority" are spoken of to describe the cultural situation of the Christian West compared with the Greek philosophical culture in the 12th century: Bianchi 1997a, 3. On the activity of translating Greek works into Latin, on the main centres producing translations and on the methodological problems faced by the translators cf. Blanché 1973, 163–4; Reade 1980, 403–7; Knowles 1984, 251–61; Rossi 1994; Fumagalli Beonio Brocchieri and Parodi 1996b, 209–13; Bianchi 1997a, 3–17.

and in the universities of the West had hampered direct knowledge of the works, which had been available only in the original text. This situation of linguistic unintelligibility had made the Hellenic cultural heritage totally inaccessible until the first translations produced in the course of the 12th century had started to become widespread.[55] The same Bolognese teachers from the glossators' school were completely unable to understand Greek, as is shown by the fact that passages from Byzantine sources written in that language were accompanied—at least until a suitable Latin translation was produced—by a single, laconic note that indicated the absolute inability of the jurists to understand their meaning: "*Graecum est, legi non potest*" ("It is written in Greek and therefore cannot be studied").[56]

Also as regards *dialectica*, at the time of the *logica vetus* the general lack of Latin versions had produced a complete ignorance of some of the fundamental manuscripts of Greek thought. These therefore remained completely absent from the Christian cultural scene until the feverish activity of the translators in the 12th century allowed a basic linguistic comprehension, necessary to embark on a reading and understanding of the philosophical doctrine of classical Greece, to be included in the studies of medieval universities.[57] In particular, the most significant discovery in the field of logic undoubtedly concerned the acquisition of a full and complete knowledge of Aristotle's *Organon* (not from an abbreviated and abridged form, as had happened in the past). This was made possible not only by the recovery and translation of some of the Stagirite's fundamental works that had previously been totally unknown, such as *Prior Analytics*, *Topics*, and *Sophistici elenchi*,[58] but also by the new and better understanding of some works that, although already known in the context of the *logica vetus* like the *Categories* and *De interpretatione* (*On Interpretation*), had not been studied in relation to the overall doctrine resulting from the discovery of the other Aristotelian texts.[59] The majority of the

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[55] Cf. Evans 1996, 37–8; De Libera 1999a, 293–4. On the fundamental role of Latin in the context of medieval learned culture cf. Haskins 1972, 111–20; Verger 1999, 17–25.

[56] Cf. Calasso 1954, 524. Burgundius Pisanus (1110–1193 ca.) was the first to translate the Greek passages of *Digesta Iustiniani* into Latin; on Burgundius cf. Liotta 1972, 423–8; Classen 1974. In general on this topic cf. Troje 1971.

[57] As regards the inaccessibility of works written in a different language to Latin it has been noted that "the *translatio studii*, the transmission of knowledge, could happen solely in the form of *translatio linguarum*, of a linguistic transposition": Bianchi 1997a, 2.

[58] On the rediscovery of Aristotle's works on logic cf. Prantl 1937, 177–95; Padellaro 1970, 17; Grabmann 1980, vol. 2: 86–102; Knowles 1984, 256–7. In particular sophist theory was completely unknown to the *logica vetus*, so that "it is not by chance that the new interest in Aristotle of the twelfth century started with the effective introduction, in study and doctrinal analysis, of the rediscovered Boethian version of *Elenchi Sofistici*": Minio-Paluello 1972, 757–8.

[59] The medieval authors, deprived of any real historical and philosophical knowledge about the formation of Aristotle's works, saw the *Organon* as a coherent and systematic course of logic: cf. Ebbesen 1999, 22; De Libera 1999a, 337.

new translations of the *Organon* (as well as the re-acquisition of some old and forgotten Boethian translations of Aristotle's writings) were produced in the second or third decade of the 12th century, with the one (but important, as we shall shortly see) exception of the *Posterior Analytics* text, where instead the first versions appeared only about 1150.[60]

The study of these important and fundamental works by Aristotle—finally translated into Latin, and so understandable again—gave rise to a new order of principles and gnostic rules in the study of scholastic philosophy.[61] This was so marked that the arrival of the new conceptual approach in the first half of the 12th century made the new logic distinct from the early medieval logic (*logica vetus*), which was still devoid of the majority of the ideas contained in the *Organon*. From the middle of the 12th century logic showed itself to be inescapably linked to the general scientific changes the rediscovery of the Stagirite's teachings had caused, even taking the name of *logica nova* (the new logic). Added to all this, the period between the end of the 12th century and the start of the 13th saw the rise of the *logica moderna* (modern logic), which represented a further development in the thought and heuristic methods of the medieval "Terminist" philosophers, and integrated and completed the tools offered by Aristotle's *Organon*.[62]

However, this did not mean that the earliest translations of the *Organon* had immediately produced a wide and profound knowledge of Aristotelian logic, even at an elementary level of academic study. A slow progress was imposed by the laborious manual transcription of the newly translated texts and by the need to radically change the centuries-old conceptual positions held by the teachers of *dialectica* in the liberal arts schools. This very likely contributed to slow up and obstruct the reception of the new teachings for some time.[63] However, the process of popularising the new philosophy—initially limited to universities—soon spread with a growing and irrepressible vitality

[60] On the various translations of Aristotle's works on logic, and on the times when they were produced cf. Minio-Paluello 1972, 749; Abbagnano 1993, 523–4; Evans 1996, 42.

[61] On the significance of and problems with the terms "scholastic method," "scholastic philosophy" and "scholastic logic" cf. Blanché 1973, 159–60; Grabmann 1980, vol. 1: 43–53; Reade 1980, 383; Fumagalli Beonio Brocchieri and Parodi 1996b, 265–6. On Scholasticism in general cf. Agazzi 1954, 221–38.

[62] Cf. Haskins 1972, 288–9; Blanché 1973, 164; McKeon 1975, 167–9; Reade 1980, 400; Weinberg 1985, 163; Fumagalli Beonio Brocchieri and Parodi 1996b, 191. Concerning *logica modernorum* (the logic of the "Terminists") cf. Roncaglia 1994, 283–98; De Libera 1999a, 362–71; De Libera 1999b.

[63] On the desirability of not emphasising the immediate cultural effects produced in the Middle Ages by the rediscovery of ancient works and teachings cf. Minio-Paluello 1972, 763–6; Bianchi 1997a, 18. In fact a temporal hiatus exists between the translation of Aristotle's works and their general acceptance in the schools (cf. Knowles 1984, 257). For example it has been shown that Aristotle's works on logic only rarely appear, and then with some delay (not before the beginning of the 13th century), in monastery libraries: cf. Grabmann 1980, vol. 2: 99.

to all the lower levels of the educational system. In the course of the second half of the 12th century,[64] the schools became increasingly aware of the ongoing cultural revolution and started to ensure that the new generations of students—and so also the minds of the future Bolognese teachers—had fully absorbed the heritage of scientific techniques and methods introduced by the freshly acquired knowledge of Aristotle's works.[65] Starting from the middle of the 12th century, the rediscovered teachings of the *Organon* no longer remained the prerogative of an erudite few, but gradually achieved a general level of diffusion through the basic teaching given in the liberal arts schools (Knowles 1984, 258; Bianchi 1997b, 30). In the course of the 13th century the spread of learning necessitated the production of preparatory and elementary handbooks specifically designed to simplify understanding in the schools of the complicated Aristotelian logical structures. These texts, therefore, contributed to further a general and uniform cultural assimilation of the innovative and fundamental logical ideas found in the rich collection of gnostic tools provided by the *logica nova* and the *logica moderna*.[66]

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[64] To identify the second half of the 12th century as the period when the Aristotelian texts started to become widespread and well known, following their rediscovery and translation in the first half of the century, cf. Minio-Paluello 1972, 749, 766. On this point cf. Knowles 1984, 251, who fixes the period between 1140 and 1170 as the end of "ancient logic." The beginning of the effective assimilation of Aristotle's works began in the last quarter of the 12th century, but Aristotelian thought only became the accepted philosophical reference system "starting from the first decades of the 13th century": Rossi 1994, 178. We must also remember that the teaching of the *logica vetus* had been a prerogative of the monastic schools, while *logica nova* was taught in the town schools—Episcopal, but rarely lay—that sprang up at the start of the 12th century: cf. Manacorda 1914, t. 1: 269–80; Codignola 1954, 270–5; Puggioni 1993, 46; Fumagalli Beonio Brocchieri and Parodi 1996b, 259; De Libera 1999a, 290, 295. In general on the medieval structure of school instruction see the description given by Merlo in Tabacco and Merlo 1989, 608–18.

[65] On the propulsive role of the universities in the rediscovery, study and teaching of Greek philosophical thought cf. Bianchi 1997b, 25–48; De Libera 1999a, 345. The pre-eminence of the study of dialectic with respect to other fields of secular knowledge at the time of *logica nova* is shown by Tweedale 1993, 71. The predominance of logic in humanist literature between the 12th and the 14th centuries is also seen and extolled by contemporaries, as happens in "Battle of the Seven Arts" by Enricus of Andeli, a work from the beginning of the 13th century which describes how grammar, having gone to war, is routed by dialectic (cf. Gilson 1983, 495–7; De Libera 1999a, 293; also on this topic cf. Garin 1969, 15–27).

[66] On the handbooks of logic compiled to assist in an understanding of the teachings of the *Organon*, as for example Peter of Spain's *Summulae logicales* (he was elected Pope in 1276 taking the name John XXI), William of Shyreswood's *Introductiones in logicam*, Lambert of Auxerre's *Dialectica*, cf. Dal Pra 1960, 463; Vasoli 1961, 314–5; Blanché 1973, 164–5; Pozzi 1992, 6; Abbagnano 1993, 595–7; Fumagalli Beonio Brocchieri and Parodi 1996b, 332; Bianchi 1997b, 35. For the relationship between language and logic, particularly relevant in the *logica modernorum* of the "Terminists" of the 13th century, cf. Markowski 1981.

3.2.2. The Syllogistic Method

Certainly the most relevant aspect of the new gnostic approaches that resulted from the complete knowledge and deeper understanding of *Organon*—and that would show itself to be the harbinger of significant consequences for the subsequent development of Western scientific thought—concerned the complete re-acquisition of the technique of syllogism. It was the lynch-pin of Aristotelian logic and a potent heuristic tool that was able to radically replace the *distinctio* method that had been so widely used until the middle of the 12th century in the culture of the *logica vetus*, at least as regards the epistemology of scientific reasoning.[67]

In his writings, Aristotle proposed a model for logical argument based on three fundamental theories and on a further three theories concerning their practical application. The fundamental theories were: the theory of terms, the theory of propositions and the theory of valid inferences or syllogisms, which were explained, respectively, in the *Categories*, in *De interpretatione* (*On Interpretation*), and in *Prior Analytics*. The theories concerning their application (i.e., the theories of apodictic argument, probable argument and eristic argument) were described in *Posterior Analytics*, in *Topics*, and in *Sophistici elenchi*. Taken together, these theories (*Organon*) unified the study of the different aspects of syllogistic teaching and so allowed a complete mastery of the Aristotelian technique of inferential reasoning (Schulthess and Imbach 1996, 40–1; Casari 1997, 4–5). The complexity of the logical principles to be respected in order to formulate inferences, created a need to understand all the *Organon* texts governing the application of syllogistic logic. These inferences had to be not only valid (to reach logical conclusions by the correct use of syllogism) but also true (to identify conclusions where, besides a correct formal use of syllogism and a technical exactness in the results achieved, one could assume the logical consequence of the inference as truthful—and not just as rationally plausible). The intention was, therefore, to avoid the formulation of fallacious (eristic) reasoning and aberrant paralogism.[68] This general methodological ap-

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[67] On syllogism in Aristotle's thought cf. Negro 1968; Ross 1977, 32–8; Thom 1981. The antithesis between Plato's gnostic system and that of Aristotle depended on the fact that the Platonic dialectic imposed "at every step the choice of initial definitions and the testing of these definitions by means of subsequent division or by their consequences. This selective characteristic radically distinguishes dialectic from the deductive process (which is necessarily demonstrative) that Aristotle believed implicit in the nature of all science": Abbagnano 1993, 126. The radical novelty of the scientific theory introduced by the Aristotelian texts caused a general change in the previously accepted "system of interpreting the world" (cf. Wieland 1987, 67), insofar as the translation of Aristotle's works on logic "in turn influenced the thought and methods of the schools": Knowles 1984, 256.

[68] Cf. Abbagnano 1993, 196. Logic in this sense is the science of the "valid form" of reasoning, namely, the study of the criteria used to distinguish correct from incorrect reasoning: cf. Ciardella 1991, 27–30; Bucher 1996, 13–7. On eristic argument and paralogism cf. Berti 1987, 128.

proach would remain—despite subsequent additions and re-formulation—the basic framework for all formal logic until modern times.[69]

The syllogistic form in particular is the vital cornerstone of the entire complicated heuristic Aristotelian system[70] and provides a proper way of obtaining a coherent deduction (an inference) from two premises that are invariably seen (both in classical and medieval times) as linguistic propositions. Aristotle himself affirmed in *Prior Analytics* that "a syllogism is a sentence in which certain things being laid down, something else different from the premises necessarily results, in consequence of their existence."[71]

In this conceptual framework, the theory of terms and the theory of propositions offer the necessary semantic methodological base for understanding the value of the grammatical elements (subject, copula, predicate) and the significance of their correlation inside different possible linguistic propositions (affirmative universal proposition, particular affirmative, universal negative, particular negative).[72] In fact, medieval logic—which ignored the present day semiotic expedients made possible by meta-linguistic and symbolic languages—remains closely linked to the Latin constructions used to express the concepts under investigation. Consequently, the correct qualification of the terms of discourse and the certain identification of their semantic value appears essential for a correct definition of the content of the propositions, on which—as necessary premises of the inference—one must base all syllogistic reasoning.[73] A clear definition of the significance of the expressions used as presuppositions in the inferential logic process, therefore, represents a preliminary and

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[69] Above all, the three fundamental theories remained unaltered: cf. Casari 1997, 4. As regards the application of Aristotelian logic in modern and medieval legal science cf. Kalinowski 1971; Capozzi 1976, 25–36; Perelman 1979, 15; Giuliani 1994. The persistence of the value of Aristotelian syllogism has been particularly emphasised in modern law "also after the arrival of the modern logics which supplanted Aristotelian logic and which in any case recognise that the human mind produces logical thought by the same mechanisms, even if the way of expressing or of representing them changes in the course of time with recourse to methods that are ever more sophisticated and precise": Sammarco 2001, 21, n. 26.

[70] In the Aristotelian vocabulary, the syllogistic technique belongs to the conceptual sphere of analysis (which implies a connection with certainty and with irrefutable demonstration) and not to that of synthesis (which instead concerns mere probability but nevertheless opens the road to discoveries that simple analysis could never lead to), as the name of the works dedicated to syllogism themselves (*Analytics*) shows: cf. Panza 1997, 370–83.

[71] Aristotle, *Prior Analytics*, I, 1, 24b 18–20 (Engl. vers. Owen, 82). On this passage from Aristotle cf. Abbagnano 1993, 193. Regarding the syllogistic mechanism cf. Berti 1987, 118; Sanguineti 1987, 123–37; Ackrill 1993, 129–49.

[72] Cf. Viano 1955, 57–62; Łukasiewicz 1968, 120–7; Pozzi 1992, 13–6; Bucher 1996, 121–5.

[73] It has been written that, apropos of the different approaches of medieval and modern logic, "medieval thinkers highlighted the logical structure of natural language whereas modern thinkers construct a symbolic language following logical structures": Pozzi 1992, 5. On the symbols characterizing modern artificial language cf. Lolli 1991, 29–41; Copi and Cohen 1999, 339–89. On the doctrine of *suppositio* and on the medieval attempt to develop semantics cf. Weinberg 1985, 183–4.

unavoidable condition for an effective application of syllogism.[74] However, a rational evaluation of the relations between the individual elements being examined could only come about by using syllogistic reasoning to connect the linguistic propositions. In fact, considering the initial ideas (the premises of the inference) in isolation did not address the problem of their truth or falsity, while the coincidence of premises in a judgement that affirms that one thing is inherent in another generates the difficulty of ascertaining and verifying the overall truth or falsity of the syllogistic conclusion in question.[75]

In a nutshell, syllogism is a technique by which it is possible to infer a third predicative proposition (conclusion) from two predicative propositions (major premise and minor premise) based on the principle of identity and difference (*dictum de omni et de nullo*). In other words, it is based on the principle by which two terms, each identical to a third, are identical to each other (identity), and—on the contrary—two terms of which only one is identical to a third, are not identical to each other (difference).[76] The syllogistic reasoning process finishes with a deduction that is legitimised by the existence of a term which is common to the two premises (middle term). This has the function of connecting the other two major and minor terms, and thus permits a conclusion to be inferred that—given the truth of the premises—must, in turn, necessarily be true.[77] This type of logical method remains unchanged, despite the possible existence of many different syllogistic forms which differ because of the nature of the premises used in their construction.[78] However, in all its diverse forms of expression, syllogism is a formal process which links premises together and aims to show the relationship that explains and clarifies a conse-

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[74] During the medieval period, material logic consisted of the study of the content of premises, namely, of the *materia* (substance) of reasoning (*Logica Maior*, major logic), as opposed to the study of links between premises and conclusions which was instead studied as formal logic (*Logica Minor*, minor logic). On this topic cf. Vanni Rovighi 1962, 45–6; Padellaro 1970, 15; Ciardella 1991, 64–5.

[75] Cf. Codignola 1954, 104. Also in the medieval period "the central theme of logic remained that established by Aristotle: declarative discourse," meaning "linguistic configuration about which it makes sense to say it is true or false": Casari 1997, 20.

[76] Cf. Negro 1968, 99–100; Capozzi 1974, 319–31; Ciardella 1991, 71–80. These two fundamental laws of syllogism can also be expressed in these terms: "what is true of the totality of the genus (*omnis*) is also true of the species and of the individual things contained in this genus; what is false for the totality of the genus (*nullus*) is also false for the species and the individual things contained in this genus": Blanché 1973, 174.

[77] Cf. Capozzi 1974, 257–66; Puggioni 1993, 45; Fedriga 1993, 298. On the rules that are essential for the validity of a syllogism and on its various forms (which for reasons of brevity cannot be examined here) cf. Vanni Rovighi 1962, 83–92; Knuuttila 1991, 477–82; Bucher 1996, 125–6; Copi and Cohen 1999, 219–338; Gangemi 2002, 61–79.

[78] In reality, although the syllogistic process has a high level of uniformity, various forms of it exist and it can present itself in various ways (there are at least 24 species of valid inference). Medieval logic, in distinguishing between and classifying these, also resorted to ingenious mnemonic expedients: cf. Fedriga 1993, 298–305; Bucher 1996, 126–38; Casari 1997, 50–4.

quence which is different from the initial presuppositions. This occurs, for example, in the famous inferential argument that starts from the premises concerning the mortal nature of man and Socrates' membership in the human race, and ends by deducing his mortal nature.[79]

The re-exhumation of Aristotle's *Organon* after centuries of oblivion prepared the way for the complete rediscovery of syllogism; for the cultural re-acquisition of the most complex, but also most authoritative and effective, gnostic mechanism that Greek philosophy could offer the medieval world. It was in fact Aristotle himself who declared, with full authority, that Plato's process of division should be considered weak and unreliable when compared to syllogism, which was infinitely superior from the point of view of coherence and cognitive usefulness:

That the division through genera is but a certain small portion of the method specified, it is easy to perceive, for division is, as it were, a weak syllogism, since it begs what it ought to demonstrate, and always infers something of prior matter. (Aristotle, *Prior Analytics*, I, 31, 46a 31–35; Engl. vers. Owen, on pages 153–4)[80]

Distinctio had been the privileged technique for obtaining scientific certainty during the *logica vetus* period, but this demonstration of its weakness led, therefore, to its progressive devaluation and to its ever more effective replacement by syllogism as the main heuristic criterion.[81] Furthermore, the different methodological approach of the *logica nova*—which was destined, from the middle of the 12th century, to revolutionise the concept of received scientific knowledge itself—was not confined to philosophical studies, but inevitably had an effect on the hermeneutic and didactic techniques adopted for the study of law in the glossators' school.[82]

[79] This very popular example of syllogism comes from the medieval period when the premises of inferential reasoning were extended to also include classes of names for individual things that were absent from the Aristotelian system: cf. Łukasiewicz 1968, 109–15; Blanché 1973, 175; Bucher 1996, 131. On the syllogism on Socrates' mortality cf. Codignola 1954, 104–5; Schulthess and Imbach 1996, 45–6.

[80] Cf. Celluprica 1978, 152–3; Zanatta 1996, 107–16.

[81] Bianchi (1997a, 18–9) speaks of an "uncontrollable eruption of the Aristotelian following" in the twelve hundreds and adds that "the history of medieval thought was in the first place the history of reception, interpretation and use of Aristotle's philosophy."

[82] It has, in this sense, been written that "European thought derived, first of all, knowledge as an ideal and a criterion of what it was to be scientific from Aristotle and his followers": Bianchi 1997a, 19. The eruption of the revolutionary doctrine that came from Aristotle's logic broke the previous epistemological laws and introduced "a new conception of reason and of science" (Gregory 1992, 10), leading to a true and proper "increase of rationality in the twelfth century" (Wieland 1987, 69). On this topic Verger (1999, 28) holds that the Aristotelian belief "was first of all a logic, a syllogistic art taken as a demonstrative technique par excellence. Well read medieval men naturally tended to think in syllogistic way."

3.2.3. *The Legal Application of Syllogism in the Glossators' School and the* Quaestio de facto

Assured by the basic teaching given in the schools of liberal arts, the capillary-like growth in the use of Aristotelian logical principles from the second half of the 12th century on, made a rich heritage of previously unknown or completely neglected logical techniques available to all the scientific disciplines. For this reason, at the same time the rediscovered content of the *Organon* inevitably caused all the sciences, including legal science, to resort to the heuristic ideas in Aristotle's works, thus rendering all previously used research methods antiquated and outmoded.[83] Awareness that the *logica vetus* tools were obsolete required (or better, demanded) that the glossators of the *logica nova* period master and apply a complex of logical rules that had been unknown or little known to the early Bolognese teachers. In particular, the radical conceptual innovation represented by the general replacement of the diairetic method with syllogism as the basic technique for acquiring certainty endowed with scientific value meant that the Bolognese could not refuse to assimilate and adopt it.[84]

The most substantial benefit produced for the glossators' school by this general and fundamental innovation in the methodology of scientific theory must be seen in the birth and gradual development—around the middle of the 12th century—of the *quaestio de facto*. This was a new technique of legal investigation that was destined to rapidly form itself into a separate collection of works that were different and distinct from those containing the glosses.[85]

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[83] We need to bear in mind that "Medieval university preparation was in fact based on the study of the *auctoritates*, authoritative works that allowed a systematic body of knowledge to be drawn from them, and every variation in their choice had serious repercussions as much for teaching as for science": Bianchi 1997b, 34. On this subject John of Salisbury († 1180) clearly indicated in *Metalogicon* that non-observance of the appropriate logical rules deprives *sapientia* of all rational structure and of all credibility (cf. Gregory 1992, 22). In particular John of Salisbury affirmed in 1159 that no dialectic from then on could ignore knowledge of the *corpus* of works of Aristotelian logic, insofar as "such knowledge would have been a *conditio sine qua non* for whoever wished to teach logic": Knowles 1984, 258. The arrival of Aristotelian metaphysics had the effect of overwhelming the traditions of the schools and of profoundly changing their teaching, as indicated by Gilson (1983, 406), who likewise underlines the circumstance whereby, "after the discovery of Aristotle's books, the teachers of the liberal arts had acquired a much more substantial authority" (Gilson 1983, 474). Cf. also Paradisi 1968, 625–6; Chenu 1995, 32–5; De Libera 1997.

[84] The way studies were organised meant that only students who were expert in logic would see the wide territory of legal science open to them: cf. Knowles 1984, 259; Flash 1992, 154. Furthermore, the ferocious Parisian condemnation of 1277 against Aristotle's teachings—which we will speak about further—did not concern Aristotle's logic, which was by then itself identified with the teaching of the basic rules of thought from which all disciplines had consistently drawn the rules for discussion and hermeneutic technique: cf. Bianchi 1997b, 36–8. On the glossators' knowledge of Aristotle and syllogism cf. Otte 1968; Otte 1971, 145–55.

[85] On the link between the rediscovery of Aristotelian logic and the affirmation contained

The *quaestio de facto emergens* sprang (as its name clearly suggests) from an event—real or fictitious—brought to the attention of legal science by judicial practice. It concerned the legal doubt (*quaestio*) raised by a specific actual case (*factum*) that could not be easily classified within existing legal paradigms (it would otherwise be treated as a *casus*, i.e., an event that conforms exactly to an abstract situation described in the legal texts).[86]

After the identification of the legal question to be resolved, the *quaestio de facto* involved a disputation over the doubt raised and took the form of a dialectical comparison of two contrasting opinions—conventionally represented in the persons of the *opponens* and the *respondens* (or of the *actor* and the *reus*) who championed two irreconcilable opinions (thesis and antithesis).[87] The antinomy between the two conflicting opinions was the result of the radically antithetic nature of the solutions proposed for application to the actual case under investigation: The difference between the two solutions came from the differing opinions of the opposing dialectics about the applicability, or inapplicability, of a specific norm with which to govern the actual case in point that lay behind the *quaestio*.[88]

Research in the rich archives of Romano-canonical law for the most suitable discipline for a controversial case was justified—and imposed—by the Bolognese teachers' firm conviction that the *ius commune* always and inevitably provided an answer to all those legal needs being generated by the various, changing demands of society. This, therefore, induced the glossators to search only in the *Corpus iuris* for a comprehensive set of rules to govern any legal problem that daily life could produce and that was not already explicitly provided for in existing legal tomes: "*Omnia in corpore iuris inveniuntur*" ("In the *corpus iuris* one can find everything").[89] In this type of research the glossator could not have gained any advantage by turning to *distinctio* (a hermeneutic method that was well known to the earliest Bolognese teachers), because even the boldest subdivision of normative precepts would have only allowed him to split, clarify and specify all the various hypotheses already expressly foreseen in the legal texts. Despite this, it would not have allowed him to ascertain if the

in the *quaestio disputata* in university faculties (also law faculties) cf. Lawn 1993, 11–2; Chenu 1995, 38–40. The first reliable documents indicate that the disputation of legal issues in Bologna probably started about the middle of the 12th century in the Bulgarus school: cf. Kantorowicz 1939, 59–67; Belloni 1989, 7–22; Bellomo 1992a, 74.

[86] Cf. Kantorowicz and Buckland 1969, 208–9; Bellomo 1974a, 24–30; Fransen 1985, 240; Bellomo 1992a, 208–11; Bellomo 1997a. In particular on different types of *casus legis* cf. Di Bartolo 1997.

[87] On the technique of university disputation in legal matters cf. Otte 1971, 156–85; Mayali 1982; Colli 1984, 37–49.

[88] "The recognition that quarrel, controversy and conflict of opinions represented a fact of human life that could not be eliminated is implicit in medieval dialectic": Giuliani 1966, 132.

[89] On this celebrated affirmation contained in the Accursian gloss and on the trust of the jurists in the self-sufficiency of the *scientia iuris* cf. Quaglioni 1990, 126–7.

norm could be extended to analogous cases which were not clearly contemplated in it. In fact, a simple division and subdivision of the legal prescription into its different facets would have led to a definition of the different *casus* (cases) corresponding to individual aspects of the norm being looked at, but would never have permitted the identification of whether or not a particular precept could be applied to events that were not included in that norm. Furthermore, as has already been indicated above, recourse by the jurists to *distinctio* provided the main reason for identifying an appropriate definition of every species, that is, of every legal institute (distinguished by use of the *quaestio legitima* from other species, i.e., from the different institutes belonging to the same genus). However, this did not allow them to determine any possible interactions of the genus (i.e., Roman or canon law) with those legal paradigms which were not provided for in those laws and which were, for this reason, necessarily extraneous to all possible conceptual specifications. This was true as much for the genus as for the species; both for the norm and for all possible conceptual specifications derived from the legal text through the use of *distinctio*.[90]

In other words, even a much more detailed analysis of the sources of *ius commune* conducted through the use of the *distinctio* criterion, would not serve to verify the applicability of the norm to cases not foreseen in the legal text. The existence of a *quaestio de facto* raised this into a problem that was both real and crucial. The solution for this type of hermeneutic difficulty had, therefore, to be sought in a heuristic tool other than *distinctio*, and the rediscovery of Aristotle's logic offered the glossators the type of reasoning that was most suitable for this purpose: syllogism.

3.2.4. *The Inferential Mechanism of the* Quaestio de facto

In the *quaestio de facto emergens*, the norm whose application is supported or contested does not directly regard the legal paradigm in question (otherwise, as has been said, there would be no *quaestio* but only a *casus*). This causes both the *opponens* and the *respondens* to turn to a syllogism to show beyond all doubt the possibility, or impossibility, of extending the application of the law in question to the controversy. It was, therefore, up to both contenders to provide suitable arguments so that an inferential mechanism could be constructed capable of revealing the necessary logic for the extension of the law to the *factum* (fact), or the error of such an extension.

In more detail, the rules of syllogistic inference[91] required that the *argumenta* (arguments) adopted by the two opposing dialectics—that is, by the

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[90] As regards the distinction between definition and demonstration in medieval logic cf. Eco 1993, 51.

[91] On the distinction between categoric and hypothetic syllogism, and between perfect and imperfect inference in a syllogistic context cf. Puggioni 1993, 34–46; Fedriga 1993, 297.

supporters of the antonymous opinions making up the thesis and antithesis—necessarily draw their strength from suitable τόποι (*loci* in Latin, topics in English)[92] capable of justifying and sustaining the contrasting solutions proposed in the *quaestio* in discussion.[93] To clarify the significance of these technical words, we can usefully turn to the concise and illuminating definitions provided in the well known and much used 13th century manual of logic, *Summulae logicales*, by Peter of Spain († 1277).[94] There we read that the *quaestio* is a "*dubitabilis propositio*" ("a proposition in doubt"), while the *conclusio* that settles the *quaestio* is an "*argumento vel argumentis approbata propositio*" ("a conclusion is a proposition proved by an argument or arguments").[95] From this it follows that the determining element for the solution of the *quaestio* is the *argumentum* (described as "*ratio rei dubiae faciens fidem*," i.e., as "a reason producing belief regarding a matter that is in doubt")[96] which however, in turn, depends entirely on the support of a suitable *locus*. In fact, Peter of Spain himself made the statement that "*argumentum per locum confirmatur*" ("an argument is confirmed by means of a Topic").[97]

The structure of the syllogistic argument therefore makes the role of the *locus* fundamental.[98] It consists of the "*sedes argumenti vel id unde ad propositam quaestionem conveniens trahitur argumentum*,"[99] or in other words, of the logical principle (*maxima propositio*) or the authoritative and irrefutable rule (*differentia*), on which the coherence of the *argumentum* is constructed.[100] The effectiveness of the *argumentum* depends, in short, on the application of a *locus* that is able to play the part of a "middle term" between the other two

[92] The use of the Latin term *locus* to translate the Greek word τόπος goes back to Boethius: cf. Ebbesen 1999, 13–4.

[93] "A dialectic *topos* is therefore a 'topic' that contains arguments, a *sedes argumenti*": Puggioni 1993, 32.

[94] On the great prestige given to Peter of Spain's *Summulae logicales* up to the 16th century cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 332.

[95] *Summulae logicales*, *De locis*, 5.02 (Engl. vers. Kretzmann and Stump, on page 226).

[96] *Summulae logicales*, *De locis*, 5.02 (Engl. vers. Kretzmann and Stump, on page 226). This definition of the *argumentum*, originating with Aristotle and Cicero, had already been used by Boethius and by Isidore of Seville: cf. Brugi 1936, 24, n. 9; Sbriccoli 1969, 344–5.

[97] *Summulae logicales*, *De locis*, 5.06 (Engl. vers. Kretzmann and Stump, on page 228).

[98] "The analysis of *loci* (topics) can be seen as an argumentative strategy that aims at discovering those general principles that permit particular conclusions to be inferred. These principles allow the conclusions to be further confirmed and made credible, thus reinforcing the reasoning": Fedriga 1993, 305.

[99] *Summulae logicales*, *De locis*, 5.06: "Topic is the foundation of an argument, or that from which we draw an argument suitable for the question at issue" (Engl. vers. Kretzmann and Stump, on page 228).

[100] In medieval logic the *loci* were distinguished as *maximae propositiones* and *differentiae*: by *maxima propositio* we mean "a general and self-evident principle; the *maxima* does not need to be demonstrated and does not derive from other principles," while "the function of the *differentia* is that of finding the 'middle' for the construction of the reasoning": Puggioni 1993, 33; cf. also Fedriga 1993, 306.

terms (major and minor) contained in the premises in such a way as to lead to a correct syllogistic inference. Basing their views on Cicero, the medieval logicians in fact defined the *locus* as *vis inferentiae*, that is to say, as the essential support of the inference (Puggioni 1993, 33, 45). On this point, the *Summulae logicales* offer a very detailed catalogue of twenty-one possible *loci* to be used in the construction of syllogisms, as for example—to cite only a few of them— the *locus a causa materiali*, Topic from a material cause ("*Ferrum est, ergo arma ferrea esse possunt*": "Iron exists; therefore, there can be iron weapons");[101] the *locus a causa formali*, Topic from a formal cause ("*Albedo est, ergo album est*": "Whiteness exists; therefore, a white thing exists");[102] the *locus a contrariis*, Topic from contraries ("*Hoc corpus est album, ergo non est nigrum*": "This body is white; therefore, it is not black");[103] and the *locus a maiore*, Topic from a greater ("*Rex non potest expugnare castrum, ergo nec miles*": "The King cannot capture the fortress; therefore, neither can a knight").[104] The *locus a simili* (Topic from a similar) obviously had great importance for the legal discipline, and Peter of Spain refers to it as "*habitudo ipsius similis ad aliud simile*" ("The Topic from a similar is the relationship of one similar to another").[105] Legal science made great use of this *locus* to extend the range of Roman and canonical laws to cases analogous to those expressly mentioned in the sources of the *Corpus iuris civilis* and in the collections of decretals.[106]

Furthermore, the glossators who adapted the inferential method to legal studies very soon turned their attention to another of the various *loci* that logic provided; the *locus ab auctoritate* (Topic from authority) described by Peter of Spain as "*habitudo ipsius auctoritatis ad id quod probatur per eam*" ("The Topic from authority is the relationship of an authority to that which is proved by the authority").[107] *Auctoritas* was defined in the *Summulae logicales* as "*iudicium sapientis in sua scientia*": "Authority is the judgment of a wise man in his own field of knowledge." According to logical precepts, *auctoritas* offered elements of certainty and incontestability that were comparable to the immediate argumentative evidence of all the other dialectical *loci* which were based solely on logical principles; consequently, the *argumenta* proposed in

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[101] *Summulae logicales*, *De locis*, 5.25 (Engl. vers. Kretzmann and Stump, on page 236).

[102] *Summulae logicales*, *De locis*, 5.26 (Engl. vers. Kretzmann and Stump, on page 237).

[103] *Summulae logicales*, *De locis*, 5.34 (Engl. vers. Kretzmann and Stump, on page 240).

[104] *Summulae logicales*, *De locis*, 5.37 (Engl. vers. Kretzmann and Stump, on page 241). For a list summing up the *argumenta* used by the glossators cf. Brugi 1936, 27; Sbriccoli 1969, 349–50; Otte 1971, 189–211.

[105] *Summulae logicales*, *De locis*, 5.38 (Engl. vers. Kretzmann and Stump, on page 241).

[106] Cf. Cortese 1992b, 476–9; Cortese 1995, 394. The analogical reasoning peculiar to modern legal logic diverges significantly from the *de similibus ad similia* process of the legal science practised by the glossators; for an examination of the differences between the two forms of argument cf. Giuliani 1966, 171–7. In general on analogical interpretation in medieval legal science cf. Piano Mortari 1976, 246–52.

[107] *Summulae logicales*, *De locis*, 5.42.

the *quaestio* disputation could be effectively upheld. The example offered by Peter of Spain was as follows: "*Astronomus dicit caelum esse volubile, ergo caelum est volubile*" ("An astronomer says that heaven is revolvable; therefore, heaven is revolvable").[108] The development of legal science by the glossators (and then by the commentators) led to *auctoritas* (but merely *auctoritas probabilis* and not *auctoritas necessaria*, i.e., only probable authority and not absolutely necessary authority) being used ever more incisively in the building of jurisprudential doctrines. In the end, this led to the development of the phenomenon of the *communis opinio*, where the most widely agreed (and therefore "common") doctrinal opinion to be found in the science of laws came to be identified as the most probable legal truth (Cortese 1992b, 483–90; Cortese 1995, 454–61).

3.2.5. *The Role of the* Loci loicales per leges probati

Resort to the *auctoritas*—which the works of logic uniquely linked to the *locus ab auctoritate*, just mentioned—was destined to play a fundamentally important role in the field of law, by offering undoubted stability and certainty to the dialectical *argumenta* considered in the legal *quaestiones*. In fact the entire legal science of the glossators was founded on the explanation of works characterised by *auctoritas necessaria*. All the law studied at Bologna came from sources which were said to be antonomastic expressions of the maximum *auctoritas* (the Pope or the Emperor), and this fact implied that the voluminous collection of imperial and canonical sources (the *Corpus iuris civilis*, Gratian's *Decretum* and the *Decretales* collections) constituted an all but inexhaustible and incontrovertible reserve of texts for use in support of dialectical *argumenta*.[109]

The importance given by jurists to *auctoritas* in the sources of the *utrumque ius* (Romano-canonical law) meant that it was not possible to resort to any of the *loci* indicated by the *dialectica* unless the argument invoked found express confirmation and support in a normative text. The *loci* were seen as instruments which could not be ignored in the construction of a valid method of inference, but their use in the legal world was admissible only in the circumstances just described. The fact was that every affirmation contained in the *libri legales* (the volumes containing the collections of law) enjoyed the undisputed and infallible authority conferred on it by the sources from which it came (not subject to dispute because held to be incontestable by definition).[110] This pro-

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[108] *Summulae logicales*, *De locis*, 5.42 (Engl. vers. Kretzmann and Stump, on page 243).

[109] For example, the *Causae* that make up the second part of Gratian's *Decretum* correspond to the *quaestio de facto* scheme. In these, appear both the texts of the *auctoritates* cited *pro* and *contra*, and the *solutio* of the legal dilemma set out at the beginning of each *Causa*: cf. Stickler 1950, 209. The approach taken by Gratian would, besides, serve as a model for the development of the oldest canonical *quaestiones*: cf. Fransen 1985, 245.

[110] The *quaestiones de facto*, as analyses of the probable, concern only the possible broad

duced the result that every passage of the different legislative collections then in existence might be used—if pertinent—as a presupposed legal basis for each of the different *argumenta* that needed to be cited to sustain the necessity (or, on the contrary, the impossibility) of extending the law to the actual case that the *quaestio* related to.[111] Indeed, reference to the *auctoritas* of Romano-canonical law was very soon considered not only of much greater help than any other for moulding the syllogistic premises of the *quaestiones de facto*, but also the sole and exclusive procedure that was valid and admissible in the field of law. At the beginning of the 13th century, the glossator Azo rebuked his pupil Bernardus Dorna for having cited non-legal texts in order to confirm an *argumentum*; reminding him that "*non licet allegare nisi Iustiniani leges*" ("it is not permitted to cite anything other than the Justinianian laws").[112]

One of the Vatican codices (*Vat. lat.* 9428) deals with the *quaestio de facto* and gives an effective synthesis of the jurist's way of organising the defence of an *opponens* or *respondens* position based on such premises. In this codex— after the stipulation that doubt and controversy can only exist in a hypothesis that is not already a law ("*ubi casus legis, ibi nulla dubitatio*")—the glossator explains that "*ubi non est casus legis, necesse est ut per argumenta et per legum rationes procedamus*," which means that in the case where an explicit legislative provision does not exist, resort is needed to dialectical arguments that are supported by reference to sources of law.[113] The tool available to the jurist to propose a convincing solution of the *quaestio*—to create a valid and persuasive syllogism—was, therefore, to identify all the norms and their *rationes* (their rational principles) that could be found in all the complex mass of documents making up the *Corpus iuris civilis* and collections of canon law, adequate for producing a convincing *argumentum* in favour or against the suggested extension of the law. It is the *auctoritas* (authority) of the laws cited—assuming the *argumentum* is appropriate for the solution of the *quaestio*—that makes it inevitable that the *ratio* of the *lex*, so identified, brings about the broader application of the law in question (or, on the other hand, the refusal of a wider interpretation), as a necessary consequence of syllogistic reasoning. This causes a possible extension of the effects of the *causa legis* (the reason that inspired the law) to an event not expressly regulated by the legislator.[114]

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application of Roman or canonic law, not the (indisputable) certainty and truth of the law itself; cf. Bellomo 2000, 570–1.

[111] The evolution of the technique of citing fragments of Justinianian legislation to support dialectical *argumenta* is summed up in Martino 1997.

[112] The passage is in a *quaestio* by the glossator Azo drawn up in Landsberg 1888, 74. The glossator's statement is commented on by Paradisi 1965, 256.

[113] The codex *Vat. lat.* 9428 has been studied in depth by Bellomo (1992a, 209; 2000, 570).

[114] On the concept of *causa legis* and of *ratio legis* cf. Calasso 1956; Cortese 1962; Calasso 1967, 285–310; Cortese 1992b, 472–6; Balbi 2001, 50–60.

The syllogism applied in the *quaestio de facto* did not draw its persuasive strength from the simple doctrinal opinion of the individual glossator or from the mere logical efficacy of the *locus* invoked. Given the principle that all legal discipline had to be taken from the existing complex of Roman and canon law sources, the inference for a possible extension of the precept in question to new legal cases was necessarily founded on another legal provision. This, thanks to the *auctoritas* of its dictate, justified the reasonableness of the extension beyond all doubt: "*Erubescimus sine lege loquentes*" ("We are ashamed of ourselves when we reason without making reference to a legal text") said the glossators (Sbriccoli 1969, 347).

The common form of *modi arguendi* in the dialectical disputations of legal *quaestiones* indeed shows that not only did each *argumentum* have to be founded on an appropriate *locus*, but also the *locus* had in turn to be rooted in the citing of a precise part of the law from where the glossator could invoke the *ratio* and the *vis* (Cortese 1995, 192–5). This meant that it was not a simple *locus loicalis* (a *locus* based on a logical axiom, as in the case of the *locus* "*a contrario sensu*" considered in its pure conceptual form), but a *locus per legem probatus*; a *locus* supported by an exact legal reference. This consequently gave the *locus* the nature of a *modus arguendi* (argumentative technique) endowed with legal value (for example the same *locus loicalis* "*a contrario sensu*" was expressly confirmed in the Digest—Dig. 1.21.1 pr.—and so became a *modus arguendi in iure*: Bellomo 2000, 579). The *quaestio* was thus formulated in such a way that the delivery of the topic of the disputation followed the indications given in the passages of the *Corpus iuris civilis* used in the discussion of the conceptual justification (*loci loicales*). These had been chosen by the *actor* and the *reus* in support of the opposing dialectical positions (*argumenta*) required to define a correct and convincing syllogism.

The obligation to link the different forms of the *loci loicales* to the legal texts studied by the glossators, therefore, conferred the essential qualification of *loci loicales per leges probati* on them, when used in the *quaestiones de facto*. There were many types of *loci* (dozens of them, among which for example, the *loci* "*a contrario sensu*," "*a simili ad similia*," "*a divisione*," "*a fortiori*" and so on). In the course of the 12th and 13th centuries, the law schools—particularly those outside the Bolognese *Studium*—created appropriate indexes of these *loci* and built up a rich repertoire in order to help the contending parties engaged in the *quaestio* disputation in their work. These indexes are detailed lists containing a series of legal directions for every possible *modus arguendi*. This guaranteed correct argument and allowed the antagonists in the dialectical conflict to concentrate on the logical suitability of resorting to the various *argumenta*, instead of looking for supporting texts in legal sources, thus saving time and effort.[115] With this aim in mind, the glossator Pillius of

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[115] Cf. Kuttner 1951, 770–1; Stein 1966, 144–5, 158–9; Weimar 1967, 91–123; Weimar

Medicina, who taught law at Modena, compiled a work towards the end of the 12th century that was significantly entitled *Libellus disputatorius*, which he boasted created a text capable of considerably shortening (from ten to four years) the length of time needed to study law.[116] Pillius managed to reduce the time needed for academic study by simplifying the jurists' task of dialectical discussion in the *quaestiones disputatae*. The maxims (*generalia*) enumerated in *Libellus disputatorius*, in fact, meticulously indicated the corresponding supporting sources; facilitating their direct use as dialectical *argumenta* because it permitted a precise and easy "*contradicentium invicem rationes invenire*" (recovery of normative principles suitable for drawing the dialectical contrast from both parties).[117]

3.2.6. The Dialectical Nature of the Syllogism Contained in the Quaestio de facto *and the Merely Probable Value of the* Solutio

In the *quaestio de facto*, the identification of the *loci* at the base of the *argumenta* (resorting to the *modi arguendi in iure* technique) presents itself as the necessary conceptual foundation for syllogism to function. The applicability, or inapplicability, of a Roman or canonical law precept to the new *factum* described in the *quaestio* was a logical consequence (i.e., the conclusion of a syllogism) that came from the two legal premises invoked by the competing parties (one premise inevitably consisted of the text of the norm whose broader application was being discussed while the other one was represented by the sources cited to justify or reject its extension). Therefore, the solution of the *quaestio* lay in the correct use of an inferential mechanism that, starting from the different correlations between the source passages proposed by *opponens* and *respondens*, indicated the logical need (or otherwise, the absolute irrationality) of extending the norm invoked to the precise legal case that had given rise to the disputation.

This method tried to extract an equally authoritative consequence (the possible broader use of a specific law) from two authoritative premises whose authority came, by definition, from the fact that they were normative texts belonging to the *utrumque ius*. It necessarily tried to do so in a coherent way,

1973, 143; Cortese 1982a, 251–2, 265–6; Colli 1990, 236–8; Cortese 1992b, 470–1, 481; Cortese 1995, 152. This class of works developed about 1180, but did not initially have any success in Bologna: cf. Ascheri 2000, 217. On the collections of *modi arguendi in iure* cf. in particular Caprioli 1963, 1965; Bellomo 1974b.

[116] Cf. Belloni 1989, 54. On Pillius cf. Cortese 1982b, 98–9, who emphasises the "extraordinary theoretical complexity" of *Libellus disputatorius*; Cortese 1995, 148–51.

[117] Cf. Belloni 1989, 53–4; Cortese 1993, 46–7. In the field of canon law, the same aim was pursued by the work known as *Perpendiculum*, on which cf. Kuttner 1951, 771–92. On the relationship between *brocarda*, *loci generales*, *generalia*, *notabilia* and *regulae* (different expressions but frequently used as synonyms) cf. Stein 1966, 145; Schrage and Dondorp 1992, 33.

but it depended directly on an adequate knowledge and precise application of the rules of syllogism and, therefore, closely linked the glossators' *quaestio de facto* to the conceptual techniques of the *logica nova* (Coing 1952, 33–4). The Master who decided the outcome of the disputation resolving the *quaestio* had, for that reason, to be absolutely certain in his grasp of the entire Aristotelian technique of inferential reasoning. This was because his task involved declaring which syllogism, among all those proposed in the discussion, was effectively valid and exact—was suitable for giving a correct solution to the question raised—and which syllogisms were, instead, flawed with incoherence and with such serious imperfections as to invalidate the congruence of the argument; thereby compromising the reasonableness of the inference advanced in the course of the *quaestio*.[118]

However, the role of the Master who settles legal doubt by selecting the most convincing syllogism and rejecting the less plausible ones, indicates that, in the case of the *quaestio de facto*, we are dealing with an inferential mechanism that leads to a "probable truth";[119] to a syllogistic conclusion that does not have the characteristics of a "necessary truth," but that is imposed—from among all the various possible syllogistic inferences suggested in the course of the disputation—as the most likely and convincing solution. Despite this, the *solutio* (the solution) always remains provisional; susceptible to revision when new and better reasoned arguments arrive to undermine the present "truth" and, therefore, to overturn the outcome of the *quaestio*. As the glossator Pillius of Medicina often used to repeat to resolve questions debated in his school, the *solutio* was proposed "*sine praeiudicio melioris sententiae*," without excluding opinions that are possibly more correct (Nicolini 1933, 74; Giuliani 1964, 184). That was what happened, for example, in the case of the *quaestiones quaternales*, those particular questions that were frequently re-examined in the halls at Bologna. These questions were not only repeatedly raised and debated on account of their known effectiveness for teaching purposes, but could sometimes result in differing solutions when, from time to time, new and different arguments were put forward.[120]

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[118] "The function of the *Magister* (Master) in disputations is the same as that of a judge": Giuliani 1966, 149. On this point it needs to be stressed that in the second half of the 12th century logicians had concentrated on the study of fallacies (of reasoning that was apparently valid but in reality was contradictory) described by Aristotle in *Sophistici elenchi* (cf. Puggioni 1993, 47), and that for example Adam of Balsham (Parvipontanus) wrote an *Ars disserendi* in 1152 in which he indicated the possibility of teaching the recognition and avoidance of sophisms as a principal aim of the study of logic (cf. Blanché 1973, 183). On the problem of *fallaciae* and *sophismata logicalia* in the field of law cf. Colli 1985.

[119] "The Aristotelian dialectic (contained in the *Topics* and in *Sophistici elenchi*) seems to offer a logic of controversy, of choice, of credibility. On the basis of these texts it appears possible to identify the world of the *probabile* among the 'certainly true' (apodictic discourse) and the 'certainly false' (sophistic discourse)": Giuliani 1966, 143.

[120] Cf. Kuttner 1943, 322; Weimar 1973, 144–5; Fransen 1985, 237, 256–7; Errera 1996, 29.

All this shows that the syllogism used in the *quaestiones de facto emergentes* involves a solely dialectical type of reasoning, which arrives at conclusions that are simply probable (and not yet absolutely certain) because they start from premises that are, in turn, purely probable. Aristotle's *Topics* allowed the medieval logicians to obtain a precise distinction between demonstrative, dialectical and sophistic syllogisms, which depended solely on the different degree of truth in the premises, and not on the form of the syllogism (always equal from a functional point of view).[121] Aristotle said:

First, then, we must say what reasoning is and what different kinds of it there are, in order that dialectical reasoning may be apprehended; for it is the search for this that we are undertaking in the treatise which lies before us. Reasoning is a discussion in which, certain things having been laid down, something other than these things necessarily results through them. Reasoning is demonstration when it proceeds from premises which are true and primary or of such a kind that we have derived our original knowledge of them through premises which are primary and true. Reasoning is dialectical which reasons from generally accepted opinions. Things are true and primary which command belief through themselves and not through anything else; for regarding the first principles of science it is unnecessary to ask any further question as to "why," but each principle should of itself command belief. Generally accepted opinions, on the other hand, are those which commend themselves to all or to the majority or to the wise—that is, to all of the wise or to the majority or to the most famous and distinguished of them. Reasoning is contentious if it is based on opinions which appear to be generally accepted but are not really so, or if it merely appears to be based on opinions which are, or appear to be, generally accepted. For not every opinion which appears to be generally accepted is actually so accepted. (Aristotle, *Topics*, I, 1, 100a 22–100b 28; Engl. vers. Forster, on pages 273–5)

In particular, the conclusions of dialectical syllogism—which draw their inferential strength from a resort to premises that have the simple status of probable argument (Aristotle called them *endoxa*, or "notable opinions")—in turn, have the value of mere probability.[122] From the point of view of logic, the syllogisms of the *quaestiones de facto emergentes* also used arguments that were simply probable as the premises of their syllogistic reasoning, such as the different *loci loicales*—even if also *per leges probati*.[123] Once applied to the *verba*

[121] In the first book of the *Topics* "Aristotle distinguishes between demonstrative, dialectical and sophistic syllogisms, where the difference is not in the structure of the syllogisms but in the truth content of the premises. The distinction between topics (dialectic) and analytics (demonstration) does not lie in purely formal criteria, but in criteria concerning the content": Pinborg 1993, 345.

[122] Cf. Perelman 1979, 22–33, who in particular (ibid., 30) indicates that "the controversy had as an effect, in the first place, the exclusion of some arguments, showing their irrelevance, in the second place the elimination, because they were unreasonable, of some warmly favoured solutions, without however necessarily imposing one type of argument and only one binding solution." On the theme cf. Viano 1955, 52–5; Zanatta 1996, 45–54.

[123] Peter Abelard had already at the start of the 12th century emphasised that the *loci rhetorici* are based on a deceptive similarity; the link of the *loci* with imperfect inferential mechanisms had therefore determined on Abelard's part an "anti-rhetorical" and "antijuridical" attitude, that is to say, a disparagement of all the distinctive *loci* of legal experience that led in the end to hostility towards the "controversial" character of the science of the law

(expressions found in the texts) of Roman and canon law by the *opponens* and the *respondens*, these led to opposing, but equally reasonable, results.[124] Furthermore, the fact that the *loci loicales* belonged to the area of probable opinions is indicated beyond doubt by the fact that every *locus* needed to be sufficiently *per leges probatus* in order to be accepted as an *argumentum* in a legal disputation (i.e., had to be supported by suitable references from legal texts), while Aristotelian logic prescribed that the basic principles of demonstrative syllogisms had to be immediately and universally recognised as true, quite apart from the external support that might be offered by any authoritative text. Therefore, the syllogistic conclusion resolving the legal *quaestio* did not possess a demonstrative value that was absolutely true, necessary and certain, but had only the value of an inference that was purely likely and probable; was liable to criticism and rebuttal on the basis of different *argumenta*.[125] On this point, even the most intuitive and potent of the *argumenta*, the *similitudo rationis* (similarity of a rational nature) of the *argumentum a simili*, has been said to "leave us in the field of probability, where no conclusion is certain, rigorous" (Giuliani 1966, 175). Albertus Magnus said in the 13th century that "*in probabilibus si affirmatio est probabilis, etiam negatio opposita probabilis est, quia quod potest esse potest etiam non esse*" ("in the world of the probability, if the affirmation is probable, its exact denial is also probable, because what can be can also not be").[126]

Furthermore, all this is confirmed by the logical and philosophical culture at the time of the glossators, when science itself is rooted in a continuous and uninterrupted comparison of opinions. Scientific progress is seen as an inevitable act of choosing (based on the consensus of the other law experts, the *doctores*, as the only possible criterion of truth)[127] between the various possible dialectical alternatives—all theoretically likely—suggested to solve doctri-

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and therefore opened the way to the creeping of "systematic" elements into dialectic and into medieval jurisprudence: cf. Giuliani 1966, 195–7, 214–6.

[124] The reasonableness and the validity of each *argumentum* are indefeasible conditions for its application in the *quaestio*: "The *opinio* is not an arbitrary, subjective impression, but is a judgement based on proof; it is able to completely withstand the refutation of the opposite opinion only if it contains *argumenta veritatis*": Giuliani 1966, 160.

[125] Cf. Pinborg 1993, 352–60. In the dialectic *quaestio* "the search for the truth happens by putting a practical problem to the test and refutation of two opposing positions. […] The choice, the identification of the weightier side cannot be done in abstract, but in relation to circumstantial elements": Giuliani 1966, 144. On the merely probable value of the solution of a *disputatio dialectica* cf. Colli 1984, 45–6; as specifically regards the opinionative nature of the syllogistic *solutio* of a legal *quaestio de facto* cf. Otte 1971, 188; Cortese 1992b, 489, n. 46.

[126] The passage is cited by Garin 1969, 57 and is also given in Bellomo 1996, 37; Bellomo 2000, 569.

[127] The solution of the *quaestio* "is not the result of an individual reason, but is the opinion that is prevalently affirmed—after a long examination of the arguments *pro* and *contra*—in a school": Giuliani 1964, 185.

nal problems.[128] It follows that "until the middle of the 13th century jurisprudence, like dialectic, presents an anti-systemic character"[129] and that law therefore belongs "to the domain of the probable, of opinion, of controversy."[130] In synthesis, from an epistemological viewpoint, the legal science of the glossators consists solely of a *certitudo probabilis* (probable certainty) because the reasoning accepted by the jurists as most probable and likely is not able to completely and definitely exclude the validity of counter-reasoning (Giuliani 1964, 187–90).

3.2.7. The Syllogistic Method as a Doctrinal Tool in the Construction of a Juridical System Based on the Hermeneutic Extension of the Ius commune

The widespread tendency of the university *Studia* to resort to dialectical conflict as a basic hermeneutic and teaching technique determined the undisputed success of the *quaestio* as a versatile tool for obtaining knowledge, and produced a general adoption of the syllogistic form as an essential paradigm of scientific reasoning.[131] In fact, in the 12th and 13th centuries, the *quaestio* acquired a fundamental gnostic role in all disciplines because of its ability to lead quickly to epistemologically correct solutions for all the scientific problems raised and discussed in the universities. Its methodological coherence was guaranteed by a careful dialectical consideration of all the significant elements of the subject under discussion.[132]

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[128] On the general tendency of 12th and 13th centuries philosophical and legal speculation to seek the "truth" through dissent, controversy and conflict of opinion—and especially through the dialectic instrument of the *quaestio*—cf. Giuliani 1964, 163–90; Chevrier 1966. Cf. also Giuliani 1966, 147–8, who underlines how all the scientific conclusions obtained by syllogisms aimed at the search for "probable truth" are not "the outcome of an individual reason, but of the efforts and co-operation of entire generations," and also (Giuliani 1966, 158–9) specifies that "the dialectic method is the only valid one where a controversy exists, i.e., a conflict of opinion, of evidence, of authority; dialectic must address practical problems: It is a science of choice, of decision, of action."

[129] Giuliani 1966, 163. With reference to the glossators, Paradisi (1976, 200) spoke of the "limits shown by Bolognese logic compared with general synthesis and systematic construction."

[130] Giuliani 1964, 185, who also observes (1964, 166) how medieval thought prior to the middle of the 13th century "recognised that a vast sector of knowledge (legal, moral, political) is 'probable' in the sense that it escapes scientific determination: And it occupies itself in a search for the limits and techniques of the *ratio probabilis*."

[131] In the medieval *Studia* "lecture and disputation remained the two essential forms of both teaching and examination": Verger 2000, 75. Syllogism "became the general armoury of discourse not only when trying to prove an assertion or give critical reasoning, but also when constructing many of the elaborate structures of medieval knowledge": Knowles 1984, 258. In fact, "the growth and firm establishment of the *disputatio* method in the field of philosophy, as well as its use for theological teaching are linked to Western scholarship's understanding of Aristotle's *Analytics*, *Topics* and *Sophistici elenchi*": Grabmann 1980, vol. 2: 29.

[132] "The theory of syllogism was taught in the schools and universities as a method and teaching model for basic reasoning: So developments in syllogism, including its use as a starting

Also in the law *Studia* (and above all in Bologna) the contrast between *opponens* and *respondens* was considered a valid teaching method and, together with the conceptual coherence of syllogistic reasoning, established the triumph of scholastic debate. This led to the rapid establishment of a *quaestio de facto* class of works alongside the traditional explanatory method provided by the glosses (Montanos Ferrín 1997). It was, therefore, the logical rigour of the disputation process and its solution that determined the rapid success of the *quaestio de facto* with the jurists, and its ever more frequent and widespread application for interpretive and teaching purposes. In fact, the importance of the inferential method and the consequent need to improve the strength and efficacy of their arguments stimulated the Bolognese teachers to pay scrupulous attention to the study of the subtleties in the syllogistic method. This method claimed to be a scientifically perfect technique for the identification of the specific law to be applied whenever there was a new social need for legislation. The evident heuristic conclusiveness of syllogism produced a profusion of dialectical comparisons in the law schools all centred on the possibility of broadening the use of Roman and canon law through analogy. The record of all this laborious doctrinal activity is preserved today in the numerous collections of *quaestiones* that were put together, starting from about the middle of the 12th century, to pass on the subject matter—and the arguments—of the frequent doctrinal disputations, held both in the halls of the universities and in the special formal public sessions dedicated to this type of scientific confrontation.[133]

The glossators' school, as happened in every other scientific discipline at the time, based its epistemological statute ever more consistently on recourse to syllogism. This allowed the jurists—basing themselves exclusively on the legal writings of the *ius commune* and on the *loci* offered by logic—to give ever more new and up to date replies to the legal problems of a changing society, such as that of the later Middle Ages. A multiplicity of new legal forms and institutes (not easily definable under Justinianian law) were spontaneously and chaotically born to satisfy the continually evolving economic interests and social structure of that period. The daily legal experience of the lively modes of communal organisation truly generated a pressing need for normative precepts capable of regulating new cases which were clearly different from the

point for the study and development of other parts of logic, happened through a continuous, pedagogic, practice of disputation": Fedriga 1993, 298. On this point John of Salisbury in *Metalogicon* "strongly emphasises the usefulness of the *disputatio* for individual scientific disciplines": Grabmann 1980, vol. 2: 30. Theology also adopted the *quaestio* as an "obligatory form" of scientific reasoning: cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 268. On this point cf. Glorieux 1968; Gilson 1983, 480–1; Lawn 1993, who examines the establishment of the *quaestio* in all the different scientific disciplines.

[133] As regards the formal public disputation of the *quaestiones* cf. Fransen 1985, 234–6; Belloni 1989, 3–6; Bellomo 1992a, 216–22. On the collections of *quaestiones* cf. Landau 1997.

limited *casus* typically found in the Justinianian collections. Syllogism provided a suitable method—infallible in its logical coherence—for extending the legal arrangements of Romano-canonical law to matters that were original, and did not conform to the unchanging legislative outlook offered by the *Corpus iuris* (Fantini 1998, 172–80). Differently from *distinctio* (which was a formidable technique for explaining texts and for systematically classifying the legal institutes, but was completely unsuitable for advancing new and more extensive readings of the law), the structure of syllogism claimed critical reason, tended towards the dialectical confrontation of conflicting positions, and was ideal for proposing or refuting a suggested extension of a law through the *quaestio de facto* solution.[134] The use of inferential logic therefore offered the glossators the means of constructing an epistemological system to which no one could object, and which, without any legislative modification, guaranteed the extension of Roman law—the *ius vetus* (ancient laws) and, above all, the *ius strictum* (strictly defined laws)—to ever newer legal cases. In this way legal science could avoid recourse to the much criticised and vituperated—but flexible and continually updated—legal font of the *ius proprium* (particular laws). In conclusion, Aristotle's syllogism had been fully rediscovered from the *logica nova* halfway through the 12th century, and from then on was shared as a basic gnostic criterion by all the scientific disciplines. For the glossators it represented an ideal tool that guaranteed, to Roman law above all, a necessary vitality and a constant capacity to evolve. This would otherwise have been impeded by the lack of an industrious and intelligent legislator able to adequately and continually adapt the, by then, centuries old Justinianian laws to the diverse and pressing needs of a changing medieval society.

3.3. The Establishment in the 13th Century of an Aristotelian Epistemology Based on *Posterior Analytics* and the Birth of the Commentators' School

3.3.1. *Translations of* Posterior Analytics *in the Second Half of the 12th Century*

The Latin translations produced in the early decades of the 12th century to make Aristotelian logic intelligible had the effect of bringing the majority of the *Organon* writings to light again in the Christian world. The overturning of the *dialectica* rules that came about very soon gave a new direction to basic philosophical studies (*logica nova*), which in turn caused a new gnostic approach to be adopted (based on syllogism) in all scientific disciplines. Consequently, by the middle of the 12th century, the rediscovery of the inferential method had already generated useful innovation in the methods applied by

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[134] Cf. Bianchi 1997b, 28–9. In fact, "the contraposition makes the choice reasonable; we need to choose after identifying the two alternative sides of a problem. The choice is a task, an act of individual responsibility from which one cannot withdraw": Giuliani 1964, 175.

scientific studies, and it was also destined to spread further in the course of the same century thanks to the schools of liberal arts. Despite all this, during the same period, knowledge of the Aristotelian doctrine on logic still remained, in reality, partially incomplete and lacunose. A complete understanding of the entire work was not possible because of a lack of knowledge of the Stagirite's original epistemological ideas, given in the last part of the *Organon—Posterior Analytics*—which was still completely inaccessible to Western Christian philosophy because of the absence of a Latin version.[135]

The first translator of *Posterior Analytics* (shortly before the middle of the 12th century) was James of Venice,[136] but the criticism of this first version expressed by a certain Johannes, whose identity we are unsure of, brought about new translations: The oldest of these (from Greek) dates from before 1159 and is the work of Johannes himself,[137] another (from Arabic) was written before 1187 by Gerardus Cremonensis,[138] and yet another came from the pen of William of Moerbecke round about 1269.[139] The difficulty of creating a satisfactory Latin version of *Posterior Analytics* had the effect of keeping the medieval *Studia* ignorant of the contents of this noteworthy part of Aristotelian logic for a long time. It therefore started to be studied and used by Latin speaking logicians only in the second half of the 12th century, with the effect that it did not achieve full standard usage as a teaching programme in the schools of liberal arts until the early decades of the 13th century. Consider for example that, according to Roger Bacon, the first course dedicated to a study of *Posterior Analytics* took place in Oxford in the first decade of the 13th cen-

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[135] Cf. Schulthess and Imbach 1996, 160. In general, "the arrival of *Posterior Analytics* in the West was slow and difficult" also because no Boethian translation of these works by Aristotle had been handed down to the Middle Ages: cf. Tabarroni 1997, 186–7. The earliest written translation of *Posterior Analytics* had, furthermore, shown itself to be "almost completely unreliable because of errors committed by the transcription of the words written in Greek": Knowles 1984, 257.

[136] Cf. Grabmann 1980, vol. 2: 94–5; Serene 1982, 498; Rossi 1994, 169; Tabarroni 1997, 187, who suggests the years around 1130–1140 as the date when it was translated; De Libera 1999a, 327, 337. On the style adopted by James of Venice in translating Aristotle's works cf. Brams 2000.

[137] On *Translatio Ioannis* cf. Tabarroni 1997, 188; De Libera 1999a, 327, 337–8.

[138] 1187 is the year of Gerardus Cremonensis' death: cf. Dal Pra 1960, 410; Fumagalli Beonio Brocchieri and Parodi 1996b, 213; De Libera 1999a, 338. Knowles (1984, 257) indicates 1187 as the date of Gerardus' translation.

[139] William of Moerbecke's translation of the *Organon* was completed before 1270: cf. Rossi 1994, 177. On the work performed by Moerbecke in translating Aristotle's works (mainly at the behest of Thomas Aquinas) cf. Grabmann 1946, 62–84. On the matter of the various translations of *Posterior Analytics* in the course of the 12th century cf. Minio-Paluello 1972, 749; Schulthess and Imbach 1996, 297; Bianchi 1997a, 13; De Libera 1999a, 337–8. James of Venice's version, however, remained the most used until the arrival of the humanist age: cf. Grabmann 1980, vol. 2: 99; Serene 1982, 498, n. 9; Rossi 1994, 169; Evans 1996, 43; Bianchi 1997a, 13. Also see Grabmann's thoughts (1980, vol. 2: 97–8) on the hypothesis that one of the translations had been produced by Enricus Aristippus Catinensis.

tury (Tabarroni 1997, 188). Indeed, the oldest commentary on this Aristotelian work comes from Robert Grosseteste, Chancellor of Oxford University and Bishop of Lincoln, who wrote it between 1220 and 1230.[140]

The considerable delay—about thirty years—between the first versions of *Posterior Analytics* and translations of the Stagirite's other works on logic was an inevitable consequence of the particular complexity of the Aristotelian text. James of Venice, for example, had preferred to start translating (about 1130) the Greek commentaries on *Posterior Analytics* before dealing with the direct version of the original work (Ebbesen 1999, 9–10), and the mysterious Johannes of the second Latin translation noted in the prologue how "the teachers in Paris preferred to silently ignore the existence of this work, as it seemed obscure to them" (Tabarroni 1997, 188). Again, around 1159, John of Salisbury in *Metalogicon* spoke of *Posterior Analytics* "with a respect full of caution,"[141] complaining above all that the work was not studied because no-one was able to explain the *ars demonstrandi* (i.e., the demonstrative methodology) contained in it.[142]

Further delay in obtaining knowledge of *Posterior Analytics* was caused as a consequence of an absence of translations of it during the early period when the teaching of Aristotle's doctrine of logic was becoming widespread. There was also concern about the correctness of the few translations in circulation—for example, John of Salisbury offers evidence of the widely-held conviction that the *culpa difficultatis* (the reason for the difficulty) of the text was attributable to the fact that it had been "*ad nos non recte translatum*" (incorrectly translated).[143] In fact, the radical methodological innovation contained in *Pos-*

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[140] Cf. Dal Pra 1960, 437; Garfagnini 1979, 81; Serene 1982, 498, 501–4; Weinberg 1985, 165; Gregory 1992, 49–50; Abbagnano 1993, 530; Puggioni 1993, 46; Rossi 1994, 175; Bianchi 1997a, 18. In particular Garfagnini (1979, 47) maintains that the 12th century was the moment of the "slow and fragmentary, but continuous and tenacious" assimilation of the Stagirite's doctrine, while it is with the 13th century that we have "the high point of complete absorption of Aristotelian thought by the Latins." Furthermore, we need to consider that the availability of translations of a work does not necessarily coincide with widespread knowledge of it: "to witness the fact that the literary and cultural reception of a work is in large measure determined by the historical situation of the 'recipient' culture, we need to remember that, while from the middle of the 12th century original Latin commentaries on the *Elenchi* began circulating, we need instead to wait until about 1230 to find the first Latin commentary on *Posterior Analytics*, that of Robert Grosseteste": Tabarroni 1997, 187.

[141] This evaluation is in Reade 1980, 400, who likewise indicates that *Posterior Analytics* "were found very difficult." Also Grabmann (1980, vol. 2: 88) explains the initial lack of translations of *Posterior Analytics* "with difficulties over the content indicated by John of Salisbury, therefore, with problems of a didactic nature." On this topic cf. Prantl 1937, 192–3, who formulates the hypothesis that the difficult style of the work was not due to the translator as much as to the inexperience of the copyists.

[142] Cf. *Metalogicon*, IV, 6, 919ᶜ–920ᵃ (*De difficultate Posteriorum Analecticorum, et unde contingat*). On the subject cf. Rossi 1994, 160.

[143] *Metalogicon*, IV, 6, 920ᵃ (*De difficultate Posteriorum Analecticorum, et unde contingat*).

terior Analytics with respect to hitherto dominant epistemological conceptions made it necessary to wait until a much greater number of versions were available from which to choose. Then, one which gave a more accurate, reliable and understandable transposition of the complicated Greek writing into Latin could be chosen, so as to make it possible to begin a confident doctrinal reflection using a clear, trustworthy and uncontested text.[144]

Caution in the translation, study and making of *Posterior Analytics* widely known did not, however, impede all the university *Studia* from progressively dealing with the interpretation of this last part of Aristotelian logic. This development in the conceptual culture of the Middle Ages began in the first decades of the 13th century, and was as difficult as it was ineluctable, because the work formed an integral part of the *Organon*.[145] However, the reading and assimilation of *Posterior Analytics*, the one text of the Aristotelian logical *corpus* still unknown, would gradually produce, in course of the 13th century, an overturning of those epistemological certainties that the study of all the Stagirite's other writings had, until then, installed and planted in the minds of the *dialectica* teachers.[146]

3.3.2. The Re-exhumation of Aristotelian Epistemology

With respect to the gnostic system that had been taught in the schools of liberal arts since the middle of the 12th century, the radical innovation inherent in *Posterior Analytics* lay in the fact that this work by Aristotle did not aim at extending, enriching and defining the syllogistic doctrine already stated in his other writings, but rather expressed a new and different conception of the de-

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[144] Serene (1982, 498) writes that "the slow reception of the *Posterior Analytics* by twelfth- and even thirteenth-century philosophers is not surprising in view of the difficulty of the text and the differences between its doctrine and the Augustinian assumptions about truth and knowledge which pervaded early medieval thought," and it has also been indicated (Evans 1996, 42) that this last work of Aristotelian logic "made an unfavourable impression on contemporaries because of its difficulty and was little used until the end of the 12th century and the early years of the following one." Indeed, "the Latin West had never known anything like a scientific theory that was as complex and rigorous as that proposed by Aristotle in *Analytics*": Tabarroni 1997, 187.

[145] Cf. Evans 1996, 60. "With the progress of assimilation of the other parts of the *logica nova* and with the help of new interpretive tools [...] also Aristotle's theory of science, as found in *Posterior Analytics*, entered to form part of the stable patrimony of knowledge that every teacher of the Arts had to show he possessed when receiving his title": Tabarroni 1997, 188.

[146] "In the period covering the 12th to the 14th century the concept of science underwent an evolution and a process of semantic and philosophical development that was really astonishing. [...] The principal event that started and largely conditioned this evolution throughout this period is undoubtedly the Latin translation of Aristotle's *Posterior Analytics* and the long process of its assimilation by the university culture of the Latin West": Tabarroni 1997, 185–6. On the progressive acquisition of Aristotle's authentic epistemological doctrine in the Middle Ages cf. Garfagnini 1979, 129–37, 193–200.

monstrative force—and, therefore, of the heuristic effectiveness—of inferential reasoning. In particular, the addition of *Posterior Analytics* to the other works of logic in the *Organon* did not bring any substantial modification to the rules of syllogism, which had been already widely described and totally regulated in all its different and complex functional aspects from the moment the *logica nova* had begun to be used. Instead, in reality, it introduced a decisive limit to the value to be given to the mechanism of inference as a general instrument for obtaining scientifically valid certainty (Ross 1977, 41; Schulthess and Imbach 1996, 42).

In fact the Aristotle of *Posterior Analytics* specified that the application of inference did not always and inevitably produce new knowledge which could be useful for the progress of science.[147] This he did without putting the coherence and infallibility of syllogism in doubt; as a tool of dialectical argument it was theoretically beyond criticism, from the point of view of pure logic. If it is in fact true that the most perfect and flawless technique that the *ars demonstrativa* can provide is syllogism, it is also true that simple resort to the syllogistic method shows it, at times, to be useless as a tool suitable for developing and expanding the knowledge inherited by individual scientific disciplines. The reason for this paradox lies in the argument that each science has particular and principal fundamental axioms (*propria principia*) and all new acquisitions of knowledge must necessarily be made to descend from these while pure logic makes use of universal principles and *loci* that, although perfect in themselves, do not have a direct link with any particular science.[148] From all this it follows that the syllogism of pure logic, even if endowed with unquestioned formal rigour and with incontestable probative logic, is not, in reality, heuristically useful for an individual science. According to Aristotle, science, instead, has to obtain all its doctrinal development through syllogisms that use the presupposed fundamentals (the *principia propria*, "postulates" or "axioms") of each discipline as the indispensable premises of every inferential reasoning.[149]

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[147] As to the difference between dialectic and science in Aristotle's thought, it is felt that "in reality the fact that, per se, dialectic is not knowledge is in no way incompatible with the possibility that it may be used for science. Also in fact, syllogism per se does not tell us anything, but nothing prevents it being used in demonstrations and that in such a context it can produce a true and proper science": Berti 1987, 131.

[148] In the Aristotelian system of logic "what characterises dialectic, distinguishing it from science, is the fact of arguing on whatever problem, i.e., its universality, and the fact of arguing from opinions that deserve consideration, or *endoxa*, rather than from principles," so that "the argument, or syllogism, of science, i.e., demonstration, starts from true first premises, i.e., from principles, or from premises that in turn are deduced from true first premises, while the argument, or syllogism, of dialectic starts from *endoxa*": Berti 1987, 127.

[149] On Aristotle's epistemology cf. Mignucci 1965. On this point also cf. Codignola 1954, 105; Vanni Rovighi 1962, 181–2; Ross 1977, 41–59; Sanguineti 1987, 162, 204–10; Haren 1992, 14–6; Ackrill 1993, 151–69; Panza 1997, 374.

In other words, despite the uniformity of the syllogistic operating scheme in all forms of inferential reasoning (major premise, minor premise, conclusion), the Aristotelian system identifies the value and efficacy of every syllogistic structure according to the nature of the premises used. These can be of four different types: axioms or *principia* (which give birth to apodictic or deductive syllogism; the only truly demonstrative one, and so the only one that is scientifically valid), probable knowledge (which generates dialectical syllogism with equally probable conclusions, and is therefore non-scientific), rhetorical "loci" that are basic to rhetorical syllogistic reasoning and rhetorical "loci" that are merely apparent (leading to aberrant heuristic reasoning).[150] On the basis of these premises, therefore, we understand that the application of syllogism does not automatically confer demonstrative force to scientific reasoning, but is able to ensure the coherence and epistemological exactness of the new gnostic acquisitions only if the inferential process adopted to identify them has drawn its origin and basis from the *principia propria* of each of the individual sciences.[151] In substance, Aristotle affirms with complete clarity that only demonstrative or apodictic syllogism has a true scientific cognitive efficacy, as the following passage from *Posterior Analytics* (I, 2, 71b 17–25; Engl. vers. Tredennick, on page 31) testifies:

By demonstration I mean a syllogism which produces scientific knowledge, in other words one which enables us to know by the mere fact that we grasp it. Now if knowledge is such as we have assumed, demonstrative knowledge must proceed from premises which are true, primary, immediate, better known than, prior to, and causative of the conclusion. On these conditions only will the first principles be properly applicable to the fact which is to be proved. Syllogism indeed will be possible without these conditions, but not demonstration; for the result will not be knowledge.[152]

The doctrine of scientific knowledge handed down by *Posterior Analytics* thus put in crisis the epistemological aspect of the *logica nova*, which had been based on the other Aristotelian works. In fact, this part of the *Organon*, which is specifically dedicated to the theory of science, was translated long after translations of all the Stagirite's other works had been produced and was only accepted in full by the medieval logicians from the 13th century on. It over-

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[150] On this Aristotelian division of syllogistic premises cf. Viano 1955, 128–31, 227–49; Sammarco 2001, 21.

[151] Dialectical syllogism does not manage to verify scientific truth because "there is a true and proper leap from discussion of opinions to understanding of the truth: in fact one absolutely cannot draw necessary conclusions from probable premises. Furthermore, when science arrives, dialogue has no reason to exist any more, because absolute objectivity imposes itself on the disputants": Viano 1955, 232. Consequently, the scientific knowledge outlined by Aristotle in *Posterior Analytics* (as interpreted by medieval logicians) identifies itself with "a knowledge that is unchanging and is founded on unquestionably certain axiomatic principles, placed in the brain, that form the basis of the demonstration": Garfagnini 1979, 82.

[152] On this passage from Aristotle cf. Mignucci 1975, 21–3; Celluprica 1978, 157–8.

turned the previously held conception of scientific research, making it necessary to accept a new and different theory of knowledge, inevitably based both on a careful examination of the premises of the syllogism and on the grounds of the validity of the inference. In this regard, Aristotle said:

Now knowledge is demonstrative when we possess it in virtue of having a demonstration; therefore the premises from which demonstration is inferred are necessarily true. (Aristotle, *Posterior Analytics*, I, 4, 73a 23–25; Engl. vers. Tredennick, on page 43)[153]

In brief, the epistemological approach laid down in *Posterior Analytics* presented science as an axiomatic-deductive system that was necessarily and ineluctably founded on *principia* that are evident, unquestionable, universal, true, primary and certain in every discipline.[154]

The renewed reading of *Posterior Analytics* produced inevitable cultural consequences, as is immediately clear in the reflections of Scholasticism on this matter—above all in the work of the Paris schools. They went as far as proposing new gnostic canons on the basis of the modifications produced in the Aristotelian matrix of logic known of until then.[155] In this sense, for example, Boethius of Dacia made a distinction in the second half of the 13th century between pure dialectical reasoning and scientific reasoning in its strictest sense, going as far as to theorise that there can no longer be any scientific knowledge that does not derive from the *principia propria* of every individual science:

Et quia certitudo in scientia habetur ex certitudine suorum principiorum, quia etiam nihil perfecte scitur, donec cognoscuntur sua prima principia usque ad posteriora, ideo, si prima principia cognoscuntur grammaticae, et per illa causaliter omnis effectus in grammatica. (Boethius of Dacia, *Modi significandi*, 4 [*Prooemium*], lin. 21–5)[156]

This teaching led to the conclusion that, in reality, logic presented a mere dialectical interest when it was taken as a separate science; that is to say when it was independent from the *principia propria* of the subject of the syllogistic reasoning. It did not have any concrete demonstrative value and, therefore, did not offer a cognitive use of any scientific importance, as Boethius of Dacia clearly indicated to the reader in this other important passage:

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[153] On the piece under examination cf. Mignucci 1975, 55–6.

[154] Cf. Calogero 1927, 19–22; Viano 1955, 133–5; Capozzi 1974, 309–16; Wieland 1987, 73; Abbagnano 1993, 194; Zanatta 1996, 20–39; De Libera 1999a, 353.

[155] On the medieval reworking of the Aristotelian epistemology in *Posterior Analytics* cf. Evans 1996, 59–64.

[156] "Since in science certainty derives from the certainty of its principles, and since furthermore we do not know anything perfectly until we know its first principles and their consequences, for this reason if the first principles of grammar are known, through these, we can know every effect of these principles within the ambit of the grammar, using a causal mechanism."

Sciendum est, quod dialecticus non facit scientiam de conclusionibus scientiarum, quas concludit per communes intentiones, quas invenit in terminis illarum conclusionum. Et ratio huius est, quia non contingit scire rem nisi ex propriis principiis. Dialecticus autem non arguit ex propriis principiis, sed ex communibus intentionibus. (Boethius of Dacia, *Modi significandi*, 34 [q. 8], lin. 54–9)[157]

The Paris philosophers who were active a little after the middle of the 13th century—among whom, besides Boethius of Dacia, we must also include Lambert of Auxerre and Peter of Spain—thus started to distinguish "between a formally valid deduction (i.e., dialectic) and a true deduction (i.e., demonstrative)."[158] From this comes the inevitable consequence that the application of the syllogistic rules taught by Aristotelian logicians in the course of the 12th and first half of the 13th century was inadequate per se as a cognitive tool of universal use and absolute merit (as had been taught in the university *Studia* up to a few decades earlier). It could only perform a useful gnostic function—capable therefore of being a reliable scientific methodology and an authentic epistemological canon—if used on the essential axioms that represented the fundamentals and the *quid proprium* (specific character) of every science. In substance, the rediscovery of the Aristotelian teachings in *Posterior Analytics* provided the basis for new epistemological precepts of philosophy. These demonstrated to all the scientific disciplines that a precise difference of content certainly existed, although not formally, between the dialectical syllogism of pure logic and that of demonstrative science, as the theologian Peter of Auvergne († 1302) clearly pointed out:

Forma syllogismi in dialectico et demonstrativo essentialiter est eadem, quia non differunt nisi solum conditionibus materialibus, que sunt probabilitatis et necessitatis.[159]

The importance given to the content, rather than to the mere form, of inferential reasoning was such that the logicians of the second half of the 13th century also began giving predominance to the ontological substance of scientific

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[157] "We need to know that dialectic does not obtain a scientific knowledge of scientific conclusions; this is reached by virtue of the common intentions it finds in the words of those conclusions. The reason for this lies in the fact that we cannot arrive at knowledge of the thing if not from its own principles. Dialectic, instead, does not argue on the basis of *propria principia*, but on the basis of common intentions." For this passage cf. Pinborg 1993, 353–4.

[158] Pinborg 1993, 354, where we also read that in Boethius of Dacia's doctrine, "logical rules express a truth only when they find concrete application." On the importance of the distinction between the logic of the necessary argument (scientific) and the dialectic of hypothetic syllogisms and of probable arguments, found in Lambert of Auxerre and in Peter of Spain, cf. Vasoli 1961, 315.

[159] The translation of the passage is as follows: "The form of dialectical and demonstrative syllogism is essentially the same, for this reason they do not differ if not only for the material conditions that are [those] of probability and necessity." Cf. Pinborg 1993, 359. As regards the origins of the passage cf. ibid., 358, n. 27.

reasoning, with respect to its simple formal rigour.[160] For this reason they also began admitting the existence of valid *consequentiae* (scientific conclusions) as the fruit of arguments that were not strictly syllogistic, as for example in the case of enthymemes (incomplete syllogisms, in that they lack one of the premises).[161]

In conclusion, we can say that those authors who were influenced by the theory of science given in *Posterior Analytics*, highlighted and emphasised the conceptual difference existing between pure logic and real science.[162] They were convinced that the syllogistic method was decidedly inadequate and sterile for cognitive purposes if used on generic logical concepts (extraneous for this reason to the concrete and specific nature of scientific experience). This, therefore, meant that the acquisition of new scientifically valid knowledge was considered indissolubly linked not only to the correct use of the formal rules of syllogistic argument but, above all, to the identification of the *principia propria* belonging to the individual disciplines and to be used as essential and unavoidable logical premises for the construction of scientifically reliable and truthful deductive syllogisms.[163]

3.3.3. *The General Adoption of the New Epistemology and the Identification of the* Principia propria *of the Individual Sciences*

In light of these considerations, it can be said that the addition of *Posterior Analytics* to the set of texts forming the *Organon* produced such far reaching innovation in the conceptual methods inherited by the scholastic logic of the 13th century, as to inevitably rebound in a radical structural change for all the disciplines. The criteria themselves of what it was to be scientific, on which,

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[160] "Starting from the middle of the 13th century the relationship between dialectical reasoning and demonstrative syllogism gradually changed: In particular there was a weakening of the predominant role of categorical syllogism": Fedriga 1993, 308.

[161] Cf. Pinborg 1993, 358–61, who indicates which medieval philosophers had dealt with the problem of enthymemes, and points to how the admission, in the 13th century, of these different forms of deductive argument had by then caused syllogism to lose its privileged position as a gnostic theory. On the expansion of forms of deduction, that took place from the 13th century on cf. Abbagnano 1993, 595; Fedriga 1993, 309–18. As regards the various possible types of enthymeme cf. Copi and Cohen 1999, 312–5. An enthymeme was defined by medieval logicians as *syllogismus abbreviatus* or *imperfectus* (abbreviated or imperfect syllogism): Kahn 2000, 496–7.

[162] Scholasticism did not however reach the point of a radical and drastic separation between the two concepts of science and logic; for example, it has been pointed out that in the 14th century also Ockham, although distinguishing in a very precise way between logic and ontology, "had however to examine what the foundation of scientific propositions was in the real world": Pinborg 1993, 370, n. 47.

[163] "While the logical structure of demonstrative or 'scientific' syllogism is simple, the additional requirements severely limit the number of full-fledged 'scientific' syllogisms": Serene 1982, 498.

up to then, all knowledge had based itself and had set out its doctrinal development, underwent significant change.[164]

In fact, simple knowledge of the inferential techniques (and, above all, of the dialectical *argumenta* and of the *loci* capable of supporting them) was no longer held suitable for offering valid scientific arguments, in so far as not every syllogism—even if rationally correct and valid—served the purpose of producing epistemologically exact *consequentiae*. In reality, this intention could be achieved only by using an apodictic syllogism based on each science's own *principia* and characteristics. This new approach obliged every scientific discipline to identify, at the outset, the complex of *principia propria* on which to build the argumentative methods that would result in the progress of scientific research; only in this way could the use of syllogism give rise to a true *scientia demonstrativa*, i.e., to a correct scientific demonstration.[165] Each discipline would then be able to proceed with the creation of syllogisms that would allow an authentic enrichment of knowledge and, therefore, the possibility of acceptable doctrinal development.

According to Aristotle, in order to be able to play their proper role, these *principia* had to be absolutely universal and necessary, and in order to be so had first of all to be true, primary, and immediate, in such a way as to exist before the conclusion, and to be its cause (Abbagnano 1993, 194). It is evident that previous conceptions of scientific progress, taken as the activity of choosing between dialectical syllogisms—alternative to and conflicting with each other—that were capable of leading to a merely probable "truth," necessarily had to founder. On the horizon lay absolute scientific certainty, obtainable from sure and irrefutable premises by the use of deduction. The new theory of science now proposed apodictic syllogisms that had no need of a dialectical comparison between contrasting opinions, but that needed only to

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[164] "Aristotle's *Analytics*, with its rigorously methodological approach, founded on a logical framework (that described in the other *Organon* books, of which it forms the culminating theory) […] imposes a scientific ideal with very precisely defined specific characteristics, by reference to which it is possible to build a hierarchy of knowledge (and therefore its own map and an organisational model of the studies which has profound implications in the field of learning), that very soon becomes determinant, with its inclusions and its exclusions, in the general process of cultural development": Tabarroni 1997, 186. Verger (1997, 105) observed that in 13th century logic "was a complex enough art to stimulate the disciplines of the higher faculties in a remarkable way, because its progress obliged them to constantly question the evidence accepted up to that moment."

[165] Therefore, in order to reach valid conclusions, it was essential that the propositions from which the syllogisms came were scientifically truthful, and every field of knowledge had to identify the first principles that defined it as a science and that provided the propositions on which suitable inferential reasoning could be built: cf. Wieland 1987, 74; Evans 1996, 59. On the concept of *scientia demonstrativa* (demonstrative science) in the 13th century and of the "knowledge-producing syllogism," as well as on the dangers of an excessive generalisation of these concepts, cf. Serene 1982, 496–8.

begin from correct scientific premises (*principia*) in order to produce incontrovertible conclusions not susceptible to dispute.[166]

The new Aristotelian epistemological doctrine established itself ever more incisively from about 1230 on, and greatly influenced the entire history of the evolution of science.[167] This, for example, is shown by the attempt of some Parisian exponents of Scholasticism to transform even theology into a perfect demonstrative science. They tried to found it on the identification of premises that were true, necessary and certain, and from which they could draw unassailable theological consequences in an equally irrefutable manner.[168] The Dominican William of Auxerre († 1231), who had been among the first in Paris to familiarise himself with the epistemological teachings of *Posterior Analytics*, had already started to conjecture a science of theology "conforming to the Aristotelian criteria of science" (De Libera 1999a, 353). Apropos of the fundamental problem of the scientific definition of the object and method of theology (questions said to be of the *ordo disciplinae*), William of Auxerre declared that the articles of faith had an axiomatic value:

Si in theologia non essent principia, non esset ars vel scientia. Habet ergo principia, scilicet articulos, qui tamen solis fidelibus sunt principia; quibus fidelibus sunt principia per se nota, non extrinsecus aliqua probatione indigentia. (William of Auxerre, *Summa aurea*, III, 12, 1, lin. 64–7; ed. Ribaillier 1986, 199)[169]

It therefore follows from this approach that it is possible to construct a safe rational system of progressive infallible demonstrations that is based on the simple identification of the articles of faith, as the theological *principia propria*: *articuli fidei principia theologiae*.[170] That means that theology, in the system outlined by William of Auxerre, after having "accepted a dogma as a

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[166] According to Crombie (1970, 211–2) the idea that permeates the scientific method of the later Scholastics consists of "rational explanation modelled on formal or geometrical demonstration; the idea that a particular fact was explained when it was possible to deduce it from a more general principle," so that science was taken as "a system of deductions from indemonstrable first principles."

[167] Cf. Van Steenberghen 1946, who identifies three periods: the acceptance of Aristotle in Paris (1200–1230), the growth of Aristotle's teachings (1230–1250), the apotheosis of Latin support for Aristotle's teachings (1250–1265). On this theme cf. also Tabarroni 1997, 188–90; Fossier 1987, 158, who states how scientific thought in the 13th century was uniformly linked to a "more or less rigorously Aristotelian" system.

[168] As regards the relationship in general between Aristotelian thought and theology in the 12th and 13th centuries cf. Grabmann 1980, vol. 2: 7–15; Wieland 1987, 70–80; De Libera 1999a, 353–9.

[169] "If theology did not involve principles, it would be neither an art nor a science. It therefore has principles, namely, the articles of faith, which however constitute nothing but principles for believers; for them they are things that are known for themselves that have no need of proof taken from other sources." On this piece cf. Vignaux 1990, 87.

[170] For this form of words cf. Vignaux 1990, 118. On William of Auxerre's doctrine cf. Chenu 1995, 86–7; Colish 2001, 467.

premise, can also proceed to the rigorous deduction of the conclusions" (Vignaux 1990, 88). To quote William of Auxerre again:

Dicitur fides argumentum non apparentium propter articulos fidei, qui sunt principia fidei per se nota. (Ibid., III, 12, 1, lin. 59–60; ed. Ribaillier 1986, 199)[171]

We are not, therefore, talking of proving the article of faith by using reasoning, but of starting from it in order to deduce the entire content of theology, which by its very nature tends to shape itself as an exact progression of syllogistic arguments. In the same way, Phillip the Chancellor († 1236), one of the first exponents of Aristotle's teachings in the university, dedicated his *Summa de summo bono* to the objective of discovering the universal first principles of theology, convinced as he was that "to resolve the problems that present themselves to him theologically, the theologian must identify and study the first principles of all things."[172]

Among the theological followers of this epistemological approach we also find Albert the Great († 1280), who was a great expert on the doctrine, developed by both Latin and Arab "peripatetic" philosophers, directed at an understanding of *Posterior Analytics* (Fioravanti 1994, 299–315). However, the person who stood out most for the great lucidity and efficacy with which he mastered the conceptual *modus operandi* of Aristotle's epistemology, as expressed in the *Organon*, is certainly Thomas Aquinas (1225–1274).[173] Aquinas championed the theory that, using appropriate syllogistic criteria (*rationaliter*), only that which can be shown to begin from sure, universal, necessary and self-evident premises (*per se notae*) enters into the realm of science, while all the rest invariably belongs to the realm of mere opinion.[174]

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[171] "Faith is a way of arguing beyond phenomena, by virtue of the articles of faith that are known principles in themselves." Cf. De Libera 1999a, 353.

[172] De Libera 1999a, 355. Eudes Rigaud's ideas develop in a similar way; on which cf. Chenu 1995, 91–2.

[173] Cf. Chenu 1995, 93–131; Tabarroni 1997, 190. It has been written that "Thomas Aquinas is better known for treating theology as a demonstrative science than for contributing to the theory of science. But his consideration of demonstrative science is interesting just because he seems so sympathetic to the details and spirit of Aristotle's enterprise, as is clear from his exposition of the requirements that demonstrative premises be true, necessary, and certain": Serene 1982, 504. On Thomist philosophy cf. Dal Pra 1960, 451–63. A close examination of the different historiographical positions regarding the importance to attribute to Thomism in medieval philosophy is found in Inglis 1998, 1–13.

[174] Between the 13th and 14th centuries a great debate divided the various theological positions "around the conception of theology as a science, where being scientific was often measured against the yardstick of Aristotelian logic": Gregory 1992, 3. In particular, Thomas Aquinas admitted that some sciences regarding natural phenomena can only partially proceed through rigid scientific demonstration, but was convinced that none of the other disciplines should avoid respecting the rules of the Aristotelian gnosis. On this theme cf. Serene 1982, 504–5; Tabarroni 1997, 192, who also affirms that (ibid., 190) Thomas Aquinas "agreed with Aristotle in holding that the evidence for a scientific proposition consisted entirely of its being

This dramatic distinction, based on Aristotle, between demonstrative syllogistic knowledge (certain) and dialectical inference (simply probable) also obliged Thomas Aquinas to seek the fundamentals of scientific validity applicable to theology (namely, the indemonstrable religious axioms that, from an Aristotelian point of view, are the true theological *principia propria*)[175] that would irrefutably guarantee it a scientific nature, and would thus protect it from being seen as merely a doctrine based on opinions.[176] On this point the following passage from *Summa theologiae* (*STh*, I, q. 1, art. 2) states:

Dicendum sacram doctrinam esse scientiam. Sed sciendum est quod duplex est scientiarum genus. Quaedam enim sunt, quae procedunt ex principiis notis lumine naturali intellectus, sicut arithmetica, geometria, et huiusmodi. Quaedam vero sunt, quae procedunt ex principiis notis lumine superioris scientiae, sicut perspectiva procedit ex principiis notificatis per geometriam, et musica ex principiis per arithmeticam notis. Et hoc modo sacra doctrina est scientia, quia procedit ex principiis notis lumine superioris scientiae, quae scilicet est scientia Dei et beatorum. Unde sicut musica credit principia tradita sibi ab arithmetico, ita doctrina sacra credit principia revelata sibi a Deo.[177]

demonstrated (namely, obtained as the conclusion of a demonstrative syllogism) and therefore derives its epistemic value from that of its premises and from the reliability of the syllogistic inference." For Aquinas, therefore, "knowledge does not exist that is not of and by universal concepts": Alessio 1994d, 336.

[175] In the Thomist system "the articles of faith can act as first principles in the supernatural world. When such principles have been acquired, one can proceed with deductive reasoning, coordinating one doctrine with another and drawing implications from them": Colish 2001, 478. For Thomas Aquinas, therefore, "every science presents itself as a well structured edifice of inferential chains that rests on foundations made up of some indemonstrable first principles": Tabarroni 1997, 191. On the *articuli fidei* (i.e., on the scientific *principia* of theology) in Thomist thought cf. Putallaz 1991, 131–48; Chenu 1995, 93–7. In general, on the concept of science in Thomas Aquinas cf. Martin 1997, 15–31.

[176] On the rationalist and speculative position of Thomist theology cf. Codignola 1954, 292–5; Gregory 1992, 36–53; Schulthess and Imbach 1996, 170–1. As regards Thomas Aquinas' attempt to harmonise theological *principia* based on reason with theological *principia* obtained from evidence offered by the ecclesiastical *auctoritates* (*articuli fidei*) cf. Evans 1996, 62. A comprehensive review of *principia* is given for example in *Summa theologiae*, which consists of a "complete and systematically ordered collection of all the truths of natural and supernatural theology, classified in a logical order, accompanied by their shorter demonstrations, placed between the most dangerous errors that contradict them and the refutation of each of these errors": Gilson 1983, 481–2.

[177] "I answer that, Sacred doctrine is a science. We must bear in mind that there are two kinds of sciences. There are some which proceed from a principle known by the natural light of the intelligence, such as arithmetic and geometry and the like. There are some which proceed from principles known by the light of a higher science: Thus the science of perspective proceeds from principles established by geometry, and music from principles established by arithmetic. So it is that sacred doctrine is a science, because it proceeds from principles established by the light of a higher science, namely, the science of God and the blessed. Hence, just as the musician accepts on authority the principles taught him by the mathematician, so sacred science is established on principles revealed by God" (Engl. vers. Fathers of the English Dominican Province, 2).

According to Thomas Aquinas, theology, which has to all effects and purposes the character of a science, develops deductively by means of syllogistic demonstrations that proceed in an apodictic manner from self-referential principles known per se (the articles of faith) to conclusions that are yet to be understood (Chenu 1995, 101–15, 128–9). Thomas Aquinas uses these words:

Dicendum quod sicut aliae scientiae non argumentantur ad sua principia probanda, sed ex principiis argumentantur ad ostendendum alia in ipsis scientiis; ita haec doctrina non argumentatur ad sua principia probanda, quae sunt articuli fidei; sed ex eis procedit ad aliquid ostendendum. (*STh*, I, q. 1, art. 8)[178]

In synthesis, the Thomist philosophical system is based on Aristotelian epistemology and holds the view that "every science, be it practice or theory, is a cosmos that stands alone, that consists of its own principles." This has the consequence that "the principles of each science consist of something that is irreducible to the principles of any other" (Alessio 1994d, 342).

The scholastic philosophers believed in the distinct plurality of scientific forms of knowledge; all are autonomous and independent because they are all founded on their own *principia*, which are different for and typical of every discipline. Adhesion to this presupposition produced the effect of extending and generalising the scope of the Aristotelian epistemological canon to all sciences. The theory of knowledge based on *Posterior Analytics* did not, in fact, remain exclusively confined to theology, but produced repercussions in all other areas of culture. From the middle of the 13th century, physics, medicine, music, astronomy and all the other disciplines belonging to the world of phenomena tried to identify the *principia* on which they could build their own special doctrinal approach and their own necessary scientific legitimisation. In the search for these *principia*, they found themselves borrowing indispensable basic axioms from such ancient sources as were held to be unquestionably endowed with *auctoritas*, for example, from the works that Aristotle had dedicated to natural philosophy.[179] Evident confirmation of the new epistemological approach in the field of the natural sciences can be found, for example, in John Buridan's († 1359 ca.) comment on Aristotle's treatise *De caelo et mundo*:

Dicendum est quod mundus nihil continet quod non sit scibile, scilicet tanquam significatum per terminos conclusionum demonstrabilium, quia sic omnia sunt scibilia. (Buridanus, *Exposi-*

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[178] "As other sciences do not argue in proof of their principles, but argue from their principles to demonstrate other truths in these sciences: so this doctrine does not argue in proof of its principles, which are the articles of faith, but from them it goes on to prove something else" (Engl. vers. Fathers of the English Dominican Province, 5).

[179] "The Aristotelian belief was something much greater that the works of Aristotle and the Latin comments that illustrated them. [...] Largely due to the fact that Aristotle's works formed the basis of the *curriculum* of studies of the medieval universities, Aristotle's teachings became the principal, and practically uncontested, intellectual system of Western Europe": Grant 2001, 130. In particular, as regards physics and medicine cf. Crombie 1970, 210–33.

tio et Quaestiones in Aristotelis "De Caelo," I, q. 1 [*Utrum de mundo debeat esse scientia distincta a scientia libri Physicorum*], on page 233)[180]

The compilation of *quaestiones*, based on the new method of studying natural phenomena and of obtaining new scientific conclusions through apodictic syllogism, soon reached widespread proportions (Grant 2001, 193); to the point that, by now, the different disciplines of the natural philosophies were drawing all their possible scientific conclusions from syllogistic demonstrations based on axioms that were unanimously considered necessary and self-evident. These unquestionable and unavoidable premises of all knowledge of the physical world were easily found in Aristotle's books on nature, in Hippocrates' aphorisms, as well as in other authoritative ancient texts.[181] Consequently, the gnostic rules described in *Posterior Analytics* found a wide and fertile testing ground in the vast field of natural science during the course of the 14th century.[182]

Furthermore, Aristotle's epistemology also had an evident and determining influence on the development of the theories current in the Paris school of "Modists": supporters of a "speculative" grammatical science capable of tracing and describing a linguistic structure common to all idioms (Roncaglia 1994, 296–8; Pinborg 1999, 187). The "Modist" writers were active between the second half of the 13th century and the beginning of the following one, and their intention of tracing the universal rules of language shared by all the diverse historical natural languages thus gave grammar the possibility of "legitimately setting itself up as a science, responding to the needs of universality

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[180] "The world does not contain anything that is not an object of science, meant therefore, through the words of demonstrable conclusions; in this way in fact all is scientifically knowable." On this argument Ghisalberti (1983, 64, n. 56) specifies that "from Buridan's writings […] it appears that by 'scientific' he means the knowledge of anything signified by the individual words that make up the conclusions of the demonstrations. Since true and proper science is a habit acquired through syllogism, and since the elements that converge at the conclusion are the premises, it follows that the subject matter of scientific knowledge consists of the significant words making up the premises and the conclusion of the demonstration, as also the things signified by such words."

[181] Cf. Grant 2001, 205–12. In fact Aristotle had shown "how one had to use syllogism for the production of scientific demonstration in natural philosophy" (ibid., 237), and for this reason "the natural philosophers of the Middle Ages were convinced that Aristotle's metaphysics and natural philosophy, with their corrections and additions, were sufficient to establish all that could be known about nature. […] To fill the remaining lacunae in their knowledge, they had simply to apply the fundamental principles of Aristotelian natural philosophy" (ibid., 240–1).

[182] Cf. Gregory 1992, 35–6; Garfagnini 1994, 236, 250–4. "The essence of Aristotle's teachings lay in a hard core composed of some fundamental principles of a general character that all natural philosophers of the Middle Ages accepted and that no-one contested. […] These fundamental principles were, not only, never explicitly contested, but all found a series of applications that would have surprised, or even also disturbed Aristotle": Grant 2001, 243, 250.

and of necessity foreseen in Aristotle's *Posterior Analytics* (it is not by chance that this work figures among the principal theoretical bases of the work of the Modists)" (Roncaglia 1994, 297).

Finally, Dante Alighieri's project of applying Aristotelian epistemological rigour to his own *Monarchia* (presumably dated around 1311–1313) was animated by the same intention of organising a highly complex field, like that of politics, in a scientifically irreproachable way. This work was written following peripatetic gnostic rules and was intended to give politics a constitutional basis that was both invulnerable and scientific (Evans 1996, 62), as is clearly evident in the following passage from Dante:

Verum, quia omnis veritas que non est principium ex veritate alicuius principii fit manifesta, necesse est in qualibet inquisitione habere notitiam de principio, in quod analetice recurratur pro certitudine omnium propositionum que inferius assummuntur. Et quia presens tractatus est inquisitio quedam, ante omnia de principio scruptandum esse videtur in cuius virtute inferiora consistant. (Dante Alighieri, *Monarchia*, I, 2)[183]

The Aristotelian roots of the heuristic method accepted by Dante led to *Monarchia* being condemned for its Averroistic and, therefore, heretical inspiration.[184] Similar accusations were levelled against the well known *Defensor pacis* (*Defender of Peace*) written in 1324 by Marsilius of Padua, which showed clear links with Aristotle's epistemological doctrines (Gilson 1983, 829; Vasoli 1994, 517–23). Marsilius had come in contact with the Stagyrite's theory of science both in Padua (the university centre where a radical Aristotelian cult exercised a strong influence) and in Paris (where Marsilius encountered the "Latin" Averroism of John of Jandun).[185] The following excerpt from *Defensor pacis* clearly expresses Marsilius' adhesion to Aristotelian-type gnostic concepts:

Propositum itaque mihi iam dictum negocium distinguam per tres dicciones. In prima quarum demonstrabo intenta viis certis humano ingenio adinventis, constantibus ex proposicionibus

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[183] "Now since every truth which is not itself a first principle must be demonstrated with reference to the truth of some first principle, it is necessary in any inquiry to know the first principle to which we refer back in the course of strict deductive argument in order to ascertain the truth of all the propositions which are advanced later. And since this present treatise is a kind of inquiry, we must at the outset investigate the principle whose truth provides a firm foundation for later propositions" (Engl. vers. Shaw, 4–5).

[184] Dante could have obtained his knowledge of Averroës' doctrine from Bologna, where a lively Averroist school flourished in the second decade of the thirteen hundreds. About this cf. Vanni Rovighi 1978.

[185] Marsilius of Padua's philosophical training caused *Defensor pacis* to be different from the majority of political writings of the time, for "the rigour of a systematic process that gives the most accomplished medieval treatment of the theory of the State […] and of the relationships which should exist between political society and the community of 'Christ's faithful,' constituted by the Church and formed, however, by the 'citizens' themselves": Vasoli 1994, 520.

per se notis cuilibet menti non corrupte natura, consuetudine vel affeccione perversa. In se-
cunda vero, que demonstrasse credideró, confirmabo testimoniis veritatis in eternum fundatis,
auctoritatibus quoque sanctorum illius interpretum necnon et aliorum approbatorum docto-
rum fidei Christiane: ut liber iste sit stans per se, nullius egens probacionis extrinsece. Hinc
eciam falsitates determinacionibus meis oppositas impugnabo, et impediencia suis involucio-
nibus adversancium sophismata reserabo. In tercia siquidem conclusiones quasdam seu peru-
tilia documenta, civibus tam principantibus quam subiectis observanda, inferam ex predetermi-
natis habencia certitudinem evidentem. (Marsilius of Padua, *Defensor pacis*, I, 1.8)[186]

Marsilius of Padua was convinced that the political theses given in *Defensor
pacis* could be demonstrated using methods that were foolproof (*viis certis*),
and that these could be discovered by using human reasoning (*humano
ingenio adinventis*) and would be founded on self-evident propositions (*con-
stantibus ex proposicionibus per se notis*). Starting from these propositions, he
could then deduce inferential conclusions possessed of an evident certainty by
virtue of those premises (*ex predeterminatis habencia certitudinem evidentem*).
This conviction clearly links Marsilius of Padua's work to the idea of science
described in *Posterior Analytics*, because it shows the author's intention of ob-
taining every possible scientific conclusion through the application of apo-
dictic syllogism to the *principia propria* typical of political science.

Therefore, all that has just been said shows that scientific disciplines in the
course of the second half of the 13th century and in the 14th century all tried
their best to explain the fundamental and important *principia* in each field.
They then obtained scientifically correct and rationally impeccable conclusions
from these principles, using epistemologically irreproachable syllogistic proce-
dures. It is, above all, important to note that this evolution did not only concern
the physical or anthropological disciplines, which the logicians of the 13th and
14th centuries held to be the most amenable to human reasoning and the most
fertile ground for positive results (Abbagnano 1993, 595). Even areas of knowl-
edge which were completely unrelated to the mechanical sciences, like theol-
ogy, metaphysics, grammar and politics were involved (Schulthess and Imbach
1996, 169). The adoption of Aristotle's epistemology, as contained in *Posterior
Analytics*, caused every individual science to question itself first of all about its
own foundations, and about its own essential conceptual premises. The pre-

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[186] "I shall divide my proposed work into three discourses. In the first I shall demonstrate
my views by sure methods discovered by the human intellect, based upon propositions self-
evident to every mind not corrupted by nature, custom, or perverted emotion. In the second
discourse, the things which I shall believe myself to have demonstrated I shall confirm by the
established testimonies of the eternal truth, and by the authorities of its saintly interpreters and
of other approved teachers of the Christian faith, so that this book may stand by itself, needing
no external proof. From the same source too, I shall refute the falsities opposed to my
conclusions, and expose the intricately obstructive sophisms of my opponents. In the third
discourse, I shall infer certain conclusions or useful lessons which the citizens, both rulers and
subjects, ought to observe, conclusions having an evident certainty from our previous findings"
(Engl. vers. Gewirth, 7).

liminary issue it had to face was, thus, the basic and ineluctable methodological problem of defining the *principia propria* from which all further knowledge was to be drawn.[187] Finally, for a Scholasticism influenced by *Posterior Analytics*, to think is a "métier" that has scrupulously defined laws; and this is true to the point where, unless it respects these laws, science cannot exist.[188]

3.3.4. *The Birth of the Commentators' School*

The reading and reception of *Posterior Analytics* resulted in the adoption of the epistemological approach it contained, culminating, in the years between 1250 and 1270, in the most illustrious moment of the golden age of medieval philosophy and theology at the Parisian schools (Van Steenberghen 1946, 131–96; Knowles 1984, 397; Verger 1997, 103–8). The ability of this new approach to condition the entire philosophical and theological doctrine so profoundly was such that its advent caused so radical an overturning of methods that the legal world could not remain unaffected by it. The world of law was linked to the application of the same collection of gnostic techniques that the contemporary *dialectica* offered, and therefore evolved in the same way.[189] It is, thus, not surprising that a new way of studying the *Corpus iuris civilis*, based on the reacquisition of Aristotle's original epistemology as expressed in *Posterior Analytics*, was devised and applied really during the same epoch and in the very same place. In particular, between 1260 and 1280, a law teacher and cleric in Orléans, Jacques of Revigny (Jacobus de Ravanio: † 1296), introduced a new technique for interpreting the Justinianian texts, that was different from all previous ones known to science.[190]

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[187] "Although we might unite medicine, theology, astronomy, canon law, jurisprudence, and natural science under one common idea—that of scientific rationality which uses conceptual means and aims at general statements—a general conception regarding contents can no longer be established": Wieland 1987, 74. The doctrine proclaimed by Raymond Lull († 1315) in his *Ars Magna* can be considered the culmination of this concept and an indication of the crisis of scientific specialism. In this work he tries to show logic as a universal and fundamental science for all the other sciences, based on the argument whereby "since each science has its own principles, different from the principles of the other sciences, there must be a general science whose principles contain and imply those of the particular sciences, as the particular is contained in the universal": Abbagnano 1993, 598. Cf. also Garin 1969, 62–3.

[188] Cf. Chenu 1995, 101, where we read—regarding the *doctrina sacra*—that science "essentially brings with it a movement of the mind from the known to the unknown, by means of a demonstration, that proceeds from principles (known) to conclusions (to be known). This is its elementary structure, as opposed to immediate knowledge, *intellectus*: It directs all its efforts to and finds its cognitive value in the full initial possession of its principles, which are reached from what is evident." In this way an important scientific *habitus demonstrativus* emerges with the 13th century, based on Aristotle's epistemology: cf. Schulthess and Imbach 1996, 170.

[189] On the changes that took place in the law schools within the general context of the epistemological evolution during the 13th century cf. Verger 2000, 75–6.

[190] The blossoming of the Orléans law school and the reasons for its success form the subject of a fundamental study by Meijers (1959). On this topic also cf. Maffei 1967, 71–3.

The close connection of the new scientific method of studying law with the new heuristic methods developed and tested in the Parisian university environment is indicated really by the place where it developed. In fact, because of the ban on the teaching of Roman law in Paris—sanctioned in 1219 by Pope Honorius III with the decree *Super specula‹m›*[191]—the *Studium* at Orléans had become the closest university centre to the Parisian schools that could be a legitimate testing ground for the scholastic doctrine's new epistemology in the field of legal science. This legitimacy was the result of Pope Gregory IX's authorisation in 1235 of the teaching of Roman law in Orléans.[192]

Indeed, the cultural environment corresponded perfectly to the Parisian model; the Orléans law school was ecclesiastical—both the teachers and the pupils were drawn from the ranks of the clergy—and this fact undoubtedly had the effect of assisting the teachers resort to the innovative gnostic canons found in Aristotle. These had already been authoritatively tested by the theological schools of Paris, and so must also have been well known to those clergy who studied legal matters in nearby Orléans.[193]

Jacques of Revigny applied the scholastic movement's new scientific method to the study of law in a period when the transformation of epistemology was at its height, and which, as already indicated, reached its peak for the theological students of Paris roughly between 1250 and 1270. In fact, Revigny's teaching began in about 1260—the period when, as a simple Bachelor, he put Franciscus Accursii in some difficulty while the Bolognese glossator was giving a lecture at Orléans—and he continued calling the attention of the world of legal studies to the new methods until around about 1280, when he gave up teaching (Cortese 1995, 397–8). Indeed, we need to point out that the gnostic changes that had produced the great cultural flowering in the schools of philosophy and theology of Paris in the years after the middle of the 13th century actually found their longest-lasting development in the field of law. This was because the epistemological innovations introduced in the areas of philosophy and theology were very soon destined to suffer an inevitable decline as a result of hostility on the part of the ecclesiastical hierarchy.[194]

[191] X 5.33.28 (= Potthast 1874, 539–40, n. 6165).

[192] Cf. Meijers 1959, 28; Piano Mortari 1976, 40–1; Cortese 1995, 394–5. On the teaching of law at Paris at the start of the 13th century and on the decree *Super speculam* cf. Coppens 1999.

[193] Cf. Meijers 1959, 6–8, who describes the university at Orléans as a higher college for the clergy and notes that the laity there were referred to as *rustici*. In particular cf. Maffei 1967, 54–7, on the link between Jacques of Revigny and the Dominican environment in Orléans, where that theological teaching would have taken place which would explain "the possession of dialectical techniques which the theologians considered correct and proper, techniques introduced by him into the field of legal argument." On the point also cf. Cortese 1982a, 271–2.

[194] Verger (1997, 110) has pointed out that "the progress of jurisprudence is so much more notable if one thinks that it took place in a period like the last third of the twelve hundreds when the most innovative doctrines in the field of philosophy and theology were in decline."

Despite the importance and soundness of the cultural changes that the adoption of the new Aristotelian epistemology caused, examination of Revigny's works shows that, in reality, the novelty of the scientific approach developed at Orléans did not contain any radical modification of hermeneutic and didactic techniques or of the already noted explanatory works that had previously been in use. In fact, in Revigny's *Lecturae* we find the use, above all, of the pre-existing technique of *quaestio*, including both *quaestiones* that had been disputed and those that had not. This shows how the new hermeneutic method adopted in French circles was based on the same fundamental syllogistic tool that had already been widely tried earlier in Bologna by the glossators. However, differently from the Bolognese *quaestiones*, all the *quaestiones* developed at Orléans present "a more accentuated theoretical flavour than elsewhere and minor practical purpose," as a constant and common characteristic (Cortese 1995, 403).

The reason for the difference between the lively and real Bolognese *quaestiones* that were linked to legal practice and the speculative and abstract *quaestiones* from Orléans lies in their different approaches and aims. If the purpose of the Bolognese glossators had been to extend the range of an individual law's *verba* to a *factum* not expressly contemplated, but subsumable in the *causa* of the *lex* invoked, then the aim pursued by the Orléans teachers was, rather, to subject that law to a penetrating and complete analysis which would allow them to reach the innermost *ratio* of the norm. This *ratio* was the reason for the existence (*principium proprium* of legal science) of the legislative precept to be used as the premise of all further demonstrative syllogisms that would permit the application of that *principium* in practical legal matters.[195] The way this analysis of the *ratio legis* was carried out at Orléans was by successive specification and definition (for example, through the *distinctiones* disguised as *quaestiones* conceived by the most celebrated of Revigny's successors in the Orléans school, namely, Pierre of Belleperche, also called Petrus de Bellapertica).[196]

The conceptual approach of the clergy who taught in Orléans in the second half of the 13th century had been formed by Thomist type theological studies. Consequently, this process would have enabled them to identify the *regula*—i.e., that fundamental *ratio*—from which all other scientific deductions connected with a legal matter could be drawn, as syllogistic consequences. In other words, the discovery of the *principium proprium* from which every law drew its foundations (that involved the identification of the essence of *ratio scripta*)[197] was the essential condition, indicated as such by Aristotle's

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[195] The interest paid by the commentators' school to the *ratio legis* inherent in Roman sources has always been stressed as a characteristic feature of the commentators; cf. Solmi 1930, 514; Calasso 1954, 571; Piano Mortari 1986, 31–8.

[196] Cf. Meijers 1959, 102–3; Cortese 1982a, 265. On the extensive structural modification of the *quaestio* at the time of the commentators (despite the preservation of the same terminology used by the glossators in their series of explanatory works) cf. Bellomo 1974a, 66–73.

[197] French legal tradition gives Roman law (also for political reasons linked to the existence

epistemology, for developing any further syllogistic reasoning of a certain and inevitably scientific nature in the field of law. Therefore, differently from the dialectical syllogism of the *quaestio de facto* of the glossators, it would not be liable to dispute, to challenge or to disproof.[198] In fact, "in the domain of the probable it is not sufficient to prove, it is also necessary to persuade; only in demonstrative logic can one avoid consensus, given that demonstration has a necessary character" (Giuliani 1966, 148).

The logical procedure followed by the Orléans teacher, therefore, proceeds from the *ratio* of a law (*principium proprium* of *scientia iuris*) to obtain all its possible scientific consequences through the use of apodictic syllogisms. According to the rules of Aristotelian epistemology, not only are these consequences absolutely incontestable, but are likewise set apart from any comparison with contrary *argumenta*, which they are by now completely irrelevant for identifying scientific truth. This method differs from the glossators' technique, and what counts in it is the direct demonstration of the legitimacy of the principle and of its limits (Maffei 1967, 67). It is from this same principle that all possible consequential scientific results are derived using irrefutable apodictic syllogisms. In other words, the glossators had resorted to dialectical syllogisms and had achieved results that were merely probable and debatable (always liable to be disproved), while Revigny uses the apodictic syllogism and so arrives at scientifically certain and irrefutable conclusions.

When seen in this light, Jacques of Revigny's *Dictionarium iuris* or *Alphabetum* was a truly original and innovative work, in comparison with those in vogue up to then in the law schools, and furthermore, offers clear confirmation of the attention that he gave to the problem of identifying the *principia propria* of legal science (D'Amelio 1972). *Alphabetum* is an encyclopaedia of terms exclusively dedicated to legal entries, for which Revigny often gives a concise but exhaustive definition. The work was unprecedented in the field of law[199] and shows that the adoption of a lexicographical classification, quite unusual until then as a form of legal writing,[200] brought a comprehensive change in the methods used in the world of law studies, which now clearly turned towards the

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of strong monarchical power in France) the mere value of a *ratio scripta*, i.e., of a criterion of reasonableness expressed in a written norm: cf. Piano Mortari 1976, 42–3.

[198] Apropos of the method of the "comment," it has been written that "the medieval idea of science was that of Aristotle, of learning built on a base of certain knowledge, deduced by demonstration from supreme and indisputable true principles. Scientific procedures required the use of an argumentative method that had its starting point and support in a complex of necessary and unchangeable eternal principles. […] It did not raise any doubt that jurisprudence had all the attributes of the *scientia*": Piano Mortari 1960, 801.

[199] Roman jurisprudence had been decidedly averse to any process of definition and for a long time subsequent legal science felt the effect of this aversion towards definitions, which had also been expressed in *Corpus iuris civilis*: cf. Orestano 1987, 148–9.

[200] In general on the technique of compiling dictionaries in the Middle Ages cf. Manacorda 1914, t. 2: 246–55.

identification and declaration of a series of definitions to describe fundamental concepts. In the *Dictionarium iuris*, these concepts were listed (aiming for completeness) in alphabetical order so that the entries could easily be consulted. The important aspect is that Revigny states that the definitions he constructed to encapsulate the *quid proprium* of each legal concept were even superior to the Justinianian sources, since "*semper utantur legislatores inpropriis locutionibus*" ("the legislators always used an inappropriate terminology"), from which he draws the conclusion that "*quisquis habeat patulas modo providet aures, audiat et legum lucida verba notet*," or that the true legal axiom to be grasped does not lie in the norm, but in the *lucida verba* (the clear definitions) of the *Dictionarium iuris*.[201] In fact, the construction of an appropriate definition requires the explanation of the *principium* of each institute, which is inevitably identified with its *ratio* (*ratio est anima legis*: the *ratio* is the spirit of the law) and can be effectively synthesized by means of a *regula* designed to be a *plurium similium collectio brevis* (a brief synthesis of many similar concepts).[202] In brief, the system and structure of the *Dictionarium iuris* was intended to perform the ambitious function of offering—as a result of the descriptions it contains—a picture of the *principia propria* of legal science, through which the then dominant epistemological approach could indicate how any further progress might be made in the acquisition of knowledge.[203]

The glossators had been experts in the use of the inferential techniques offered by the *logica nova*, and their use of the dialectical syllogism contained in the *quaestio de facto* had allowed them extend the range of the *verba* of the individual law (the literal wording of the Romano-canonical legislation) to legal paradigms not expressly provided for. This however resulted in conclusions that were merely probable and debatable. Differently from the glossators, Jacques of Revigny applies the new scholastic gnostic method, which is now based on *Posterior Analytics* and is an incontrovertible source of scientific certainty, to the legal world for the first time. For this reason every doctrinal development had to begin from the comprehensive *ratio* of the legal precept, and not any longer from dialectical *argumenta* founded on simple *loci loicales per leges probati* or from premises comparable to those "noteworthy opinions" (*endoxa*) that Aristotle claimed unsuitable for founding a true demonstrative syllogism. All doctrine had to begin from that *principium pro-*

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[201] For a rendition of this passage from *Dictionarium iuris* cf. D'Amelio 1972, 67–8.

[202] Cf. Piano Mortari 1986, 32. On the concept of *regula iuris* and on its history in the Middle Ages cf. Caprioli 1961–1962, 267–305; Stein 1966, 131–52; Cortese 1992b, 476–7; Alpa 2000, 30–1.

[203] In the world of law, Revigny's *Dictionarium iuris* satisfies "one of the great intellectual ambitions of the 13th century" that Thomas Aquinas had already addressed in the field of theology, namely, "that of summarising all contemporary knowledge in a vast encyclopaedia": Vincent 1997, 123. On the importance, for the systematic development of legal science, of the appearance of legal dictionaries cf. Giuliani 1997, 143–5.

prium of the *scientia iuris* which would allow all successive inferential reasoning to be obtained from it, and be of an absolutely essentially apodictic nature, so as to increase knowledge of legal doctrine in a way that could not be scientifically disproved. On this subject Pierre of Belleperche says in his *Lectura Institutionum*, for example, that the immediate purpose of his work is to indicate the *mens* (aim) and the *potestas* (efficacy) of the *leges*, and not the examination of their textual detail: "*Causa finalis propinqua est cognitio subiecti et scire mentem et potestatem earum* [scilicet *legum*]" (Petrus de Bellapertica 1536, 24 [*rubrica Institutionum*]).

Mastery of the *principia* (the descriptions of the legal institutes) presented in the *Commentaria* of the Orléans jurists, and in an even more concise form in Revigny's *Dictionarium iuris*, meant that those interpreting them could thus avoid the trouble of having to explain the specific *causa legis* of every law every time they needed to evaluate the possibility of extending it legitimately to an analogous situation (which was, however, always a matter of opinion because it resulted from a dialectical syllogism). Instead, mastery of the *principia* immediately put the entire collection of all true, certain and primary axioms totally at the disposal of the jurist. These axioms proved to be essential for ensuring the solid scientific reliability of the apodictic syllogisms developed from these *principia*, and so provided a means of regulating individual cases in a way that would be irrefutable and uncontroversial.[204]

With respect to the school of the glossators, the French jurists of the second half of the 13th century did not introduce innovations into the logical technique they used, which therefore remained the syllogism, but changed the type of inferential method adopted. Following the distinction laid down by Aristotle, they no longer resorted to dialectical syllogism (based on probable premises and sources of "truth" that, therefore, were likewise open to disproof) but made use of the apodictic syllogism (coming from incontestable *principia*, that was thus suitable for producing syllogistic conclusions endowed with an equally necessary and incontrovertible "truth" from a scientific point of view).[205]

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[204] The epistemological change introduced in Orléans led to "a growing movement towards a search for the 'substance' of relations and towards definitions," so that "the search for the substance of things leads—from a new point of view—to a broadening of the legal world of definitions. […] The process of transformation took centuries and brought about the 'translation' of all the Roman heritage into new forms of legal thought and the passage to a new form of *scientia iuris*. It is the creation of a totally new mental habit, still largely dominant today, that in itself generates the conviction that there can be no other": Orestano 1987, 150–1, 392–6.

[205] We need to note that the law historians, from the earliest to the most recent, have as a rule limited themselves to emphasising the importance (and at times to reproaching the exuberance) of resort to dialectical procedures as a distinctive and characteristic element of the origin and development of the Commentator's school: cf. Savigny 1857, 565–7; Ciccaglione 1901, 111–5; Brugi 1921a, 50–61; Besta 1925, 843–73; Solmi 1930, 513–21; Trifone 1943, 231–

3.3.5. *The Establishment of the Commentators' School in Italy*

The scientific approach that evolved from the method introduced by Jacques of Revigny and perfected by Pierre of Belleperche (who although not a pupil of the former, continued the teaching at Orléans) took the name "school of comment" (from the explanatory work in prevalent use, the *Commentarium*). It represented a radical innovation in the development of the legal science of the second half of the 13th century, in a period when, in Italy, a form of teaching continued to be propounded that was based instead on hermeneutic techniques that were by then antiquated and, above all, scientifically obsolete in light of the new and burgeoning French epistemological method. The innovation developed by the law professors at Orléans was, however, very soon destined to excite interest in Bologna too, despite the fact that the Italian jurists nourished some doubts—which would never be completely appeased—about the suitability of excessive philosophical subtlety in the study of law.[206] By about the end of the 13th century, the Bolognese didactic approach was passé, its methods had been surpassed and it, therefore, rapidly and inexorably fell out of favour under the attack of the new epistemology. As a result of the close links between the French and Italian cultures (and politics), the new approach very soon started to spread rapidly into the universities, where, until then, the method adopted by the glossator's school had reigned undisputed.[207]

6; Calasso 1954, 564–70; Piano Mortari 1960, 796; Pecorella 1966; Horn 1973, 263–4; Orestano 1987, 65, 148; Cortese 1995, 409. In reality, the glossators just as much as the commentators knew and used exactly the same reserve of logical-dialectical techniques, above all syllogism: cf. Cortese 1992b, 468. The difference between the two schools therefore lies not in the diversity of heuristic tools used, but exclusively in the different value attributed to dialectical or apodictic syllogism as a fundamental epistemological canon. As regards the different epistemological structures adopted by the two schools, their common heritage of logical techniques was lacking an overall framework and this has not allowed the historian to grasp the difference existing between the hermeneutic and didactic methods used. These were effectively homogeneous as regards the tools that were adopted (since both were based on inference), but their application started from different syllogistic premises (*endoxa* or *principia propria*). The similarity of the logical techniques used by the glossators and commentators has also prompted some to emphasise the continuity (rather than the break) between the two schools, causing them to hold that the logical foundations remained substantially unaltered despite the change that occurred in legal method: cf. Solmi 1930, 516; Paradisi 1976, 233–8; Astuti 1976, 140–2, 146–8 (who speaks of only the quantitative development, and not about the qualitative difference between the dialectical procedures used in the two schools, and ends by denying any novelty from a methodological and scientific point of view); Cortese 1995, 410 (who speaks of "dialectical techniques that the jurists had tested for some time"). Piano Mortari, above all, expresses a lively criticism of those historical descriptions that highlight aspects of continuity between the various lines taken by medieval jurists, rather than the significant changes in the ideas between the two schools: cf. Piano Mortari 1976, 63–4; Piano Mortari 1979, 202–11.

[206] The opinions of the Italian professors who derided the French contemplative studies of dialectic are found recorded by Meijers 1959, 118–9. On this argument cf. Nicolini 1964, 64.

[207] Meijers (1959, 117–8), for example, records that the legal method developed in France

The person, above all, who introduced the heuristic techniques and episte-mological criteria of the French jurists into the Italian universities (Siena, Perugia, Naples, Florence and, perhaps, Bologna) was Cinus Sighibuldi of Pistoia (Cynus Pistoriensis: 1270–1336). An enthusiastic follower of Revigny and of Belleperche (Bezemer 2000), he referred to the French jurists as the *moderni* (moderns) to distinguish them from the *antiqui* (ancient) jurists, namely, those glossators who, although they had already been using the same fundamental, syllogism-based, *quaestio* reference works for some time, had not, however, made the Orléans scientific approach the basis of their legal reasoning. Consequently, they did not form the syllogistic premises of their *quaestiones* correctly, or in conformity with the precepts of the new gnostic approach which, beginning in the second half of the 13th century, had radically changed the fundamental characteristics of scientific rigour.[208] It is significant that the Parisian theologians of the end of the 13th century had already adopted a similar distinction between *antiqui* and *moderni* to indicate the sharp difference existing between the earlier generations of teachers, who had ignored the gnostic approach described in *Posterior Analytics*, and the more recent ones, who instead knew and actually used Aristotle's scientific theory. It is, in short, familiarity with this work of Aristotle that creates quite a sharp distinction between *antiqui* and *moderni* (Chenu 1928; Chenu 1995, 99).

As a result of Cinus' teachings the Italian universities, also, very quickly embraced the new method in full, to the point where, despite the persistent veneration given to the doctrine of the glossators by some Italian jurists,[209] it was really in Italy and not in France that the commentators' school found its most brilliant and highly venerated exponents, for example, Bartolus of Saxoferrato (1314–1357) and Baldus de Ubaldis of Perugia (1327–1400).[210] It was with Cinus of Pistoia in particular that the legal teaching of the Italian schools

was brought to the fore not only by the Italian jurists who had taken themselves off to the Orléans school, but also by the close connection existing between the Roman curia and the Orléans teachers, all of whom were members of the clergy.

[208] Cinus of Pistoia's intention to embrace the "*novitates modernorum Doctorum*" (i.e., the innovations of the *Moderni* doctors) is expressed in Cynus Pistoriensis 1578, 1ra. On Cinus as a jurist cf. Libertini 1974, 23–40; Astuti 1976, 129–52. Bellomo offers a different meaning for the adjectives *antiqui* and *moderni* and, placing his faith on two *Libri magni quaestionum* from the Vatican library, fixes the transition between the two approaches at around about 1270: cf. Bellomo 1974a, 53 (where, however, in footnote 84, we also read that "it cannot be excluded that the name *moderni* serves in general to denominate those doctors of the Italian schools who, in common with some teachers beyond the Alps, gave a lot of space to Scholasticism in their cultural formation and in the actual application of scientific and practical activity"); Bellomo 2000, 545–65, where we read that, besides the merely chronological criterion, there could have been "differences in method that were substantial and radical, or such, however, as to justify the two qualifications" (ibid., 563).

[209] Cinus of Pistoia was ironical about the way the lawyers idolized the *Magna Glossa*: cf. Bellomo 1993, 433.

[210] For a recent work on Bartolus of Saxoferrato cf. Bellomo 1998a, 181–93.

started for the first time to liberate itself from teaching methods that had been based on a direct reading of legal texts, and to turn rather towards an exposition of *principia*, which were scientifically drawn from the legal sources. In addition, the attention of the jurists also became increasingly concentrated on the *regulae iuris* (legal rules), which were summaries of these same *principia*.[211]

On this point we should note, as historiography has suggested, that it was the particular legal context (dominated by *droit coutumier*, the law of custom) and political context (i.e., French monarchical power, which was hostile to the Holy Roman Empire) that provided the main factors which induced the Orléans jurists to interpret and use the Justinianian *lex* through the form of the *ratio scripta* (Meijers 1959, 21–4; Piano Mortari 1960, 797). However, if the new method introduced in Orléans had been linked only to these contingent factors, and the reasons for the change—starting halfway through the 13th century—in the epistemological order of the entire culture were not, instead, of a more general, deeper and comprehensive nature, we would not understand Cinus of Pistoia's interest in this method. Nor, above all, would it be possible to explain why the thought of the French jurists was accepted in Italy, where the situation was different both legally and politically from that of the French (Astuti 1976, 146).

It needs to be said that the Italian teachers began to see the importance of the new method developing in France and were aware that it was useful to identify the *principia* of legal science in the light of the new epistemological system imposed by the reading of *Posterior Analytics*. The importance of the modifications in teaching meant that change was, in fact, comparable to the transformation of a century earlier caused by Pillius of Medicina with his revolutionary *Libellus disputatorius*. As already mentioned, at the end of the 12th century Pillius had managed to shake up the inertia in the teaching methods of the Bolognese teachers by offering his own students a complete collection of the *loci loicales per leges probati*. These allowed savings in time and effort when identifying the legitimate foundations of each dialectical *argumentum*, and so permitted a considerable reduction in the time taken to learn the technique of the legal *quaestio*. This innovation had had great success outside the Bologna *Studium*, and had caused those minor universities which had welcomed the new method to increase in popularity; also in the end causing the Bolognese *alma mater* to take account of Pillius' work.

In the same way, the comprehensive and far reaching epistemological renewal coming from Orléans—and in particular the technique, started by

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[211] The observation that the traditional didactic method, based principally on the explanatory reading of legal texts, begins to die out from the time of Cinus (the start of the 14th century) (cf. Bellomo 1993, 430) is linked to the fact that the definite establishment of Aristotle's philosophy in Italy and the development of the Italian Aristotelian movement started only towards the end of the 13th century and lasted until the 16th (cf. Piano Mortari 1976, 65–7).

Revigny, of identifying the legal *principia* in order that they could have a syllogistic use—rapidly highlighted the limits of the traditional Bolognese teaching methods. These methods had been developed in a cultural context that was still deprived of knowledge of *Posterior Analytics*, and was therefore unprepared for welcoming the Aristotelian logical canons imposed by Parisian Scholasticism. In fact, the study of law carried out in Bologna took the *verba* of the law as its essential and inevitable starting point for all hermeneutic reasoning, and the jurist developed *quaestiones* from it by using dialectical *argumenta*. These *quaestiones* were needed to give greater syllogistic efficacy to the specific law source being examined. In this way, it was possible to extend the *lex* of the *Corpus iuris* to actual cases, which could consequently be governed as a result of the same *causa legis*.[212] This is why, for example, what Azo declared in his *Summa Institutionum* (1210 ca.) is significant. He maintained that the base on which the glossators had built the foundations of legal science was essentially the texts of the Justinianian laws: "*ad noticiam ergo legum habendam, que constringit vitas hominum, debet quilibet anhelare ne per iuris ignorantiam a rectitudinis tramite deviare cogatur.*"[213] Again, halfway through the 13th century, Odofredus expressed himself in the same way. He based all his didactic method on a series of phases that were inevitably connected to the direct explanation of the text of Justinian's *leges*.[214]

Quite differently, the scientific approach taken by the commentators was not centred on an explanation of passages from *Corpus iuris civilis* in order to give an extensive interpretation of the *verba* of the individual *lex*,[215] but had as its main objective the immediate and specific identification of the legal *sensus* (meaning) of the Justinianian precept. This meaning was obtained by the teacher through a judicious use of a hermeneutic technique intended to explain the *regula*, the *principium proprium* of legal science.[216] Indeed, by using

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[212] On the importance in the glossators' school's understanding the Justinianian *verba legis*, and on how the objective of applying the logical tools provided by the dialectical method was the use of analogy to extend the scope of the *verba legis* cf. Piano Mortari 1976, 44–54; Piano Mortari 1979, 180. It has been written on this that in the twelve hundreds and thirteen hundreds "legal thought is dominated by the need to not distance oneself from scientific sources, from the 'dogma' of Justinian's laws, from their own verbal format": Bellomo 1996, 22.

[213] Azo 1506, 346a (*Prooemium*, ca. me.): "Everyone must yearn to have a correct knowledge of the legislative texts that regulate the lives of men, in order that he is not induced by his ignorance to deviate from the straight and narrow."

[214] Odofredus' passage on the didactic method (*Prooemium* in the *Digestum vetus*) is published in Savigny 1854, 734 and is analysed by Haskins 1972, 174–5. On the didactic method in use at Bologna in the first half of the 13th century cf. Bellomo 1974a, 49, n. 76; Bellomo 1992a, 207.

[215] The commentators' school affirmed "the widespread idea of having to stand back from the literal meaning of the words in the interpretive work": Piano Mortari 1986, 36.

[216] It is true that, recalling Cicero, Azo had already stated in the preface to *Summa Institutionum* that every science has its principles and roots ("*habet quaelibet scientia principia et radices, super quibus regulare constituitur fundamentum*": Azo 1506, 346a), but for Azo, this

induction, the commentator could usefully take advantage of the rich doctrine already developed by the glossators to identify the "nature" of the institutes governed by the Justinianian laws,[217] but with the difference that the new approach received from Orléans now made the teacher develop an autonomous process of definition. This allowed him to set aside Romano-canonical sources and replace them with a lucid and exhaustive synthesis (*definitio*) of the legal *principium* present in every law (the "*materia*" of the law),[218] together with all the possible exceptions and specifications made necessary by the specific nature of the argument.[219]

In the 16th écentury, Mattheus Gribaldi Mofa gave a conceptually rigorous description of the commentators' method, in which he clearly reconstructs and summarises how the Justinianian *verba* were distanced by this process of definition in order to achieve a wording of the *regulae* that was imbued with the *ratio* of the Roman law.[220] In his work *De methodo ac ratione studendi* (dating back to 1541) he reveals the nature of the *regulae* used by the commentators, and praises Bartolus and Baldus as unequalled in crafting idioms that were suitable and effective for synthesising the legal *principium* underlying the fonts of Roman law:

foundation lies in the "*noticia legum*" (knowledge of the legislative texts) which appears a few lines earlier in the same preface (on this passage of Azo cf. Bellomo 1992b, 185, n. 34). In reality, the glossators' and commentators' schools had two different conceptions of the basic *principia* of the *scientia iuris*, consequently developing radically different gnostic systems and heuristic methods. It is sufficient for example to reflect on the fact the *regula* explained by the commentators is the result of an inductive syllogistic process which tends to replace the *verba legis*, while the definition created by the glossators generally represents the product of an analytical process based on the *distinctio* used on precisely those *verba* that cannot be set aside: cf. Otte 1971, 212–3; Carcaterra 1972, 302–4. On induction as an argumentative process in Aristotle's logic cf. Vanni Rovighi 1962, 184–8.

[217] The glossators had started to isolate some legal *figurae* that had a precise, unitary "nature" (for example, the *natura contractus*, the *natura obligationis*, the *natura donationis*, etc.). This characteristic, while also being autonomous and independent from individual laws because it preceded all legal activity, could be recognised in the Justinianian legal rules which transposed it into the discipline of positive law: cf. Stein 1966, 131; Bellomo 1993, 460–1.

[218] On the meaning of the *materia legis* adopted by the commentators (different from that taken by the glossators) cf. Horn 1973, 325–6.

[219] The *casus legis* and the *summarium legis* present in the *lecturae* of the commentators synthesised the *causa* of each law in a general and abstract rule, capable of general application in the contemporary legal context: cf. Di Bartolo 1997, 210–5. Already in Riccardus of Saliceto († 1379) the *casus legis* does not any longer represent "the account of the fact nor even the norm with its content," but "the legal principle that is in the norm, […] that runs through the norms as the essential life-blood of their existence, and for this reason it is opportune that it is expressed, as Riccardus does, in a form and way that is ever more refined and synthesised": Bellomo 1996, 30.

[220] On Mattheus Gribaldi Mofa's complex scientific personality, in which the cultural need to preserve the commentators' method combines with that of humanist requirements, cf. Quaglioni 1999.

Neque enim ex universa lege verbum aliquod retinemus, sed ex ratione tacita definitionis generalem regulam subtili interpretatione deducimus, atque ita non quid iurisconsultus dixerit, sed quid senserit explicamus. Quo in genere, duos omnino ex doctoribus nostris excelluisse comperio, Bar‹tolum› et Bald‹um›, qui universas ferme legum sententias ita perstrinxerunt, ut eorum formulis, vel epitomis, nihil aut brevius aut subtilius excogitari possit. (Gribaldi Mofa 1559, 17r–v [I, 8: *Regulas tum ex verbis, tum ex mente legum colligendas*])[221]

If a significant characteristic of the glossators' school had, therefore, been an "undervaluation of the technique of definition," and a rejection of every general abstract concept (Giuliani 1966, 181), then by contrast, the distinctive feature of the commentators' school became a great predilection for definitions, which would find enthusiastic advocates like Bartolus and Baldus (Brugi 1921b, 51). As a result, with the commentators "syllogism is guaranteed by reference to an ontological order which can be known through a knowledge of definition" (Giuliani 1966, 215). In fact, here is a passage by Baldus that makes it clear how the identification of the *principia* must be considered an indispensable premise for deriving any scientific truth:

Qui vult scire consequens, debet primo scire antecedens. Qui vult scire quid rei, debet scire principia rei. […] Est namque diffinitio brevis demonstratio rei per oppositionem factam, que rei amplectitur proprietates. (Baldus 1599, 7ra (ad legem *De iustitia et iure*, l. 1 [Dig. 1.1.1], ad verba *Iuri operam daturum*))[222]

Rather than the examination of its wording, the identification of the innermost and determining rational substance of the law was, therefore, the true objective which the commentators' school strove to obtain from a scientific study of the *Corpus iuris civilis*: "*Nota quod scientia consistit in medulla rationis, et non in cortice scripturarum.*"[223] The immediate knowledge of the legal *principium* (the *medulla rationis*, namely, the "rational core" of the norm) not only allowed the interpreter to avoid the onerous task of having to reconsider the *ratio* expressed by the *verba* of the norm (the *cortex scripturarum*, the wording of the external "bark" of the law) on every occasion, but to avoid, above all, any risk of disputability or disproof being inherent in the inferential reasoning

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[221] "We do not draw even a word from any of the law, but, thanks to an elaborate interpretation, we extract a general rule from the implicit *ratio* of the legal provision, and we thus arrange to explain not what the jurist said in the norm, but his thinking. And I ascertained that among all law teachers, two were without doubt the most outstanding in this type of interpretation, and they are Bartolus and Baldus, who summarise the profusion of words found in the laws so briefly that one cannot discover anything briefer or more ingenious than their formulae or syntheses."

[222] "Who wants to know the effects, must know the causes. Who wants to know the nature of every thing, must know its *principia*. […] Definition is in fact a brief exposition created for contrast, which includes the essential properties of each thing." Orestano's considerations on this passage are found in Orestano 1987, 150.

[223] Baldus 1599, 19rb (ad legem *De legibus et senatusconsultis, et longa consuetudine*, l. 17 [Dig. 1.3.17], ad verba *Scire leges*).

based on the *argumentum a similibus*. In fact, one could draw all further doctrinal development from the *definitio* (the fixing and stating of the legal *principium*) in a way that was epistemologically certain, so that "*non perfecte novit artem, qui non novit principia artis*" ("who does not know the *principia* of an art does not know that art perfectly").[224] The possibility or impossibility of applying any legal discipline to a particular fact did not, therefore, derive from the analogous extension of the words of a specific legislative text, but was entirely and easily obtainable by a deductive-syllogistic route (therefore rigorous and not liable to disproof) from the *principia propria* of the *scientia iuris* contained in the norm. The commentators used these *principia propria* directly, in the form of *definitiones*, as the premises for all scientific reasoning.[225]

Indeed, an understanding of the special epistemological character which animates the commentators' school still lives in the words written by Mattheus Gribaldi Mofa in the 16th century. Tracing a clear picture of the scientific criterion behind legal studies, he specifies that "*omnem disciplinam generalibus constare praeceptis, quae ignorare non licet*," i.e., that every scientific discipline consists of general precepts which cannot be ignored.[226] In substance, at more than two centuries' distance from the beginning of the commentators' school, Mattheus Gribaldi Mofa confirms—in an Aristotelian way—that every science is founded on its own general precepts, and that every perfect discipline (like that of the law) must necessarily be deduced from a knowledge of the universally valid principles that govern it:

Omnis igitur disciplinae progressus, a generalibus praeceptis recte deducitur, quae veluti cuiusque artis fundamenta ad omnium specierum, atque individuorum cognitionem ita necessaria sunt, ut neque ignorari, neque in dubium revocari debeant. Plane ignorari universalia non possunt, sine quibus ad particularium notitiam minime pervenitur. Revocari in dubium non debent, cum vel ipsa sint luce clariora, vel notius supra se habeant nihil. (Gribaldi Mofa 1559, 5v [I, 3])[227]

An examination of the characteristics of the general precepts which Mofa speaks about shows in particular that they must be considered necessary (*nec-*

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[224] Baldus 1599, 7va (ad legem *De iustitia et iure*, l. 1 [Dig. 1.1.1], ad verba *Iuri operam daturum*; *additio*).

[225] Giuliani 1966, 181, observes that reasoning *a similibus* is useful and understandable only in the ambit of the probabilistic logic that distinguishes the science of the glossators; if, on the contrary, "the law were certain and rigorous, the processes of justification would be deductive and rigorous, and not those of the *similis ratio*." We would add that, this is really what happens in the science of the commentators.

[226] Gribaldi Mofa 1559, 5r (I, 3, rubrica). For a careful examination of this theme cf. Quaglioni 1999, 200–1.

[227] "All scientific progress must be obtained from general precepts that, as the foundations of every art, are so essential for a knowledge of all the particular and individual expressions that are not to be ignored or put in doubt. Universal principles cannot be ignored because without them knowledge of individual and particular realities is not possible, and they cannot be doubted because nothing exists that is more evident and more certain than them."

essaria), incontestable (*neque ignorari, neque in dubium revocari debeant*), and evident (*luce clariora, vel notius supra se habeant nihil*); it can easily be shown that the character of these precepts corresponds exactly with the nature of the scientific *principia propria* (true, primary, immediate) outlined by Aristotle in *Posterior Analytics*. In a late and mature reflection, Mofa, one of the last to follow the commentators' method, still expressly and repeatedly cites *Posterior Analytics* as one of the principal fonts for a correct understanding of the epistemology fundamental to all in the commentators' school (Quaglioni 1999, 205–6). It is clear that Mattheus Gribaldi Mofa identifies the essential methodology of jurisprudence with the criterion that any progress towards the acquisition of scientific knowledge must necessarily come from general and fundamental precepts:

Caeterum de effectibus seu individuis scientia esse non potest, sunt enim (secundum Platonem) prope infinita ut nulla arte recipi queant, nullaque disciplina comprehendit. Causas vero universales esse constat et finitas, ex quibus propterea recte fiunt demonstrationes. (Gribaldi Mofa 1559, 8r [I, 4: *Felix qui potuit rerum cognoscere causae*])

In short, we read in these lines a clear, concise, and final description of the Aristotelian scientific method applied by the commentators' school: There can be no science of the particular (of the innumerable *verba legis* that make up the different Roman and canonical *leges*), but there can only be a science of the general (of the limited number of *regulae* or *axiomata iuris* that make up the *principia propria* of the *scientia iuris*).[228]

3.3.6. *Legal* Principia, *Word Lists,* Consilia, *and the Evolution of the Doctrine of the* Ius commune *in the School at Bologna*

The new gnostic approach was aimed at the construction of a system of synthesising *rationes* (*principia*) from which all scientific, doctrinal developments would be derived through the use of syllogism. The Italian jurists were masters of this gnostic approach, as is shown by the exact and talented way they attempted to progressively perfect and enrich the reserve of *rationes*. These were identified and collected in the extensive *Commentaria* drawn up in the course of the 14th and 15th centuries. However, the work that best documents the synthetic-systematic intentions that were typical of the commentators' science is probably that of the *Dictionarium iuris* compiled by Albericus of

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[228] It has been shown that Gribaldi Mofa's *De methodo ac ratione studendi* is an "expression of a rationalism that, in the text as much as in the richness of the marginal notes, assumes the quality of a great *concordia Aristotelis et Corporis iuris*, i.e., of an intrinsic concordance between philosophical principles and legal axioms": Quaglioni 1999, 203. Similarly, in the 17th century Everhard Bronchorst (1554–1627) stated that the legal *regulae* are no other than the indispensable *prima iuris principia*, i.e., the irreplaceable basis of all the deductive reasoning created by the *scientia iuris*: cf. Stein 1966, 166–7.

Rosciate (1290–1360 ca.). This was conceived as an amplification and perfecting of the homonymous work produced almost a century before at Orléans. Revigny's idea of an alphabetical construction of definitions is, in fact, rendered much more extensive and analytical by Albericus, who, in light of the powerful development that the commentators' science had brought about in legal doctrine, creates an even more precise, meticulous, and complete repertoire of legal rules.[229] Consequently, the method used by Revigny finds its most vivid exposition and crowning achievement in Italy, in Albericus' *Dictionarium*, which not only aims at capturing in a single systematic synthesis all the legally relevant *principia propria*—in their Aristotelian sense—drawn from the *Corpus iuris civilis*,[230] but also contains a true and proper mini-treatise of *modi arguendi* under the heading "*Arguitur.*" From these, the reader can obtain all the elements necessary to create any type of inferential argument (apodictic as much as dialectic) that can produce syllogistic conclusions which are formally correct, be they of a scientific nature or of merely probable status.[231]

This organisational format gives legal science a list of entries covering fundamental legal principles (*principia propria*), and a collection of rules that allow the application of syllogistic logic to these principles. The good fortune and longevity of this form of gnostic presentation is also borne out by its reuse in Mattheus Gribaldi Mofa's work *De methodo et ratione studendi*, already mentioned. In the middle of the 16th century, he presented his readers with a substantial series of general legal principles (set out in alphabetical order beginning with "*Absurdum intellectum ab omni dispositione reiiciendum*" up to "*Ultima prioribus derogare*") and of *axiomata iuris* (which have been compared to the aphorisms of Hippocratic literature),[232] together with an examination of the rules of syllogism to be applied to those principles.[233] The list of *principia* indicated in Gribaldi Mofa's *De methodo* represents, in short, an indispensable catalogue of the limited number of *praecepta iuris* from which a multiplicity of scientifically valid syllogistic conclusions could be drawn.[234] In-

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[229] On the vitality of this form of presentation, even after Albericus' work cf. Ascheri 2000, 277.

[230] He deals with *principia* such as "*Impugnare non dicitur qui ius suum tenetur*" and "*Ignotus aliquando accipitur non paciscendo*" (these *regulae* are cited by Horn 1973, 350, n. 12). In addition to the *regulae iuris* (which make up the main part of the work), Albericus also inserts an explanation of some words and gives indications of the Justinianian passages connected with some of the entries listed in his *Dictionarium*: cf. Savigny 1857, 627–8.

[231] Cf. Albericus 1581, s.v. "*Arguitur*" (followed by a long list of *argumenta*). Cf. Ascheri 2000, 266, n. 21.

[232] Gribaldi Mofa 1559, 5v–8r (I, 3). The intention of dealing with inferential techniques in a comprehensive manner also induces Mofa to list the *loci communes* that are typical of dialectical syllogisms: cf. Gribaldi Mofa 1559, 32v–42r (I, 17–18).

[233] Gribaldi Mofa 1559, 14v–15r (I, 7: *Regularum usum quam maxime necessarium esse*).

[234] A broad analysis of the format of *De methodo ac ratione studendi* is found in Quaglioni 1999, 206–7.

deed, Bartolus of Saxoferrato had already compared the legal scientific procedure to the gospel parable of the five loaves and two fishes: He held that, starting with five loaves (the five volumes of the *Corpus iuris*, the golden coffer of the *principia iuris*) and with two fishes (namely, the two *sensus legales*, the *literalis* and the *argumentalis*), legal science could produce—as a result of a shrewd syllogistic use of the limited number of premises available—all the infinite scientific conclusions necessary for the world of law.[235]

The confident certainty that the commentators' school placed in the role of apodictic syllogism as the essential and unavoidable epistemological canon for developing legal science saw to it that the consequent meticulous identification of all the *principia* found in the *iura* and in the *leges* of the *Corpus iuris civilis* became an additional powerful tool for extending the efficacy of Roman law. In fact, knowledge of the *ratio* of the norms served as the premise and inevitable conceptual basis for the development of the technique—and works—of the *consilia*.[236] In the *consilia*, the jurists evaluated the conformity or discrepancy of the *principia propria* of the ancient *ius commune* against the various cases offered in reality by legal daily life and, making use of their authoritative doctrinal opinion, they proposed recourse to the *ratio* expressed by the Justinianian norms (a *ratio* not susceptible to aging or to abrogation as a legal *principium*) to regulate matters that were ever new and different (Cortese 1992b, 479–80). A necessary effect of the conceptual *modus operandi* of the authors of the *consilia* was, therefore, the continuous development and progressive enlargement of the normative force of those *principia* which the commentators had authoritatively indicated as the essential scientific basis of the *ius commune*. In this way they determined—also sometimes by virtue of some rather too unscrupulous syllogistic constructions—the steady progress of the *ius commune* and its continuous capacity for expansion.[237]

3.3.7. The Crisis in Aristotelian Epistemology and in Legal Science Based on Syllogism

The powerful doctrine created by the glossators was based on Plato's criterion of *distinctio* and, from the middle of the 12th century, on the rediscovery of Aristotle's syllogism, but was revolutionised in the course of the second half of

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[235] "Haec scientia, quae figurata est in quinque panibus, et duobus piscibus, ex quibus saturata est turba; Io‹annes› 6 c. Quid enim aliud quinque panes, nisi quinque volumina lib. ff. huius civilis scientia, scilicet ff. Vetus, Infortiatum, ff. Novum, Codex, et Volumen, duo pisces sunt duo sensus legales, scilicet sensus literalis, et sensus argumentalis. Ex istis enim quinque panibus, et duobus piscibus, totus mundus saturatur": Bartolus 1615, 182vb. For comment on this passage by Bartolus cf. Quaglioni 1990, 134.

[236] On *consilia* literature (*pro parte* or *pro veritate*) cf. Ascheri 1995, 185–209.

[237] As regards the importance of the *consilium* works as a vehicle for the diffusion of the *ius commune* cf. Ascheri 2000, 268–9.

the 13th century by the advent of Aristotle's doctrine on scientific knowledge, as expressed in *Posterior Analytics*. Even this innovation, which had given birth to the method adopted by the commentators, was however destined to wane and be overtaken by the substantial epistemological innovations introduced from the end of the 13th century on.[238]

The earliest roots of the Aristotelian epistemological crisis can be traced back to the condemnation in Paris, in 1277, by Bishop Tempier of 219 philosophical propositions held to be heretical and consequently censored.[239] Two of the propositions condemned as heterodox had, in fact, a direct link with the gnostic technique founded on *principia propria* (immediate and not liable to demonstration) of the individual scientific disciplines. Bishop Tempier criticised any certainty that was based on "*principia per se nota*," or was reached through the use of such principles.[240] In substance, the condemnation was directed against this epistemological approach that relegated the importance of certain assertions (or disproved or denied them). The assertions in question being those that were not composed of *principia* that were immediately evident or were not syllogistically derived from ideas endowed with elementary evidence (the doctrine of necessity or determinism).[241] The approach that had been condemned was that which claimed to identify the basis and foundation of all certain scientific knowledge in the complex of true, necessary and self-evident (*per se noti*) axioms; this was considered by the scholastic philosophers of Paris, in the middle of the 13th century, to be the essential and inevitable starting point for any authentic and believable cultural development. In brief, the condemnation hit the scholastic gnostic system (and especially the Thomist theological system), which regarded the resolute, deductive logic in-

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[238] "We can say that as soon as the assimilation of the doctrine contained in *Analytics* ended, in about the middle of the 13th century, an equally intense and fervid process of redefinition started immediately, which, in the last analysis, was critical of the Aristotelian scientific ideals. This led, above all in the 14th century, to the introduction of revolutionary changes to the perspective contained in these ideals": Tabarroni 1997, 186. On this topic cf. Pinborg 1976, 240–51.

[239] On the 1277 condemnation of Averroism cf. Dal Pra 1960, 443; Weinberg 1985, 176–7; Fossier 1987, 154; Vignaux 1990, 56–7. An early condemnation of Aristotelian doctrine had taken place at a Provincial Council held in Paris in 1210 and presided over by Peter of Corbeil, but on that occasion (as at the subsequent condemnation of 1215) Aristotelian logic remained absolutely without any form of sanction: cf. Grabmann 1941, 42–69; Copleston 1971, 272–5; Vignaux 1990, 51; Gregory 1992, 24; Fumagalli Beonio Brocchieri and Parodi 1996b, 262. In general on the hostility towards Aristotle's scientific and philosophical works in the 13th century cf. Grant 1997, 37–43.

[240] The text of the articles in question (3 and 4) can be read in Hissette 1977, 20–1. On the subject cf. Serene 1982, 507, n. 43.

[241] Cf. Crombie 1970, 44–5; Tabarroni 1997, 193. More generally, "the collection of condemned propositions [...] precisely indicates, apart from the inevitable deforming and forcing, the cornerstones of a well defined philosophical system: Aristotle's teachings": Fioravanti 1994, 315.

dicated by Aristotle's epistemology as a criterion and measure of being scientific.[242]

A different conception of noetic and intuitive science, different from the Aristotelian, dianoetic, rational model attacked by the Parisian condemnation of 1277,[243] was revived for example in the doctrine of the English Franciscan Duns Scotus († 1308), who taught theology at Oxford. While not contesting the heuristic value of syllogism, he declared that syllogistic logic was insufficient as an exclusive epistemological criterion. Thus, Duns Scotus turned his attention to the importance of perceptual experience and to God's intervention in the cognitive process,[244] and did so to the point of causing a re-evaluation of the Augustinian conception by which knowledge would not be possible without ineffable divine illumination.[245]

Scotus' doctrine anticipates the radical change in the theory of science which took place in the 14th century and which would see another Franciscan don at Oxford, William Ockham (1290–1349 ca.), fiercely opposed to the Aristotelian concept whereby only knowledge obtained through deductive inferential reasoning would give unquestionable scientific certainty.[246] In fact, Ockham's epistemological approach provided for the repudiation of the scholastic claim that only those truths which sprang from a formal-logical process were certain and incontestable when such a process led from axioms noted

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[242] Other propositions condemned by Tempier in 1277 are even more explicit in deprecating the philosophers' conviction that they possessed the one true wisdom and in criticising the opinion that noetic and intuitive theology did not have scientific value: cf. Dal Pra 1960, 444–5; Vignaux 1990, 57. Among the writers against whom the Parisian condemnation was most clearly directed is indeed Boethius of Dacia whose radical adhesion to the Aristotelian epistemology was abhorred since it led to a doubting of the scientific validity of the Church's official teachings: cf. Weinberg 1985, 177–9. On the distance between Thomist thought and the rationalism of the radical Aristotelian cult cf. Van Steenberghen 1980b, 75–110.

[243] On the dianoetic position on the problem of scientific truth in Aristotle cf. Calogero 1927, 23–8.

[244] Duns Scotus' doctrine continues the theme evident in the constant Franciscan polemic already conducted by Bernard of Clairvaux (in the 12th century) and by Bonaventura of Bagnoregio (in the 13th century) against cognitive processes based on Hellenic philosophy rather than on what God revealed: cf. Codignola 1954, 291–2; Alessio 1994a, 345–53. On the rivalry between the Platonism (Augustinian and mystical) of the Franciscans and the Aristotelian culture (rational and doctrinal) of the Dominicans cf. Dal Pra 1960, 429, 466–7; Tabarroni 1997, 194–5; Trottmann 1999.

[245] In the same way as Aristotle and Thomas Aquinas, Duns Scotus also "believes that first principles can be evident on the basis of experience, but he insists that the apprehension of the correct premises of a scientific syllogism does not suffice for scientific knowledge": Serene 1982, 509. Cf. also Gregory 1992, 51–2. On this subject, Vignaux (1990, 109) indicates how, for Duns Scotus, theology does not have the characteristics of a truly scientific reasoning because knowledge of God is not based on appropriate general ideas that can be used as secure syllogistic premises.

[246] Cf. Serene 1982, 514, where we read that, in Ockham's doctrine, "scientific knowledge is not epistemologically decisive."

per se to scientific conclusions endowed with ontological value (McCord Adams 1993). This induced the English philosopher to support the value of empiricism, of knowledge obtained through the intuitive perception of the individual data of experience, from which "probable" truths could be derived. In reality, such truths are not deducible from necessary and self-evident premises, even if these are endowed with scientific certainty, nor are they susceptible to rigorous syllogistic demonstration.[247] Furthermore, Ockham's denial of the absolute and exclusive scientific value that the 13th century awarded to causal connection (fundamental for the operation of Aristotelian logic but incompatible with the religious postulate of divine omnipotence) irremediably compromised the overall value of the inferential demonstrative structure, and consequently invalidated the entire gnostic efficacy of an epistemology based on syllogism.[248]

The slow eclipse of the ideal of a theory of knowledge in which syllogism was an infallible technique that was universally valid for obtaining a complex of ideas of incontrovertible scientific esteem from unchangeable and eternal *principia propria* therefore coincides with the change in the concept of demonstrative science. This change took place when the new nominalist and probabilist philosophical currents based on perceptive experience established themselves.[249] At the beginning of the 15th century, Peter of Ailly († 1420), following this line, got to the point of saying that "*philosophia Aristotelis seu doctrina magis debet dici opinio quam scientia [...] et ideo valde sunt reprehensibiles qui nimis tenaciter adherent auctoritati Aristotelis*" ("Aristotelian phi-

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[247] Cf. Crombie 1970, 234–5; Mugnai 1994. "In the epistemological field, Ockham's starting point is the primary importance given to an intuitive knowledge of the particular as a font of scientific evidence," which he puts alongside the "traditional categories of the immediate knowledge of principles *per se noti* and of the knowledge of conclusions syllogistically derived from necessary and evident premises": Tabarroni 1997, 196.

[248] Ockham's logic "abandons the Aristotelian attempt at a rigorous process capable of re-examining the categories of reality themselves. Science can, therefore, be only about the particular, outside of pure, formal-logical discourse: the Aristotelian-Thomist claim of the universality of knowledge is abandoned for a more modest programme of particular and probable knowledge, based on a continual resort to experience": Garfagnini 1979, 271. For this reason, according to Ockham, all knowledge comes from sensitive intuition alone and not from reason, which leads instead to confused and uncertain conclusions at an ontological level: cf. Fossier 1987, 155; Gregory 1992, 55–6. In fact in Ockham's conception, the world is totally subject to the inscrutable will of God, with the consequence that Ockham's epistemology is characterised by a radical empiricism in which knowledge can be obtained only from experience through "intuitive cognition": cf. Vignaux 1990, 120–32; Grant 1997, 43–7; Grant 2001, 213–4.

[249] "Ockham's attack on contemporary physics and metaphysics had the effect of eliminating reliability from the majority of principles on which the system of physics was based in the 13th century": Crombie 1970, 236. Tabarroni observes (1997, 197) how "with Ockham the Aristotelian ideal of demonstrative science was confined exclusively to the field of formal knowledge of an analytical nature," thus producing a "fracture [...] in the long debate on the subject of scientific knowledge" in the course of the 14th century (ibid., 199). Cf. Grassi 1994.

losophy or doctrine must be considered more an opinion than a science […] and therefore those who adhere too tenaciously to Aristotle's authority are very wrong").[250] However, already in the course of the 14th century Ockham's influence had shown itself to be deep and decisive, producing "a widespread tendency to accept empiricism as the foundation of all possible knowledge," and this process developed to the point where "empiricism and the refusal of the reality of what is not observable became characteristic traits of the style of nominalist thought, in the fields of science and philosophy."[251]

As regards the world of law in particular, the decline of the Aristotelian epistemological system would inevitably signal a crisis in the commentators' school. This school of law was itself based on the conception of demonstrative science as received and taught in the 13th century in the medieval *Studia*, and which was destined in the course of the following century to encounter drastic opposition. The crisis of the scholastic Aristotelian cult entered an acute and irreversible phase with Ockham,[252] and would cause the birth of new schools, including those dedicated to a study of the law. These would be founded on epistemological criteria that were different from and incompatible with the Aristotelian methods that had, until then, dominated the doctrinal development of the schools of *ius commune*.[253] Late medieval legal science, built on the *logica vetus* and on the *logica nova* (and inseparably linked to these logical models), started to fade away with the 15th century, despite the fiery defence of this scientific method (*mos italicus*) on the part of the last supporters of the commentators' school (Cortese 1995, 477). In fact, in the first half of the 14th

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[250] Petrus de Alliaco 1513, 83vb (I Sent., q. 3, art. 3). The passage cited from Peter of Ailly is examined by Gregory 1992, 56. On this subject cf. also Fossier 1987, 160–2; Le Goff 1991, 142–5.

[251] Grant 1997, 47. On the empirical and sceptical tendencies of the 14th century cf. Crombie 1970, 237–8. However, we need to specify that the Parisian teachers of the Arts, in the same period, were far from wanting to completely undermine the Aristotelian foundations of the scientific vision of the world: cf. Tabarroni 1997, 202–3. In general on the characteristics of Scotus' and Ockham's doctrines, as well as on those of the Parisian philosophers that were inspired by the thoughts of the Oxford theorists, cf. Heer 1991, 272–6; Tabarroni 1997, 197–204.

[252] Cf. Garfagnini 1979, 271. One of the consequences that Ockham's doctrine had on theological studies was therefore "a general tendency to eclecticism and to scepticism": Verger 1997, 123. Ockham's epistemological doctrine even generated "a taking of sceptical positions with respect to the possibility of scientific knowledge in general": Tabarroni 1997, 197.

[253] "It was certainly not against dialectic per se that the humanist jurists railed. But they could not support the decadent Aristotelian-scholastic dialectic of the commentators and proposed a new one. […] It is clear from what we have said that the humanist problem of a new logic, different from the medieval Aristotelian-scholastic one, was also profoundly felt by the jurist supporters of this humanist approach": Piano Mortari 1978, 138–9. On this theme cf. Cortese 1992a, 490; Manzin 1994, 23–61. The first generic skirmishes of the crisis generated by an unfettered abuse of dialectic, had already begun in the first half of the 14th century: cf. Fioravanti 1992, 175–6.

century, the uncontrollable stream of innovations that came in the field of philosophy apropos of demonstrative scientific procedure, gradually but ever more insistently, led to the challenging of the centrality and ontological priority of the *Corpus iuris civilis*. It led to the birth of a new doctrinal approach (*mos gallicus*) stimulated by criticism of the previous legal science, whose conclusions were held to be unreliable and lacking absolute value (Maffei 1956, 153–76; Birocchi 2002, 7–12).

Even before the criticism coming from the *mos gallicus* jurists descended on the followers of the commentators' school, the decadence of the *mos italicus* had already been ordained by a supplanting of Aristotle's gnostic method and by the obsolescence of the entire cognitive approach of late medieval science. Its collapse had dragged down with it all the epistemological techniques founded on syllogism, and among them, also, the scientific criterion adopted by the commentators.[254] The emergence of the new doctrine of legal humanism and the development of its philological approach, thus, found its roots and theoretical foundations in the most characteristic aspect of the nominalist science of the 14th century, namely, in the "heuristic and probative value given to the techniques of linguistic analysis in the construction of scientific discourse."[255] The end of confidence in Aristotelian syllogism, held to be devoid of scientific value by the Ockhamist logicians, was consequently the decisive cause of the gradual but inevitable loss of prestige of the entire commentators' school. Their complete gnostic structure was considered obsolete, ineffective and arbitrary, and so was generally repudiated by successive intellectuals.[256]

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[254] Calasso speaks of a "fatal wearing away" of the dialectic technique used by the commentators: cf. Calasso 1959, 72. On the progressive abandoning of the Aristotelian scientific ideal cf. Gregory 1992, 58–9; Graziano 1992, 47–55. As regards the possible link (also disputed in doctrine) between modern science and the final developments in medieval epistemology cf. de Muralt 1991, 26–36; Bianchi 1994, 488–9; Grant 2001, 252–308.

[255] Tabarroni 1997, 203, who adds (ibid., 204) how "the definite abandonment of the postulate of isomorphism between science and reality which had been correctly identified in the previous century as the indispensable metaphysical support of the Aristotelian ideal of science" became a determining factor in the 14th century. On the epistemological innovations immediately following the Middle Ages cf. Mamiani 1999. As regards the field of the physical sciences cf. Butterfield 1998. For conceptions of the nature of science and scientific explanation from the 16th century on cf. Bechtel 2001.

[256] The modern historian tends however to re-dimension the clear break between the *mos italicus* and the *mos gallicus*, to tone down the contrast between the two cultural systems and to stress instead the elements of continuity between the two models: cf. Maffei 1956; Quaglioni 1999; Minnucci 2002, 1–10.

Chapter 4

POLITICS IN WESTERN JURISPRUDENCE

by Kenneth Pennington

In his work *Politica methodice digesta* that he published in 1603 Johannes Althusius defined politics as the "art of associating [*consociandi*] men for the purpose of establishing, cultivating, and conserving social life among them" (Althusius 1964, 12). Althusius was an early modern German jurist who firmly believed that human social institutions were and should be regulated by law. "Common law [*lex communis*], which is unchanging, indicates that in every association […] some persons are rulers (heads, overseers, prefects) or superiors, others are subjects or inferiors. For all government is held together by *imperium* and subjection" (ibid., 14–5). "Local laws [*leges propriae*] are those enactments by which local associations are ruled" (ibid., 16). Althusius did not think of politics as being primarily the art of conflict but the art of living together. Law provided the foundation of a community's social structure.

Althusius lived in the waning years of the *Ius commune*, the common law that was taught in all of Europe's law schools until the Protestant Reformation. It was not a set of statutes. Rather, it was a set of norms and a jurisprudence that was based on ancient Roman, canon, and feudal law. It provided a rich source of principles for all European jurists. Although he was a Protestant, Althusius drew heavily upon legal traditions and sources of Pre-Reformation Europe. His *Politics* is studded with references to Hostiensis (Henricus de Segusio), Panormitanus, (Nicolaus de Tudeschis), Bartolus of Sassoferrato, Baldus de Ubaldis, and many others. He summarized five centuries of jurisprudence in the *Ius commune* that dealt with all aspects of human concourse.

The *Ius commune* was born in the late eleventh century.[1] In the early Middle Ages, Europe was a land without jurists. With the establishment of law schools, first at Bologna and then in other Italian, French, and Spanish cities, jurists began to discuss issues that may be broadly defined as political. In the modern world we primarily think of politics as a continuing struggle between parties with differing ideological and economic beliefs. From the thirteenth to fifteenth the Italian city states did have competing, organized parties striving for control of political institutions of their communities. The rest of Europe, for the most part, did not. Medieval jurists dealt with political matters in two ways. They analyzed and developed legal rules for the governance of political institutions from the office of the prince to the corporate governance of cities, secular and ecclesiastical corporations (guilds, cathedral chapters, monaster-

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[1] For the history and importance of the *Ius commune* see Bellomo 1989.

ies), and representative assemblies. The jurists were also called upon to render opinions on legal questions that arose from political conflicts in medieval society. They became experts who were asked to solve problems, answer questions, and advise princes. Law was established as an important branch of learning, and jurists became an indispensable class in the political life of European society (see Fried 1974; Brundage 1995; and the essays collected in Bellomo 1997b, especially Bellomo 1997c and 1997d).

4.1. The Jurisprudence of Sovereignty in the Twelfth and Thirteenth Centuries

Law became important in political debates of the second half of the eleventh century. The conflict between Pope Gregory VII (1073–1085) and the German Emperor Henry IV (1056–1106) generated a mountain of literature. One of the first signs that law would play a role in political disputes was a treatise written by a certain Petrus Crassus. He used Roman and canon law to defend Henry IV and cited Justinian's *Institutes* to establish the principle that kingdoms cannot be ruled without laws (Petrus Crassus, *Defensio Henrici IV. regis*, 1.432–453; see the Latin text and the German translation in Schmale-Ott 1984).

   As law became important in politics and in all other parts of medieval society schools were established to teach it. Stories circulated about how the teaching of law originated. Not surprisingly some of these tales credited rulers with encouraging the teaching of Roman law. One of the most intriguing is a report by a German chronicler, Burchard of Biberach, that Matilda, Countess of Tuscany, petitioned Irnerius to teach the books of Justinian's compilation. Whether the story is true or not it reflects an assumption of the early twelfth century that rulers were interested in fostering the study of ancient Roman law and that the knowledge of law would enhance a ruler's authority. In any case Irnerius was a major figure of the early twelfth century who taught law in Bologna, advised the Emperor Henry V (1106–1125), and served as a judge in Tuscany (Cortese 1995, 58–61; on Irnerius, see Spagnesi 1970). Legal historians generally credit him and an even more shadowy figure, Pepo, for establishing Roman law as a field of study in Bologna.

   The reign of the German emperor Frederick I Barbarossa (1152–1190) marked the beginning of the jurists' using their recondite knowledge in the service of the prince. Frederick recognized the importance of jurists and protected the Law School at Bologna with an imperial decree, the *Authentica Habita* (1155), that granted the students at Bologna special privileges. Three years later at an imperial Diet in Roncaglia (near Piacenza) Frederick opened the assembly with an oration that contained a remarkable number of references to texts of the *libri legales*, the textbooks used at Bologna (ibid., 67, 164, 167). The emperor tacitly cited Justinian's Digest, Code, and Institutes to

justify his rule. The texts of the *libri legales* legitimized his authority but also protected the rights and liberties of his subjects. When he proposed new laws, as he did at Roncaglia, he promulgated them but, he said, the people confirmed them by accepting them through customary usage. He proclaimed that laws must be just, possible, necessary, useful, and suited to the time and place. He concluded by pointing out that one may not judge laws after they have been established. Rather one must judge according to the laws. All of these points were taken from the *libri legales* (Pennington 1993d, 10–1).

Frederick's speech at Roncaglia was not an isolated example of the importance of law for imperial rhetoric and policy. Godfrey of Viterbo wrote a poem that exalted Frederick's legislative authority and employed the standard metaphors of the new jurisprudence to describe the imperial office: The emperor was living law and could promulgate, derogate, or abrogate law (ibid., 11–2).

Frederick promulgated new laws that treated the emperor's rights and prerogatives in Italy at Roncaglia. An Italian chronicler wrote that Frederick summoned law professors from Bologna to advise him on his imperial rights that were due to him. One of the laws is particularly instructive.

The prince possesses all jurisdiction and all coercive power. All judges ought to accept their administration from the prince. They should all swear the oath that is established by law.

This law was entirely based on principles of Roman law. Frederick did not know Latin and was not educated in law. He gathered men around him who were experts of the *libri legales*, the new legal science. European princes would follow Frederick's lead for the next 700 years. They gave jurists positions of power and authority in their curiae and used them as trusted and advisors. The laws that were promulgated at Roncaglia began a long tradition of medieval jurists' contributing to the formation of a jurisprudence of sovereignty.

It is instructive to compare the promulgation of King Henry II (1154–1189) of England's Constitutions at Clarendon (1164) to Frederick's legislative work at Roncaglia. Henry made no claim to have the authority to legislate. He gathered his barons and bishops together to "recognize" royal liberties and prerogatives.[2] A "recognition" of law was the same term used to discover the facts of a case by jurors in early English writs. In England law was not a manifestation of royal prerogative; it was a fact that could be discovered by examining the customs of the realm. There is no trace of the new jurisprudence of monarchical authority in the rhetoric that justified the Constitutions (on the Constitutions see Helmholz 2004, 114–8). The English kingdom would only begin to be influenced by the legal theories of sovereignty of the *Ius commune* in mid-thirteenth century when the author called Bracton at-

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[2] Prologue to the Constitutions: "facta est ista recordatio vel recognitio cuiusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum."

tempted to describe the prerogatives of the king using some of the same texts and language that were used to exalt Frederick Barbarossa's authority at the Diet of Roncaglia (Tierney 1963a, 295–309).[3]

A story that circulated among the jurists illustrates the authority that jurists began to exercise in medieval society. The setting of the story was the Diet of Roncaglia. It may or may not be true. The protagonists were two of the four great doctors and teachers of Bologna, Bulgarus and Martinus. Frederick had summoned these experts to Bologna to advise him. While riding with them on horseback on day, Frederick asked them whether according to law he was the Lord of the World (*dominus mundi*). The idea of the emperor's being the *dominus mundi* was probably inspired by a passage in the Justinian's Digest (Dig. 14.2.9). In a passage taken from a commentary on the Rhodian Law of the Sea, the Emperor Antoninus declared that he was the "Master of the World" (*tou kosmou kurios*). Another text of Roman law became closely associated with the imperial title in the minds of the jurists. In a law that was included in his Code, *Bene a Zenone* (Cod. 7.37.3), Justinian did not claim the title, Lord of the World, but he did assert that the emperor could be understood to own all things. If the emperor owned all things, it was a short step for the jurists to conclude that the emperor was, indeed, the Lord of the World.

Frederick must have heard from people in his court that the emperor had these grand titles. He asked the jurists what authority and prerogatives such titles bestowed upon the imperial office. "Am I legally the Lord of the World," he asked. The tradition reported that Bulgarus declared that he was not the lord over private property. Martinus responded that he was, in fact, Lord of the World. Frederick rewarded Martinus' sycophantic answer with a gift of a horse (Pennington 1993d, 17–30).

In the second half of the twelfth century the jurists who glossed Justinian's codification dealt with these texts and others that touched upon the emperor's prerogatives. They concluded that the prince did not have jurisdiction over his subjects' private property under normal circumstances. Rights to private property were protected by natural law. One point should be emphasized. When Frederick asked whether he was Lord of the World, no jurist interpreted his question as asking whether other kings were subject to him. That question did not interest them. It would be left to Pope Innocent III to broach that question at the beginning of the thirteenth century. The twelfth-century jurists focused on the emperor's authority to take the rights of his subject away and his prerogative to abrogate law arbitrarily. In other words they were interested in the relationship of the prince to the law (see the discussion of Tierney 1963b, 378–400).

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[3] See Nederman 1988, 415–29, who does not understand the importance of the *Ius commune* for Bracton's political thought.

The Roman law *libri legales* gave the medieval jurists very fragmented texts upon which they could construct a theory of princely authority and of the prince's relationship to the law (see Stein 1988, 37–47, especially 44–6). There is little in the Digest on a theory of law. A text in the Digest from the Roman jurist Gaius stated that natural reason established law that is observed among all human beings. It is called the *Ius gentium* or law of peoples. This law and the customs and laws of individual cities (*civitates*) constituted the laws under which human beings lived (Dig. 1.1.9). The *libri* also contained some definitions of terms at the beginning of the Digest. The medieval jurist, who began to study and comment upon ancient Roman law did not, however, have a coherent set of texts upon which they could create a jurisprudence that treated the nature of law. That task was taken up by Gratian, who began to teach canon law at Bologna in the early twelfth century.

When Gratian began teaching at Bologna, Irnerius was teaching Roman law at about the same time. Until recently the only secure fact that we knew about Gratian was that he compiled a collection of canons that later jurists called the *Concordia discordantium canonum*. This cumbersome title was later shortened to the Decretum. It very quickly became the most important canonical collection of the twelfth century and later became the foundation stone of the entire canonical jurisprudential tradition. It was not replaced as a handbook of canon law until the *Codex iuris canonici* of 1917 was promulgated.

Since the work of Anders Winroth in 1996 we have learned much more about Gratian. Winroth discovered four manuscripts of Gratian's collection that predated the vulgate text of the Decretum. Since then another manuscript of this early recension has been discovered in the monastic library of St. Gall, Switzerland. Although all five manuscripts must be studied in detail before we fully understand their significance, some conclusions can already be made. The first recensions of Gratian's work were much shorter than the last recension. The differences between the recensions mean that Gratian must have been teaching at Bologna for a significant amount of time before he produced his first text that circulated. There was a significant period of time between when he began teaching and the final version of the Decretum. Most evidence now points to Gratian's having begun his teaching in the 1120's. He continuously revised his text until the late 1130's or early 1140's. In spite of its defects—organization was its primary flaw—it immediately replaced all earlier collections of canon law in the schools (Winroth 2000; Larrainzar 1999; see also Larrainzar 1998).

Gratian became the "Father of Canon Law" because the last recension of his collection was encyclopedic and because with his "case method" he provided a superb tool for teaching. His vulgate version of the Decretum was a comprehensive survey of the entire tradition of canon law.

Gratian introduced jurisprudence into canonical thought. His first innovation was to insert his voice into his collection to mingle with those of the Fa-

thers of Nicaea, St. Augustine, and the popes of the first millennium. He did this with dicta in which he discussed the texts in his collection.[4] He pointed to conflicts within the texts and proposed solutions. His dicta made the Decretum ideal for teaching, and the Decretum became the basic text of canon law used in the law schools of Europe for the next five centuries.

In addition to the novelty of his dicta, Gratian created a collection of canon law that was organized differently than any previous collection. In his earliest version of the text, Gratian focused on 33 cases (*causae*). In each case he formulated a problem with a series of questions. He then would answer each question by providing the texts of canons that pertained to it. When the text of the canon did not answer the question without interpretation or when two canons seemed in conflict, Gratian provided a solution in his dicta. Gratian's hypothetical cases were effective teaching tools that were ideally suited to the classroom. Gratian was the first teacher to use cases to teach law.[5]

Perhaps the most important parts of Gratian's work for the beginnings of European jurisprudence were the first twenty distinctions of the 101 distinctions (*distinctiones*) in the first section of his Decretum that he added to his original text. In these twenty *distinctiones* he treated the nature of law in all its complexity. Gratian must have realized that he could not teach law by looking only at cases and questions of fact. He had to make his students understand the sources of law. As I pointed out above, the *libri legales* did not discuss the relationship between the different types of law. Gratian did that in his first twenty distinctions. These twenty distinctions stimulated later canonists to reflect upon law and its sources.

Gratian began Distinction One with the sentence: "The human race is ruled by two things, namely, natural law and usages" (*Humanum genus duobus regitur naturali videlicet iure et moribus*). The canonists grappled with the concept of natural law and with its place in jurisprudence for centuries. Their struggle resulted in an extraordinary rich jurisprudence on natural law and reflections on its relationship to canon and secular law. Brian Tierney has noted that "natural law [did not] constitute a significant limitation on the legislative competence" of the prince. It was also not "a kind of detailed pattern of legislation laid up in heaven." Rather, natural law provided a moral basis for deciding whether a given enactment was a good and just law (Tierney 1963b, 388). It was a set of norms that evolved in European jurisprudence through a long gestation in the arguments of the jurists (see Pennington

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[4] Gratian may have been influenced by the dicta that he found in Alger of Liège's *De misericordia et iustitia*, although it is difficult to know how Gratian would have learned of Alger's work; see Kretzschmar 1985, 141–54.

[5] One manuscript contains a text of the Decretum with only *Causae*. I believe that this manuscript contains a version of Gratian's Urtext. See Pennington 2003, and the expanded version, Pennington 2004b.

2004c, 417–20). In some cases, the jurists found justifications in sacred scripture for their arguments about which norms were based on natural law. In others, they could discover no precedents in sacred scripture. Instead they relied on norms that had evolved in the *Ius commune*. These norms conformed to reason, reason so compelling that they expressed eternal truths. We shall see that the jurists used norms and principles that they defined as natural law to limit the authority and prerogatives of the prince.

Gratian concluded that natural law dictated that "Each person is commanded to do to others what he wants done to himself," connecting natural law with the biblical injunction to do unto others what you would have them do unto you (Matthew, 7.12). By defining natural law as the duty to treat other human beings with care and dignity, Gratian encouraged jurists to reflect upon a central value of natural law: the rendering of justice and the administering of equity in the legal system. The inspiration for Gratian's dictum was two texts in Justinian's Digest (Dig. 1.1.9–10). Most of the texts that Gratian used were taken from the *Etymologiae* of Isidore of Seville (560–636). Isidore combined the various traditions of natural law that had circulated in the ancient world. He defined it as being the law common to all nations that was established by the instigation (*instinctus*) of nature, not by human legislation. Examples of natural law were marriage and the procreation of children, "one liberty of all human beings" (*una libertas omnium*), and the acquisition of property taken from the heavens, earth, and sea. Natural law was, as the Roman jurists had earlier concluded, natural reason. To define the contents of natural law Gratian placed Isidore's definition of natural law on the first page of his Decretum (D. 1 c.7). Together with the texts of Roman law in Justinian's compilation, Gratian's Decretum became one of the standard introductory texts for the study of law (the *Ius commune*) in European law schools, and Isidore's definition became one of the most important starting points for all medieval discussions of natural law.

Gratian also discussed the various types of human law: unwritten custom, civil law, the law of a city or of a people, including definitions taken from Roman law. Law was a hierarchy. Under Gratian's schema, laws were not simply reflections of different usages in various communities. All law had to be evaluated according to standards that transcended human institutions. Law was also intimately connected to people. The prince could not exclude his subjects from being a central source of law. The people could not only make law, they could approve it. Gratian ended his treatment of legislation by defining how law became valid: "Laws are established through promulgation and validated when they are approved by the acceptance of the people" (D. 4 d.a.c.4: "cum moribus utentium approbantur"). Remarkably, Frederick Barbarossa used these very words when he described his conception of his legislative authority at Roncaglia (Pennington 1993d, 10, n. 11).[6]

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[6] Otto of Freising, *Gesta Frederici*, Liber 4, Chapter 5: "Nostis autem, quod iura civilia

Gratian and Frederick marked the beginning, not the end, of the jurists' contemplation of the role of the prince in making law. The jurists read the texts in the *libri legales* that described the emperor's supreme legislative authority and were uncertain how to reconcile the authority of the medieval prince with the powerful tradition of customary law. Customary law had dominated Europe for centuries. Almost all local legal systems were based on customary law in the twelfth century. Frederick Barbarossa's legislation at Roncaglia is one of the few examples that we have in the twelfth century of a monarch's consciously exercising his authority to make new law. The assizes of King Roger II of Sicily are another.

The twelfth-century jurists did not agree about the relationship of custom to new legislation. Irnerius wrote that custom that was established by long usage should be preserved, particularly if it were not contrary to reason and did not contradict written law. He did not, however, think that custom could abrogate the decrees of the prince. "All power of making law has been transferred to the prince" (Pennington 1988, 425). Other jurists argued that under certain circumstances, particularly with the tacit approval of the prince, custom could derogate from, if not abrogate, law. A maxim began to circulate in legal circles that "custom was the best interpreter of law."

During the course of the twelfth century jurists focused much more on the power of the prince to make new law than on the right of the people to establish and be governed by their own customs.[7] A few jurists noted that society needed new laws because change demanded them. By the end of the twelfth century canonists had created a new concept to describe the law promulgated by the prince or by governing institutions: positive law (*ius positivum*). The term remains a fundamental legal concept in our understanding of law.

The change from a legal system that recognized custom as the primary source of law to one that gave primacy of place to positive law was a difficult one. Southern European societies made the transition more quickly and easily than did those of Northern Europe. The Italian city states were the first to codify their customs and revise those codifications regularly as their institutions and courts evolved. Pisa, for example, produced a code of its laws by the middle of the twelfth century (Wolf 1973, 573–86).

Gratian, Irnerius and the early jurists took most of their assumptions about law and its relationship to princely authority from Germanic customary law and feudal law. Customary law emphasized the contractual relationship between the people and the prince. Consequently, for early jurists the prince had a sacred duty to defend the laws and customs of the land. The prince was

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nostris beneficiis in summum provecta, *firmata ac moribus utentium approbata satis habent roboris*, regnorum leges, in quibus quod ante obtinebat postea desuetudine inumbratum est, ab imperiali remedio vestraque prudentia necesse habent illuminari."

[7] Paolo Grossi (1997) laments this development in medieval law and society.

bound by the law. They thought that law should be reasonable and just. Most importantly, the prince could not exercise his legislative authority arbitrarily.

At the beginning of the thirteenth century the jurists developed new ways of looking at law. Until then they had focused on the content of law when they decided whether a law was just or not. They presumed that law must be moral, ethical, equitable, and, most importantly, reasonable. As new theories of legislation emerged from the *Ius commune*, the jurists began to look at the sources of human law and the institutions that produced positive law. It was then that they discovered the will (*voluntas*) of the prince as a source of law. When they introduced the will of the prince into political discourse, they created a new political language that became "the basis of a new philosophy of law with Marsiglio [of Padua] and [much later with] Hobbes and was the original kernel of the recently dominant theory of legal positivism" (Black 1984, 55). The jurists were the first to look upon the will of the prince as being a primary source of law. A canonist, Laurentius Hispanus (ca. 1190–1248) was the first jurist to peer into the body of the prince to find his will.

Pope Innocent III (1198–1216) inspired Laurentius to reflect upon the will of the legislator. No pope or other medieval ruler shaped the political thought of the medieval jurists more than Innocent.[8] In his decretals the pope exalted papal political power. Innocent emphasized the pope's fullness of power (*plenitudo potestatis*) within the Church. Although the term was coined in the early Church, Innocent found it particularly useful for describing his authority. During the thirteenth and fourteenth centuries, secular rulers adopted papal terminology to describe their power and authority.

Innocent issued a decretal letter, *Quanto personam*, in 1198 in which he made an unprecedented pronouncement on the roots of papal authority. He claimed that the pope exercised divine authority when he granted a bishop the right to leave his church.

God, not man, separates a bishop from his church because the Roman pontiff dissolves the bond between them by divine rather than by human authority, carefully considering the need and usefulness of each translation. The pope has this authority because he does not exercise the office of man, but that of the true God on earth.

Laurentius quickly understood the implications of Innocent's rhetoric. He believed that royal and papal authority were divinely ordained. That was a widely-held idea in late antique, medieval, and early modern political thought.[9] Innocent, however, took this commonplace of medieval political thought and took it a significant step further. He asserted that the pope's authority rested upon divine authority and also that the pope shared in God's authority. That was a significant innovation. For the future it meant that the

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[8] Examples to support this generalization can be found in Pennington 2004e, 314–9.
[9] Canning 1996, 16–20, is an excellent summary of these ideas.

pope could exercise power that had hitherto been reserved only to God. Areas of law that had earlier been defined as based on divine law—marriage and vows especially—could now be subject to papal authority. If the pope shared authority and power with God, he could abrogate or derogate divine law that had been formerly beyond his jurisdiction.[10] When Laurentius commented upon *Quanto personam* he defined a ruler's legislative authority in a novel and unprecedented way:

Hence the pope is said to have a divine will [...] O, how great is the power of the prince; he changes the nature of things by applying the essences of one thing to another [...] he can make iniquity from justice by correcting any canon or law, for in these things his will is held to be reason [*pro ratione voluntas*] [...] And there is no one in this world who would say to him, "Why do you do this?" [...] He is held, nevertheless, to shape this power to the public good.

No jurist had ever made the claim that the prince could make laws that were unreasonable and unjust. The jurists always agreed that laws should be just and reasonable. Laurentius, however, asserted that reason was not the only standard by which law should be judged. The will of the prince and his will alone could be considered a source of human law. Earlier jurists had never distinguished clearly between the content of law and the source of law. Laurentius was the first jurist in European jurisprudence to argue that the content of law had no necessary connection to its source. It had been a doctrine of faith among the jurists who commented on Gratian's tract *De legibus* that laws that were not reasonable were null and void. Laurentius, however, argued that the will of the prince must be supreme. He did not, however, argue that the prince could act arbitrarily. Later jurists did not use the maxim that he cited, "Pro ratione voluntas" (taken from Juvenal's *Satires*) as a justification for tyranny.

Frederick Barbarossa's jurists who discussed the authority of the emperor in the twelfth century had a different and more primitive view of monarchical authority. When they called the prince the "Lord of the World" and declared that he was "legibus solutus" (not bound by the laws), they focused on his status. The prince was sovereign, he was superior to the law, but he had to submit himself to the law. They did not explore the source of law or of the prince's authority or the relationship of the prince and the law.

The reason for their reluctance to confront the issue of the relationship of the prince and the law was primarily because in the twelfth century the prince was not the only or even the main source of law in society. Only in the thirteenth century when princes began to legislate regularly did the jurists begin to think about the source the prince's authority and to develop new definitions of the prince's power.

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[10] On the implications of Innocent's thought for the pope's power to dissolve a marriage bond, see Noonan 1972, 129–36. On vows see Brundage 1969, 66–114.

Henricus de Segusio († 1271), or Hostiensis, was one of the most important and influential jurists of the thirteenth century (Pennington 1993b, 758–63, and, in English, Pennington 1993c). His career took him to Paris, London, and Rome. He wrote the most extensive commentary on canon law produced by any jurist in the thirteenth century. His work is characterized by a deep understanding of the political world, secular and ecclesiastical, and a profound interest in the language of political power and authority.

Hostiensis was sensitive to legal questions that touched the structure of institutions. He developed a jurisprudence that described the power of secular and ecclesiastical princes in remarkably new ways. More than any earlier jurist he delved into the meaning of the terms that the jurists had been accustomed to use when they described power and authority in medieval society. He extensively analyzed the traditional terminology. He explored the term "Plenitudo potestatis" (fullness of power) that had long been used to describe the power of the pope and that was beginning to be used to describe the authority of the secular prince in minute and careful detail (Watt 1965, 161–87).

Like Laurentius Hispanus, Hostiensis was inspired by Pope Innocent III. Even more than Laurentius he emphasized the divine foundations of papal power. He decorated Innocent's claims in *Quanto personam* with extravagant rhetoric. While commenting on Innocent's decretal letters he wrote that all political authority comes from God. All princes exercised their authority by divine mandate. The pope, he asserted, had a singular status. Hostiensis based his commentary on Laurentius' but greatly enhanced the pope's power. Whatever the pope does, he wrote, he acts on God's authority. The pope is the vicar of God. The curia of the pope in Rome was God's curia. Whatever the pope does is licit as long as he does not err in the faith. Whenever he acts "de iure" he almost always acts as God.[11]

The pope exercised divine authority and presided over a consistory that reached from heaven to earth. Pope Innocent III might have thoroughly relished Hostiensis' rhetoric. One inexorable conclusion that one might draw from Hostiensis' commentary is that if pope's authority is divine, then his law must also be divine. This logical conclusion did not escape Hostiensis. Divine law is the "Ars artium" (Science of sciences) that comprises human and canon law. Roman law is divine because the emperors created the rules of procedure by divine inspiration. The emperor is the living law (*lex animata*) whom the Lord has given to men and to whom He has subjected the law. Canon law was also divine. Theology was the head of the Church, canon law the hand, and Roman law the feet. Sometimes the hand of the Church leads the head; sometimes the feet. Hostiensis did not create a new jurisprudence of law but outfitted traditional definitions with remarkable metaphors.

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[11] This paragraph and the following are based on Pennington 1993d, 48–75.

In one respect Hostiensis did break with previous jurisprudence. He insisted that canon law was a part of divine law and that the pope, as vicar of God, promulgated laws that should be considered divine. A similar metaphor for the secular prince circulated in canon law. When the prince issues laws, they are divinely promulgated through his mouth (*leges divinitus per ora principum promulgatae*).[12] This is true, concluded Hostiensis, only indistinctly. Only the pope could promulgate law divinely. "The pope, not the emperor, is the general vicar of Christ."

Hostiensis' most important and lasting contribution to the language of political thought was creating a new set of terms to describe sovereignty and the power of the prince. Ancient Roman jurisconsults introduced the jurists of the *Ius commune* to the basic language of sovereignty. The Roman jurisconsult Ulpian coined the most widely used definitions of the prince's authority: "What pleases the prince has the force of law [*Quod principi placuit vigorem legis habet*]" (Dig. 1.4.1) and "The prince is not bound by the law [*Princeps legibus solutus est*]" (Dig. 1.3.31). Twelfth-century jurists used these two maxims to establish two principles: That the prince can legislate and that he can change law. The jurists also expressed the concept of legislative sovereignty with the maxim "An equal cannot have authority over an equal [*Par in parem imperium non habet*]." This maxim expressed their conviction that a ruler could not bind his successor. No twelfth-century jurist permitted the prince to act or to legislate arbitrarily.

Roman jurists called the emperor's power to legislate, command, and judge "imperium" or "potestas." Ulpian wrote that the Roman people had transferred "imperium" to him (Dig. 1.14.1). Most medieval jurists thought that the people's bestowal of power on the prince could not be revoked. Borrowing from theologians' terminology describing the power of God, Hostiensis gave the pope a glorified new definition of his authority. The pope and God both ruled by a "potestas absoluta" and "potestas ordinata" (Courtenay 1990 and Moonan 1994). Since Hostiensis thought that the pope promulgated law divinely he followed the logic of his theory and concluded that terminology describing God's power should also apply to the pope. The pope was the first human being to wield divine power, but jurists soon bestowed "potestas absoluta" on secular princes.

Like Laurentius before him Hostiensis blazed a new path for the jurisprudence of sovereignty. He separated legal thought from primitive Germanic ideas of kingship that law was custom and that the king was bound by the law. With his "potestas ordinata" the pope had the authority to exercise jurisdiction over positive law; "Potestas absoluta" enabled the pope to exercise extraordinary authority and jurisdiction. With this exalted power the pope

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[12] From a letter dated 874 of Pope John VIII (872–882) written to the German Emperor Louis II (850–875) and included in Gratian's Decretum (C.16 q.3 c.17).

could legislate in matters touching the law of marriage and vows, areas of the law that had been considered a part of divine law and outside papal jurisdiction.

"Potestas absoluta et ordinata" played a very important role in the future. Later jurists defined the prince's power with these terms and sometimes concluded that the prince could take the rights of subjects away when he exercised his absolute power. In combination with Laurentius' "pro ratione voluntas" the jurist used "potestas absoluta" to create more a sophisticated jurisprudence of sovereignty. The prince was the source of law. He was not always limited by reason or morality. Under some conditions the prince could promulgate laws that were contrary to reason. He could sometimes act contrary to the precepts of justice. The jurists justified these aberrations of political behavior by citing two other norms: the common good of society and great necessity. By the later Middle Ages the jurists could defend the prince who acted contrary to law, custom, and who violated individual private rights. Hostiensis laid the foundations for later jurists to embrace an absolutism that ignored the traditional rights of subjects.

Alongside this development, however, medieval "constitutionalism" remained an important strand of thought in medieval jurisprudence. Many jurists were reluctant to adopt a theory of absolutism that did not limit the prince's power. Their first line of defense against arbitrary power was the rights of subjects. From early in the twelfth century jurists asserted that property rights were founded on precepts of natural law or the "ius gentium." Further, the prince did not have the right to alienate his lands. When the jurists argued that property rights were grounded in natural law they could claim that the prince could not violate those rights since he had no jurisdiction or sovereignty over natural law. It was a higher law that transcended human positive law.

The alienation of property was a key issue for the jurists. From the late twelfth century they realized that rights that attached to the office of the prince and not to his person belong not to the prince but to the common good. A forged document drew their attention to the issue. In the so-called Donation of Constantine the emperor was purported to have bestowed his imperial rights on the Church. The document was a forgery of the late eighth or early ninth century.[13] The text of the forgery was included into canon law by Gratian. In the early thirteenth century Pope Honorius III (1216–1227) issued a decretal letter, *Intellecto*, in which he asserted that the King of Hungary could not alienate royal lands that injured his kingdom and the crown. Honorius laid down the doctrine of inalienability in canon law. The canonists immediately expanded the principle to the ruler of the Church. A little later the Roman lawyer Accursius argued that the Donation of Constantine was not

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[13] The standard treatment is Maffei 1969.

a binding document. The emperor, he concluded, could not injure the rights of future emperors (*par in parem imperium non habet*). The jurists established the doctrine of inalienability of rights as being a significant limitation on monarchical power.

The jurists of the *Ius commune* created another powerful limitation on the power of the prince: the "ratio iuris" (reason of law) and the norms of law.[14] They coined legal maxims that were taken from Roman law, early medieval legal thought, and from their own analysis. These maxims were touchstones of justice and equity in law and can be found in their commentaries, the decretals of popes, and in secular laws. They provided benchmarks with which the acts of the prince could be judged.[15]

In the thirteenth century the jurists began to discuss monarchical power and authority and create a jurisprudence based on contemporary secular law. The Emperor Frederick II (1212–1250) issued the first royal code of laws in 1231, the Constitutions of Melfi, also known as the *Liber Augustalis*. In the prologue to his codification he (or, more likely, his jurists) discussed the authority of the prince.[16] The prince is an instrument of God. His duty is to establish laws, to promote justice, and to correct and chastise wrongdoers.[17]

Thus we, whom God has elevated beyond any hope man might have cherished to the pinnacle of the Roman empire and to the singular honor of all other kingdoms at the right hand of divine power, desire to render to God a two fold payment for the talents given to us, out of reverence for Jesus Christ, from whom we have received all we have.

In a later constitution Frederick contrasted his authority with that of the ancient Roman emperors.

It is not without great forethought and well-considered planning that the Quirites [Roman citizens] conferred the right and *imperium* of establishing laws on the Roman prince through the *Lex regia*. Thus the source of justice might have its source from the same person that defends justice: he who ruled through the authority established by Caesar.

The descriptions of authority that we find in the *Liber Augustalis* resonate and reverberate with the doctrine that we have described in the *Ius commune*.

The pope was a ruler who claimed universal jurisdiction over all Christendom. When Frederick Barbarossa asked Martinus and Bulgarus if he were the

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[14] Ennio Cortese's book, *La norma giuridica: Spunti teorici nel diritto comune classico* (1962), remains the most detailed and important discussion of norms in the *Ius commune*.

[15] I discuss the origins of several key norms, "Necessitas legem non habet," "Quod omnes tangit" and "Ne crimina remaneant impunita," in Pennington 2000, 350–4.

[16] The most thorough discussion of Frederick's codification and its influence remains Calasso 1957.

[17] These texts and my discussion of the *Liber Augustalis* are based on Pennington 1988, 441–2.

Lord of the World, the jurists ignored the obvious meaning of the question: Did the emperor hold a higher office and exercise jurisdiction over kings? Martinus and Bulgarus interpreted Frederick's question as being whether he could take the rights of his subjects away. Could the emperor take away the property rights of his subjects?

Frederick Barbarossa may have had more interest in his status in relationship to other kings than the jurists did. The English King Henry II wrote a letter to Frederick in which he bestowed the title "Dominus mundi" on the emperor. Henry might have thought that he pleased the emperor with that title. However, modern historians have found the question whether this indicated that the emperor claimed superiority over kings much more interesting than the medieval jurists did. They have argued that the national monarchies could not be sovereign until they had been freed from the yoke of imperial universal jurisdiction. Yet this question did not seem to be important to the jurists. None of them broached the question whether the emperor exercised *de facto* or *de iure* sovereignty over other European Christian princes.

Some modern historians have asserted that the "state" did not exist in medieval Europe because local authorities and kings could not exist under the umbrella of these two universal rulers. How could states exist when jurists argued that the pope had the right to judge princes and their subjects in a number of different matters? A true state could not exist if its sovereignty was not untrammeled. Some jurists did present an exalted view of imperial power and prerogatives. The canonist Johannes Teutonicus wrote in a gloss that eventually became a part of the Ordinary Gloss of canon law:

The emperor is over all kings […] and all nations are under him […] for he is the Lord of the World […] even Jews are under him […] and all provinces are under him […] unless they can show themselves to be exempt […] none of the kings can have prescribed an exemption, since prescription has no place in this […] A kingdom cannot have been exempted from imperial authority, since it would be without a head […] and that would be monstrous. Rather all must give the emperor tribute, unless they are exempt […] All things are in the power of the emperor. (Johannes Teutonicus, *Apparatus glossarum in Compilationem tertiam*, 84–5)[18]

If Johannes had been in the emperor's company at Roncaglia, Frederick would have probably given him a stable of horses for his glorious summary of imperial authority.

Not all the jurists found Johannes' glorification of imperial power edifying. Sometimes their reaction was clearly based upon a nascent sense of national identity. In reaction to Johannes' gloss the canonist Vincentius Hispanus (ca. 1180–1248) would have none of his exaltation of Teutonic virtue (see Post 1964, 487–93).

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[18] On this passage and what follows see Pennington 1993d, 32–7.

Make exception, Johannes Teutonicus, of the Spanish, who are exempt by the law itself. They did not admit Charlemagne and his peers into their lands. I, Vincentius, say that the Germans lost their *imperium* through their own stupidity. […] Only the Spanish have obtained *imperium* through their virtue.

Oddly, Pope Innocent III (1198–1216) was the first to state categorically that the kings were independent of the emperor. Innocent issued a decretal letter, *Per venerabilem* in 1202 in which he stated that the king of France recognized no superior in temporal affairs. Innocent's decretal was included into canonical collections, and the jurists began to analyze Innocent's comment. Some concluded that kings were subject to the emperor *de iure*, but not *de facto*. Others argued that kings were entirely independent and free from imperial jurisdiction. They created a maxim to describe royal independence: "Rex in regno suo imperator est" ("A king is emperor in his kingdom"). By the middle of the thirteenth century this maxim had become a commonplace.

Modern historians have argued about the maxim's precise meaning. Some historians have pointed out the maxim is not an unambiguous justification for royal independence from universal imperial rule. In the period from ca. 1270–1330, the jurists of the *Ius commune* used the maxim to argue three different points. First, that every king is independent of the emperor and that every king can exercise the same prerogatives within his kingdom as the emperor. The king was, in other words, the prince of Roman law. Second, that the kings were not independent of the emperor but that they did have the same prerogatives as the emperor in their kingdoms. Third, that kings were independent of the emperor but could not exercise the same prerogatives as the emperor in their kingdoms. They were not princes. Whatever the case, by the late Middle Ages the jurists had created a sophisticated and nuanced jurisprudence of sovereignty that shaped the political arguments of early modern European thinkers.

4.2. The Importance of Feudal Law for Political Institutions in Medieval Society

The jurists created a vigorous doctrine of kingship and defined the relationship of the prince and the law with originality and creativity. Roman law provided them with their terminology, but Christian conceptions of justice and duty shaped their thought. Feudal law revealed to the jurists another side of the prince's nature: his limitations and duties to his subjects.

Feudal law was born in an age without jurists. It was customary, unformed, and existed in a wide variety of texts. There was no pervasive paradigm of European feudal law as there was for Germanic customary law. The sources from all over Europe in the period from 800 to 1000 contain the terms lord (*dominus*), vassal (*vassalus*), fief (*beneficium* or *feudum*). Later jurists would carefully analyze and define their meaning. Historians, however, have learned that when they find these

words in early medieval sources, they cannot simply assume that these words describe the lord and vassal relationship that is often found in later feudal law: that a lord had bestowed a fief upon a vassal in return for military service. The vassal had sworn homage and fealty to the lord. This was the basis of the feudal contract and established a complicated set of norms that governed the prince's duties and obligations to his vassals. It also defined a vassal's duties to his lord.[19]

The word that described a fief in the tenth and eleventh centuries (sometimes, but not always, a piece of land) was generally *beneficium*. Although the word, "feudum," from which the English word *feudal* is derived, is found in early sources, it replaces *beneficium* as the standard word to describe a fief only during the twelfth and thirteenth centuries. For political relationships the feudal contract had several advantages over a contract in Roman law. The feudal contract could be inherited and broken for political reasons. When a feudal contract passed from one generation to another, the bonds that the contract cemented were renewed in public ceremonies that reminded each party of its obligations, rights, and duties.

Law can exist without jurisprudence, but law without jurisprudence creates ambiguities that can be destructive of the public good. Unless there are jurists to interpret the law, the rights of persons and institutions are never secure. Although Roman and canon law had standard *libri legales* there were no books or standard texts for feudal law. By the twelfth century feudal customary law began to define far more than just the relationship between the lord and his vassal. Secular and ecclesiastical institutions were involved in legal relationships that were feudal. Clerics took oaths to their bishops; kings took oaths to the pope. There was a need for written law and a jurisprudence that would provide an interpretive tool to understand what these oaths meant. Monasteries had feudal ties with persons and institutions. Bishops had feudal relationships with men and towns. Towns had feudal contracts with other towns and persons. The nobility had traditional feudal contracts with vassals but also with towns. Feudalism, in other words, had become much more than the contract that regulated and defined a relationship between a "lord" and a "vassal." Lawyers who studied the new *Ius commune* at Bologna and other schools realized that texts were needed to make feudal law a discipline.

The books of feudal law were finally formed in the second half of the twelfth century out of disparate sources. Obertus de Orto, a judge in Milan, sent his son Anselm to study law in Bologna ca. 1154 and 1158. Anselm reported to his father that no one in Bologna was teaching feudal law. Obertus

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[19] "Feudalism" and feudal law have been the subject of much controversy in the recent literature. Reynolds (1994) has published a broad, interpretive work whose discussion and analysis is sometimes exasperatingly unclear. Shorter and less tendentious articles by various authors on feudal law and institutions in France, Germany, England, Kingdom of Sicily, Scandinavia, Poland and Bohemia, Hungary, Iberian peninsula, and the Latin East and institutions can be found in the *Lexikon des Mittelalters* 5 (1991, 1807–25).

wrote two letters to his son (that may be rhetorical conceits) in which he de-
scribed the law of fiefs in the courts of Milan. It may be that the primary rea-
son why Obertus wrote these two letters was that a compilation of customary
law was being undertaken by the commune of Milan. Whatever the case may
have been, Obertus' two letters became the core of a set of texts for the study
of feudal law. Obertus put his letters together with other writings on feudal
law, especially from Lombard law, to create the first of three "recensions" of
the *Liber feudorum* (in the manuscripts the book was named *Libri feudorum,
Liber usus feudorum, Consuetudines feudorum*, and *Constitutiones feudorum*).
The manuscripts of the first two recensions reveal that there was no standard
text. Some of them included eleventh- and twelfth-century imperial statutes of
the emperors Conrad II, Lothair II, and Frederick I. The second recension of-
ten contained a letter of Fulbert of Chartres and additional imperial statutes.
Typical of legal works in the second half of the twelfth century the jurists and
scribes added texts of various types (*extravagantes*) to this recension. Almost
no two manuscripts contain exactly the same text. The jurists did not com-
ment on the *Liber feudorum* of Obertus. The text's entry into the schools must
have been slow. The first jurist to write a commentary on the *Liber* was the
jurist of Roman law, Pillius. He wrote his commentary on the second recen-
sion of the *Liber feudorum* ca. 1192–1200, probably while he was a judge in
Modena. He did not comment on all parts of the *Liber*. Although the letter of
Fulbert of Chartres circulated in many manuscripts he did not gloss it. He left
the interpretation of Fulbert's letter to the canonists (Gratian had placed the
letter in his Decretum). This fact illustrates an important point about feudal
law in the twelfth century: Its jurisprudence was not the product of one area
of law but of the *Ius commune*.[20]

The final or vulgate recension of the *Liber feudorum* added constitutions
of the Emperor Frederick II, the letter of Fulbert, and other texts that had
circulated in the twelfth-century manuscripts. Accursius, the most important
jurist of Roman law in the thirteenth century, wrote a commentary based on
Pillius' in the 1220's. It may have gone through several recensions, not all by
Accursius. Accursius also wrote the Ordinary Gloss on the rest of Roman law
at about the same time. His authority and the importance of feudal law com-
bined to give *Liber feudorum* with Accursius' Ordinary Gloss a permanent
place in the *Ius commune*.[21]

Feudal relationships generated legal problems and court cases in the later
Middle Ages. The earliest reports of court cases involving feudal disputes and

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[20] On the formation of the *libri feudorum* see Weimar 1990, who has examined the
development of the *Liber feudorum* with admirable thoroughness, and a short summary in
Weimar 1991, 1943–4. See also Di Renzo Villata 2000.

[21] The *Liber* and the Ordinary Gloss have been reprinted with a commentary by Mario
Montorzi (1991).

using feudal law date to the late twelfth century, and their numbers proliferate during the thirteenth and fourteenth centuries. As the number of these cases increased, jurists were called upon to write *consilia* (legal briefs) to solve them. I shall discuss some of the *consilia* that jurists wrote for feudal legal problems in Section 4.4 below.

The feudal oath was the central element in the feudal relationship. The use of oaths to cement political and social relationships was not peculiar to European society. In almost all human societies oaths embedded in rituals created social bonds.[22] The feudal oath of fidelity that a vassal took to his lord is almost emblematic of the popular and scholarly image of medieval social relationships. In the *Liber consuetudinum Mediolani*, a compilation of the customs of Milan that was promulgated in 1216, there is an oath that the vassal should take to his lord:

I, [James], swear that henceforward I will be a faithful man or vassal to my lord. I will not lay open to another what he has entrusted to me in the name of fealty to [my lord's] injury. (Besta and Barni 1949, *Liber consuetudinum Mediolani anni MCCXVI*, 121; my translation)[23]

The text of the custom enigmatically concludes: "Many things are contained in these words, which are difficult to insert here" (ibid.).[24] The sentence would have been puzzling, however, only to those who did not know feudal law. A thirteenth-century jurist reading this text would have recognized immediately that the compilers of the customs were referring to a letter of Bishop Fulbert of Chartres (1006–1028).

By 1216 Fulbert's letter had been the most important legal text for defining the oath of fealty for a century. The letter's origins lie in a request that William V, count of Poitou and duke of Aquitaine, made to Fulbert asking for advice about the obligations and duties that a vassal owed to a lord. William had troubled relationships with his vassals. In his reply (ca. 1020) Fulbert wrote a short treatise on feudal relationships that circulated fairly widely.[25] Gratian treated clerical oaths in Causa 22 and placed it in the earliest version of his Decretum (C. 22 q.5 c.18) ca. 1124. It became a *locus classicus* for canonistic discussions of the feudal contract and the relationship of the lord and vassal.[26]

Fulbert told William that when a vassal took an oath to his lord six things were understood to be contained in it, whether explicitly expressed or not: to

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[22] There are a very good set of articles on the oath in *Lexikon des Mittelalters* 3 (1986) 1673–92.

[23] "Iuro ego N. quod amodo fidelis ero homo sive vasallus domino meo. Nec illud quod mihi nomine fidelitatis commiserit, alii ad eius detrimentum pandam."

[24] "In quibus verbis multa continentur, quae his inserere difficile est."

[25] On the history and the sources of the letters see the fundamental Giordanengo 1992a and 1992b.

[26] See Pennington 2004a upon which these paragraphs on feudal law are based.

keep his lord safe, to protect him from harm, to preserve the lord's justice, to prevent damage to his possessions, and to not prevent the lord from carrying out his duties. Fulbert alleged that he got this list from written authorities, but his exact source, if there were one, has never been discovered. For the next four centuries jurists cited Fulbert's list of obligations and duties as being central to the feudal oath of fealty. The text in Gratian's Decretum reads:

The form of fidelity that anyone may owe to a lord and vice versa, may be found in a letter of Bishop Fulbert.

   Since I was asked to write something about the oath of fidelity, I have noted for you these things which follow from the authority of books. Whoever swears fidelity to his lord should always have six things in mind: safe, secure, honest, useful, easy, possible. Safe, namely, that he not injure his lord with his own body. Secure that he not injure his secret interests or his defenses through which his lord can be secure. Honest that he not injure his lord's justice or in other matters which seem to pertain to his honesty. Useful that he not injure his lord's possessions. Easy or possible, that that the good, which his lord could easily do, he would make difficult, and that what would be possible, he would make impossible for his lord. A faithful man should pay heed to these examples.

   It is not sufficient to abstain from evil, unless he may do what is good. It remains that he faithfully gives his lord counsel and help in the aforementioned matters, if he wishes to be worthy of his benefice [fief] and safe in the fidelity that he has sworn. The lord also ought to render his duty to his faithful man in all things. If he does not, he may be thought of as faithless, just as he, who in consenting or telling lies will be perfidious and perjurious. (Gratian, *Decretum*, St. Gall Stiftsbibliothek 673, fol. 158 [C. 22 q.5 c.18]; my translation)

Huguccio (ca. 1190) was the first canonist to give Fulbert's letter a close reading and an extended commentary. At the beginning of his commentary he noted that many things are tacitly understood when someone took an oath, vow, or made a promise.[27] He then discussed each of the six tacit obligations listed by Fulbert. The first, that a vassal could not injure his lord's body without cause or unjustly, Huguccio interpreted through the norms of the jurisprudence of the *Ius commune*. If there were cause or reason (*causa et ratio*) a vassal could injure his lord. These two norms (cause and reason) were, perhaps, the most powerful in medieval jurisprudence and generally trumped any rule, law, custom, or statute.[28] If the vassal were a judge or a magistrate—a social situation into which only urban vassals would probably fall—he could punish his lord if he merited it.[29] According to Huguccio, Fulbert's principle

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   [27] Admont 7, fol. 316r (A), Klagenfurt, Stiftsbibliothek XXIX.a.3, fol. 221r (Kl), Klosterneuburg, Stiftsbibl. 89, fol. 273v (K), Lons-le-Saunier, Archives departementales du Jura, 16, fol. 304v (L), Vat. lat. 2280, fol. 242v (V): s.v. *in memoria*: "Cum iurat et postquam iurauit ut ea obseruet que etsi in tali iuramento non exprimerentur, tamen intelliguntur ibi comprehendi. Multa enim in sacramentis et uotis et promissis etiam non expressa subintelliguntur, arg. supra eodem q.ii. Ne quis (c.14), Beatus (c.5)."

   [28] The comprehensive and detailed study of *causa* and *ratio* in the *Ius commune* remains Cortese 1962, especially vol. 1, chaps. 3–7.

   [29] Admont 7, fol. 316r (A), Klagenfurt, Stiftsbibliothek XXIX.a.3, fol. 221r (Kl), Klosterneuburg, Stiftsbibl. 89, fol. 273v (K), Lons-le-Saunier, Archives departementales du

of honesty encompassed two points. A vassal could not injure a lord's justice or his women. First he observed that according to customary law, even though it was unwritten, a vassal could not testify against his lord in court. Again he looked to other norms of the *Ius commune* to qualify the prohibition. If justice and cause demanded it, the vassal could testify against him because his lord had no justice.[30] Then Huguccio turned to sexual morality. Perhaps he had read too many French *lais* about the sexual misconduct of the nobility. He defined vassal's honesty as not violating the women who surrounded his lord. The lord's wife and daughter were, understandably, not to be touched. Huguccio, however, also included any other woman in the lord's home. In sum, the vassal should not do any dishonest thing in his lord's house.[31] This may be another example of Huguccio's propensity to embrace moral absolutes, what later canonists called the "rigor of Huguccio" (see Müller 1994, 137). In any case, Johannes Teutonicus placed only his lord's wife and daughter outside a vassal's predatory field.[32]

Huguccio then turned to the vassal's obligation to give his lord counsel and help. His first point was the vassal was only obligated to give aid when the lord needed help in licit and honest affairs. If the lord was injured, a vassal should respond immediately, but within reasonable limits (*moderatio inculpatae tutelae*) and with attention to the admonition of Saint Paul in Romans 12:19: An enemy should be treated with respect; disarm malice with kindness.[33] The concept of justifiable defense that Huguccio cited (*moderatio inculpatae tutelae*) is taken from Roman law and slowly penetrated the *Ius commune* during the twelfth century.[34] It was typical of twelfth-century jurists

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Jura, 16, fol. 304v (L), Vat. lat. 2280, fol. 242v (V): s.v. *in corpore suo*:"iniuste, sine causa uel ratione, nam si uassalus de corpore suo iniuste sine causa uel ratione, nam si vassallus est iudex uel officialis bene potest punire dominum in corpore si meruerit (meruit K) sic puniri."

[30] Ibid., s.v. *de iustitia*: "Numquid non potest ferre testimonium contra dominum et quidem iure consuetudinis, licet non sit scriptum receptum est ut uassallus non audiatur contra dominum, sicut nec libertus auditur (auditus L) contra patronum. Mihi tamen uidetur quod ubi dominus fouet iniustam causam et hoc scit uassalus, licite potest ferre testimonium contra eum, nec tunc in dampnum erit ei de sua iustitia quod ibi dominus non habet iustitiam cum iniustam foueat causam."

[31] Ibid., s.v. *ad honestatem*: "Non ergo debet accedere ad uxorem eius uel filiam uel aliam feminam in domo eius manentem uel alia inhonestas in domo facere, arg. de pen. di.v. Consideret (c.1)."

[32] Johannes Teutonicus to C.22 q.5 c.18, s.v. *ad honestatem* (printed in many fifteenth– and sixteenth–century editions of Gratian's Decretum).

[33] Ibid., s.v. *consilium et auxilium*: "In licitis et honestis. Puta pro defensione sui et suarum rerum licite, tamen iniuriam enim illatam domino licet uassallo incontinenti repellere cum moderatione tamen inculpate tutele, et non contra preceptum Apostoli scilicet quo dicitur 'Non uos defendentes,' etc. (Romans 12.19)."

[34] Its earliest appearance seems to be in a statute of Diocletian and Maximianus from A.D. 290 that entered the Justinianian Code at 8.4.1. The concept is cited by John of Salisbury, Alanus de Insulis (of Lille), and can be found in the letters of Pope Innocent III, e.g. (Po. 595).

to combine Roman and Biblical precepts to establish a legal norm (Helmholz 1996, 149–51, 164–5, 314–5, 344–7).

Huguccio then turned to the question of the moral and legal responsibility of a vassal to defend others. Nobody should sin for himself or for another, he reflected, but at the same time everyone has an obligation to defend anyone from injury.[35] Huguccio's presumption is completely contrary to the norms of British and American common law where the doctrine of nonfeasance has held sway. Under the influence of the *Ius commune*, however, most civil law legal systems have a duty-to-assist other persons in their jurisprudence.[36] Huguccio had no doubt that every man had a duty to assist another person. For him the duty to render aid reflected in some way a person's commitment to the common good. If everyone has an obligation to render assistance, he wondered, what is the legal force behind the vassal's duty to help his lord? How would a vassal's duty to a lord differ from his duty to aid others in distress?[37] He found the answer to that question in a conciliar canon: "I say that the vassal is bound to his lord [by the oath of fealty] more willingly and more specially—just as in the conciliar canon from the Council of Toledo in Gratian's Decretum. That canon stated that oaths to uphold promises make the breaking of those promises to be feared."[38] Huguccio quoted a phrase from the canon and expected that his readers would supply the complete quotation: "Specific promises are more to be feared than general vows."[39] Later canonists followed Huguccio's lead and insisted that a vassal must do more than just defend his lord when he is in danger. Alanus Anglicus (ca. 1200) formulated a lapidarian expression of the precept: "Although the oath of fealty does not expressly state it, a vassal should give heed that his lord may not be injured."[40] Tancred (ca. 1215) and following him, Bernardus Parmensis in the Ordinary Gloss (ca. 1245), insisted that persons who swore oaths of faithfulness and obedience must not only protect them from attack and harm but

[35] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Non enim pro se uel pro alio debet quis peccare, set eodem modo tenetur iniuriam repellere a quolibet."

[36] Feldbrugge 1966, 630–1, states that "however, Roman law and scholastic thought were unfavorably inclined toward legislation of this nature […] since World War II […] almost every new criminal code contains a failure-to-rescue provision." He seems unaware of the deep historical roots of the idea in the ethical and moral world of the *Ius commune*.

[37] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid ergo prodest iuramentum uassalli domino?"

[38] Ibid.: "Dico (quod *add.* KL) propensius et specialius ei tenetur et 'Solet plus timeri etc.' (D. 23 c.6)."

[39] Gratian, D. 23 c.6: "Solet enim plus timeri quod singulariter pollicetur quam quod generali sponsione concluditur."

[40] Alanus Anglicus to C. 22 q.5 c.18, Seo de Urgel 113 (2009), fol. 131r–131v, s.v. *consilium et auxilium*: "Operam enim dare debet ne domino noceatur, licet hoc in fidelitate non exprimatur, arg. ff. locati, In lege (D. 19.2.29 [27]), ff. de uerborum oblig. In illa stipulatione (D. 45.1.50)."

they were bound to protect them from plots and dangerous plans.[41] This principle remained an important part of the oath of fidelity.[42] It also shaped the mores of political action in European society for centuries.

A vassal's obligation to aid his lord militarily was Huguccio's next topic. He formulates several hypotheticals. What if the lord wishes to seize his fief or his property? The vassal must not obey his lord unless his lord's war were just. The vassal is not bound to obey if his lord moved against him personally.[43] What, however, if his lord attacked his son or his father? Huguccio's answer relied on juridical distinctions drawn for the family, kin, and vassals of excommunicates.[44] The vassal did not have to obey his lord when his son and father lived under the same roof. Otherwise, if his lord were waging a just war against his family, the vassal was held to obey his lord.[45]

Huguccio addressed his final topic at the end of his commentary. Fulbert's letter laid down the norms that a vassal must adhere to if he were worthy of his fief. Huguccio noted that the other side of the coin was that if a vassal showed himself unworthy by violating these principles, his lord could take his fief (*beneficium*) away from him.[46] He then linked the rules governing a vassal's loss of his fief to the ecclesiastical sphere. What if, he asked, a cleric offered legal protection and assistance (*patrocinium*) in a case against his own church or against his bishop to whom he has sworn fidelity? Huguccio thought that the cleric should lose his benefice unless he was pursuing his own legal case or that of his own people. He concluded by noting that while their lords are excommunicated, those who have sworn oaths of loyalty are not compelled to obey them.[47]

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[41] Tancred to 1 Comp. 1.4.20(17)(X 2.24.4) (Ego episcopus), Admont, Stiftsbibliothek 22, fol. 3v, Alba Iulia, Bibl. Batthyaneum II.5, fol. 3v, s.v. *Non ero neque in consilio neque in facto ut uitam perdat aut membrum*: "Hoc non sufficit, immo 'oppertet eum ubicumque senserit dominum periclitantem ad prohibendas insidias, occurrere,' C. quibus ut indignis l.ult. (Cod. 6.35.12) xxii. q.v. De forma, ubi suppletur quod hic de fidelitate minus dicitur e contrario." The quotation that Tancred took from Justinian's Code is from a statute of Justinian in 532 A.D. in which the emperor clarified for Pope John II the meaning of "sub eodem tecto" in the Senatusconsultum Silanianum that punished slaves for not defending their masters.

[42] Cf. Ryan 1998, 219, who thinks Fulbert's letter that Tancred cited has "virtually nothing in common with the contents of the decretal *Ego episcopus*." As Huguccio's commentary has made clear, the two letters both deal with the duty of a person who has sworn fealty to a lord to protect him from harm.

[43] Huguccio to C. 22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid si uelit inuadere illum uel res eius? In hoc casu non ei tenetur obedire nisi iustum esset bellum. Item non tenetur ei contra se."

[44] See Vodola 1986, 63–4, 101–5, for a discussion of the canon that Huguccio cited.

[45] Huguccio to C. 22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Set numquid contra filium uel patrem tenetur ei obedire? Non si in una domo simul morantur, arg. xi. q.iii. Quoniam multos (c.103). Alias si iustum esset bellum contra filium uel patrem forte tenetur ei obedire."

[46] Ibid., s.v. *si beneficio dignus*: "Innuitur a contrario quod si dignum se non exhibeat in supradictis, dominus potest ei auferre ei beneficium."

[47] Ibid., s.v. *si beneficio dignus*: "Quid ergo si clericus prestiterit patrocinium contra

The canonists who wrote after Huguccio expanded upon the jurisprudence that he created for the oath of fealty. Importing another definition from Roman jurisprudence, Alanus commented that a vassal who betrayed his lord fell under the Roman law of treason.[48] The jurists liked that connection. A number of them repeated it.[49] Johannes Teutonicus copied this gloss into his Ordinary Gloss, where it remained a principle of feudal law until the end of feudalism. The Roman law of treason specified the death penalty for the crime. The canonists transformed a traitor from a perjurer into a capital felon. It was no small step. They marked a stage in the development of law in which the rights and honor of the lord became identified with much more than another person. He became the symbol of the territorial state. The *Chansons de geste* had long emphasized a warrior's faithlessness as the ultimate betrayal ("trahison") in a world of honor (Nelson 1988, 223, 236–7). At the beginning of the thirteenth century the jurists of the *Ius commune* followed the poets.[50]

Fulbert of Chartres' letter in Gratian's Decretum provided the canonists with an opportunity to enter directly into the feudal world. The church had long used oaths of obedience, and, as we have seen, the canonists saw the ecclesiastical oath as an institution governed by the same rules as the secular feudal oath of fealty. Canon law continued to contribute to the jurisprudence of feudal law after the twelfth century but did not produce any legislation as central as Fulbert's letter. Pope Innocent III (1198–1216) touched upon feudal matters in many of his letters. Two of them entered the official collections of canon law under the title *De feudis*. One of these letters shaped feudal law in an important area: the right of a lord to bestow a fief when he had taken an oath not to bestow a fief on someone else. Feudal law in the later Middle Ages found its jurisprudential roots in Roman law, canon law and in secular legal systems. This cross-fertilization accounts for the vigor of feudal law until the end of the sixteenth century. As we shall see in part four of this chapter the jurists used the norms of feudal law to define political relationships until the seventeenth century.

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ecclesiam suam uel episcopum cui fecit fidelitatem? Meretur amittere beneficium nisi in propria causa et forte suorum, arg. di. xcvi. Si imperator (c.11) et not. quod dum domini sunt excommunicati non coguntur fideles obseruare ista, ut xv. q.vi. Nos sanctorum iuratos (c.4)."

[48] Alanus Anglicus to C. 22 q.5 c.18, Seo de Urgel, Biblioteca del Cabildo 113 (2009), fol. 131r–131v, s.v. *in damnum domino suo*: "Forte litteras uel nuntium hostibus eius mittendo, quod qui fecerit reus maiestatis erit, ff. ad leg. Iul. ma. l.i., iii. (Dig. 48.4.1, 3)."

[49] *Ecce vicit leo* to C.22 q.5 c.18, Paris, Bibl. nat. lat. nouv. acq. 1576, fol. 232r (P), Sankt Florian, Stiftsbibliothek XI.605, fol. 85r–85v (S), s.v. *de munitionibus*: "idest de castris suis que ei commisit que si rediderit (tradiderit P) inimicis reus est lese maiestatis, ut ff. ad leg. Iul. ma. l.iii."

[50] For later jurists' treatment of rebellious vassals and treason, see Pennington 1993d, 96–7, 169–70, 195, 259.

4.3. The Jurisprudence of Secular and Ecclesiastical Institutions

Monarchy was the primary form of government in the Middle Ages. Although the Italian city states established republican forms of government in the twelfth and thirteenth centuries, by the fifteenth century most had reverted back to princes. As most medieval jurists, Dante was convinced that monarchy was the proper and legitimate form of government when he wrote *Monarchia* in the early fourteenth century. The legitimacy of monarchies was rarely seriously questioned.[51]

It was typical for medieval people to think of themselves as belonging to various collective organizations. Some of these groups were local. Others occupied a larger stage. In the twelfth century the jurists began to define the relationships of these organizations to one another and the legal rights of the individuals within them. The jurists named these organizations, secular and ecclesiastical, "universitates." A good example of their thought is the canon law of ecclesiastical corporations, especially the legal status of the bishop to his chapter. The cathedral chapter constituted a "universitas" or corporation that represented the local church. By the thirteenth century, a bishop's power and the exercise of his office were limited by a new conception of the bishop's juridical personality that embraced the joint authority of the bishop and the cathedral chapter (Gaudemet 1979b, 55–102; Gaudemet 1979a). The jurists of the *Ius commune* used rules and norms that the canonists developed and applied them to other corporate entities from secular guilds to church councils and, in part, even to the Roman curia.[52]

In the period between ca. 1180 and 1300, the canonists generally concurred that the bishop and chapter together constituted the basic administrative unit of the diocese. The canons of the cathedral chapter usurped the rights of the lower clergy and spoke for the people and the clergy of the entire diocese. To describe this new juridical entity, the canonists worked out corporate theories. In canonistic thought, the relationship of the bishop and the cathedral chapter divides into three categories: What the bishop can do in the name of the church; what the chapter may do without the consent of the bishop; and what the bishop and chapter ought to do together. The canonists limited both the bishop and chapter considerably in what they could do alone. Normally, a bishop and chapter had to alienate property, to confer benefices and offices, to ordain priests and to judge cases in the episcopal court jointly. One canonist, Johannes Teutonicus, asked whether the consent of the parish priests was necessary in some cases, a question that may have still been asked by recalcitrant conservatives in the early thirteenth century. In the late twelfth century Huguccio and Laurentius thought that in some cases parish

[51] One notable exception was Ptolemy of Lucca; see Blythe 1997, and 1992, 92–117. On the controversy that revolved around Dante's *Monarchia*, see Cassell 2004.
[52] For what follows see Pennington 2002.

priests ought to be consulted by the bishop and chapter. Johannes and the later canonists were not, however, inclined to let the parish priests share in the governance of the diocese.[53]

One can detect attitudes about the proper governance of the *universitas* in a letter from late in the pontificate of Innocent III. The bishop of Vic, Guillem, ruled over a difficult and contentious cathedral chapter. While on a visit to Rome he must have complained to the pope about his canons and pleaded for papal intercession to support episcopal authority. Innocent issued a decretal letter to the bishop in which he laid down the general rule that reasonable enactments of the cathedral chapter should not be thwarted by a few canons. He mandated that when the bishop and the "potior et sanior" members of the chapter ordained something, unless the smaller part of the chapter's objections were supported by reason, the will of the bishop and chapter should prevail. Innocent concluded that if the canons refused to come to the chapter's meeting or if they left during disputes, their absence could not be considered grounds for appealing the decisions of the bishop and *maior et sanior pars* of the chapter (Freedman and Masnou 2002, 118). Since the beginning of the twelfth century jurists and popes had used the phrase "maior et sanior pars" to describe the members of a monastic community or of a cathedral chapter who had the legal right to rule and to consent to measures established by the *universitas* (corporation) with the abbot or the bishop. As we will see below, the same terminology began to be used to describe a majority of electors when secular corporations chose their rectors. These principles of reason and of majority became cornerstones of the jurists' political thought in the microcosm and the macrocosm.

If the participation of the entire clergy in the governance of the diocese represented the old world, we can discern a tension in canonistic electoral theory between the rights of the local cathedral chapter and the expanding claims of papal power. Electoral theory is important for understanding the relationship of the person of the bishop and his territorial domain, his diocese. The bishop gradually became a stranger in a strange land during the thirteenth and fourteenth centuries. They were no longer native sons who were born in the local diocese; they were not even committed to a stable, monogamous marriage with their churches. We can see in the jurisprudence of thirteenth-century electoral theory a reflection of the old and new order of episcopal power.

The key to the canonists' views on election is their opinions on what constitutes a numerical majority in an election. The canonists adopted the term *maior et sanior pars* from the rules governing the governance of the *universitas* and used it to describe a majority of the electors in a corporation. The *maior et sanior pars* was not a numerical majority—although it could be—but was

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[53] Johannes Teutonicus to C. 12 q.2 c.73 v. *consensum*.

the most important part of the corporate body. Geoffrey Barraclough (1933–1934, 277) has written optimistically that "it is striking enough that the church had the wisdom to reject the democratic fallacy of 'counting heads,' and to attempt an estimate of the intelligence and enlightened good faith of the voters." What may have seemed wise in the context of 1934 does not resonate as well today. Nonetheless, Barraclough's generalization is off the mark for the Middle Ages because the Church did not have the wisdom to reject fallacious democratic reasoning until the first half of the thirteenth century. The double papal election of 1159 had demonstrated to the canonists the dangers of rejecting democracy. In this case the papacy and the canonists quickly concluded that elections based on the principle of majority rule avoided schism and fostered stability. At the Third Lateran Council of 1179 a conciliar canon established the rule that a pope-elect must have the consent of a two-thirds majority in the college of cardinals.

In the early thirteenth century Johannes Teutonicus propounded a theory of election that advocated a clear numerical majority in ecclesiastical elections.[54] But Johannes was one of the last of the Old School. His theory was rejected by Bernardus Parmensis and, most importantly, by Pope Gregory IX, who stated in the decretal, *Ecclesia vestra*, that the *maior et sanior pars* must not always be a numerical majority.[55] The most interesting aspect of Johannes' electoral theory is his view on electing an "extraneus," a foreigner, as bishop. As we have seen, until the twelfth and thirteenth centuries, most bishops were local men. Although Johannes was a fervent democrat in ecclesiastical elections, he was a committed oligarch when an ecclesiastical corporation wanted to elect an *extraneus*. Johannes may have been reacting to the increasing presence of foreign shepherds among local flocks. He believed that an *extraneus* could be elected only if there were no worthy candidates to be found locally, and only if the election were almost unanimous. Almost unanimous in this case means all but one. If the chapter elected an *extraneus* but two canons favored a local candidate, the two canons become the *maior et sanior pars* no matter how many canons voted for the other candidate.[56]

Johannes' electoral theory reflects his conviction that foreign shepherds should not care for local flocks. He believed that an *extraneus* could be elected only with great difficulty, and he believed that even the pope could not provide a bishop to an unwilling flock. Johannes firmly rejected the constitutional structure of the church that was slowly evolving during his lifetime.

Johannes Teutonicus was in a minority. All the later canonists agreed that the cathedral chapter could elect an *extraneus* if the bishop had been elected

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[54] Johannes Teutonicus to 3 Comp. 1.6.7 (X 1.6.22) v. *solum plures* (ed. Pennington 1981) 59.

[55] X 1.6.57.

[56] Johannes Teutonicus to 4th Lat. c.23 (4 Comp. 1.3.8 [X 1.6.41]) v. *ipsius quidem ecclesie* (ed. García y García 1981) 210–1.

by the *maior et sanior pars*. Johannes, the old conservative, conceived of the church as being a local institution, serving local interests, and controlled by local people. In general his ecclesiology emphasized local rights. His idea that local rights were important remained an important element in the medieval *Ius commune*.

Johannes' jurisprudence of the norms governing the "universitas" was kept alive in the secular sphere if not in the ecclesiastical, especially in the governments and guilds of the Italian cities (Black 1984, 44–65). By the later Middle Ages the church was moving steadily towards centralization. The bishop became a prince who ruled over his territory. His territory was more clearly defined than it had ever been, and his jurisdiction over institutions within his territory was more vigorously defined than it had ever been. The bishop, however, became less a creature of the diocese. The bonds between a bishop and his flock were attenuated and the legal relationship between them diminished. By the later Middle Ages, when bishops were often appointed by papal mandates rather than elected by local cathedral chapters, the metaphors that had traditionally described the *bonus pastor* often became more and more rhetorical embellishments rather than descriptions of reality. The diocese and the bishopric were the forerunners of the modern state. Bishops, like secular princes, exercised increasingly centralized jurisdiction over their territories. What happened within the structure of the Church was replicated in the Italian city states where despotism in one form or another replaced communal, corporate rule.

In ancient Roman law a "universitas" was an association of persons in both public and private law. The jurists used the terminology of Roman law to describe medieval corporations but expanded the scope and importance of corporate theory in law. Already in the twelfth century an anonymous jurist called "the people" a "universitas." Although the norms governing corporate governance were established by the jurists of the *Ius commune*, these norms were modified by local custom and practice. From their thorough analyses of corporate law, the jurists created a doctrine of community. In particular, they defined the relationship of the head of the corporation to the members. What was particularly significant was that corporate theory began as a juridical description of small groups but became a tool that the jurists used to describe the secular state and the entire Church. As Brian Tierney has put it:

The decretalists themselves, down to Innocent IV, certainly had no intention of providing arguments for critics of papal sovereignty; but in fact a more detailed analysis of the structure of corporate groups was precisely what was necessary to provide a sounder juristic basis for the rather vague "constitutional" ideas that occur in decretist works. (Tierney 1955, 96)[57]

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[57] See the discussion of corporate theory in the enlarged edition of Tierney's seminal book: Tierney 1998, 95–118.

Consequently, for a complete understanding of the political thought of the medieval jurists one must delve into their corporate theory of representation.

The bishop's position in the "universitas" could be seen from two perspectives. He could be seen as the sole ruler of the cathedral chapter and the diocese. He could also be seen as a ruler who shared his authority with the canons of his chapter. In the early twelfth century Gratian had put some texts into his Decretum that stipulated that a bishop must govern with the consent of his chapter. In later canonical collections there were two titles that touched directly upon the relationship of the bishop and his chapter: "Concerning those things which a prelate may do without the consent of his chapter" and "Concerning those things which a greater part of the chapter may do."[58] A number of papal decretals under these two titles established the norms by which cathedral chapters should be governed. The bishop could not alienate ecclesiastical property, he could not unilaterally grant clerics benefices and stipends, he could not make any important decision without the advice and consent of his chapter. After reading these papal decretals no canonist could have possibly concluded that a bishop could act alone without his chapter in all matters.

A much more authoritarian bishop was attractive for a few canonists. Pope Innocent IV (1243–1254) was a distinguished canonist. He rejected the model of corporate governance supported by most canonists (Tierney 1955, 107; 1998, 99; see also Melloni 1990).

Rectors who govern corporations have jurisdiction and not the corporations. Some say that a corporation may exercise jurisdiction without rectors. I do not believe it.

Innocent put forward a simple, absolutist theory of corporate government that may have been influenced by Roman law. The Roman jurists did not have a sophisticated theory of corporations. The model of rulership that emerges in the texts of Roman law is that the people bestow authority on the prince but do share in his rule.

When the canonists described corporate governance within the Church they developed a much more complex model of governance. The question of authority arose most often when ecclesiastical property and stipends were at issue or when the corporation was involved in litigation. The jurists created rules that dictated when a rector and the members of a corporation should act together or when they could or should act separately. They constructed a model of rulership in which sometimes the rector would sit in the corporation and act with the members and when the rector would act independently. Hostiensis, for example, argued that when the bishop sat in his chapter as a canon, his vote was equal to that of any other member of the chapter. If, however, the chapter was negligent, then the bishop could exercise all the rights of the chapter alone. If the bishop acted in matters that touched his preroga-

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[58] Titles in the *Compilationes antiquae* and the Decretals of Gregory IX, X 3.10 and 3.11.

tives, his vote was equal to that of all the members of the chapter. In this case, the bishop could make decisions with the vote of one other canon. The bishop and one other canon constituted the "maior et sanior pars." Hostiensis was careful to protect the rights of the church against negligent prelates and canons. When the "status ecclesiae" (state of the church) was at stake, that is, fundamental rights and duties that touched the well-being and prerogatives of the entire local church (*universitas*), the bishop must have the consent of the *maior et sanior pars* of the entire chapter.

Medieval political thought was influenced in two ways by the jurists' theory of corporations. The jurists described the complicated relationship between the prince and his subjects in the macrocosm with the same rules that they applied to the microcosm. Their ideas about the proper relationship of the bishop to his chapter, the pope and his curia, the prince and his court, and, ultimately, the prince in his representative assembly (council or parliament) became fundamental norms for a just and proper doctrine of rulership.

The juridical personality of the group quite naturally became a concern of the jurists. During the late twelfth and early thirteenth centuries the jurists began to realize that the corporation could be represented by a delegate that they named a procurator, *syndicus*, or *advocatus*. This delegated official could defend the interests of the *universitas* in court. His actions, the jurists decided, would be binding on the members of the *universitas*. The delegate possessed "plena potestas" or "generalis et libera administratio." With proper mandates the official could sell, buy, lease, make contracts as well as represent the interests of the *universitas* in court. The jurists placed two significant limitations on the exercise of his authority. He could not exceed the terms of his mandate and could not injure the rights of the *universitas* (Tierney 1998, 108–17).[59]

The jurisprudence of representation entered European society through the Church. As we have seen, the cathedral chapter became a larger part of ecclesiastical governance in the early thirteenth century. When Pope Innocent III convened the Fourth Lateran Council he instructed bishops to inform members of their chapters to "send good men to the council."[60] After having been summoned to the Fourth Lateran Council, chapters were not shy about asserting their new rights to participate in councils. They quickly claimed the right to be represented by procurators and through those representatives to be voting members of local synods.

Archbishops and bishops were not universally happy with the claims of chapters, and the issue was joined. In 1216 the archbishop of Sens refused to

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[59] See Pennington 2004d on which the following paragraphs are based.

[60] See the excellent discussion of Kay 2002, 97–101. Until relatively late the canonical tradition attributed *Etsi membra* to Pope Innocent III; see Kemp 1961, 43–4, who also gives a brief survey of canonistic commentary on the decretal.

permit representatives of the cathedral chapters in Sens to participate in a provincial synod. The chapters appealed to Pope Honorius III. The pope supported their claim decisively in the decretal *Etsi membra*. The pope's arenga was a stirring sermon on the corporate body of the Church and the interdependence of each individual member.

Although the members of Christ's body, which is the Church, do not have one function but diverse ones […] He placed each person in that body so that the members constitute one body. The eye cannot say to the hand "I don't need what you do" or the head to the feet, "you aren't necessary to me." Still more important, the weaker members of the body seem to be necessary.[61]

Honorius instructed the archbishop and his suffragans that he intentionally wrote his arenga for them as an admonition. The archbishop had denied representatives (*procuratores*) of the cathedral chapters admittance to comprovincial councils in which matters touching their interests were treated. The archbishop had defended his position in a letter to the pope.[62] Honorius, however, did not find his reasons, whatever they were, convincing.

We and our brothers the cardinals were in complete agreement that those chapters ought to be invited to such councils and their nuncios [*nuntii*] ought to be admitted to the business of the council, especially those about matters that are known to concern the chapters.[63]

Further, Honorius concluded, the archbishop should follow the mandate of this decision in the future. "When the head gives the members their due the body shall not experience the ravages of schism but will remain whole in the unity of love."[64]

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[61] Translation based on Richard Kay's (2002): "Etsi membra corporis Christi, quod est ecclesia, non omnia unum actum habeant set diuersos […] prout vouluit in ipso corpore posuit unumquodque, ipsa tamen membra efficiunt unum corpus, ita quod non potest oculus dicere manui 'tua opera non indgeo' aut caput pedibus 'non estis michi mecessarii,' set multomagis que videntur membra corporis infirmiora esse necessaria sunt." Kay edits and translates the original text cited above on pages 541–3. Tancred included it in *Compilatio quinta* 3.8.1 and Raymond de Peñafort placed it in the Gregoriana, X 3.10.10.

[62] Ibid.: "Hec idcirco premisimus quia provincie vestre capitula cathedralia suam ad nos querimoniam transmiserunt quod vos procuratores ipsorum nuper ad comprovinciale concilium convocatos ad tractatum vestrum admittere noluistis, licet nonnulla soleant in huiusmodi tractari conciliis que ad ipsa noscuntur capitula pertinere […] et intellectis nichilmominus litteris quas nobis super eodem curastis negotio destinare."

[63] Ibid.: "Nobis et eisdem fratribus nostris concorditer visum fuit ut ipsa capitula ad huiusmodi concilia invitari debeant et eorum nuntii ad tractatus admitti, maxime super illis que capitula ipsa contingere dinoscuntur."

[64] Ibid.: "Ideoque volumus et presentium vobis auctoritate mandamus quatinus id decetero sine disceptatione servetis […] Quatinus capite membris et membris capiti digna vicissitudine obsequentibus corpus scismatis detrimenta non sentiat set connexum in caritatis unitate consistat."

Richard Kay calls Honorius' decretal "a landmark in the development of representative government."[65] He is absolutely right. The canonists immediately expanded the right to attend provincial councils by representatives of cathedral chapters into a more general right of persons whose interests were affected by the business of the council. During the thirteenth century provincial synods included representatives of cathedral chapters as a matter of course (see Condorelli 2003). *Etsi membra* became a key legal justification that persons and ecclesiastical institutions had the right to send representatives to assemblies that dealt with issues pertaining to their interests and that they, through their representatives, had the right to consent to new legislation. The decretal also justified claims of representation in the secular realm.

Honorius III's decretal became a part of canon law, and canonists commented on it for the next four centuries. Shortly after Honorius promulgated *Compilatio quinta* in 1225, Jacobus de Albenga alluded to the fundamental but unarticulated principle that lay at the heart of *Etsi membra*, a norm that was decisive when the pope and his cardinals decided to support the canons and not their archbishop and bishops.[66] Honorius, he wrote, embraced the right of cathedral chapters to participate in councils "because what touches them ought to be decided by them."[67] In the middle of the thirteenth century Bernardus Parmensis explicitly quoted the maxim in his Ordinary Gloss to the decretal that Jacobus alluded to: What touches all ought to be approved by all (*Quod omnes tangit ab omnibus approbari debet*).[68] Jurisprudential norms of the *Ius commune* were powerful tools for shaping institutions in medieval society. *Etsi membra* is a splendid example of how a legal principle could inform a judicial decision and regulate the rules governing the calling of a council. The logic of the decretal's argument could be understood as meaning that any council should invite persons who were not normally present in the deliberations of the council when it dealt with matters touching their interests. Jacobus de Albenga saw the logical implications of the decision and explained that although lay persons were not normally invited to church councils, if the issues that were to be decided by the council touched their interests, they too should be summoned. Such issues could be matters of faith and of marriage.[69]

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[65] Ibid., 538.

[66] Post 1964, 234–5, connected "Quod omnes tangit" and *Etsi membra* more almost sixty years ago.

[67] Jacobus de Albenga to 5 Comp. 3.8.1, s.v. *contingere* (Admont, Stiftsbibliothek 22, fol. 295r and Cordoba, Biblioteca de Cabildo 10, fol. 327v): "quia quod eos tangit ab eis comprobari debet, ut liiii. di. c.i. et lxvi. c.i et viii. q.i. Licet (c.15)."

[68] Bernardus Parmensis to X 3.10.10, s.v. *contingere*: "Et merito quia quod omnes tangit ab omnibus debet comprobari."

[69] Jacobus de Albenga to 5 Comp. 3.8.1, s.v. *contingere* (Admont, Stiftsbibliothek 22, fol. 295r): "Laici vero huiusmodi conciliis interesse non debent nisi specialiter uocarentur, ut lxiii.

Not every pope was as sympathetic to Honorius III's conception of the Church as an interdependent body with mutual rights. As Brian Tierney has noted many years ago:

The canonists' tendency to personify the individual churches, to discuss problems of their internal structure in terms of anthropomorphic imagery, did not influence the actual content of their doctrines so much as is sometimes supposed. The head-and-body metaphor could so easily be adapted to support any constitutional solution. (Tierney 1998, 95)

Tierney demonstrated that Pope Innocent IV, who was also a great jurist, had a unitary vision of the corporation, the papacy, and the Church, and he conceived each as "regimen unius personae."[70] When Innocent came to gloss Honorius' *Etsi membra* he did not want to deal with a text with which he had so little sympathy. "Repeat what we have said in our commentary above on the canon of the Fourth Lateran Council *Grave*."[71] And if his readers or listeners did as they were instructed they learned again the pope's uncompromising "strict authoritarianism" (Tierney 1998, 98). In *Grave* Pope Innocent III had decreed that prelates and chapters who are convicted of bestowing ecclesiastical benefices upon unworthy candidates more than two times should lose their authority to confer benefices. Provincial councils were to investigate and judge these cases.[72] First Innocent distinguished between episcopal and provincial councils. He noted that only bishops of the province must be summoned to the provincial council that would judge these cases of irresponsible electors but that abbots, priests, and the clergy of the city should be summoned to episcopal councils.[73] Innocent conceded that cathedral chapters ought to be summoned to provincial councils when matters that concerned them were treated. Otherwise they were not admitted to provincial councils unless it were a matter of "honesty" or "counsel."[74] Advice, however, was very

Adrianus, in fine (c.2) uel nisi specialiter tractaretur causa fidei, ut xcvi. di. Vbinam (c.4) uel nisi tractaretur de matrimonio, tunc enim cum tales cause eos tangant possunt interesse, ut xxxv. q.v. Ad sedem (c.2). jac." Bernardus repeated Joacobus' gloss in his Ordinary Gloss.

[70] Tierney discusses the corporate theories of Innocent and Hostiensis in Tierney 1998, 98–108. See also the important study Melloni 1990, especially 165.

[71] Innocent IV, *Commentaria* to X 3.10.10, s.v. *capitula* (Venice 1570) 460: "Repete quod diximus supra de prebend. cap. Grave (X 3.5.29)."

[72] X 5.5.29 (4th Lat. c.30). Norman Tanner has provided an English translation of the conciliar canon in Tanner 1990, 1: 249. A French translation can be found in Duval et al. 1994.

[73] Innocent IV, *Commentaria* to X 3.10.10, s.v. *provinciali concilio*: "Ad hoc concilium de necessitate vocandi sunt episcopi et non alii […] et hoc de archiepiscopali sive provinciali concilio. Ad episcopale autem concilium vocandi sunt abbates, sacerdotes, et omnem clerum civitatis et dioecesis convocare debet episcopus. Sunt autem episcopi sic congregati in concilio provinciali loco ordinarii in omnibus causis quae vertuntur inter episcopos et clericos […] Immo plus dicimus quod iidem episcopi sine concilio sunt ut iudices oridinarii in omnibus causis clericorum quae ad concilium referuntur."

[74] Ibid.: "Capitula autem cathedralium ecclesiarum tunc sunt vocanda ad concilium

different from a legal right to participate in conciliar affairs. Innocent's silences speak even more clearly about his conception of the Church than what he does say. He completely ignores the earlier discussions about the rights of laymen, cathedral chapters, and others to participate in councils. His vision of his Church did not include the idea of representation and consent in the body politic. Later jurists, however, accepted the right of corporations to be represented in church councils and secular assemblies. Pope Innocent IV's views remained in abeyance until the sixteenth century, when "strict authoritarianism" had a revival in the ecclesiastical and secular realms.

As the jurists explored and developed a jurisprudence that governed the *universitas*, they created norms that regulated the political life of medieval and early modern society. Perhaps the most significant norm that they established was "Quod omnes tangit, ab omnibus approbari debet" ("What touches all ought to be approved by all"). Consent and counsel of the members of the *universitas*, whether it was a guild or a kingdom, became a cornerstone of juristic thought. As time went on, these principles were applied to the pope and the college of cardinals, the bishop and his chapter, the rector and his *universitas*, and the prince and his realm. The doctrines of corporate governance became a counterweight to the old and still powerful theories of monarchical rule. They were not just alternatives to monarchical rule. The jurists argued that these norms of corporate governance should be integrated into princely government. They were a powerful force for limiting the power of the prince. The jurists, more than any other group, created "medieval constitutionalism" (Pennington 1988, 444–53).

4.4. The Jurists' Role in Shaping the Political Thought from 1250 to 1500

If one were to look at only the commentaries of the jurists on Roman, canon, and feudal law of the late Middle Ages one would be struck by the great continuities in political thought from the twelfth to the seventeenth century. Many of the issues that the jurists discussed were the same. They discussed the authority of the prince and the rights of his subjects. They continued to elaborate and expand their understanding of corporate theory. They responded to contemporary political institutions. The city states of Italy made them consider the relationship of small local states to the empire and national monarchies. Many questions were raised about the juridical structures of these new states. Could they legislate? Did their rulers have the same author-

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provinciale cum de eorum factis agitur, infra de his quae fiunt a praelat. sine consen. cap. c. finali (*Etsi membra*, X 3.10.10), alias non nisi de honestate vel propter consilium (concilium ed.), 63 (64 ed.) dist. c. Obeuntibus (c.35)." D. 63 c.35 was canon 28 of the Second Lateran Council, in which cathedral chapters were ordered to take into account the advice (*consilium*) of "religiosi viri" and not to exclude them from their deliberations.

ity as the prince? Did the rights and duties of the rectors and members of the *universitas* apply to them? In the end the jurists answered yes to all these questions.[75]

The jurists developed their political ideas when they explicated the texts of ancient Roman, canon, and feudal law. Although they commented on these texts with a constant eye on the structures and institutions of the societies in which they lived—their jurisprudence was not desiccated academic law— their greatest contributions to political thought came as recognized experts from whom European rulers sought legal advice (Pennington1994a and 1994b; see the remarks of Walther 1998, 245–7). The literary vehicle that they used in their work was the *consilium*.[76] Jurists wrote *consilia* (legal briefs) at the request of clients who ranged from princes to city states, from judges to litigants (Ascheri 1980). They presented the facts of the case and then solved it after having presented both sides of the argument. For some jurists writing *consilia* became a significant source of income. One of the most prolific jurists, Baldus de Ubaldis, was said to have earned 15,000 ducats just for writing *consilia* on testamentary substitutions (Pennington 1997a, 52). Early the jurists also began complaining about the pay they received for their efforts. Between 1246 and 1312, Jacobus Palliarensis of Siena wrote a *consilium* for Amadoris de San Gimignano and noted that "his small payment was transformed into a large stipend by the affection of the judge who had sent it to him" (Chiantini 1997, 30). As we have seen, princes sought the opinions of jurists in the twelfth century. Although Frederick Barbarossa did not, it seems, ask Martinus and Bulgarus for a written opinion about the breadth of his political authority, the emperor's question reflected the rising status and importance of jurists for medieval politics.

By the end of the twelfth century we have some evidence that judges turned to jurists for professional opinions about legal cases. The earliest examples demonstrate that judges and institutions turned to famous teachers of law for opinions.[77] These teachers applied their expert knowledge and the principles and norms of the *Ius commune* to questions of law and questions of fact in the local courts.[78] This process demonstrates that the jurisprudence of the *Ius commune* transcended the practices of the local courts and at the same time was seen as a set of authoritative norms that served as guideposts and benchmarks for legal practice. The jurists could not know the customary and statutory law of all the local jurisdictions where they were asked for opinions,

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[75] For the political thought of the late medieval jurists see Canning 1988, 454–76 and Cortese 1995, 2: 247–52.

[76] On the *consilia* see Bellomo 2000, 465–70 and passim; the essays in Baumgärtner 1995 and Ascheri, Baumgärtner, and Kirshner 1999 are also valuable.

[77] See the two examples from the early thirteenth century printed in Pennington 1990.

[78] Chris Wickham (2003, 210–1) discusses two *consilia* of unknown jurists in the 1190's.

but their knowledge of the norms of the *Ius commune* was seen as indispensable for bringing local practice into concordance with universal principles of justice, reason, and equity.[79]

We have a singular example of Pope Innocent III issuing a *consilium* in a political matter in 1203. The tract was included in his register and later in collections of canon law. In his register it has the rubric *Consilium quod dominus papa Innocentius misit crucesignatis sine bulla*. No other letter in the entire corpus of Innocent's letters was labeled a *consilium*. That fact is remarkable for two reasons. As we have seen, a *consilium* had become the term designating a response written by jurists to a particular legal problem. A *consilium* was neither a judgment nor a binding statement of law on those for whom it was written. Even if written by the pope, a *consilium* was advisory and not normative. The rubric stated that Innocent sent the *consilium* to the crusaders "sine bulla." Consequently, his *consilium* was not a definitive judgment, and we may understand "sine bulla" as underlining that point.

The contents of the *consilium* reflect Innocent's attitudes and motivations at a key moment during the Fourth Crusade in which the Venetians and the crusaders were taking a course that would lead them to the walls of Constantinople. It was a military and political decision that Innocent opposed but that he could not hope to control. Innocent permitted the crusaders to sail with the Venetians until they reached the lands of the Saracens or the province of Jerusalem. Innocent compared the Venetians to an excommunicated *paterfamilias*. In the *Ius commune* a *paterfamilias* was the head of a family. Family members did not have to shun contact with him if he were excommunicated. Innocent warned the crusader, however, not to wage war with the Venetians after they reached the lands of the Saracens unless the Venetians had been absolved. When the crusaders received Innocent's *consilium* they certainly understood that the pope issued it for political purposes with the help of his curial jurists. The document warned them indirectly not to attack Constantinople and not to collaborate with the Venetians after they reached the Holy Land. This is the first political *consilium* that we have in the *Ius commune*.[80] Bulgarus and Martinus gave Frederick Barbarossa oral opinions. From the early thirteenth century the jurists regularly responded to questions in writing.

Although Innocent III's *consilium* was a precocious anticipation of a rich genre, it differed from the *consilia* that began to flourish in the fourteenth

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[79] Julius Kirshner (1999, 108–30) discusses whether the *consilia* had the authority of precedents in law courts. He cites various opinions about whether *consilia* had precedential authority, whether the medieval *Ius commune* had a concept of precedent, and surveys earlier literature.

[80] On this *consilium* see Pennington 2000. The jurists at this time would not, however, have drawn a clear distinction between Innocent's admonitions contained in a papal letter and this one that is labeled a *consilium*.

century in significant ways. First, and most importantly, the *consilia* were written by private, professional jurists. They were not written by princes and popes. If rulers who possessed legislative and judicial power and authority had written *consilia* their purpose would have been obviated. They would have been considered legislation rather than advice. In the case of Innocent's *consilium* the canonists included it into the collections of canon law. They transformed the document from advisory to depositive. *Consilia* were primarily meant to be advisory. Their purpose was to counsel the great and the small about the juridical norms that were significant for a particular legal problem. *Consilia* became an important literary genre because they were written by jurists who attempted to persuade, not to mandate. They became authoritative because of the prestige of the jurist who wrote them but even more from the power and force of the arguments contained in them. The reason of the law was far more important than the status of the jurists.

The second half of the thirteenth century marked the beginning of the Age of *Consilia* that would last for the rest of the Middle Ages. By the sixteenth century *consilia* rivaled commentaries as the most important genre of legal writing. We do not have copious numbers of *consilia* from the period from 1250 to 1300. In this period, jurists wrote *consilia* for private clients. They were paid modest amounts. Their *consilia* became part of the court archives. They did not circulate. They were not collected (see Chiantini 1995, with citations to recent literature).

The jurists were soon asked to render opinions on delicate political matters. An early example is a *consilium* written by Jacobus de Belvisio (ca. 1270–1335) and Jacobus de Butrigariis (ca. 1274–1347) who were doctors of civil law at the Law School in Bologna. Belvisio had been an advisor to the Angevin king who ruled the Kingdom of Naples, Charles II of Anjou († 1309). Sometime around 1309 both jurists were asked to write a *consilium* about the feudal rights and obligations contained in a feudal contract. The podestà of Castello di Monte, in the territory of San Gimignano, had sworn a feudal oath to the representative of Charles I of Anjou, the King of Naples (1225–1285), John Britaud, the Vicar of Tuscany. Forty years later the jurists were asked to define the terms of the contract between the Angevin king and the Castello and its men (*universitas et homines castri Montis*).[81] This relationship between a prince and a city is a splendid example how the obligations of feudal law and concepts of representation in canon law melded together in medieval society.

The two jurists began with a prologue in which they indicated their purpose. A *consilium* demands justice and truth. Justice means that rights should be granted to everyone. Truth means that God guides them to seek the truth in law and in rights. The *universitas* and its heirs had sworn an oath of fealty and homage to the king and his heirs. The jurists saw their task as exploring

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[81] Mario Ascheri has printed this *consilium* in Ascheri 1985, 77–80.

what this act had meant in the *Ius commune*. To define what a vassal's obligations were from having sworn the feudal oath, they cited texts and jurisprudence from canon law.

The question remained, however, what the obligations of a person who swore a feudal oath were if he were not a vassal, courtier (*domesticus*), or *familiaris regis* (a special dignity at the Angevin court) and if he were not placed under the perpetual and continual jurisdiction of the king. The feudal contract stated that the men were to "defend and preserve royal property to the best of their ability against all other communes [*universitates*] and persons." However, the jurists did not think that their obligations extended beyond the borders of Tuscany.[82] Nonetheless, the vassals were obligated to wage war against the enemies of the king in Tuscany if the king waged war there. The jurists insisted that vassals were not bound to the terms of the contract and do not have a duty to serve their lord beyond reasonable jurisdictional limitations established by written documents.[83] Furthermore, the "bonus dominus" must protect and preserve the rights and property of his vassals. They concluded by stating unequivocally that the rights in the feudal contracts could not be prescribed.

Jacobus Belvisio and de Butrigariis used the norms and principles taken from canon, Roman, and feudal law to interpret the feudal contract concluded forty years earlier. They repeated several times the six key concepts for understanding a feudal contract: *incolume, tutum, honestum, utile, facile, et possibile* (uninjured, safe, honest, useful, easy, and possible). These concepts were not taken from Roman or feudal law. As we saw in section two, they were contained in a letter of Fulbert, bishop of Chartres († 1028), in which he had defined the obligations of the vow of fealty. That chapter of Gratian's Decretum had become the locus classicus for discussions of the feudal contract. The two jurists also used corporate law to understand the relationship between the feudal lord and his subjects. As in the case of Castello di Monte, procurators with full power (*plena potestas*) could bind the *universitas* not only in the present but also in the future. Oaths of fealty bound corporations as firmly as they bound persons. At the end of their *consilium* the jurists noted how much they were paid for their work: eight gold Florins.[84]

One of the first jurists to produce a collection of his *consilia* was Oldradus de Ponte. He was a professor of law and advocate in the Roman curia in Avignon. He was born in Lodi and died sometime after 1337, probably in Avi-

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[82] Ibid., 79: "quod non teneantur extra Tusciam nisi comode et sine suis expensis et dampno facere possent."

[83] Ibid. Magnus Ryan has written an essay (Ryan 1998) in which he argues that the jurists did not understand the oath of fealty. He comes to this conclusion with only a superficial examination of the evidence. Much more satisfying is Giordanengo 1999, who presents an overview of the evidence that should be studied on this question.

[84] Eight Florins contained ca. 28 grams of gold (28.35 grams in one ounce).

gnon. Oldradus studied law in Bologna at the end of the thirteenth century. He was a layman, married with three sons, one of whom became a jurist. Lay canonists were not unusual in the fourteenth century. He entered the entourage of Cardinal Peter Colonna in 1297 for a short time, and later he taught law at the University of Padua until ca. 1310. He left Padua for the papal court in Avignon. Oldradus served as an auditor and judge in the Rota (papal judicial court) at Avignon. He may have also taught in the law school at the court in Avignon. From the evidence of his *consilia* Oldradus was the most important jurist at the papal court from ca. 1311 to 1337. An Englishman at the curia, Thomas Fastolf, wrote that Oldradus was still discussing cases with auditors in the Rota ca. 1337. That is the last certain notice we have of his life. He met Petrarch at Avignon, and the poet called him the most famous jurist of the age (McManus 1999, with complete bibliographical references).

His *consilia* dealt with a wide range of political problems. Many of them do not name litigants and do not describe a particular court case. They seem to have been written in response to legal questions that had been posed at the papal court in Avignon. He wrote *consilia* on the rights of non-Christians, Jews and Muslims. Although he thought that it was legal to wage war against Muslim's in Spain, he argued that when they lived peacefully in Christian society their rights should be protected (Oldradus de Ponte 1990). Oldradus' life and *consilia* illustrate the position that jurists had achieved in medieval society. Their opinions were sought and paid for. A knowledge of law was seen as a valuable tool for analyzing and solving political problems.

A conflict that arose between Emperor Henry VII (1309–1313) and King Robert of Naples (1309–1343) raised a number of complicated problems for the papal court, Oldradus de Ponte, and the jurists. Henry demanded Robert's support for his political plans in Northern Italy. After Robert had thwarted Henry's plans to be crowned emperor in St. Peter's, the two rulers became implacable enemies.[85]

Henry's conception of his office was as elevated as Frederick Barbarossa's. In a letter that he sent to the kings of Europe he declared that God had established him as the one prince to whom all men should be subject. The city of Rome was the seat of ecclesiastical and imperial power. Pope Clement V (1305–1314) entered the fray. He demanded that Henry promise not to invade Robert's kingdom and asked him to submit his dispute with Robert to papal arbitration. In 1312 Henry broke with Robert and issued a public denunciation of him. He accused Robert of treason and summoned him to the imperial court. He threatened that he would proceed against Robert even if the king did not appear in his court.

A number of jurists wrote tracts that defended Henry's actions. Others wrote tracts and *consilia* in support of Robert (Pennington 1993d, 172–8).

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[85] See Pennington 1993d, 165–71 for this paragraph and what follows.

Clement V turned to the most distinguished jurist in his curia, Oldradus de Ponte, and asked him to write two *consilia* on the legal issues of the dispute (ibid., 179–83). In the first, Oldradus dealt almost exclusively with the question of due process. He posed a series of questions about the legitimacy of Henry's summons of Robert to his court. Is a summons issued to a place where a defendant has notorious enemies invalid? If so, is a subsequent trial and judgment also invalid? Oldradus argued that two considerations must be taken into account when examining a summons: the "execution of intent" and the manner through which the summons is brought. The execution of intent is the defendant's knowledge of the summons and his ability to defend himself. This element was a principle of the *Ius commune* and cannot be omitted. Oldradus observed that the right of self-defense is granted to everyone in extrajudicial matters by natural law, and, consequently, a person has the right to defend himself by natural law. There can be no defense without knowledge. If the prince would render a judgment without all necessary knowledge, he would take a defense away from a man that is granted by natural law. This is also a principle of the *Ius commune*, concluded Oldradus, and the prince may not violate it. A summons is the means by which knowledge is brought to the court. The means by which a summons is delivered is not established by natural law. A summons can be delivered by a nuncio, letter, or edict. The means are regulated by positive law, and the prince can, therefore, summon anyone as he wishes.

In the second *consilium* Oldradus grappled with the other issue raised by the dispute: Did the emperor exercise jurisdiction over other kings and over the king of Sicily? He drew his arguments from many sources and decisively rejected the emperor's claim that he was "dominus mundi." The Roman people could not have bestowed more power on the emperor than they themselves held. They did not exercise authority over other nations, therefore they could not make him lord of the world. God did not establish imperial rule since there were no scriptural justifications for it. He cited a metaphor of the bees that imperialists had used to justify the emperor's authority. "One bee who is king," he wrote, "is not king of all bees."

One feature of Oldradus's *consilium* is particularly striking: He did not deny the universality of the emperor by subjecting him to the pope. Oldradus was no hierocrat. His comment at the end of the *consilium* is telling. After reviewing the arguments of the canonists for the emperor's sovereignty, he concluded that their thought was a result of their nationalities: Johannes Teutonicus was a German, the others were Italians; therefore, as subjects of the emperor, they supported his claims of sovereignty. Only the Spanish opposed German claims. Oldradus's *consilium* became a focal point for considering the universal authority of the emperor in the later Middle Ages. Jurists and publicists incorporated it into their works, and supporters of the late medieval empire debated his thesis.

In these *consilia* Oldradus put forward two arguments to justify Robert of Naples' position. The first was new and had slowly evolved in the thought of the jurists during the previous fifty years. The prince could not deny a subject his right of due process when this right was grounded in natural law. The second argument was not as new and had been debated for two centuries. Oldradus maintained that the emperor was not "dominus mundi" and did not exercise jurisdiction outside the borders of the German empire.

Oldradus' *consilia* marked a new stage in the role of jurists in politics. In earlier political disputes the opinions of the jurists were ephemeral documents written for a particular dispute, at a particular time, in a particular place. Oldradus' *consilia*, however, were compiled into a collection that circulated widely in manuscript form. With the advent of printing they circulated even more universally. His *consilia* were reprinted numerous times in the fifteenth and sixteenth centuries. Oldradus' and the jurists' *consilia* were transformed from temporally limited legal arguments on particular cases to general political statements about the right order of medieval political institutions. They articulated the political principles developed by the jurists of the *Ius commune* and provided concrete examples of how these norms could be applied. Jurists read and cited Oldradus' *consilia* for the next three centuries. *Consilia* became one of the main vehicles for the circulation of the political principles of the *Ius commune*.

After Oldradus every major jurist who wrote *consilia* collected and published them. The great majority were devoted to the mundane affairs of everyday life: wills, dowries, contracts, and marriage cases. Jurists wrote *consilia* for individuals, corporations, and princes. When the jurists wrote *consilia* about the institutions of medieval society they often provided insights into the political life of communities that no other sources offer.

Bartolus of Sassoferrato (ca. 1313–1357) was one of the most revered jurists in Italy during the fourteenth century. His fame has endured until the present day. His career as a teacher and jurist was at the dawn of the Age of *Consilia*. He produced ca. 400 *consilia*, which are many fewer than the large numbers that later jurists would write. Although most of his *consilia* did not treat political problems, there is one that does offer an example of his political thought.

In ca. 1258 the commune of Spoleto granted some inhabitants of Arrone a place that came to be called Montefranco. The commune granted these men and their heirs liberty and a privileged legal status as free men (*libertas et franchisia*). They would have the same liberties as the citizens of Spoleto. In return the men promised the commune to build a fortification and to render annual services. These services probably included the defense of Spoleto. Montefranco was on a hill 400 meters high and was a splendid position to defend Spoleto from the South. The men of Montefranco lived there for forty years and never paid taxes to Spoleto. In the 1330's Montefranco and other

fortified towns surrounding Spoleto resisted the commune's attempts to integrate them into the political life of the commune. In particular, they resisted paying taxes. Montefranco asked Bartolus to write a *consilium* that was probably presented in the communal court of Spoleto. Bartolus posed two questions: Could Spoleto impose taxes on Montefranco and would their immunity from taxation extend to goods that they had subsequently acquired? (Bartolus 1529, *Consilium* 59, fol. 19r–19v).

Bartolus first broached the question of citizenship: Were the men of Montefranco citizens of Spoleto or inhabitants of the city? If Montefranco were part of the territory of Spoleto Bartolus had no doubt that any person who was born there was a citizen of the commune. Bartolus argued that the commune granted the men of Montefranco the right to build a fortification. When Spoleto concluded that pact the commune bestowed all rights of lordship and jurisdiction on Montefranco. Therefore, Montefranco was no longer a part of the territory of Spoleto. However, Bartolus then noted that this argument was not valid because it was a principle of the *Ius commune* that no one could alienate lordship and jurisdiction unless it were returned to a higher authority from whom they received it. Bartolus finished this part of his *consilium* by stating that Montefranco is part of the territory of Spoleto, but not simply a part. Spoleto's jurisdiction was limited by contracts, conditions, and privileges (*immunitates*) that were given to the men who established Montefranco.

What are the people of Montefranco obligated to? Bartolus quoted from the original agreement: They must serve in the army, take part in the parliament, "hold a friend for a friend" (Quintilianus, *Institutio oratoria*, 5.7), receive a podestà, and pay a certain amount annually. The original inhabitants of Montefranco promised that and no more. Bartolus cinched his argument with a norm from testamentary law: "Those things that one wants to be bound by make clear that in other things one does not want to be obligated." Since the men of Montefranco did not obligate themselves to pay taxes, Spoleto could not impose taxes on them. Bartolus noted that even though Spoleto promised to treat them as citizens one may not conclude that they had the authority to impose taxes on them as if they were citizens.[86] Bartolus asserted that when Spoleto promised to grant the men of Montefranco the same liberty and franchise as the citizens of Spoleto, the commune cannot now claim that they are obligated to more than what was contained in their contract. "It is certain," Bartolus concluded, "that the men of Montefranco believe with just reason that they are free from the burden of paying taxes. They have not paid taxes for forty years and more. They are free and cannot have new taxes imposed upon them."

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[86] For Bartolus' theory of citizenship see Kirshner 1973, especially 707–9. Kirshner does not discuss this *consilium*.

When Bartolus turned to the issue of whether the commune could tax the property acquired since the contract had been made, he turned to the jurisprudence of canon law. The canonists had argued that papal privileges that exempted monasteries from tithes could be interpreted as exempting future property from tithes (Pennington 1984, 162–77). Bartolus applied the same norms and cited the same papal decretals to argue that the new property of the men of Montefranco was also exempt. "The men of Montefranco are exempt, their heirs are exempt, the heirs of their heirs are exempt to infinity," trumpeted Bartolus at the end of the *consilium*.

Bartolus' *consilium* illustrates interplay of institutions and rights in medieval society. The jurists mediated and controlled relationships in society by bringing their knowledge and expertise to bear on political questions. The norms of the *Ius commune* provided them with the tools to analyze political problems. Their status as respected and valued experts made their opinions important in European courts and also in the schools. The case law in the *Ius commune* had been confined to the appellate decisions of the popes in canonical collections. By the end of the fourteenth century the proliferation of *consilia* provided secular and ecclesiastical courts with additional authoritative statements of law that were cited in the courts and pondered in the schools.

Baldus de Ubaldis (1327–1400) succeeded Bartolus as the most renowned European jurist. Baldus taught at the law schools of Perugia, Florence, and Padua. He began teaching at the university of Pavia in 1390. The powerful ruler of Milan, Giangaleazzo Visconti, had appointed him to the post, and he remained there until his death in 1400. When Giangaleazzo summoned him, he was the most distinguished Italian jurist of his time, and his fame had begun to rival that of his old teacher in Perugia, Bartolus (on his life and works, see Pennington 1997a).

Baldus wrote several thousand *consilia*, many of which have never been printed. After arriving in Pavia, he rendered several important political opinions for his new lord. Legal historians have long known of these *consilia* that Baldus composed for Giangaleazzo. In his sixteenth-century biography of Baldus, Diplovatatius mentioned *consilia* touching upon Giangaleazzo's affairs. In one of these *consilia*, "Rex Romanorum," Baldus discussed the legal questions revolving around Giangaleazzo's assumption of ducal authority in Lombardy. Baldus struggled with, and slowly began to resolve, the issues that touched fundamental legal prerogatives of the Visconti's *signoría*. "Rex Romanorum" offers us a rare glimpse of how a medieval jurist wrote, and then rewrote, a *consilium* treating a delicate political and legal problem.[87]

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[87] For the text of "Rex Romanorum" and a more detailed discussion of the textual tradition see Pennington 1992 (reprinted with many corrections: see Pennington 1993a). For Baldus' other "political *consilia*" dealing with other feudal problems of Giangaleazzo, see Pennington 1997b.

Baldus began to write "Rex Romanorum" in response to the objections of some Italians to the German Emperor Wenceslaus's bestowal of Lombardy on Giangaleazzo as general imperial vicar in 1395. With his privilege in hand, Giangaleazzo claimed the ducal title for himself and argued that all cities and lordships were now subject to him as their feudal lord. Wenceslaus had granted Giangaleazzo all imperial rights and lordships in Lombardy. He declared that he made this grant with certain knowledge and from his fullness of power, notwithstanding any concessions, constitutions, immunities, liberties, and privileges that anyone might possess.

The privilege raised several legal problems. It encroached upon the rights of imperial vassals in Lombardy and broke longstanding diplomatic ties between the emperor and local authorities. Some German princes claimed that the emperor did not have the authority to grant such a privilege because it injured the imperial patrimony.

Baldus raised two questions in the beginning of the first version of "Rex Romanorum." In the first, he asked whether a nobleman, who held a city not mentioned in the privilege, but whose city contained a part of a diocese that Wenceslaus had bestowed upon Giangaleazzo, must acknowledge Giangaleazzo's lordship. The second question was whether Wenceslaus had granted all jurisdiction and power to Giangaleazzo and whether he could recognize who was or who was not an imperial vassal according to his will.

In fact, if we may judge from the space that he allotted to each question, the second was of far greater importance to Baldus. He devoted only a few lines to the first question. In his earliest draft of the *consilium*, he concentrated on whether Wenceslaus could transfer all imperial jurisdiction and power to Giangaleazzo. If Giangaleazzo had seen this early version of the *consilium*, he might not have been pleased. Baldus restricted Wenceslaus's privilege considerably. Could the emperor order a vassal who holds him as his liege lord to swear allegiance to another lord? Baldus concluded that it would be dangerous to believe the emperor had this authority. Further, if one thought that Wenceslaus could revoke earlier privileges, then his successor might do exactly the same. Giangaleazzo and his children might lose everything that Wenceslaus had granted them. Echoing the constitutional provisions of the Magna Carta, he noted that if a feudal lord wronged his vassal, he should appeal to his peers at the lord's court. If this failed, he could wage war against his lord.

Baldus concluded his argument with a hope and a proverb. His hope was one that he would repeat several times later on in the *consilium*: That Giangaleazzo would listen to opinions that might not please him. In his proverb, Baldus quoted a King who wished that he would not bestow a larger but a more stable kingdom upon his son. Baldus's message to Giangaleazzo was clear: Treat the rights of imperial vassals in Lombardy with respect.

After discussing these issues, Baldus ended the first draft of the *consilium*

with a remark that seems an afterthought: All this is true if one presupposes that the emperor-elect can bestow such a privilege.

In the next stage of composition, Baldus tackled other problems connected with Giangaleazzo's ducal rights. In his first analysis, Baldus dealt with the emperor's authority to derogate or abrogate legislation: Could the emperor abrogate or derogate imperial privileges that his predecessors had bestowed upon the princes of Lombardy? Since then he read *consilia* of Christophorus and Paulus de Artionibus[88] in which they argued that the pope could neither revoke a fief nor change its terms to a vassal's detriment. These two *consilia* raised an issue that Baldus had not considered. When Wenceslaus had granted Giangaleazzo lordship over Lombardy, he broke his feudal contracts with his Lombard vassals. The jurists who commented on feudal law had developed a very sophisticated theory of how contracts bound the prince. By the end of the thirteenth century, most jurists agreed that the prince could not unilaterally break a contract with his vassal. Baldus sat down and added a short treatise on contracts. He argued that feudal contracts could only be changed with the consent of the parties. A contract with the prince could not be valid if its force were dependent on his will alone. The prince is a rational creature and ought to be subject to reason. He should not break contracts without cause. In doubtful matters, one should never assume that the prince wishes to dispossess someone of their rights.

Baldus continued his discussion of whether a prince could transfer an unwilling vassal to another lord. Drawing analogous examples from marriage, slave, and contract law, he argued both sides of the issue. In his conclusion, he did not resolve the issue but raised an entirely different question: Did Wenceslaus diminish imperial authority by granting his privilege? To this question, Baldus could give a confident, if somewhat irrelevant answer: No.

Baldus turned next to feudal oaths. Vassals in Giangaleazzo's lands are obligated to render the feudal oath to him, but if they refuse, they should lose only their fiefs and should not be punished further. In the end, however, Baldus again affirmed his position that the prince should not force an unwilling vassal to accept a new lord and made a plea that Giangaleazzo should understand that any right he wished to exercise must be based on equity. If not, it was unjust.

Baldus made another important addition to the first part of the *consilium* at the very end. A contract, he wrote, was different from a privilege. The prince is bound to observe a contract by natural law, and this is one case in which the prince is not presumed to have acted with cause if he were to break a contract. In his earlier statement on contracts, Baldus had not treated the issue of cause—a key element in the jurists' theory of contracts—nor had he based his argument on natural law. Now, however, he formulated a general statement on

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[88] The *consilium* of Christophorus Albericius in Bologna, Collegio di Spagna, 236, fol. 121v–124r may be the one that Baldus cited.

the inviolability of contracts with which almost every jurist between 1200 and 1700 might have agreed.

In this *consilium* Baldus touched upon almost every element of the jurists' ideas of princely authority.[89] The task was not an easy one for him. Although he had treated many of the questions separately in his commentaries on the *Corpus iuris civilis* and in his commentaries on canon and feudal law, when asked to analyze Giangaleazzo's rather straightforward problem, he did not find it easy to bring what he had written about the emperor together. Naturally, he was sensitive to the political dangers of giving Giangaleazzo an unsatisfactory answer. He had lived for most of his life in republican city states, and their constitutional problems undoubtedly attracted his attention more than those of the prince. He had written other *consilia* that touched upon the political problems in Europe, most notably on the Papal Schism of 1378.[90] His *consilia* treating the rights of Giangaleazzo and the Papal Schism underlines a fundamental point about the literary genre. The jurists were forced to synthesize the rich, fecund, and complex traditions of the *Ius commune* when they treated a complicated political case. This task was one that they had never faced in their great commentaries, but it was a task that played an important role in shaping European political thought.

At the end of the Middle Ages the Age of *Consilia* was in full swing. Most jurists produced few works of commentary but many *consilia*. By the end of the fifteenth century it was the most important genre in law. Great political events were often subjected to minute analysis in *consilia* commissioned by princes. The dramatic events surrounding the murder of Giuliano de' Medici compelled the supporters of the Medici to commission a number of jurists to write *consilia* on the issues of the case. The protagonists in Giuliano's murder were worthy foes. On the one side stood the pope, Sixtus IV, the spiritual leader of Christendom and temporal prince of Central Italy; on the other, Lorenzo, first citizen of Florence.[91]

Sixtus had excommunicated Lorenzo after he had escaped the assassins whom the pope had probably hired. Lorenzo had no doubts about the injustice of pope's duplicity. On 19 June 1478, he wrote to René of Anjou:

I know that the only crime I have committed against the pope is, and God is my witness, that I live and that I did not suffer death [...] On our side we have canon law, on our side we have natural and political law, on our side we have truth and innocence, on our side God and mankind.

Sixtus's bull of 1 June, 1478 had condemned Lorenzo as a son of iniquity and a rebel against the Church. Sixtus used the new printing press to give his bull

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[89] Scholars have disagreed about whether Baldus granted Giangaleazzo "absolute power" in this *consilium*; see Pennington 2004e, 305–19.

[90] Walter Ullmann analyzed Baldus' *consilia* on the Schism in Ullmann 1948, 143–60.

[91] For a detailed discussion of these events and the *consilia* see Pennington 1993d, 238–68.

wide circulation. The Signoria of Florence responded to Sixtus's letter on 21 July, in an apologia probably written by Bartolomeo Scala. They rejected Sixtus' allegation that Lorenzo was a tyrant. The pope had the authority, they observed, to wage war against the Turks, but to wage war against a Christian ruler was quite another matter. Both Sixtus' original bull and the Signoria's response to it were pieces of propaganda aimed at a larger public.

Lorenzo and his advisors must have been aware that they needed more than propaganda to discredit Sixtus' excommunication and interdict, and a number of jurists were called upon to defend Lorenzo. They quickly responded with detailed rebuttals and provided Lorenzo with a formidable defense. By the end of July 1478 he had already received tightly argued and lengthy *consilia*.

Four *consilia* have been preserved from this controversy. Each *consilium* contains extensive discussions of the political and the legal ramifications of the Pazzi Conspiracy. Bartolomeo Sozzini (Socinus) (1436–1507), the doctors of Florence who represented the entire college of doctors (undoubtedly the doctors of law), Francesco Accolti, and lastly, Girolamo Torti (Hieronimus de Tortis) wrote *consilia* defending the Medici.

When Lorenzo wrote to René of Anjou in the middle of June, he must have known about the main arguments that could be made in his defense. The rhetorical flourish of his elegantly cadenced litany—that canon law, natural law, and God supported him—should not obscure the essential truth of his statement. All the *consilia* make the same argument: Two centuries of Romano-canonical procedural law supported Lorenzo, and these procedural rules were not just a part of positive canon law but were based on a higher law, natural law. Each jurist made the same fundamental point: Even the prince's (in this case the pope's) "potestas absoluta" could not subvert the judicial process. They established that when Sixtus condemned Lorenzo, he had violated procedural rules to which even the pope must adhere. There was no longer any doubt that the supreme prince of Christendom was bound by the procedural rules of the *Ius commune.*

The jurists' defense of Lorenzo de' Medici provides remarkable illustration of the political role that the jurists played in medieval society. By the end of the fifteenth century, Lorenzo's dramatic rhetoric in his letter to René of Anjou was more than just rhetoric. Law was staunchly on his side. Jurists inside and outside Florence leant their legal expertise to his defense. In their *consilia*, the lawyers summarized two centuries of juristic thought about the relationship of the prince and the law. Their task was not daunting. In their commentaries the jurists had created a sophisticated doctrine of "due process" that Pope Sixtus violated when he condemned Lorenzo without a hearing. A defendant's right to present his case in court had become so embedded in juristic thought that even the prince's absolute power could not dislodge it.

The writings of these jurists transmitted the jurisprudence of due process into the early modern period. Due process of law became part of the intellectual baggage of every jurist who studied the *Ius commune*, and natural law continued to be the sturdy foundations upon which key elements of judicial procedure rested. Bartolomé de Las Casas, Jean Bodin, Samuel Pufendorf, Johannes Althusius, and Benedict Carpzov incorporated these norms of procedure created by the medieval jurists into their works.

4.5. Law and Political Thought 1500–1700

The Renaissance is not a meaningful concept in the history of law and jurisprudence nor in the history of political thought.[92] The jurists of the sixteenth and seventeenth centuries dealt with the same problems, used the same texts, were shaped by the same norms and jurisprudence as the jurists of the fourteenth and fifteenth centuries. The jurisprudence of the *Ius commune* was too potent an intellectual construct to be significantly distorted or completely dismantled by developments in philology and religion.[93] Recent scholarship has demonstrated that the Protestant Reformation had only a modest impact on law. In his fine study of Lutheran jurisprudence in the sixteenth century, John Witte Jr. (2002, 168) concluded that:

It must be emphasized that there were dozens of other Evangelical moralists and jurists [besides Melanchthon, Eisermann and Oldendorp] in the first half of the sixteenth century who wrote on law, politics, and society. Sometimes their views echoed those of Melanchthon, Eisermann, or Oldendorp. Sometimes, they adhered more closely to the traditional teachings of medieval canonists and civilians. The Lutheran Reformation did not produce a single or uniform jurisprudence.

Witte has shown that the Protestant jurists' conception of politics was virtually the same as their predecessors'. They believed that magistrates must obey their own laws. Natural law limited their authority and power. The *Ius commune* was the font of legal reason (Witte illustrates this very well in his discussion of their conception of equity). Protestant jurists adopted a key element of prior political thought and incorporated it fully into their work: the common good (ibid., 140–68).

The same may be said of the great jurists of the sixteenth and seventeenth centuries. The Northern jurists who practiced what has been called the "mos gallicus" used the tools of philology to recover the texts of Roman law. They used the same tools that Erasmus used to study the Bible and that Lorenzo Valla and others employed to produce texts that were cleansed of detritus of

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[92] This generalization has been and remains controversial. It underpins, however, the conclusion of this essay.

[93] The literature on "humanistic jurisprudence" is enormous but also inaccessible to most English-speaking scholars. The modern debate has centered on reactions to Troje 1971.

centuries. Some scholars have contrasted this "Humanistic Jurisprudence" with the "mos italicus." In Italy, they generalize, law remained trapped in the grip of medieval jurists. These generalizations have a grain of truth but obscure several important points. When they wrote about political power, the humanists discussed many of the same issues in exactly the same language as their medieval and Italian colleagues. They depended on the same set of norms embedded in the *Ius commune*. The practitioners of the "mos gallicus" were just as interested in the practice of law and in the foundation of political life in law as their southern counterparts. They were not scholars who distanced themselves from the real world. Perhaps the most significant difference between these jurists (North and South of the Alps) and their predecessors was their interest in systematically exploring subjects. Jean Bodin's *De republica*, Prospero Farinacci's *Praxis et theoricae criminalis*, and Hugo Grotius' and Samuel Pufendorf's works all illustrate a commitment to creating comprehensive surveys that treated certain aspects of law.[94]

Not all or even the most important humanist jurists produced systematic treatments of political thought. Perhaps the most important French jurist of the sixteenth century, Jacques Cujas (Cujacius) (1522–1590), scattered his remarks about the authority of the prince, the structure of society, and the sources of law throughout his works in good medieval fashion. His most important conclusions about the prince and the state echo the thought of the medieval jurists. Reason and the common good are the foundation stones upon which society rests (Cujas 1658, *Paratitla in libros ix. Codicis*, Cod. 8.52). There can be no people without law, and the people must consent to the law for it to be valid (ibid., Dig. 1.1.7). He concluded, in traditional fashion, that the prince is bound by the laws (ibid., *Observationes* Liber 15.30 [to Dig. 1.3.31]). A medieval jurist would have found nothing strange in his conclusions or in his reasoning. His political thought may have been cloaked in the refined language of the humanists but his conclusions resonate with older discourses.

Indeed, during the sixteenth century, jurists described the authority of the prince with the same terminology that their predecessors had used since the thirteenth. The prince had "plenitudo potestatis," "potestas absoluta," "ordinata," and was "legibus solutus." Historians cannot, however, agree whether the jurists in the sixteenth century changed the meanings of these terms. A key issue that has sparked much debate is whether medieval jurists attributed "true" sovereignty to the prince and whether sixteenth-century jurists interpreted these terms as granting the prince absolute power, untrammeled by any limitations. Did absolutism replace medieval constitutionalism?

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[94] See the still useful and masterful Maffei 1956, and, more recently, Bellomo 1989, 217–29. See also the essays, in Burns and Goldie 1991, by Donald Kelly, Francis Oakley, J.H.M. Salmon, and Julian H. Franklin.

It is beyond the scope of this chapter to solve this problem. We have seen that medieval jurists interpreted the authority of the prince in a variety of ways—from what might be described as "constitutional" to "absolutistic." A brief comparison of medieval and early modern definitions of absolute power might illustrate the range of meanings that absolute power had in the writings of the late medieval and early modern jurists.

The great Italian, Protestant jurist turned Englishman, Albericus Gentilis, wrote a tract in 1605 in which he discussed the nature of monarchy.[95] He observed that royal power is absolute, that is, without limits. The prince is "legibus solutus," and what pleases the prince has the force of law, for his will is held to be reason (Albericus Gentilis 1605, 8, 11, 24). No medieval jurist would have quarreled with Albericus. However, he continued in a different vein: "And they define absolute power as that through which he can take away a right of another, even a great right, without cause" (ibid., 10). Most of his predecessors would have parted company with him at this point. The jurists of the *Ius commune* were not, for the most part, absolutists.

Sixteenth-century political thought has a rich variety and texture. William Barclay, a Scotsman, studied law on the continent and subsequently became a professor of Roman law at Pont-à-Mousson and Angers. His most significant work of political theory was *De regno et regali potestate* (Barclay 1600). Although some scholars have called him an absolutist and staunch proponent of divine right monarchy, if one reads him carefully, his language and thought is simply a statement of the Roman law principle "Princeps legibus solutus est,"—the prince may transcend positive law through his absolute power— and he borrows extensively—often with direct quotes—from the glosses of the canonists. He did not depart significantly from the norms of "medieval constitutionalism."

Perhaps the best-known commentary on a ruler's authority and power in the sixteenth century is Jean Bodin's *De republica* (see Franklin 1991). Some scholars have summarized sovereignty in Bodin's *De republica* as "high, absolute, and perpetual power over citizens." The prince "gives laws to all his subjects" without seeking anyone's or any group's consent. Bodin's prince was absolute "and even if his commands are never 'just or honest,' it is still 'not lawful for the subject to break the laws of his prince'."[96] If they are right, Bodin seems to have broken sharply with traditional definitions of political power, and his prince was absolute as few others before him were.

Bodin created an exalted and rarified vision of political power, but in his prefatory letter he denied that his *De republica* broke with the past. He discussed the prince's authority in Book 1, Chapter 8 of the *De republica* and

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[95] For further detail and more complete bibliographical references for what follows, see Pennington 1993d, 275–84, on which the next pages on Jean Bodin rest.

[96] These quotations in this paragraph are taken from Skinner 1978, 285–8.

adopted the terminology of power that the jurists had created in the jurisprudence of the *Ius commune*. "Maiestas," he wrote, cannot be limited by time, by a greater power, nor by any law. "Maiestas" meant that the prince was not bound by the law. In other words, Bodin equated "maiestas" with the prince's absolute power to change, abrogate or derogate positive law. He explained that the kings of France were loosed from the law and possessed absolute power. As a justification of his contention, he cited a famous *consilium* by Oldradus de Ponte in which Oldradus had equated kings with the emperor and insisted that European kings were not subject to imperial jurisdiction. Bodin defined absolute power with language that is redolent with echoes of the past:

What is absolute power, or rather power that has been freed from the law? No one has yet defined it. If we define absolute power as that which is above all laws, then no prince possesses the rights of sovereignty. All princes are bound by divine, natural, and the common law of all nations.[97]

Any late medieval jurist could have written this definition of political authority. Natural law had traditionally limited the prince.

Medieval and early modern jurists always used natural law and the norms of the *Ius commune* to limit the prince. They also used amorphous concept that they called "status regni" or, in the church, "status ecclesiae." The state of the realm or the state of the church was an inviolable body of law, custom, and tradition that was not subject to the authority of the prince. Bodin declared that none of the laws from which the prince derives his "imperium" can be arrogated or derogated. An example, he noted, was the Salic law from which French kings derived their authority and which was the very foundation of the kingdom. Assemblies of the people, he argued, could not limit the prince's sovereignty.

Natural law was the kernel of medieval jurisprudence that blossomed into a coherent intellectual system harnessing the will of the prince.[98] Bodin adopted all the limitations of the prince's sovereignty that the jurists had developed during the prior three centuries:

Those who state that princes are loosed from laws and contracts give great injury to immortal God and nature, unless they except the laws of God and of nature, as well as property and rights protected by just contracts with private persons.[99]

[97] "Quid autem sit absoluta, vel potius soluta lege potestas, nemo definiit. Nam si legibus omnibus solutam definiamus, nullus omnino princeps iura maiestatis habere comperiatur, cum omnes teneat lex divina, lex item naturae, tum etiam lex omnium gentium communis, quae a naturae legibus ac divinis divisas habet rationes" (Bodin 1594, I, 8).

[98] The jurists never thought that natural law was simply what was contained in the New Testament; see Pennington 2004.

[99] "Qui autem principes, legibus et pactis conventis solutos esse statuunt, nisi Dei praepotentis ac naturae leges, tum etiam res ac rationes cum privatis iusta conventione contractas excipiant, maximam immortali Deo, ac naturae iniuriam inferunt" (Bodin 1594, I, 8).

To support his allegation, he cited Accursius's famous gloss to *Princeps* (Dig. 1.3.31(30)) in a marginal footnote, reaching back three centuries for an authority to define princely power. As Brian Tierney brilliantly demonstrated when he dissected Accursius's gloss forty years ago, although modern historians have misread him, Bodin would have understood Accursius's references and allusions as no modern reader can (Tierney 1963b, 387–97). Accursius held contracts to be inviolable and secure from the arbitrary power of the prince. His commentary on *Princeps* is an extended discourse on the prince's obligation to submit himself to positive law. Bodin reached back into Accursius' Ordinary Gloss on Justinian's Digest and adopted his thirteenth-century principles.

Medieval and early modern jurists distinguished between contracts that the prince made with private citizens and those he concluded with other princes or cities. They also noted that contracts between citizens and non-citizens had a different legal status. Bodin did not use these distinctions to augment princely authority by arguing that the prince could render some contracts invalid but not others. The prince could not break any contract he entered into; he was bound to uphold the law. He cited a recent event in French history to support his contention. The French *parlement* had vigorously maintained that Charles IX could not sunder his agreements with the clergy without their consent. Bodin rejected the views of those canonists like Panormitanus, Antonio de Butrio, Francesco Zabarella, and Felinus who had argued that the prince's contracts were "natural obligations" and only validated by civil law. Although Bodin may not have understood his predecessors' thought on contracts accurately, he vigorously rejected any attempt to enhance the authority of the prince to break contracts arbitrarily. Who can doubt, he asked rhetorically, that obligations and contracts have the same nature?

In the preceding pages we have discussed the intricate development of juristic ideas about a just trial and fair legal procedures—what in Anglo-American common law is called due process of the law. We have noted that when earlier jurists discussed due process, they invariably raised the issue whether the prince could subvert judicial procedure through his absolute power or "plenitudo potestatis." We have also seen that early modern jurists embraced medieval conceptions of due process. When we turn to Bodin's *Republic*, we find no discussion of due process or the prince's role in the judicial process. The explanation for this omission is simple. Bodin limited his prince much more than any medieval jurist would have thought possible: He barred him from the courtroom. Medieval jurists had understood that when the prince presided over a court, he violated basic legal principles that forbade a judge to participate in cases that touched his own interests. In Book 4, Chapter 6 of the *Republic*, Bodin proves that the prince should not serve as a judge in his kingdom. In contrast to his discussion of the prince's absolute power in Book 1, Chapter 8, he cited very few legal citations and gave only a few references to earlier jurists. His reticence is not inexplicable. No earlier jurists had ever

argued that the prince could not preside over his own court. The key question is whether Bodin would have adopted the principles of due process that we have discussed, even if he banned the prince from the courtroom. He referred to judicial procedure in one brief, but telling passage:

Therefore, if a contract is natural and common to all nations, then obligations and actions have the same nature. No contract and obligation can be conceived that is not common to nature and all nations.[100]

Bodin cited three texts of Roman law to justify his statement. One of them, *Ex hoc iure*, was the key passage in the Digest that discussed the origins of judicial procedure.

Bodin's theory of contracts is one of the keys to understanding his relationship to past jurisprudence. He noted that although some contracts might arise from the positive laws of a city, the prince would still be obligated to observe those agreements even more than a private person. Furthermore, the prince cannot abrogate pacts even with his most exalted power. All the most important jurists, observed Bodin, agreed on this point.

Like many other late medieval jurists, Bodin considered Angelus de Ubaldis a prime example of those jurists who granted the pope, emperor, and kings inordinate, unrestrained power. Angelus's opinion was not as straightforward as his interpreters imagined, but Bodin dubbed him one of those "pernicious adulators" of the prince's power. Nonetheless, he noted that most jurists—citing Cinus, Panormitanus, Baldus, Bartolus, and others—believed that the prince could not arbitrarily expropriate the goods of private citizens. Bodin concurred. Bodin delivered a ringing condemnation of absolute power as an arbitrary and tyrannical authority in *De republica*:

Since the jurists abhor that plague and dispute many things of that sort brilliantly, nevertheless they make an absurd exception. They say that if the prince wishes to use his highest, absolute power, that [he may expropriate private property] as if they would say that it is in accordance with divine law to dispossess citizens with force and arms. The Germans call the right of the powerful to despoil the weak the law of pillage. Pope Innocent IV, who was an extraordinarily learned jurist, defined this power as the authority to derogate ordinary law. They claim that this great power of the prince can abrogate divine and natural law.[101]

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[100] "Igitur si conventio naturalis est ac gentium omnium communis, obligationes quoque et actiones, eiusdem esse naturae, consequens est. At nulla fere conventio, nulla obligatio cogitari potest, quae non sit et naturae et gentium omnium communis" (Bodin 1594, I, 8).

[101] "Sed cum pestem illam abhorreant, ac multa in eo genere praeclare disputent; illud tamen absurde, quod hanc exceptionem subiiciunt, nisi summa, et ut ipsi loquuntur, absoluta potestate uti velit, quod perinde est, acsi dicerent, vi et armis oppressos cives diripere fas esse. Potentiores enim hoc iure adversus inopiam tenuiorem uti consueverunt, quod praedatorium ius rectissime appellant Germani. At Innocentius iiii. pontifex Romanus, iuris utriusque peritissimus, summam illam, sine legibus, solutam potestatem definiit, ordinario iuri derogare posse. Illi vero summam potestatem ad legum divinarum ac naturalium abrogationem pertinere voluerunt" (ibid.).

Bodin did not embrace (what he thought was) Innocent IV's absolutism. He accepted the commonly held limitations on the prince's absolute power and rejected the arguments of Angelus de Ubaldis and others who granted the prince great power to subvert the established order. Bodin concluded, just as so many of his predecessors had also concluded, that the prince could not expropriate property without a just cause.

Bodin raised the question whether the prince was bound by the contracts of his predecessors. The jurists had discussed this issue in connection with the Donation of Constantine and had generally agreed that the prince was bound to observe the contractual and testamentary provisions of his predecessors. Bodin pointed out that the prince's hereditary obligations must be upheld. Why must we discuss this distinction, he asked, since wills and contracts are a part of the law of nations? For Bodin the answer was simple. The law of nations is not inviolable, unless it is also supported by divine and natural law. The prince may revoke iniquitous laws even if they are part of the law of nations—such as the law of slavery.

What should be clear by this point is that Bodin's conception of sovereignty was unthinkable without the work of his predecessors. His definition of absolute power was taken from earlier jurists, and the limitations that he placed upon the prince were adopted from their thought. His argument that contracts, private property, and actions were based on natural and divine law were items that he easily took from the shelves of medieval jurisprudence. He did not cite the opinions of medieval and Renaissance jurists arbitrarily or willfully, but he knew their thought and their idiosyncrasies well. We may conclude that Bodin's conception of sovereignty that he expounded in Book 1, Chapter 8 of the *De republica* would not have offended the most constitutionally minded jurist of the Middle Ages.

Bodin's contribution to the history of political thought was conceptual rather than substantive. The medieval and Renaissance jurists rarely wrote systematically about sovereignty. When they referred to the *loci classici* of the prince's authority, the glosses and commentaries on these texts did expound a coherent doctrine. But not a coherent work which could be entitled "On sovereignty." They were content to paste their glosses together in their minds rather than writing an extended commentary on the Prince's *maiestas*. In this sense, Bodin was right when he wrote that no one had ever defined the prince's power—no one had written a systematic tract describing sovereignty. That was Bodin's contribution to political thought. And it is an example of the importance of sixteenth- and seventeenth-century jurists. In the next century, Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694) would develop and refine the genre of the legal treatise with numerous tracts on war, peace and politics.[102] Even a casual reading of their work reveals there deep

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[102] See the recent bilingual edition of Grotius' (2001) *De imperio summarum potestatum*

and profound debt to the jurisprudence of the *Ius commune*. When Grotius, a Protestant, wished to define the "supreme power" that ruled society he quoted Pope Innocent IV's *Commentary on the Decretales of Gregory IX* (just like Jean Bodin) and cited three legal maxims that he took from the *Ius commune* to illustrate how the prince's authority was limited by legal norms (Grotius, *De imperio summarum potestatum*, Chapter 6.13, on pages 318–9). The age of the *Ius commune* was waning, but its persuasive force was not yet spent. It would be another century before the rise of national legal systems, the balkanization of legal education, and the triumph of the vernacular languages over Latin in these systems would transform a decline into a death rattle.

To end where this chapter began: with Johannes Althusius. When Althusius defined politics as the "art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them," he described the task that the jurists of the *Ius commune* had accomplished in the prior four centuries. They used a dead legal system (Roman law), canon law, and feudal law to define and measure the political bonds in European society. Many of the norms that they created still shape our political thought and thinking today.

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circa sacra, edited by Harm-Jan van Dam, with an excellent bibliography. On Pufendorf, see Pufendorf 1997.

BIBLIOGRAPHY

Note that some of the cited works of St. Augustine, St. Bernard of Clairvaux, Boethius, Lactantius, and Pseudo-Augustinus are to be found in *Patrologia Latina* edited by J.-P. Migne, namely, in *Patrologiae Latinae cursus completus seu Bibliotheca universalis integra, uniformis, commoda, oeconomica, omnium Ss. Patrum, Doctorum, Scriptorum ecclesiasticarum … qui ab aevo apostolico ad tempora Concilii Tridentini (anno 1545) pro latinis, et Concilii Florentini (anno 1439) pro graecis floruerunt … series latina prior … accurante* J.P. Migne *...* Paris, 1844–1902. The collection of *Patrologia Latina* is abbreviated in this bibliography as *P.L.*; for all cited works, it is indicated also the volume in which each of them can be found. Analogously, works by Capistranus, Coras, Hopper, Sebastiano Medici, and Philippus de Casolis can be found in *Tractatus Universi Iuris*, duce et auspice Gregorio XIII Pontifice Maximo, in unum congesti ... Venice, 1584, which is abbreviated here as *T.U.I.*

Abbagnano, Nicola. 1993. *Storia della filosofia*. Vol. 1: *La filosofia antica, la filosofia patristica, la filosofia scolastica*. Turin: UTET.

Accursius. 1489. Accursii *Glossa in Volumen*. Venice. (Reprint in *Corpus Glossatorum Juris Civilis*. Vol. 11. Turin: Ex officina Erasmiana, 1969.)

Ackrill, John L. 1993. *Aristotele*. Trans. P. Crivelli. Bologna: Il Mulino. (1st ed. in English 1981.)

Agazzi, Aldo. 1954. *Problemi e maestri del pensiero e della educazione*. Vol. 1: *Storia della filosofia e della pedagogia dai Greci alla Scolastica*. Brescia: La Scuola.

Aimone Braida, Pier V. 1983. Il proemio "Missurus in mundum." *Bulletin of Medieval Canon Law* 13: 27–38.

Albericus de Rosate. 1581. Alberici a Rosate *Dictionarium iuris tam Civilis quam Canonici*. Venice.

———. 1585a. Alberici de Rosate Bergomensis *iurisconsulti clarissimi ac summi practici In primam ff. Veter. Part. commentarii ...* Venice.

———. 1585h. Alberici de Rosate Bergomensis *iurisconsulti clarissimi ac summi practici In secundam Codicis part. commentarii ...* Venice.

Albericus Gentilis. 1605. *Regales disputationes tres*. London.

Alessio, Franco. 1994a. L'Illuminazione e la fede. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 345–69. Rome-Bari: Laterza.

———. 1994b. I maestri di Parigi: Pietro Abelardo. In *Storia della filosofia.* Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 78–110. Rome-Bari: Laterza.

———. 1994c. Sentenze e compendi. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 130–40. Rome-Bari: Laterza.

———. 1994d. Tommaso. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 324–44. Rome-Bari: Laterza.

Alexander de Hales. *Doctoris irrefragabilis* Alexandri de Hales *ordinis minorum Summa Theologica* iussu et auctoritate R.mi P. Bonaventurae Marrani … studio et cura PP. Collegii S. Bonaventurae ad fidem codicum edita, III, secunda pars secundi libri. Quaracchi: Collegium S. Bonaventurae, 1930.

———. Magistri Alexandri de Hales *Glossa in quatuor libros Sententiarum Petri Lombardi* nunc

demum reperta atque primum edita studio et cura PP. Collegii S. Bonaventurae, II. Quaracchi-Florence: Collegium S. Bonaventurae, 1952.

Alighieri, Dante. *Convivio*. In *Le Opere di Dante*, critical text of the Società Dantesca Italiana. Vol. 3. Ed. F. Brambilla Ageno. Florence: Le Lettere, 1960.

———. *De vulgari eloquentia*. In *Le Opere di Dante*, critical text of the Società Dantesca Italiana. Vol. 4. Ed. P. Rajna. Florence: Le Lettere, 1960.

———. *Monarchia*. In *Le Opere di Dante*, critical text of the Società Dantesca Italiana. Vol. 5. Ed. P. G. Ricci. Florence: Le Lettere, 1960. (Engl. vers. P. Shaw, *Dante. Monarchy*. Cambridge: Cambridge University Press, 1996.)

———. *Divina Commedia. Paradiso*. In *Le Opere di Dante*, critical text of the Società Dantesca Italiana. Vol. 7, 2nd revised edition. Ed. G. Petrocchi. Florence: Le Lettere, 1994.

———. *Divina Commedia. Purgatorio*. In *Le Opere di Dante*, critical text of the Società Dantesca Italiana. Vol. 7, 2nd revised edition. Ed. G. Petrocchi. Florence: Le Lettere, 1994.

Alpa, Guido. 2000. *La cultura delle regole. Storia del diritto civile italiano*. Rome-Bari: Laterza.

Althusius, Johannes. 1964. *Politica methodice digesta*. In *The Politics of Johannes Althusius*. Trans. Carl J. Friedrich. London: Eyre & Spottiswoode. (1st ed. 1603.)

Angelus a Gambilionibus. 1574. Angeli a Gambilionibus *de Aretio I.C. clarissimi In quatuor Institutionum libros commentaria. Ex vetustissimis exemplaribus repraesentata et accurata diligentia et studio ab omnibus erroribus nuper castigata … Accesserunt excellentissimorum I.C. D. Antonii Caii, ac Francisci Purpurati eruditissimae adnotationes, ac eiusdem Caii subtilissimus Substitutionum Tractatus*. Venice.

Anselmus Cantuariensis. *Sancti Anselmi Cantuariensis Episcopi Monologion*. In *Sancti Anselmi Cantuariensis Archiepiscopi Opera Omnia*. Ed. F. S. Schmitt. Stuttgart: Fromann, 1968.

Antonius a Butrio. 1578a. *Excellentissimi* Antonii a Butrio *Iuris Utriusque monarchae Super Prima Primi Decretalium Commentarii ...* Venice.

———. 1578f. *Excellentissimi* Antonii a Butrio *Iuris Utriusque monarchae In Librum Quartum Decretalium commentarii ...* Venice.

Aquinas, Thomas. Sancti Thomae de Aquino *in libros Sententiarum*, I–II. In *Scriptum super Sententiis magistri Petri Lombardi*, t. 1–2. Ed. P. Mandonnet. Paris: P. Lethielleux, 1929.

———. Sancti Thomae Aquinatis *Super librum De Causis expositio*. Ed. H. D. Saffrey. Fribourg: Société Philosophique-Nauwelaerts, 1954.

———. Sancti Thomae Aquinatis doctoris angelici *Liber de veritate catholicae fidei contra errores infidelium, qui dicitur Summa contra Gentiles*. Ed. P. Marc, C. Pera, and P. Caramello. Turin: Marietti, 1961–1967.

———. Sancti Thomae Aquinatis doctoris angelici *Summa theologiae*. Ed. P. Caramello. Turin: Marietti, 1962–1963. (Engl. vers. Fathers of the English Dominican Province. Vol. 1. New York: Benziger, 1948; reprint 1981 by Christian Classics.)

———. Sancti Thomae Aquinatis *Quaestio disputata de potentia*. In *Quaestiones disputatae*. Vol. 2. Ed. P. M. Pession. Turin: Marietti, 1965.

———. Sancti Thomae Aquinatis *De substantiis separatis ad fratrem Reginaldum socium suum*. In *Opera omnia iussu Leonis XIII P. M. edita*. Vol. 40. Rome: Ad Sanctae Sabinae, 1969.

———. Sancti Thomae Aquinatis *Quaestio disputata de veritate*. In *Opera omnia iussu Leonis XIII P. M. edita*. Vol. 22. Rome: Editori di San Tommaso, 1970–1976.

———. Sancti Thomae Aquinatis *In duodecim libros Metaphysicorum Aristotelis expositio*. Ed. M. R. Cathala and R. M. Spiazzi. Turin: Marietti, 1971.

———. Sancti Thomae Aquinatis *Super Evangelium Iohannis reportatio*. Ed. R. Cai. Turin: Marietti, 1972.

———. Sancti Thomae Aquinatis *De ente et essentia*. In *Opera omnia iussu Leonis XIII P. M. edita*. Vol. 43. Rome: Editori di San Tommaso, 1976.

———. Sancti Thomae de Aquino *super Boetium De Trinitate*. In *Opera omnia iussu Leonis XIII P. M. edita*. Vol. 50. Paris: Commissio Leonina-Éditions Du Cerf, 1992.

Aristotle. *Prior Analytics*. In *The Organon or Logical Treatises of Aristotle*. Vol. 1. Trans. O. Freire Owen. London: Bell, 1901.

———. *The Categories.* In *Aristotle in Twenty-Three Volumes*. Vol. 1: *The Categories*, *On Inter-pretation*. Trans. Harold P. Cook. London: W. Heinemann, 1967. (The Loeb Classical Library.)

———. *Posterior Analytics.* In *Aristotle in Twenty-Three Volumes*. Vol. 2: *Posterior Analytics*, *Topica*. Trans. H. Tredennick. London: W. Heinemann, 1967. (The Loeb Classical Library.)

———. *Topics*. In *Aristotle in Twenty-Three Volumes*. Vol. 2: *Posterior Analytics*, *Topica*. Trans. E. S. Forster. London: W. Heinemann, 1967. (The Loeb Classical Library.)

———. *Eudemian Ethics.* In *Aristotle in Twenty-Three Volumes.* Vol. 20: *The Athenian Consti-tution*, *The Eudemian Ethics*, *On Virtues and Vices*. Trans. H. Rackham. London: W. Heinemann, 1968. (The Loeb Classical Library.)

———. *Nicomachean Ethics*. In *Aristotle in Twenty-Three Volumes*. Vol. 19. Trans. Harris Rackham. London: W. Heinemann, 1968. (The Loeb Classical Library.)

———. *On the Soul*. In *Aristotle in Twenty-Three Volumes*. Vol. 8: *On the Soul*, *Parva Naturalia*, *On Breath*. Trans. W. S. Hett. London: W. Heinemann, 1968. (The Loeb Classical Library.)

———. *Parts of Animals*. In *Aristotle in Twenty-Three Volumes*. Vol. 12: *Movement of Animals*, *Progression of Animals*, *Parts of Animals*. Trans. A. L. Peck. London: W. Heinemann, 1968. (The Loeb Classical Library.)

———. *Physics*. In *Aristotle in Twenty-Three Volumes*. Vol. 5: *The Physics*. Trans. P. H. Wicksteed and F. M. Cornford. London: W. Heinemann, 1968. (The Loeb Classical Library.)

———. *Metaphysics*. In *Aristotle in Twenty-Three Volumes*. Vol. 17: *Metaphysics*, Books I–IX. Vol. 18: *Metaphysics*, Books X–XIV, *Oeconomica*, *Magna Moralia*. Trans. H. Tredennick. London: W. Heinemann, 1968–1969. (The Loeb Classical Library.)

Ascheri, Mario. 1980. "Consilium sapientis," perizia medica e "res iudicata": Diritto dei "dot-tori" e istituzioni comunali. In *Proceedings of the Fifth International Congress of Medieval Canon Law, Salamanca, 21–25 September 1976*. Ed. Stephan Kuttner and Kenneth Penning-ton, 533–79. Vatican City: Biblioteca Apostolica Vaticana. (Monumenta iuris canonici, Se-ries C, 6.)

———. 1985. Analecta manoscritta consiliare (1285–1354). *Bulletin of Medieval Canon Law* 15: 61–94.

———. 1995. *Tribunali, giuristi e istituzioni. Dal Medioevo all'età moderna*. Bologna: Il Mulino.

———. 2000. *I diritti del Medioevo italiano. Secoli XI–XV*. Rome: Carocci.

Ascheri, Mario, Ingrid Baumgärtner, and Julius Kirshner, eds. 1999. *Legal Consulting in the Civil Law Tradition*. Berkeley: Robbins Collection.

Ashworth, E. Jennifer. 1994. Les manuels de logique à l'Université d'Oxford aux XIVᵉ et XVᵉ siècles. In *Manuels, programmes de cours et techniques d'enseignement dans les Universités médiévales*. (Actes du Colloque international de Louvain-la-Neuve, 9–11 settembre 1993). Ed. J. Hamesse, 351–70. Louvain-la-Neuve: Institut d'Études Médiévales de l'Université Catholique de Louvain.

Astuti, Guido. 1976. Cino da Pistoia e la giurisprudenza del suo tempo. In *Cino da Pistoia* (Atti dei Convegni Lincei, 18), 129–52. Rome: Accademia Nazionale dei Lincei.

Augustinus, Aurelius. *S. Aurelii Augustini Hipponensis episcopi De civitate Dei*. In *Aurelii Augustini opera*, Pars 14. Ad fidem quartae editionis Teubnerianae quam a. MCMXXVIII–MCMXXIX curaverunt Bernardus Dombart et Alphonsus Kalb paucis emendatis mutatis additis. Turnholti: Brepols, 1955. (Corpus christianorum, series latina.)

———. *S. Aurelii Augustini Hipponensis episcopi De diversis quaestionibus LXXXIII liber unus*. In *P.L.*, 40.

———. *S. Aurelii Augustini Hipponensis episcopi Enarratio in Psalmum 109*. In *Sancti Augustini opera*, *Enarrationes in Psalmos* 101–50, Pars 4. Ed. F. Gori and F. Recanatini. Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2002. (Corpus scriptorum ecclesiasticorum Latinorum.)

Azo. 1506. Azonis *Summa Institutionum*. Pavia. (Reprint in *Corpus Glossatorum Juris Civilis*. Vol. 2. Turin: Ex officina Erasmiana, 1966.)

———. 1596. Azonis *In quatuor libros Institutionum*, in *Summa* Azonis *locuples iuris civilis thesaurus hactenus depravatissima, nunc autem iugi sedulitate et exquisita studio D.H. Dresii ll. Licentiati … restituta. Quibus accedunt quarundam veterum appostillarum et additionum castigationes, nec non quaedam annotatiunculae marginales, ab eodem in gratiam tyronum adiectae ... Accessere insuper eiusdem* Azonis *Quaestiones, quae Brocardicae appellantur ...* Venice.

Balbi, Raffaele. 2001. La "causa legis" nel pensiero grazianeo. *Il Diritto Ecclesiastico* 112.1: 50–60.

Baldus. 1580a. Baldi Ubaldi Perusini *iuris utriusque consultissimi In Decretalium volumen commentaria Francisci de Parona alias excusis, Vincentiique Godemini novissimis, nunc primum additis, adnotationibus illustrata ...* Venice.

———. 1580b. Baldi Ubaldi Perusini *iuris utriusque consultissimi In Feudorum usus commentaria Andreae Barbatiae alias excusis Vincentiique Godemini i.u.d. Pisis ordinarium Iuris Canonici legentis adnotationibus illustrata ...* Venice.

———. 1586a. Baldi Ubaldi Perusini *iurisconsulti omnium suae tempestatis celeberrimi, ingenio acutissimi, sensuque profundissimi In primam Digesti Veteris partem commentaria, doctissimorum hominum aliis omnibus hactenus impressis adnotationibus illustrata ...* Venice.

———. 1586c. Baldi Ubaldi *In primam et secundam Infortiati partem commentaria ...* Venice.

———. 1586e. Baldi Ubaldi *In primum, secundum et tertium Cod. lib. Commentaria ...* Venice.

———. 1586f. Baldi Ubaldi Perusini *In quartum et quintum Codicis librum commentaria ...* Venice.

———. 1586g. Baldi Ubaldi *In Sextum Codicis librum commentaria ...* Venice.

———. 1586h. Baldi Ubaldi *In VIJ, VIIJ, IX, X, XI Cod. lib. commentaria ...* Venice.

———. 1586x. *Quaestio Baldi de schismate.* In Baldus 1586g.

———. 1586y. Baldi Ubaldi Perusini *Tractatus de pactis*, *cum adnotationibus Benedicti a Vadis Forosemproniensis i.u.d.*. In Baldus 1586c.

———. 1599. Baldi de Ubaldis Perusini *In primam Digesti Veteris partem Commentaria.* Venice.

Ballanti, Graziella. 1995. *Pietro Abelardo: la rinascita scolastica del XII secolo.* Florence: La Nuova Italia.

Barclay, William. *De regno et regali potestate.* Paris, 1600.

Baron, Roger. 1955. Hugonis de Sancto Victore Epitome Dindimi in Philosophiam: Introduction, texte critique et notes. *Traditio* 9: 91–148.

Barraclough, Geoffrey. 1933–1934. The Making of a Bishop in the Middle Ages. *The Catholic Historical Review* 19: 275–319.

Bartolus. 1529. Bartolus of Sassoferrato, *Consilia, Questiones, et Tractatus.* Venice. (Reprinted Rome, 1996.)

———. 1570a. Bartolus a Saxoferrato *In primam Digesti Veteris partem cum adnotationibus Alex., Barb., Parisii, Claud. a Seissel, And. Poma., Ioan. Franc. Rove. atque aliorum ... Praestitimus novissimae huic editioni Alexandri etiam, et Barb. nomina in eorum additamentis ... Praeterea Bartoli vitam ...* Venice.

———. 1570b. Bartolus a Saxoferrato, *In secundam Digesti Veteris partem …* Venice.

———. 1570c. Bartolus a Saxoferrato, *In primam Infortiati partem …* Venice.

———. 1570e. Bartolus a Saxoferrato, *In primam Digesti novi partem ...* Venice.

———. 1570l. *Consilia, quaestiones et tractatus* Bartoli a Saxoferrato ... Venice.

———. 1570x. *Tractatus testimoniorum.* In Bartolus 1570l.

———. 1570y. *Tracta. De alveo do. Bar.* In Bartolus 1570l.

———. 1570z. *Sermo do. Bartoli in doctoratu Do. Bonaccursii fratris sui.* In Bartolus 1570l.

———. 1615. Bartoli a Saxoferrato *Sermo … in doctoratu Do. Io. a Saxof.* In *Consilia, Quaestiones et Tractatus* (*Opera omnia.* Vol. 10). Venice.

Baumgärtner, Ingrid, ed. 1995. *Consilia im späten Mittelalter: Zum historischen Aussagewert einer Quellengattung.* Sigmaringen: Thorbecke. (Schriftenreihe des Deutschen Studienzentrums in Venedig, Studi 13.)

Bechtel, William. 2001. *Filosofia della scienza e scienza cognitiva.* Trans. M. Marraffa. Rome-Bari: Laterza. (1st ed. in English 1988.)

Bellomo, Manlio. 1963. A proposito della rappresentanza: due inedite "distinctiones" di Iacopo e di Martino. *Annali di storia del diritto* 7: 115–24.

———. 1969. Due *Libri magni quaestionum disputatarum* e le *quaestiones* di Riccardo da Saliceto. *Studi senesi*, III.18.2: 256–91.

———. 1974a. "Legere, repetere, disputare." Introduzione ad una ricerca sulle "quaestiones" civilistiche. In *Aspetti dell'insegnamento giuridico nelle Università medievali*. Vol. 1: *Le "quaestiones disputatae." Saggi*, 13–81. Reggio Calabria: Parallelo 38. (Now in *Medioevo edito e inedito*. Vol. 1: *Scholae, Universitates, Studia*, 53–97. Rome: Il Cigno Galileo Galilei, 1997.)

———. 1974b. "Loci loicales" e forme del pensiero giuridico in alcuni testi dei secoli XIII e XIV. *Rivista di Storia del Diritto Italiano* 47: 5–18.

———. 1989. *L'Europa del diritto comune*. Rome: Il Cigno Galileo Galilei. (English translation, *The Common Legal Past of Europe: 1000–1800*. Trans. Lydia G. Cochrane. Washington, D.C.: The Catholic University of America Press, 1995.)

———. 1992a. *Saggio sull'Università nell'età del Diritto comune*. Rome: Il Cigno Galileo Galilei.

———. 1992b. La scienza del diritto al tempo di Federico II. *Rivista Internazionale di Diritto Comune* 3: 173–96. (Now in *Medioevo edito e inedito*. Vol. 2: *Scienza del diritto e società medievale*, 39–62. Rome: Il Cigno Galileo Galilei, 1997.)

———. 1993. *Società e istituzioni dal medioevo agli inizi dell'età moderna*. Rome: Il Cigno-Galileo Galilei.

———. 1996. "Factum" e "ius." Itinerari di ricerca tra le certezze e i dubbi del pensiero giuridico medievale. *Rivista Internazionale di Diritto Comune* 7: 21–46. (Now in *Medioevo edito e inedito*. Vol. 2: *Scienza del diritto e società medievale*, 65–89. Rome: Il Cigno Galileo Galilei, 1997.)

———. 1997a. Factum proponitur certum, sed dubium est de iure. In *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*. Ed. M. Bellomo, 1–28. Munich: Oldenbourg.

———. 1997b. *Medioevo edito e inedito*. Vol. 2: *Scienza del diritto e società medievale*. Rome: Il Cigno Galileo Galilei.

———. 1997c. Una nuova figura di intellettuale: Il giurista. In *Medioevo edito e inedito*. Vol. 2: *Scienza del diritto e società medievale*. Rome: Il Cigno Galileo Galilei.

———. 1997d. Il testo per interpretare il testo: Sulle origini della giurisprudenza medievale. In *Medioevo edito e inedito*. Vol. 2: *Scienza del diritto e società medievale*. Rome: Il Cigno Galileo Galilei.

———. 1998a. Bartolo da Sassoferrato. In *Medioevo edito e inedito*. Vol. 3: *Profili di giuristi*, 181–93. Rome: Il Cigno Galileo Galilei.

———. 1998b. Per un profilo della personalità scientifica di Riccardo da Saliceto. In *Medioevo edito ed inedito*. Vol. 3: *Profili di giuristi*, 95–128. Rome: Il Cigno-Galileo Galilei. (1st ed. 1972, *Studi in onore di Edoardo Volterra*. Vol. 5, Milan: Giuffrè.).

———. 2000. *I fatti e il diritto. Tra le certezze e i dubbi dei giuristi medievali (secoli XIII–XIV)*. Rome: Il Cigno-Galileo Galilei. (I libri di Erice, 27.)

Belloni, Annalisa. 1989. *Le questioni civilistiche del secolo XII. Da Bulgaro a Pillio da Medicina e Azzone*. Frankfurt am Main: Klostermann.

Berger, Adolf. 1951. *In Dubiis benigniora*. *Seminar* 9: 187–205.

Bernardus Claravallensis OCist. [S. Bernardi Abbatis Primi Clarae-Vallensis] *Tractatus de interiori domo seu de conscientia aedificanda*. In *P.L.*, 184.

Berti, Enrico. 1987. *Contraddizione e dialettica negli antichi e nei moderni*. Palermo: Epos.

Besta, Enrico. 1925. *Fonti: legislazione e scienza giuridica dalla caduta dell'Impero romano al secolo decimosesto* (= *Storia del diritto italiano*. Ed. P. Del Giudice, Vol. 1.2). Milan: Hoepli. (Reprint Frankfurt am Main-Firenze: Sauer & Auvermann-Gozzini, 1969.)

Besta, Enrico, and Gian Luigi Barni, eds. 1949. *Liber Consuetudinum Mediolani Anni MCCXVI*. Milan: Giuffrè.

Bezemer, Kees. 2000. Word for word (or not): On the track of the Orleans sources of Cinus' lecture on the Code. *Tijdschrift voor Rechtsgeschiedenis* 68: 433–54.

Bianchi, Luca. 1994. Il cielo e il mondo. In *Storia della filosofia.* Vol. 2: *Il Medioevo.* Ed. P. Rossi and C. A. Viano, 488–506. Rome-Bari: Laterza.

———. 1997a. L'acculturazione filosofica dell'Occidente. In *La filosofia nelle università: secoli XIII e XIV.* Ed. L. Bianchi, 1–23. Florence: La Nuova Italia.

———. 1997b. Le università e il "decollo scientifico" dell'Occidente. In *La filosofia nelle università: secoli XIII e XIV*. Ed. L. Bianchi, 25–62. Florence: La Nuova Italia.

Bidez, Joseph. 1913. *Vie de Porphyre, le philosophe néo-platonicien*. Gand-Leipzig: van Goethem-Teubner. (Reprint Hildesheim 1980.)

Biffi, Inos. 1992. *Figure medievali della teologia*. Presentazione di Marie-Dominique Chenu. Prefazione di Giuseppe Colombo. Milan: Jaca Book.

Birks, Peter, and Grant McLeod. 1987. *Justinian's Institutes*. London: Duckworth.

Birocchi, Italo. 2002. *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*. Turin: Giappichelli.

Black, Antony. 1984. *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present.* London: Methuen.

Blanché, Robert. 1973. *La logica e la sua storia da Aristotele a Russell*. Trans. A. Menzio. Rome: Ubaldini. (1st ed. in French 1970.)

Bluhme, Friedrich. 1820. Die Ordnung der Fragmente in den Pandektentiteln. *Zeitschrift für geschichtliche Rechtswissenschaft* 4: 257–473.

Blythe, James M. 1992. *Ideal Government and the Mixed Constitution in the Middle Ages.* Princeton: Princeton University Press.

———. 1997. *On the Government of Rulers*, De Regimine Principum. Philadelphia: University of Pennsylvania Press.

Bocheński, Joseph M. 1972. *La logica formale. Dai Presocratici a Leibniz*. Trans. A. Conte. Turin: Einaudi. (1st ed. in German 1956.)

Bodin, Jean. 1594. *De Republica Libri Sex*. Latine Ab Auctore Redditi, multo quam antea locupletiores; cum indice ... Ed. 3., prioribus multo emendatior. Francofurti: Apud Ioan. Wecheli viduam, sumtib. Petri Fischeri.

Boethius, Anicius Manlius Severinus. Anicii Manlii Severini Boethii *in Isagogen Porphyrii* commenta copiis a G. Schepss comparatis suisque usus recensuit S. Brandt. Vienna: Academia Litterarum, 1906.

———. An. Manl. Sev. Boetii *In Categorias Aristotelis libri quatuor*. In *P.L.*, 64.

———. An. Manl. Sev. Boetii *in Porphyrium dialogi a Victorino translati*. In *P.L.*, 64.

———. An. Manl. Sev. Boetii *De Trinitate*. In *Boethius: The Theological Tractates*. Trans. H. F. Stewart, E. K. Rand, and S. J. Tester. London : Heinemann, 1973. (The Loeb Classical Library.)

Boethius of Dacia. *Modi significandi sive quaestiones super Priscianum maiorem*. Ed. J. Pinborg and H. Roos (Corpus Philosophorum Danicorum Medii Aevi, IV.1). Copenhagen: Fr. Bagge, 1969.

Boland, Vivien. 1996. *Ideas in God according to Saint Thomas Aquinas. Sources and Synthesis*. Leiden: Brill.

S. Bonaventura. *Doctoris seraphici* S. Bonaventurae *Commentaria in quatuor libros Sententiarum Magistri Petri Lombardi, II. In secundum librum Sententiarum*. Quaracchi: Collegium S. Bonaventurae, 1885.

———. *Seraphici Doctoris* S. Bonaventurae *Collationes in Hexaëmeron, sive illuminationes Ecclesiae*, in *Doctoris Seraphici* S. Bonaventurae *S.R.E. Episcopi Cardinalis opera omnia* iussu et auctoritate R.mi P.A. a Parma totius ordinis minorum S. Francisci ministri generalis edita studio et cura PP. Collegii a S. Bonaventura … 5. Quaracchi: Collegium S. Bonaventurae, 1891.

———. *Seraphici Doctoris* Santi Bonaventurae *Quaestiones disputatae de scientia Christi, de mysterio SS. Trinitatis, de perfectione evangelica*. Quaracchi: Collegium S. Bonaventurae, 1891.

Brams, Jozef. 2000. L'influence de l'Aristoteles latinus: Boèce et Jacques de Venise. In *L'élaboration du vocabulaire philosophique au Moyen Âge*. (Actes du Colloque international de

Louvain-la-Neuve et Leuven, 12–14 septembre 1998). Ed. J. Hamesse and C. Steel, 203–19. Turnhout: Brepols.

Bretone, Mario. 1996. *Res incorporalis* in Filellenismo e tradizionalismo a Roma nei primi due secoli dell' impero. *Atti convegni Lincei* 125: 117–42.

Brugi, Biagio. 1921a. *Per la storia della giurisprudenza e delle Università italiane. Saggi.* Turin: UTET.

———. 1921b. *Per la storia della giurisprudenza e delle Università italiane. Nuovi saggi.* Turin: UTET.

———. 1936. Il metodo dei glossatori bolognesi. In *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento.* Vol. 1: 23–31. Palermo: Castiglia.

Brundage, James A. 1969. *Medieval Canon Law and the Crusader.* Madison: University of Wisconsin Press.

———. 1995. The Rise of the Professional Canonists and Development of the *Ius commune. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* kanonistische Abteilung 81: 26–63.

Bucher, Theodor G. 1996. *Introduzione alla logica.* Trans. G. Auletta. Bologna: CLUEB. (1st ed. in German 1987.)

Buckland, W. W. 1931. *The Main Institutions of Roman Private Law.* Cambridge: Cambridge University Press.

———. 1939. Praetor and Chancellor. *Tulane Law Review* 13: 163–177.

Buridanus. Ioannis Buridani *Expositio et Quaestiones in Aristotelis "De Caelo."* Ed. B. Patar. Louvain-la-Neuve: Éditions de l'Institut supérieur de philosophie-Peeters, 1996.

Burns, James H., and Mark Goldie, eds. 1991. *The Cambridge History of Political Thought, 1450–1700.* Cambridge: Cambridge University Press.

Butterfield, Herbert. 1998. *Le origini della scienza moderna.* Trans. A. Izzo. Bologna: Il Mulino. (1st ed. in English 1958.)

Cagnolus. 1586. *Splendidissimi iurisconsulti* D. Hieronymi Cagnoli *equitis illustrissimi Sabaudiae Ducis Senatoris in Constitutiones et leges Primi, Secundi, Quinti et Duodecimi Pandectarum…aurearum enarrationum liber primus …* Venice.

Calasso, Francesco. 1954. *Medio Evo del diritto.* Vol. 1: *Le fonti.* Milan: Giuffré.

———. 1956. Causa legis. Motivi logici e storici del diritto comune. *Rivista di Storia del Diritto Italiano* 29: 25–37. (Now in *Annali di storia del diritto* 9 [1965 = Scritti di Francesco Calasso]: 157–68.)

———. 1957. *I glossatori e la teoria della sovranità.* 3rd ed. Milan: Giuffré.

———. 1959. Bartolismo. *Enciclopedia del diritto.* Vol. 5: 71–4. Milan: Giuffré.

———. 1967. *Il negozio giuridico. Lezioni di storia del diritto italiano.* 2nd ed. Milan: Giuffré.

Calogero, Guido. 1927. *I fondamenti della logica aristotelica.* Florence: Le Monnier.

Canning, Joseph. 1988. Law, Sovereignty and Corporation Theory, 1300–1430. In *The Cambridge History of Medieval Political Thought, c. 350–c. 1450.* Ed. J. H. Burns and Mark Goldie, 454–76. Cambridge: Cambridge University Press.

———. 1996. *A History of Medieval Political Thought, 300–1450.* London: Routledge.

Capasso, Ideale, and Giorgio Tabarroni. 1970. Cielo. *Enciclopedia Dantesca.* Vol. 1. Rome: Enciclopedia Italiana.

Capistranus. 1584. *Tractatus de quodam matrimonio per modum consilii* Ioannis a Capistrano. In *T.U.I.,* 9.

Capozzi, Gino. 1974. *Giudizio, prova e verità. I principi della scienza nell'analitica di Aristotele.* Naples: Edizioni Scientifiche Italiane.

———. 1976. *Introduzione alla logica come analitica della scienza e della storia.* Naples: Jovene.

Caprioli, Severino. 1961–1962. Tre capitoli intorno alla nozione di "regula iuris" nel pensiero dei glossatori. *Annali di storia del diritto* 5–6: 221–374.

———. 1963. "De modis arguendi" scripta rariora. *Studi Senesi* 75: 30–56, 107–90, 230–53.

———. 1965. "De modis arguendi" scripta rariora. *Studi Senesi* 77: 355–414.

Carcaterra, Antonio. 1972. Dialettica e giurisprudenza. *Studia et documenta historiae et iuris* 38: 277–318.

Casari, Ettore. 1997. *Introduzione alla logica*. Turin: UTET.

Cassell, Anthony K. 2004. *The Monarchia Controversy: An Historical Study with Accompanying Translations of Dante Alighieri's Monarchia, Guido Vernani's Refutation of the "Monarchia" Composed by Dante, and Pope John XXII's Bull, Si fratrum*. Washington, D.C.: The Catholic University of America Press.

Celluprica, Vincenza. 1978. *La logica antica*. Turin: Loescher.

Cerami, Pietro. 1985. La concezione celsina del "*ius*"—Presupposti culturali e implicazioni metodologiche. *Annali del Seminario Giuridico. Università di Palermo* XXXVIII: 5–250.

Chadwick, Henry. 1986. *Boezio: La consolazione della musica, della logica, della teologia e della filosofia*. Trans. F. Lechi. Bologna: Il Mulino. (1st ed. in English 1981.)

Chenu, Marie-Dominique. 1926. Le *De Spiritu imaginativo* de R. Kilwardby, O.P. († 1279). *Revue des sciences philosophiques et théologiques* 15: 507–17. (Now in *Studi di lessicografia filosofica medievale*. Ed. G. Spinosa. Florence: Olschki. 2001.)

———. 1928. Notes de lexicographie philosophique médiévale. *Revue des sciences philosophiques et théologiques* 17: 82–94.

———. 1946. *Imaginatio*. Note de lexicographie philosophique médiévale. *Miscellanea Giovanni Mercati. 2. Letteratura medioevale*, 593–602. Vatican City: Biblioteca Apostolica Vaticana. (Now in *Studi di lessicografia filosofica medievale*. Ed. G. Spinosa. Florence: Olschki. 2001.)

———. 1957. *La théologie comme science au XIIIe siècle*. Paris: Vrin.

———. 1995. *La Teologia come scienza nel XIII secolo*. Trans. M. Spranzi and M. Vigevani. Milan: Jaca Book. (1st ed. in French 1957.)

———. 1999. *La Teologia nel XII secolo*. Trans. P. Vian. Milan: Jaca Book. (1st ed. in French 1976.)

Chevrier, Georges. 1966. Sur l'art de l'argumentation chez quelques Romanistes médiévaux au XIIe et au XIIIe siècle. *Archives de philosophie du droit* 11: 115–48.

Chiantini, Monica. 1995. Dal mondo della prassi: Una raccolta di *consilia* della seconda metà del Duecento per la curia podestarile di San Gimignano. In *Consilia im späten Mittelalter. Zum historischen Aussagewert einer Quellengattung*. Ed. Ingrid Baumgärtner, 32–50. Sigmaringen: Thorbecke.

———. 1997. *Il* consilium sapientis *nel processo del secolo XIII, San Gimignano 1246–1312*. Siena: Il leccio.

Ciardella, Piero. 1991. *La conoscenza. Breve introduzione alla Logica ed alla Filosofia della Conoscenza*. Casale Monferrato: Piemme.

Ciccaglione, Federico. 1901. *Manuale di storia del diritto italiano*. Vol. 2. Milan: Vallardi.

Cicero. *Brutus*. In *Cicero in Twenty-eight Volumes*. Latin text and English translation. Vol. 5: *Brutus*, *De Oratore*. Trans. G.L. Hendrickson. London: Heinemann, 1971. (The Loeb Classical Library.)

———. *De Oratore*. In *Cicero in Twenty-eight Volumes*. Latin text and English translation. Vol. 5: *Brutus*, *De Oratore*. Trans. H.M. Hubbell. London: Heinemann, 1971. (The Loeb Classical Library.)

———. *De Officiis*. In *Cicero in Twenty-eight Volumes*. Latin text and English translation. Vol. 21: *De Officiis*. Trans. W. Miller. London: Heinemann, 1975. (The Loeb Classical Library.)

———. *Epistolae ad familiares sive ad diversos*. In *Cicero in Twenty-eight Volumes*. Latin text and English translation. Vols. 25–7. Trans. W. Glynn Williams. London: Heinemann, 1979. (The Loeb Classical Library.)

———. *Pro Plancio*. In *Cicero in Twenty-eight Volumes*. Latin text and English translation. Vol. 11: *Pro Archia poeta*, *Post reditum in senatu*, *Post reditum ad Quirites*, *De domo sua*, *De haruspicum responsis*, *Pro Plancio*. Trans. N.H. Watts. London: Heinemann, 1979. (The Loeb Classical Library.)

Classen, Peter. 1974. *Burgundio von Pisa. Richter-Gesandter-Übersetzer*. Heidelberg: C. Winter.

Cobban, Alan B. 1975. *The Medieval Universities: Their Development and Organization*. London: Methuen.

Cochetti, Maria. 1978. La biblioteca di Giovanni Calderini. *Studi medievali* 19.2: 951–1027.

Codignola, Ernesto. 1954. *Il problema dell'educazione. Sommario di storia della filosofia e della pedagogia*. Vol. 1. Florence: La Nuova Italia.

Coing, Helmut. 1952. Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Romanistische Abteilung) 69: 24–59.

Colish, Marcia L. 2001. *La cultura del Medioevo (400–1400)*. Trans. E. Gallo. Bologna: Il Mulino. (1st ed. in English 1997.)

Colli, Vincenzo. 1984. Una lectura di Giovanni Bassiano. 'Dialectica disputatio' ed esposizione didattica nella esegesi di un passo dell'Infortiatum. *Ius commune* 11: 37–53.

———. 1985. Insolubilia Hugolini. Tradizione manoscritta e analisi di casus antinomici. *Ius commune* 13: 13–34.

———. 1990. Termini del diritto civile. In *Méthodes et instruments du travail intellectuel au moyen âge*. Ed. O. Weijers, 231–42. Turnhout: Brepols.

Columna. 1581. Aegidii Columnae Romani *Eremitarum D. Augustini Sacrae Theologiae doctoris fundamentarii Archiepiscopi Bituricensis S.R.E. Cardinalis In secundum librum Sententiarum Quaestiones* nunc denuo excusae industria R.P.F. Angeli Rocchensis Augustiniani profess. Conventus Camerini S. Theologiae Doctoris ... Venice.

Condorelli, Orazio. 2003. *Principio elettivo, consenso, rappresentanza: Itinerari canonistici su elezioni episcopali, provvisioni papali et dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII–XV)*. Rome: Il Cigno. (I libri di Erice, 32.)

Coopland, George W. 1925–6. An Unpublished Work of John of Legnano. The *Somnium* of 1372. *Nuovi studi medievali* 2.1: 65–88.

Copi, Irving M. and Carl Cohen. 1999. *Introduzione alla logica*. 3rd ed. Trans. G. Lolli. Bologna: Il Mulino. (1st ed. in English 1994.)

Copleston, Frederick. 1971. *Storia della filosofia*. Vol. 2: *La filosofia medioevale da Agostino a Scoto*. Trans. A. Balestrieri Sacchi. Brescia: Paideia. (1st ed. in English 1950.)

Coppens, Chris. 1999. The Teaching of Law in the University of Paris in the First Quarter of the 13th Century. *Rivista Internazionale di Diritto Comune* 10: 139–69.

Coras. 1584. Ioannis Corasii *iurisconsulti, regiique senatoris Tolosae, De iuris arte liber, quatuor partibus conclusa. De iure civili in artem redigendo*, in *T.U.I.*, 1.

Cortese, Ennio. 1962. *La norma giuridica: Spunti teorici nel diritto comune classico*, 2 vols. Milan: Giuffrè. (*Ius nostrum*: Studi e testi pubblicati dall'Istituto di Storia del Diritto Italiano dell'Università di Roma, 6.1–2; reprint 1995.)

———. 1982a. Legisti, canonisti e feudisti: la formazione di un ceto medievale. In *Università e società nei secoli XII–XVI*. (Nono Convegno internazionale, Pistoia, 20–25 settembre 1979), 195–281. Pistoia: Centro italiano di Studi di storia e d'arte.

———. 1982b. Scienza di giudici e scienza di professori tra XII e XIII secolo. In *Legge, giudici, giuristi*. (Atti del convegno tenuto a Cagliari nei giorni 18–21 maggio 1981), 93–148. Milan: Giuffré.

———. 1992a. *Il rinascimento giuridico medievale*. Rome: Bulzoni.

———. 1992b. Tra glossa, commento e Umanesimo. *Studi senesi* 104: 458–503. (Now in *Miscellanea Domenico Maffei dicata: historia, ius, studium*. Ed. P. Weimar and A. García y García. Vol. 3: 29–74. Goldbach: Keip, 1995.)

———. 1993. Alle origini della scuola di Bologna. *Rivista Internazionale di Diritto Comune* 4: 7–49.

———. 1995. *Il diritto nella storia medievale*. Vol. 2: *Il basso Medioevo*. Rome: Il Cigno Galileo Galilei.

Corvino, Francesco. 1976. Il rinnovamento culturale del secolo XI. In *Storia della filosofia*. Vol. 5.2: *La filosofia nei primi due secoli dopo il Mille*. Ed. M. Dal Pra, 121–42. Milan: Vallardi.

Courtenay, William. 1990. *Capacity and Volition: A History of the Distinction of Absolute and Ordained Power*. Bergamo: Lubrina. (Quodlibet, Ricerche e strumenti di filosofia medievale.)

Cousin, M. Victor, ed. 1970. *Ouvrages inédits d'Abélard pour servir a l'histoire de la philosophie scolastique en France*. Hildesheim: Olms. (1st ed. 1859.)

Crescenzi, Victor, ed. 1990. *La glossa di Poppi alle Istituzioni di Giustiniano*. Rome: Istituto Storico Italiano per il Medio Evo.

Crombie, Alistair C. 1970. *Da S. Agostino a Galileo. Storia della scienza dal V al XVII secolo*. Trans. V. Di Giuro. Milan: Feltrinelli. (1st ed. in English 1952.)

Crook, John A. 1995. *Legal Advocacy in the Roman World*. London: Duckworth.

Cursus. 1678. Collegii Salmanticensis fr. Discalceatorum B. Mariae de Monte Carmeli parenti suo Eliae consecrati *Cursus theologicus Summam Theologicam Angelici Doctoris D. Thomae complectens a quaest. 7, Primae Secundae complectens, IV, iuxta miram eiusdem Angelici Praeceptoris doctrinam et omnino consone ad eam, quam Complutense Collegium eiusdem Ordinis in suo Artium cursu tradit* ... Venice.

Cynus. 1578. Cyni Pistoriensis *iurisconsulti praestantissimi In Codicem et aliquot titulos primi Pandectorum tomi, id est, Digesti Veteris, doctissima commentaria … a … Nicolao Cisnero I.U.D … correcta et illustrata ...* Frankfurt am Main. (Reprint Rome: Il Cigno Galileo Galilei, 1998.)

Dal Pra, Mario. 1960. *Il pensiero occidentale*. Vol. 1: *La filosofia antica e medievale*. Florence: La Nuova Italia.

Dal Pra, Mario, ed. 1969. Pietro Abelardo, *Scritti di logica.* Introductiones dialecticae: Editio super Porphyrium. Glossae in Categorias. Editio super Aristotelem de interpretatione. De divisionibus. *Logica* Ingredientibus: Super Topica glossae. Florence: La Nuova Italia.

D'Amelio, Giuliana. 1972. Il "Dictionarium iuris" di Jacques de Revigny. *Tijdschrift voor Rechtsgeschiedenis* 40: 43–72.

Dekkers, René. 1958. *De Regulis Juris*. Brussels: Paleis der Academiën.

De Libera, Alain. 1997. Die Rolle der Logik im Rationalisierungsprozeß des Mittelalters. In *Das Licht der Vernunft. Die Anfänge der Aufklärung im Mittelalter*. Ed. K. Flasch and U. R. Jeck, 110–22. Munich: Beck.

———. 1999a. *Storia della filosofia medievale*. Trans. F. Ferri. Milan: Jaca Book. (1st ed. in French 1993.)

———. 1999b. Le tradizioni di Oxford e Parigi nell'ambito della logica. In *La logica nel Medioevo*. Trans. P. Fiorini. Ed. C. Marabelli and A. K. Rogalski, 85–101. Milan: Jaca Book. (1st ed. in *The Cambridge History of Later Medieval Philosophy*. Ed. A. Kenny, N. Kretzmann and J. Pinborg, 174–87. Cambridge: Cambridge University Press, 1982.)

De Muralt, André. 1991. *L'enjeu de la philosophie médiévale. Études thomistes, scotistes, occamiennes et grégoriennes*. Leiden: Brill.

De Rijk, L.M., ed. 1956. Petrus Abaelardus*, Dialectica. First complete edition of the parisian Manuscript*. Assen: Van Gorcum.

———, ed. 1972. Peter of Spain (Petrus Hispanus Portugalensis), *Tractatus called afterwards Summulae logicales*. First critical Edition from the Manuscripts with an Introduction. Assen: Van Gorcum.

De Ruggiero, Guido. 1946a. *Storia della filosofia*. Vol. 2.2: *La filosofia del cristianesimo. Dalla patristica alla scolastica*. 4th ed. Bari: Laterza.

———. 1946b. *Storia della filosofia*. Vol. 2.3: *La filosofia del cristianesimo. La maturità della scolastica*. 4th ed. Bari: Laterza.

Di Bartolo, Stefano. 1997. Il "casus legis" nell'opera di Iacopo Bottrigari sr. Alcuni esempi dell'uso della dialettica nella metodologia giuridico-esegetica dello "Studium" bolognese del '300. *Rivista Internazionale di Diritto Comune* 8: 179–216.

Dillon Bussi, Angela. 1978. Cassoli Filippo. *Dizionario Biografico degli Italiani*. Vol. 21. Rome: Enciclopedia Italiana.

Di Renzo Villata, Maria Gigliola. 2000. La formazione dei "Libri feudorum." In *Il feudalesimo nell'alto medioevo: Settimane di studio del Centro Italiano di Studi sull'Alto Medioevo 47*. Vol. 2: 651–721. Spoleto: Presso la sede del Centro.

Diurni, Giovanni. 1976–7. L'*Expositio ad Librum Papiensem* e la scienza giuridica preirneriana. *Rivista di Storia del Diritto Italiano* 49: 5–277.

Dolezalek, Gero. 1994. Les gloses des manuscrits de droit: reflet des méthodes d'enseignement. In *Manuels, programmes de cours et techniques d'enseignement dans les Universités médiévales*. (Actes du Colloque international de Louvain-la-Neuve, 9–11 settembre 1993). Ed. J. Hamesse, 235–55. Louvain-la-Neuve: Institut d'Études Médiévales de l'Université Catholique de Louvain.

D'Onofrio, Giulio. 1986. *Fons scientiae. La dialettica nell'Occidente tardo-antico*. Naples: Liguori.

Donovan Glynis M., and Maurice H. Keen. 1981. The *Somnium* of John of Legnano. *Traditio* 37: 325–45.

Duval, André, Bernard Lauret, Hervé Legrand, Joseph Moingt, and Bernard Sesboüé, eds. 1994. *Les conciles œcuméniques*. 2 vols. Paris: Cerf.

Ebbesen, Sten. 1999. La logica scolastica dell'antichità come fonte della logica scolastica medievale. In *La logica nel Medioevo*. Trans. P. Fiorini. Ed. C. Marabelli and A. K. Rogalski, 1–32. Milan: Jaca Book. (1st ed. in *The Cambridge History of Later Medieval Philosophy*. Ed. A. Kenny, N. Kretzmann and J. Pinborg, 101–27. Cambridge: Cambridge University Press, 1982.)

Eco, Umberto. 1993. L'albero di Porfirio. In *Logica e linguaggio nel Medioevo*. Ed. R. Fedriga and S. Puggioni, 51–69. Milan: LED. (1st ed. in *Semiotica e filosofia del linguaggio*, 91–106. Turin: Einaudi, 1984.)

Ermini, Giuseppe. 1923. *I trattati della guerra e della pace di Giovanni da Legnano*. Imola: Galeati. (Now in Capitani, O. and E. Menestò eds., *Scritti storico-giuridici*. Spoleto: CISAM, 1977.)

Ernesti, Johann Christian Gottlieb. 1797. *Lexicon terminologiae latinorum rhetoricae*. Lipsiae : Sumtibus Caspari Fritsch.

Errera, Andrea. 1995. *Arbor actionum. Genere letterario e forma di classificazione delle azioni nella dottrina dei glossatori*. Bologna: Monduzzi.

———. 1996. La "quaestio" medievale e i glossatori bolognesi. *Studi senesi* 108: 490–530.

———. 1999. Forme letterarie e metodologie didattiche nella scuola bolognese dei glossatori civilisti: tra evoluzione ed innovazione. In *Studi di storia del diritto medioevale e moderno*. Ed. F. Liotta, 33–106. Bologna: Monduzzi.

Evans, Gillian R. 1996. *Tra fede e ragione. Breve storia del pensiero medievale da Agostino a Cusano*. Trans. S. Simonetta. Genua: Edizioni Culturali Internazionali. (1st ed. in English 1993.)

Everard. 1587. *Topica iuris sive loci argumentorum legales, authore* D. Nicol. Everardo a Meldiburgo *I.C.Cl. magnique Senatus Belgici apud Mechliniam olim praeside summariis singularis praefixis illustrati, ac P. Prateii adnotatiunculis doctissimis … nunc vero summa diligentia recogniti, non parvoque labore reemendati a R.P.M. Livio a Lege Ven. August. Sac. Theol. Doct.* ... Venice.

Faber. 1546. Ioannis Fabri *In quatuor Institutionum libros commentaria* ... Lyon.

Falchi, Gian Luigi. 1981. *Le controversie tra Sabiniani e Proculiani*. Milan: Giuffrè.

Fantini, Maria Grazia. 1998. *La cultura del giurista medievale. Natura, causa, ratio*. Milan: Franco Angeli.

Fassò, Guido. 1966. *Storia della filosofia del diritto. I. Antichità e Medioevo*. Bologna: Il Mulino.

Fedriga, Riccardo. 1993. Sillogistica e topica. In *Logica e linguaggio nel Medioevo*. Ed. R. Fedriga and S. Puggioni, 297–318. Milan: LED.

Feldbrugge, Ferdinand J.M. 1966. Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue. *American Journal of Comparative Law* 14: 630–57.

Fioravanti, Gianfranco. 1992. "Sermones" in lode della filosofia e della logica a Bologna nella prima metà del XIV secolo. In *L'insegnamento della logica a Bologna nel XIV secolo*. Ed. D. Buzzetti, M. Ferriani, and A. Tabarroni, 165–76. Bologna: Istituto per la Storia dell'Università di Bologna.

———. 1994. L'Aristotelismo latino. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 299–323. Rome-Bari: Laterza.

Fitting, Hermann. 1965. *Juristische Schriften des früheren Mittelalters aus Handschriften meist zum ersten Mal herausgegeben und erörtert*. Aalen: Scientia. (1st ed. 1876.)

Flasch, Kurt. 1992. *Introduction à la philosophie médiévale*. Trans. J. de Bourgknecht. Fribourg: Éditions Universitaires Fribourg. (1st ed. in German 1987.)

Fossier, Robert. 1987. *Il tempo delle crisi (1250–1520)*. Trans. E. De Angeli. Turin: Einaudi. (1st ed. in French 1983.)

Franklin, Julian H. 1991. Sovereignty and the Mixed Constitution: Bodin and His Critics. In *The Cambridge History of Political Thought, 1450–1700*. Ed. J. H. Burns and Mark Goldie, 298–328. Cambridge: Cambridge University Press.

Fransen, Gérard. 1982. Les gloses des canonistes et des civilistes. In *Les genres littéraires dans les sources théologiques et philosophiques médiévales. Définition, critique et exploitation* (Actes du Colloque international de Louvain-la-Neuve, 25–27 mai 1981), 131–49. Louvain-la-Neuve: Institut d'Études Médiévales de l'Université Catholique de Louvain.

———. 1985. Les questions disputées dans les Facultés de droit. In *Les questions disputées et les questions quodlibétiques dans les Facultés de Théologie, de Droit et de Médecine*. Ed. L. Genicot, 223–77. Turnhout: Brepols.

Fransen, Gérard, and Stephan Kuttner, eds. 1969. *Summa "Elegantius in iure diuino" seu Coloniensis*. Vatican City: Biblioteca Apostolica Vaticana.

Freedman, Paul, and Josep Maria Masnou. 2002. Some Additional Letters of Pope Innocent III concerning the Cathedral Chapter of Vic. *Römische historische Mitteilungen* 44: 103–20.

Fried, Johannes. 1974. *Die Entstehung des Juristenstandes im 12. Jahrhundert: Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena*. Köln: Böhlau. (Forschungen zur neueren Privatrechtsgeschichte, 21.)

Frier, Bruce W. 1985. *The Rise of the Roman Jurists: Studies in Cicero's pro Caecina*. Princeton: Princeton University Press.

Fumagalli Beonio Brocchieri, Mariateresa and Massimo Parodi. 1996a. Platone ed Aristotele nel Medio Evo. In *Aristotelismo e platonismo nella cultura del Medioevo*. Ed. A. Arisi Rota and M. De Conca, 33–42. Pavia: Ibis.

———. 1996b. *Storia della filosofia medievale. Da Boezio a Wyclif*. Rome-Bari: Laterza.

Funaioli, Igino, ed. 1969. *Grammaticae romanae fragmenta*. Stuttgart: Teubner.

Gallo, Filippo. 1987, Sulla definizione celsina del diritto. *Studia et Documenta Historiae et Iuris* 53: 7–52.

Gangemi, Giuseppe. 2002. *La costruzione sociale della logica. Tra concetti di relazioni e concetti di attributi*. Milan: Giuffré.

García y García, Antonio, ed. 1981. *Constitutiones concilii quarti Lateranensis una cum commentariis glossatorum*. Vatican City: Biblioteca Apostolica Vaticana.

———. 1994. La enseñanza del derecho en la universidad medieval. In *Manuels, programmes de cours et techniques d'enseignement dans les Universités médiévales*. (Actes du Colloque international de Louvain-la-Neuve, 9–11 settembre 1993). Ed. J. Hamesse, 201–34. Louvain-la-Neuve: Institut d'Études Médiévales de l'Université Catholique de Louvain.

Garfagnini, Gian Carlo. 1979. *Aristotelismo e Scolastica*. Turin: Loescher.

———. 1994. La nuova immagine del mondo. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 235–57. Rome-Bari: Laterza.

Garin, Eugenio. 1969. Dialettica e retorica dal XII al XVI secolo. In *L'età nuova. Ricerche di storia della cultura dal XII al XVI secolo*, 45–79. Naples: Morano.

———, ed. 1947. Coluccio Salutati, *De nobilitate legum et medicinae*. Florence: Vallecchi.

Gaudemet. Jean. 1979a. *Les élections dans l'Eglise latine des origines au XVIe siècle*. Paris: Fernand Lanore.

———. 1979b. *Le Gouvernement de l'église à l'époque classique: Le gouvernement local*. Paris: Sirey.

———. 1980. Bologne, capitale européenne du droit. *Archivio giuridico Filippo Serafini* 199: 3–22. (Now in *Église et société en Occident au Moyen Age*, 7. London: Variorum, 1984.)

Gellius, Aulus. *The Attic Nights of Aulus Gellius: In Three Volumes.* Latin text and English

translation. Ed. and trans. John C. Rolfe. London: W. Heinemann, 1948. (The Loeb Classical Library.)

Genzmer, Erich. 1934. Die iustinianische Kodifikation und die Glossatoren. In *Atti del Congresso Internazionale di Diritto Romano (Bologna, 17–20 aprile 1933)*. Vol. 1: 347–430. Pavia: Successori Fratelli Fusi (Now in *Das römische Recht im Mittelalter*. Ed. E. J. H. Schrage, 5–53. Darmstadt: Wissenschaftliche Buchgesellschaft, 1987.)

———. 1935. *Vorbilder für die Distinctionen der Glossatoren*. in *Acta Congressus Iuridici Internationalis Romae, 12–17 novembris 1934*. Vol. 1: 343–58. Rome: Apud custodiam librariam Pont. Instituti utriusque iuris.

Ghisalberti, Alessandro. 1983. *Giovanni Buridano: Il cielo e il mondo. Commento al trattato "Del cielo" di Aristotele*. Milan: Rusconi.

Gibson, Margaret. 1982. Latin Commentaries on Logic before 1200. *Bulletin de philosophie médiévale* 24: 54–64. (Now in *"Artes" and Bible in the Medieval West*, 8. Aldershot-Brookfield: Variorum, 1993.)

Gilson, Etienne. 1953. *La philosophie de saint Bonaventure*. Paris: Vrin.

———. 1962. *L'être et l'essence*. Paris: Vrin.

———. 1969. *L'esprit de la philosophie médiévale.* Gifford Lectures (Université d'Aberdeen). Paris: Vrin.

———. 1983. *La filosofia nel Medioevo. Dalle origini patristiche alla fine del XIV secolo*. Trans. M. A. del Torre. Florence: La Nuova Italia. (1st ed. in English 1952.)

Giordanengo, Gérard. 1992a. Coutume et droit féodal en France (XIIe-milieu XIVe siècle). In *Féodalités et droits savants dans le Midi médiéval*. Aldershot: Variorum.

———. 1992b. Epistula Philiberti. In *Féodalités et droits savants dans le Midi médiéval*. Aldershot: Variorum.

———. 1999. Consilia feudalia. In *Legal Consulting in the Civil Law Tradition*. Ed. Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner, 143–72. Berkeley: Robbins Collection. (Studies in Comparative Legal History.)

Giuliani, Alessandro. 1964. L'elemento "giuridico" nella logica medioevale. *Jus* 15: 163–90.

———. 1966. *La controversia. Contributo alla logica giuridica*. Pavia: Pubblicazioni della Università di Pavia.

———. 1994. Osservazioni sulla procedura nel metodo dialettico: dalla tradizione aristotelica a quella medioevale. In *L'educazione giuridica*. Vol. 6: *Modelli storici della procedura continentale*. Tome I: 27–31. Naples: ESI.

———. 1997. L'"Ordo Iudiciarius" medievale tra retorica e logica. In *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*. Ed. M. Bellomo, 133–45. Munich: Oldenbourg.

Glorieux, Palemon. 1968. L'enseignement au Moyen Age. Tecniques et méthodes en usage à la Faculté de Théologie de Paris au XIIIe siècle. *Archives d'histoire doctrinale et littéraire du Moyen Age* 43: 123–36.

Gordon, William M., and Olivia F. Robinson, trans. 1988. *The Institutes of Gaius, with English Translation*. London: Duckworth.

Grabmann, Martin. 1941. *I divieti ecclesiastici di Aristotele sotto Innocenzo III e Gregorio IX*. Rome: Pontificia Università Gregoriana.

———. 1946. *Guglielmo di Moerbeke O.P., il traduttore delle opere di Aristotele*. Rome: Pontificia Università Gregoriana.

———. 1980. *Storia del metodo scolastico*. Vol. 1 and 2. Florence: La Nuova Italia. (1st ed. in German 1909–1911.)

Grant, Edward. 1997. *La scienza nel Medioevo*. 2nd ed. Trans. P. Fait. Bologna: Il Mulino. (1st ed. in English 1971.)

———. 2001. *Le origini medievali della scienza moderna. Il contesto religioso, istituzionale e intellettuale*. Trans. A. Serafini. Turin: Einaudi. (1st ed. in English 1996.)

Grassi, Onorato. 1994. Il problema della certezza. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 472–87. Rome-Bari: Laterza.

Gratarolus. 1567. *Dialogus de substantiis physicis ante annos ducentos confectus, a Vuilhelmo Aneponimo philosopho. Item, libri tres incerti authoris, eiusdem aetatis. 1. De calore vitali. 2. De mari et aquis. 3. De fluminum origine*. Industria Guilielmi Grataroli medici, quasi ab interitu vindicati. Strasburg.

Graziano, Michele. 1992. *Scienza e dialettica nel loro sviluppo storico*. Palermo: La Ginestra.

Gregory, Tullio. 1992. *Mundana sapientia: Forme di conoscenza nella cultura medievale*. Rome: Edizioni di Storia e Letteratura.

Gribaldi Mofa, Mattheus. 1559. Matthaei Gribaldi Mophae iurisconsulti cheriani *De methodo ac ratione studendi libri tres*. Venice.

Grossi, Paolo. 1968. *Le situazioni reali nell'esperienza giuridica medievale*. Padua: CEDAM.

———. 1992. *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*. Milan: Giuffré.

———. 1997. *L'ordine giuridico medievale*. Rome-Bari: Laterza.

Grotius, Hugo. *De imperio summarum potestatum circa sacra: Critical Edition with Introduction, English Translation and Commentary*, 2 vols. Ed. and trans. Harm-Jan van Dam. Leiden: Brill, 2001. (Studies in the History of Christian Thought 102.)

Gualazzini, Ugo. 1974. *"Trivium" e "quadrivium."* Milan: Giuffré.

Henricus de Segusio.1963. Henrici de Segusio *Summa aurea.* Turin: Bottega d'Erasmo. (1st ed. 1581.)

Haren, Michael. 1992. *Medieval Thought. The Western Intellectual Tradition from Antiquity to the Thirteenth Century*, 2nd ed. Houndmills: Macmillan Press.

Haskins, Charles H. 1972. *La rinascita del XII secolo*. Trans. P. Marziale Bartole. Bologna: Il Mulino. (1st ed. in English 1958.)

Heer, Friedrich. 1991. *Il Medioevo (1100–1350)*. Trans. F. Codino. Milan: Mondadori. (1st ed. in German).

Helmholz, Richard H. 1996. *The Spirit of Classical Canon Law*. Athens, GA.: University of Georgia Press.

———. 2004. *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s.* In *The Oxford history of the Laws of England*. Vol. 1. Oxford: Oxford University Press.

Henry, Desmond P. 1999. Predicabili e categorie. In *La logica nel Medioevo*. Trans. P. Fiorini. Ed. C. Marabelli and A. K. Rogalski, 33–50. Milan: Jaca Book. (1st ed. in *The Cambridge History of Later Medieval Philosophy*. Ed. A. Kenny, N. Kretzmann and J. Pinborg, 128–42. Cambridge: Cambridge University Press, 1982).

Hissette, Roland. 1977. *Enquête sur les 219 articles condamnés à Paris le 7 mars 1277*. Louvain: Publications Universitaires.

Hoetink, Hendrik R. 1959. Autour du Sénatus-Consulte Claudien. In *Droits de l'antiquité et sociologie juridique: Mélanges Henri Levy-Bruhl*. Paris: Sirey.

Holland, Thomas Erskine, ed. 1917. Giovanni da Legnano, *Tractatus de Bello, de Represaliis et de Duello by Giovanni da Legnano, I.U.D. Professor of Civil and Canon Law in the University of Bologna*. Oxford: Oxford University Press.

The Holy Bible: Containing the Old and New Testaments in the Authorised King James Version. Chicago, Ill.: Good Counsel Publishing Company, 1960.

Hopper. 1584. Ioachimi Hopperi Phrisii *iureconsulti de iuris arte, libri tres*. In *T.U.I.*, 1.

Horn, Norbert. 1967. Philosophie in der Jurisprudenz der Kommentatoren: Baldus philosophus. *Ius commune* 1: 104–49.

———. 1968. *Aequitas in den Lehren des Baldus*. Cologne-Graz: Böhlau.

———. 1973. Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts. In *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*. Vol. 1: *Mittelalter (1100–1500). Die gelehrten Rechte und die Gesetzgebung*. Ed. H. Coing, 261–364. Munich: Beck.

Iansen, Bernardus S.I., ed. 1926. Fr. Petrus Iohannis Olivi ofm, *Quaestiones in secundum librum Sententiarum*, III (*quaestiones 72–118*). Quaracchi: Collegium S. Bonaventurae.

Inglis, John. 1998. *Spheres of Philosophical Inquiry and the Historiography of Medieval Philosophy*. Leiden: Brill.

Ioannes Andreae. 1581. Ioannis Andreae I.C. Bononiensis *omnium canonici iuris interpretum facile principis In Primum Decretalium librum Novella Commentaria, ab exemplaribus per Petrum Vendramaenum in Pontificio Venetiarum foro Advocatorum mendis, quibus referta erant, diligenter expurgatis, nunc impressa. His accesserunt doctissimorum virorum annotationes* ... Venice.

Ioannes ab Imola. 1575. Ioannis ab Imola *In Primum Decretalium commentaria, quamplurimum iurisconsultorum, qui probe aliquid his praeclarissimis ac pene divinis commentariis hactenus addidisse apparuerunt, adnotationibus illustrata. Hac novissima vero omnium editione ab erroribus innumerabilibus, quibus ubique depravata et passim mutila summi viri deprehendisse conquerebantur, habita ad vetustissimos Ioannis de Anania codices fide, suo candori vindicata, atque integritati restituta. Accesserunt etiam huic nostrae editioni commentaria eiusdem Auctoris in XIIIJ cap. sub tit. de renunciatione, nempe a cap. in praesentia, usque ad finem, quae in aliis desiderantur codicibus, habita ex bibliotheca eiusdem Ioannis de Anania* ... Venice.

Isidore of Seville. Isidori Hispalensis Episcopi *Etymologiarum sive originum libri XX*. Ed. W. M. Lindsay. Oxford: Oxford University Press, 1911.

Iulianus Duciensis. 1492. Iuliani Duciensis de Imola *Oratio pro principio inclyti Bononiensis Studii habita anno domini MCCCCLXXXX: regnante Ill. Johanne Bentivolo secundo*. Bologna.

Jacobi, Klaus. 1988. Logic: The Later Twelfth Century. In *A History of Twelfth- Century Western Philosophy*. Ed. P. Dronke, 227–51. Cambridge: Cambridge University Press.

———. 1994. Dialečctica est ars artium, scientia scientiarum. In *"Scientia" und "ars" im Hoch- und Spätmittelalter*. Ed. I. Craemer-Ruegenberg and A. Speer. Vol. 1: 307–28. Berlin: de Gruyter.

Jacques Cujas. 1658. *Opera omnia*. 10 vols. Paris: Soc. typogr. librorum officii ecclesiastici. (Reprint Goldbach: Keip, 1996.)

Jörs, Paul. 1888. *Römische Rechtswissenschaft zur Zeit der Republik*. Berlin: Vahlen.

Johannes Teutonicus. Johannis Teutonici *Apparatus glossarum in Compilationem tertiam*. Ed. Kenneth Pennington. Vatican City: Biblioteca Apostolica Vaticana, 1981. (Monumenta iuris canonici, Series A, 3.1.)

John of Salisbury. Ioannis Saresberiensis *Metalogicon* (*Corpus Christianorum. Continuatio Mediaevalis*, 98). Ed. K. S. B. Keats Rohan. Turnhout: Brepols, 1991.

Jolivet, Régis. 1959. *Trattato di filosofia*. Vol. 1: *Logica*. Trans. V. Da Re. Brescia: Morcelliana. (1st ed. in French 1945.)

Jolowicz, Herbert F. 1952. *Historical Introduction in the Study of Roman Law*. Cambridge: Cambridge University Press.

Jolowicz, Herbert F., and Barry Nicholas. 1972. *Historical Introduction to the Study of Roman Law*. 3rd ed. Cambridge: Cambridge University Press.

Kahn, Christoph. 2000. Terminology and Etymology in Medieval Logic. In *L'élaboration du vocabulaire philosophique au Moyen Âge*. (Actes du Colloque international de Louvain-la-Neuve et Leuven, 12–14 septembre 1998). Ed. J. Hamesse and C. Steel, 489–509. Turnhout: Brepols.

Kalinowski, Georges. 1971. *Introduzione alla logica giuridica*. Trans. M. Corsale. Milan: Giuffré. (1st ed. in French 1965.)

Kantorowicz, Hermann. 1939. The Quaestiones Disputatae of the Glossators. *Tijdschrift voor Rechtsgeschiedenis* 16: 1–67. (Now in *Rechtshistorische Schriften*. Ed. H. Coing and G. Immel, 137–85. Karlsruhe: Müller, 1970.)

———. 1957. *The King's Two Bodies. A Study in Mediaeval Political Theology*. Princeton: Princeton University Press.

Kantorowicz, Hermann, and William Warwick Buckland. 1969. *Studies in the Glossators of the Roman Law. Newly Discovered Writings of the Twelfth Century* (with *addenda et corrigenda* by P. Weimar). Aalen: Scientia. (1st ed. 1938.)

Kay, Richard. 2002. *The Council of Bourges: A Documentary History*. Aldershot: Ashgate. (Church, Faith and Culture in the Medieval West.)

Kemp, Eric Waldram. 1961. *Counsel and Consent: Aspects of the Government of the Church as Exemplified in the History of the English Provincial Synods*. London: SPCK.

Kirshner, Julius. 1973. *Civitas sibi faciat civem*: Bartolus of Sassoferrato's Doctrine on the Making of a Citizen. *Speculum* 48: 694–713.

———. 1999. *Consilia* as Authority in Late Medieval Italy: The Case of Florence. In *Legal Consulting in the Civil Law Tradition*. Ed. Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner, 107–40. Berkeley: Berkeley: Robbins Collection.

Kneale, William Calvert, and Martha Kneale. 1972. *Storia della logica*. Trans. A. Conte and L. Cafiero. Turin: Einaudi. (1st ed. in English 1962.)

Knowles, David. 1984. *L'evoluzione del pensiero medievale*. Trans. B. Loschi. Bologna: Il Mulino. (1st ed. in English 1962.)

Knuuttila, Simo. 1991. Buridan and Aristotle's Modal Syllogistic. In *Historia Philosophiae Medii Aevi*. Ed. B. Mojsisch and O. Pluta. Vol. 1: 477–88. Amsterdam: Grüner.

Köhn, Rolf. 1986. Schulbildung und Trivium im lateinischen Hochmittelalter und ihr möglicher praktischer Nutzen. In *Schulen und Studium im sozialen Wandel des hohen und späten Mittelalters*. Ed. J. Fried, 255–84. Sigmaringen: Jan Thorbecke.

Kretzschmar, Robert. 1985. *Alger von Lüttichs Traktat "De misericordia et iustitia." Ein kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits: Untersuchungen und Edition.* Sigmaringen: Thorbecke. (Quellen und Forschungen zum Recht im Mittelalter, 2.)

Kriechbaum, Maximiliane. 2000. Philosophie und Jurisprudenz bei Baldus de Ubaldis: "Philosophi legum imitati sunt philosophos naturae." *Ius commune* 27: 299–343.

Kuttner, Stephan. 1937. *Repertorium der Kanonistik (1140–1234)*. Vatican City: Biblioteca Apostolica Vaticana.

———. 1940. Zur neuesten Glossatorenforschung. *Studia et Documenta Historiae et Iuris*, 6: 275–319. (Now in *Studies in the History of Medieval Canon Law*, Aldershot: Ashgate, 1).

———. 1943. Bernardus Compostellanus Antiquus. *Traditio* 1: 277–340. (Now in *Gratian and the Schools of Law. 1140–1234*, 7. London: Variorum, 1983.)

———. 1951. Réflexions sur les Brocards des Glossateurs. In *Mélanges Joseph de Ghellinck*, Vol. 2: 767–92. Gembloux: J. Duculot. (Now in *Gratian and the Schools of Law. 1140–1234*, 9. London: Variorum, 1983.)

———. 1976. Gratian und Plato. In *Church and Government in the Middle Ages. Essays presented to C.R. Cheney*. Ed. C.N.L. Brooke et al., 93–118. Cambridge: Cambridge University Press. (Now in *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, 11. Aldershot: Variorum, 2nd ed. 1992.)

Lactantius, Lucius Caecilius Firmianus. *Lucii Caecilii Firmiani Lactantii Divinarum institutionum liber secundus de origine erroris*. In *P.L.*, 6.

Landau, Peter. 1997. Kanonistische Quaestionenforschung. In *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*. Ed. M. Bellomo, 73–84. Munich: Oldenbourg.

Landsberg, Ernst. 1888. *Die Quaestiones des Azo*. Freiburg: Mohr.

Lapus 1571. *Allegationes Iur. Utr. Monarchae Domini* Lapi de Castiglionchio *Patritii Florentini ab infinitis erroribus per D. Quintilianum Mandosium Iurecons. Romanum purgatae et cum eiusdem D. Quintiliani additionibus doctissimis pariter et utilissimis additis insuper nonnullis allegationibus, seu consiliis eiusdem Lapi et aliorum quae in antiquis editionibus non habentur …* Venice.

Larrainzar, Carlos. 1998. El decreto de Graciano del códice Fd (=Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand. *Ius ecclesiae: Rivista internazionale di diritto canonico* 10: 421–89.

———. 1999. El borrador de la "Concordia" de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg). *Ius ecclesiae: Rivista internazionale di diritto canonico* 11: 593–666.

Lawn, Brian. 1993. *The Rise and Decline of the Scholastic 'Quaestio Disputata.' With Special Emphasis on Its Use in the Teaching of Medicine and Science*. Leiden: Brill.

Le Bras, Gabriel. 1960. Théologie et Droit Romain dans l'oeuvre d'Henri de Suse. *Études histo-*

riques à la mémoire de Noël Didier publiées par la Faculté de Droit et des Sciences Économiques de Grenoble, 195–204. Paris: Montchréstien.

Leff, Gordon. 1992. The "Trivium" and the Three Philosophies. In *A History of the University in Europe.* Vol. 1: *Universities in the Middle Ages*. Ed. H. de Ridder-Symoens, 307–36. Cambridge: Cambridge University Press.

Legendre, Pierre. 1965. Recherches sur les commentaires pré-accursiens. *Tijdschrift voor Rechtsgeschiedenis* 33: 353–429. (Now in *Écrits juridiques du Moyen Age occidental*, 6. London: Variorum, 1988.)

———, ed. 1973. *La Summa Institutionum* Iustiniani est in hoc opere *(Manuscrit Pierpont Morgan 903)*. Frankfurt am Main: Klostermann.

Le Goff, Jacques. 1991. *Gli intellettuali nel Medioevo*. Trans. C. Giardini. Milan: Mondadori. (1st ed. in French 1957.)

Lexikon des Mittelalters. 10 vols. Munich: Artemis, 1977–1999.

Libertini, Vincenzo. 1974. *Cino da Pistoia*. Lanciano: Editrice Itinerari.

Liebs, Detlef. 1976. Rechtsschulen und Rechtsunterricht im Prinzipat. *Aufstieg und Niedergang der Romischen Welt* II, 15: 197–286.

Liotta, Filippo. 1972. Burgundione. *Dizionario Biografico degli Italiani*. Vol. 15: 423–8. Rome: Enciclopedia Italiana Treccani.

Lolli, Gabriele. 1991. *Introduzione alla logica formale*. Bologna: Il Mulino.

Lombardi, Luigi. 1961. *Dalla "fides" alla "bona fides."* Milan: Giuffrè.

Lottin, Dom Odon. 1954. *Morale fondamentale*. Paris: Desclée.

Louis, René, Jean Jolivet, and Jean Châtillon, eds. 1975. *Pierre Abélard, Pierre le Vénérable. Les courants philosophiques, littéraires et artistiques en Occident au milieu du XIIe siècle*. Paris: Éditions du centre national de la recherche scientifique.

Łukasiewicz, Jan. 1968. La sillogistica di Aristotele dal punto di vista della logica formale moderna. In *La sillogistica di Aristotele*. Ed. J. Łukasiewicz and C. Negro, 109–243. Brescia: Morcelliana. (2nd ed. in English 1957.)

Luscombe, David Edward. 1989. Trivium, Quadrivium and the Organisation of Schools. In *L'Europa dei secoli XI e XII fra novità e tradizione: sviluppi di una cultura*. (Atti della decima Settimana internazionale di studio, Mendola 25–29 agosto 1986), 81–100. Milan: Vita e pensiero.

Maccagnolo, Enzo. 1976. Rerum universitas. *Saggio sulla filosofia di Teodorico di Chartres*. Florence: Le Monnier.

———. 1980. *Il divino e il megacosmo. Testi filosofici e scientifici della scuola di Chartres*. Milan: Rusconi.

Maffei, Domenico. 1956. *Gli inizi dell'Umanesimo giuridico*. Milan: Giuffré.

———. 1967. Il giudice testimone e una "quaestio" di Jacques de Revigny (Ms. Bon. Coll. Hisp. 82). *Tijdschrift voor Rechtsgeschiedenis* 35: 54–76. (Now in *Studi di storia delle università e della letteratura giuridica*, 4. Goldbach: Keip, 1995.)

———. 1969. *La donazione di Costantino nei giuristi medievali*. Milan: Giuffrè.

Maierù, Alfonso. 1972. *Terminologia logica della tarda scolastica*. Rome: Edizioni dell'Ateneo.

———. 1993. La dialettica. In *Lo spazio letterario del Medioevo.* I: *Il Medioevo latino*. Ed. G. Cavallo, C. Leonardi and E. Menestò. Vol. 1: *La produzione del testo*. Tome 2: 273–94. Rome: Salerno Editrice.

Maine, Henry Sumner. 1935. *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*. Oxford: Oxford University Press. (World's Classics.).

Maioli, Bruno. 1969. *Porfirio: Isagoge*. Padua: Liviana.

Mamiani, Maurizio. 1999. L'ordine e il metodo: la tradizione logico-retorica antica e la nuova scienza. In *Filosofia e scienza classica, arabo-latina medievale e l'età moderna*. Ed. G. Federici Vescovini, 245–54. Louvain-la-Neuve: Fédération Internationale des Instituts d'Études Médiévales.

Manacorda, Giuseppe. 1914. *Storia della Scuola in Italia.* Vol. 1: *Il Medio Evo*. Tome 1 and 2. Palermo: Sandron. (Reprint Florence: Le Lettere, 1980.)

Mantica. 1580. *De coniecturis ultimarum voluntatum libri duodecim auctore* Francisco Mantica Utinensi *iurisconsulto celeberrimo et in florentissimo Patavino Gymnasio Iuris Caesarei vespertini professore acutissimo. Tractatus omnibus sane doctoribus, legentibus, consulentibus, in foro versantibus et iurisdicentibus, non modo utilis, sed etiam necessarius …* Frankfurt am Main.

Manzin, Maurizio. 1994. *Il petrarchismo giuridico. Filosofia e logica del diritto agli inizi dell'Umanesimo*. Padua: CEDAM.

Marchesi, Angelo. 1984. *Dal "Lógos" greco al "Lógos" cristiano*. Parma: Zara.

Markowski, Mieczysław. 1981. Sprache und Logik im Mittelalter. In *Sprache und Erkenntnis im Mittelalter (Akten des VI. Internationalen Kongresses für Mittelalterliche Philosophie. Bonn, 29 August–3 September 1977)*. Ed. J.P. Beckmann et al., 36–50. Berlin: de Gruyter.

Marouzeau, Jules. 1959. Sur deux aspects de la langue du droit. In *Droits de l'antiquité et sociologie juridique: Mélanges Henri Levy-Bruhl*. Paris: Sirey.

Marsilius of Padua. Marsilii Patavini *Defensor pacis*. Ed. Richard Scholz. Hannover: Hahn, 1932–1933. (Engl. vers. A. Gewirth, *Marsilius of Padua*. Vol. 2. New York: Arno Press, 1979.)

Martin, Chrisopher F. J. 1997. *Thomas Aquinas. God and Explanations*. Edinburgh: Edinburgh University Press.

Martino, Federico. 1997. Argumenta ex legibus. In *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*. Ed. M. Bellomo, 147–56. Munich: Oldenbourg.

Mayali, Laurent. 1982. De usu disputationis au Moyen Âge. *Rechtshistorisches Journal* 1: 91–103.

Mazzanti, Giuseppe, ed. 1999. Guarnerius Iurisperitissimus, *Liber Divinarum Sententiarum*. Spoleto: CISAM.

———. 2000. Irnerio: contributo a una biografia. *Rivista Internazionale di Diritto Comune* 11: 117–81.

McCord Adams, Marilyn. 1993. Sillogismo e dimostrazione in Guglielmo di Ockham. In *Logica e linguaggio nel Medioevo*. Ed. R. Fedriga and S. Puggioni, 319–39. Milan: LED. (1st ed. in *William Ockham*, 437–57. Notre Dame, Indiana: University of Notre Dame Press, 1987.)

McKeon, R. 1975. The Organization of Sciences and the Relations of Cultures in the Twelfth and Thirteenth Centuries. In *The Cultural Context of Medieval Learning*. Ed. J. E. Murdoch and E. Dudley Sylla, 151–84. Dordrecht-Boston: D. Reidel.

McManus, Brendan. 1999. The *Consilia* and *Quaestiones* of Oldradus de Ponte. *Bulletin of Medieval Canon Law* 23: 85–113.

Medici. 1584. Sebastiani Medici Florentini *De definitionibus, prima pars*. In *T.U.I.*, 18.

Meijers, Eduard Maurits. 1959. L'université d'Orléans au XIIIᵉ siècle. In *Études d'histoire du droit*. Ed. R. Feenstra and H. F. W. D. Fischer. Vol. 3: 3–124. Leyden: Universitaire Pers.

Melloni, Alberto. 1990. *Innocenzo IV: La concezione e l'esperienza della cristianità come regimen unius personae*. Genoa: Marietti. (Istituto per le Scienze religiose di Bologna, Testi e ricerche di scienze religiose 4.)

Meyer, Christoph H. F. 2000. *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts. Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters*. Leuven: Leuven University Press.

Michaud-Quantin, Pierre and Michel Lemoine. 1970. *Études sur le vocabulaire philosophique du moyen âge*. Rome: Edizioni dell'Ateneo.

Mignucci, Mario. 1965. *La teoria aristotelica della scienza*. Florence: Sansoni.

———. 1975. *L'argomentazione dimostrativa in Aristotele. Commento agli Analitici Secondi*. Vol. 1. Padua: Antenore.

Minio-Paluello, Lorenzo. 1972. Nuovi impulsi allo studio della logica: la seconda fase della riscoperta di Aristotele e di Boezio. In *La scuola nell'Occidente latino dell'Alto Medioevo*. Vol. 2: 743–66. Spoleto: Centro Italiano di Studi sull'Alto Medioevo.

Minnucci, Giovanni. 2002. *Alberico Gentili tra mos italicus e mos gallicus. L'inedito Commentario Ad legem Juliam de adulteriis*. Bologna: Monduzzi.

Mommsen, Theodor, Paul Krueger, and Alan Watson, eds., 1985. *The Digest of Justinian*. Latin text (ed. T. Mommsen and P. Krueger), English translation (ed. A. Watson). Philadelphia, Pa.: University of Pennsylvania Press.

Montanos Ferrín, Emma. 1997. Las "Quaestiones Disputatae" en los estatutos universitarios medievales. In *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*. Ed. M. Bellomo, 157–204. Munich: Oldenbourg.

Montorzi, Mario. 1991. *Diritto feudale nel Basso medioevo: Materiali di lavoro e strumenti critici per l'esegesi della glossa ordinaria ai* Libri feudorum*: Con la ristampa anastatica dei* Libri feudorum *e della loro glossa ordinaria.* Turin: Giappichelli.

Moonan, Lawrence. 1994. *Divine Power: The Medieval Power Distinction up to Its Adoption by Albert, Bonaventura, and Aquinas*. Oxford: Clarendon.

Müller, Wolfgang P. 1994. *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist.* Washington, D.C.: Catholic University of America Press. (Studies in Medieval and Early Modern Canon Law, 3.)

Mugnai, Massimo. 1994. Ockham. In *Storia della filosofia*. Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 419–50. Rome-Bari: Laterza.

Nardi, Bruno. 1967. *Saggi di filosofia dantesca*. Florence: La Nuova Italia.

———. 1992. *Dal* Convivio *alla* Commedia *(sei saggi danteschi)*, con premessa alla ristampa di Ovidio Capitani. Rome: Istituto Storico Italiano per il Medio Evo.

Nederman, Cary J. 1988. The Royal Will and the Baronial Bridle: The Place of the *Addicio de cartis* in Bractonian Political Thought. *History of Political Thought* 9: 415-29.

Negro, Camillo. 1968. Il sillogismo in Aristotele. In *La sillogistica di Aristotele*. Ed. J. Łukasiewicz and C. Negro, 63–100. Brescia: Morcelliana. (2nd ed. in English 1957.)

Nelson, Janet. 1988. Kingship and Empire. In *The Cambridge History of Medieval Political Thought c. 350–c. 1450*. Ed. J. H. Burns and M. Goldie. Cambridge: Cambridge University Press.

Nevizzanus. 1573. *Sylvae nuptialis libri sex in quibus ex dictis Moder. materia matrimonii, dotium, filiationis, adulterii, originis, successionis et monitorialium plenissime discutitur: Una cum remediis ad sedandum factiones Guelphorum et Gebelinorum. Item modus iudicandi et exequendi iussa Principum. Ad haec, de auctoritatibus Doctorum, privilegiisque miserabilium personarum. Quae omnia ex quaestione an nubendum sit, vel non, desumpta sunt,* Ioanne Nevizano Astensi … *auctore* ... Venice.

Nicolini, Ugo. 1933. *Pilii Medicinensis Quaestiones Sabbatinae. Introduzione all'edizione critica*. Modena: Università degli Studi di Modena.

———. 1964. I giuristi postaccursiani e la fortuna della Glossa in Italia. *Jus* 15: 42–69. (Now in *Scritti di storia del diritto italiano*, 336–63. Milan: Vita e pensiero.)

Nörr, Dieter. 1972. *Divisio und Partitio. Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie*. Berlin: Schweitzer.

Noonan, John T. 1972. *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia.* Cambridge, Mass.: Belknap Press of Harvard University Press.

Odofredus. 1550. *Domini* Odofredi *in iure absolutissimi matura, diligentissimeque repetita interpretatio In undecim primos Pandectarum libros, iuris candidatis, propter exemplorum (quae rudiores movent), mirificam copiam, usui maximo futura. Huic accesserunt permultorum eruditissimorum virorum elucubrationes diligentissimae* ... Lyon.

Oldradus de Ponte. 1990. *Jews and Saracens in the Consilia of Oldradus de Ponte*. Ed. and trans. Norman Zacour. Toronto: Pontifical Institute of Medieval Studies.

Olgiati, Francesco. 1944. *Il concetto di giuridicità in san Tommaso d'Aquino*. Milan: Vita e pensiero.

Orestano, Riccardo. 1987. *Introduzione allo studio del diritto romano*. Bologna: Il Mulino.

Otte, Gerhard. 1968. Die Aristoteleszitate in der Glosse. Beobachtungen zur philosophischen Vorbildung der Glossatoren. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Rom. Abt.) 85: 368–93.

———. 1971. *Dialektik und Jurisprudenz. Untersuchungen zur Methode der Glossatoren*. Frankfurt am Main: Klostermann.

———. 1997. Logische Einteilungstechniken bei den Glossatoren des römischen Rechts. In *Dialektik und Rhetorik im früheren und hohen Mittelalter. Rezeption, Überlieferung und gesellschaftliche Wirkung antiker Gelehrsamkeit vornehmlich im 9. und 12. Jahrhundert*. Ed. J. Fried, 157–69. Munich: Oldenbourg.

Otto of Freising. *Gesta Frederici*. Ed. F. J. Schmale. Berlin: Deutscher Verlag der Wissenschaften, 1965.

Pace, Giacomo. 1992. *Iterum homines querebant de legibus*. Una nota sulla riemersione dei *Digesta* nel Medioevo. *Rivista internazionale di diritto comune* 3: 221–9.

Padellaro, Rosa. 1970. *Nominalismo e realismo nell'XI e XII secolo*. Rome: Elia.

Padovani, Andrea. 1983. *Studi storici sulla dottrina delle sostituzioni*. Milan: Giuffrè.

———. 1993. Le fondamenta giuridiche del testamento nella dottrina medievale. In *Actes à cause de mort. Acts of last will, III. Europe médiévale et moderne. Medieval and modern Europe (Recueil de la Société Jean Bodin pour l'histoire comparative des institutions. Transactions of the Jean Bodin Society for comparative institutional history, LXI)*, 173–96. Bruxelles: De Boeck.

———. 1995. Giurisprudenza. Scienza giuridica (Storia del diritto medievale). In *Digesto delle discipline privatistiche. Sezione civile*. Vol. 9: 193–212. Turin: UTET.

———. 1997. *Perché chiedi il mio nome? Dio, natura e diritto nel secolo XII*. Turin: Giappichelli.

———. 2003. I giuristi medievali e la "Quaestio de universalibus". In Amicitiae pignus: *Studi di storia del diritto in onore di A. Cavanna*. Ed. A. Padoa Schioppa, G. di Renzo Villata, and G. P. Massetto. Milan: Giuffrè.

Palmieri, Giovanni Battista, ed. 1914. Rogerii *Summa Codicis (ex codice manuscripto Bibliothecae publicae Tubingensis M.C. 14)*. In *Scripta anecdota antiquissimorum Glossatorum,* 1.2. Bologna: Gandolphi.

Panormitanus. 1582. Abbatis Panormitani *Commentaria In quartum et quintum Decretalium libros quamplurium Iurisconsultorum, qui probe hucusque aliquid iis addidisse apparuerunt, et nunc demum Alexandri de Nevo adnotationibus illustrata. Hac postera vero editione recognita, atque ab innumeris erroribus, quibus ob temporis vetustatem et librariorum recentem iniuriam ubique depravata, mutila passim et plerisque in locis decurtata usque adeo deprehendebantur, ut nullus plane sensus esset, tam in textu, quam in allegationibus, summo studio vindicata et integritati suae restituta. Quibus praeter eiusdem Panormitani Quaestionem quandam in Parmensi Gymnasio disputatam Repetitionem in c. Per tuas, De arbitris, in Alma Bononiensi Academia editam et interpretationem ad Clementinas epistolas, quae tamen omnes in veteribus codicibus reperiebantur* ... Venice.

Panza, Marco. 1997. Classical Sources for the Concepts of Analysis and Synthesis. In *Analysis and Synthesis in Mathematics, History and Philosophy*. Ed. M. Otte and M. Panza, 365–414. Dordrecht: Kluwer.

Paradisi, Bruno. 1962. *Storia del diritto italiano. Le fonti del diritto nell'epoca bolognese*. Vol. 1: *I civilisti fino a Rogerio*. Naples: Liguori.

———. 1965. Diritto canonico e tendenze di scuola nei glossatori da Irnerio ad Accursio. *Studi medievali* 6.2: 155–287 (Now in *Studi sul Medioevo giuridico*. Rome: Istituto Storico Italiano per il Medio Evo, 1987. Vol. 2: 525–656.)

———. 1968. Osservazioni sull'uso del metodo dialettico nei glossatori del sec. XII. In *Atti del convegno internazionale di studî accursiani* (Bologna, 21–26 ottobre 1963). Ed. G. Rossi. Vol. 2: 621–36. Milan: Giuffré.

———. 1976. Le glosse come espressione del pensiero giuridico medievale. In *Fonti medievali e problematica storiografica.* (Atti del Congresso Internazionale tenuto in occasione del 90° anniversario della fondazione dell'Istituto Storico Italiano; 1883–1973). Vol. 1: 191–252. Rome: Istituto Storico Italiano per il Medio Evo.

———. 1994. Il giudizio di Màrturi. Alle origini del pensiero giuridico bolognese. In *Scintillae iuris. Studi in memoria di Gino Gorla*. Vol. 1: 861–87. Milan: Giuffré.

Pattin, Adrian o.m.i. 1966. *Le* Liber de causis. Édition établie à l'aide de 90 manuscrits avec introduction et notes. *Uitgave van Tijdschrift voor filosofie* 28: 90–203.

Paulus Venetus. 14.. Clarissimi artium et sacre theologie doctoris Pauli Veneti ordinis heremitarum divi Augustini *Expositio in libros posteriorum Aristotelis ...* Venice.

Pecorella, Corrado. 1966. Postglossatori. *Novissimo Digesto Italiano.* Vol. 13: 423–5. Turin: UTET.

Pennington, Kenneth. 1984. *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries.* Philadelphia: University of Pennsylvania Press.

———. 1988. Law, Legislative Authority, and Theories of Government, 1150–1300. In *The Cambridge History of Medieval Political Thought c.350–c.1450.* Ed. J. H. Burns and M. Goldie, 424–53. Cambridge: Cambridge University Press.

———. 1990. Lotharius of Cremona. *Bulletin of Medieval Canon Law* 20: 43–50. (Reprinted in: *Miscellanea Domenico Maffei dicata: Historia-Ius-Studium.* Ed. Antonio García y García and Peter Weimar. Goldbach: Keip, 1995; and in *Popes, Canonists, and Texts 1150–1550.* Aldershot: Variorum, 1993.)

———. 1992. The Authority of the Prince in a *Consilium* of Baldus de Ubaldis. In *Studia in honorem Eminentissimi Cardinalis Alfonsi M. Stickler.* Ed. Rosalio Iosepho Card. Castillo Lara, 483–515. Rome: Libreria Ateneo Salesiano. (Studia et Textus Historiae Iuris Canonici 7.)

———. 1993a. The Authority of the Prince in a Consilium of Baldus de Ubaldis. In *Popes, Canonists, and Texts 1150–1550.* Aldershot: Variorum, 1993.

———. 1993b. Enrico da Susa, detto l'Ostiense (Hostiensis, Henricus de Segusio o Segusia). In *Dizionario biografico degli Italiani,* 42: 758–63. Rome: Istituto della Enciclopedia Italiana.

———. 1993c. Henricus de Segusio (Hostiensis). In *Popes, Canonists, and Texts 1150–1550.* Aldershot: Variorum.

———. 1993d *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition.* Berkeley: University of California Press.

———. 1994a. Learned Law, *Droit Savant, Gelehrtes Recht*: The Tyranny of a Concept. *Rivista internazionale di diritto comune* 5: 197–209.

———. 1994b. Learned Law, *Droit Savant, Gelehrtes Recht*: The Tyranny of a Concept. *Syracuse Journal of International Law and Commerce* 20: 205–15.

———. 1997a. Baldus de Ubaldis. *Rivista internazionale di diritto comune* 8: 35–61.

———. 1997b. *Allegationes, Solutiones,* and *Dubitationes*: Baldus de Ubaldis' Revisions of His *Consilia.* In *Die Kunst der Disputation: Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert.* Ed. Manlio Bellomo, 29–72. Munich: Oldenbourg. (Schriften des Historischen Kollegs, Kolloquien 38.)

———. 2000. Innocent III and the *Ius commune.* In *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag.* Ed. Richard Helmholz, Paul Mikat, Jörg Müller, and Michael Stolleis, 349–66. Paderborn: Ferdinand Schöningh. (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft, NF 91.)

———. 2002. Bishops and their Diocese. *Folia canonica* 5: 7–17.

———. 2003. Gratian, Causa 19, and the Birth of Canonical Jurisprudence. In *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico.* Ed. Enrique De Leon and Nicolas Alvarez de las Asturias, 215–36. Milan: Giuffrè.

———. 2004a. The Formation of the Jurisprudence of the Feudal Oath of Fealty. *Rivista internazionale del diritto comune* 15.

———. 2004b. Gratian, Causa 19, and the Birth of Canonical Jurisprudence. In *"Panta rei": Studi dedicati a Manlio Bellomo.* Ed. Orazio Condorelli, vol. 4: 339–55. Rome: Il Cigno Galileo Galilei.

———. 2004c. Natural Law. *Dictionary of the Middle Ages: Supplement 1,* 417–20. New York: Charles Scribner's Sons.

———. 2004d. Representation in Medieval Canon Law. *The Jurist* 64.

———. 2004e. Was Baldus an Absolutist? The Evidence of his *Consilia.* In *Politische Reflexion in der Welt des späten Mittelalters: Political Thought in the Age of Scholasticism: Essays in Honour of Jürgen Miethke.* Ed. Martin Kaufhold, 305–19. Leiden: Brill. (Studies in Medieval and Reformation Thought, 103.)

Pepin, Jean. 1975. Neopitagorismo e neoplatonismo. In *Storia della filosofia*. Vol. 4.2: *Filosofia ellenistica e cristianesimo dal I al V secolo d.C.*. Ed. M. Dal Pra, 307–28. Milan: Vallardi.

Perelman, Chaïm. 1979. *Logica giuridica nuova retorica*. Milan: Giuffré. (1st ed. in French 1976.)

Pescatore, Gustav. 1912. Verzeichnis legistischer Distinktionen mit Angabe des Verfassers. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Romanistische Abteilung) 33: 493–510.

Peter of Spain. Petri Hispani *Summulae logicales*. Ed. L. M. de Rijk. Assen: Van Gorcum & Co., 1972. (Trans. in *The Cambridge Translations of Medieval Philosophical Texts*. Vol. 1: *Logic and the Philosophy of Language*. Ed. N. Kretzmann and E. Stump. Cambridge: Cambridge University Press, 1988.)

Petrus de Alliaco. 1513. Petri de Alliaco *Quaestiones super primum, tertium et quartum Sententiarum*. Paris.

Petrus de Bellapertica. 1536. Petri de Bellapertica *Lectura Institutionum*. Lyon (Reprint Bologna: Forni, 1972.)

Petrus Crassus. *Defensio Henrici IV. regis*. In *Libelli de lite imperatorum et pontificum*. Ed. L. de Heinemann. Hannover: Hahn, 1891. (Monumenta Germaniae Historica.)

Philippus de Casolis. 1584. *Tractatus* Philippi de Casolis Regien. *de testamentis, successionibus, per modum disputationis in qua interfuerunt D. Baldus de Ubaldis et eius discipulus D. Christophorus Castillioneus anno Domini 1391 in Studio Papiensi*. In *T.U.I.*, 8.1.

Philonenko, Maximilien. 1956. *Elegantia*. In *Studi in onore di Pietro De Francisci*. Vol. 2. Milan: Giuffrè.

Piano Mortari, Vincenzo. 1956. *Ricerche sulla teoria dell'interpretazione del diritto nel secolo XVI. I. Le premesse*. Milan: Giuffré.

———. 1960. Commentatori. *Enciclopedia del diritto*. Vol. 7: 794–803. Milan: Giuffré.

———. 1966. La sistematica come ideale umanistico dell'opera di Francesco Connano. In *La storia del diritto nel quadro delle scienze storiche*. (Atti del primo congresso internazionale della Società Italiana di Storia del diritto), 521–31. Florence: Olschki.

———. 1976. *Dogmatica e interpretazione. I giuristi medievali*. Naples: Jovene.

———. 1978. *Diritto, logica, metodo nel secolo XVI*. Naples: Jovene.

———. 1979. *Aspetti del pensiero giuridico medievale*. 2nd ed. Naples: Liguori.

———. 1986. *Ricerche sulla teoria dell'interpretazione del diritto nel secolo XVI*. Vol. 1: *Le premesse*. Milan: Giuffré.

Pinborg, Jan. 1976. Diskussionen um die Wissenschaftstheorie an der Artistenfakultät. In *Die Auseinandersetzungen an der Pariser Universität im XIII. Jahrhundert*. Ed. A. Zimmermann, 240–68. Berlin: De Gruyter.

———. 1993. Topica e sillogistica nel Medioevo. In *Logica e linguaggio nel Medioevo*. Ed. R. Fedriga and S. Puggioni, 341–76. Milan: LED. (1st ed. in *Sapienter ordinare*. Ed. F. Hoffmann, 158–78. Leipzig: St. Benno, 1969.)

———. 1999. Grammatica speculativa. In *La logica nel Medioevo*. Trans. P. Fiorini. Ed. C. Marabelli and A. K. Rogalski, 185–203. Milan: Jaca Book. (1st ed. in *The Cambridge History of Later Medieval Philosophy*. Ed. N. Kretzmann, A. Kenny and J. Pinborg, 254–69. Cambridge: Cambridge University Press, 1982.)

Pini, Antonio Ivan. 1999. Scuole e Università. In *La società medievale*. Ed. S. Collodo and G. Pinto, 481–532. Bologna: Monduzzi.

Placentinus. 1535. Placentini *iurisconsulti vetustissimi In summam Institutionum sive Elementorum D. Iustiniani sacratissimi principis, nunc primum in lucem aediti libri IIII. Eiusdem de varietate actionum libri VI*. Mainz. (Reprint in *Corpus Glossatorum Juris Civilis*. Vol. 1. Turin: Ex officina Erasmiana, 1973.)

Plato. *The Statesman* (*Politicus*). In *Plato in Twelve Volumes*, Greek text and English translation. Vol. 8: *The Statesman*, *Philebus*. Trans. H. N. Fowler. London: W. Heinemann, 1975. (The Loeb Classical Library.)

———. *Sophist* (*Sophista*). In *Plato in Twelve Volumes*, Greek text and English translation. Vol. 7: *Theaetetus*, *Sophist*. Trans. H. N. Fowler. London: W. Heinemann, 1977. (The Loeb Classical Library.)

Post, Gaines. 1964. *Studies in Medieval Legal Thought: Public Law and the State 1100–1322.* Princeton: N.J.: Princeton University Press.

Potthast, August. 1874. *Regesta Pontificum Romanorum.* Vol. 1. Berlin: Rudolf de Decker. (Reprint Graz: Akademische Druck, 1957.)

Pozzi, Lorenzo. 1969. *Boezio: Trattato sulla divisione.* Padua: Liviana.

———. 1974. *Studi di logica antica e medioevale.* Padua: Liviana.

———. 1992. *Introduzione alla logica medievale.* Brescia: Grafo.

Prantl, Karl. 1937. *Storia della logica in Occidente.* Vol. 2.1: *Dal secolo VII al secolo XII.* Trans. L. Limentani. Florence: La Nuova Italia. (1st ed. in German 1885–1890.)

Preti, Giulio. 1953. Studi sulla Logica formale nel Medioevo. II: Natura (oggetto, scopi, metodo) della Logica. *Rivista critica di storia della filosofia* 8: 680–97.

Pringsheim, Fritz. 1921. Beryt und Bologna. In *Festschrift für Otto Lenel*, 204–85. Leipzig: Tauchnitz.

Pseudo-Augustinus. *Ps. Augustini De spiritu et anima liber unus.* In *P.L.*, 40.

Pufendorf, Samuel. 1997. *Samuel Pufendorf: Gesammelte Werke.* Ed. Wilhelm Schmidt Biggemann. Berlin: Akademie

Puggioni, Sara. 1993. La logica fino al XII secolo. In *Logica e linguaggio nel Medioevo.* Ed. R. Fedriga and S. Puggioni, 27–50. Milan: LED.

Putallaz, François-Xavier. 1991. *Le sens de la réflexion chez Thomas d'Aquin.* Paris: J. Vrin.

Quaglioni, Diego. 1990. Autosufficienza e primato del diritto nell'educazione giuridica preumanistica. In *Sapere e/è potere. Discipline, dispute e professioni nell'Università medievale e moderna.* Vol. 2: *Verso un nuovo sistema del sapere.* Ed. A. Cristiani, 125–34. Bologna: Istituto per la Storia di Bologna.

———. 1999. Tra bartolisti e antibartolisti. L'Umanesimo giuridico e la tradizione italiana nella "Methodus" di Matteo Gribaldi Mofa (1541). In *Studi di storia del diritto medioevale e moderno.* Ed. F. Liotta, 185–212. Bologna: Monduzzi.

Quintilianus, Marcus Fabius. *Institutio oratoria*, 4 vols. Latin text and English translation. Trans. H. E. Butler. London: Heinemann, 1966–1969. (The Loeb Classical Library.)

Radin, Max. 1930. *Eleganter. Law Quarterly Review* 46: 311–25.

Reade, W. H. V. 1980. La filosofia nel Medioevo. In *Storia del Mondo Medievale.* Vol. 5: *Il trionfo del papato e lo sviluppo comunale.* Ed. A. Merola, 370–424. Milan: Garzanti. (1st ed. in English 1926.)

Reynolds, Susan. 1994. *Fiefs and Vassals: The Medieval Evidence Reinterpreted.* Oxford: Oxford University Press.

Roby, Henry John. 1884. *An Introduction to the Study of Justinian's Digest.* Cambridge: Cambridge University Press.

Romano, Andrea, ed. 1977. *Le sostituzioni ereditarie nell'inedita* Repetitio de substitutionibus *di Raniero Arsendi*, con la collaborazione di Sante Polica. Catania: Giannotta.

Roncaglia, Gino. 1994. Logica nuova e logica dei moderni. In *Storia della filosofia.* Vol. 2: *Il Medioevo.* Ed. P. Rossi and C. A. Viano, 283–98. Rome-Bari: Laterza.

Ross, David. 1977. *Aristotle.* London: Methuen. (1st ed. 1923.)

Rossi, Giovanni. 1999. Un umanista di fronte al diritto: a proposito del *De iure* di Leon Battista Alberti. *Rivista di storia del diritto italiano* 72: 77–154.

Rossi, Pietro B. 1994. La nuova biblioteca. In *Storia della filosofia.* Vol. 2: *Il Medioevo.* Ed. P. Rossi and C. A. Viano, 159–79. Rome-Bari: Laterza.

Ryan, Magnus. 1998. The Oath of Fealty and the Lawyers. In *Politisches Denken und die Wirklichkeit der Macht im Mittelalter.* Ed. J. Canning and O. G. Oexle, 211–28. Göttingen: Vandenhoeck & Ruprecht. (Veröffentlichungen des Max-Planck-Instituts für Geschichte 147.)

Sammarco, Angelo Alessandro. 2001. *Metodo probatorio e modelli di ragionamento nel processo penale.* Milan: Giuffré.

Sanguineti, Juan José. 1987. *Logica filosofica.* Florence: Le Monnier. (1st ed. in Spanish 1984.)

Savigny, Friedrich Carl von. 1834–1851. *Geschichte des Römischen Rechts im Mittelalter.* Vols. 1–7. Wiesbaden: Becker.

———. 1854. *Storia del diritto romano nel Medio Evo*. Vol. 1. Trans. E. Bollati. Turin: Gianini e Fiore. (Reprint Rome: Multigrafica Editrice, 1972.)

———. 1857. *Storia del diritto romano nel Medio Evo*. Vol. 2. Trans. E. Bollati. Turin: Gianini e Fiore. (Reprint Rome: Multigrafica Editrice, 1972.)

Sbriccoli, Mario. 1969. *L'interpretazione dello statuto. Contributo allo studio della funzione dei giuristi nell'età comunale*. Milan: Giuffré.

Scarano Ussani, Vincenzo. 1989. *Empiria e Dogmi: la scuola Proculiana fra Nerva e Adriano*. Turin: Giappichelli.

Schiller, Arthur A. 1958. Jurists' Law. *Columbia Law Review* 58: 1226–38.

———. 1968. The Nature and Significance of Jurists' Law. *Boston University Law Review* 47: 20–39.

Schmale-Ott, Irene, trans. 1984. Petrus Crassus, *Defensio Henrici IV. regis.* In *Schriften über den Streit zwischen Regnum und Sacerdotium*, 174-239. Darmstadt: Wissenschaftliche Buchgesellschaft. (Ausgewählte Quellen zur deutschen Geschichte des Mittelalters, Freiherr vom Stein-Gedächtnisausgabe 12b.)

Scholz, Heinrich. 1983. *Storia della logica*. Trans. E. Melandri. Bari: Laterza.

Schrage, Eltjo J.H. and Harry Dondorp. 1992. *Utrumque ius: eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts*. Berlin: Duncker & Humblot.

Schulthess, Peter, and Ruedi Imbach. 1996. *Die Philosophie im lateinischen Mittelalter. Ein Handbuch mit einem bio-bibliographischen Repertorium*. Zürich-Düsseldorf: Artemis & Winkler.

Schulz, Fritz. 1936. *Principles of Roman Law.* Oxford: Clarendon Press.

———. 1946. *History of Roman Legal Science*. Oxford: Clarendon Press.

———. 1953. Die Quare-Sammlungen der Bologneser Glossatoren und die Problemata des Aristoteles. In *Atti del Congresso Internazionale di Diritto Romano e di Storia del Diritto (Verona, 27–29 settembre 1948)*. Ed. G. Moschetti. Vol. 1: 297–306. Milan: Giuffré.

Sciascia, Gaetano. 1948. *Elegantiae Juris*. Bollettino dell' istituto di diritto romano 51–52.

Seckel, Emil. 1911. *Distinctiones Glossatorum*. Studien zur Distinktionen-Literatur der romanistischen Glossatorenschule. In *Festschrift der Berliner Juristischen Facultät für Ferdinand von Martitz*, 277–436. Berlin: O. Liebmann. (Reprint Graz: Akademische Druck, 1956.)

Serene, Eileen. 1982. Demonstrative science. In *The Cambridge History of Later Medieval Philosophy*. Ed. A. Kenny, N. Kretzmann and J. Pinborg, 496–517. Cambridge: Cambridge University Press.

Simondo, Piero. 1976. *Ars vetus e ars modernorum. Il pensiero logico medievale: testi e interpretazioni*. Turin: Società Editrice Internazionale.

Skinner, Quentin. 1978. *The Foundations of Modern Political Thought*. Vol. 2: *The Age of the Reformation*. Cambridge: Cambridge University Press.

Slattery, Michael P. 1958. Genus and Difference. *The Thomist* 21: 343–64.

Solmi, Arrigo. 1930. *Storia del diritto italiano*. 3rd ed. Milan: Società Editrice Libraria.

Sordi, Serafino. 1967. *Manuale di logica classica, con appendice sulla logica simbolica*. Padua: Liviana.

Soto. 1598. *Commentariorum* F. Domingi Soto Segobiensis *Caesareae Maiestati a sacris confessionibus, publici apud Salmanticenses Professoris in quartum Sententiarum*, II, Venice.

Spagnesi, Enrico. 1970. *Wernerius Bononiensis Iudex: La figura storica d'Irnerio.* Florence: Olschki. (Accademia toscana di scienze e lettere "La Colombaria," Studi 16.)

———. 2001. Irnerio teologo, una riscoperta necessaria. *Studi medievali* 42: 325–79.

Stein, Peter G. 1960. *Pauli Manualium Libri Tres*. Revue Internationale des Droits de l'Antiquité 3, 7.

———. 1961. Elegance in Law. *Law Quarterly Review* 77: 242–56.

———. 1966. *Regulae iuris: from Juristic Rules to Legal Maxims*. Edinburgh: Edinburgh University Press.

———. 1971. The Relations Between Grammar and Law in the Early Principate: the Beginnings of Analogy. In *La Critica del Testo. Atti del II Congresso internazionale della Società italiana di storia del diritto*. Vol. 2. Florence: Olschki.

———. 1972. The Two Schools of Jurists in the Early Roman Principate. *Cambridge Law Journal* (Jubilee Issue) 31: 8–31.

———. 1974. The Development of the Notion of "*naturalis ratio.*" In *Daube noster.* Ed. A. Watson. Edinburgh: Scottish Academic Press.

———. 1982. School Attitudes in the Law of Delicts. In *Studi in onore di Arnaldo Biscardi.* Vol. 2. Milan: Istituto Editoriale Cisalpino, La Goliardica.

———. 1983. The Development of the Institutional System. In *Studies in Justinian's Institutes in Memory of J.A.C. Thomas.* Ed. P. Stein and A.D.E. Lewis. London: Sweet and Maxwell.

———. 1988. Roman Law. In *The Cambridge History of Medieval Political Thought c.350–c.1450.* Ed. J. H. Burns and M. Goldie, 37–47. Cambridge: Cambridge University Press.

———. 1994. The Civil Law Doctrine of Custom and the Growth of Case Law. In *Scintillae iuris. Studi in memoria di Gino Gorla.* Vol. 1. Milan: Giuffrè.

———. 1995. Interpretation and Legal Reasoning in Roman Law. *Chicago-Kent Law Review* 70: 1539–56.

Stickler, Alphonsus M. 1950. *Historia juris canonici latini.* Vol. 1: *Historia fontium.* Rome: PAS.

———. 1953. "Sacerdotium et Regnum" nei Decretisti e primi Decretalisti. Considerazioni metodologiche di ricerca e testi. *Salesianum* 15: 575–612.

Stump, Eleonore. 1978. *Boethius's De topicis differentiis.* London: Cornell University Press.

Suarez. 1751. Francisci Suarez Granatensis *e Societate Jesu Doctoris eximii Metaphysicorum Disputationum, in quibus et universa naturalis Theologia ordinate traditur et Quaestiones ad omnes duodecim Aristotelis libros pertinentes accurate disputantur*, pars secunda, 36. Venice.

Tabacco, Giovanni, and Grado G. Merlo. 1989. *Medioevo: V–XV secolo.* Bologna: Il Mulino.

Tabarroni, Andrea. 1997. Il problema della scienza. In *La filosofia nelle università: secoli XIII e XIV.* Ed. L. Bianchi, 185–205. Florence: La Nuova Italia.

Talamanca, Mario. 1977. Lo schema "genus-species" nelle sistematiche dei giuristi romani. In *Colloquio italo-francese: La filosofia greca e il diritto romano (Roma, 14–17 aprile 1973).* Vol. 2: 3–319. Rome: Accademia Nazionale dei Lincei.

Tanner, Norman P., ed. 1990. *Decrees of the Ecumenical Councils,* 2 vols. Vol. 1: *Nicaea I-Lateran*; vol. 2: *Trent-Vatican II.* Washington, D.C.: Georgetown University Press.

Thom, Paul. 1981. *The Syllogism.* Munich: Philosophia.

Tierney, Brian. 1955. *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism.* Cambridge: Cambridge University Press.

———. 1963a. Bracton on Government. *Speculum* 38: 295–309.

———. 1963b. "The Prince is not Bound by the Laws": Accursius and the Origins of the Modern State. *Comparative Studies in Society and History* 5: 378–400. (Reprinted in *Church Law and Constitutional Thought in the Middle Ages.* London: Variorum Reprints, 1979.)

———. 1998. *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism.* 2nd enlarged ed. Leiden: Brill.

Trifone, Romualdo. 1943. *Le fonti della storia del diritto italiano.* 3rd ed. Naples: Jovene.

Troje, Hans Erich. 1971. *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts.* Cologne: Böhlau.

Trottmann, Christian. 1999. *Théologie et noétique au XIIIe siècle. À la recherche d'un statut.* Paris: J. Vrin.

Tweedale, Martin M. 1993. Logica: dalla fine dell'XI secolo al tempo di Abelardo. In *Logica e linguaggio nel Medioevo.* Ed. R. Fedriga and S. Puggioni, 71–112. Milan: LED. (1st ed. in *A History of Twelfth Century Western Philosophy.* Ed. P. Dronke, 196–226. Cambridge: Cambridge University Press, 1988.)

———. 1999. Abelardo e il culmine della "logica vetus." In *La logica nel Medioevo.* Trans. P. Fiorini. Ed. C. Marabelli and A. K. Rogalski, 51–67. Milan: Jaca Book. (1st ed. in *The Cambridge History of Later Medieval Philosophy.* Ed. A. Kenny, N. Kretzmann, and J. Pinborg, 143–58. Cambridge: Cambridge University Press, 1982.)

Ullmann, Walter. 1942. Baldus' conception of Law. *Law Quarterly Review* 58: 193–212.

———. 1948. *The Origins of the Great Schism: A Study in Fourteenth-century Ecclesiastical History*. London: Burns Oates & Washbourne.

Vaccari, Pietro. 1957. *Storia della Università di Pavia*. Pavia: Università.

Van Caenegem, Raoul C. 1981. Law in the Medieval World. *Tijdschrift voor Rechtsgeschiedenis* 49: 13–46.

Vanni Rovighi, Sofia. 1949. *S. Anselmo e la filosofia del sec. XI*, Milan: Bocca.

———. 1962. *Elementi di filosofia*. Vol. 1: *Introduzione, logica, teoria della conoscenza*. Brescia: La Scuola.

———. 1974. *San Bonaventura*. Milan: Vita e pensiero.

———. 1978. Gli averroisti bolognesi. In *Studi di filosofia medioevale*. Vol. 2: *Secoli XIII e XIV*; 222–44. Milan: Vita e pensiero.

Van Steenberghen, Fernand. 1946. *Aristote en Occident. Les origines de l'aristotélism parisien*. Louvain: Editions de l'Institut supérieur de philosophie.

———. 1980a. Aristoteles (IV: Lateinisches Mittelalter). In *Lexikon des Mittelalters*. Vol. 1: 936–9. Munich: Artemis.

———. 1980b. *Thomas Aquinas and radical Aristotelianism*. Washington, D.C.: The Catholic University of America Press.

Vasoli, Cesare. 1961. *La filosofia medioevale*. Milan: Feltrinelli.

———. 1970. Intelligenza. *Enciclopedia Dantesca*. Vol. 1. Rome: Enciclopedia Italiana.

———. 1994. La comunità politica e il potere. In *Storia della filosofia.* Vol. 2: *Il Medioevo*. Ed. P. Rossi and C. A. Viano, 507–23. Rome-Bari: Laterza.

Vegetti, Mario. 1971a. I fondamenti teorici della biologia aristotelica nel "De partibus animalium." In *Opere biologiche di Aristotele*. Ed. D. Lanza and M. Vegetti, 489–553. Turin: UTET.

———. 1971b. Origini e metodi della zoologia aristotelica nella "Historia animalium." In *Opere biologiche di Aristotele*. Ed. D. Lanza and M. Vegetti, 77–128. Turin: UTET.

Verger, Jacques. 1981. Universités et écoles médiévales de la fin du XIᵉ à la fin du XVᵉ siècle. In *Histoire mondiale de l'éducation.* Vol. 1: *Des origines à 1515*. Ed. G. Mialaret and J. Vial, 281–309. Paris: Presses Universitaires de France.

———. 1997. *Le università nel Medioevo*. Trans. M. d'Andrea. Bologna: Il Mulino. (1st ed. in French 1973.)

———. 1999. *Gli uomini di cultura nel Medioevo*. Trans. C. Ranzi. Bologna: Il Mulino. (1st ed. in French 1997.)

———. 2000. The Universities. In *The New Cambridge Medieval History*. Vol. 6: *1300–1415*. Ed. M. Jones, 66–81. Cambridge: Cambridge University Press.

Viano, Carlo Augusto. 1955. *La logica di Aristotele*. Turin: Taylor.

Viehweg, Theodor. 1962. *Topica e giurisprudenza*. Trans. G. Crifò. Milan: Giuffré. (1st ed. in German 1951.)

Vignaux, Paul. 1990. *La filosofia nel Medioevo*. Trans. M. Garin. Rome-Bari: Laterza. (1st ed. in French 1987.)

Vincent, Catherine. *Storia dell'Occidente medievale*. Trans. G. Viano Marogna. Bologna: Il Mulino. (1st ed. in French 1995.)

Vodola, Elizabeth. 1986. *Excommunication in the Middle Ages*. Berkeley: University of California Press.

Vulteius. 1598. Hermanni Vulteii J.C. *Jurisprudentiae Romanae a Justiniano compositae libri II.* Marburg.

Walther, Helmut G. 1998. Die Macht der Gelehrsamkeit: Über die Meßbarkeit des Einflusses politischer Theorien gelehrter Juristen des Spätmittelalters. In *Politisches Denken und die Wirklichkeit der Macht im Mittelalter*. Ed. J. Canning and O. G. Oexle, 241–67. Göttingen: Vandenhoeck & Ruprecht. (Veröffentlichungen des Max-Planck-Instituts für Geschichte 147.)

Watson, A. 1974. *Law Making in the Later Roman Republic.* Oxford: Clarendon.

Watt, John A. 1965. The Use of the Term "Plenitudo potestatis" by Hostiensis. In *Proceedings*

of the Second International Congress of Medieval Canon Law. Ed. Stephan Kuttner and J. Joseph Ryan, 167–87. Vatican City: S. Congregatio de seminariis et studiorum universitatibus. (Monumenta iuris canonici, Series C, 1.)

Weimar, Peter. 1967. Argumenta brocardica. *Studia Gratiana* 14 (*Collectanea Stephan Kuttner. IV*): 91–123.

———. 1969. Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit. *Ius commune* 2: 43–83.

———. 1973. Die legistische Literatur der Glossatorenzeit. In *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*. Vol. 1: *Mittelalter (1100–1500). Die gelehrten Rechte und die Gesetzgebung*. Ed. H. Coing, 129–260. Munich: Beck.

———. 1990. Die Handschriften des *Liber feudorum* und seiner Glossen. *Rivista internazionale di diritto comune* 1: 31–98.

———. 1991. Liber feudorum. In *Lexikon des Mittelalters*, 5: 1943–4. Munich: Artemis.

Weinberg, Julius R. 1985. *Introduzione alla filosofia medievale*. Trans. L. Neri. Bologna: Il Mulino. (1st ed. in English 1964.)

Wesenberg, Gerhard and Gunter Wesener. 1999. *Storia del diritto privato in Europa*. Trans. P. Cappellini and M.C. Dalbosco. Padua: CEDAM. (1st ed. in German 1954.)

Wickham, Chris. 2003. *Courts and Conflict in Twelfth-Century Tuscany*. Oxford: Oxford University Press.

Wieacker, Franz. 1954. Spezifikation—Schulprobleme und Sachprobleme. In *Festschrift E. Rabel*. Ed. W. Kunkel and H.J. Wolff. Vol. 2. Tübingen: Mohr.

———. 1967. *Privatrechtsgeschichte der Neuzeit unter Besonderer Berücksichtigung der deutschen Entwicklung*. Göttingen: Vandenhoeck u. Ruprecht.

———. 1980. *Storia del diritto privato moderno, con particolare riguardo alla Germania*. Vol. 1. Trans. U. Santarelli. Milan: Giuffré. (1st ed. in German 1967.)

———. 1988. *Romische Rechtsgeschichte I*. Munich: Beck.

Wieland, Georg. 1987. Plato or Aristotle—A Real Alternative in Medieval Philosophy? In *Studies in Medieval Philosophy*. Ed. J. F. Wippel, 63–83. Washington: The Catholic University of America Press.

William of Auxerre. Magistri Guillelmi Altissiodorensis *Summa aurea*. Ed. J. Ribaillier. Vol. 3.1. Paris-Grottaferrata: CNRS, 1986.

Winroth, Anders. 2000. *The Making of Gratian's Decretum.* Cambridge: Cambridge University Press. (Cambridge Studies in Medieval Life and Thought, 4th Series.)

Witte Jr., John. 2002. *Law and Protestestantism*: *The Legal Teachings of the Lutheran Reformation*. Cambridge: Cambridge University Press.

Wolf, Armin. 1973. Die Gesetzgebung der entstehenden Territorialstaaten. In *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, 1. Mittelalter (1100–1500): Die gelehrten Rechte und Die Gesetzgebung*. Ed. Helmut Coing, 573–86. Munich: Beck.

Zabarella, Francesco. 1517. *Lectura Juri Canonico affabreconcina excellentissimi Iuris Cesarei et Pontificii Doctoris domini* Cardinalis Zabarellae *Super quarto et quinto Decretalium. Cum additionibus, concordantiis et summariis, numeris domini Johannis Thierry Lingonensis iurium interpretis* ... Lyon.

Zabarella, Jacopo. 1587. Iacobi Zabarellae Patavini *In duos Aristotelis libros posteriores analiticos commentarii. Tertia editio cum antiqua Aristotelis conversione ab eodem cum graecis exemplaribus diligentissime collata et omnibus mendis expurgata* ... Venice.

———. 1597a. Iacobi Zabarellae Patavini *Opera logica: quorum argumentum seriem et utilitatem ostendet tum versa pagina, tum affixa praefatio Ioannis Ludovici Havvenrevteri doctoris medici et philosophi in Argentoratensi Accademia professoris* ... Cologne.

———. 1597b. Iacobi Zabarellae Patavini *Liber de tribus praecognitis*. In Zabarella 1597a.

Zanatta, Marcello. 1996. Introduzione*.* In *Organon di Aristotele*. Ed. M. Zanatta. Vol. 1: 9–154. Turin: UTET.

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 8

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

A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 8

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

by

Michael Lobban

Department of Law, Queen Mary, University of London, UK

Springer

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A NOTE ON THE AUTHOR

Michael Lobban is professor of Legal History at Queen Mary, University of London. After finishing his doctorate at Cambridge University, he held a Junior Research Fellowship at St. John's College, Oxford, and has held posts at the University of Witwatersrand, the University of Durham and Brunel University. Michael Lobban's research interests lie in the field of English legal history and the history of jurisprudence. He is the author of *The Common Law and English Jurisprudence, 1760–1850* (Oxford: Clarendon Press, 1991), which was the joint winner of the Society of Public Teachers of Law's prize for outstanding legal scholarship in 1992, and of *White Man's Justice: South African Political Trials in the Black Consciousness Era* (Oxford: Clarendon Press, 1996). He has also written widely on aspects of private law and on law reform in England in the eighteenth and nineteenth centuries, as well as co-editing, with C.W. Brooks, a volume entitled *Communities and courts in Britain, 1150–1900* (London: Hambledon Press, 1997).

PREFACE

This volume is primarily concerned with jurists' and legal philosophers' understandings of law, rather than with those of philosophers (such as J.S. Mill), whose views are handled in other volumes of the *Treatise*, particularly in Patrick Riley's Volume 10. In the chapters that follow, brief mention has been made of John Locke and of Thomas Hobbes, insofar as their theories were directly of relevance to, and discussed by, common lawyers. However, since both of these thinkers are given more comprehensive treatment by Professor Riley, readers should consult his volume for a fuller discussion of these thinkers. In the current volume I have modernised all spelling and punctuation.

In such a work as this, it is inevitable that the author will draw many ideas both from the published work of other scholars and from the guidance and advice of colleagues and friends. I hope in the body of the text to have drawn the reader's attention to relevant published works of other authors. The Clarendon Edition of Thomas Hobbes's *Writings on Common Law and Hereditary Right* (ed. Alan Cromartie and Quentin Skinner, Clarendon Press, Oxford 2005) unfortunately appeared too late to be taken account of in this volume, but readers are referred both to its edition of Hobbes's *A Dialogue between a Philosopher and a Student of the Common Laws of England* and to Dr. Cromartie's very useful introduction.

I should like to take this opportunity to express my gratitude to a number of people who have helped me in a number of ways during the writing of this volume, though without pretending to hold any of them in any way to account for any infelicities and errors which may remain. I am especially grateful to Chris Brooks, who has been a consistent source of stimulating and thought-provoking ideas and comments, as well as offering generous guidance, advice and assistance. I have long greatly appreciated both his friendship, and his example. I have also benefited from the comments and advice of Neil Duxbury, David Lemmings, David Lieberman, Wilfrid Prest and Philip Schofield. John Langbein was kind enough to allow me to read his unpublished work on the early history of Yale Law School, and was an excellent host when I presented some of the ideas contained here at a seminar at Yale Law School in 2001. I am also grateful to David Lemmings for inviting me to present some of the material at a conference at the Australian National University in the same year. Some of the material in Chapters 3–5 of this volume is discussed in a chapter in the volume of proceedings from that conference, *The British and Their Laws in the Eighteenth Century* (Boydell & Brewer, Woodbridge 2005) under the title, "Custom, Nature and Authority: The Roots of English Legal Positivism." I have also given a more extended version of some material con-

Chapter 1

PRECURSORS

1.1. The Age of Bracton

Legal historians since F. W. Maitland have agreed in dating the origins of the English common law to the era of the reign of Henry II (1154–1189) (Pollock and Maitland 1968; Milsom 1976; Hudson 1996; Brand 1992b). Although the Anglo-Saxon monarchy prior to the Norman conquest was strong and relatively centralised, with kings issuing law codes and taking an active interest in the maintenance of law and order and in dispute resolution (see Wormald 1999a, Wormald 1999b), it was only with the introduction of new remedies in the 1160s and 1170s that the foundations were laid for a system of justice in which cases would be commenced by a regular procedure of returnable writs, and judgments rendered by a professional judiciary, operating in courts keeping records (see in addition Turner 1985; Brand 1992c). These remedies were regular and available throughout the king's domain, and the royal courts administered "one national law and not a multitude of local and regional customs" (Van Caenegem 1988, 29). When historians speak of the "common law" in the late twelfth and early thirteenth centuries, it is this system which they are referring to: the term itself was not then in use. By the mid-thirteenth century, however, the expression "common law," adapted from the canonists' invocation of a *ius commune*, was widely used to mean the body of law administered in the court which was distinct from statutes enacted by the king with his council, prerogative and local custom (Hudson 1996, 18; Pollock and Maitland 1968, I: 176–7).

The era of the formation of the English common law saw the production of two treatises on "the laws and customs of England" which give some insights into how early jurists thought about law, legislation and custom. The first, written between 1187 and 1189, was known as *Glanvill*, after Sir Ranulf de Glanvill, the justiciar of England by whom it was presumed, probably incorrectly, to have been written. It was a largely practical and procedural work, describing the writs used before the king's justices in civil litigation, though it also contained some substantive discussions (see Turner 1990; Brand 1999). Writing, as he was, in the early period of the formation of the common law, *Glanvill* acknowledged that there was a "confused multiplicity" of "laws and legal rules of the realm," but he felt that there were enough general rules to be written down. At the same time, the author showed some familiarity with the terminology and concepts of Roman law. Although England's laws were unwritten, he said, "it does not seem absurd to call them laws—those, that is, which are known to have been promulgated about problems settled in council

on the advice of the magnates and with the supporting authority of the prince, for this is also a law, that 'what pleases the prince has the force of law'" (Hall 1993, 2–3).

Glanvill's reference to D.1.4.1 suggests that he saw the principal source of law to lie in the royal will, a point which may be reinforced if we believe that the author of the text was familiar with precise reforms legislated by Henry II, the evidence for which was later lost (Hall 1993, xxxv). Nonetheless, some caution is needed before we conclude that the author had a more "legislative" view of law than a "customary one" (cf. Tubbs 2000, 7). For *Glanvill* observed that the king "does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed" nor by those "most learned" in those laws and customs (Hall 1993, 2). Nor should it be overlooked that the reforms of Henry II were more about creating procedures to enforce customary norms which already existed than self-consciously altering these norms. If the effect of Henry's reforms was to alter the nature of the customs, it was not necessarily his intention to do so (see Milsom 1976, 36–7).

Glanvill was soon superseded by a larger work on the laws and customs of England. This work, known as *Bracton*, was attributed to Henry of Bracton, a thirteenth century judge of the King's Bench. Recent scholarship has cast doubt on its authorship. According to Samuel Thorne, the text was originally composed in the 1220s by a clerk in the service of the judge Martin of Pateshull, most probably William of Ralegh, who himself in turn became a judge. Additions were then made to the text in the 1240s, either by another author or a reviser. This may account for the many apparent contradictions in the text and the various changes of mind which the author appears to have had (Thorne and Woodbine 1968–1977, 3: xliv–l; Brand 1996, 73–9; but contrast Barton 1993). *Bracton* was the first attempt to put the law of England into a comprehensive structure; and this project was clearly influenced by Roman law models. The level of *Bracton*'s Roman law learning has long been debated. For Maitland, *Bracton* was "a poor, an uninstructed Romanist" (Maitland 1895, xviii). He argued that *Bracton* borrowed from Azo's *Summa* of the *Institutes* for his general statements, but made little use of Roman law when dealing with the English detail. More recent scholarship has challenged this view, showing that Roman learning is to be found in much more of the text than Maitland realised (Woodbine 1922; Barton 1968). In Thorne's view, Roman law supplied him both with concepts and a technical vocabulary, with which to describe and analyze material obtained from the plea rolls (Thorne and Woodbine 1968–1977, xxxiii).

The structure of the work followed that of Justinian's *Institutes*, beginning with a general introduction on justice and law, and proceeding to discuss persons, things and actions. However, its content consisted "of the judgments and the cases that daily arise and come to pass in the realm of England"

(Thorne and Woodbine 1968–1977, 2: 20). This attempt to put English law into Institutional form was not a complete success. Firstly, *Bracton* was not a successful redaction of actual English law. It combined analysis of the practice of the courts in the 1220s and 1230s with material clumsily added in the 1240s, which made for unresolved inconsistencies. One scholar has indeed pointed out that the text contains passages which do not describe the actual practice of the courts at any time in the period of its composition (Barton 1993). By the time it had got into circulation, it was hence no longer an accurate guide as to the details of the law (Brand 1996, 87). Secondly, it failed to establish a tradition of treatises. It is true that over fifty copies were made of the manuscript and circulated widely before the mid-fourteenth century; and the material was drawn on by the authors of two treatises known as *Fleta* and *Britton*, which were written at the end of the thirteenth century. However, as the legal education of common lawyers developed, particularly at the Inns of Court after 1339 (Baker 2000), works such as *Bracton* came to be seen as of decreasing relevance. Nevertheless, *Bracton* is an important text, not only for its insight into legal thought in the early era of the common law, but also because interest in it revived strongly in the early modern period (Yale 1981). The treatise was published in 1559, and was soon cited and drawn on by a range of other scholars, including Sir Edward Coke. Moreover, in the seventeenth century, *Bracton*'s few comments on the nature of kingship (which we will examine shortly) were frequently invoked, both by those who sought to limit the king, and by those who sought to magnify his powers (see, e.g., Malcolm 1999, 83, 664–5, 779).

Bracton*'s text began with a statement similar to *Glanvill*'s. "Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved." He proceeded to say that it was not absurd to call them *leges*,

> since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law. (Thorne and Woodbine 1968–1977, 2: 19)

There has been much debate about the relationship between custom and legislation in *Bracton*. According to Charles H. McIlwain, the text saw the king as bound by a substantive customary law, which defined the extent of royal power. The king had full powers of administration and legislation to implement and supplement this customary law, but he had no power to alter it. There was thus a distinction in legal thought, he suggests, between law (*iurisdictio*) and government (*gubernaculum*), and between *leges* (administrative orders which could be changed) and *consuetudines* (fundamental customs which could not be changed) (McIlwain 1947, 77, 82–3). McIlwain's view has been challenged by a number of scholars who have cast doubt on his distinc-

tion, and on the idea that the king was bound by fundamental customs
(Tierney 1963, 309; Lewis 1964; Hanson 1970). Moreover, it has recently been
argued that there is no claim in *Bracton* that "custom stands in a superior po-
sition to enacted law" and that there is nothing in the text which compels the
conclusion that the author considered all law to be customary (Tubbs 2000,
15–7).

McIlwain's view that *Bracton* conceived of custom as being fundamental in
the sense of being unchangeable cannot be accepted. However, he did see
most law as derived from the consent of the community as manifested in cus-
tom, rather than from any kind of legislation: the laws and customs of Eng-
land "have been approved by the consent of those who use them." *Bracton*'s
rationale for why custom was binding was the same as that given in the Digest
for resorting to custom when written law was silent (D.1.3.32). Unlike the Di-
gest, *Bracton* did not explicitly say that custom should be resorted to when
there was no written law applicable; but this was superfluous, as he had al-
ready established at the outset that English law was unwritten. For *Bracton*,
the bases of the general rules of law were customary. To give an example, he
pointed out that a gift made *propter nuptias* by the bridegroom to the bride at
the church door was "properly called the wife's *dos* according to English cus-
tom"—in contrast to the Roman meaning—"and it is that with which we deal
here" (Thorne and Woodbine 1968–1977, 2: 266).

However, while the basis of the system was customary, its rules were al-
ready becoming the technical matter of specialists developed in the judicial le-
gal forum. Again following the Roman model, *Bracton* noted that if "like mat-
ters arise let them be decided by like, since the occasion is a good one for pro-
ceeding *a similibus ad similia*" (cf. D.1.3.12). Where the matter is "difficult
and unclear," there needed to be resort "to the great court to be there deter-
mined by counsel of the court, [...] [since] it is more becoming and more law-
yer-like to take counsel rather than to determine anything rashly" (Thorne
and Woodbine 1968–1977, 2: 19, cf. 3: 73). There could be disagreements
among those specialists, and it took the best reasoning to resolve these issues
(see, e.g., ibid., 3: 321–2). We should not forget that the work was written "to
instruct the lesser judges" since "these laws and customs are often misapplied
by the unwise and unlearned who ascend the judgment seat before they have
learned the laws" (ibid., 2: 266).

If the law was primarily derived from the custom of the people, what was
the relationship between the king and the law? *Bracton* made it clear that the
king held the "material sword pertaining to the governance of the realm,"
having the power "to cause the laws, customs, and assises provided, approved
and sworn in his realm to be observed by his people" (ibid., 2: 166). However,
while he had no equal in the realm, he could not legislate alone. In making
this argument, *Bracton* wrote that "since he is the minister and vicar of God
on earth," the king "can do nothing save what he can do *de jure*." He sought

to draw the sting of the principle in D.1.4.1, that what pleases the prince has the force of a statute, by noting that the king obtained his sovereignty "by the *lex regia*." *Bracton* cited the text from the Digest, but omitted the words: "this is because the populace commits to him and into him its own entire authority and power." His omission suggests that for *Bracton*, if the king *derived* his power from the people, they had not *transferred* their power to him. Rather, the king gave his *auctoritas* to "what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon" (ibid., 2: 305).

Secondly, *Bracton* sought to establish that the king was bound to act according to law. This was so even though no writ could run against him, but he could only be petitioned. In a passage much rehearsed (and adapted) by seventeenth century writers, *Bracton* wrote,

> The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power. For there is no *rex* where will rules rather than *lex*. (Ibid., 2: 339)

There has been much debate about the nature of the king's obligation in *Bracton*'s view. At a number of points, the text spoke of the king's obligation in moral terms. Following a civilian tradition which laid stress on the text *Digna Vox* (C.1.14.4), he noted that it was a saying worthy of the majesty of a ruler that the prince should acknowledge himself bound by the law (Thorne and Woodbine 1968–1977, 2: 305, cf. 2: 166). Equally, *Bracton* pointed out that the king swore a coronation oath to give judgments with equity and mercy; and he spoke of the laws and customs being confirmed by their oath (ibid., 2: 21, 304; see Post 1968). Moreover, *Bracton* clearly expected kings to be just. It has been suggested that for *Bracton*, the salient feature of kingship was "the granting of justice to all subjects who may require it," and that the king was expected to acquire a habit of being just. According to this view, the king was expected to submit to law without external constraint, "because the justice embodied therein is congruent with the fixed and unshakable quality of justice inscribed upon his soul" (Nederman 1984, 68). Equally, *Bracton* put it in logical terms. The king should enforce the laws, since "it is useless to establish laws unless there is someone to enforce them" (Thorne and Woodbine 1968–1977, 2: 166).

The notion that the king was bound by a moral obligation is supported by the comment early in the text that if the king was not just, "it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them" (ibid., 2: 33). But elsewhere in the text, this view was contradicted, and it was suggested that there were human controls to be exerted. This is most notable in the well-known passage which begins, "Private persons cannot question the acts of kings, nor ought the justices to discuss the meaning of royal charters." The passage proceeds:

No one may pass upon the king's act [or his charter] so as to nullify it but one may say that the king has committed an *injuria*, and thus charge him with amending it, lest he [and the justices] fall into the judgment of the living God because of it. The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him. [That is why the earls are called the partners, so to speak, of the king; he who has a partner has a master.] (Ibid., 2: 110)

This passage, much drawn on by later constitutionalist writers, has been taken as an acknowledgement by *Bracton* of the realities of the English polity, set into a text which drew on very different theoretical paradigms, but without seeking to make a coherent theory (Hanson 1970, 131). It is generally agreed that this passage, the *addicio de cartis*, did not form a part of the original text, but was a later addition, perhaps by the reviser. Nevertheless, the contradictory positions elaborated in the text were rehearsed in simplified form by later texts, such as *Fleta* (Richardson and Sayles 1955, 35–7). Moreover, some scholars have sought to interpret the text as consistent with *Bracton*'s general views. Tierney, for instance, looking to canonistic parallels, and drawing on the writings of Decretists who asserted that the power of the pope and council together was greater than that of the pope alone, suggests that the writer of this text might have adhered to one of the canonist positions. By such a view, magnates could oppose the king's judgments *in curia*, and had a duty to do so if they were unjust, though if the king maintained his position, his judgment retained legal validity. The magnates could thus exert *political* pressure, but in the end had no *legal* means to coerce a recalcitrant king (Tierney 1963, 315–6). Nederman, by contrast, argues that according to the position in the *addicio*, while the magnates could not force the king to do justice, they were able to prevent him from acting unjustly, and thus far had a legal and not merely a moral bridle on the king (Nederman 1988, 422–5). *Bracton* indeed commented that a king "is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care" (Thorne and Woodbine 1968–1977, 2: 305), which might be read to imply that unjust acts by the king were simply not "kingly" acts.

Nevertheless, as Tierney has observed, *Bracton* had no sophisticated knowledge of the learned laws, and had no concept of the English state on which to build a constitutional theory. He offered no explicit theory of what legal steps could be taken if the king misbehaved. In the often turbulent world of the early thirteenth century, kings often found themselves "bridled" by the political action of the magnates (see Goldsworthy 1999, 24). *Bracton*'s phrases about the importance of law and the need to bridle the king were to be well received in the seventeenth century: but he offered no vision of human law which could control a recalcitrant king.

1.2. The Age of Fortescue

After *Bracton*, there was strikingly little literature aimed at lawyers beyond introductory guides to practice (see, e.g., Turner and Plucknett 1951; Philbin 1999), registers of writs (De Haas and Hall 1970), reports of cases (notably the Year Books dating from the beginning of the fourteenth century) and (from the middle of the fifteenth century) abridgments. Such literature was decidedly practical, rather than theoretical. The lack of a theoretical literature should perhaps not surprise us. If a legal text has the function of educating lawyers, and of propagating or publicising common doctrine used in a variety of courts over a wide area, it may be said that the common law stood in little need of such texts. The system created by Henry II and his successors was a highly centralised system of justice, focused on Westminster Hall. A small number of judges and subsequently lawyers worked in a small number of courts. These judges whether on eyre or on assizes took their learning with them, as they toured the kingdom (see Turner 1985; Brand 1992c). Secondly, there was no university-based common law education in England (until Blackstone's Vinerian Chair was set up in Oxford in 1758). Instead, the legal Inns in London were the place of study of the aspiring practitioner. Here, practice and theory intertwined; and legal expertise was elaborated and shared between judges, senior lawyers and students in equal measure within the Inns and inside the court (Brand 1992a; Baker 1986c; Thorne and Baker 1990; Baker 2000). As Baker has shown, until the flexible system of oral tentative pleading became ossified in the sixteenth century, judges tended to avoid settling disputed points of substantive law, preferring that the parties compromise. For them, the essence of the common law was not to be found in the definitive judicial pronouncements from the bench, but in the "common learning" of the profession, which was elaborated primarily in the readings and moots at the Inns (Baker 2003, 48–52, 467–72).

The one central legal textbook to emerge in the fifteenth century was Sir Thomas Littleton's *Tenures*, which this judge of the Common Pleas wrote for his son, probably in the 1450s or 1460s. Printed after its author's death in 1481, this remained a model treatise, setting out the medieval rules of real property (without equitable complications) in straightforward series of definitions and rules. Though lambasted by Hotman, Littleton remained an object of veneration for the English. In 1550, Mountagu CJ referred to it as "the true and most sure register of the fundamentals and principles of our law" (Baker 2003, 501, note); while Sir Edward Coke called it "a work of as absolute perfection in his kind, and as free from error, as any books that I have known to be written of any humane learning" (Coke 1614, preface). Indeed William Fulbecke, writing in 1600, stated that "*Littleton* is not now the name of a lawyer, but of the law itself" (Fulbecke 1620, 27ᵛ). With Coke's commentary, it remained a standard introduction for law students to land law into the nine-

teenth century. But Littleton's text—unlike Coke's elaborate notes to it—was scarcely a work of jurisprudence. It was, as Baker comments, "very much a student primer" (Baker 2003, 502).

For the theory of English law, the work of Littleton's contemporary, Sir John Fortescue (c.1395–1479) was much more important. Fortescue was admitted to Lincoln's Inn before 1420, becoming a sergeant at law in 1438, and rising to be chief justice of the King's Bench in 1442. Fortescue also had an active political career, sitting in several parliaments in the 1420s and 1430s. In the era of the Wars of the Roses, he remained loyal to the Lancastrian king Henry VI, with whom he fled to Scotland in 1461. It was here that he composed *De Natura Legis Naturae*, written in support of the Lancastrian claim to the throne of England. In 1463, he went with Queen Margaret to France, where he contributed to the education of Edward, Prince of Wales, for whom, as "Chancellor of England," he composed *De Laudibus Legum Angliae*. Fortescue also wrote a treatise on *The Governance of England*, which may also have been composed in exile. In April 1471, he returned to England with the Queen and the prince, but was captured at the battle of Tewkesbury. Prince Edward died in the battle, and shortly afterwards his father was also killed. After their deaths, Fortescue sought a general pardon from Edward IV, for whom he was to act as a counsellor (Fortescue 1885, 40–74).

Although Fortescue has sometimes been seen as a scholar providing a detached view of the system he knew, it has been convincingly shown that he was in fact an active polemicist whose works must be read in their political context (Gross 1996). His works were not treatises aimed at the legal profession, but were polemical pieces furthering a particular cause. However, the arguments he put forward about the constitution were to have an enduring appeal. *De Laudibus Legum Angliae* was first published ca. 1546, and was reprinted six times in the sixteenth century. It was produced in an edition with notes by John Selden in 1616, and saw new editions in the eighteenth and nineteenth centuries (Fortescue 1942, xcv). *De Natura Legis Naturae*, a work referred to on a number of occasions in *De Laudibus*, was not, however, published until 1869, although it did circulate among lawyers in the late fifteenth century (see Baker 2003, 492).

1.2.1. Fortescue on the Constitution of England

Fortescue's fame rested on his articulation of a theory of England as a *dominium politicum et regale* (Fortescue 1997, xv; Skeel 1916; Burns 1985). He first made use of the terminology in *De Natura*, a work written to answer the question—of particular importance in an era of rival dynastic claims to the English throne—whether on the death of a king, the crown should pass to his younger brother, or to the son of the king's deceased daughter (see Gill 1971). Since Fortescue argued that this could only be settled by natural law,

he had to demonstrate that the rule of kings was founded in that law and discuss its nature. In making the argument, he had to explain the meaning of the passage in 1 Samuel 8: 11–8, which related that when the people of Israel asked for a king to rule over them, God punished them with an oppressive tyrant. The passage seemed to indicate both that to seek a king went against natural law, and that once a king had been created, he was to be obeyed even if his commands went against the law of nature. Fortescue's response came in two arguments. The first admitted that the Israelites had committed a great offence in asking for a king, but noted that "this proveth not that the kingly dignity which they demanded is an unjust thing." They had offended, since they already "had God for their king" (Fortescue 1869a, 203–4). However, by appointing a king, God showed his approval of kingly power.

For his second argument, Fortescue distinguished between the powers a king had, which were necessarily good, and the use he made of them, which might be bad. Just as a married woman was not *sui iuris*, but under the power of her husband, so the people were under the power of their king, or the *ius regis*. When the king exerted that power over the people, "to them it is always law, though sometimes good and sometimes bad." The power itself was always good since it came from God; but it could be abused and "brought into ill-fame by contagion of an unjust prince, even as an unjust prince becomes deservedly infamous." Fortescue therefore acknowledged the existence of binding unjust laws, such as Herod's decree, by which all the children in Bethlehem were put to death. Nonetheless, if such laws were binding on the people—and Fortescue noted that there were benefits to the people even from the worst of kings—no royal action ever escaped the vengeance of divine punishment if it proceeded against "the rule of nature's law" (Fortescue 1869a, 218–20; cf. Doe 1990, 52–5).

The key question was thus not whether a king could validly make unjust laws, but how to ensure the best kind of rule, so that this would not occur. If, as Aquinas had argued, the best kind of rule was that by the best king, the worst was rule by a tyrant. It was therefore essential to remove any opportunities for tyranny (Fortescue 1869a, 218; cf. Fortescue 1942, 27). The problem of the unjust king, Fortescue contended, was best solved by having government which was both regal and political. Adapting Aquinas's definitions of *dominium regale*, where the ruler governed by laws he had made, and *dominium politicum*, where the ruler governed by laws made by the community, he defined the English polity as a combination of the two, a *dominium politicum et regale*, where laws were made by the king with the consent of the three estates of the realm (Fortescue 1869a, 205). As Fortescue saw it, law made under the *Lex Regia*, where the prince had absolute power, was "oftener bad than good" (ibid., 220); deserving "the name of corruptions rather than of laws." But the laws made with the assent of the kingdom, as in England,

cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men [...]. And if statutes ordained with such solemnity and care happen not to give full effect to the intention of the makers, they can speedily be revised. (Fortescue 1942, 41)

In *De Laudibus*, Fortescue argued that, whereas kingdoms possessed regally had originated in usurpation and conquest, kingdoms ruled politically originated in consent, and with the purpose of making the people safer in their persons and property than they had been before. Since this purpose would be frustrated if they were ruled by strange laws or if the king could deprive them of their means, "such a power as this could not issue from the people, and if not from them, a king of this sort could obtain no power over them" (ibid., 35). The king and the people were part of one body united by law:

The law, indeed, by which a group of men is made into a people, resembles the nerves of the body physical, for, just as the body is held together by the nerves, so this body mystical is bound together and united into one by the law [...]. And just as the head of the body physical is unable to change its nerves, or to deny its members proper strength and due nourishment of blood, so a king who is the head of a body politic is unable to change the laws of that body, or to deprive that same people of their own substance uninvited or against their wills. (Ibid., 41)

Nevertheless, Fortescue's king was not merely a governor executing the laws of the community. He remained *regal* and was as powerful as kings in purely regal kingdoms. To be sure, since the English king could not legislate alone, he was unable to make the tyrannical corruptions of law which a purely regal king might enact. However, "to be able to sin is not power or liberty, no more than to be able to grow old or rotten" (Fortescue 1869a, 217; cf. Fortescue 1942, 35; Fortescue 1885, 121). Practically speaking, of course, the political king was weaker: if Fortescue accepted the theory that a king who became a tyrant thereby became less kingly, he noted that the populace could not resist a tyrant, whose punishment would come in another world, but had to accept his law. But as a matter of theory, insofar as corruptions of law were not to be regarded as law, they were equals.

Fortescue also argued that there were occasions when any king needed to rule purely regally. In cases of emergency, including invasions or rebellions, where time would not allow the due process required in peacetime to be followed, the king did not have to follow the law. At such times, he could, for the safety of the kingdom, waste the property of his subjects (Fortescue 1869a, 216). Besides prerogative powers in times of emergency, the king had a regal power to dispense equity. Drawing on Aristotle's discussion in the fifth book of the *Nicomachean Ethics*, he noted that not all cases were capable of being embraced by the statutes and laws of the kingdom. In such cases, "superior authority is held to have absolute power, not indeed so as to violate a perfect law, but so as rather to fulfil a law of his own kingdom by reason of

the law of nature, which is natural equity." In these instances, "the office of a good prince, who is called a living law, supplies the defect of the written law," breathing life into it (Fortescue 1869a, 215; cf. Aristotle, *Nicomachean Ethics*, 1137b). Fortescue thus did not see the king as being bridled by the law or by his parliament, in any coercive sense.

The concept of a *dominium politicum et regale* was later seen as a precursor of a theory of constitutional monarchy. Yet Fortescue was ambiguous on the matter. Although the polity was founded by consent, the people as a body was not said to confer power on the king, whether absolute or limited. In *De Laudibus*, he rather compared the formation of the state with the growth of an embryo, with the king issuing from the people, as the head issued from the body (Fortescue 1942, 31; cf. Chrimes 1936, 319–24). Kingly power could neither be conferred by custom nor by the acts of rulers themselves: it could only come from natural law (Fortescue 1869a, 200). His argument in *De Natura* was therefore that the succession to the crown in cases of doubt was to be settled by that law. Though in another tract, he argued that where there was no direct heir, the son of the woman nearest in the royal line should be raised up as king by the Lords and Commons (Fortescue 1869b, 515; cf. Doe 1989, 259; Gross 1996, 88), the elective nature of kingship played a relatively minor role in his works. Fortescue as a political adviser was clearly keen for the king to rule well, and on the best advice; and he was well aware of the problems caused by the weak kingship of Henry VI (Wolffe 2001, 343–4). However, his plans for the fiscal powers of the crown as set for the *Governance of England* would have weakened parliament by endowing the crown generously (Chrimes 1936, 329–32).

1.2.2. *Fortescue on the Nature of Law*

Fortescue's discussion of the nature of law rested on familiar foundations drawn from medieval philosophy. All human laws, he said, were either established by the law of nature, or by its authority. Any law which did not conform to natural law was no law, but a corruption, so that "the rules of the political law, and the sanctions of customs and constitutions ought to be made null and void, so often as they depart from the institutes of nature's law" (Fortescue 1869a, 193–4, 200, 221). However, he was more interested in focusing attention on human law. Fortescue taught the young prince that since all power came from God, "all laws that are promulgated by man are decreed by God" (Fortescue 1942, 9, citing Romans 13: 1). The prince would therefore learn justice by learning the law, since human laws "are none other than rules by which perfect justice is manifested" (Fortescue 1942, 11).

If human law derived from natural law, there was a clear distinction between them. This could be seen in two ways. Firstly, *ius* was a genus of which *lex* was a species. *Ius*, which derived from *iustitia*, embraced "everything

which is equal and good." While law had to be equal and good to be a species of *ius*, it was not convenient to call give all *ius* the name of *lex*: "for every man who seeks to have back what is his own before a judge hath the right [*ius*] but not the law [*lex*] of claiming it" (Fortescue 1869a, 222). It was only in the decree of the judge that *ius* and *lex* merged. This was to suggest that human law might not supply the remedies which the law of nature, or right, demanded. Secondly, he pointed out that human laws were distinct from divine laws, though they derived their life from them. Human laws were to divine laws as the planets were to the sun: "For every planet hath its functions within its proper sphere, wherein it develops the powers of its own nature, and yet escapes not the laws of the sun, in which all the planets partake." In like manner, all human laws acquired their force by the influence of divine law "and yet they who are skilled, however profoundly, in the knowledge of the divine law cannot, without the study of human laws, be learned in human laws" (ibid., 242). This was in effect to remove natural law from consideration as an operative force. For Fortescue, as for many common lawyers, natural law was only to be resorted to in questions where positive law gave no answers. For him, the key example of this was the question of succession debated in *De Natura*, yet as has been noted, it is ironic that in making his argument for the point of succession at issue, Fortescue, who declared that he had "for more than forty years studied and practised himself in the laws" of England, ultimately found the most compelling argument not in the law of nature, but in the English law of entails (ibid., 261; see Hanson 1970, 232ff.).

In *De Laudibus*, Fortescue reiterated his arguments about the importance of positive law, and was similarly brief on natural law. He pointed out that the law of nature was the same in all regions, so that in those areas where the laws of England sanctioned natural law, it was no better or worse than the laws of any other place: "Wherefore there is no need to discuss it further" (Fortescue 1942, 39). However, when it came to matters of positive law—customs and statutes—English law was the best. This was testified by the continuity of its customs, which had ever since "the kingdom of England blossomed forth into a dominion regal and political out of Brutus's band of Trojans." Although the kingdom had often been conquered,

> throughout the period of these nations and their kings, the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them, especially the Romans, who judged almost the whole of the rest of the world by their laws. (Ibid.)

Fortescue's argument appeared to be that the common law had been unchanged since time immemorial—it was of greater age even than Roman law—and that it was this age gave it its authority (see Pocock 2003, 15–8). This was a view echoed in a comment in 1470 of Serjeant Catesby, who ob-

served in a case that the common law had been in existence since the creation of the world (Baker 2003, 18).

Fortescue's sense of history may have been naive; but it should not be assumed that he felt the entire body of the law was static and unchanging. He admitted that the law was not perfect. Defects were to be amended in parliament, as well as by the equitable intervention of the king (Fortescue 1942, 135). Indeed, his very theory of the *dominium politicum et regale* would have been superfluous if laws could not be changed. At the same time, Fortescue acknowledged the difficulty of learning the law. Knowledge of English law, he pointed out, could scarcely be acquired in twenty years of learning (Fortescue 1869a, 241; cf. Fortescue 1942, 23 and 117–21). His argument was not that the *details* of the law were perfect and immutable, but that the fundamental principles of the common law were so good that it had never been felt necessary to change them. It was these principles, rather than the detail of the law, which he urged the prince to learn. In explaining these, he drew on the language of Aristotle's metaphysics. Since law was "artificially devised," there was strictly speaking no "matter and form" out of which it was made, as there was with physical objects. Nevertheless, "customs, statutes, and the law of nature, from which all the laws of the realm proceed" could be treated as the material causes of law, the elements from which it was created. (In this phrase, his reference to the law of nature must be taken to refer to particular applications of it in human law.) The efficient cause of law, or the means by which law was created, were its principles. These he described as

certain universals which those learned in the laws of England and mathematicians alike call maxims, just as rhetoricians speak of paradoxes, and civilians *regulae iuris*. These principles, indeed, are not known by force of argument nor by logical demonstrations, but they are acquired, as it is taught in the second book of the *Posteriora*, by induction through the senses and the memory. Wherefore, Aristotle says in the first book of the *Physics* that *Principles do not proceed out of other things nor out of one another, but other things proceed out of them.*

Out of these principles were "discovered the final causes, to which one is brought by a process of reasoning upon a knowledge of principles" (Fortescue 1942, 21). The final end was, justice. But, as the chancellor asked the prince, "how shall you be able to love justice, if you do not first somehow grasp a knowledge of the laws by which justice itself is known?" (ibid., 15). A parallel conception of the distinction between the general concept of right or justice, the principles of law, and the elements from which it was made was set out in *De Natura*, where Fortescue noted that while law "is a species of Right, yet as thus described it is itself a genus in relation to the Law of Nature, of Custom, of Statute, and to all special and private laws, of which, as above related, the number is like that of the stones in the heap or the trees in the forest" (Fortescue 1869a, 223).

It was the principles or maxims of the common law that comprised its unchanging core, rather than its details, which could vary. The principles were

largely to be found in customs dating back to the arrival of Brutus. But it was not their age, or even their customary status which made them binding; for customs could be void, since "reason and truth always overcomes custom" (ibid., 224). Instead, they were binding because they were consonant with divine law and justice: and the reason for this was because they were made in a *dominium politicum et regale*. Viewed this way, the theoretical question of whether laws could be void as corruptions lost its relevance in the English polity, where justice was to be learned through the laws. Fortescue thus was not arguing that human law regulated matters indifferent in a way which rendered morality irrelevant. Rather, his was an argument for the innate morality of English law, particularly as compared with a jurisdiction such as France.

1.3. Christopher St. German

If Fortescue's *De Laudibus* was regarded by many as a foundational text for theories of the English constitution, Christopher St. German (1460–1541) produced what was perhaps the most important theoretical work on English law prior to the seventeenth century. A member of the Middle Temple, he practised in the Court of Requests and the Star Chamber, but seems to have given up legal practice around 1511 (Guy 1985, 11–2). All his significant work dates from the late 1520s. His best known work is *Doctor and Student*, the first part of which was published in Latin in 1528 (and translated into in English in 1531), and the second part in English in 1530. The fact that St. German wrote in English is significant, for he aimed at a wider audience than merely the legal profession, who "have least need of it" (St. German 1974a, 177). Nevertheless, it was a work which remained extraordinarily popular with lawyers. After its author's death, it was republished six times in the sixteenth century, nine times in the seventeenth, and six more times in the eighteenth. The arguments in *Doctor and Student* were subsequently challenged by an anonymous *Replication of a Serjeant at the Laws of England*. It has been conjectured that this work may well have been written by St. German himself, perhaps as a way of summarising contemporary attacks on the earlier work (Guy 1985, 57; but cf. Yale 1975, 327). Whatever the authorship of this tract, St. German himself replied in *A Little Treatise Concerning Writs of Subpoena*, which was written around 1532, but not published until 1787.

At the same time as writing these legal works, St. German was actively engaged in the political debates around the English Reformation. In 1531, he wrote *A Little Treatise called the New Additions* (St. German 1974b), which examined the issues then being debated between church and state. It was designed to accompany a set of parliamentary proposals drafted by St. German which sought to secure reforms to curtain the clergy's traditional privileges and restrict their jurisdictional independence (Guy 1985, 19–33). Over the next four years, he wrote a further number of polemical pamphlets on the re-

lationship between church and state, which took him into a controversy with Sir Thomas More. In 1532, he published *A Treatise concerning the Division between the Spirituality and Temporality* (St. German 1979), which was answered by More's *Apology*, which elicited in turn a reply from St. German— *Salem and Bizance* (St. German 1987)—which itself led to further exchanges between the two (see Guy 1986a). After the passing of the Act of Supremacy in 1534, he published a *Treatise concerning the Power of the Clergy and the Laws of the Realm* (St. German 1535a) and *An Answer to a Letter* (St. German 1535b), again looking at the relationship between church and state.

As John Guy has argued, St. German "constructed a brilliant, comprehensive and *systematic* theory of law within an English context," which "created the impression that English law was a homogeneous *corpus*" with an enhanced status with regard to other species of law (Guy 1986a 102). The corollary of this was a theory of the supremacy of the king-in-parliament, which might independently of the Pope declare King Henry VIII's marriage to Catharine of Aragon void. For St. German, the king-in-parliament had both absolute temporal power within the realm of England, and power to interpret scripture. If his work had constitutional importance, it was also highly important for illustrating the nature of reasoning in common law and equity, and for the relationship between those two. It is therefore useful to begin with his views of the grounds of the law of England.

1.3.1. St. German on the Grounds of the Law of England

Doctor and Student took the form of a dialogue, and began with a Doctor of Divinity explaining his understanding of the grounds of law to a Student of English law. The Doctor's discussion of natural and positive law borrowed largely from Gerson and Aquinas. Using Aquinas's terminology, the Doctor defined the law of reason as "the participation or knowledge of eternal law in a rational creature, revealed to him by the natural light of reason." He argued that it was immutable, so that any statute, custom or prescription against it was void, as a corruption (St. German 1974a, 13–5). Since men were liable to be blind to the dictates of reason, however, more laws were needed, including those given by revelation, and human positive law, "which is necessarily and probably following of the law of reason and of the law of God *for the due end of human nature*." Neither the laws of princes nor the ordinances of the church were obligatory unless consonant to the law of God; but if they were so consonant, such laws "must be observed in the law of the soul, and he that despiseth them despiseth God" (ibid., 27–9).

Having opened with fairly commonplace definitions, St. German turned the reader's attention to the law of England. In reply to the Doctor, the Student outlined six grounds of these laws: reason, the law of God, general customs, maxims, local customs, and statutes. Discussing the first, the Student

explained that English lawyers did not "reason what thing is commanded or prohibited by the law of nature and what not." Instead, if something was grounded on the law of nature, they said that reason willed it to be done. English law was a system based on a process of practical reasoning. The student proceeded to distinguish between the primary and secondary law of reason, but in a way very different from Aquinas, for whom the secondary law of nature consisted of deductions from the primary law, which was comprised of self-evident principles. For the Student, the law of primary reason was derived from reason alone, and commanded or prohibited those things which all men knew simply by reason to be so commanded or prohibited. It encompassed acts such as murdering the innocent, perjury or deceit (ibid., 31–3). The law of secondary reason by contrast dealt with rules grounded on customs. It was primarily concerned with matters of property, which (both Doctor and Student agreed) was a human institution (ibid., 19). This law in turn divided into two branches. The first—the law of secondary reason general—dealt with rules derived by reason from the custom of property generally kept in all countries, including offences such as theft, trespass or disseisin. The second—the law of secondary reason particular—was derived by reason from the customs and statutes of England that were particular to this realm (ibid., 35). Matters of property law were thus not derived from "pure" reason but from reasoning on the custom of holding property. Through the use of examples, the Student was able to show how the reasoning process worked in law: Given the premises of a custom—for instance that one could distrain beasts for arrears of rent—the lawyer could by the use of his reason solve legal questions—such as who would bear the loss if the beast died. There was "no need to have a written law upon the point" (ibid., 37).

In setting up this debate between Doctor and Student, St. German aimed to show that English law conformed to the law of nature as understood by philosophers, thereby enhancing its status (St. German 1974a, 31; cf. Hanson 1970, 259). However, for practical purposes, rules derived from pure reason or from the law of God were much less important than the complex rules derived from other sources. Indeed, he argued that the law of primary reason and secondary reason general was not much debated in England, since their contents were sufficiently well known. The real difficulty came with the reasoning on the law of secondary reason particular, derived from maxims of English law. Since "often there is no easy approach to deduction from them," a true knowledge of English law needed a high degree of professional expertise. No man "*though he were the wisest*" could reason in the laws of England if he were ignorant of its first principles (St. German 1974a, 37–9). These principles were mainly to be found in the common law, which was made up of general customs "of old time" used throughout the kingdom, which had been "accepted by our sovereign lord the king and his progenitors and all their subjects" and which were not against the law of God or reason (ibid., 45–7). Custom was "the very

ground of divers courts," as well as the basis for the main principles of land law, such as primogeniture. However, the existence and interpretation of these customs were matters for determination by the judges, rather than the people, sitting as jurors. These customs did not have the strength of law "only by reason," which alone could not explain (for instance) the rules of primogeniture. It was their acceptance by custom which made them binding. Since they were not grounded on pure reason alone—which was immutable—they could be abolished or modified, by parliamentary statute.

Alongside general customs stood maxims, or "divers principles [...] which have been always taken for law in this realm." Maxims were sufficient authority of themselves: Provided they were not against reason or the law of God, they needed no justification. Unlike other common lawyers, St. German described maxims in terms which made them appear more like rules than principles. Indeed, he said they were of the same strength and effect as statutes (ibid., 59). Like general customs, they were determined by judges, not juries. Although St. German acknowledged that maxims might conveniently be considered as general customs—since they drew their strength from custom—they were distinctive in that whereas the latter were diffused throughout the realm and were known by all, maxims were only known in the king's courts and among those learned in law. Nevertheless, this distinction was a fine one. Indeed, St. German acknowledged that while some customs (such as primogeniture) were so generally known that they needed no proclamation by written texts, there were other "maxims and customs" that were not openly known by the people, but were to be known "partly by the law of reason: & partly by the books of the laws of England" (ibid., 69; cf. Guy 1986b, 193–5). The maxims of the law were in effect the customs of the courts, as evidenced in their records, and were thus to be distinguished from reason. As the student pointed out, in many cases, it was unclear whether a legal rule (such as that a man who commanded another to commit a trespass was himself to be considered a trespasser) was founded on the law of reason or "only by a maxim of the law" (St. German 1974a, 69).

1.3.2. St. German on the Power of Parliament

Pure reason thus played a part in English law, but it was entwined with reasoning on the basis of customs, maxims and statutes. However, for St. German, the latter were not purely indifferent matters which only owed their status to human imposition. For, like Fortescue, he accepted the familiar argument that all human institutions were part of the divine order. Human law was "superadded" to the law of God and reason; it

hath not only the strength of man's law, but also of the law of reason or of the law of God, whereof it is derived, for laws made by man which have received of God power to make laws be made by God. (St. German 1974a, 111)

This raises the question of the relationship in St. German's thought between human law and the law of reason. St. German has often been seen as a pioneer of the concept of the sovereignty of parliament, which carried the implication that statutes could not be tested by a higher law (Guy 1986a, 101; Baumer 1940, 59; Allen, 1957, 167; Goldsworthy 1999, 71). Recently, however, it has been argued that he did subject human law to legal invalidation if it contradicted natural law (Walters 2003). St. German's view of the role of parliament, which he discussed most fully in his polemical works, echoes the vision of law found in *Doctor and Student*. Although pure reason might determine some simple questions, for practical purposes most questions were too complicated to be left to individual reason. In these situations, it was left to parliament to determine the rule.

In his polemical writings, St. German argued that there was no other authoritative interpreter of law—secular or religious—than parliament. When considering who should expound scripture, St. German noted that some Biblical texts, such as those on the genealogy of Christ, were so clear that they needed no further exposition. By contrast, it was wise to consult men learned in Scripture over unclear texts, as one would consult a lawyer in cases of law. Their opinions could be followed, provided they were "not directly against the law of reason: for that all men are bounden to know" (St. German 1535b, sig. G). However, in cases of doubt "concerning the faith or moral living of the people," which might lead to disquiet in the realm, it could not be left merely to the learning of the clergy, for wisdom without power could not ensure stability which it was the task of a wise king to provide (St. German 1535a, sig. 5v–6). A king could therefore prevent "any exposition of scripture be it by doctors, preachers or any other [...] that it is like to make unquietness among the people." In these cases of doubt, the means given by God through which the people could "come to the knowledge of the truth as shall be necessary to their salvation" was parliament (St. German 1535b, sig. G4v–G5v). As St. German explained, according to Scripture, disputes which could not be resolved were to be referred to the church (Matthew 18: 15–7). This however did not mean the priesthood alone, but the entire congregation of Christ; and since disputes could not be referred to the universal church, "when it is said, show it to the church, it is to be understood thereby that it shall be shown to them that by the law & custom there used have authority to correct that offence." In England, this power lay with the king-in-parliament which "represenseth the whole catholic church of England." For in England, the power of kings was a "*Jus regale politicum*" (St. German 1535a, sig. D4–4ᵛ, cf. St. German 1535b, sig. G 6ᵛ).

If parliament was the means by which to resolve these problems, were there any limitations to its powers? St. German did not argue that the solutions found by parliament (or according to the custom of the realm) would *necessarily* be just, for he reiterated the Thomist point that only human laws

"not contrary to the law of reason nor the law of God" derived their authority from God (St. German 1974a, 111). Parliament had no direct power over the laws of God or reason, "but to strengthen them and to make them to be more surely kept it hath good power" (St. German 1974b, 332). A law forbidding the giving of alms would therefore be void (St. German 1974a, 41). Similarly, in his polemical writings, St. German was clear that there were some powers which the secular authority simply could not possess. Thus, the king could not exercise any merely spiritual powers, such as consecration and absolution. If parliament were expressly to grant to the king such spiritual powers, the grant would be void "for they have no authority to change the law of God" (St. German 1535b, sig. B 3). Nor did parliament have power (for instance) to prohibit marriage or to forbid entry into religious houses (St. German 1974b, 331). In effect, if parliament granted such powers, they would be no more effective than if it were to grant the king power to make men geniuses.

Such limitations were hardly controversial. What was notable about St. German's exposition was the extent to which he was prepared to go to confer jurisdiction over ecclesiastical matters onto parliament. Although secular authority had no direct power over spiritual matters, St. German was clear that it could regulate their exercise. Thus, while it was part of the law of God and of reason that ministers of the church should be given sufficient goods to sustain them, it was a matter of positive law to determine what that amount was. Tithes were therefore a positive, and not a divine institution (St. German 1535a, sig. A 7ᵛ–A 8ᵛ, F1). Similarly, parliament could regulate how marriages should be made and in what form, and could "order the manner of entry into religion." A statute which forbad the sons of lords marrying the daughters of husbandmen would be void; but a statute that no lord's son should marry a foreign-born woman without a royal licence would be valid (St. German 1974b, 331). Perhaps most controversially, parliament, "as the high sovereign over the people which hath not only charge on the bodies, but also on the souls of his subjects," could determine who was Pope in case of a schism (St. German 1974b, 327).

If in theory, there were some limits to parliament's authority, St. German (like Fortescue) tended to assume that parliament would not err, but would exercise an infallible moral judgment (see Hinton 1960, 416–7; Baumer 1940, 76, 156; Eccleshall 1978, 112). His polemical works were replete with examples of ecclesiastical rules which violated secular law, and were to be regarded as void; but he offered no examples of secular laws which violated the law of God and reason. Indeed, in *Salem and Bizance*, he threw out a challenge: "if master [Sir Thomas] More can show any laws, that have been made by parliament, concerning the spirituality, that the parliament had no authority" to make, he should produce them (St. German 1987, 371). Moreover, in *Doctor and Student*, he observed that "it can not be thought that a statute that is

made by [the] authority of the whole realm" in parliament "will recite a thing against the truth" (St. German 1974b, 300, cf. 317). Similarly, in *The Power of the Clergy*, he reiterated the point, when discussing legislation regulating the benefit of clergy:

it is not to [be] presumed that so many noble princes and their counsel and the lords and the nobles of the realm and yet the Commons gathered in the said parliament would from time to time run in to so great offence of conscience as is the breaking of the law of God.

He added that no sufficient proof had been shown at any of these parliaments that it was against the law of God that priests should answer before secular courts: "and if there be no sufficient proof that it is against the law of God, then the custom of the realm is good to put them to answer upon" (St. German 1535a, sig. B 8ᵛ–C). The laws of the realm could not be presumed to violate the laws of God; and in the absence of proof, they had to be presumed good.

1.3.3. Law, Conscience, and Equity in St. German's Thought

In most cases, the individual was to regulate his conscience according to law and the dictates of public authority, presuming them to be reasonable. In most matters of law, there was little room for the individual to be instructed by the pure light of reason. As he showed in *Doctor and Student*, when it came to the law of property, which was derived from custom and statute, conscience was to be guided by law. Thus, St. German pointed out that the rules of inheritance enforced in some parts of England varied from the common law rule of primogeniture, allowing the youngest son to inherit under the custom of Borough English and allowing equal partition under gavelkind. However, in their respective areas, the rule of law bound conscience: so that it would not be against conscience for a younger brother to inherit in some places and not in others (St. German 1974a, 121). Equally, if positive laws were changed by competent authority, even without sufficient cause, "then the conscience which had been previously founded upon it must change likewise" (ibid., 111, 129). St. German's polemical point behind this was that conscience should not be ruled by clerics. Discussing a number of determinations to be found in the *Summa Rosella* of Baptista Trovomara and the *Summa Angelica* of Angelus Carletus, two manuals of conscience aimed at confessors, he noted that they were "either against the king's laws" or "of no authority in this realm. And therefore those whosoever in this realm order their conscience after the determinations of the said sommes [...] and by the authority of the said sommes we think they err in conscience" (St. German 1535a, sig. F8–8ᵛ; cf. St. German 1974a, 275).

St. German's picture of a system of positive law under the control of secular authorities, which was to be presumed to be reasonable, raised a problem: if

the common law was reasonable, why did it need equity to correct it? More specifically, why was a *court* of Chancery needed to supplement the common law? This was a matter not touched on by Fortescue, but it was one which St. German, who had practiced in courts of equity, could not avoid. The Chancery's equitable jurisdiction had developed since the later middle ages (Jones 1967; Avery 1969; Avery 1970; Ormrod 1988). In St. German's day, the court had attracted significant amounts of business under the Chancellorship of the cleric Thomas Wolsey (1515–1529), whose methods of dispensing justice so antagonised the common lawyers that when he fell from power, the Lords issued articles against him listing complaints about his conduct. His successor as Chancellor, the lawyer Thomas More (1529–33), took much greater care not to alienate the common lawyers. In this context, questions were raised concerning the relationship between law and equity. St. German's *Doctor and Student* was the first English published work to address the relationship between these two.

For St. German, if in many areas conscience was to be guided by law, there were also times when law was to be ruled by a conscience which was not simply a set of rules pronounced by theologians. In defining this conscience, St. German elaborated the concept of *synderesis*. This was a natural power in the soul moving towards good from evil, which he described as "a spark of reason" (St. German 1974a, 81). Law was to be tested by this reasoning faculty which was found in every man. In many cases, it was quite consonant with this reason that conscience should be guided by law. The Student illustrated this through a syllogism. The major proposition, which "synderesis ministers," was that "Rightwiseness is to be done to every man." The minor proposition, supplied by a rule of English law, was that only a son born after marriage should be the heir. The conclusion was that in conscience the inheritance was only to be given to a son born after marriage (ibid., 129). But in other cases, conscience operated to modify the law.

The prime vehicle through which conscience did this was equity. In turning to equity, or epieikeia, St. German began with a definition drawn from Gerson's interpretation of Aristotle. Laws, he said, "covet to be ruled by equity,"

which is no other thing but an exception of the law of God or of the law of reason from the general rules of the law of man: when they by reason of their generality would in any particular case judge against the law of God or the law of reason, the which exception is secretly understood in every general rule of every positive law. (St. German 1974a, 97; see Rueger 1982, 17–9)

In contrast to Fortescue, St. German's Student showed that equity was administered by English judges, rather than by the king. Equity was to be found firstly within the common law itself, for judges were able to make equitable interpretations of statutes, excepting cases from the rigour of a statute either by the law of reason or by considering the intent of the makers. However, St. German showed that the main judicial forum for the exercise of equity was the distinct Court of Chancery, for "most commonly, where any thing is ex-

cepted from the general customs or maxims of the laws of the realm by the law of reason, the party must have his remedy by a writ that is called *sub pena*," which commenced cases in that court.

The distinction between the practice of common law and the Chancery was illustrated most clearly by their respective attitudes to uncancelled bonds. At common law, if a man borrowed money on a sealed bond, but failed to have it cancelled when he paid the money owed, the holder of the bond could sue for the sum, and the debtor would not be allowed to deny the debt. For St. German, the general rule on bonds was a convenient one, designed to prevent people avoiding sealed obligations by means of bare averments. Although it was clear that any rule requiring a debtor to pay twice for the same debt was "against reason & conscience," this would only occur in particular cases; and in such cases, a remedy was given to the man by subpoena in equity (St. German 1974a, 77). This seemed an illustration of the Aristotelian point that the general words of the law were good but that they might lead to injustice in the individual case. Nevertheless, the question remained as to why there needed to be separate courts of law and equity.

St. German's answer was to look at the different procedures of the courts. The common law courts had distinct rules of procedure, which might prevent the defendant making the plea which would render him justice. Since they determined *secundum allegata et approbata*, if certain facts were kept from the record, a case might be "tried & found by verdict against the truth" (St. German 1974a, 117; cf. St. German 1985, 121). In such cases, "it is not against the common law, [that] the party have remedy in the Chancery [...] though he can have none by common law" (St. German 1985, 108). The Chancery, where "the very truth in conscience is to be searched," thus was able to provide a remedy where the common law could not (St. German 1985, 121). Indeed, in the case of uncancelled bonds,

The Judges of the common law know as Judges by the grounds of the law that the payment sufficiently dischargeth the debt in reason and conscience, as the chancery doth, but yet they may not by the maxims and customs of the law admit the only payment for a sufficient plea before them. (Ibid.)

This was to indicate that the law of the realm—indeed perhaps even the "common law" itself—was not limited to the practices of the King's Bench, Common Pleas and Exchequer. For "the common law pretendeth not that that maxim stretcheth not [sic] to all courts, nor to the whole common law, but to certain courts, according to the custom before time used" (St. German 1985, 111). This seems to suggest that St. German saw there to be a single system of law, to which different courts with different procedures might contribute (but cf. Yale 1975, 330).

If the Court of Chancery was a court of conscience, nevertheless the Lord Chancellor must "order his conscience after the rules and grounds of the law

of England" (St. German 1974a, 111; St. German 1985, 123). This meant that it could not be a perfect court of conscience and that there would remain areas where individuals should depart from the law for conscience's sake, but where law would not do so. St. German made it clear that Chancery only intervened "If a *subpena* lie in the case" (St. German 1974a, 103). This meant that while the law of the realm was grounded on the law of reason and God, yet it "will not always give him remedy when he hath right" (St. German 1985, 124). There were a number of examples given where the Chancery offered no remedy. Firstly, there were cases where no evidence was available to put before the court, as where a man who was sued for a genuine debt waged his law—defending himself with the aid of oath-swearers rather than a jury—and succeeded by swearing a false oath. Since his wrongful act could not be proved in court, there would be no remedy even in Chancery, but he would be bound in conscience to restore the debt (St. German 1974a, 109; cf. St. German 1985, 116–7). In this kind of case, Chancery was of necessity blind; but elsewhere, it shut its ears to supplicants for reasons of policy. Thus, the Chancery refused to hear a man contradict what he had earlier affirmed in a court of record, denying him a remedy to prevent any "unseemly ambiguity or contradiction in the king's courts" (St. German 1974a, 117; cf. St. German 1985, 115). Again, though there was no curial remedy, the party would be bound in conscience to recompense. Finally, if a remedy in Chancery would relieve directly against the rule of a statute, the remedy was denied. As he put it, "there lyeth no sub pena directly against a statute, nor directly against the maxims of the law, for if it should lie, then the law should be judged to be void, and that may not be done by [any] court, but by the parliament" (St. German 1985, 116).

In saying this, St. German clearly acknowledged that if a statute contradicted the law of God or reason, there would be no remedy in court to address the problem. For instance, "if it were enacted that if an alien came through the realm as a pilgrim and died, that all his goods should be forfeit, this statute were against reason and not to be observed in conscience." However, there would be no remedy at common law or in Chancery for the executors of the pilgrim to recover the goods (St. German 1985, 117). It would be incumbent on parliament to correct its error; and the law would not bind in conscience. In the *Treatise concerning the Division*, St. German appeared to reiterate the idea that a statute could bind in law but not in conscience:

It is held by them, that be learned in the law of this realm, that the parliament hath an absolute power, as to the possession of all temporal things within this realm, in whose hands so ever they be, spiritual, or temporal, to take them from one man, and give them to another without any cause or consideration. For if they do it, it bindeth in the law. And if there be a consideration, that it bindeth in law and conscience. (St. German 1979, 194)

As a matter of law, parliament could confiscate goods without reason, and there would be no court to compel restitution. In such cases, the party ben-

efiting would be impelled to restitution only by his conscience, by the fear of punishment in the next world (St. German 1974a 109, 115–7).

While acknowledging parliament's theoretical power to act in an arbitrary way, St. German generally sought to show that it had not done so. Thus, in the text where the passage quoted above appears, he argued that a statute which had deprived the church of mortuaries (21 Hen VIII c. 6, 1529) had been enacted on good grounds and not "without any cause or consideration"—and indeed that clergymen who told people that they were bound for the sake of their souls to give an equivalent to the church were bound in conscience themselves to make restitution of money so acquired. Similarly, although he argued in *Doctor and Student* that if a statute were passed denying a remedy in Chancery on any matter in conscience, and enacting that every matter should be decided only by the rules of the common law, then such a statute would be against right and conscience, he nevertheless insisted there was no such statute in England, not even 4 Hen. IV c. 23, which forbad the Chancery from examining cases after judgment in the common law courts, and which some saw as curtailing the jurisdiction of equity (St. German 1974a, 103; cf. St. German 1985, 108).

However, when it came to the detail of law, he did in fact show that there were cases where equity would not intervene—since to do so would be to give relief against a statute—but where the party was bound in conscience to recompense (St. German 1985, 116). St. German thus made it clear that the law was not always coincident with reason in every case. It attempted via the subpoena to provide a remedy for defects of law in many instances, but there would remain some cases where there was no remedy in court, but only in the conscience of the person. It should be noted that the cases St. German gave as illustrations were ones involving property, in which conscience was normally to follow the law. How was a party to know what conscience demanded, if he was not to look to another source of authority, such as the clergy? St. German's view was that by reasoning from the premises of the established law, the conclusion in some cases would be self-evidently unreasonable and unjust. The conscience of the individual, informed by synderesis, would guide his conduct.

St. German's works thus put forward a number of perspectives which would prove highly important. Firstly, he showed that equity as administered by the Lord Chancellor was to be guided by the law, and not by the conjectures of the holder of the Great Seal (St. German 1985, 121). As he showed, the distinction between common law and the equity of the Chancery was rooted in their different procedures. Secondly, he showed in a theoretical work that the foundations of English law were customary, but also that these customs were interpreted and applied by professional lawyers, rather than laymen. Thirdly, in an age of Reformation, he showed that England was not bound by any external authority, but that parliament had full power to legislate for the kingdom. What parliament enacted was to be presumed reason-

able, as was the case with the common law. The fact that parliament was supreme did not of itself make its pronouncements right; and there were occasions when a party might be bound by conscience to restore what the law said was his. For the law did not always provide a remedy; and in the exceptional cases when it did not, a party was left to his own conscience.

1.4. Equity, Common Law, and Statute under the Later Tudors

The concept of equity which St. German had discussed in its various aspects continued to play an important part in legal thought in the later sixteenth century. This era saw a number of works which discussed the jurisdiction of the Chancery in ways which owed much to St. German (Hake 1953; West 1627). Like St. German, the Elizabethan lawyer Edward Hake reiterated that the Chancery offered remedies which were not available at common law, because of the strictness of its procedure. Both common law and Chancery looked to equity, but only the latter could look at collateral circumstances. Moreover, echoing St. German, Hake said that where the common law failed to give a remedy, it was often for want of proof by the plaintiff (Hake 1953, 126–7). The Chancery, moreover, did not contradict the common law, for it did not settle the question of right, but only directed the conduct of the parties before the court. William Lambarde (1536–1601) also noted that the Chancery worked in a distinct way from that of the common law courts. The subpoena allowed the examination on oath of parties and witnesses; the court did not refer issues to a jury but left all in the hands of the judge; but its decision therefore did not determine matters of right, but only directed the conduct of the parties before the court (Lambarde 1957, 40; cf. Macnair 1999).

The concept of equity was also used by lawyers who reflected on the common law and statute. If the rise of the Chancery's jurisdiction had forced lawyers to consider the role of that court, the Tudor era was also one of great legal growth, with the development of much new law. In this context, lawyers faced with having to apply the common law to new situations and to interpret an increasing body of statute found the concept of equity a useful tool in explaining the adaptability of law to new situations. On the common law side, the decline of oral tentative pleading put a greater onus on judges to make definitive decisions on matters of law after the pleadings had been set, and they became more confident in making authoritative decisions. At the same time, the legal profession and its clients sought a law "clearly stated upon known or admitted facts" (Baker 2000, 81–2). This was reflected in changes in the nature of law reporting, manifested in the publication of the *Commentaries*, or reports, of Edmund Plowden (1518–1585). Where the Year Book reports focused on procedural questions, Plowden claimed a superiority in his reports since they were made "upon Points of Law tried and debated upon Demurrers or special Verdicts" (Plowden 1816, preface; see also Behrens 1999;

Tubbs 2000, chap. 5). His cases were carefully selected, for the reporter sought "to extract the pure only, and to leave the refuse."

Elizabethan lawyers continued to perceive the common law as being founded on custom, or "a secret convention of the citizens agreeing together for a long time." However, its rules and maxims were considered a matter of specialist legal reasoning to be applied by lawyers (Hake 1953, 132, 92). As Serjeant Morgan put it in 1550, arguments in court were to be drawn from

our Maxims, and Reason, which is the Mother of all Laws. But Maxims are the Foundations of the Law, and the Conclusions of Reason, and therefore they ought not to be impugned, but always to be admitted; yet these Maxims may by the Help of Reason be compared together, and set one against another, (although they do not vary) where it may be distinguished by Reason that a Thing is nearer to one Maxim than to another, or placed between two Maxims. (*Colthirst* v. *Bejushin*, Plowden 1816, I: 27a)

Although the word "equity" was little used in the courts of common law, some argued that the exposition of the common law was in fact "altogether guided and directed by *Epieikeia*" (Hake 1953, 103–4, 11–2). When cases occurred which could not be ruled by the generality of legal maxims (which were constant), they had to be "expounded by the hidden righteousness of those grounds and maxims" (Hake 1953, 11). Hake rejected Plowden's view that equity was "no part of the law, but a moral virtue which corrects the Law" (Plowden 1816, II: 466a). Equity, he argued, was not the private conscience or reason of a judge, but of the law. The judge needed to be learned in every part of the law, taking his direction "as a skilful artisan" from the grounds and fountains of the law (Hake 1953, 33). Hake argued that the common law's innate equity could be seen firstly in its exposition of the law. Thus, judges had at all times expounded deeds and contracts according to the intention of the parties, and not by the strict form of the words they used (ibid., 51). Secondly, it could be seen in its provision of remedies, which were flexible and directed by reason. Following Fortescue, Hake acknowledged that in cases which could not be determined either by the letter or interpretation of the law, recourse had to be had to magistrate to supply a new law, since to do otherwise would be to set the judge above the law. However, in England, the law did provide a comprehensive system of remedies: for in all cases where a special writ was not available, "it is allowed unto a man to take his remedy by the general writ" (ibid., 23, 104–5).

Hake's reference was to the action on the case, which he portrayed as an equitable remedy offered by the common law. It was a flexible common law remedy for non-forcible wrongs, which was widely (though incorrectly) agreed in this era to have been created by chapter 24 of the Second Statute of Westminster of 1285 (but which historians now agree dated from a change in pleading practices dating from the later fourteenth century: see Milsom 1981, chap. 11; Ibbetson 1999, chap. 3). By this action, a party could in his writ set

out background information to his claim, and assert that the facts alleged constituted a wrong from which he suffered damage. At the heart of this action stood the concepts of a legal "wrong," *injuria* and damage. However, the wrong was not generally pre-defined in law. Rather, courts often used precedent customary norms as a source of liability, as when innkeepers or carriers of goods were held liable for goods entrusted to them. Equally, this remedy allowed judges to develop the law in new directions, by granting the remedy in novel cases, when reason or justice favoured the plaintiff. Thus, in 1516, when discussing whether the remedy of action on the case should be extended to cover cases for the nonperformance of contracts, the Reader at Gray's Inn, Peter Dillon, argued that it should, "for every law is grounded on reason, and reason wills that if a man has injury he should have an action" (Baker 1977, 272). The flexible format of the action on the case meant that it allowed the common law to expand significantly in the course of the sixteenth century. It is notable therefore that Hake commented that if pleaders only turned their minds to framing actions under this remedy more frequently, there would be less need to resort to the Chancery (Hake 1953, 107); while Lambarde equally attributed the rise of the Chancery's jurisdiction to the failure to develop the remedies offered by the second statute of Westminster (Lambarde 1957, 38–40). These comments were most likely to have been motivated by the fact that the common law remained blind to uses and trusts, which had come to play a central role in property law, rather than from any lack of awareness of the flexible common law remedies available. In any event, Hake's discussion should serve to remind that if common lawyers saw their system as being built on a customary foundation, as supplemented by statute, they also conceived of it as a system of remedies devised by public authority, administered by experts which could ensure that justice was done, by drawing on norms from within the community. It was not a static system, but one which could grow and adapt, developing in an "equitable" way.

The reign of Henry VIII also saw a transformation in the number and range of statutes passed, as part of what has been called the Tudor Revolution in government (Elton, 1953). While judges had always had to handle legislative material, it was only from the reign of Henry VIII that they began to articulate a conception of statute as a categorically distinct source of law, and to develop theoretical views of how to interpret statutes (Thorne 1942; Hatton 1677). In this era, therefore, lawyers became more concerned to define more clearly the relationship between common law and statute, and to see the relationship of each to a wider concept of equity. According to Plowden, it was not the words of a statute which made it law, but its internal sense. Equity was therefore "a necessary ingredient in the exposition of all laws," informing the judge when the literal meaning was to be enlarged or contracted (Plowden 1816, II: 466a). Once again, stress was laid on the expert, rather than private nature of equity, for it was argued that statutes were to be construed by "judi-

cial knowledge" rather than the private knowledge of the judge (Serjeant Saunders in *Partridge* v. *Strange and Croker* (1553), Plowden 1816, I: 83a). The equity and good reason which would temper the words of a statute were often to be sought in the common law, "which is the ancient of every positive Law" (*Stowell* v. *Lord Zouch* (1562), Plowden 1816, I: 363). As Thomas Egerton put it, in the first treatise composed on statutory interpretation, if they did not know the ancient law, judges would neither be able to know the statute or follow it well, but would only "follow their noses and grope at it in the dark" (Thorne 1942, 141). In other cases, however, notably where statutes made innovations, they were to be interpreted according to the intent of the legislator. Since those who had framed the law were not available to be asked, the task devolved on the sages of the law "whose talents are exercised in the study of such matters" (Plowden 1816, I: 82). They were to consider what the law maker would have done when confronted with the case (Plowden 1816, II: 467). In practice, this meant deciding "according to the necessity of the matter, and according to that which is consonant to Reason and good Discretion" (Plowden 1816, I: 205a).

A number of rules of construction were developed. Statutes which enlarged the common law, or settled doubts in it, were to be expounded equitably "for since the common law is grounded upon common reason, it is good reason that that which augmenteth common reason should be augmented" (Thorne 1942, 143; cf. Hake 1953, 89). Statutes which remedied mischiefs were to be construed equitably, though they should not be extended to cases outside the mischief (Thorne 1942, 146–7; cf. Hake 1953, 87–8). By contrast, penal statutes were to be narrowly construed (Thorne 1942, 154; cf. Hake 1953, 88), as were those in restraint of the common law. Egerton argued that statutes were to be construed against their very words on a number of occasions. In some cases, words had to be disregarded *ex necessitate* "as when it can otherwise not happen." Parallel to this was a rule that the words did not apply where they would lead to absurdity or contradiction. Similarly, there were cases where provisions in statutes fell out of use through desuetude. More striking still was Egerton's argument that in some cases, a statute should be construed against its very words "*ut evitetur iniquum*, for statutes come to establish laws, and if any iniquity should be gathered of them they do not so much as deserve the name of laws" (Thorne 1942, 162). He was not the only one to put forward such an argument. Sir Christopher Hatton (d. 1591) noted that "sometimes statutes are expounded by equities, because law and reason repugn to the open sense of the words, and therefore they are reformed to consonance of Law and Reason" (Hatton 1677, 44–5). If this appeared to give judges a great power to ignore the words of statutes, it should nevertheless be noted that this was a rule of interpretation, not one of nullification. Thus, one example given of its operation by Egerton was the provision in Magna Carta, confirming all customs, which was held to confirm only ones with a reasonable beginning.

Chapter 2

THE AGE OF SIR EDWARD COKE

The Renaissance saw a transformation in the legal environment in England (see Baker 1986b). To begin with, English society became more litigious than it had ever been. The sixteenth century saw a tenfold rise in the volume of civil litigation, which resulted in part from social and economic expansion. At the same time, there was a significant expansion in the number of lawyers, both of barristers and attorneys (Brooks 1986, 51 and 113; Brooks 1998a; Muldrew 1998; Prest 1986, 7). Moreover, in the age of humanism, law had a new cultural role. It was increasingly perceived that the work of the barrister was *officium ingenii*, to be contrasted with the mechanical *officium laboris* of the attorney. The Inns of Court were seen not merely as venues for training lawyers, but as finishing schools for gentlemen. In *The Book Named Governor* (1531), Sir Thomas Elyot (ca. 1490–1546) advised that if young men were set to study philosophy and "the laws of this realm," they would become the most "noble councellors" in any realm (Elyot 1962, 52–3; cf. Terrill 1981, 31). At the same time, the era from the later fifteenth century saw major developments in substantive law, with the development of new remedies for breaches of contract, and significant changes in land law (Simpson 1975; Ibbetson 1999; Simpson 1986).

Such was the growth of the law in the sixteenth century that by its end, many of the leading common lawyers of the age, including Edward Coke (1552–1634), Francis Bacon (1561–1626) and Thomas Egerton, Lord Ellesmere (ca. 1540–1617), considered it to be replete with complexities which only served to make it uncertain and encourage litigation. Bacon, Ellesmere and Coke each condemned the condition of the statutes, which were often contradictory and acted as snares to the unwary. Even the conservative Coke recommended making "one plain and perspicuous law divided into articles [...] so as each man may clearly know what and how much of them is in force, and how to obey them" (Knafla 1977, 105; Coke 1604, sig. B3ʳ⁻ᵛ). They also worried about the state of the common law. Ellesmere condemned developments in the common law which threatened to undermine its certainty by giving too great a discretion to the judges (Knafla 1977, 121–2). His rival Coke agreed that the law could be harmed by lawyers, drawing new forms of conveyances unknown to ancient law, or engaging in complex pleadings in novel forms of action (Coke 1602a, sig. q 5ʳ⁻ᵛ; Coke 1611, sig. A ii).

In this context, we might expect to see a flourishing of a new theoretical or institutional treatment of the common law, both for lawyers, and for the wider litigating public. It is therefore striking that the early seventeenth century saw no overarching treatise which would put the law into a learned and compre-

hensive framework in the manner of *Bracton*. Part of the reason for this may be sought in the context in which lawyers and legal writers found themselves, for the question of law reform was complicated after the accession of James VI of Scotland to the throne of England in 1603 by the new king's plans to unite his two kingdoms. Many common lawyers, and notably Coke, opposed any project to unite English and Scots law, which had seen a reception of Roman law in the fifteenth and sixteenth centuries. It was those lawyers who were trained in the civil law who were most enthusiastic for a union of laws, and one of them, John Cowell (1554–1611), was the author of the only early seventeenth century work to attempt to put English law into the institutional framework of Justinian. Cowell's *Institutiones Juris Anglicani* of 1605 was not merely an academic exercise for the better instruction of lawyers (Cowell 1651). As Levack has written, "it was a serious attempt at the codification of English law on the basis of the civil law, and it represented a practical, albeit preliminary effort towards the realization of legal union" (Levack 1987, 83). Cowell's standing among common lawyers fell further in 1607, because of the absolutist views he expressed in another work, the *Interpreter*.

Even those who were in favour of a union of the two kingdoms, such as Bacon (who wrote a *A Preparation toward the Union of Laws for the King* in 1604), were cautious in this atmosphere not to propose any recasting of the content of the common law which might imply any kind of codification on Romanist lines. In his 1616 *Proposition Touching the Compiling and Amendment of the Laws of England*, Bacon observed that more doubts arose on written law than on the common law, which in the manner of all good sciences kept "close to particulars": and he declared that the "work which I propound, tendeth to pruning and grafting the law, and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation" (Bacon 1857–1874e, 67). Common lawyers from Coke to Bacon aimed to remove the excrescences from the pure common law, but without casting the law into a new form. This however raised the problem of how one was to find pure principles of law from the "multitude of cases, judgments, statutes, arguments, treatises, comments, questions, diversities, expositions, customs of courts, pleadings, moots, readings, and such like" with which the student of the law had to deal (Fulbecke 1620, 9ʳ).

Legal writers offered a number of tools. Firstly, the early seventeenth century saw the publication of more law reports, notably the English reports of Sir Edward Coke and the Irish reports of Sir John Davies (1569–1626). Common lawyers from Bacon to Coke agreed that it was from such sources that any understanding of the law was to be sought. Coke's reports, published after 1600, came in for much criticism from his opponents. He was accused of making reports which were not warranted by the records of the cases, and of reporting decisions contrary to the judgments given (see Egerton 1710). Nonetheless, no less a rival than Bacon could concede that had it not been for

Coke's reports, "the law by this time had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time" (Bacon 1857–1874e, 65). For Coke, the law report was an essential tool for understanding the law: it "set open the windows of the law to let in that gladsome light whereby the right reason of the rule (the beauty of the law) may be clearly discerned" (Coke 1613, preface, sig. c iii). Davies, who produced a set of reports (rather than an institute) for Ireland in an era when the common law was being exported there, also saw the law report as an essential tool (see Pawlisch 1985). He described reports as "comments or interpretations upon the text of the Common Law: which text was never originally written, but hath ever been preserved in the memory of men, though no man's memory can reach to the original thereof" (Davies 1869–1876a, 251). Bacon argued for an official system of law reports, noting that "judgments are the anchors of laws, as laws are of the state." Indeed, he himself appointed short-lived reporters when he was Lord Keeper (Bacon 1857–1874b, 103–4). The core of his proposal for a digest of the common law contained was to make "a perfect course of the law in *serie temporis*, or yearbooks, (as we call them) from Edward the First to this day" (Bacon 1857–1874e, 68; cf. Bacon 1857–1874b, 100–1). His plan involved condensing agreed law, omitting overruled cases, and pruning repetition or tautologies. However, he continued to insist that "laws be taken from sworn judges" (Bacon 1857–1874b, 107).

A second form of literature comprised "auxiliary books" which could serve as guides to the law. These included books explaining the terms and practices of law, such as Coke's *Book of Entries* which contained the pleadings used in various actions, alphabetically arranged, and taken from recent and cases which he had himself discussed elsewhere. For Coke, such works were essential, for the lawyer needed to combine "knowledge in universalities, and the practice in particulars." As he advised the student,

No man can be a complete lawyer by universality of knowledge without experience in particular cases, nor by bare experience without universality of knowledge; he must be both speculative and active, for the science of the laws, I assure you, must join hands with experience. (Coke 1671, preface).

If this was to teach the particulars, education in "universals" was to be obtained from another type of book, which sought to instruct students in the method of extracting underlying principles of law, and organising them. From the late sixteenth century, a number of works appeared which sought to teach logic and method to the lawyer. One example of this was Abraham Fraunce's *Lawiers Logike* of 1588, the first treatise on forensic logic published in England, and a work which sought to introduce lawyers to the Ramist method. If the law was "in vast volumes confusedly scattered and utterly undigested," Fraunce said, it was not the law itself which was to be blamed, "but lawyers

themselves that never knew method" (Fraunce 1588, sig. a3ᵛ). Fraunce's work was an exposition of Ramus's method, using examples drawn from English law, often from Plowden's *Commentaries*. But the notion of instructing lawyers in logic soon took hold: a series of pedagogical works in the early seventeenth century taught lawyers the tools of logic to extract principles, or maxims, from the mass of material in law. Such works included *A Direction or Preparative to the Study of the Law* by William Fulbecke (1560–1603) and *The English Lawyer* and *Lawyer's Light* by John Dodderidge (1555–1628). They also included works which extracted and discussed maxims. The first book of Sir Henry Finch's (1558–1625) *Nomotechnia* (published in 1613 in Law French) and of his *Law, or a Discourse thereof* (published in English in 1627), set out and illustrated a number of maxims and rules (see Finch 1759a; Finch 1759b). His work was followed by the *Treatise of the Principall Grounds and Maximes of the Lawes of this Kingdome* by William Noy (1577–1634; see Noy 1757) and the *Maximes of Reason, or Reason of the Common Law of England* by Edmund Wingate (1596–1656; see Wingate 1658). It was also followed by Francis Bacon's *Collection of Some Principall Rules and Maxims of the Common Lawes of England*, which derived from work begun in the 1590s, and was published in incomplete form in 1630.

Finally, there were what Bacon dubbed "institutions." These he saw as being books for the novice, "to be a key and general preparation to the reading of the course." They needed to be comprehensive and well-ordered, to give the student "a little pre-notion of every thing, like a model towards a great building," but they were not to be authoritative (Bacon 1857–1874e, 70; Bacon 1857–1874b, 105). Other lawyers were often sceptical about the value or need for works discussing substantive law. Davies boasted that the grounds of the law of England "are so plain and so clear, as that the professors of our law have not thought it needful to make so many glosses and interpretations thereupon as other laws are perplexed an confounded withall." He praised Littleton for having reduced the principal grounds of the common law with "singular method and order" and asked rhetorically, "who ever yet hath made any gloss or interpretation upon our Master Littleton?" (Davies 1869–1876a, 262). Coke was also initially sceptical about attempts to bring the common law into a better method, noting that abridgements "greatly profited the authors themselves; but as they are used have brought no small prejudice to others" (Coke 1604, sig. B 3ᵛ). Nevertheless, there were some general overviews produced, besides Cowell's explicitly Romanist work. Finch's *Nomotechnia* and his *Law, or a Discourse thereof*, which were more influenced by Ramus than by Justinian, provided such an introduction. Finch used the Ramist method of definition and division to produce an overview of the law in which "there should not be the slightest particular that is left uncertain and of which there is not contained herein the unequivocal truth, everything having a natural and consistent relationship with everything else" (quoted in Prest 1977,

344). However, although this work was later seen as a precursor of Blackstone, its influence in the early seventeenth century remained limited.

In the event, the most influential and widely read introduction to English law in the seventeenth century was Edward Coke's four volume *Institutes of the Laws of England*. Coke's method was neither that of Ramus nor that of Justinian. His masterpiece was in fact a gloss on Littleton's *Tenures*, which was published as the first volume of the *Institutes* in 1628. In it, he added to Littleton's simple and uncluttered text a detailed series of commentaries on law and legal reasoning, adding reference to statutes, Year Book authorities, and older texts and making observations on them. Three more parts were published posthumously in the 1640s. The second part was a commentary on statutes, the third a discussion of criminal law, the fourth a commentary on the courts. Coke's *Institutes* were not a comprehensive overview of the law of England set out in the form of rules: Rather, they were a commentary on the sources of English law by a lawyer keen to impart the art of legal thinking.

2.1. Common Law Reasoning in the Early Seventeenth Century

Coke and Davies have often been identified as representative of a "common law mind" which existed in the early seventeenth century. According to J.G.A. Pocock, their vision was very insular, in that they assumed that the common law was both ancient and immemorial, and the only true source of law in England (Pocock 1987; but cf. Brooks and Sharpe 1976; Pawlisch 1980). In the preface to his Irish reports, Davies eulogised the common law as "nothing else but the *Common Custome* of the Realm":

a *Custom* which hath obtained the force of a Law is always said to be *Ius non scriptum*: for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are always matter of Record; but being only matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people. (Davies 1869–1876a, 252)

Customs obtained the force of law when they had been "continued without interruption time out of mind," which continued use showed their convenience and suitability for the people. Coke equally eulogised the common law as the product of experience as developed over time:

if all the reason that is dispersed into so many several heads were united into one, yet he could not make such a law as the Law of England is, because by many succession of ages it has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection. (Coke 1794, 97b)

Historians like Pocock have been troubled by the problem that while Coke described the law as a customary system, which might imply that it changed over time with the manners of the people, he also seemed to hold to the view

that the common law and the constitution had always existed in its present form (Pocock 1987, 35–6, 275; cf. Burgess 1992, 72–7). Such a view was put forward especially in the prefaces to his reports. In Coke's view, the grounds of the common law were "beyond the memory or register of any beginning," and were the same as those William the Conqueror had found after his invasion (Coke 1611, preface, sig. §§ 3). In making this argument, he drew on Fortescue's notion that the common law had arrived with Brutus and that "the realm has been continuously ruled by the same customs as it is now" (Fortescue 1942, 39; cf. Coke 1602b, preface sig. C ii–D i). His use of history has long been seen as problematic. To begin with, it was very crude. Coke often read current institutions back into history from the slenderest foundations. Thus, in the preface to the third volume of his reports, he used a post-conquest claim by an abbot to have had conusance of pleas out of the king's court in the time of Edward the Confessor to infer the existence prior to 1066 of a Chancery issuing original writs directed to sheriffs who summoned juries for trials. In fact, Coke was not an incompetent historian. He was rather a careful collector of historical manuscripts and an enthusiastic and able researcher (see Boyer 2003, chap. 9; Musson 2004). Yet he was prepared to maintain positions which he must, as an historian, have known were hard to maintain.

In explaining this, it must be recalled that he was writing not as an historian but as a lawyer. Indeed, he warned "the grave and learned writers of histories" not to meddle "with the laws of this realm, before they confer with some learned in that profession" (Coke 1602b, sig. Dii). Coke's aim in the prefaces was not merely to praise the laws of England, but to prove that the common law had survived unaltered by any conqueror (Coke 1602b, preface, sig. C iii^v). In making this proof, he used historical evidence to vouch authority for his propositions, rather than to establish historical fact (see Yale 1976, 11). Thus, Coke sought to prove his contention that the common law existed prior to the conquest by testing whether examples of the operation of four common law rules could be found from that era (Coke 1607, sig. q iii-v). By proving these selected propositions, he felt he would obtain support for his greater argument. In reading the prefaces, it should be borne in mind that Coke's emphasis on the importance of history was something which had not been particularly stressed earlier in the sixteenth century. As C. W. Brooks has shown, his "ancient constitutionalism" did not reflect the attitude of late sixteenth century lawyers, but was rather "a response to a particular set of political, religious and legal conditions" (Brooks 1998b, 226; cf. Brooks 2002).

Nevertheless, Coke's arguments were not merely those of a polemicist who hid his essentially evolutionary view of law to make political points. He did perceive that there were fundamentals which were unchanging. The ancient common law was the "birth-right and the most ancient and best inheritance" which the subjects had. It was by the law that they enjoyed their goods, their

lives and indeed their very country (Coke 1605, preface, sig. A iiii). As Coke saw it,

For any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages and proved and approved by continual experience to be good & profitable for the common wealth, cannot without great hazard and danger be altered or changed. (Coke 1604, preface, sig. B2)

This raises the question of what the "fundamental points" of the common law were for Coke. He clearly did not see the law as static. Indeed, he described his selection of pleadings in his *Book of Entries* as being of "greater authority and use, and fitter for the modern practice of the law," since they were recent. Nonetheless, the image of change to be found in Coke is often a negative one, of the pure stream of law corrupted by badly drawn statutes or over-complex pleadings. His desire to purify the law thus begs the question of what was essential and unchanging in Coke's vision of law.

In answering this question, it should be noted to begin with that Coke did not see the common law as a set of rules which could be defined, or a set of customs which could be described. Rather, he said,

reason is the life of the Law, nay the common law itself is nothing else but reason, which is to be understood of an Artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason [...]. No man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason. (Coke 1794, 97b; cf. Dodderidge 1629, 91)

For Coke, law was the professional learning of lawyers. He was not unrepresentative in taking this view. In explaining legal reasoning, Dodderidge distinguished primary and secondary conclusions of reason. The former kind were certain and evident to everyone with capacity. For Dodderidge, some of the law was derived from primary principles, or the law of nature. However, most law which concerned matters of probability only, or secondary principles, which were "not so well known by the light of nature, as by other means." They were discerned through "discourse," and were "peculiarly known, for the most part, to such only as profess the study and speculation of laws" (Dodderidge 1629, 45). These secondary principles were drawn from two sources. Some came from custom and experience, but others came from reason deduced in argument (Dodderidge 1629, 47–8, 57). Common lawyers often stressed the importance of nature and custom, for they were the foundations of much of the law. But in practice, it was reason in argument which was the most important source of law. As Dodderidge put it, "the efficient ground of rules, grounds, and axioms is the light of natural reason tried and fitted upon disputation and argument" (Dodderidge 1629, 91).

Dodderidge's typology of nature, custom and reason reflected the way many lawyers viewed the common law. Though the natural law foundations of the common law were commonly invoked, nature was only resorted to in the absence of other authority. "When new matter was considered whereof no former law is extant," Sir John Dodderidge wrote (quoting words of Justice Yelverton spoken in 1468), "we do as the Sorbonnists and Civilians resort to the law of nature which is the ground of all Laws" (Dodderidge Undated, 4v; Doe 1990, 71; cf. Hake 1953, 108). Coke himself was happy to invoke the law of nature when needed. In *Calvin's Case* in 1608, a test case to determine whether a subject of King James, born in Scotland after his accession to the English throne, was an alien in England, he argued that obedience and ligeance was due to the king by the law of nature. Coke described it as the eternal law of the creator, which "never was nor could be altered or changed." Although Coke also used precedents and analogies from the common law, the importance of the law of nature in helping to settle a novel and uncertain question here should be noted (*English Reports* 77: 393; cf. Burgess 1992, 127–9; Gray 1980).

Lawyers equally accepted the customary foundation of the law. "The *Customary Law of England*," Davies wrote, "we do likewise call *Jus commune*, as coming nearest to the *Law of Nature*, which is the root and touchstone of all good Laws, and which is also *Jus non scriptum*, and written only in the memory of man" (Davies 1869–1876a, 253). However, legal writers made it clear that the common law developed in the courts, and not in the community. In particular, a distinction was made between general customs, which were equated with the common law, and particular customs, which were equated with local practices. When Coke listed the "divers laws within the realm of England," he used the phrases *communis lex Angliae* and *lex terrae* to describe the common law, which "appears in our books and judicial records." It was distinct from to "*Consuetudines*, Customs reasonable," which were local customs (Coke 1794, 11b, 110b). Finch similarly defined the common law as "a law used time out of mind" in contrast to customs, which were "special usages time out of mind altering the common law" (Finch 1759b, 77–8). The difference between the two was explained by Thomas Hedley in a speech to parliament in 1610. The common law, he said, "is a reasonable usage, throughout the whole realm, approved time out of mind in the king's courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth." It was "extended by equity," so that whatever fell under the same reason would be found to be covered by the same law. By contrast, customs were confined to particular local places, were tried by a jury. They were to be "taken strictly and according to the letter and precedent," and therefore admitted "small discourse of art or wit," in contrast to the common law, which required learning and wisdom. Hedley pointed out that while the common law derived from custom, it did not rest upon any cus-

tom as its *immediate* cause. Instead, it rested on "many other secondary reasons which be necessary consequence upon other rules and cases in law, which yet may be so deduced by degrees till it come to some primitive maxim, depending immediately upon some prescription or custom" (Foster 1966, 2: 175–6).

It was the common law's foundations, rather than its current details, which were customary. When lawyers spoke of these foundations, they often had in mind the constitutional structure of the kingdom, and the fundamental rules concerning property, whose origins could not be precisely traced, but which had been digested in Littleton. For Coke, the essential principles of the common law were derived from immemorial custom, reconfirmed over time. Magna Carta, the Charter of the Forest, the Statute of Merton and the two Statutes of Westminster, along with the original writs in the *Register*, he observed, "are the very Body, & as it were the very Text of the common Laws of England. And our Year Books and Records, yet extant for above these 400 years, are but Commentaries and Expositions of those laws, original writs, indictments and judgements" (Coke 1611, preface, sig. A ii; cf. Coke 1794, 115b). Nature and Custom were thus the bases on which the law was built. As Dodderidge saw it,

A Ground, Rule, or Principle, of the Law of *England* is a conclusion either of the Law of Nature, or derived from some general custom used within the Realm, containing in a short Sum, the reason & direction of many particular & special occurrences. (Dodderidge 1629, 6)

Nonetheless, the essence of the law was found in the process of legal reasoning. For common lawyers, this was an essentially forensic exercise. As Coke saw it, the principles of law were clear; it was their application which was complex. The law, as he put it, "is not uncertain *in abstracto* but *in concreto*" (Coke 1613, preface, sig. ciii). Davies similarly argued that doubts arose more from the multiplicity of facts than of laws. "[I]t must be a work of singular judgement," he said "to apply the grounds and rules of the law, which are fixed and certain, to all human acts and accidents, which are in perpetual motion and mutation" (Davies 1869–1876a, 261). Law was to be dealt with at the very point where it was most difficult: *in concreto*, mixed with fact. As Coke put it, "no man alone with all his true and uttermost labours, nor all the actors in them themselves by themselves out of a Court of Justice, nor in Court without solemn argument" could ever have come to the "right reason of the rule." It was the very procedure of argument in open court which led men to the correct legal solution (Coke 1613, preface, sig. c iii).

The principles of law were themselves derived from the process of reasoning. As Dodderidge put it, they were the "reasons of every resolution in any book case being reduced into short sentences, propositions or summary conclusions" (Dodderidge 1629, 95). Rather than drawing on positive ancient foundations for the rules they would use in court, lawyers therefore pointed

to the tools of reasoning learned from books on logic, as well as maxims. In his commentary on Littleton, Coke observed that Littleton's proofs of common law were taken from twenty different fountains. Firstly, they were drawn "from the maxims, principles, rules, intendment and reason of the common law." The list which followed of the other sources included a number which referred to judicial sources—legal records, original writs, good pleadings, approved precedents—some from logical arguments, and some from the opinions of learned men. Of these sources, maxims were the most important. Following Edmund Plowden's much quoted phrase, Coke defined a maxim as "a sure foundation or ground of art, and a conclusion of reason." A maxim, he noted, was in essence the same thing as a rule, a common ground, or an axiom (Coke 1794, 11a). In effect, the unchanging "fundamentals" of law were to be found in its principles and maxims, which had been refined by learned men over the ages.

Perhaps the most sophisticated exponent of maxims in the early seventeenth century was Francis Bacon (Bacon 1857–1874c). In his view, maxims were "most important to the health [...] and good institutions of any laws," for they were like the ballast of a ship, which would keep everything upright (Bacon 1857–1874e, 70). Bacon's enthusiasm for the form of the maxim was echoed in his use of aphorisms in *De Augmentis Scientiarum* (1623), and at various points in his career he planned to put together a comprehensive set of legal maxims. In the end, however, this project remained unfinished and only an incomplete set of maxims, dating from 1596–1597, was published after his death, only to be largely neglected (Coquillette 1992, 35–48). For Bacon, maxims were not simple rules to be learned. On commencing his collection, he deliberately eschewed digesting them into a certain method or order, to give a coherence to the whole. Instead, by setting forth a series of "distinct and disjointed aphorisms," he wanted to "leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications" (Bacon 1857–1874c, 321).

Bacon described his project as "collecting the rules and grounds" dispersed through the body of the law. The function of the maxim was to illuminate how the law worked, revealing its underlying principles. He was thus not concerned with the technicalities of the forms of action to be used, or the manner of pleading, but the principles which animated the law. Thus, his first maxim, or *regula*, dealt with causation in the law. Bacon explained that the law looked to proximate, and not remote causes, since it would be "infinite for the law to judge the causes of causes." But as a principle was not a fixed rule, he illustrated his proposition by showing its limits. Thus, he showed that the rule did not apply in criminal cases, because "when the intention is matter of substance [...] there the first motive will be principally regarded, and not the last impulsion" (Bacon 1857–1874c, 327–9). His fifth *regula* dealt with necessity and duress, showing that a man was not held to be at fault "where the

act is compulsory and not voluntary, and where there is not a consent and election." Once again, Bacon explained the limits of the rule: while the plea of necessity could be used to justify private wrongs, it could not be used to justify wrong against the commonwealth. Similarly, "the law intendeth some fault or wrong in the party that hath brought himself into the necessity." The seventh *regula* showed that in civil cases, the law looked to the "damage of the party wronged, [rather] than the malice of him that was the wrong-doer," while in criminal cases, it was the intention of the defendant which mattered (Bacon 1857–1874c, 343–5). For Bacon, such maxims, which "sound into the true conceit of law by depth of reason," were of use in helping resolve cases where there was no direct authority, or where the authorities varied. More broadly, "the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation somewhat the more settle and be corrected" (Bacon 1857–1874c, 319).

Bacon's method of gathering maxims reflected his broader inductive method. They were to be derived from legal materials: statutes, Year Book cases, forms of pleading. In *De Augmentis Scientiarum*, Bacon wrote,

It is a sound precept not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it. (Bacon 1857–1874b, 106)

A maxim in law was thus like a "middle axiom" in natural science. As Kocher has put it, "it is obtained by induction from congruous lines of cases running through several different kinds of law, and, when applied back to those fields, serves to promote consistency within and between them" (Kocher 1957, 11–2). Bacon was insistent that law came not from abstract opinions, but from the material of judgments. Instead of taking the views of advocates or doctors, he said, "Let the laws be taken from sworn judges." Any reconstruction of law must be based on old authorities, "otherwise the work would appear rather a matter of scholarship and method, than a body of commanding laws" (Bacon 1857–1874b, 107, 101). At the same time, Bacon had a fluid view of the development of law, as assisted by the reasoning process which generated usable maxims. He argued that it was inevitable that new situations would arise where the law had not found an answer. In such situations, he advised drawing from similar cases, but with caution and judgment. Moreover, he stressed the need to avoid the judicial conservatism he associated with Coke and excessive veneration for the past: "Let reason be esteemed prolific, and custom barren. Custom must not make cases" (Bacon 1857–1874b, 90).

As befitted a man who held the Great Seal, he was therefore prepared to look for justice beyond the legal rule. Indeed, in *De Augmentis Scientiarum*, he commented that not every position of law should be taken as a rule: "But

let those be considered rules which are inherent in the very form of justice" (Bacon 1857–1874b, 106). Maxims were thus to be guided by reason and justice rather than by positive rules. Bacon therefore distinguished between more important maxims, and less important rules. In the twelfth *regula*, which stated that pleadings should be departed from, rather than that wrongs should be unpunished, he argued

The law hath many grounds and positive learnings, which are not of the maxims and conclusions of reason, but yet are learnings received, which the law hath set down and will not have called in question: these may be rather called *placita juris* than *regulae juris*. With such maxims the law will dispense, rather than crimes and wrongs should be unpunished. (Bacon 1857–1874c, 358–9; cf. 320)

These *placita* contrasted "with highest rules of reason, which are *legum leges*, such as we have here collected." Bacon gave as an illustration of what he meant the qualification of the legal rule that an accessory to a felony could not be proceeded against until the principal had been tried. This rule, Bacon said, did not apply to protect a man who induced a madman to commit a felony, on the grounds that the madman could not be tried. In such a case, the crime had to be punished. However, where the rule in question was "one of the higher sort of maxims," then the law would rather endure a particular offence to escape punishment than the rule be violated. As an illustration of this, Bacon noted that a penal statute was not to "be taken by equity." Bacon did not fully articulate what he meant by the distinction between *regula* and *placita* (see Coquillette 1992, 44–5). It may however be suggested that he had in mind an equitable application of remedies, in which courts would modify the strict application of a rule of procedure or practice in order to do justice.

   Bacon's unfinished work proved far less influential on common lawyers than *Coke upon Littleton*, for Coke's emphasis on the primacy of the judicial forum for legal argument was what held the greatest attraction for lawyers. Nonetheless, the view which Bacon had of the importance of the maxim was one shared by other common lawyers. For they were the legal principles running through the legal system which were both drawn from the experience of past cases and allowed the law to be applied and developed in novel situations. It is thus notable that many of those who stressed the importance of maxims and the process of legal reasoning were wary of putting law into a static institutional form for the very reason that it would stifle development. It was, Dodderidge said, "more convenient and profitable [...] to frame law upon deliberation and debate of reason, by men skilful and learned in that faculty" when a case arose which needed settling, for then it would be resolved with much more care and thought (Dodderidge 1629, 90). Legal reasoning using principles and maxims which were developed from reasoning on ancient foundations allowed the common law to be both static in its fundamentals, and developing at the same time.

2.2. The Common Law and Legislation

The role of the common lawyers in the constitutional debates of the early seventeenth century has attracted much recent attention. Historians have disagreed about whether this era saw a clash between a monarch keen on advancing absolutist claims and those who wanted to restrain the king through the language of common law constitutionalism, or whether there was largely a constitutionalist consensus (see Russell 1990; Burgess 1992; Burgess 1996; Sommerville 1999). Two constitutional questions have attracted particular attention. The first (which is examined in this section) concerns the question of legislation. This involves two issues: the legislative powers of the crown, and the relationship between legislation and the common law. The second (which is examined in the next) concerns the question of whether the crown was bound by the common law, or had prerogative powers beyond it.

The question of legislation was largely a theoretical one, given the irregularity of early seventeenth century parliaments and the relative paucity of statutes. Nevertheless, it could generate much political heat. When, in 1607, John Cowell wrote in his *Interpreter* that the king was "above Law by his absolute power" and could make laws by himself (though he usually made them in parliament), the opinion was so offensive to parliamentarians that the king was forced to condemn the book. When Roger Maynwaring preached a similar doctrine in 1627, he faced impeachment (Cowell 1607 sig. Qq1, tit. "King"; Sommerville 1999, 113–24). Their positions were extreme, however, and the king never sought to act on them. The mainstream position was derived from Fortescue's notion of a *dominium politicum et regale*, in which statutes did not come from the will of the prince alone, but were made with the assent of the whole realm (Fortescue 1942, 41). In Coke's phrasing, "There is no Act of Parliament but must have the consent of the Lords, the Commons, and the Royal assent of the king" (Coke 1644a, 25). Nevertheless, agreement on the process of legislation could mask disagreement about its intrinsic nature. In particular, there was disagreement over whether law was made by the king, or came from the consent of the community. The Royalist position echoed the view of the *Digna vox* (cf. Davies 1869–1876b, 25). James I told parliament in 1610 that kings, who were the original lawmakers, subsequently bound themselves "to the observation of the fundamental laws of his kingdom." Every just king was "bound to observe that paction made to his people by his laws, in framing his government agreeable thereunto, according to that paction which God made with Noah after the deluge." Nevertheless, "laws are properly made by Kings only; but at the rogation of the people, the King's grant being obtained thereunto" (McIlwain 1918, 309). By contrast, common lawyers like Coke cited *Bracton*'s proposition that the king was under God and the law, interpreting this to mean he was bound by it (Coke 1604, preface, sig. B3).

It has sometimes been suggested that men like Coke sought to show that the common law was fundamental; and that part of his argument was that parliament had no power to legislate in contradistinction to the common law. Instead, it is said that parliament was seen as the ultimate court of the common law, guarding its unchanging values, but acting when they needed detailed application or when the law needed pruning. This is a view associated with the work of C. H. McIlwain, who argued that until the civil war, the "high court of parliament" was seen as giving judgments declaratory of a fundamental law (McIlwain 1910 and 1947). While McIlwain's thinking on fundamental law has been criticised (Gough 1955), the idea that early seventeenth century lawyers saw parliament as a court which declared, but did not make, the law has recently been restated by some historians. Indeed, in the words of one historian, "[t]hat Coke thought of parliament as a sovereign court rather than a sovereign legislator is apparent in all he wrote about the institution" (Burgess 1996, 180; see also Cromartie 1999). A number of comments from Coke can be found to support this view. For instance, he said that "*expounding* of laws does ordinarily belong to the reverend judges, and sages of the realm: and in cases of greatest difficulty and importance to the high court of parliament" (Coke 1604, preface, sig. B 2; cf. Coke 1613, preface, sig. c). Moreover, in his discussion in the *Institutes*, he compared the records of parliament with judicial records, and asserted that the Commons and the Lords had the power of judicature, both together and separately (Coke, 1644a, 3). There were clear potential political advantages in treating parliament as a court, for it might allow the two houses to "declare" the law independently of the king, and indeed control the king. The 1620s thus saw some lawyers keen to reassert parliament's judicial role, notably in passing acts of attainder.

However, the fact that common lawyers spoke of parliament as a court does not mean that they denied it had a legislative role (see Gray 1992, 182–3). Indeed, the power of parliament was stressed repeatedly in the sixteenth and seventeenth centuries (see Goldsworthy 1999). Thomas Egerton, for instance, in his treatise on statutory interpretation, wrote,

The most ancient court & of greatest authority is the king's high court of Parliament, the authority of which is absolute & bindeth all manner of persons because that all men are privy & parties thereunto. (Thorne 1942, 108)

While speaking of parliament as a court, William Lambarde noted that it "has also jurisdiction in such cases which have need of help, and for which there is no help by any law, already in force" (Lambarde 1957, 140). Sir Thomas Smith, writing in the 1560s, talked of parliament as the "most high and absolute power" in the realm. He stated that parliament had the power to abrogate old laws and make new, to change the rights and possessions of private men, to establish forms of religion and give form to the succession of the crown, for it "representeth and hath the power of the whole realm both in the

head and the body" (Smith 1982, 78–9). Smith did note that there could be trial or judgment by parliament, but said that "that great council being enough occupied with the public affairs of the realm, will not gladly intermeddle itself with private quarrels and questions" (ibid., 89).

Nor did Coke himself see parliament as a judicial court as opposed to a legislative body. In arguing for Coke's "judicial" vision of parliament, Burgess cites the following as "the most significant passage of all," which "opened the way for parliamentary 'legislation' to be seen as the rendering of a decision, binding on all other courts" (Burgess 1996, 180–1):

And as every Court of Justice has laws and customs for its direction, some by the Common Law, some by the Civil and Canon law, some by peculiar laws and customs, &c. So the High Court of Parliament *Suis propriis legibus & consuetudinibus subsistit*. It is *lex & consuetudo Parliamenti*, that all weighty matters in any Parliament [...] ought to be determined, adjudged, and discussed by the course of Parliament, and not by the Civil law, nor yet by the Common laws of this realm. (Coke 1644a, 14–5)

Omitted from the above quotation, however, is a key phrase—"moved concerning the Peers of the Realm or Commons in Parliament assembled." This passage indicates that what Coke had in mind was not general judgments about the law of the land, but rather decisions on matters internal to parliament: parliamentary privilege. Moreover, this was precisely not the common law—as clashes in subsequent centuries between the Commons and Courts would show (see *Stockdale* v. *Hansard* (1840), *English Reports* 113: 411, 428). For Coke, *lex & consuetudo parliamenti* was a separate source of law, the law relating to parliament (Coke 1794, 11b).

Coke did not confuse the function of the courts and those of parliament. Echoing Lambarde, he pointed out that this institution was akin, not to the French parlements, but to their "Assemblée des Etats" or the German Diet (Coke 1613, preface, sig. c iii; cf. Lambarde 1957, 123). It was the *commune concilium* of the realm, with every member a counsellor (Coke 1644a, 3). The judges, by contrast, could be called to give assistance in the upper house, but "they have no voices in Parliament" (Coke 1644a, 4). In making this point, Coke was echoing the view of James I in 1616, when he told the judges that their function was *ius dicere* and not *ius dare*: "you are so far from making Law, that even in the higher house of Parliament, you have no voice in making of a Law, but only to give your advice when you are required" (McIlwain 1918, 332). For Coke, parliament did have power to make new law: "Of Acts of Parliament," he said, "some be introductory of a new law, and some be declaratory of the ancient law, and some be of both kinds by addition of greater penalties or the like" (Coke 1644a, 25). Coke was in no doubt about the power of parliament. "Of the power and jurisdiction of the Parliament for making laws in proceeding by Bill," he wrote, "it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds" (Coke 1644a, 36; cf. Coke 1794, 110a).

This was clearly a power to go beyond the common law, for one of the examples he gave was that parliament could legitimate one born before his parents' marriage. The English rule on legitimation was distinct from that of the civil law, and was cited by Fortescue as an example of its superiority (Fortescue 1942, 93). This was also the point on which, in the Statute of Merton, the medieval barons had famously rejected the civilian rule, when "with one voice [they] answered, that they would not change the laws of England" (Coke 1604, preface; Baker 2002, 490). While he often condemned the effect of statute on the common law, Coke also admitted that "there be certain Statutes concerning the administration of justice, that are in effect so woven into the common Law, and so well approved by experience, as it will be no small danger to alter or change them" (Coke 1604, preface, sig. B3). Once the act was made, he added, it had to be expounded by the judges, according to the intention of those passing the acts, just as they interpreted wills according to the intention of the testator (Coke 1613, preface, sig. c iii). Indeed, no judge of Coke's generation would have confused the distinction between a statute and a judgment, for by 1600 there was an increasingly large amount of discussion on how to interpret and construe statutes (see Egerton 1942; Behrens 1999; Knafla 1977; Mirow 1999; and chap. 1 above).

If Coke did not deny parliament's power to make new law, did he nevertheless feel that statutes were subject to review by the judges of the common law? Following his judgment in *Dr. Bonham's Case*, Coke has often been seen as the father of judicial review. Under legislation passed in the reign of Henry VIII, the College of Physicians was authorised to fine any person who practised medicine in London without being licensed by the College. It was also given the power to punish malpractice, which included the power to fine and imprison. Thomas Bonham, a medical practitioner, continued his practice after being refused membership by the College, feeling they had no authority to regulate the medical practice of those who held university degrees; whereupon he was gaoled by the College. The dispute went on for a number of years, before in 1610 the Common Pleas ruled that the College, despite its statute, had no power to punish Bonham (see Cook 1985). Coke gave a number of reasons for his decision, but the most significant one centred on his objection to the provision in the statute which seemed to make the College judge in its own cause. In his judgment, Coke stated,

And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void. (*English Reports* 77: 652)

The meaning of this judgment has been much discussed by historians (Plucknett 1926; Thorne 1938; Berger 1969; Gray 1972; Stoner 1992, 48–62; Burgess 1996, 181–93; Boyer 1997, 82–93; Tubbs 2000, 155–61). On the one

hand, it has been suggested that in the case, Coke was only putting forward a maxim of statutory interpretation, arguing that judges should make narrow constructions of unreasonable statutes. On the other, it has been urged that laws were to be tested by the standard of a fundamental law, which opened the way for judicial review.

A close examination of the case suggests that Coke was engaged rather in judicial interpretation of a statute than in its overturning. Coke gave a number of reasons for finding for Bonham, which rested on a close reading of the statute. He ruled, for instance, that the College was not by its statute constituted a court, and so had no power to gaol for contempts; and that it had no power by its statute to gaol Bonham for practising without a licence (*English Reports* 77: 651, 655). Moreover, even Coke's *dictum* can be read as advocating a form of statutory interpretation rather than nullification. As has been shown in Chapter 1, judges were sometimes prepared to go far in interpreting statutes against their very words. Coke's statement was not intended to suggest judges could strike down statutes which merely violated *natural* reason. His use of the words "common right," which he used elsewhere to mean the common law, suggested that it would be for the judges to "control" statutes by reading them in the context of the broader common law, using their "artificial" reason in this process (Coke 1794, 142a–b; cf. Burgess 1996, 182–4). Moreover, in the case which he reported immediately after *Bonham's Case*, Coke spoke of London customs "which are against common right" but which *were* allowed "because they have not only the force of a custom, but are also supported and fortified by the authority of Parliament" (*The Case of the City of London* (1610), *English Reports* 77: 658, 664). This might suggest he did not have in mind a power of nullification. Nevertheless, the words which Coke used in his report of the case—with its bold declaration that statutes could be judged *void*—were broad and controversial, seeming to suggest a greater power of review. Coke knew that they were provocative, and when challenged by the crown to revise his report, he held his ground (Boyer 1997, 87–8). Moreover, his report drew sharp criticism. Lord Ellesmere for instance commented that it was not for the judges, but for "the King and Parliament to judge what was common right and reason" (*English Reports* 72: 932; cf. Knafla 1977, 306–7).

Coke and other lawyers certainly saw *some* limits to parliament's authority. As Thomas Hedley saw it in 1610, parliament derived its authority from the common law, not vice versa:

But you will say the parliament has often altered and corrected the common law in diverse points and may, if it will, utterly abrogate it, and establish a new law, therefore more eminent. I answer set a dwarf on a tall man's shoulders, and the dwarf may see further than the tall man, yet that proves him not to be of a better stature than the other. The parliament may find some defects in the common law and amend them (for what is perfect under the sun), yet the wisest parliament that ever was could never have made such an excellent law as the common law is. But that parliament may abrogate the whole law, I deny, for that were includedly to take away the power of the parliament itself, which power it has by the common law. (Foster 1966, 2: 174)

Parliament itself was not omnipotent. Coke pointed out that one parliament could never bind a subsequent one, "for it is a maxim in the law of the parliament, quod leges posteriores priores contrarias abrogant" (Coke 1644a, 43). For common lawyers, there were certain essential constitutional foundations which could not be undermined by the statute of one parliament. With this in mind, it is worth noting that the small handful of English cases in the following century claiming a power of judicial review each involved the issue of allowing a man to be judge in his own cause (*Day* v. *Savadge* (1615), *English Reports* 80: 235; *The City of London* v. *Wood* (1702), *English Reports* 88: 1592). Statutes conferring such powers would in effect abolish the jurisdiction of the courts, and remove one of the foundations on which the polity rested. Coke's notion of judicial review (and that of some of his successors, such as Holt) *may* thus have been limited to voiding laws which were perceived to remove one of the institutional foundations of the state, rather than reviewing laws for any lesser kind of unconstitutionality (cf. Hamburger 1994).

Yet if this was the understanding which explains Coke's broad wording in *Bonham*, it was not one which he articulated clearly. Indeed, in the world of practical politics, he often showed an awareness more of parliament's strength than its weakness. Thus, in 1628, he looked for constitutional security in ancient statutes, and warned of the consequences of parliamentary acknowledgement of royal sovereign powers. It was Coke who read a draft of the Petition of Right to the House of Lords, protesting against the levying of forced loans and imprisonment *per mandatum domini regis*. In the petition, a range of medieval statutes from *de Tallagio Non Concedendo* to Magna Carta were cited to show that the king was acting against the rights of the people: "by which the statutes beforementioned, and other the good laws and statutes of this realm," the petition declared, "your subjects have inherited this freedom, and they should not be compelled to contribute any tax, tallage, or aid, or other like charge not set by common consent in parliament" (Johnson et al. 1977–1983, vol. 3: 339; cf. Gardiner 1899, 67). At another point in the debates, Coke noted that Magna Carta, "with the statutes, are absolute" (Johnson et al. 1977–1983, vol. 3: 503). In these debates, Coke was seeking to anchor the people's inheritances in firmer evidence than the collective judicial memory. Nor did he seem to doubt parliament's power to alter the constitution. Warning against accepting the Lords' resolution saving the king's intrinsic prerogative power, he stated, "We are now about to declare and we shall now introduce and make a new law, and no king in Christendom claims that law, and it binds the subject where he was never bound." Coke went on: "Never yet was any fundamental law shaken but infinite trouble ensued." His argument was not that it could not *validly* be done, but rather that it could not *safely* be done (Johnson et al. 1977–1983, vol. 3: 95).

2.3. The Common Law and the Crown

The nature of the royal prerogative, and the question of whether the king was bound by the common law, were much more pressing issues for lawyers in the era of the first two Stuart kings than the issue of the power of parliament. They raised a central question over the relationship between common law and other parts of the "lex terrae." In his commentary on Littleton, Coke listed fifteen "diverse laws within the realm of England." He began with the *lex coronae*, the *lex et consuetudo parliamenti*, and the law of nature, before going onto the famous threesome of common law, statute and local customs. Thereafter he listed *jus belli*, canon law and civil law in certain courts in certain cases, *lex forestae*, *lex mercatoria* and some local laws (Coke 1794, 11b). These were listed separately. Instead of being set out as features of a unified common law, they appeared as a number of jurisdictions, which sat together, sometimes competing for litigation, within a recognised legal system, but not necessarily subservient to the common law (cf. James I's views in McIlwain 1918, 330–3).

The most contentious of them was the *lex coronae*. The royal prerogative was often treated (in the words of Chief Justice Hobart in 1623) as "the law of the realm for the King, as the common law is the law of the realm for the subject" (*English Reports* 78: 173; cf. Coke 1794, 15b, 90b). This law regulated such matters as how the crown descended and how it could acquire and dispose of rights in things. There was relatively little comprehensive discussion of the crown's prerogative powers in the late sixteenth century (but see Staunford 1567). Such as there was tended to focus little on the public law powers of the king as a governor. However, in the early seventeenth century, when the crown increasingly sought to use its prerogative powers to raise revenue at the expense of the private property of the subject, the question of how far the king had powers beyond the reach of the common law became more contentious.

Revisionist historians have recently argued that absolutist positions were only taken by a small group of civil lawyers in England, and that most sought to argue on more common ground. There was clearly widespread agreement on some crucial issues. It was a constitutional maxim that "the laws of England are the high Inheritance of the Realm," so that any act of the king alone which went against these laws was not valid unless it received its "life and strength from some *Act of Parliament*" (Fuller 1607, 3; cf. Burgess 1996, 158). The king could not legislate or tax—and thus interfere with private property rights—without calling parliament. Nonetheless, a question which was more open to debate was whether by his prerogative the king had a power of government, which might allow him at time of emergency to act in a way which would interfere with private property without consent; and whether such a power was beyond the scrutiny of the courts.

In this context, some lawyers and judges began to use the language of the king's "absolute" and "ordinary" powers (see Oakley 1968). This language was used particularly in 1606 in *Bate's Case*, in which the court of Exchequer had to consider the case of a trader who had refused to pay an imposition levied on imported currants, which had not been sanctioned by parliamentary authority. While there were many precedents affirming that the king could not raise taxes without parliamentary assent, there was also established authority that the king's prerogative powers included the regulation of overseas trade. The king's view prevailed; and the case was notable for a comment of the Chief Baron, Sir Thomas Fleming:

The King's power is double, ordinary and absolute [...]. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of *meum*; and this is exercised by equity and justice in ordinary courts, and by the Civilians is nominated *jus privatum*, and with us Common Law [...] The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is *salus populi*; [...] and this power is [not] guided by the rules which direct only at the Common Law, and is most properly named policy and government. (Howell 1816–1826, vol. 2: 389)

Such language was echoed by others. Sir John Davies, whose support of the king's extra-parliamentary methods of raising revenue would lead to his being offered the chief justiceship of the King's Bench in 1626, drafted a work on *The Question concerning Impositions*, which was not published until 1656. In it, he discussed certain prerogatives, including the right to make war, pardon offenders and grant honours, as well as levying impositions on foreign trade, as areas where the king had "sole and absolute power *Merum imperium & non mixtum*, and which prerogative is as antient as the Crown, and incident to the Crown by the Law of Nations" (Davies 1869–1876b, 11–2). The king thus had a double power. In his ordinary power of jurisdiction, he ministered "justice to the people, according to the prescript rule of the positive law." By contrast, matters of government, trade, and commerce rested with the crown "as a principal prerogative." In having this double power, the king "doth imitate the Divine Majesty, which in the Government of the world doth suffer things for the most part to pass according to the order and course of Nature, yet many times doth shew his extraordinary power in working miracles above Nature" (Davies 1869–1876b, 25–6). These prerogatives were not granted to the king by the people, but were kept by the king when positive law was established. They could not be removed from the king by any statute, for his "prerogatives are the sunbeams of his crown, and as inseparable from it as the sunbeams from the sun" (Davies 1869–1876b, 89). Answering the objection that if the king levied impositions, this would deprive people of their property without their consent, Davies retorted that when subjects lived under a "royal monarchy," they consented to be ruled by the law which gave the king these powers.

Coke later observed of the decision in *Bate's Case*, that "the common opinion was, that that judgement was against law" (Coke 1642, 63). In a number of disputes with the crown over extra-parliamentary revenue, leading to the famous case of *Ship Money* case in 1637–38 (Howell 1816–1826, vol. 3: 825–1316), common lawyers attempted to marshal arguments to control the crown's use of the prerogative, to deny the crown any "absolute" power. However, lawyers had difficulty making a conclusive argument that would subject the crown to the common law. The ambiguity of the position can be seen from some comments of Francis Bacon's. On the one hand, Bacon stressed the king's double power, in a way analogous to that of Fleming and Davies (Bacon 1857–1874g, 373). On the other, he noted in *Calvin's Case*: "although the king, in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day" (Bacon 1857–1874a, 646). The common lawyers' problem was that the prerogative itself had two different aspects: firstly, there were the crown's powers regarding its property and patronage; and secondly, there were its broader governmental powers. The first was clearly subject to control by the courts. As Edmund Plowden put it, "the law has so admeasured [the king's] prerogatives that they shall not take away nor prejudice the inheritance of any" (Plowden 1816, vol. 1: 236; *English Reports* 75: 359; cf. Coke 1642, 63; Coke 1644b, 84). When lawyers cited his maxim, it was to interpret the extent of the king's power to grant privileges or use his property in a way which would harm others' rights. They were not addressing the governmental problem of what he could do for the sake of the commonwealth. As James Morice put it, in a Reading in the Middle Temple in 1578, "The Law has rightly distinguished between the Sovereign rule and government of the king, and the right liberties and Inheritances of the Subject." Thus, there were limits to the king's power to grant monopolies, which might deprive individuals of their trade, but in cases concerning royal government, he had a pre-eminence above the law (Morice 1578, f. 248ᵛ–9; cf. Weston and Greenberg 1981, 11). James I himself acknowledged the distinction, when telling the judges in 1616 to keep within their bounds:

for my part, I desire you to give me no more right in my private prerogative, than you give to any subject; and therein I will be acquiescent: As for the absolute prerogative of the crown, that is no subject for the tongue of a Lawyer, nor is lawful to be disputed. (McIlwain 1918, 333)

The nature and limits of legal control over the king were also seen in the debate over his power to dispense with statutes. In Bacon's words, statutes could be suspended by the king's sole authority for causes known to him; and this "inherent power" was "exempt from controlment by any Court of Law" (Bacon 1857–1874g, 373). In spite of this, lawyers did seek to set some limits the king's powers. It was contended that the king could not by his licence prejudice individual subjects, or allow the commission of a wrong which was *malum in se*. He could only dispense with statutes dealing with wrongs which

were *mala prohibita* (Egerton 1942, 168–9; Knafla 1977, 303). In the *Case of Monopolies*, Coke controversially sought to extend this further, saying that the king could not dispense with statutes made *pro bono publico*, though his assertion was denied by Ellesmere (*English Reports* 77: 1260, 1265n; cf. Cromartie 1999, 99–100). However, legal discussions of the king's power to dispense with law tended to focus on the problem of the crown using the prerogative to benefit itself, or particular subjects, at the expense of the wider community, rather than with matters pertaining to the government of the realm. For example, Plowden wrote, regarding a power of pardon: "if a bridge is repairable by a subject, and it falls to decay, and the King pardons him from repairing it, yet this shall not excuse him, but he shall repair it notwithstanding, because others, viz. all the subjects of the realm, have an interest in it" (*Nichols* v. *Nichols*, *English Reports* 75: 725; cf. Coke 1644b, 154). Thus, the king was not permitted to harm private rights incidentally by the exercise of his prerogative. However, there was also a higher form of prerogative, which could not be removed. As Coke put it in his Report of the *Case of Non Obstante*:

No Act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*; as a sovereign power to command any of his subjects to serve him for the public weal [...] for upon commandment of the King, and obedience of the subject, doth his government consist [...] but in things which are not incident solely and inseparably to the person of the King, but belong to every subject, and may be severed, there an Act of Parliament may absolutely bind the King; as if an Act of Parliament [were passed] to disable any subjects of the King to take any land of his grant, or any of his subjects [...] for to grant or take lands or tenements is common to every subject. (*English Reports* 77: 1300)

It has been argued that if there were matters which were within the "absolute" power of the king, this only meant that this power was discretionary in the sense of not being subject to appeal. This discretion, it has been suggested, still had to be exercised according to law, and therefore respecting the property rights of subjects (Burgess 1996, 30–7). Thus, when William Lambarde spoke of the absolute power of justices of the peace in certain cases, he said that this "absolute authority is to our Law better known by the name of *Discretion*" (Lambarde 1602, 54, quoted in Burgess 1996, 31). Coke himself wrote that even though commissioners of sewers were authorised to act "according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law" (Coke 1605, 99b). Elsewhere, he wrote

Discretio est discernere per legem quid sit justum. And this description is proved by the Common law of the land, for when a jury do doubt of the law, and desire to do that which is just, they find the special matter, and the entry is, *Et super tota materia, &c petunt discretionem Justiciariorum* [...] that is, they desire that the Judges would discern by law what is just, and give judgment accordingly. (Coke 1644a, 41; cf. *Hetly* v. *Boyer* (1614), *English Reports* 80: 1065)

This appeared to say that all discretion was a matter of judicial knowledge: that artificial reason determined all matters of discretion. On the other hand, Coke elsewhere spoke of "the crooked cord of private opinion, which the vulgar call discretion," which he contrasted with "the golden and streight metwand of the law" (Coke 1794, 227b; Coke 1644a, 41). He realised that there was a discretion which was beyond the control of the common law. Indeed, the most obvious example of this was the Chancellor's jurisdiction, so distrusted by Coke as being the judgment of one man alone, without a jury. If the king's absolute power was discretionary, then, it was not necessarily bounded by laws.

Try as they might, common lawyers in a number of disputes from *Bate's Case* to the case of *Ship Money* in 1637 were unable convincingly to argue that the king's prerogative powers of government were subject to control by the common law. If it was agreed that the king had no authority to take the property of subjects without their consent, it was also agreed that he could, in emergencies, use his prerogative power for the sake of the good of the kingdom. In cases such as *Ship Money*, the central question turned on whether an emergency in fact existed, and who could determine this question. Yet this was a matter on which the common law could give no clear answer.

2.4. Common Law and Equity

Besides seeking to control the prerogative powers of the crown, common lawyers such as Coke were concerned about the powers of the rival jurisdiction of the Court of Chancery. After the tempestuous Chancellorship of Cardinal Wolsey, there had been much co-operation between common lawyers and Chancery (Jones 1961; Jones 1967). But by the era of Ellesmere and Coke, it was contested once more. Part of the rivalry was simply over business; but much of it was political and ideological, and derived from the Chancery's position (in James I's words) as "the dispenser of the king's conscience" (McIlwain 1918, 334). John Cowell's entry in his *Interpreter* on the "Chancelor" stated that

whereas all other Justices in our commonwealth, are tied to the law, and may not swerve from it in Judgement: the Chancellor hath in this the kings absolute power, to moderate and temper the written law, and subjecteth himself only to the law of nature and conscience, ordering all things *iuxta aequum & bonum*. (Cowell 1607, sig. N2ᵛ)

This was a rather less controversial statement than his description of the king's absolute powers elsewhere in the work, for it was common enough by 1600 to describe the Chancellor's jurisdiction in equity as "absolute" (e.g., Staunford 1567, f. 65; West 1627, 177). Nevertheless, in early Stuart England, such language was apt to make common lawyers uncomfortable. Coke certainly preferred the word "extraordinary" when describing the equitable jurisdiction of the Chancellor (Coke 1644a, 79).

The contest between the common law courts and the Chancery came to a head in the clash which developed between Coke as Chief Justice of the King's Bench, and the Lord Chancellor Ellesmere (supported by Bacon) between 1614 and 1616, and which resulted in Coke's dismissal from the bench. The clash centred on Ellesmere's practice of examining suits in Chancery after they had received a final judgment at common law. Equity lawyers justified hearing such cases by saying that their court did not challenge the right, but only directed the conscience of the parties. As Ellesmere put it in 1615, "when a judgment is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate and set it aside, not for any defect or error in the judgment, but for the hard conscience of the party" (*Earl of Oxford's Case*, *English Reports* 21: 487). In any event, they did not see their court as subject to the control of the common law. As William West put it in 1594, so great was the power of the Chancery "that judgements therein given are not to be controlled or reversed in any other court, than the high court of parliament" (West 1627, 177). Common lawyers like Coke were of a different view. They feared that this practice would undermine their judgments, and might lead to endless litigation as those who lost at common law sought to reopen their cases in equity. They also felt that the practice was against the statute 4 Hen. IV c. 23 which stated that judgments in the king's courts could only be undone by attaint or writs of error, and against a decision of the judges in *Finch* v. *Throgmorton* (see *English Reports* 81: 101).

Matters came to a head in a series of disputes after Coke's appointment to the King's Bench in 1613 (see Knafla 1977, 159ff; Baker 1986a). The first case involved one Richard Glanvill, a jeweller, who had obtained money on the sale of a jewel which was falsely represented to be a diamond. Glanvill subsequently obtained judgment for the sum, by apparently fraudulent means. The purchaser of the stone then sought to recover in Chancery, and obtained a decree. However, Glanvill refused to pay, and was committed to gaol for contempt of Chancery. He then sued a writ of habeas corpus in the King's Bench for his release, which he obtained, was recommitted by Ellesmere, and released again when the King's Bench found the return to the writ of habeas corpus—that he had been gaoled by the mandate of the Lord Chancellor—bad for generality. This was not the only case where the question of whether the King's Bench could examine Chancery decrees in cases brought on habeas corpus was raised. In the *Earl of Oxford's Case*'s, Ellesmere made clear his views of Chancery's right to examine the conscience of the party, and when the defendants in that case, committed to gaol by the Chancellor for refusing to answer the plaintiff's bill, sought a habeas corpus, the King's Bench judges reiterated their view that the common law courts would be undermined if their judgments could be questioned in Chancery. However, they desisted from directly challenging Ellesmere by releasing the prisoners (*Dr Googe's Case* (1615), *English Reports* 81: 98, 487). While no further habeas corpus ap-

plications were brought, Glanvill sought to indict his antagonists in the Chancery suit by using the statute of *praemunire*, in a proceeding apparently encouraged by Coke. This statute (27 E. 3 c 1) punished those who "sue in any other court to defeat or impeach the judgments given in the king's courts," and was aimed at those who sued in courts outside the realm—particularly in Rome—without the assent of the monarch. When the grand jury failed to find a true bill, Coke declared to the assembled lawyers that "whosoever shall set his hand to a bill in any English court after a judgment at law, we will preclose him from the bar for ever speaking more in this court" (Knafla 1977, 173; Baker 1986a, 217).

In the context of these challenges to his authority, Ellesmere made a complaint to the king, and asked for his personal resolution of the affair, asking whether "upon apparent matter of equity," which the common law judges could not resolve, the Chancery could give relief, and whether there was any statute to restrain the Chancellor in the exercise of his powers (see Bacon 1857–1874d, 350). Ellesmere had already composed a treatise on the question over the summer of 1615 in which he showed that the statute of *praemunire* could not apply to the Chancery since it was one of the king's courts. The matter was investigated by the king's counsellors, rather than the judges, and in June 1616, the king gave his resolution in the Star Chamber. In his speech, he noted that each court should keep within its expected bounds. However, he declared that the King's Bench had no jurisdiction to hear cases of *praemunire* against the Chancery, for "how can the King grant a *praemunire* against himself?" The king went on: "I mean not, the Chancery should exceed its limit; but on the other part, the King only is to correct it, and none else" (McIlwain 1918, 334). The king thereby upheld the authority of the Chancellor to hear cases after a judgment at common law, although he encouraged suitors to abide even by unjust judgments, rather than continue to litigate. Chancery's right was confirmed by a decree (Spedding 1869).

The victory of the Chancery was followed by the humiliation of Coke and the death of Ellesmere, and the Great Seal passed to Bacon. On taking his seat in Chancery in 1617, Bacon made it clear that he was not ambitious to undermine the jurisdiction of the common law, and that he would exercise the power to issue decrees after judgment cautiously, and would not seek to subvert the law (see Bacon 1857–1874f, 182–93). Bacon's views on the equitable function can be seen in *De Augmentis Scientiarum*, where he spoke of the need for praetorian courts. "It is of the greatest importance to the certainty of laws," he wrote, "that Praetorian Courts be not allowed to swell and overflow, so as, under colour of mitigating the rigour of the law, to break its strength and relax its sinews, by drawing everything to be a matter of discretion" (Bacon 1857–1874b, 96). Moreover, he was insistent on the need to keep "praetorian" and "regular" courts apart, for if they were mixed together, "discretion will in the end supersede the law" (Bacon 1857–1874b, 96). Though venal in office, Ba-

con also presided over important reforms in the court's practice, and restored
a harmony between the workings of the courts. This harmony was maintained
by his successor, Lord Keeper Williams who declared that he acted as keeper
of the king's conscience, which could never be "in enmity and opposition with
his laws and statutes" (Baker 1986a, 227). Moreover, the harmony was largely
maintained throughout the rest of the century, although there were again to be
some criticisms that equity procedure threatened the common law after the
Restoration and in the early 1690s (see Macnair 1997).

While Chancery and common law worked in harmony after 1616, the de-
bate flared up again in the 1640s, with the publication of the third and fourth
volumes of Coke's *Institutes*, in which he discussed Chancery's jurisdiction,
and put forward his own view of the arguments of 1616 (Coke 1644b, 122–3;
Coke 1644a, 86). In reply, an anonymous *Arguments, Proving from Antiquity
the Dignity, Power and Jurisdiction of the Court of Chancery* was written, al-
though it was not to be published until 1693, when it was included in a vol-
ume of *Reports of Cases Taken and Adjudged in the Court of Chancery in the
Reign of Charles I, Charles II, and James II*. This tract set out the opinions of
counsel as given in 1616, and also drew on the arguments which Ellesmere
had put forward in a tract written at the time of the crisis, and which were
themselves published in 1641.

As these publications revealed, there was more at issue in 1616 than the
personal rivalries of the participants, for the dispute revealed some contrast-
ing views of the nature of English law. It showed firstly that equity and com-
mon lawyers had different notions of legal reasoning. For Coke and the com-
mon lawyers, as has been seen, the essence of law was to be found in the arti-
ficial reasoning of lawyers practising in common law courts. Although Chan-
cery men accepted St. German's views that equity should be guided by law,
the very notion of equity which they derived from Aristotle suggested the
need to test the hard rule of law by a notion of justice which went beyond it.
Using Aristotelian terminology, William West's *Symboleography*, written in
1594, thus stated that the efficient cause of equity was God, while its material
cause comprised the law of nature, the law of nations, and good manners. In
contrast to the vision of a law which was rooted in a customary ancient consti-
tution, as interpreted by the common law judges, equity lawyers argued that
both kinds of court "join in the Manifestation of God's glory" (*English Re-
ports* 21: 486), seeking justice. Discussing the Chancery in 1616, Sir Anthony
Ben of the Middle Temple noted that "justice is her plain song, as it is the
plain song of the law." If the function of equity was "to supply, not to subvert
the fundamental laws of the land," one sometimes needed to go beyond strict
law (Ben 1615, 211ᵛ). For example, according to the rules of the common law,
only the eldest son inherited as heir: but many fathers went beyond this strict
law when they sought to provide for their younger children. "If then a private
man may see an equity and a justice in his own heart, which the law sees not,"

he went on, it could be presumed that the Chancery could do right "though not by the light of the law" (Ben 1615, f. 214ᵛ). For West, equity was like an apothecary's store, which was full of all manner of drugs, but which needed a skilful apothecary so to mix them to make the medicine effective. In contrast to the later quip of John Selden, who criticised the conscience of the Chancery for varying according to the length of the Chancellor's foot, West compared equity with a shoe shop, in which every man would be sure to find a shoe to fit (West 1627, 175ᵛ).

This meant, secondly, that they had a different view of history from that put forward by Coke. Equity lawyers were able to point not only to Coke's own admission in *Calvin's Case*, "that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did *dare jura*" (*English Reports* 77: 392). They could also invoke his revered medieval *Mirror of Justices*, which stated that cases had been judged by equity before customs were written and made certain (Whittaker 1895, 9; Anonymous 1902, 579). Ben noted "that equity is ancienter than law" and that the Chancery should not be limited by her "younger brother" (Ben 1615, f. 211ᵛ). Citing the comment made by Serjeant Catesby in 1470 that the common law was an ancient as the world, he observed,

Catesby surely must be intended to speak of that law which is reasonable, equal, supple and mild, which is the law of nature or the law of reason which is the law of justice; let us not impound all reason into book cases and law authorities (though they also make manifest for us) but if law be universal reason let us examine it by that reason that is every man's reason and then for whether this be reason. (Ben 1615, f. 207ᵛ)

Coke's views on the history of the courts was also open to challenge. In the fourth part of his *Institutes* published in 1644, Coke set out a history which argued that while the Chancery had existed in the time of Alfred, its equitable jurisdiction developed much later, only being recognised by legislation in the later middle ages (Coke 1644a, 82–3). However, this was not the only version available. In *Archeion*, written in 1591, and published in 1635, William Lambarde dated the creation of law courts to the reign of Alfred (Lambarde 1957, 15). Lambarde's history accounted both for the presence of a common law which derived from the consent of the people, and a distinct equitable jurisdiction derived from the king. In his view, government originated when a people racked by conflicts submitted themselves to a ruler for the sake of peace, initially accepting his commands as laws. Since such kings turned their power to personal gain, the people subsequently devised laws and rules of justice which bound the ruler. According to this vision, it was the king who set up the courts in which people were to be given remedies, but the courts applied the rules of justice derived from the people themselves. Nonetheless, the king himself retained an obligation as "immediate *minister* of *justice* under *God*" to provide them with justice. This meant

that besides his court of mere Law, he must either reserve to himself, or refer to others a certain sovereign and pre-eminent Power, by which he may both supply the want, and correct the rigour of that positive or written law, which of itself neither is nor can be made such a perfect Rule, as that a Man may thereby truly square out Justice in all Cases that may happen. (Lambarde 1957, 42–3)

Law was thus to be corrected by the "*conscience* of the *prince*" (Lambarde 1957, 17). For Lambarde, the equity jurisdiction of the Chancery was to be traced to the era when the King's Bench ceased to follow and advise the king, and as a result became more limited in its jurisdiction. At that point, the king conferred on the Chancellor "his own regal, absolute, and extraordinary pre-eminence of *Jurisdiction* in *Civil* Causes, as well for amendment as for supply of the *Common Law*" (Lambarde 1957, 39; cf. Hake 1953, 140).

Other lawyers took up the notion that the Chancery derived its jurisdiction from the king's continuing duty to see that justice was done. Ben argued that the king had the duty to dispense justice with mercy, which was supported both by scripture (Proverbs 20: 28) and by his coronation oath (e.g., Ben 1615, f. 206; Anonymous 1902, 578). Pointing out that no one disputed the king's power to pardon offenders, Ben argued that to deny him the power to assist his honest subjects with equity in civil cases would be "a lopping of an arm of goodness from the body of Majesty" (Ben 1615, f. 206). Defenders of equity could trace the history of their institution to this exercise of the king's powers, rather than to statute or usurpation. This point was made by the author of the *Arguments*, writing at a time when Lambarde's work had been published, and had been supplemented by the historical researches of John Selden and Sir Henry Spelman. He maintained that in Saxon times, the king gave equitable relief to all his subjects in his *aula regis*. It was only after the conquest that this body divided into four courts, and only in the reign of Edward I that a legal profession emerged. According to the author,

It cannot be denied but that the Chancery, as it judgeth in Equity, is Part of the Law of the Land, and of the ancient Common Law; and let it not be imputed to the Chancery, that the Lord Chancellor hath too great an arbitrary Power in making of his Decrees: For if it be well observed, the Judges use as great a Power in declaring what is law, as the Lord Chancellor doth in declaring what is Equity; and if either be covetous, timerous or malicious, as much Hurt may be done by the one as by the other; whereas in Truth, neither of them ought to proceed in doubtful Cases without the Judgment of Parliament. (Anonymous 1902, 591; cf. Egerton 1641, 1–2, 8; Anonymous 1651, 22)

Earlier, Ben had equally argued that the court of Chancery was as much a court by the law as any other court in the land, the Chancellor as warranted in his office as the sheriff.

As with the dispute over the royal prerogative, it was not merely the political power of the king which prevented the common lawyers' view prevailing. For they were unable to make a legal argument which subjected equity to the common law. However, defenders of equity did not seek to make the court

into an instrument of royal power. Rather, they saw the two courts as complementary. Why, Ben puzzled in 1615, "should law and equity become now of a sudden incompatible who have so long time been found profitable servants of the state?" (Ben 1615, f. 215). For him, it was more important to "look to the work, and not to the instrument by which the work is wrought" (ibid., f. 211). In Lambarde's view, just as two poisonous herbs when skilfully mixed made a good medicine, so law and equity when well compounded made "a most sweet and harmonical *Justice*" (Lambarde 1957, 44; cf. Anonymous 1902, 577). Again lawyers reiterated the points that courts of law were blind to questions of fraud, trust and confidence which the Chancery could unravel. When arguing against the applicability of 4 Hen. IV c. 23, the author of the *Arguments* pointed out that if a man was brought before the Chancery having previously obtained judgment at law, "he cannot be said to answer anew, having never answered before" (Anonymous 1902, 590). The courts asked different questions, for they had different machineries and procedures. There were, he pointed out, a number of functions the Chancery performed which could not be done by the common law courts. And if they could perform those functions, "were not this to erect a Court of Chancery in themselves, and to confound the Courts of Equity and Law together?" (Anonymous 1902, 580).

Chapter 3

THE AGE OF SELDEN AND HALE

The first half of the seventeenth century saw continuing disagreements regarding the power of the crown, and its relationship with the law. The debate over the king's power was revived after the accession of Charles I in 1625, particularly after he sought to finance a war with Spain through a forced loan, and used martial law powers to billet troops on the civilian population (see Cust 1987, chap. 1; Boynton 1964). In both cases, the legality of the king's actions came under scrutiny. For his defenders, there were certain areas of prerogative power which lay beyond the remit of the common law. "Execution of martial law is necessary where the sovereign and state think it necessary," the admiralty judge Sir Henry Marten told the Commons in April 1628: "Neither does it derogate common law in the execution of it" (Johnson et al. 1977–1983, vol. 3: 548). For the common lawyers, however, this was a dangerous argument, for they were reluctant to admit that the crown had powers beyond the scrutiny of the law. As Sir Edward Coke retorted to Marten, "Our common law bounds your law martial" (ibid., 550).

The extent of the king's prerogative powers were particularly questioned after five knights were imprisoned in 1627 for refusing to pay the forced loan. When they obtained a writ of habeas corpus, the crown stated that they had been "committed by his majesty's special commandment." Although such a committal without cause shown appeared to violate Magna Carta, the law on the matter was ambiguous (Baker 2002, 472–4). As recently as 1615, the judges, including Sir Edward Coke, had accepted as lawful a similar return to a writ of habeas corpus, which had not shown cause, but simply recorded a committal by the mandate of the Privy Council. In that instance, the men detained were suspected of involvement in a gunpowder treason plot (*Salkingstowe's Case*, *English Reports* 81: 444). However, when the knights were gaoled for refusing to pay money not authorised by parliament, many began to argue that this was an unlawful exercise of crown power. The detentions were first challenged in the King's Bench, where no formal judgment was entered, and later in parliament. The question was again raised whether the king's powers were part of, or distinct from, the common law.

The parliament of 1628 continued to assert and affirm the ancient rights of Englishmen, notably in securing the passage of the Petition of Right, which addressed the grievances of the raising of revenue by means of forced loans, the use of martial law and the billeting of troops, and imprisonment without cause shown (see Guy 1982; Popofsky 1979; Reeve 1989, chap. 2). The debates on the petition give an important insight into common lawyers' thought. The lawyers remained keen both to harness prerogative to law, and to deny

the king any notion of sovereignty. When the Lords proposed that the petition should state that they were acting "with a due regard to leave entire that sovereign power wherewith your Majesty is trusted," so that it would not be seen as an attack on the prerogative, Coke answered:

I know that prerogative is part of the law, but "Sovereign Power" is no parliamentary word. In my opinion it weakens Magna Charta and all the statutes; for they are absolute, without any saving of "Sovereign Power"; and should we now add it, we shall weaken the foundation of law, and then the building must needs fall [...]. If we grant this, by implication we give a "Sovereign Power" above all laws. (Johnson et al. 1977–1983, vol. 3: 495, 502–3; cf. Burgess 1992, 195–200)

For Coke, it was the common law which was sovereign; and prerogative was part of that law. Nonetheless, omitting the proposed clause did not confirm that the king did *not* have prerogative emergency powers, and the question of the extent of the crown's powers remained ambiguous.

While the king reluctantly accepted the petition, being in dire need of subsidies, this experience taught him the lesson that calling parliament was more trouble than it was worth. Abandoning parliament, he now sought to rule alone, raising revenue by the use of extraordinary levies, such as ship money, from 1634 onwards. Although it was no innovation to raise money in this way to pay for a fleet, the levy was controversial since it was exacted on inland as well as coastal counties, and was levied on a regular and sustained basis. As had occurred with the forced loan, some refused to pay, and in 1637 proceedings were taken against John Hampden for his failure to pay. The crown succeeded in the litigation, though the judges divided seven to five. At issue was the crown's right to use its prerogative powers to raise funds, and thereby to interfere with the property of the subject without their consent. There was much agreement in the case that the crown could raise money in an emergency for the defence of the kingdom, and that the king was the sole judge of what constituted an emergency. But Hampden's counsel argued that in the absence of a clear and immediate danger, the king should call parliament to authorise a tax. It was the king's use of his prerogative powers which was causing controversy, and raising deeper questions about how and when he could use them (see Keir 1936; Sharpe 1992, 721–8).

The heightened political tension of the era from the mid-1620s to the civil war, which broke out in 1642, created a new incentive to develop a vision of the common law which would encompass both private law adjudication and the public law position of the crown. Coke's vision of the law as artificial reason, elaborated in the courtroom by skilled practitioners, reflected the practising common lawyer's view of how legal disputes were solved. However, it did not comfortably explain either the crown's role in public affairs, or the role of legislation. It seemed ultimately to rest either on an assertion of the immemoriality of the common law, which made the crown and parliament somehow subservient to it, or on an assertion of judicial expertise. Neither proved con-

vincing, in an age when Coke's version of history came under attack. In this context, a different vision of the common law emerged, which sought different foundations for its authority, and for the crown and parliament's role within it. The central theorists of this new vision were Coke's contemporary, John Selden (1584–1654), and his disciple Sir Matthew Hale (1609–1676). These men began to turn common law theory into a more positivistic direction.

3.1. The Positivism of Selden and Hale

Selden did not see the law as a process of expert reasoning, but as a set of positive rules which could be traced. "All the law you can name," he argued, "is reduced to these two: it is either ascertained by custom or confirmed by act of parliament" (Johnson et al. 1977–1983, vol. 3: 33). Far more than Coke, he undertook painstaking research into the history of the common law, to trace the origins of its doctrines and institutions. His historical works included scholarly editions of medieval texts, including Fortescue (Selden 1725d) and Eadmer (Selden 1623), an introduction to a new edition of *Fleta* (Selden 1925), general overviews of the development of English law in the middle ages (Selden 1615; Selden 1683), and more detailed scholarly works on particular topics, such as his *History of Tythes* (Selden 1725c) and his *Titles of Honour* (Selden 1725e). In these works, Selden rejected a Cokean veneration of the antiquity of the common law. All laws, he retorted, were equally ancient, and equally founded in nature. However, they had taken different paths, and "hence it is, that those customs which have come all out of one foundation, *nature*, thus vary from and cross one another in several common-wealths" (Selden 1725d, 1891). Moreover, laws were subject to change. From their beginnings, laws increased, altered, or were interpreted, so that, save for the "meerly immutable part of nature," they were like a "ship, that by often mending had no piece of the first materials" remaining (Selden 1725d, 1891–2).

Selden's interest in history was not merely for the sake of erudition. He realised that many disputed questions could not be settled simply by arguments from reason alone, but needed historical determination. Thus, the *History of Tythes* was written to answer those who argued that tithes were due to the clergy by divine right. Selden showed that when it came to the temporal maintenance of the church, practice was often at odds with the canon law, which "was never received wholly into practice in any state" but was subjected to "the variety of the secular laws" and to "national customs." What state existed, he asked, "wherein tithes are paid *de facto*, otherwise than according to human law positive? that is, as subject to some customs, to statutes, to all civil disposition" (Selden 1725c, 1070–2; cf. Woolf 1990, 216–35). An historical examination could show the development of the form in which tithes were paid in different locations. Selden also felt that close historical examination could give answers to political questions, such as how extensive the king's pre-

rogative powers were. Rather than arguing in the abstract, Selden felt the lawyer should look to the history of positive institutions to see if the powers claimed by the king had ever existed (see Tuck 1982; Tuck 1993, 207–11). Such investigations were more reliable than Coke's case-based reasoning, for they rendered "the sudden opinion of any judge to the contrary [...] of no value" (Johnson et al. 1977–1983, vol. 2: 527; cf. Berkowitz 1988, 143; Christianson 1996, 139; White 1979, 233–4). In his work, Selden criticised those—including scholars who treated the Roman civil law as if it were the positive law of European states—who "can make no difference betwixt the use of laws in study or argument (which might equally happen to the laws of *Utopia*) and the governing authority of them" (Selden 1725c, 1332). Law had to be traced in its social context.

Alongside his historical works, Selden also engaged in theoretical writing about the nature of law. His ideas were developed in three works: *Mare Clausum*, first composed in 1619 to answer Grotius's arguments in *Mare Liberum* (Selden 1652); *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum* (Selden 1725a) composed in 1640; and *De Synedriis et Praefecturis Juridicis Veterum Ebraeorum* composed in the early 1650s. In these works, Selden elaborated a theory of natural law based on divine commands. Where Coke's concept of law was essentially adjudicative, Selden's was clearly positivist. "[H]ow should I know I ought not to steal, I ought not to commit Adultery," he asked,

unless some body had told me? [...] 'tis not because I think I ought not to do them, nor because you think I ought not, [for] if so, our minds might change; whence then comes the restraint? from a higher power, nothing else can bind. (Selden 1927, 69–70)

Law was not made by reason but by authority. "When the Schoolmen talk of *Recta Ratio* in Morals," he said, "either they understand Reason, as 'tis governed by a command from above, or else they say no more than a woman, when she says a thing is so, because it is so" (Selden 1927, 116). This meant that the notion of punishment was essential to the concept of a law: "The idea of a law carrying obligation irrespective of any punishment annexed to the violation of it," he wrote, "is no more comprehensible to the human mind than the idea of a father without a child" (Selden 1725a, 106, quoted in Tuck 1993, 215). Selden divided natural law into the obligatory part—what was commanded or forbidden by God—and the permissive part, which was left to human decision (Selden 1652, 12–3; cf. Tuck 1979, 84–98; Christianson 1996, 251–5). For Selden most of the positive laws of a society were composed of "permissive" matter, human legislation which built on the foundations of the obligatory laws in ways appropriate to their contexts. The obligatory matter was quite restricted in scope, but the most important principles were to be found in the seven *praecepta Noachidarum*, given to Noah's sons after the Flood (see Sommerville 1984; Tuck 1993, 214–7; Roslak 2000). These divine

commands forbade homicide and theft, and obliged people to maintain the religious and civil order. The most important of them was the duty to keep one's contracts, and the forms of government agreed on by the people (Selden 1725a, 150). For Selden, like Grotius, political society emerged after individuals began to appropriate property, occupying uninhabited portions of the earth with the explicit or implicit consent of others. The positive rules concerning property allocation derived from the content of the contracts people made. It was part of the permissive law. Nonetheless, that law depended on the force of the obligatory laws: "all these things," he wrote,

are derived from the alteration of that *Universal* or *Natural law of nations* which is *Permissive*: for thence came in private Dominion or Possession, to wit from the *Positive Law*. But in the mean while it is established by the *Universal Obligatorie Law*, which provides for the due observation of Compacts and Covenants. (Selden 1652, 24–5)

Selden's positivist view of the nature of law was echoed by his follower, Sir Matthew Hale. Hale was a judge and a law reformer (see Cromartie 1995). Although less accomplished both as an historian and as a philosopher, he proved highly important in transmitting a Seldenian approach to law and history. Hale's influence came both from his work as a judge and jurist in the 1650s and 1660s, when he composed a number of writings which aimed towards providing an overall institutional treatment of the common law. Although the writings remained unpublished in his life, a number of them proved very influential when they were published in the eighteenth century, notably his *Pleas of the Crown* of 1707 (Hale 1707b) and his *Analysis of the Common Law* and *History of the Common Law* of 1713. While his treatise on the prerogatives of the crown was not published until the twentieth century (Hale 1975), it circulated in manuscript form.

In his unpublished *Treatise of the Nature of Lawes in Generall and Touching the Law of Nature*, Hale set out a definition of law which owed much to Selden. For Hale, law was

a rule of moral actions, given to a being endued with understanding and will, by him that hath power or authority to give the same and exact obedience thereunto *per modum imperii*, commanding or forbidding such actions under some penalty expressed or implicitly contained in such law. (Hale Undated (c), f. 3)

For a law to exist, he argued, "there must be an author thereof as a legislator" who "must be distinct from the person to whom it is given or that is to be obliged by it" (Hale Undated (c), f. 7). Hale answered the objection to a positivist view that in society men were obliged by laws which derived from their own consent, by saying that "[t]he legislator is one, and I that am obliged am another person, and between us there may arise an obligation." Like Selden, Hale said that a law required the existence of a sanction. Law created two kinds of obligation:

1. An *antecedent* obligation, whereby the subject is bound to obey such laws as are justly made. 2. An obligation *secondary* or *subsequent*, whereby the subject in case of disobedience is obliged to the penalty or sanction of the law. (Hale Undated (c), f. 12, cf. f. 48)

Like Selden, Hale argued that natural law was revealed to man through the seven *Praecepta Noachidarum*, as well as through a faculty possessed by every rational being, the *intellectus agens*, which enabled men to see natural law, just as light enabled them to perceive objects. However, man could not live by these precepts and his conscience alone. Positive law was needed, and not only because men might be blinded to the dictates of conscience by their lusts, and required the prospect of human punishment. For Selden and Hale, natural law was not a complete set of immutable, timeless principles which operated independent of government. It could not be applied in the abstract, for law was a social institution, located in a context. As Hale noted,

though it may be true, that the consequences and deductions, that may be made by reason, may be ramifications of the law of nature; yet possibly it may be hard to conclude, that all those deductions and inferences are that law of nature, which was intended for the common rule or law of mankind; because, though they might be truths; yet every man is not capable of that perspicacity to follow the consequences so far. (Hale Undated (c), 17$^{r \cdot v}$)

Positive laws were needed "to settle that variety and inconstancy of particular applications and conclusions, which, without some established rule, would be found in most men, though of excellent parts and reason, and agreeing in common notions" (Hale 1791, 274–5).

Natural law was itself hard to uncover where it was "mingled with involved or difficult circumstances of the particular acts or actions," or where there were several laws of nature to be considered, "that either cross, or allay, or are interwoven with the moral actions to be done." Equally, while there were indifferent matters, when closely examined, any moral action might lose its indifference, since "there may be the circumstances considered a greater preponderance of reason to the one part than the other" (Hale Undated (c), 26^v, 22^v, 81^v). This meant that natural law and positive law were closely intertwined. Many details were left undetermined by the law of nature "because of their great variety and the great diversity that ariseth by the exigencies and conveniences of several people." Such matters were "left to the guidance, laws and customs of people" (ibid., f. 83^v). Indeed, like Selden, Hale argued that "judicial laws [...] were never in the design of Almighty God intended farther than that people to whom they were given." Just as it would be unsuitable to apply the natural law which existed for birds to beasts, so "that law, which would be a most wise, apt, and suitable constitution to one people, would be utterly improper and inconvenient for another" (Hale 1787, 259–60).

3.2. Hooker, Selden, and Hale on the Source of Political Authority

For Selden and Hale, positive law in society derived from a lawmaker contractually created by the people. Their views carried strong echoes of the position developed by Richard Hooker (1554–1600) in the 1590s, of a constitution created by past consent, which generated criteria of validity for the actions of various constitutional agents. Hooker's *Of the Laws of Ecclesiastical Polity* was a work which proved congenial not only to common lawyers, but also to radical Whigs such as John Locke and to conservative political thinkers such as Edmund Burke (see Eccleshall 1981). It was made up of eight books and a preface. However, only the first five books were published in Hooker's lifetime. The sixth and eighth books were first published in 1648, and the seventh in 1662. In the later books, Hooker developed a view of the English constitution which laid stress on the legislative authority of the crown-in-parliament, and minimised the independent role of the king. This led to royalist writers in the seventeenth century casting doubt on the authorship of these books. Later scholars have also puzzled over the authorship of the later works, since many felt that the voluntarist arguments developed here, which saw law as the will of the sovereign, were inconsistent with the rationalist Thomist position predominant in the early books (Munz 1952, 107–10; but cf. McGrade 1963). It is now agreed that the entire work was composed by Hooker in the 1590s (Hill 1971). Although Hooker was generally regarded after his death as a "judicious" writer, giving a neutral and balanced account of the constitution, it is now also recognised that he was engaged in a partisan controversy concerning the nature of the late Elizabethan English church (see esp. Cargill Thompson 1980; Lake 1988, chap. 4). In particular, his aim was to convince English Calvinists that they were morally compelled to follow established ecclesiastical authority even when they disagreed with its rulings.

Hooker's argument entailed showing the rational structure of the universe and that it was governed by law (Lake 1988, 146–7). He therefore began with a rationalist view of law derived from Aquinas, in which he set out a definition of natural law, taught by reason, which bound universally. The law of reason included whatever could easily be known to be the duty of all men, and whatever could be deduced from manifest principles "by *necessary* consequence" (Hooker 1977, I.8.9, I.8.11, I.10.1). However, man's will was "inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature" (ibid., I.10.1). Moreover, what natural law required could not "be discerned by every man's present conceit, without some deeper discourse and judgement" (ibid., I.10.5). Mankind therefore needed political societies, which "do not only teach what is good but they enjoin it" with "a certain constraining force" (ibid., I.10.7). But why should an individual accept the coercive judgment of a political authority rather than following his own conscience? Hooker's answer had two aspects.

The first echoed a position we have encountered in St. German's thought. Hooker acknowledged that, if there were "necessary and demonstrative" proofs that established laws were wrong, the individual was at liberty in conscience to reject them. However, when it came to mere probabilities, over which men were apt to disagree, it was unseemly that publicly accepted rules should be set aside because particular private individuals protested against them (ibid., *Preface* 6.6). Matters of probability—which comprised human laws—were to be settled by the collective voice of society, rather that the individual, for there would be no end of contention unless all agreed to some definitive sentence. Moreover, positive laws should be made by wise men, since men of common capacity were unable to discern what was best. Hooker's view on probability also led him to argue why men were morally obliged to obey settled laws and customs. Hooker told the Calvinists that "since equity and reason, the law of nature, God and man, do all favour that which is in being, till orderly judgement of decision be given against it; it is but justice to exact of you, and perverseness in you it should be to deny thereunto your willing obedience" (ibid., *Preface* V.5). Established laws should be presumed to be *morally* right until it could be demonstrated that they were not. This applied even when the reason of established rules was not evident, since "the judgment of antiquity concurring with that which is received may induce [men] to think it not unfit, who are not able to allege any known weighty inconvenience which it hath" (ibid., V.7.4).

The second part of Hooker's answer rested on the notion of consent. He argued that each individual was bound by the law, since he had already consented to it. For Hooker, political power derived either from the immediate appointment of God, or from "common consent" (ibid., I.10.4). Any prince who exercised political power without either express commission from God or "authority derived at the first from their consent upon whose persons they impose laws" was no better than a tyrant. "Laws they are not therefore," he wrote, "which public approbation hath not made so" (ibid., I.10.8). However, approbation was given to the laws not only by those "who personally declare their assent by voice sign or act, but also when others do it in their names by right originally at the least derived from them." Although political authority derived from the community, it could be conferred even on an absolute monarch. But once this authority had been conferred, its holder had the right to speak for the community:

to be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore as any mans deed past is good as long as himself continueth: so the act of a public society of men done five hundred years since standeth as theirs, who presently are of the same societies, because corporations are immortal: we were then alive in our predecessors, and they in their successors do live still. (Ibid., I.10.8)

Hooker's view was a significant modification of the position we have seen in Fortescue. His theory of the original contract could show not only that sub-

jects were bound by the constitution, but that the powers of the crown were defined by it. Hooker thus made use of *Bracton*'s maxim that the king should be under no man, but under God and the law (ibid., VIII.2.3; cf. McGrade 1985, 119–20). "The entire community giveth general order by law how all things publicly are to be done," he wrote, "and the *King* as the head thereof the highest authority over all causeth according to the same law every particular to be framed and ordered thereby" (Hooker 1977, VIII.8.9). The power of legislation came from the community, and not from the king, whose role in lawmaking was essentially limited to the power of veto.

Hooker did not have a static vision of a fundamental law or an unchanging ancient constitution. To understand the constitution involved not merely looking to the original compact (the details of which were in any event likely to have been lost), but also to whatever had subsequently been freely "condescended unto, whither by express consent, whereof positive laws are witnesses, or else by silent allowance famously notified through custom reaching beyond the memory of man" (ibid., VIII.2.11). The constitutional allocation of power in the state was the product of an original agreement, as modified over time, which determined where powers lay in the community, and how they were to be exercised. A body politic could thus not resume the powers conferred on rulers "without their consent" (ibid., VIII.2.10). It was better, therefore, to set out the limits on the power of the king before the power was transferred. In England, Hooker said, the constitution had given some powers to the king, where he was free to act; but in other areas, the law was "a barr unto him; not any law divine or natural [...] but the positive laws of the realm have abridged therein and restrained the *Kings* power" (ibid., VIII.2.17).

In *Mare Clausum* and in *De Jure Naturali*, Selden similarly rooted the origins of political society in consent. He argued that common property came to be divided among particular proprietors through the "consent of the whole body or universality of mankind (by the mediation of something like a compact, which might bind their posterity)" (Selden 1652, 21). Selden and Hale argued what had been agreed had to be maintained. In Hale's view, by the agreement which transferred governmental powers, each individual had given his faith both to the governors, and to God: "and till God himself shall cancel that obligation, which I owe thereby to Almighty God, I cannot deliver myself from the obligation that I have given by my faith to my governors" (Hale Undated (c), f. 7v). When discussing the question whether the people were greater than the king, since they had made him king, Selden observed, "The answer to all these Doubts is, Have you agreed so? if you have, then it must remain till you have alter'd it" (Selden 1927, 93). The form of government created by a society could vary across time and space. As Hale saw it, the people could transfer all powers to the prince, or they might reserve some (Hale 1975, 3). Even if the prince had originally been given absolute powers, the

constitution could be changed by the agreement of "all persons interested."
This could be manifested by a formal treaty between prince and people, or
"by long custom and usage," which raised a presumption that there had been
an agreement, and which itself implied consent (Hale 1975, n. 5). In England,
of course, there was no document containing the original contract. However,
in the absence of firm evidence, "constant usage is to be the Rule to judge by;
because it carries the Evidence of what the Pact shall be presumed to have
been" (Hale Undated (a), f. 222). Similarly, talking of the liberties found in
the grants of Edward the Confessor, or Magna Carta, he said there was

as great reason to conclude them to be parts of the Original & primitive Institution of the Eng-
lish Government by their long usage and frequent concessions and Confirmation of Princes in
so long and continued a Series of Time, as if Authentic Instruments of the first articles the Eng-
lish Government were extant. (Hale 1924, 511)

Where Coke had felt it to be politically important to argue for the imme-
moriality of the laws and constitution in order to show both that the common
law was superior to the king, and that William I had not obtained a full right
to legislate by the conquest (see Pocock 1987, chap. 2), Selden and Hale were
less anxious to show that nothing had changed in 1066. For Selden, while
much stayed the same after the Conquest, changes had also been introduced.
Notably, his historical work revealed the importance of new feudal tenures in-
troduced after 1066 and their impact on English society. However, Selden did
not see William as a conqueror changing all laws. In his early *Jani Anglorum*,
he noted that William agreed to the petition of "all the great men of the
Country, who had enacted the *English* Laws" to observe the previous laws;
but "together with the ratifying of old Laws, there was mingled the making of
some new ones." For Selden, William took possession of the royal govern-
ment "upon pretence of a double Right," having both a claim by blood and
by "adoption," "having in Battel worsted *Harald*" (Selden 1683, *Preface*, 47–
9). For Hale, no conquest would be secure until the conqueror had obtained
the "Consent or Faith of the conquered, submitting voluntarily to him" (Hale
1971, 50–1; Hale 1975, 4). In fact, William's conquest was of the usurper
Harold, rather than of the whole nation; but in any event his title to the crown
had been "ratified by continued Custom & Usage, which doth interpret the
first submission, or dedition & gives a Right by tacit consent of King & Peo-
ple" (Hale Undated (a), f. 225). For both men, what mattered in effect was
less the ultimate historical origins of the polity—which could not in any case
be accurately traced—than the constitutional criteria which had been clearly
established over the course of time.

Selden's position on the historical origins of civil society was inconsistent.
In the first edition of *Titles of Honour*, he argued that it arose when families
gathered in villages or cities as self-governing democracies, which subse-
quently introduced kingship by consent (Selden 1725e, 927). He modified his

position in the second edition of the work, when he was keen to appease the king, by arguing that monarchy preceded democracy (Sommerville 1984, 445). He now argued that kingship was the original form of rule, "as if the sole observation of nature had necessarily led the affections of men to this kind of state" (Selden 1725e, 112). Although Selden here traced the origins of kingship to the division of the earth after the Flood, he did not put forward a divine right view of kingship. Rather, he said that kingship "hath a twofold original, either from the power of the sword, or *conquest* [...] or by some *choice* proceeding from the opinion of the virtue and nobleness of him that is chosen." Selden gave examples of each kind (omitting mention of England), but noted that even the kingdom of the Israelites derived from consent "if we regard only the humane way of instituting it [...]. For there the people having referred themselves to *Samuel*, for the election of their King, he made a choice for them in the anointing both of *Saul* and *David*, from whom the title continued hereditary" (Selden 1725e, 110).

There has been some debate about whether Selden developed a theory of a mixed monarchy in the years before the civil war (cf. Christianson 1996 and Sommerville 2002). Some consistency can be identified. For Selden, laws were not made by the king alone. In ancient times, Druids "were wont to meet, to explain the Laws in being, and to make new ones as occasion required"; and "whilst the *Saxons* governed, the Laws were made in the General Assembly of the States or Parliament" (Selden 1683, 93). Turning to the present, he spoke of "a wonderful harmony" by which "the three estates, the *King*, the *Lords* and the *Commons*, or Deputies of the People, are joined together, to a most firm security of the public." This statement was significantly criticised by Selden's late seventeenth century editor, who felt that the author had erred in characterising the king as one of the three estates and not as paramount (Selden 1683, 94, 117). Selden turned again to the nature of royal power in 1647 in his introduction to *Fleta*. Here, he discussed the power of the king by considering how *Bracton* and his successors had treated the *lex regia*. Selden noted that *Bracton*'s abbreviated citation of the text masked the Roman idea of all power being transferred to the ruler, and instead suggested that the king's prerogative was bound by "the various stipulations of the Lex Regia" which in England comprised "our remarkable characteristic of administering justice according to law and legislating in assemblies of Estates." Ulpian's maxim was interpreted "only in so far as consistent or at least not inconsistent with our immemorial customs" (Selden 1925, 29, 39). Much of his introduction contained a discussion of the impact of Roman law in England. While he admitted that medieval jurists drew on Roman sources for reasons or analogies, he showed that Roman ideas on government had no impact in England. The civil law did not take root firstly because the English felt an aversion to its principles of government, and secondly because of "the remarkable esteem in which the English or common law was held, and our constant faithfulness

to it as something immemorially fitted to the genius of the nation" (Selden 1925, 165).

Hale also traced the roots of parliament to Saxon times (Hale 1707a, 63; Hale 1971, 5, 70). Writing legal treatises on parliament and prerogative after the civil war, he was more explicit in his constitutional theory than Selden. As he put it, "Parliament hath sovereign and sacred Authority in making, confirming, repealing and expounding Laws." It had, he added, borrowing a phrase from Coke, "transcendent and absolute" powers (Hale 1707a, 46, 49). Neither the king, nor the people alone, had sovereign powers. "The original or fundamental Law bounding monarchy," Hale said, was "that regularly he cannot make or alter a Law or impose any common charge without assent of Parliament." The king's subjection to law was confirmed by the presence of "other additional Laws which either Custom or the King's assent in Parliament have provided to be perpetual or temporary bounds of the King's power" (Hale Undated (a), f. 243ʳ⁻ᵛ). However, the king was not a mere agent of the people, for he had "his rights absolutely, perpetually & hereditarily & cannot be deprived of them either in whole, or part, without his consent," since he was given these powers by the original contract (ibid., f. 222ᵛ; cf. Hale 1975, 13). He was not subject to control by the people within the area of his just prerogatives. If the king had his rights, however, so too did the people have their liberties (confirmed in instruments such as Magna Carta), which could not be removed without their consent (Hale 1924, 511).

Although agreeing that all human law derived its power from the original consent of the people, neither Hale nor Selden said that laws required their current, actual consent. According to Selden,

Laws or civil sanctions depend on the express and natural consent of those who were present and active themselves in making laws or admitting customs in use; or on the tacit and civil consent of those who surrendered their decision and power before others, according to the diverse origins and constitutions of republics, or from the submission of themselves and their descendants, or by other means, so that they agreed to bind themselves and their descendants to whatever was decreed, without giving their express and natural consent to each individual matter. (Selden 1725a, 607; cf. Roslak 2000, 141)

Hale equally rejected the view that English law came from "the immediate consent of all the persons concerned in the law to be made." Instead, statutes were passed "[b]y the immediate consent of that person or those persons in whom by the constitution of the commonwealth that power is placed" (Hale 1975, 169). By the law of nature, he said, each man had an obligation "to obey that authority and those laws that are made by his express or tacit consent or by those whom he has virtually and implicitly at least trusted with that power" (Hale Undated (c), f. 83). Legislation was thus not the act of the people, but a "*Tripartite Indenture*, between the King, the Lords and the Commons" (Hale 1971, 3). For Selden, similarly, "Every Law is a Contract between the King and the People, and therefore to be kept" (Selden 1927, 69).

3.3. Constitutional Theories in the Civil War

The view of the constitution taken by Selden and later by Hale came under pressure in 1642, when it became apparent that the "contract" between king and people was being violated. Faced with a rebellion in Scotland which he needed funds to quell, Charles I finally called a "short" parliament in April 1640, but dissolved it after three weeks when its members were keener to air their grievances than vote money. By November, his increasingly urgent need for money forced him to call a new parliament. The "long" parliament sought immediately to remove the tools which the king had used to rule alone. In 1641, legislation was passed to ensure parliament would meet at least every three years and could not be dissolved without its own consent; and the courts of Star Chamber and High Commission were abolished. Relations between king and parliament deteriorated as fear grew that the king was negotiating with the Scots to raise an army. In January 1642, backed by 400 soldiers, he attempted unsuccessfully to arrest five leading parliamentarians; and having failed to do so, he left London, to prepare for war. In this context, a constitutional question was raised: by what authority could either side raise troops?

In March 1642, parliament issued a militia ordinance, to allow it to raise troops without the king's assent. The ordinance declared that there was an emergency, and that the ordinance was needed for the safety of the king, parliament and the kingdom. The king had already rejected an appeal in January by parliament to put troops under the control of men named by it. As Mendle has shown, while royalists saw the ordinance as an attempt by parliament to act against the constitution, encroaching on the royal prerogative, parliament did not explicitly assert a right of *legislation* in issuing the ordinance. Seeing itself as a council, it claimed to assume an executive power, akin to a royal proclamation. In normal circumstances, the king's agreement was needed, for such acts by the council essentially constituted the giving of advice to the king. However, in the context of danger, parliament took the view that if the king endangered the kingdom, by leaving the country or subjecting himself to evil counsellors, it could act alone, just as the council could act for the king in the event of a minority (see Mendle 1992; Mendle 1995, 79–81). Thus, Sir Simonds D'Ewes argued, when it was said that all men ought to obey the ordinance, it was not meant that an ordinance had the same efficacy as an act of parliament "or that we can bind the liberties and properties of the subject by such an ordinance against their wills." Rather, it meant that since the ordinance was merely made for the preservation of the kingdom "to which every man is by the fundamental laws of this realm bound," each man should "voluntarily, willingly, and cheerfully" obey it (Snow and Young 1987, 41). In June, the king (who commanded that men disobey the ordinance) responded by seeking to raise troops through commissions of array.

In this context, many began to resort to reason-of-state arguments. Nevertheless, there remained much common ground in early 1642 between those who have been described as "constitutional royalists" and "constitutional parliamentarians," with many on both sides remaining keen to invoke the language of constitutionalism (see Smith 1994). In an attempt to attempt to woo constitutionalist moderates, the king in June issued an *Answer to the XIX Propositions*, in which he acknowledged the co-ordinate power of legislation, declaring that "In this kingdom the laws are jointly made by a king, by a house of peers, and by a house of commons chosen by the people, all having free votes and particular privileges" (Wootton 1986, 172; see also Weston and Greenberg 1981, chap. 3; Mendle 1985). The drafters of the *Answer*, Lucius Cary (Viscount Falkland), and Sir John Culpeper, sought to use the theory to defend the king's constitutional position from attacks in the Commons, and to that end endorsed the risky argument that the king was only one of three estates, which had co-ordinate powers. The theory of mixed monarchy was given greater articulation in *A Treatise of Monarchie*, published in 1643 by the presbyterian clergyman, Philip Hunton (see Tuck 1979, chap. 7; Sanderson 1982). Though not a lawyer, Hunton position echoed that of the common lawyers, both before the civil war, and after the Restoration. It is also useful for showing the limits of the constitutionalist theory.

3.3.1. Philip Hunton and the Mixed Monarchy

Hunton argued that while the office of kingship had divine authority, the incumbents were established as kings by the people's consent (Hunton 1643, 20). Governments, he argued, grew from contracts. Even where there had been a conquest, the people submitted to a contract of subjection, so that the rule was by consent. If a society agreed to create an absolute monarchy, it was bound thereafter to obey the ruler, "because an *Oath* to a lawful thing is *Obligatory* […]. And let none complain of this as a hard condition when they or their ancestors have subjected themselves to such a power by oath or political contract" (Hunton 1643, 6, 11). Nevertheless, if the ruler violated divine law, or plotted the destruction of the political society, he could be resisted, for this contradicted the very purpose of political society. If the people, by their original contract, created a limited monarchy, the monarch gained no greater powers than he was given by that agreement. An initially absolute monarchy could become limited by "after-condescents," which were not mere acts of grace by a king promising to rule according to law, but were "a change of title, and a resolution to be subjected to in no other way, than according to such a frame of government" (Hunton 1643, 13). The nature of the government thus depended on the terms of the agreement. To see what power the community retained, one had to look to the "Originall Contract and Fundamentall Constitution of that State" (Hunton 1643, 16).

England, Hunton explained, was a mixed monarchy: The nobles and commons had set a sovereign over themselves by a public compact; agreed to be governed by certain fundamental laws; and covenanted with the king that their consent would be needed for the passing of any new laws. The king could not legislate or tax alone, and in matters "of the greatest difficulty and weight" he was bound to consult the Lords and Commons (Hunton 1643, 38–9, 44, 47). Nonetheless, he was properly a *monarch*, and was not subject to control by the other two estates. For that reason, Hunton rejected arguments that the king was *universis minor* and that the people which had made the king were greater than the king thus made. The English constitution was a mixed monarchy at its core, for the concurrence of all three estates was needed for legislation, which was "the height of power, to which the other parts are subsequent and subservient." The architects of this frame of government were praised for creating a system where the two houses could "moderate and redress the excesses and illegalities of the Royal power" (Hunton 1643, 40–1). If this seemed a eulogy of a balanced constitution, the context of the civil war forced him to consider the question of resistance. Hunton argued that the king himself could not be resisted, for kingship made his person sacred. However, his unlawful orders to others could be:

The two estates in parliament may lawfully by force of arms resist any persons or number of persons advising or assisting the king in the performance of a command illegal and destructive to themselves or the public. [...] For the measure of [the sovereign's power] in our government is acknowledged to be the law: and therefore he cannot confer authority to any beyond law: so that those agents deriving no authority from him are mere instruments of his will. (Hunton 1643, 51–2)

Could the two houses go further and take unilateral action, as they had in passing the militia ordinance? Hunton noted that in times of emergency, the two houses had a duty to act for the public safety and to preserve the fundamentals of the kingdom, when the kingdom was in danger, and the king refused to use his power of the sword:

I say, in this case, the two estates may by extraordinary and temporary ordinance assume those arms, wherewith the king is entrusted, and perform the king's trust: and though such ordinance of theirs is not formally legal, yet it is eminently legal, justified by the very intent of the architects of the government, when for [the preservation of the kingdom] they committed the arms to the king [...]. And thus doing the king's work, it ought to be interpreted as done by his will. (Hunton 1643, 62–3)

This was no disparagement of the king's prerogative, since his very being as king depended on the existence of a kingdom which was being defended. Despite his attempts to argue for a kind of lawfulnessness parliament's actions, Hunton's theory of mixed monarchy showed that in such cases, *law* in effect provided no solution. In a mixed monarchy, there could by definition be no constitutional judge between the parts, since such a judge would be a supe-

rior. A clash between the monarch and the community was "a transcendent case beyond the provision of that government, and must have an extraordinary judge, and way of decision." Such a decision was not "authoritative and civil, but moral," where "the superior law of reason and conscience must be Judge" (Hunton 1643, 17–8). In such a situation, parliament could make a judgment. But in deciding whether the kingdom was in danger, parliament was not

a legal court ordained to judge of this case authoritatively, so as to bind all people to receive and rest their judgement for conscience of its authority, and because they have voted it: 'Tis the evidence, not the power of their votes, must bind our reason and practice in this case [...] our consciences must have the evidence of truth to guide them, and not the sole authority of votes. (Hunton 1643, 73)

An appeal had to made to the community, which was "unbound, and in state as if they had no government" (Hunton 1643, 18).

Hunton's view was reflected in Selden's succinct comment:

To know what obedience is due to the prince, you must look into the Contract betwixt him and his people, as if you would know what Rent is due to the Landlord from the Tenant, you must look into the Lease. When the Contract is broken, and there is no third Person to judge, then the [decision] is by arms. (Selden 1927, 137)

In the crisis of 1642, after careful legal inquiry, Selden took the decision that the king was more clearly in breach of his contract than parliament, in issuing commissions of array. As a result, he stayed with parliament in London, rather than joining the king (Tuck 1982). Other "constitutionalists," including lawyers such as Edward Hyde, who saw the threat posed by the militia ordinance as greater than that which came from the king's actions, left Westminster in 1642, and threw in their lot with the monarch (Smith 1994, 101–2). In this context of crisis, when "the ancient pillars of law, and policy were taken away, and the state set upon a new basis" (Parker 1642, 5), theorists began to look to new foundations for political obligation which were based on notions distinct from those of the common lawyers. The most important exponents of these theories were Henry Parker (1604–1652) and Thomas Hobbes (1588–1679).

3.3.2. Henry Parker and Parliamentary Absolutism

Unlike the common lawyers, Parker sought to locate ultimate power in parliament without the king. Although a lawyer, called to the bar in 1637, he developed arguments in a series of pamphlets written in the early 1640s which were not cast in traditionally *legal* terms. Parker said in certain situations, one had to look beyond law, to reason of state, which was "more sublime and imperial than Law," for "when war has silenced Law, as it so often does; policy is to be observed as the only true law, a kind of dictatorian power is to be allowed to

her" (Parker 1643, 18–9; cf. Mendle 1995, 118). Parker first addressed the issue of what happened when law ran out in 1640, in *The Case of Shipmony*, where he considered the king's right to levy extraordinary duties (see Mendle 1989). He admitted that any ruler could exact extraordinary duties in times of need, for

the supreme of all human laws is *salus populi*. To this law all laws almost stoop, God dispenses with many of his laws, rather than *salus populi* shall be endangered, and that iron law which we call necessity itself, is but subservient to this law: for rather than a nation shall perish, anything shall be held necessary, and legal by necessity. (Parker 1640, 7)

However, Parker insisted that this could only be done for the public good. In case of public need, every man would consent to have his property taken, since this would be the only means by which property could be secured, and those who suffered would be compensated. However, property could not be confiscated for the private needs of the king. In these situations, the decision could not be left to the king alone with his private counsellors, for he might be seduced from the public interest. Instead, the king had to be counselled by parliament, for while "[p]rivate men may thrive by alterations [...] the common body can affect nothing but the common good, because nothing else can be commodious for them" (ibid., 35–6).

Parker returned to the question of who was to decide in emergencies in 1642, after the issuing of the militia ordinance. With parliament under attack from some quarters, and the "king deserting his grand council," Parker reiterated his view in May that parliament was the best counsel a king could have, for it had greater knowledge "than any other privadoes" and had no private interest to deprave them. Indeed, the judgment of parliament was "the judgment of the whole Kingdom" (Parker 1642, 9). Moreover, in this pamphlet, Parker noted that "that right which [the king] hath as a Prince, is by way of trust, and all trust is commonly limited more for the use of the party trusting, than the party trusted" (ibid., 8). These themes were developed more fully in a second pamphlet written shortly afterwards, in response to the King's condemnation of parliament's position. Parker now noted that all power was "originally inherent in the people" and it was passed into the hands of rulers by "a law of common consent and agreement," by which the people could "ordain what conditions, and prefix what bounds it pleases" to rulership. This meant that "the king, though he be *singulis major*, yet he is *universis minor*, for if the people be the true efficient cause of power, it is a rule of nature *quicquid efficit tale, est magis tale*" (Parker 1934, 1–2). Moreover, he argued that the purpose of government was to pursue the common good, and that there were some natural limitations to the people's obligation:

the safety of the people is to be valued above any right of [the king's], as much as the end is to be preferred before the means; it is not just nor possible for any nation so to inslave itself, and to resign its own interest to the will of one Lord, as that that Lord may destroy it without in-

jury, and yet have no right to preserve it self: For since all natural power is in those which obey, they which contract to obey to their own ruin, or having so contracted, they which esteem such a contract before their own preservation are felonious to themselves, and rebellious to nature. (Ibid., 8)

Since kingship was a trust, the question was raised as to who was to ensure the trust was kept. Princes were not "beyond all limits and laws." They were not to be judged by private parties, however, but by "the whole community in its underived Majesty" (ibid., 15). This was to be found in parliament. Parker still spoke of parliament as offering counsel to the king, rather than commanding him to do certain acts. But he noted that "public approbation, consent, or treaty is necessary in all public expedients, and this is not mere usage in England, but a law" (ibid., 5). The king was bound in these matters to follow the counsel of his parliament, just as he was bound to follow that of the judges in legal matters. "In perspicuous, uncontroverted things, the law is its own interpreter," he noted, but in matters of law or of state which were ambiguous, the supreme determination had to be left either to the discretion of Parliament or that of the king (ibid., 36). For Parker, it was clear that parliament had to be the final arbiter, rather than the king, since it could have no private interest, whereas the king was liable to be seduced by evil counsellors. In the context of the developing crisis of the spring of 1642, Parker wrote that parliament "may not desert the king, but being deserted by the king, when the kingdom is in distress, they may judge of that distress, and relieve it, and are to be accounted by the virtue of representation, as the whole body of the state" (ibid., 45). This was an extraordinary measure, Parker noted, to save the kingdom from ruin. Nonetheless, Parker's vision of the nature of the polity still saw parliament as standing at the apex of law. Thus, he said that Henry VII had been praised since

he governed his subjects by his laws, his laws by his lawyers, and (it might have been added) his subjects, laws and lawyers by advice of Parliament, by the regulation of that court which gave life and birth to all laws. In this policy is comprised the whole art of sovereignty; for where the people are subject to the law of the land and not to the will of the prince, and where the law is left to the interpretation of sworn upright judges, and not violated by power; and where parliaments superintend all, and in all extraordinary cases, especially betwixt the king and kingdom, do all the faithful offices of umpirage, all things remain in such a harmony, as I shall recommend to all good princes. (Ibid., 42)

However, by January 1643, Parker was much more cynical about law, ridiculing the king's supporters' claim that the subject's best security lay in the law. As "our judges preyed upon us heretofore in matters of state," he said, "so our martialists now have a power of spoiling above the general law, or any particular protection" (Parker 1643, 5). Now, he defended parliament's power to go beyond law, saying it was "equally destructive to renounce reason of state, and adhere to law in times of great extremity, as to renounce law, & adhere to policy in times of tranquillity" (ibid., 19). Parliament, he now said, "is

nothing else but the whole Nation of England." Kings and laws could not have been created by nations acting collectively. Rather, "both kings and laws were first formed and created by such bodies of men, as our parliaments now are; that is, such councils as had in them the force of whole nations by consent and deputation, and the majesty of the whole nations by right and representation" (ibid., 16). It followed from there that "princes are the creatures, and natural productions of parliaments" (ibid., 18).

3.3.3. *Thomas Hobbes and the Sovereign State*

If Parker's was a theory suited for the parliamentarians, Hobbes developed an absolutist theory of sovereign power, which required men to obey even an arbitrary ruler. Hobbes had already sketched the outlines of his theory in *The Elements of Law, Natural and Politic*, composed in 1640 and pirated in two tracts in 1649–1650. He was so worried by parliament's likely reaction when it was called that he left England for Paris, where in 1642 he published *De Cive*, which was destined to become the most influential statement of his views on the continent. He remained in royalist circles in France, and it was there that he composed *Leviathan*, published in 1651. In writing this work, he set out to fight "for all kings and all those who under whatever name bear the rights of kings" (quoted in Skinner 1996, 331). But instead of seeking a divine right argument for kingship, Hobbes rooted his theory in human consent, as manifested in an original contract, entered into for prudential reasons. For Hobbes, the people had no unity before they created a sovereign to rule over them. Rather, they were in a "state of nature," in which there was no law to impose obligations on people. In this state, each person had full liberty of action, and, given that rights consisted in liberties, "a right to every thing" (Hobbes 1991, 91). Every man was his own judge, for there was no common measure to determine matters which might cause disagreement. Disputes could not be settled by right reason, since there was no common standard of reason. As Hobbes put it in *De Cive*, "it is impossible that culpable and inculpable actions can be defined by agreement between individuals who are not pleased and displeased by the same things" (Hobbes 1998, 162). The state of nature was therefore inevitably a state of war. In such a condition, men would always defend themselves according their own particular judgments, and so would be weakened in the face of common enemies and against each other (Hobbes 1969, 188; Hobbes 1991, chap. 13; Tuck 1993, 309).

At the same time, nature impelled men to seek what was good for them, and avoid what was bad. The fundamental law of nature was to seek peace, as a means of self-preservation (Hobbes 1991, chap. 14). From this law, a second was derived, which was that each man should be willing "when others are so too [...] to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself" (ibid.,

92). This was reinforced by Hobbes's third law of nature, which was that men should keep their contracts. Covenants, however, were not valid where there was a fear that one side would not perform. In the state of nature, therefore, where there was no guarantee that contracts would be performed, it was not unjust to fail to perform one's agreement. Indeed anyone who performed first betrayed himself to his enemy, contrary to his inalienable right of defending his life and means of living (ibid., 96). For contracts of mutual trust to be valid, there had to be a superior to enforce them. This superior was the sovereign created by consent. How was this possible, if there could be no valid contract in the state of nature? Hobbes pointed out that as well as contracts in which one or both parties were left to perform in *future*, there could be mutual transfers or renunciation of rights. In creating the sovereign, each person renounced his right of governing himself to another body, on condition that all others did so as well:

A commonwealth is said to be instituted, when a multitude of men do agree and covenant, every one with every one, that to whatsoever man or assembly of men, shall be given by the major part, the right to present the person of them all, (that is to say, to be their representative), every one, as well he that voted for it, as he that voted against it, shall authorise all the actions and judgments of that man, or assembly of men, in the same manner, as if they were his own. (Ibid., 120–1)

Once this state was set up, each man had an obligation to obey it. Firstly, since it was an "injustice, and injury, voluntarily to undo" what was "voluntarily done" (ibid., 93), it would be wrongful for any subject to renounce his obligation to obey. The establishment of a civil power, by removing the fear of non-performance, gave validity to the contract of the people; and justice consisted in keeping valid contracts (ibid., 101). Secondly, only a fool would deny there was justice in keeping his promises, since the man who thought he could with impunity break his word would be liable to be cast out of society and left to perish, or else would rely only on the unpredictable errors of other men in not seeing his deception.

Hobbes made it clear that the contract creating the sovereign was one between the people themselves and not between them and the ruler. In monarchies, this meant that subjects could not dissolve the state and "return to the confusion of a disunited multitude" without the agreement of the monarch himself, since he was one of the original contractors—*qua* individual, not *qua* sovereign: unless he agreed, the others would break their contract with him (ibid., 122). It also meant that there was no contract which the sovereign was party to. Indeed, insofar as Hobbes argued that a wrong could only be done to someone with whom an agreement had been made or to whom something had been given as gift, a sovereign could by definition commit no injustice to his people (Hobbes 1998, 43–5; Hobbes 1991, 100–1; Hobbes 1969, 94; see Skinner 1996, 309–13). For Hobbes, the people were bound to obey the sovereign until such time as he could offer no protection for them.

In *Leviathan*, Hobbes developed a notion of representation which was particularly important providing a concept of "sovereignty as the property of an impersonal agency," which was an important step in developing a modern concept of the state (Skinner 2002b, 368–9; see also Skinner 2002c). Hobbes argued that in their contract, the people created an "Artificiall Man," or state in which "the *Soveraignty* is in an Artificiall *Soul*" (Hobbes 1991, 9). This artificial person was for Hobbes an actor who represented the people, who in turn were the authors of his acts (see ibid., 112–4). When each individual agreed to the appointment of one man "to beare their person," he acknowledged himself to be the author of whatever acts were done by the bearer of sovereign power (ibid., 120). Since each man was the author of the sovereign's acts, he who complained of injuries committed by the sovereign "ought not to accuse any man but himself" (ibid., 124).

In this process, all agreed to "submit their wills, every one to [the sovereign's] will, and their judgments, to his judgment" (ibid., 120). It was the role of the sovereign to make the definitive judgment, to act as the arbitrator whose reason was to settle all controversies (ibid., 32–3, 469; Hobbes 1998, 51–2; Hobbes 1969, 90–1). For Hobbes, the very standard of justice, of right and wrong, was thus set by the sovereign (Hobbes 1991, 223, 183). "Where there is no common power, there is no law," Hobbes noted, "where no law, no injustice" (ibid., 90). Law was "the public conscience" by which men had already agreed to be guided (ibid., 223). It was not that the sovereign had any greater access to truth; but his judgment was final and settled what would otherwise be divisive arguments. This meant that the sovereign could himself be subject to no law "for to be subject to laws, is to be subject to the commonwealth, that is to the sovereign representative, that is to himself; which is not subjection, but freedom from the laws" (ibid., 224). The sovereign united legislative, executive and judicial powers, for sovereignty was indivisible. Hobbes dismissed the notion of a mixed monarchy, in which there was a separation of powers. If the three component parts agreed, he said, they were as absolute a sovereign as a single power. On the other hand, it was an error to seek security in the disagreement of the branches, for if that occurred, the result was nothing other than war. "The division therefore of the sovereignty, either worketh no effect, to the taking away of simple subjection, or introduceth war; wherein the private sword hath place again" (Hobbes 1969, 115; Hobbes 1991, 124–7). The sovereign made the law of property, prescribing the rules by which each might know what was his. This made Hobbes defend such actions as the levying of ship money:

no private Man can claim a Propriety in any Lands, or other Goods from any Title, from any Man, but the King, or them that have Soveraign Power; because it is in virtue of the Soveraignty, that every man may not enter into, and Possess what he pleaseth; and consequently to deny the Soveraign any thing necessary to the sustaining of his Soveraign power, is to destroy the Propriety he pretends to. (Hobbes 1971, 73, cf. 64)

While Hobbes remained in royalist circles in the 1640s, by the time *Leviathan* was completed in 1651, at the height of the controversy over "engagement" with the new republic, he had come to endorse the arguments of *de facto* theorists that the consequences of not having a government were far worse than the inconvenience of submission. Submission to the sovereign was only required so long as the ruler provided the subject with protection (Hobbes 1991, 153). In his "Review and Conclusion," Hobbes made it clear that any man living under the protection of the powers that existed, was submitting to them (ibid. 484–5; see Skinner 2002a).

3.3.4. *Hale and the Revival of Common Law Constitutionalism*

In the 1640s, common law constitutionalism was unable to provide a bridge between the parties to the conflict in the civil war, and by 1649, the king had lost his head and the country its crown.

Nonetheless, absolutist or parliamentarian theories of the constitution did not ultimately displace the common lawyers' view of the constitution. With the Restoration of the monarchy in 1660, the Convention parliament resolved that by the ancient and fundamental law, the government should be by king, lords and commons. The king's constitutional position was restored, and indeed his ministers restated the view that he was the legislator, and not merely of co-ordinate power with the two houses of parliament (Weston and Greenberg 1981, 156–61). This was a view echoed by Hale, who set out a common lawyer's view in manuscripts written after 1660. As Hale put it,

> this Government is mixed, in some points, [...] being absolutely monarchical, in others mixt; as not to make laws, or alter them, impose public taxes; and the king is bound to observe the directions of the laws, tho not under the coercive power of them; for such acts are void & the immediate instruments of them are liable to punishment & repair the damages. (Hale Undated (a), 222$^{\text{r-v}}$)

The king was bound by law in a number of ways. He could not legislate alone; so that "those actions of his which have not their formalities that the Law requires are made void," whereas "those that have them are good though the matter be faulty, at least till duly repealed" (Hale Undated (a), 236$^{\text{v}}$). Hale noted that "acts by him done or omitted contrary to the tenor of these Laws or Customs, which he is bound to observe in conscience, yet make him not liable to any personal loss or damage" (Hale Undated (a), 279). However, if the king exceeded his power, Hale argued, he would be subject to the *potestas irritans* of the judges. This was their power simply to ignore his actions where they were *ultra vires*. If the king's act were void, moreover, then the ministers who put the law into execution were liable to the coercive law, to make satisfaction. At the same time, Hale accepted the traditional view that the king could dispense with statutes where he alone was concerned. Equally, where a statute prohibited

something which concerned the profit of the public, the king could dispense if he was "immediately intrusted in the managing thereof" (Hale 1975, 177). However, the king could not dispense with laws regulating *mala in se*, nor where the subject's interest was immediately concerned (Hale 1924, 510).

Hale did not espouse a theory of resistance. Ultimately, he felt, the subject was "under the obligation of non-resistance and passive subjection" for otherwise he might violate his promise of obedience, which would go against the law of God (Hale Undated (c), 44). In general, he suggested, "the best means to remedy such excesses is to convince the Judgment of the Prince, if it may be, or by denying Supplies, for an application of an active force or over rigid remedies may endanger all" (Hale 1975, 15; Hale Undated (a), f. 245). For Hale regarded statutes as "a kind of reciprocall contract & stipulation between the King [and] his Subjects," in which the subjects granted money, "and the king at their request grants them laws and liberties" (Hale 1924, 511).

3.4. Thomas Hobbes's Challenge to the Common Law

If Hobbes's notion of the sovereign posed a challenge to the common lawyer's view of public law, he also presented a significant challenge to their conceptions of private law, and the judicial role. Although the elements of his views are to be found in *Leviathan*, they were set out more fully in his *Dialogue between a Philosopher & a Student of the Common Laws of England*, written in 1666 and published in 1681. Here he reiterated his positivist vision of law:

A Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, and what they must forbear to do. (Hobbes 1971, 71)

Hobbes ridiculed Coke's view of law as artificial reason. If law were reason, he said, he might himself perform the office of a judge within a month and learn all the statutes in two (Hobbes 1971, 56, 84). But in fact, much of what Coke claimed to be law was grounded only in his own private opinion. It had no basis in statute and could be shown to be against reason. If Coke's "definitions must be the rule of law," Hobbes asked, "what is there that he may not make felony or not felony, at his pleasure?" (Hobbes 1971, 119; cf. 151–7). In fact, Hobbes argued, law was made not by wisdom but by authority, "the reason of this our Artificial Man the Common-wealth and his command" (Hobbes 1971, 55; Hobbes 1991, 187). It was the sovereign who determined what was to be punished. Even if wrongs such as theft, murder, or adultery were forbidden by the laws of nature, what counted as theft, murder, or adultery in society was "determined by the *civil*, not the *natural*, *law*" (Hobbes 1998, 86).

Hobbes spoke of "positive law" in terms of statute (Hobbes 1971, 58, 69), and noted that positive law could not be retrospective since there could be no obligation until it was promulgated (Hobbes 1991, 203–4). However, despite

these comments, he also acknowledged that not all law was statutory, and promulgated in advance by the sovereign. Laws could be made tacitly, and by adoption, as when the sovereign approved the sentence of a judge, even by silent acquiescence. Similarly, through the tacit acceptance of the sovereign, the opinions of jurists or long use could acquire the force of a law (Hobbes 1969, 190; Hobbes 1991, 84; Hobbes 1998, 162). In practice, if the sovereign was the *formal* source of all law, Hobbes noted that much of its content came from natural laws, which "have been laws from all eternity," (Hobbes 1991, 197) or from reason, which "changes neither its end, which is *peace and self-defence*, nor its means, namely those virtues of character [...] which can never be repealed by either custom or civil laws" (Hobbes 1998, 54–5). In contrast to positive law, "*Unwritten law* is law which needs no promulgation but the voice of nature, or natural reason, such as are *natural laws*":

For as it is impossible to write down ahead of time universal rules for the judgement of all future cases which are quite possibly infinite, it is understood that in every case overlooked by the *written laws*, one must follow the *law of natural equity*, which bids us to give equal to equals. And this is by force of the *civil law*, which also punishes those who by their action knowingly and willingly transgress *natural laws*. (Hobbes 1998, 161)

Natural equity, in the state of nature, was a virtue which disposed men to peace and obedience, though given the insecurity of that state, it would not often be acted on. In society, it became part of the civil law by adoption by the sovereign, for it was he who enforced it. As Hobbes put it, law was made not by the man who penned it, but by the sovereign who enforced it (Hobbes 1991, 110, 185; Hobbes 1971, 59).

For Hobbes, natural law consisted of rules found out by reason showing how best to preserve oneself and maintain peace (Hobbes 1991, 109). One of the laws of nature was not to judge in one's own cause, but to submit to arbitrators, who had to deal equally between the parties: "The observance of this law, from the equal distribution to each man, of that which in reason belongeth to him, is called EQUITY" (Hobbes 1991, 108). As men in entering society were submitting to the arbitration of the sovereign, so the sovereign (who himself had a duty to follow natural law: Hobbes 1991, 231; Hobbes 1998, 83–4) had to decide between them according to equity. The same applied to the judges, in cases coming before them. Discussing unwritten law, Hobbes wrote,

in the act of judicature, the judge doth no more but consider, whether the demand of the party, be consonant to natural reason, and equity; and the sentence he giveth, is therefore the interpretation of the law of nature; which interpretation is authentic; not because it is his private sentence; but because he giveth it by authority of the sovereign, whereby it becomes the sovereign's sentence; which is law for that time, to the parties pleading. (Hobbes 1991, 191–2)

Although Hobbes claimed that this would not constitute an *ex post facto* law, since "if the fact be against the law of nature, the law was before the fact"

(Hobbes 1991, 203), this argument was hard to square with his view that it was precisely "for want of a right reason constituted by nature" that an arbitrator was needed, by whose judgment contending parties would stand (Hobbes 1991, 33). It seems to suggest that it was only in the context of the hearing that the offence would be precisely defined, by the judge's idea of what was equitable, in the process of adjudication.

Natural equity thus stood at the heart of Hobbes's idea of the application of law, for the sovereign's will was always presumed to be "consonant to equity and reason" (Hobbes 1991, 188). Even in interpreting statutes, judges should not follow the literal words, but should seek the equitable intention of the sovereign. Thus, "if the words of the law do not fully authorise a reasonable sentence," the judges ought "to supply it with the law of nature" (Hobbes, 1991, 194). "Justice fulfils the law," Hobbes said, "and equity interprets the law; and amends the judgments given upon the same law" (Hobbes 1971, 98–9). Indeed, the presumption that the sovereign acted according to natural equity was a very strong one, and irrebuttable in certain cases:

though a wrong sentence given by authority of the sovereign, if he know and allow it, in such cases as are mutable, be a constitution of a new law, in cases, in which every little circumstance is the same; yet in laws immutable, such as are the laws of nature, they are no laws to the same, or other judges, in the like cases for ever after. (Hobbes 1991, 192)

Hobbes was particularly sceptical about the value of precedent. To rely on the authority of precedent cases would make justice depend on the decisions of a few learned or ignorant men, "and have nothing at all to do with the study of reason" (Hobbes 1971, 115). It was not custom, but equity, which made a decision law (Hobbes 1971, 96–7). The most recent precedent was always to be preferred, being fresher in the mind and most recently approved by the sovereign (Hobbes 1971, 142).

In *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Hobbes argued that English law itself derived from two sources: reason and statute. Treason, murder, robbery and theft were "Crimes in their own nature without the help of statute," their criminality being constituted by the malicious nature of the culprit's intention (Hobbes 1971, 111–2, 102, cf. 121). Hobbes's argument was not always clear and consistent, for he also suggested that statutes were needed to give precise definition to *mala in se* such as treason, as occurred in 1352 when Edward III passed the statute of treasons (Hobbes 1971, 102, cf. 120). This fitted with his idea that inchoate natural law notions were defined in society by the sovereign's commands. Moreover, he also stated in the *Dialogue* that murder, robbery and theft were "crimes defined by the statute-law." However, he could state at the same time that "robbery is not distinguished from theft by any statute," but only by reason (Hobbes 1971, 122, 118): and indeed medieval criminal law generally had little useful statutory definition. However, whether treason or theft were statu-

tory crimes or *mala in se* was not the essential point for Hobbes. In this tract, his aim was to show that heresy was not a crime, *either* by reason, *or* by statute—a point of some interest to Hobbes himself, given that he faced accusations of heresy for his arguments in *Leviathan* (Tuck 1993, 35–40; Hobbes 1971, 122–6).

Hobbes argued that judges had authority because of their position as the voice of the sovereign in court. In making their judgments, they looked to the natural equity which was the presumed will of the sovereign. They did not have authority as experts who had privileged access to the artificial reason of an ancient law which did not derive its force from the sovereign, as Hobbes read Coke to argue. However, Hobbes's vision was hard to square with what courts actually did. In practice, most disputes in court were settled neither by the mere application of statutes nor by resort to natural equity, but centred on questions of property or crime whose rules derived from customary origins, and which had been elaborated over a succession of cases in court. What was missing in Hobbes's treatment was an account of such rules and their derivation. His discussion of custom was especially uncomfortable.

For Hobbes, custom gained its authority by sovereign adoption. Only reasonable customs were law, for none could be presumed to have been adopted which were against reason or equity (Hobbes 1991, 184). Hobbes cited the common lawyers' position for this, but overlooked their distinction between particular customs, which had to be proved reasonable, and the common law, whose reasonableness was presumed. Hobbes himself also divided local customs and general unwritten law. The former he saw in positivist terms: where a province in a commonwealth had its own customs, they were to be seen as laws anciently written or made known by previous sovereigns, which continued to be law by their adoption by the current sovereign. By contrast, if a reasonable unwritten law was generally observed in all the provinces, "that law can be no other but a law of nature, equally obliging all man-kind" (Hobbes 1991, 186). This definition presented problems for Hobbes's understanding of English law. If provincial law were analogous to local customs, and all other unwritten law were analogous to common law, this would make the common law nothing but pure reason:

I deny that any custom of its own nature, can amount to the authority of a law: For if the custom be unreasonable, you must with all other lawyers confess that it is no law, but ought to be abolished; and if the custom be reasonable, it is not the custom, but the equity that makes it law. For what need is there to make reason law by any custom how long soever when the law of reason is eternal? (Hobbes 1971, 96–7)

Equally, in *Elements of Law*, he argued that customs against reason, however often repeated, could never abridge the law of nature; which could only be modified by consent and covenant, as in the creation of a sovereign, by which a man abridged himself of liberty (Hobbes 1969, 93).

This view made it hard for Hobbes to explain the rules of property. In the *Dialogue*, when the lawyer and philosopher turned to this subject, the following exchange took place:

Ph[ilosopher]. [...] let us come now to the Laws of *Meum & Tuum*.
La[wyer]. We must then examine the Statutes.
Ph[ilosopher]. We must so, what they command and forbid, but not dispute of their Justice: For the Law of Reason commands that every one observe the Law which he hath assented to, and obey the Person to whom he hath promised obedience and fidelity. (Hobbes 1971, 158)

This was to see all property law as of positive imposition. However, this passage was followed by another, in which the philosopher argued that to understand Magna Carta, it was necessary to look into "the customs of our ancestors the *Saxons* [and] also the law of nature." Hobbes did not discuss these customs, but he did argue that the fundamentals of English property law had natural origins. Thus, the laws of the Saxons, the philosopher said, were "no other than natural equity." The law of inheritance, for instance, followed "a natural descent [...] and was held for the law of nature" (Hobbes 1971, 162–3; cf. Hobbes 1991, 137).

Hobbes's discussion of punishment also showed some uncertainty about the nature of custom. The quantification of punishment, he said, could not be left to the discretion of each judge, since, "there being as many several reasons, as there are several men, the punishment of all crimes will be uncertain, and none of them ever grow up to make a custom" (Hobbes 1971, 140). Hobbes argued that punishments should be defined by statute, and where not, the judges should consult the king. However, penalties imposed by the judges on the basis of custom might be followed "from an assured presumption, that the original of the custom was the judgment of some former king" (Hobbes 1971, 142). Similarly, in *Leviathan*, he argued that where a certain punishment "hath been usually inflicted in the like cases," a greater penalty should not be inflicted, not because the custom had authority in itself, but because of the expectation generated by the earlier punishment (Hobbes 1991, 203). His comment that judges should take into account such expectations might suggest that precedents might have to be taken into account. Yet Hobbes remained suspicious of precedent, and avoided any detailed discussion of how the unwritten law might generate rules.

Unlike Bentham, Hobbes did not develop a theory of legislation to accompany his positivist view of the sources of law, whereby all law had to come from a codified positive law. Instead, much of law was left to the equity of the judge speaking for the sovereign. He was therefore unable to explain sufficiently how unwritten, indifferent rules—such as the rules of property—could be known. They could not be found merely in the last judicial pronouncement: since that very pronouncement had been made in the context of earlier decisions. If natural law was the same the world over, it was evident that rules

of property varied, in the way that local customs did. While for Hobbes all customs had to be tested by reason, he could not ultimately show that the kind of knowledge of custom which common lawyers had was not necessary. In his discussions of the common law, Hobbes appeared to argue that the unwritten law was not Coke's artificial reason, but natural equity. Yet, he had ultimately to admit that the "work of a Judge [...] is very difficult, and requires a man that hath a faculty of well distinguishing of dissimilitudes of such cases as common judgments think to be the same," and that it required both learning in the laws and skills of interpretation (Hobbes 1971, 115, 99–100). Yet his theory could not explain the nature of that knowledge.

3.5. History, Custom, and Authority in Selden and Hale

The challenge for thinkers such as Selden and Hale was to develop a vision premised on a command theory of law which could account for the role of custom and the reasoning of lawyers. The foundations of such a vision were laid before the civil war by Selden, and developed by Hale, in an explicit answer to Hobbes. For these writers, the common law had positive foundations in an historical past. Where Hobbes's vision was ahistorical, seeing all law as derived from the current sovereign who derived his status from a contract which could not be broken, Selden and Hale saw the ruler as himself deriving his authority from an historical original contract which defined the sphere of his power, and determined the validity of his actions. Ultimate sovereignty rested in the parties to the original contract, who could modify it. But in that contract, they had created a system which could generate and modify valid rules. The validity of the customary rules of property and crime which the courts handled and developed were to be traced to this original contract. History therefore played a crucial part in their notion of authority.

Selden sketched out a history of English law prior to Henry I (in "whose time, or near thereabout, are the first beginnings of our Law, as our Lawyers now account") in *Jani Anglorum* (Selden 1683, preface). He put particular stress on the legislation of successive kings, such as "*Ina*, *Alfred*, *Edward*, *Athelstan*, *Edmund*, *Edgar*, *Ethelred*, and *Knute* the *Dane*" (Selden 1683, 38). Many features of English law could be traced to early legislation: such as the origin of courts leet, justices and sheriffs (all in the reign of Alfred). Even some laws which were reckoned "among the most ancient Customs of the Kingdom" could be traced to post-Conquest legislation (Selden 1683, 66). Selden did note that laws "are *made* either by Use and *Custom* (for things that are approved by long Use, do obtain the force of Law) or by the Sanction and *Authority* of Law-givers," but he spent relatively little time discussing pure custom. Even in the era of the ancient Britons, it seemed that law was controlled by experts. At that period, the "*Druids* were wont to meet, to explain the Laws in being, and to make new ones as occasion required" (Selden 1683, 93;

cf. Selden 1725b, 8). From the Saxon era, he contended, new laws were made in assemblies.

Hale's reading of Selden persuaded him that much of what was regarded as common law began as statute. However, he also acknowledged that much was introduced by custom (Hale 1971, 44, 67, 82). In general, the "formal and obliging Force and Power" of the common laws "grows by long Custom and Use" (Hale 1971, 17), and many of the key rules of inheritance, conveyance and contract "have not their Authority or Institution by Acts of Parliament" (Hale Undated (b), f. 33ᵛ). Following Selden, Hale showed that the common law was a mixture of British, Saxon, Danish and Norman law. In practice, it was "almost an impossible Piece of Chymistry to reduce every *Caput Legis* to its true Original." Each part obtained its authority by its being received and approved in England (Hale 1975, 42–3). This however raised a presumption that it originated "from the just legislative authority of him or them that first had it." Customary law, he said, "hath not the formality of other instituted laws, yet it hath the substance and equivalence of an institution by the legislative authority" (Hale Undated (c), f. 10ᵛ, cf. Hale 1975, 169). Equally important for Hale's argument was the legislative confirmation of this law in the middle ages. Under William, "many of those ancient Laws [were] approv'd and confirm'd by the King and *Commune Concilium*," while the Conqueror's new laws "were not imposed *ad Libitum Regis*, but they were such as were settled *per Commune Concilium Regni*." Similarly, the charters of John, which Hale elsewhere saw as affirming the common law, only obtained a full enactment in the reign of Henry III, "when the Substance of them was enacted by a full and solemn Parliament" (Hale 1971, 68, 70, cf. 7). For Hale, as has been seen, the location of "just legislative authority" could change over time, by modifications of the original contract, real or presumed: as it clearly had in England since the Saxon era. By that token, rules which might have originated in custom could continue to have validity when adopted by a polity whose legislative authority had changed. However, popular custom alone would no longer generate legal rules. For, as Hale put it, the custom which made up the common law was "not simply an unwritten Custom, not barely *Orally* deriv'd down from one Age to another; but it is a Custom that is derived down in Writing, and transmitted from Age to Age" and especially from the era of Edward I (ibid., 44). The "writing" he had in mind was of course that to be found in legal records. Custom was the source of the *capitala legum*, those fundamentals of English law with no traceable positive origin, such as the course of descent in property.

In contrast to Coke, both Selden and Hale saw the common law as a developing body. Hale compared it with Titius, who "is the same Man he was 40 Years since, tho' the Physicians tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before." The further laws proceeded from their original institution, he continued, the larger

and more numerous they became (Hale 1971, 40–1). The law grew both through the passing of new legislation and through judicial interpretation. Nevertheless, Hale was keen to stress that the judges were not legislators. Though their decisions were legally binding on the parties to a case, "yet they do not make a Law properly so called, (for that only the King and Parliament can do)" (ibid., 45). Indeed, Hale was keen to restrict the scope for judicial creativity. Answering Hobbes, he argued that judges should not follow their own natural reason, but should follow established precedents and rules. Law, he said, did not have the demonstrative certainty of mathematics. Although it might be possible to develop an abstract system rules of universal law, "when persons come to particular application of these common notions to particular instances and occasions, we shall rarely find a common consent or agreement among men" (Hale 1924, 502–3). For that reason, "the wiser sort of the world have in all ages agreed upon some certain laws and rules and methods of administration of common justice" (ibid., 503). For the sake of stability,

it is reason for me to prefer a law by which a kingdom has been happily governed four or five hundred years, than to adventure the happiness and peace of a kingdom upon some new theory of my own, though I am better acquainted with the reasonableness of my own theory than with that law. (Ibid., 504)

For Hale, the law of reason alone was arbitrary and uncertain (ibid., 503). If judges were left to follow their own estimate of equity, they might be corrupt or partial, or produce contradictory decisions. Nor could they look just to the case before them. The expounder of the law, Hale said, "must look farther than the present instance and whether such an exposition may not Introduce greater inconvenience than it remedies" (ibid., 504). To avoid the danger of arbitrariness, it was essential "that one age and one tribunal may speak the same things and carry on the same thread of the law in one uniform rule as near as is possible" (ibid., 506).

Hale's advice to judges was therefore to follow settled rules where they could. Where a clear rule existed, the judge should apply it, as in the simple case of determining who was the heir to an ancestor. But what was a judge to do "if a case fall out that hath not been in terminis decided" (Hale Undated (b), f. 32)? These more complex cases required some deduction from the common law, "the great *Substratum* that is to be maintain'd" (Hale 1971, 46). Firstly, Hale said, the judge was to inquire "with all imaginable industry" into what had formerly been done in such cases, and not depart from such resolutions "without very evident and clear & unanswerable reason." If there were no precedent resolutions, the judge should "keep his Reason as near as may be within the Cancelli of the Reason of the Law" and make analogies with similar cases, in order to maintain certainty. For a mischievous certain law, he observed, was better than an arbitrary one, since the former could be amended by act of parliament, whereas "there is no cure for the Inconven-

iences of an Arbitrary Law." Only "if there be no former decision, no legal reason or reason governed by the analogy of law to guide the judgment" could the judges resort to reason. But even here he argued, against Hobbes, that the judges' "experience and observation and reading gives them a far greater advantage of judgment than the aery speculations" of philosophers (Hale Undated (b), f. 32–33ᵛ).

Judges thus had a role to play in the development of the law, helping to accommodate it "to the conditions, exigencies and conveniencies of the people" (Hale 1971, 39). However, this was to be done by the reasoning of men learned in the principles and precedents of law. For Hale, a body of experts interpreted and developed a body of law which had originated in the past, by applying it to novel circumstances in ways which would be most faithful to the spirit of that law. Hale retained a critical view of many aspects of the common law, as befitted a man who had presided over a commission to reform the law in the interregnum (see Cotterrell 1968). Yet, he felt that change should be made by experts. He insisted that "nothing be altered that is a foundation or principal integral of the law," for to do so might endanger its entire fabric. Further, any thing that could be done by the power and authority of the judges should be left to them. Only in matters which could not be changed should parliament intervene, and then it should act under the guidance of the judges (Hale 1787, 272). For Hale, it was imperative that lawyers and judges should engage in law reform, to prevent the work being done incompetently by unlearned men.

For Hale, the law thus developed, not through the changing customs of the people, but through the efforts of legislators and judges. He was very keen to show that there were settled and stable rules which were built upon by the judiciary. Nonetheless, certain questions remained from his discussion of judging. For instance, Hale said that individual decisions were "less than a law," though they were great evidence of what the law was. Such a view of the judicial function made sense if one were to see the common law as a body of rules, whose meaning was debated in different cases, by men whose opinion would clearly be worth more than that "of any private persons" (Hale 1971, 45). However, he also argued that common law was to be found in judicial decisions "consonant to one another in the series and successions of time" (ibid., 44). Judicial decisions were not merely commentaries on an existing body of law, but themselves developed it. This raised the question in particular of how to account for those rules of law or bodies of doctrine which derived from judgments made on the basis of reason alone. Although Hale devoted little time to this problem, considering it as a relatively minor area, it was a subject which was much discussed a century later.

Chapter 4

THE AGE OF BLACKSTONE AND KAMES

Selden and Hale presented a reorientated vision of the common law, which focused on law as the product of positive imposition. They saw custom as a set of positive rules originating in the past, which had been developed by judicial argument in court. In their vision, the law of nature played a muted role, as a premise of the system rather than as a working tool. This vision proved a particularly influential one on common lawyers, as can be seen from an examination of the most important English jurist of the eighteenth century, Sir William Blackstone. Blackstone's principal work, *Commentaries on the Laws of England* (1765–1969), was the fruit of his lectures at Oxford, and were designed to give an introduction to the law to the gentleman (see Lieberman 1989, chaps. 1–2). They were the best and most elegant overview yet written, and one which aimed to examine all aspects of law. Blackstone was more an expositor and summariser than a deep thinker, and his theoretical positions were often inconsistent. Nevertheless, the prevailing idiom of his work was that of Selden and Hale, both in his understanding of the nature of the constitution and in his views on the foundations and workings of the common law. At the same time that Blackstone was working, a different and less positivist view of law was being developed to the north of the border. There, the most important published jurist of the Scottish Enlightenment, Lord Kames, developed a theory which sought to answer questions left unanswered by Blackstone's vision, on different premises.

4.1. Challenging the Common Law: Sidney, Locke, and Popular Sovereignty

If Selden and Hale wrote in an era where the greatest constitutional contention revolved around the question of the nature and extent of royal prerogative power, the constitutional landmark dominating eighteenth century legal thought was the revolution of 1688. The decade preceding the revolution had seen a striking change in political language, with both supporters of the crown and its opponents moving away from common law constitutionalist positions. In the later years of Charles II's reign, the notion that an ancient constitution existed came under renewed attack from royalist thinkers, who sought to argue that the king's authority did not rest on the consent of the people. Attacks on the antiquity of parliament, which had been deployed during the civil war, were now rehearsed once more, to great effect. *The Freeholder's Grand Inquest* written in 1644, probably by Sir Robert Filmer (1588–1653), was republished in 1679 (see Filmer 1991a, xxxiv–vi; Weston and Greenberg 1981, 115; Pocock 1987, 151). It argued that the House of Commons had no part of the

legislative power, but that "the king himself only ordains and makes laws, and is supreme judge in parliament" (Filmer 1991a, 72, 74). When an attempt to refute this was made by William Petyt (1641–1707) (Petyt 1680), who argued that there was a prescriptive right to representation in the Commons preceding the time of legal memory, he was answered by Robert Brady (d. 1700; Brady 1680). Brady used detailed research to show both that land law had been revolutionised by the conquest, and that the king's council after that event was not attended by representatives of the community, but only by his tenants-in-chief. This had important political implications. For Brady, William and his successors were lawmakers, not bound by any immemorial constitution, nor by terms set with the consent of the people. The liberties enjoyed by the English—including their role in lawmaking—derived only from grants and concessions from the king (Brady 1685, preface).

Having attacked the historical version of their opponents, royalists did not now rest their own arguments for the crown's power on history. Instead, they argued (in Brady's words) that "the Kings of England hold their Crowns by the Laws of God and Nature, and therefore cannot be reputed of Human Institution" (Brady 1681, 31). This was to move the debate away from history altogether. A catalyst in this change in political language was the publication of Filmer's *Patriarcha* (written before the civil war) in 1680 (Filmer 1991c). Filmer was unequivocal on the matter of consent: "we see the principal point of sovereign majesty and absolute power," he said, "to consist principally in giving laws unto subjects without their consent" (Filmer 1991b, 177). Filmer based his thinking on divine right and patriarchalism. After the Fall, man was morally incapable of self-government, he argued: he could only be ruled by an authority sanctioned by God prior to human history. This was the power of kings, which was akin to that which God gave to Adam. The publication of *Patriarcha* drew important responses from both Algernon Sidney (1623–1683) and John Locke (1632–1704). In answering the royalist argument, these two writers developed political theories which laid stress on the sovereignty of the people. Both men moved in Radical Whig circles in the late 1670s and early 1680s, and both developed their arguments in order to show that the people had a right to rebel against an oppressive king.

Although Sidney was more eclectic in his arguments than Locke, neither based his theory on historical justifications or on the legal language of common law constitutionalism. "Axioms are not rightly grounded upon judged cases; but cases are to be judged according to axioms," Sidney wrote:

Axioms in law are, as in mathematics, evident to common sense [...] the axioms of our law do not receive their authority from Coke or Hales but Coke and Hales deserve praise for giving judgment according to such as are undeniably true. (Sidney 1772, 409–10; cf. Scott 1988, 38)

In his view, an unjust law was simply not law, and could be seen as such by even the meanest understanding. Against Filmer's argument that government

came from God, Sidney saw it as a human institution, erected to promote the public good and to develop virtue. "As governments were instituted for the obtaining of justice," he wrote,

we are not to seek what government was the first, but what best provides for the obtaining of justice, and the preservation of liberty. For whatever the institution be, and how long soever it may have lasted, it is void, if it thwarts, or does not provide for the end of its establishment. [...] If any man ask, who shall be the judge of that rectitude or pravity which either authorizes or destroys a law? I answer, that as this consists not in formalities and niceties, but in evident and substantial truths, there is no need of any other tribunal than that of common sense, or the light of nature, to determine the matter. (Sidney 1772, 404–5)

If obedience did not rest merely on the rightful origin of a ruler's power, he was only to be obeyed as long as he acted for the public good (see Scott 1991, chap. 11). In Sidney's view, the people of England had originally delegated their power to parliament, and the king was a trustee, without independent power. The people therefore had the right, acting through parliament, to resist a bad king. "[I]n all the revolutions we have had in England," Sidney wrote, "the people have been headed by parliament, or the nobility and gentry that composed it, and, when kings failed of their duties, by their own authority called it" (quoted in Scott 1991, 264).

In his *Two Treatises of Government* (1681), Locke also sought to justify rebellion, using the language of natural rights rather than that of the common law. Locke's social contract theory differed significantly from that of common lawyers such as Selden or Hale. Locke did conceive of natural law in voluntarist terms as the commands of God, arguing that "what duty is, cannot be understood without a law; nor a law be known, or supposed without a lawmaker, or without a reward and punishment" (Locke 1975, 74; cf. 352). However, in the *Second Treatise*, he did not conceive of the social contract as creating a state with sovereign powers whose valid commands had always to be obeyed. Rather, the government which was set up was seen to be the servant of the people, to protect their natural rights. Where for Selden and Hale, the positive laws of political society developed from natural law foundations, Locke rather saw potential conflicts between the demands of nature and the acts of political rulers.

Arguing against Filmer, he used the concept of the state of nature to show man's natural equality under God. There was a law of nature "which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that all being equal and independent, no one ought to harm another in his life, health, liberty or possessions" (Locke 1988, 271, §6; for a fuller discussion of Locke, see Riley, Volume 10 of this Treatise). Rights therefore existed before the origin of political society, notably rights of property. Whatever a man cultivated in the state of nature through his labour became his property (Locke 1988, 286–7, 290–1, 292–3, §§ 26, 32, 36). Men subsequently entered society to protect their property, which included life, liberty and estate (ibid.,

350, §123). Political society was formed by an original compact, by which every man agreed with the others to "make one society, who, when they are thus incorporated, might set up what form of government they thought fit" (ibid., 337, §106). Locke explained that the "first fundamental positive law of all commonwealths is the establishing of the legislative power, as the first and fundamental law which is to govern even the legislative" (ibid., 332, §97). This legislative power thus created was the supreme power in the commonwealth (ibid., 355–6, §134), but it could never be arbitrary over the lives and fortunes of the people. For men could only give to the legislature the power they possessed in the state of nature; and since in that state each man had "no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth" (ibid., 357, §135).

Locke realised that natural law alone was not sufficient for social co-ordination. Political society was needed to create and enforce laws (ibid., 350–1, §§124–6). However, government only existed to promote the public good (ibid., 353, §131), and legislation which passed had to conform to the law of nature, the fundamental rule of which was the preservation of mankind (ibid., 358, §135, cf. ibid., 209–10, *First Treatise* §92). Central to Locke's argument was the notion of consent: "the supreme power cannot take from any man any part of his property without his own consent" (Locke 1988, 360, §138). For Locke, the legislature was therefore only a fiduciary power to act for certain ends, and could be removed if it acted contrary to the trust reposed in it. The community always retained a supreme power of saving itself even from the legislature, if it should have designs against the people's liberties and properties: "And thus the community may be said in this respect to be always the supreme power," though "this power of the people can never take place till the government be dissolved" (ibid., 367, §149). When the rulers attempted to enslave or destroy the people, or attempted to rule for their harm, the people, "having no appeal upon earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment" (ibid., 379, §168).

Locke conceived of revolution as clearly a political event, rather than a legal judgment. Rebellion would come, not when a detailed analysis was made that a monarch had broken his contract with the people, or when the constitution collapsed, as it had in the 1640s, when constitutional actors ceased to act in legally *valid* ways; rather, it would come when a monarch's consistent behaviour revealed an intention to act against the public good. Locke argued that the people would be slow to react, and would do so only "if a long train of abuses, prevarications and artifices, all tending the same way" made the ruler's design to act contrary to their trust visible to the people (ibid., 414–5, §§223–5). Although Locke argued that a supreme legislature which betrayed its trust could be resisted, he felt that in England, there was little risk that parliament would take the subject's property (ibid., 361, §138). The problem lay

rather with the king. For Locke, the monarch, as executive, was subordinate to the legislature, and any oaths of allegiance to him were conditional on his acting according to law. Once he ceased to do that, he became a private citizen, to whom no allegiance was due, the public "owing no obedience but to the public will of society" (ibid., 368, §151). Similarly, while the executive had to have discretionary prerogative powers, even to act against positive law, they were only to be used for the public good (ibid., 376–7, §163).

Locke based his arguments on a pure political theory, rather than on common law arguments or history, in part because in the late 1670s and early 1680s, it was difficult to use common law arguments, since the Stuarts acted "by colour of law." For instance, lawyers agreed that the king had the power to dispense with laws, but disagreed over the extent of these powers (see Nenner 1977, 90–9). In any event, Stuart kings, having the power to remove judges, obtained a bench which was often willing to endorse its arguments for prerogative powers (Havinghurst 1950; 1953; *Godden* v. *Hales* (1686) Howell 1816–1826, 11: 1165–99). By the later years of the reign of Charles II, Whigs feared that the king wanted to rule in an absolutist manner, without consulting parliament. In this context, pamphleteers argued that not to call parliament was "expressly contrary to the common law, and so consequently of the Law of God as well as the Law of Nature" (Anon. 1681, 5; cf. Ashcraft 1986, 317). However, as Tories pointed out, since calling and dissolving parliament was one of the king's prerogatives, it was hard to make a common law argument that he was obliged to call it (Scott 1991, 75). In his treatise, written during the political crisis of 1678–1681, Locke clearly had in mind the problems caused when the king used his prerogative powers in an illegitimate way, but which could not be challenged by courts exercising a kind of *potens irritans* (Locke 1988, 402–4, §§205–8). He was also concerned at the king's dissolution of his parliament. The power to call parliament, he wrote, was not an arbitrary power to be exercised at pleasure, but was a public trust; and if the king hindered the meeting of the legislature, he placed himself at war with the people (ibid., 370–2, §§155–6). When Locke finally listed the factors which led to the dissolution of a government, he was in effect listing Radical Whig complaints against Charles II (ibid., 408–11; §§214–7, 219). However, if Charles's actions were politically contentious, it was hard to show that they were clearly illegal.

4.2. Common Law Constitutionalism Reasserted: Blackstone and the Glorious Revolution

Charles II died peacefully in his bed in 1685. After three years on the throne, his brother, James II, fled England in 1688, to be replaced in a bloodless "Glorious Revolution" by William of Orange. On 28 January 1689, the Commons resolved

That King James the Second, having endeavoured to subvert the Constitution of the Kingdom, by breaking the Original Contract between King and People, and by the advice of Jesuits, and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of his kingdom, has abdicated the Government, and that the throne is thereby become vacant. (Quoted in Dickinson 1979, 74)

Many contemporaries were uncomfortable in attempting to justify the revolution. Most sought to avoid the Lockean argument that the king was only a trustee who could be removed if he acted against the common good, preferring the fiction of abdication. Equally, few supported the idea that kingship in England was elective. Great efforts were therefore made to show that William's accession was in accordance with law, which the new king claimed he had come to defend (see Kenyon 1977; Pocock 1980; Goldie 1980; Kay 2000).

However, it proved extremely difficult to justify William's accession on the grounds of James's "abdication" alone. The revolution also had to be justified by accusing the king of breaching the original contract of government. This contract was (as Samuel Masters put it) "nothing else than a tacit agreement between the king and subjects to observe such common usages and practices as by an immemorial prescription have become the common law of our government" (quoted in Dickinson 1979, 78). The argument was not cast in Lockean terms that there was a popular *right* to rebel against a bad king who invaded their natural rights. Instead, many used language similar to that used in 1642, that the king's actions, by stretching the bounds of the law, had provoked a constitutional crisis, for which there was no clear legal remedy. The king's breaches were not minor, but effectively prevented the operation of law; and in this case, law ran out. One writer, who argued after 1688 that the king had no power to authorise his officers to commit illegal acts, and who claimed such acts could be resisted, admitted that there were no positive laws which determined what was to be done if the king assumed arbitrary power. Such, he said, were "odious Cases and not fit to be suppos'd." However, while the law made no provision for them, in such cases, "it's certain that every man is left to the Right and Law of Nature" (Anonymous Undated (b), f. 6^v). The author of another tract similarly argued that

so long as any part of the constitution is preserved in such manner as to be able to rectify the maladministration of the rest, e.g., if a subject be oppressed, so long as the courts of justice are permitted to do right, he may by them be redressed: or if those courts are overruled yet so long as parliaments are suffered to be duly chosen & transact business, the corruptions of those courts may be rectified. And so long, I suppose, Arms ought not to be taken up. For that is the last remedy & then only lawful, when all other means of legal redress fail. (Anonymous Undated (a), f. 10^{r-v})

For many, this was what had occurred in 1688.

Eighteenth century jurists remained uncomfortable with explaining the revolution. On the one hand, 1688 settled the seventeenth century disputes between crown and parliament in the latter's favour, and secured the Protestant succession so important to eighteenth century Englishmen. On the other

hand, the principle of revolution ran counter to the lawyers' vision of an ancient, uninterrupted legal system. The difficulty of reconciling these positions can be seen in Sir William Blackstone's mid-century efforts. He spoke of "those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against violence of fraud or oppression" (Blackstone 1979, 1: 243). When a quarrel arose between "the society at large and any magistrate vested with powers originally vested by that society," he said, "it must be decided by the voice of society itself" (Blackstone 1979, 1: 205). However, Blackstone was happy to follow the line of the Convention parliament when explaining the Revolution. Given that a breach of contract by the king would entail a dissolution of society and a return to the state of nature—"wild extremes into which the visionary theories of some zealous republicans would have led them"—the Convention wisely held that James's conduct amounted only to an *endeavour*, not an actual subversion of the constitution, and that this amounted to an abdication, "whereby the government was allowed to subsist, though the executive magistrate was gone" (Blackstone 1979, 1: 206; cf. 226, where he stated that James did break the original contract, and 148 where he spoke of abdication). In the end, Blackstone said that "this great measure" had to be accepted "upon the solid footing of authority" rather than on arguments from its "justice, moderation, and expedience." Our ancestors, he said, had a competent jurisdiction to decide the question, and having settled it, "it is now become our duty at this distance of time to acquiesce in their determination" (Blackstone 1979, 1: 206; cf. Lobban 1991, 31).

While accepting the results of the revolution, Blackstone sought to give a view of the constitution which followed the position of Selden and Hale, and the proponents of a mixed and balanced government, rather than that of Locke. Neither Blackstone nor his successors in the Vinerian Chair at Oxford looked to the sovereignty of the people. Perhaps the most extreme endorsement of the anti-Lockean position came from Richard Wooddeson, the third holder of Blackstone's chair. Although sceptical about the very idea of an original contract, feeling that the constitution developed through gradual change, he nonetheless asserted that popular consent to existing constitutional arrangements was not revocable, "at the will even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment" (Wooddeson 1834, 1: 22). For these thinkers, sovereignty was located in the institutional structure of a mixed monarchy, created by past consent.

Although Blackstone sometimes spoke of sovereignty as lying in the legislature, he also talked of the king as "sovereign" (Blackstone 1979, 1: 47–8, 234). In his view, the king was not a mere trustee of the people, or an executive officer subordinate to parliament (cf. De Lolme 1821, 67). Supreme power "is divided into two branches; the one legislative, to wit the parliament,

consisting of king, lords, and commons; the other executive, consisting of the king alone" (Blackstone 1979, 1: 143). Parliament and crown were equal and distinct elements, though the king had to be represented in parliament in order to prevent any encroaching on the royal prerogative, which would weaken the executive (ibid., 51). Both were beyond control by the courts. "The supposition of *law*," he wrote, "is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy" (ibid., 237). No court had jurisdiction over the king, for "the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king?" (ibid., 235). The very notion of a superior power to the king "destroys the idea of sovereignty":

If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch of branches, in which this jurisdiction resided, would be completely sovereign. (Ibid., 237)

Nevertheless, regal authority and prerogative powers had been restrained since Saxon times (ibid., 230–1). For Blackstone, as for his seventeenth century predecessors, the bounds of the kings power were set by the original contract, and could be redefined and further limited by acts of parliament. If the king's powers were limited by law, nonetheless he could do no wrong. What, then, was the remedy for executive oppression? Blackstone set out the law for various kinds of oppression. If it was of the kind which endangered the constitution, law gave no remedy; though the precedent example of 1688 demonstrated that in such a case the king would be deemed to have abdicated (ibid., 238). In case of "ordinary public oppressions," the remedy was to indict or impeach the king's ministers, for misconduct in public affairs was to be attributed to the ministers, rather than to the crown (ibid., 237, 244). In case of private injuries suffered at the hands of the crown, the party harmed had to seek a petition, granted as a matter of grace, which sought to persuade the crown that it had erred, rather than to compel it (ibid., 236). Finally, Blackstone stated that the law presumed that the king was incapable of *thinking* wrong: so that if he made a grant or a privilege contrary to reason or prejudicial to the commonwealth or any private person, the law would presume that the king could not have meant it, but was deceived, "and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the crown has thought proper to employ" (ibid., 239). If the presumption that the king would never act contrary to his trust was an example of Hale's *potens irritans*, it was a very respectful one.

When came to legislation, the king-in-parliament had "sovereign and uncontrollable authority" and "absolute despotic power":

It can regulate or new model the succession to the crown [...]. It can alter the established religion of the land [...]. It can change and create afresh even the constitution of the kingdom and of parliaments themselves [...]. It can, in short, do everything that is not naturally impossible. (Ibid., 156)

Parliament was not subject to control by the courts, whose power was limited to the equitable interpretation of statutes and the development of the common law. For Blackstone, as for other eighteenth century jurists, abuses of power were thus to be controlled not by judicial, but by political means. The first way this was achieved was through the structure of the constitution, which balanced the three estates. "[T]he constitutional government of this island is so admirably tempered and compounded," he noted, "that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest" (Blackstone 1979, 1: 51; cf. 149–51). In making this assertion, Blackstone was echoing themes from the seventeenth century; but the formulation of his ideas on the balanced constitution and the separation of powers also owed a great deal to the influence of Montesquieu's discussion of the English constitution (see Carrese 2003, chap. 6). The second means was through political vigilance. Blackstone, a politician with strong country party tendencies, was all too aware that the preservation of the constitution was not merely a matter of mechanics, but required in addition a king manifesting "the highest veneration for the free constitution of Britain" and a people who would "reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority" (Blackstone 1979, 1: 326). The safety of the constitution thus required the continuing healthy operation of various institutions, including parliament, crown and judiciary (see, e.g., Blackstone 1979, 1: 136–41).

4.3. Natural Law and Authority in Blackstone's Thought

When discussing the nature of law, Blackstone appeared to take contradictory positions. On the one hand, he said that God had dictated a law of nature, which was binding all over the globe and was superior in obligation to any other law: "no human laws are of any validity, if contrary to this" (Blackstone 1979, 1: 41). On matters which were not indifferent, human laws were only declaratory of natural law. He spoke of absolute rights as "such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it," and noted that the aim of society was "to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature," "which in themselves are few and simple." By contrast, "[s]uch rights as are social and *relative* result from, and are posterior to, the formation of states and societies." These rights, "arising from a variety of connexions, will be far more numerous and more complicated" and would "take up a greater space in any code of

laws" (ibid., 119–21). This seemed clearly to distinguish between natural rights, which came from God, and indifferent matter, which came from human legislation.

On the other hand, Blackstone also gave a positivist definition of law. Law, he said, "always supposes some superior who is to make it." While God was the legislator of natural law, municipal law was "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong" (ibid., 44). In all governments, he added, there must be "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside" (ibid., 49). And as has been seen, in England, this power lay in parliament. Scholars have long debated the apparent contradictions in Blackstone's position (see Carrese 2003, 124–38; Alschuler 1996; Finnis 1967; Hart 1956; Lieberman 1989, chap. 1; Lobban 1991, chap. 2; Lucas 1963; Rinck 1960; Simmonds 1988). These contradictions may have been accentuated by his borrowing from sources which were incompatible in his introductory chapters.

In giving a positivist definition of law, Blackstone followed the eighteenth century norm. Those jurists who had not read Selden's *De Jure Naturali* were likely to have been familiar with Samuel Pufendorf's *Of the Law of Nature and Nations*, which was translated into English in 1703 (Pufendorf 1717; see Wood 1727, 8). John Taylor, who was familiar with both of these works, and whose work was itself drawn on by Blackstone, spoke of natural law as the command of God, and saw all civil law as derived from a positive lawmaker (Taylor 1755, 245). He also distinguished sharply between law and morals. In the case of law,

the legal necessity, which is produced by the command of a person invested with the proper authority, derives nothing of its effective power from the aptness, the conveniency, or the fairness of the duty enjoined. (Taylor 1755, 45)

Blackstone's successors at Oxford also wrote in positivist terms. Thus, Sir Robert Chambers, who defined law in terms of the will of a superior, also made an important distinction between the positive law of society as the rule of man's civil conduct, and the law of God and nature as the rule of his moral behaviour (Chambers 1986, vol. 1: 88, 91; cf. Wooddeson 1834, vol. 1: 30, 48).

In fact, Blackstone's view of law was closer to Selden's and Hale's than Locke's; and his Lockean reference to absolute and relative rights at the outset of the *Commentaries* was misleading. For although there he seemed to suggest that absolute rights were more fundamental than relative rights, in the body of the text, he used the terminology in a different sense. The distinction between the two was used there not for philosophical, but for pedagogic purposes. The structure of his work, which sought to place English law in an institutional form, owed much to Hale's *Analysis*, which adapted the distinction of the law of persons, things and actions found in Justinian's *Institutes* (Cairns

1984a; Watson 1988). Where in the *Institutes*, the law of persons related largely to issues of status and capacity, Hale adapted the model. His "law of persons" dealt with them both "absolutely and simply in themselves" and "under some degree or respect of relation." The first of these covered the interest every man had in himself, including his liberty and reputation. The interest men had in goods was treated distinctly by Hale, "because they are in their own nature things separate and distinct from the person" (Hale 1739, 2–3). The second looked at persons in their relation to others, relations which were (in Hale's terms) either political, economical or civil. This was an approach taken also by Thomas Wood (Wood 1720). Blackstone followed the same model in his structure, although he insisted more than his predecessors that the right to property was one of the absolute rights of persons, a categorisation which was in the event to cause him some discomfort (Blackstone 1979, 1: 134–6; 3: 138). The division between "absolute" and "relative" rights thus sought to distinguish between those which could be considered without reference to a person's status, and those which were to be explained in the context of social relationships. Blackstone's use of the terms "absolute" and "relative" in the introduction and in the body of his work was therefore inconsistent. Indeed, the very division between rights which were free-standing and those which were not was artificial, for he pointed out that "human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society" (ibid., 4: 41).

In his discussion of substantive law, Blackstone made it clear that he did not regard "absolute" rights as either enforceable prior to the establishment of society, or as incapable of restriction. There was no indefeasible right to life or liberty, for society had the right to deprive a man of them even for committing only *mala prohibita* (ibid., 4: 8). Although there was a right to subsistence, it was one which came from the statutory poor laws, which (in Blackstone's view) were imperfect (ibid., 1: 127, 347–8, 352). Similarly, if the right to property was founded in nature, "the modifications under which we at present find it [...] are entirely derived from society" (ibid., 134). Blackstone refused to commit himself on the precise origins of property, but for practical purposes regarded it as a civil right. "[W]e often mistake for nature what we find established by long and inveterate custom," he wrote: "It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil* right" (ibid., 2: 11). He therefore traced only very few of the positive rules of property law to nature. One example, derived from Justinian, was the right to acquire property in *ferae naturae* such as bees, by hiving them, which constituted an occupation of something hitherto free (ibid., 2: 292–3). Nevertheless, this right "may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community" (ibid., 4: 411). When it came to

real property, the law of nature's title by occupancy was only to be found in one rule: if a man held an estate for the term of the life of another, and died without heir before that other, any third person could occupy and hold the land for the remainder of the term. Yet even this was scarcely a natural law form of occupation; for the new tenant would remain liable to the lessor for waste for payment of the rent reserved (ibid., 2: 25; cf. Coke 1794, 41b).

For Blackstone, all legal obligation in civil society came from positive law. "The absolute rights of every Englishman," he noted, "as they are founded on nature and reason, so they are coeval with our form of government: their establishment (excellent as it is) being still human" (Blackstone 1979, 1: 123). The importance of human legislation is seen in his discussion of the four parts of a law: the declaratory, the directory, the remedial, and the vindicatory (see Finnis 1967). Some rights existed, he said, which God and nature had established. They did not need declaration by human legislation, for they were known to every man (Blackstone 1979, 1: 54). Thus, a man did not need to be told by the sovereign not to murder. At the same time, there were also "mixed" matters, neither wholly indifferent nor part of natural law. For "sometimes, where the thing itself has it's rise from the law of nature, the particular circumstances and mode of doing it become right and wrong, as the laws of the land shall direct" (ibid., 55). Purely indifferent matters needed declaration by the state. Turning to the vindicatory part, Blackstone noted that "the main strength" of law derived from its penalty: "Herein is to be found the principal obligation of human laws" (ibid., 1: 57; cf. 4: 8). If some duties were *defined* by natural law, they were *enforced* by human punishments, which made the distinction between crime and sin. Both public and private vices were equally subject to "the vengeance of eternal justice," Blackstone said, but only public vices were subject to human punishment. While some crimes were offences against the law of nature and others not, "yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man" (ibid., 4: 42).

Blackstone was known for his distrust of the competence of eighteenth century legislators, and for his Cokean view that it was dangerous to alter any fundamental part of the common law (ibid., 3: 267; cf. Lieberman 1989, chap. 2). He also often spoke of ancient Saxon laws and liberties as the foundation of the law. However, this should not mask his essentially legislative view of the foundations of the common law, which can be seen in his view of its history, much of which was taken from Hale. Although Blackstone argued that unwritten law obtained its binding power from immemorial usage (Blackstone 1979, 1: 64), he proceeded to show that the common law's origins could be more precisely dated. Blackstone followed Selden in arguing that the common law included the customs of numerous nations, which had been moulded into a single code by several kings. In Alfred's reign, he argued, local customs had grown so various that the king decided to compile his "*dome-book* or *liber*

judicialis, for the general use of the whole kingdom." In turn, Edward the Confessor, finding three systems of law in place, "extracted one uniform law or digest of laws, to be observed throughout the whole kingdom" (ibid., 65–6). These two codes, Blackstone said, "gave rise and original to that collection of maxims and customs, which is known by the name of common law" (ibid., 1: 67; cf. 4: 405).

If much of the common law predated the conquest, however, "the fundamental maxim and necessary principle" that all land in England was held of the crown (see ibid., 2: 51, 105; 4: 411) was introduced later. Blackstone's notion of feudalism borrowed heavily from Sir Martin Wright, who in turn built on the work of Thomas Craig (Craig 1934; Wright 1730; Cairns and McLeod 2000). Wright argued both that feudal tenures were established under William and that the notion that the king was universal lord of all territories was merely a fiction which was "nationally and freely adopted," with the consent of the *commune concilium* (Wright 1730, 58–9, 71–2). Blackstone accepted this version of the origins of feudalism (Blackstone 1979, 2: 48–50; 4: 407–8). In his discussion of the historical rules of tenure, positive law, custom and legal decision mingled together. For example, he said that it had been determined "time out of mind" that a brother of the half-blood should not succeed to the estate, but that it should escheat to the king or superior lord. "Now this," he said, "is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions" (ibid., 1: 70). If this seemed purely customary, the feudal rule of escheat, referred to here, was nevertheless to be traced to the post-conquest 'statutory' agreement. Although he did not articulate it, "time out of mind" here is best understood as meaning prior to 1189, the limit of legal memory. Blackstone's 'customary' system was thus in many ways one which originated in a set of positive rules, which were subsequently developed by the courts.

Wright had also argued that at the time of the conquest, the English had been tricked by Norman lawyers, who penned the law in terms which would allow the introduction of an absolute feudal dependence, and who, by their subtle interpretations, expounded it in a way to establish oppressive feudal incidents (Wright 1730, 78–81). Blackstone repeated this view (Blackstone 1979, 2: 51; 4: 411), and asserted that, when they saw these oppressive incidents, the English sought "a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived" (ibid., 4: 418; 2: 52). This restoration was finally achieved in the reign of Charles II, when military tenures were abolished (ibid., 4: 431; 2: 77). In so arguing, Blackstone sought to persuade the reader that socage tenures—the prime form after 1660—"were relics of Saxon liberty" (ibid., 2: 81) dating from an age which (as he had earlier indicated) had traces of feudalism. This was hardly convincing history. Firstly, the argument that socage tenure "existed in the same state before the conquest as after" (ibid., 2: 85) was hard to square with his asser-

tion that after the conquest the English consented to the conversion of allo-
dial into feudal holdings (ibid., 2: 50). Secondly, Blackstone admitted that
many of the rules of property law could only be explained in the context of
the post conquest feudal system, such as the rule that all socage tenures ex-
cept those held in gavelkind were subject to escheat (ibid., 2: 72, 89, 244).
Similarly, primogeniture was part of the feudal system established by William,
superseding the equal partition which Blackstone argued was the general cus-
tom until the conquest (ibid., 2: 215; 1: 75; 4: 414, 406–7). Indeed, in
Blackstone's view of history, it was gavelkind which was the most general form
of tenure before the conquest, rather than socage. In effect, what 1660
achieved was not the abolition of feudalism and the return to an ancient
Saxon law as much as the legislative removal of the oppressive incidents the
English had been deceived into accepting (see Willman 1983; Cairns 1985).

Besides complicating land law, the Normans also transformed the Saxon
system of justice. In place of the easy and simple method of determining suits
in the county courts, "the chicanes and subtilities of Norman jurisprudence
[took] possession of the king's courts" (Blackstone 1979, 4: 409–10). The law
which should have been a plain rule of action now became instead an intricate
science. Blackstone noted that Norman lawyers had so interwoven their
finesses into the body of the legal polity that many of them could not now be
removed without injury to the substance. "Statute after statute has in later
times been made, to pare off these troublesome excrescences, and restore the
common law to it's pristine simplicity and vigour," Blackstone noted, "but
still the scars are deep and visible" (ibid., 4: 411). Because of this, modern
courts had to resort to fictions and circuities to achieve substantial justice. If
the common law was like an old Gothic castle, erected in the days of chivalry,
but fitted up for modern inhabitants, the approaches to justice were therefore
"winding and difficult" (ibid., 3: 268). Significantly, the key route to restoring
the law to its essential principles was by legislation. For Blackstone, the com-
plete restitution of English liberties achieved in the reign of Charles II was
done by statutes (ibid., 4: 432). In some cases, indeed, such as with habeas
corpus, these statutes gave better protection than ancient ones, such as Magna
Carta. (ibid., 1: 123–4; 4: 432). Thus, if Blackstone's writings contained rhe-
torical echoes of Coke's ancient constitutionalism, it was evident that when
closely examined, he had a view of the foundation of the common law which
laid greater stress on moments of positive imposition.

Blackstone was not untypical in taking this approach, for it was echoed by
a number of judgments in the eighteenth century courts. As the Master of the
Rolls, Sir Thomas Clarke, put it in 1759, "most of our law as to its foundation
is positive" (*Burgess* v. *Wheate*, *English Reports*, 96: 78). Influenced by the re-
searches of Selden, Spelman and others, and the publication of Anglo-Saxon
law codes by William Lambarde and David Wilkins, judges as well as jurists
began to show a greater interest in tracing particular moments of origin for

legal rules. In *Regina* v. *Mawgridge* in 1707, for instance, it was noted that the word "murder" was "framed by our Saxon ancestors in the reign of Canutus upon a particular occasion, which appears by an uncontested authority, Lamb 141" (*English Reports* 84: 1108; citing Lambarde 1644, 141). The court proceeded to trace the development of the changing meaning of the word since the era of *Bracton* to assist it in distinguishing between manslaughter and murder. In *Rex* v. *Dwyer* in 1724 (*English Reports* 25: 183), Chief Baron Gilbert explored the history of the concept of manslaughter by looking at the punishment for homicide in Anglo-Saxon law codes, and at the relationship between ecclesiastical and secular approaches to the problem in the centuries before and after the conquest. Similarly, in 1764, Lord Mansfield had to consider whether a legal judgment could be given on a Sunday (a key issue to determine the validity of a common recovery in the case before him). Although there was no direct authority, he noted that "the history of the law and usage, as to Courts of Justice sitting on Sundays, makes an end of the question" (*Swann* v. *Broome*, *English Reports* 97: 1000). Drawing on Sir Henry Spelman's *Original of Terms*, he traced the evolution of the rules in canon law, and their adoption in secular courts. Even on matters which could be seen as questions of natural or divine law, therefore, judges often sought to explore how human institutions had developed rules rather than reasoning from first principles or scripture.

4.4. Blackstone and Judicial Reasoning

If the common law came from ancient positive institution, how was the content of that law to be known? For Blackstone, as for his predecessors, the rules of land law were to be derived from statutes, maxims and precedents; and he was able to set out these rules clearly in Books II and III of the *Commentaries*. His approach here echoed Hale's idea that the lawyer built on and developed positive rules whose foundations lay in an historical past. When it came to these rules, Blackstone argued, judges were not free to act as they saw fit, but followed and applied the rules derived from precedent. At the same time, however, he controversially described judges as "living oracles, who had to decide in all cases of doubt," in a way which appeared to give them greater power. For he argued that "where the former determination is most evidently contrary to reason," the judge could depart from the old rule. In such a case, he was not making a new law, but "vindicating the old one from misrepresentation" (ibid., 1: 69–70). Such comments have led scholars to speak of a declaratory theory of law in the eighteenth century, by which the content of law was linked to its moral quality (see Berman and Reid 1996, 448; Evans 1987). But in fact, Blackstone accorded a much narrower power to the judge to disregard law than might at first appear. The example he gave of a judge's decision which would not be law was extreme one: it was of a judge, familiar with

the rule against the half-blood *inheriting*, deciding that an elder brother could as a consequence of the rule seize any lands *purchased* by his half brother. Such a decision would be a merely arbitrary judgment without legal foundation: a logical *non sequitur*. To say that a judge could mistake the law was to describe what later judges referred to as a decision *per incuriam*, made in ignorance of authority. Such an opinion was hardly novel. Selden's follower John Vaughan observed in 1674 that one court was not obliged to follow the decision of a prior court "unless it think that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted, nor a reversal of them" (*Bole* v. *Horton* (1673), *English Reports* 124: 1113 at 1124).

Blackstone's view can be put in context by referring to another common lawyer's view of precedent. Edward Wynne, in *Eunomus*, published in 1765, argued (following Spelman) that when cases were first decided, it was on the basis of reason and the circumstances of the case. "[E]very day," he said, "new cases arise, and are determined on their own reasons." But these cases in turn became precedents. Moreover, "tho' every Precedent must have a time to begin," he argued,

that Chief Justice argued very ill, who admitted a Jury, not Freeholders, in a capital case, and said, *why may we not make Precedents as well as those that went before us*. Because his Precedent was so far from being new, or *ex aequo et bono*, that it was contrary to settled Law, from the first age of the Constitution. (Wynne 1785, 3: 177)

Although acknowledging the problems caused by the inadequacy of mid-eighteenth century law reports, Wynne clearly stated a hierarchy in the value of precedents, from the single opinion of a judge at *nisi prius* up to the determination of a writ of error in the House of Lords, which he said was as high in authority as a statute (Wynne 1785, 3: 191–5). Certainly, dicta are to be found by judges like Lord Mansfield who denied that the common law was a system of precedent. "[T]he law of England, which is exclusive of positive law enacted by statute," Mansfield once observed, "depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them" (*Jones* v. *Randall* (1774), *English Reports* 98: 954 at 955). However, this comment was made in a case of first impression. To argue thus was not to go against the common law as a system of precedent, but only to say that in cases of first impression, judges decided on the basis of natural reason.

Eighteenth century judges accepted Hale's idea that the law was developed by the judges through analogy and extension, and developed on foundations which had been authoritatively laid. The way this was done was explained by Justice Wilmot in giving an opinion to the Lords in 1758 on the operation of the writ of habeas corpus outside the Caroline statute (31 Car. II c. 2). Wilmot argued that writs of habeas corpus in cases of private custody had originated

in the era of the Restoration, by "a warrantable extension of a legal remedy in one case, to another case of the same nature." The legality of this first extension, he said, was confirmed by its continued application by the judges for eighty years, for "the course of a court makes a law." He noted that

The principle upon which the usage was founded, lay in the law; and the usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of justice. It is upon this foundation only, that an infinite variety of forms, rules, regulations, and modes of practice in all Courts of Justice must stand, and can only be supported. (*English Reports* 97: 39)

Wilmot was thus clear that law was developed by the judges in the judicial forum. Like Hale, he also noted that the judges ensured that the law would develop to meet the people's needs. Indeed, it would be endless

to enumerate instances where the King's Supreme Courts of Justice in Westminster Hall have, for the ease and benefit of the suitors of the Court, reformed, amended, and new moulded and modified their practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of justice. (Ibid.)

Such a vision of law, showing a developing body of the common law, growing from its original foundations over time, was clearly capable of explaining the content of the law of real property and crime and showing the core principles on which the law would develop. However, jurists taking this view had far greater difficulties when it came to explaining the law of obligations. Although he spoke of "the solemnities and obligation of contracts" as part of the common law (Blackstone 1979, 2: 68), Blackstone recognised that much of its content was newer, for "our ancient law-books" did not "often condescend to regulate this species of property." In the law of obligations, there were few "positive" rules to be extended by analogy, and resort had perforce to be made to "reason and convenience, adapted to the circumstances of the times"—the kind of reasoning which Hale relegated to the last source to use (ibid., 2: 385). Blackstone therefore divided two kinds of law:

Where the subject-matter is such as requires to be determined *secundum aequum et bonum*, as generally upon actions on the case [torts], the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts [of law and equity] must submit to and follow the ancient and invariable maxims, *quae relicta sunt et tradita*. (Ibid., 3: 436)

Blackstone was confronted by the problem (which Hale had not addressed) that in many areas, the common law acted more like a system of remedies than as one of rules, enforcing obligations whose content was derived from outside the law (see Lobban 1991, chaps. 3–4). At the same time, the court of Chancery's jurisdiction—of growing importance to the propertied and commercial society of the eighteenth century—was also rooted in notions equity and good conscience, as opposed to positive rules. This posed a problem for common law theorists. For cases involving obligations in the eighteenth cen-

tury often suggested that judges were simply enforcing a system of natural rules, or rules generated by community practice, making any positivist conception of the law untenable. Blackstone himself, for example, spoke of obligations in implied contracts as "such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law" (Blackstone 1979, 3: 161). Similarly, trespass, in its largest sense, was "any transgression or offence against the law of nature, of society, or of the country in which we live" (ibid., 3: 208). At the same time, in the early eighteenth century, a number of treatises were written on equity, whose principles were described in terms of natural law or "the original and eternal Rules of Justice" (Francis 1727, 2; cf. Fonblanque 1820).

Despite such language, Blackstone did not argue that there was a system of natural law which bound the parties and the judges prior to their decision. While the courts might recognise natural obligations, he considered that their formal binding authority came only with their legal recognition and definition. Where wrongs were committed, though "the right to some recompense vests in me, at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution" (Blackstone 1979, 2: 397; cf. 2: 438). If equity, reason or nature defined the general obligation, then, it was a judicial mechanism using positive law processes, which enforced it. Significantly, Blackstone argued that the obligation to accept the sentence of the court came not from a natural obligation, but from "the fundamental constitution of government, to which every man is a contracting party" (ibid., 3: 158). For he said it was part of the original contract of society to submit to the constitutions and ordinances of the state of which one was a member: "Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge" (ibid.). The law for the parties effectively came from the judgment.

Moreover, both the judges administering the courts and the remedies they administered were seen to derive their authority from the sovereign. On the common law side, Blackstone argued, the remedies for breaches of obligations through the action on the case were to be traced to a positive origin in the second statute of Westminster, which empowered the issuing of writs adapted to the individual circumstances of the alleged wrong (Blackstone 1979, 3: 51). The origin of the Chancery's jurisdiction was more controverted. By the early eighteenth century, many jurists also rooted its origins as a court to developments after the passing of the second statute of Westminster. According to Jeffrey Gilbert (in an argument accepted by Blackstone), this statute was not only used by the officers of the Chancery to make new writs, but it was also used in the reign of Richard II to erect a new jurisdiction, as the clerical Chancellor, John Waltham, used his power to devise the new writ of subpoena in order to develop a jurisdiction over uses, which had been devised

to evade the Statute of Mortmain (Gilbert 1758, 28–30; Blackstone 1979, 3: 51–2). This view of the Chancery as a belated bastard child of the second statute of Westminster was not entirely satisfactory, however. As Blackstone realised, the subpoena was not merely a duplicate of the action on the case, which, "might have effectually answered all the purposes of a court of equity; *except that of obtaining a discovery by the oath of the defendant*" (Blackstone 1979, 3: 51; emphasis added). Even those keenest to trace the precise statutory origins of the jurisdiction of the Chancery and to argue for its subordination to the common law had to admit that the court offered a distinct set of remedies (Acherley 1736, 10–3, 35–6).

For many, Chancery's jurisdiction was better explained in different terms (see Bacon 1832, 2: 452, note (a)). For Lord Hardwicke, it derived from the "arbitrary, though sound discretion" which was reserved to the sovereign and his council for "causes of an extraordinary nature," when regular courts were set up (Tytler 1807, 1: 239; cf. his argument in *R* v. *Hare and Mann* (1719), *English Reports* 93: 442). John Reeves towards the end of the century similarly saw the jurisdiction as derived from a delegation of the king's council to the Lord Chancellor to act according to conscience (Reeves 1787, 3: 188–93). But whether the court's jurisdiction originated from the delegation of the medieval king's power to do justice or from a statutory origin did not affect the fact that the judges' authority to decide cases derived from a sovereign source. By the eighteenth century, the rival views of the nature of the constitution which these theories of origin might once have represented no longer had much purchase; and indeed courts of law and equity no longer saw each other as rivals in the eighteenth century. Moreover, in many areas, the Chancery saw its rules as being as fixed as those of common law. By the eighteenth century, under the influence of Lord Chancellors Nottingham and Hardwicke, equity had begun to harden into a system of rules and precedents (see Nottingham 1954, xxxviii–lxiii; Croft 1989). Eighteenth century lawyers rejected the Aristotelian idea of equity, and saw it increasingly as a system of rules. As John Mitford put it, "Principles of decision adopted by courts of equity, when fully established, and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law" (Mitford 1787, 4n). The court of Chancery and its equitable jurisdiction could thus be assimilated into the kind of common law theory which Blackstone espoused.

If Blackstone's view of legal reasoning could account for the development of the common law from its foundational rules, and could also account for the constitutional system which allowed new rules to be forged in the courtroom, he had much greater difficulty in explaining the coherence of the rules thus newly developed, although this was something which was demanded by his project of giving an overview of English law. He did attempt a principled discussion of the law of obligations; but it was no easy task. Since there were no

English treatises on contract law until the end of the eighteenth century, and none on tort until the nineteenth, he had few sources to draw on (see Simpson 1987; Lobban 1997). His initial outline of contract law was thus not taken from authority; but neither was it based on the multiplicity of contractual remedies in English law (Blackstone 1979, 2: 442–70). Partially influenced by Roman law, he divided the subject into sections on "the agreement," "consideration" and the different types of contract, or "the *thing* to be done or omitted" (ibid., 2: 442). The latter was in turn divided into four sections, on sale or exchange, bailment, hiring or borrowing, and debt. In spite of this arrangement, however, Blackstone had difficulty in describing a fixed system of contractual rules (see ibid., 2: 461). A large part of his problem derived from the fact that in practice, the English law of obligations remained largely a system of remedies. So large was the variety of obligations on simple contracts, for instance, that he postponed discussion of them to the section on remedies (ibid., 2: 465; 3: 153–66). The problem was even more acute when it came to torts. When discussing the remedy for consequential wrongs, the action on the case, Blackstone argued that "wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore wherever a new injury is done, a new method of remedy must be pursued" (ibid., 3: 123).

Blackstone's discussion of obligations in effect failed to solve the problem presented by Hobbes's view of adjudication. When faced with disputes in contract or tort, Blackstone's—like Hobbes's—judges appeared to decide only on the basis of natural equity, for the parties before them. He did not explain how a body of rules of obligation could evolve, or what principles could lie behind them. If law was to be more than case by case adjudication on the basis of equity, and if the development of that law was to be more than the accidental result of arbitrary choices by judges which bound later ones, some explanation needed to be made of how principles could be found in obligations as well as land law. Blackstone's vision of the law as developing on a set of positive foundations rooted in an historical past did not promise a solution to this problem. As shall now be seen, a more coherent theory of the nature of obligations was to be found north of the border in Scotland. As shall now be seen, Scots writers took a different approach to legal theory, laying less stress on moments of positive imposition than the English writers we have considered.

4.5. Scottish Legal Literature before Kames

By the time that Blackstone began to compose his *Commentaries*, Scotland already had a well established tradition of institutional treatises, strongly influenced both by Roman law models and by continental natural law writers (see Cairns 1984b; Cairns 1997). Roman law had a far greater influence on Scots law than on English. Faced with a paucity of reliable texts on Scottish common law, fifteenth century Scots lawyers began to turn to the *ius commune* to

supplement and interpret the material they had. The process of Romanisation was further boosted when in 1532 a central College of Justice was set up, growing from an existing jurisdiction in the King's Council to do justice when ordinary judges failed. This new court, which adopted a variation of the Romano-canonical procedure, was operated by a recognisable legal profession, composed of men who had practised in the ecclesiastical courts and who had some training in the learned laws (Cairns 2000, 57–74). By 1700, "Scotland was a country in which the current practice of Roman law [...] had become blended with Scottish source material to form what one might call the Roman-Scots law" (Cairns 2003, 226).

From the early seventeenth century, Scots lawyers began to attempt systematic explanations of their law. A pioneering effort was made by Thomas Craig, whose *Jus feudale tribus libris comprehensum* was written around 1600, though it was not published until 1655 (Craig 1934). As Cairns has shown, Craig made the "brilliant historical insight" that much of Scots property law was feudal in origin (Cairns 1997, 200). He used this insight to make sense of Scots land law, aiming to show that feudalism was itself a system of principles which could be resorted to when local custom did not provide an answer to a legal question (see Craig 1934, 1.8.16). Craig's importance lays not in his jurisprudential understanding, however, but in his revealing the feudal nature of Scots law. A more sophisticated jurisprudential position was elaborated by James Dalrymple, Viscount Stair (1619–1695), who was Lord President of the Court of Session between 1671–1681 (when his opposition to religious tests disqualified him from office and led him to exile in the Netherlands) and from 1688 (when he returned with William of Orange) until his death (see Hutton 1981). Stair's major work, *The Institutions of the Law of Scotland*, which was written by 1662, and published in 1681 (with a second edition in 1693), was greatly influenced by continental writers, notably Grotius (see in general Walker 1981). Stair sought to emulate those who attempted to make law into a rational discipline, in contrast to older treatises and commentaries in the Roman law tradition, which he said failed to argue "from any known principles of right" (Stair 1981, 1.1.17). Like Craig, he argued that Roman law was a source of law in Scotland only in the absence of local sources of law and where it was equitable (ibid., 1.1.16). Natural law and reason lay at the heart of Stair's system. "Law," he wrote "is the dictate of reason determining every rational being to that, which is congruous and convenient for the nature and condition thereof" (ibid., 1.1.1). Following Grotius, Stair at first appeared to take a realist position on natural law, describing it as what reason dictated (see Stein 1981, 181–2). The three precepts of Roman law, *honeste vivere, alterum non laedere, suum cuique tribuere*, were "that eternal law, which cannot be altered, being founded upon an unchangeable ground, the congruity to the nature of God, angels and men." (Stair 1981, 1.1.1). God himself could not act against his divine perfection, and invariably governed himself by goodness,

righteousness and truth. However, the structure of the work, in which the concept of obligations played a crucial part, indicated a more voluntarist position, seeing law in terms of will, and reflecting Stair's presbyterian theology (see Stein 1957, 4). For Stair (for whom "natural law" and "equity" were interchangeable terms)

The first principles of equity are these: 1. That God is to be obeyed by man. 2. That man is a free creature, having power to dispose of himself and of all things, insofar as by his obedience to God he is not restrained. 3. That this freedom of man is in his own power, and may be restrained by his voluntary engagements, which he is bound to fulfil. (Stair 1981, 1.1.18)

These three principles of right—obedience, freedom and engagement—informed the structure of the work. Stair described as "obediential" obligations those which "have their original from the authority and command of God." They were contrasted with "conventional" obligations, which derived from contract or consent (ibid., 1.7.1; 1.1.19). However, even the obligation to keep one's promises ultimately derived from the will of God (ibid., 1.10.1). Liberty, in turn, consisted in man's freedom to act as he pleased "except where he is tied by his obedience or engagement (ibid., 1.2.3).

Conventionally enough, Stair rooted the origin of political society in consent, as people chose to refer their differences to a sovereign to determine. For Stair, "government necessarily implies in the very being thereof a yielding and submitting to the determination of the sovereign authority in the differences of the people" (ibid., 1.1.16). However, he was keen to counter the view that positive law was nothing more than the arbitrary will and pleasure of the lawgiver, since he saw that such a view would render hopeless his ambition of making law appear a deductive science. He answered it by arguing that positive law only existed to make declare equity—or natural law—or to make it effectual. "[E]quity is the body of the law," he argued, "and the statutes of men are but as the ornaments and vestiture thereof" (ibid., 1.1.17). Thus, the first sovereign decided disputes by natural equity, and customs subsequently developed, arising "mainly from equity." In this way, what was convenient and inconvenient could be "experimentally seen" over a period of time, attaining the force of law only if convenient (ibid., 1.1.15–16). Equity thus permeated the whole legal system and justified the attempt to systematise it. Nevertheless, law was more than natural equity. Stair pointed out that after the fall of man from paradise, men became depraved and unwilling to give each other their due. In this context, other principles were needed to make equity effectual. In particular, there were three principles of positive law: society, property, and commerce. While he noted that after the fall, men were willing to "quit something of that which by equity is his due, for peace and quietness sake," it was clear that the principles of equity harmonised with the principles of positive law:

The principles of equity are the efficient cause of rights and laws: the principles of positive law are the final causes or ends for which laws are made, and rights constitute and ordered. And all

of them may aim at the maintenance, flourishing and peace of society, the security of property, and the freedom of commerce. (Ibid., 1.1.18)

Though influenced by the Roman model, Stair departed from the structure of Justinian's *Institutes* in his work. At the outset, he indicated that he would structure his work around the concept of rights. Stair divided rights into three kinds. The first was personal liberty, or the power to dispose of one's person. The second was dominion, or the power over property. The third was obligation

which is correspondent to a personal right [...] and it is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something, to which he is bound by obedience to God, or by his own consent and engagement. Unto which bond the correlate in the creditor is the power of exaction, whereby he may exact, obtain, or compel the debtor to pay or perform what is due; and this is called a personal right, as looking directly to the person obliged, but to things indirectly as they belong to that person. (Ibid., 1.1.22)

When dealing with the nature of rights, Stair began with liberty, before dealing with obligations, and then with dominion. Moreover, unlike Justinian's division of persons, things and actions (which "are only the extrinsic object and matter, about which law and right are versant": ibid., 1.2.23), he examined firstly the constitution and nature of rights, secondly their conveyance, and thirdly their cognition (for instance by legal remedies). Stair's notion of right was a useful analytical tool to give a well-ordered overview of Scottish private law. Nonetheless, it was clear that the concept of duty was in many ways more central to his understanding of law, for what made it peculiar, as Campbell has noted, "is its treatment of obligation as a limitation on liberty with consequent emphasis on the debtor's duty rather than on the creditor's right" (Campbell 1954, 30).

  Stair's *Institutions* was the first comprehensive overview of Scots law, and (by the nineteenth century) came to have a special status as an authoritative work (see Blackie 1981). In the eighteenth century, a number of other institutes were written which sought to systematising Scots law. Shortly before Blackstone began to lecture, Andrew McDouall, Lord Bankton (1685–1760) published his three volume *Institute of the Laws of Scotland*, which sought both to put Scots law into an institutional framework, and to make comparisons with English law. Scottish jurists by the mid eighteenth century were strongly influenced by the voluntarist approach of Samuel Pufendorf (see Moore and Silverthorne 1983), and Bankton's view of law followed this voluntarism. He began by noting that only a superior could give laws, "for none other has power to command or forbid, which is the proper business of laws" (Bankton 1751–1753, 1.1.3). The rule set by law was the standard by which to judge right and wrong. By the law of nature, God "commands such actions as are agreeable to our rational nature" (ibid., 1.1.20). Equally, positive law not inconsistent with natural law was enacted with God's sanction. It de-

rived its authority from God just as the bye-laws of a city derived their authority from the laws of the nation, so the laws of particular nations derived theirs from the universal law of mankind (ibid., 1.1.15). To break the law of one's nation was thus to break the law of God. Nor was the sovereign bound by laws. While in a state where legislative power was lodged in more than one person, each of these individuals might be bound by law, an absolute sovereign was not so bound, "because his will is the law; but being subject to the laws of God and nature, he is thereby obliged to observe, in his commerce and transactions with his subjects, those rules which he hath prescribed to them as laws" (ibid., 1.1.68). If the sovereign's command contradicted natural law, it did not bind in conscience, but the subject should offer passive obedience.

Bankton's view of the origin of society followed the natural law model derived from Grotius and Pufendorf. Thus, he argued that property derived from agreement. Bankton added that natural law "prohibits all breach of faith, and commands us to be true to our engagements" (ibid., 1.1.30, cf. 32). The creation of property was followed by the development of more complicated kinds of contract, and the erection of a sovereign. This allowed for the development of circumstances in which timeless rules of natural law could be applied: "for example, before distinction of property took place, there could be no theft or robbery; but still it was an eternal truth, that to invade another man's property, whenever such took place, was injustice, and consequently theft or robbery are against the laws of nature" (ibid., 1.1.21). Like Stair, Bankton divided obligations which depended on the will of God, and those which depended on the agreement of particular parties.

While eighteenth century Scots institutional writers, including Bankton and John Erskine (whose *Institute of the Law of Scotland* was published in 1773) developed more overtly voluntarist definitions of law than Stair had, they shared his aim of putting Scots law into a rational, deductive framework. Such an approach could successfully describe and account for the law which had developed. Moreover, it was able to put forward a natural-law explanation of obligations in a way which Blackstone had failed to do. Nevertheless, these theories were less able to show the principles underlying the development of law. The institutionalist approach could not explain why new rules might be needed at any particular point, nor did it give any guidance to the judge on how to formulate new rules. Yet in the commercialising society of the eighteenth century, it was as important to have an understanding of the principles of obligations, to show how they were to be developed, as an overview which rationalised those which existed. It was which Lord Kames sought to provide.

4.6. The Natural Jurisprudence of Lord Kames

The thinkers of the "Scottish Enlightenment" took a radically different approach from that of the earlier institutionalist writers. Many of them, includ-

ing Adam Smith and John Millar, lectured on jurisprudence (see Smith 1978; Haakonssen 1981 and 1996; Cairns 1988). However, their juristic works remained unpublished in their lifetimes, and the best known jurist of the Scottish Enlightenment was Henry Home, Lord Kames (see Lobban 2004). Where jurists north and south of the border had developed theories of natural law based on voluntarist principles, Kames's natural jurisprudence was based on a different moral theory. Following Francis Hutcheson, Kames argued that man perceived his duties not by reason, divine law or self-interest, but by a moral sense, which allowed him to discern the qualities of right and wrong, just as he was able to perceive colour, taste or smell (Kames 1758, 69–70; Kames 1767, 3–7; Kames 1774, 2: 246). People instinctively approved of certain actions and disapproved of others. Let anyone, he wrote, "but attend to a deliberate action, suggested by filial piety, or suggested by gratitude; such action will not only be agreeable to him, and appear beautiful, but will be agreeable and beautiful, as *fit*, *right*, and *meet* to be done." Mankind could know the laws that were fit for human nature, for "the laws which are fitted to the nature of man, and to his external circumstances, are the same which we approve by the moral sense" (Kames 1758, 34–5, 37).

Though he rejected Pufendorf's voluntarism which other Scots lawyers adopted, Kames accepted his stress on human sociability. Observation of man's nature, he noted, revealed that, unlike beasts of prey, man could only live comfortably in society (Kames 1758, 27–8; Kames 1774, 1: 356–7). However, rather than using this merely as a postulate in his moral theory, Kames used it empirically, noting that it was dangerous to "assert propositions, without relation to facts and experiments" (Kames 1758, 86; see Berry 1997). In Kames's view, a theory was necessary which could describe the changes in the social condition of man, and consequential changes in ideas about duties. In the preface to his *Historical Law Tracts*, he famously criticised those who studied law as if it were a mere collection of facts. To make sense of the law, he said, one had to study it historically, and philosophically, searching for the underlying principles of doctrine, rather than merely describing it (cf. Lieberman 1989, chap. 7). "The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government," he wrote: "And as these are seldom stationary, law ought to accompany them in their changes" (Kames 1780, iii). Kames was hardly new in seeking to describe law in historical terms: From the early seventeenth century, there had been much research into the origin and nature of feudalism (notably by Craig), much of the learning of which had been incorporated into works such as Wright's. The eighteenth century also saw numerous works which sought to explain the rules and procedures of the English superior courts in historical terms (e.g., Gilbert 1737; 1738; 1758; Boote 1766). Many of these works sought to trace the evolution of precise rules from the introduction of feudalism or the foundation of courts, showing their modification through statutes

or decisions. Although they showed a perception of legal change, such histories did not explain change in broader philosophical or social terms, but rather saw developments more in terms of moments of positive change. Edward Wynne, for instance, in his *Observations on Fitzherbert's Natura Brevium*, argued that the "greatest tho' almost insensible change in regard to writs has been the work of time." However, the agent of this change was generally judicial action: "the enlarging the practice of ejectments, and actions on the case, the extended dominion of rules of court, and the abolition of the feudal policy" (Wynne 1765, 14). The fullest history of English law of the eighteenth century itself sought to show how the law had developed through the interplay of litigation and legal argumentation in courts, and new legislation (Reeves 1787; cf. Lobban 1991, 50–6).

By contrast, in part under the influence of Montesquieu, a number of eighteenth-century writers, notably in Scotland, sought to show that law developed insensibly, following the manners of the people. One such was John Dalrymple's history of feudalism in Great Britain. In it, he wrote that the transfer of the lord's right to the escheated lands of his tenant to the king occurred in Scotland "without statute, without even a single decision." This was a "very singular instance of the decay of the feudal law, how it melts away of its own accord [...] how the minds of men yield without force, when the variation of circumstances leads them into yielding" (Dalrymple 1759, 68). In similar vein, Kames's history was philosophical, searching for the principles inherent in historical development, not the particular history of a single doctrine or the law of a single nation. He was not interested in reading from current doctrine backwards, to show how the law had arrived at its current state. Instead, he wanted a broader, universal history of matters such as crime, contract or property. This involved not merely tracing what records related, but supplying broken links in the historical chain "by collateral facts, and by cautious conjectures drawn from the nature of government, of the people and of the times" (Kames 1792, 25).

Kames's conjectural history was linked to his moral theory. Kames was one of the first Scots to put into print the four-stage theory of social development, according to which societies progressed from the hunter-gatherer stage through to the pastoral, agricultural and commercial stages. For Kames, it was man's nature, as well as economic need, which drove this development. Man was not "designed by nature to be an animal of prey," so that his original precarious condition as a hunter or gatherer was not suited to his nature (Kames 1758, 77). His nature rather impelled him to become a shepherd, and to bring wild creatures under subjection. As these developments occurred, so property evolved. It did not come about by the exercise of reason, nor was it in Kames's view (as it was in his friend Hume's) a matter of convention. It was rather a matter of instinct, the result of man's nature as a hoarding creature, which gave him a sense of affection for what he called his own.

In Kames's view, the virtues which were necessary for social life were to be found inherent in man's nature—such as the virtues of veracity, fidelity and trust. However, they were not fully formed in early societies, but became more refined as they developed. The savage state, he argued, was the infancy of mankind, in which the more delicate senses lay dormant. As society developed, and as education and reflection intervened, so the moral sense became more refined (Kames 1774, 2: 251; Kames 1758, 104–8). Indeed, it was only at certain stages of development that particular virtues developed. Hunter-gatherers, for instance, did not need covenants: they only developed in later societies as surpluses were produced which could be exchanged, and only found their full form in commercial society (Kames 1792, 66–7). As societies developed, so did conceptions of property. Where in the hunter-gatherer stage, property was associated only with possession, in later stages, men formed a stronger sense of connection with their beasts (in the pastoral stage) or their land (in the agricultural). Over time, the sense of property in goods or lands thus became separated from actual possession (Kames 1792, 100).

Kames saw parallels between the rise of property and the rise of government. Both began on weak foundations, but grew to a modern stability and perfection (Kames 1792, 103). In common with many of his contemporaries (and most notably his protégé Hume), he dismissed the idea that the duty to obey government was founded in an original compact (Kames 1778, 1: 341). This duty was rather rooted in human nature, since government was essential to society. However, it developed over time. The earliest governments, being concerned only with matters such as mutual defence against enemies, were simple (Kames 1774, 1: 390–1). But as wealth and ranks developed, selfishness stirred neighbours against each other, and a higher authority had to interfere in the disputes of private individuals. Government grew, when men first submitted their disputes to arbitrators, and subsequently when these became judges whose jurisdiction could not be refused (Kames 1792, 21; Kames 1777, 144). Jurisdiction first emerged in contractual disputes, and gradually extended to crime (Kames 1792, 26, 31, 46).

Kames's conjectural approach allowed him to explore the principles behind the law of obligations, whose development over time had left far fewer traces than were to be found for land law. A universal history allowed Kames to trace the underlying principles of criminal law, delict and contract, as they had developed over time, in a way which would help guide judges in the future development of the law. For Kames, the concept of equity stood at the centre of his notion of legal change. Kames did not, like Stair, simply equate equity and natural law; nor did he see it as a technical system of procedure or jurisdiction. Equity was the vehicle through which, over time, the law recognised obligations and made them binding. The principles of equity could thus explain how and why new obligations came to be recognised at law. Although he accepted Shaftesbury's notion of a moral sense, Kames did

not (like Shaftesbury) believe that there was a duty of universal benevolence. In a manner reminiscent of the natural jurists' division of perfect and imperfect rights, he distinguished between duties, which were actions necessary for the support of society, the breach of which were universally regarded as wrong, and acts of benevolence, which earned praise for the actor, but whose neglect was not condemned (Kames 1758, 43). However, for Kames, the line between duty and benevolence was not a fixed one, for in certain contexts, benevolence could become a duty. An examination of human nature revealed that benevolence was directed at those nearest to hand. The further away the subject, the more the feeling diminished (Kames 1758, 60; Kames 1774, 1: 367, 372). The closer the connection between the parties, the more benevolence became a duty. Thus, in the relationship between parent and child, mutual benevolence was an active duty: "Benevolence among other blood-relations is also a duty; though inferior in degree; for it wears gradually away as the relation becomes more distant" (Kames 1767, 15). Over time, what had been regarded as benevolence could be transformed into duty, if it were susceptible to being made into a rule. The "duty of benevolence arising from certain peculiar connections among individuals," he said, "is susceptible in many cases of a precise rule. So far benevolence is also taken under the authority of the legislature, and enforced by rules passing commonly under the name of the law of equity" (Kames 1758, 102). What was originally a rule in equity thus became over time a rule of common law: "But by cultivation of society, and practice of law, nicer and nicer cases in equity being daily unfolded, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it by the common law" (Kames 1778, 27).

4.7. Kames's Theory of Obligations

Kames used his theory of the moral sense and social development as a foundation on which to build a theory of obligations. The principles of obligation were to be found in the moral sense. This moral sense was a *common* sense: "That there is in mankind an uniformity of opinion with respect to right and wrong, is a matter of fact of which the only infallible evidence is observation and experience" (Kames 1774, 2: 251). However, he admitted that this sense was not found in equal degree in all individuals or in all societies. Indeed, "the moral sense, in some individuals, is known to be so perverted, as to differ, perhaps widely, from the common sense of mankind" (Kames 1767, 23; cf. Kames 1774, 2: 251). For Kames, the moral sense developed in a social context, and it developed over time. It was relatively undeveloped in the infancy of mankind, when men followed custom, passion, imitation, but it was refined when the taste in morals developed. If in advanced societies, some might still be found who did not have the sense of right and wrong, this no more proved

its non-existence than the fact that freaks existed proved there was no human form. However, this made him stress the fact that any inquiry concerning the moral sense had to be limited to "enlightened nations." Kames's view of a moral sense common to mankind was essential to his theory of law. For he said that if there were no common standard to determine controversies, "courts of law could afford no resource: for without a standard of morals, their decisions must be arbitrary, and consequently have no authority or influence" (Kames 1767, 10–1). However, as shall be seen, he was ultimately unable to produce a theory of the law of obligations based on the moral sense, and had to resort at crucial points to an incompatible principle of utility.

Kames used his theory of human nature and his conjectural history to explain the distinction between crimes and delicts, and the different approaches they took to liability. He argued, firstly, that those who committed crimes instinctively felt a sense of remorse, while those who were its victims felt a desire for revenge, particularly for intentional harms (Kames 1774, 2: 246; Kames 1792, 4–5). By contrast, those who committed unintended harms felt bound in conscience to make reparation, though they did not feel deserving of punishment. Kames argued, secondly, that the treatment of crimes and delicts had distinct historical origins. In his view, the jurisdiction over delicts developed first. For men were willing from an early age to submit their differences over property to arbitrators, who were made into binding judges when parties began to dispute their decisions. By contrast, where the wrong was an intentional harm, men driven by the passion of revenge were less willing to give up this power to another body, and it was only over time that the government took on this power (Kames 1792, Tract 1, passim).

As a consequence of their different natures, delicts and crimes were dealt with differently. Discussing delicts, Kames took the view that, in order to determine whether a wrong had taken place, regard had to be given to the common sense of mankind, rather than the unreliable individual reaction of the victim. Common sense dictated that a person had to compensate for harms done which were foreseeable, for "when we act merely for amusement, our nature makes us answerable for the harm that ensues, if it was either foreseen or might with due attention have been foreseen" (Kames 1774, 2: 278–9). However, he noted that where a man had a privilege, or right, a different standard was to be invoked. In these situations, the man causing harm had to pay only for harms directly caused by his acts, but not for those which were only foreseeable consequences. For as Kames pointed out, if the mere possibility of harming others restrained men from exercising their rights, they would do nothing, which would both render their right without use, and be inexpedient for society (Kames 1774, 277–8; Kames 1778, 1: 47). Discussing the question of determining the standard of liability of the wrongdoer, Kames noted that in delicts, the standard was an objective one. It was "the common sense of mankind that determines actions to be right or wrong" (Kames 1767,

23; cf. Kames 1774, 2: 274–5), rather than the subjective one of the individual. The fact that man might by nature be rash would not excuse him.

For Kames, the standards of liability in crime and delict were distinct. In delict, the opinion of either of the parties could not be taken as the standard. Rather,

> there must be an appeal to a judge; and what rule has a judge for determining the controversy, other than the common sense of mankind about right and wrong? But to bring rewards and punishments under the same standard, without regarding private conscience, would be a system unworthy of our maker; it being extremely clear, that to reward one who is not conscious of merit, or to punish one who is not conscious of guilt, can never answer any good end. (Kames 1767, 35)

When it came to criminal liability, then, it was the subjective intention of the defendant which had to be taken into account, rather than any objective standard, for the moral sense dictated that one should be punished only for one's intended acts.

Although the notion of crime had originated in the victim's desire for revenge, the determination of what constituted a crime was not left to the individual reaction, but to the decision of public authority. As Kames put it,

> in regulating the punishment of crimes, two circumstances ought to weigh, viz. the immorality of the action, and its bad tendency; of which the latter appears to be the capital circumstance, as the peace of society is an object of much greater importance, than the peace, or even life, of a few individuals. (Kames 1792, 54)

As this comment indicates, when it came to the detailed elaboration of his theory, Kames did not rely wholly on a theory of the common sense as an explanatory factor, but rather invoked the notion of utility. Kames sometimes spoke of the two notions as complementary. Thus, he argued that the rule that men should act with care was "a maxim founded no less upon utility than upon justice" since "society could not subsist in any tolerable manner, were full scope given to rashness and negligence, and to every action that is not strictly criminal" (Kames 1774, 2: 291–2; cf. Kames 1778, 1: 89, 144). Moreover, he declared that "we must not do ill to bring about even the greatest good" (Kames 1774, 2: 267). At some points, he therefore suggested that the function of utility was to go further than justice in repressing wrongs. "Wrong must be done before justice can interpose," he wrote, "but utility lays down measures to prevent wrong" (Kames 1778, 2: 84). Elsewhere, however, he noted that equity might have to be sacrificed for the sake of utility. Thus, he noted that "equity, when it regards the interest of a few individuals only, ought to yield to utility when it regards the whole society." Kames gave a number of examples where utility had to preponderate since the interest of society was "by far the more weighty consideration" (Kames 1778, 1: 24, 76). This was especially the case with commercial matters. Thus, he admitted that

according to the moral sense, where a purchaser suffered from making a mistake of quality by buying goods which were of lesser quality than he had presumed, the vendor should not profit, but the contract should be undone. However, Kames argued that in commercial reality, this could not be done, nor could the price be abated since it "would destroy commerce." Noting that "equity may be carried so far as to be prejudicial to commerce by encouraging law-suits," he argued against the *actio quanti minoris* which was given in Roman law to a purchaser who by ignorance or error paid more for a subject than it was intrinsically worth: "the principle of utility rejects it, experience having demonstrated that it is a great interruption to the free course of commerce" (Kames 1778, 1: 271–2). Similarly, discussing unequal bargains, Kames noted that

though for the sake of commerce, utility will not listen to a complaint of inequality among *majores, scientes, et prudentes*; yet the weak of mind ought to be excepted; because such persons ought to be removed from commerce, and their transactions be confined to what is strictly necessary for their subsistence and well-being. (Kames 1778, 1: 103)

In Kames's theory, utility and equity were ultimately not incompatible, insofar as he maintained that utility should never be used for the purpose of positive injustice. Instead, utility set limits to how far the courts would enforce claims of justice, turning benevolence into duty. However, this function of utility in effect undermined Kames's ability to develop a theory of obligations based on a concept of the moral sense which would explain how the law would continue to develop. Ultimately, Kames failed to articulate a successful theory of obligations on the foundations of the moral sense. Although his moral theory proved influential, notably in late eighteenth century America, his legal arguments proved less persuasive on both sides of the border, and by the nineteenth century, his influence waned. One reason for this was that his aim was to write a treatise which would draw on the case law, and therefore influence the practice, of both England and Scotland, and promote a closer union between the two. If Scots lawyers found some of his doctrine idiosyncratic, early nineteenth century English equity lawyers found that his work addressed too few of the questions which concerned their practice.

Chapter 5

THE AGE OF THE FEDERALISTS

5.1. The Common Law Mind and the American Revolution

In 1766, parliament passed the Declaratory Act, proclaiming that Westminster had full power to make law binding the colonies "in all cases whatsoever." The notion of parliamentary sovereignty which it reflected was one generally accepted by eighteenth century English lawyers. The triumph of parliament in the revolution of 1688 was supposed to have secured liberty from despotism; and the language of English politics was henceforth much less legalistic than it had been in the seventeenth century. The structure of the balanced constitution was widely lauded, receiving Montesquieu's seal of approval. Anxiety about arbitrary government now centred not on the structure of government, but on its operation. Opposition politicians feared that patronage and electoral corruption would increase the influence of the crown and its ministers, and thereby upset the balance. In this context, the rhetoric of civic virtue became more prominent, as "country party" ideologists drawing on the works of Machiavelli and James Harrington urged active political participation to prevent corruption (see Pocock 2003; Robbins 1959; Dickinson 1979). Politicians who argued that parliament was bound by the constitution understood it more in terms of its political spirit than in strictly legal terms. For Radical agitators, meanwhile, the prime remedy to political ills was not to declare limitations on the power of parliament, but to ensure greater representation of the people in the institutions. From the other side of the Atlantic, however, things looked altogether different. To Americans, parliament in the mid-eighteenth century came to look like an institutional equivalent of the Stuart kings, willing to interfere arbitrarily with their property rights. The Declaratory Act brought to a head a clash between two distinct visions of the common law, derived from the same tradition: an English positivist view centred on parliamentary sovereignty, and an American conception, which invoked fundamental, customary rights, which could not be removed by the legislature (Greene 1986a; Greene 1994; Reid 1986; Reid 1987; Reid 1991; Reid 1993).

The crisis was precipitated, when, at the end of the Seven Years War, British governments sought to make the colonies help defray the costs of imperial defence, for instance through the Stamp Act of 1765, which imposed taxation aimed at raising revenue, rather than at regulating imperial trade. In reply, Americans protested against the imposition of taxes by a parliament in which they were not represented. As the Stamp Act Congress put it, "it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent" (Morison

1965, 33). As protest increased, so parliament began to interfere with Americans' own institutions, violating rights conferred by royal charters, and hindering rights to assemble and petition. In 1768, for instance, New York's General Assembly was suspended, while in 1774, legislation unilaterally revoked parts of Massachusetts' charter of 1691. Other constitutional rights came under attack, notably the right to trial by jury. Americans were alarmed by the extension of the juryless Vice-Admiralty courts in the 1760s, and by moves to make judges more dependent on the crown (Reid 1986, 178–84; Bailyn 1965, 68). Moreover, in 1769, parliament voted that treasons committed in America could be tried in England under a statute of 1543; while five years later the Administration of Justice Act, passed after the Boston Tea Party, provided that law enforcement officers charged with any offence carried out in the course of their duties could be tried in England (Reid 1991, 281; Reid 1993, 17–22).

Americans responded to these measures by invoking language reminiscent of Coke's ancient constitutionalism, claiming rights found "in that most excellent monument of human art, *the common law of England*" (Adams 1977, vol. 1: 86, quoted in Thompson 1998, 46–7). In 1774, the first Continental Congress resolved that "our ancestors, who first settled these colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England" (Morison 1965, 120; cf. Reid 1986, chap. 14), and that these rights had descended to their heirs. They were entitled to enjoy such rights "as their local and other circumstances enable them to exercise and enjoy." The crucial principle Americans found in the common law was that of consent and participation, in both legislation and adjudication. As John Adams saw it, both the jury and the House of Commons dated from Saxon times, and fulfilled similar constitutional functions. "As the constitution requires, that, the popular branch of the legislature should have an absolute check so as to put a peremptory negative upon every act of the government," he wrote, "it requires that the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature" (quoted in Reid 1986, 51). Since it was not practicable for Americans to send representatives to Westminster, the first Continental Congress resolved, their consent could only be given in local assemblies.

Any notion that Americans had rights derived from the common law which could not be altered by parliament was, however, difficult to prove to the satisfaction of English lawyers, who took a more technical view of the common law. Indeed, the very idea that Americans had carried the common law with them had taken some time to gain acceptance, and case law gave ambiguous authority. According to *Calvin's Case* (1608) (*English Reports* 77: 377), while lands inherited by the king continued to be ruled by their own laws, he was free to alter the law in any land which was conquered. If he introduced the

common law into these lands, parliament's supremacy accompanied it. Lawyers like Blackstone continued to hold that the American colonies had indeed been conquered, and that the "common law of England, as such, has no allowance or authority there," though they were subject to the control of parliament (Blackstone 1979, 1: 105). Americans countered that (except for New York and Jamaica), the colonies had not been conquered, but were settled by Englishmen. It was not until the turn of the eighteenth century that case law and opinion established that where new territory was settled by Englishmen, they carried the common law with them; though it was also stated that they were bound by statutes which named them (see *Blankard* v. *Galdy* (1694), *English Reports* 87: 359, and *English Reports* 91: 35; *Dutton* v. *Howell* (1694), *English Reports* 1: 17; *Anonymous* (1722), *English Reports* 24: 646).

By the time this question was settled, the crown had already created colonial legislatures under charters. In the 1760s, many Americans argued that royal charters merely confirmed ancient rights, which did not derive from the king's grant alone (Reid 1986, 162ff.). Nonetheless, it was impossible to argue for an institutional ancient constitutionalism in America. Firstly, the structure of governments created in the various colonies differed from each other, and often fell far short of the ideal. Richard Henry Lee commented in 1776, "With us [in Virginia] 2 thirds of the Legislature, and all the executive and judiciary Powers were in the same hands—in truth it was very near a Tyranny" (quoted in Wood 1993, 201). Secondly, charters creating American legislatures confirmed the pre-eminence of Westminster. The power to disallow legislation in the colonies at variance with those in the metropolis was retained by the crown, and regularly exercised in the eighteenth century by the Privy Council. In 1696, parliament also asserted its power to declare void laws and customs inconsistent with its legislation. Similarly, colonial charters from the late seventeenth century reserved a right of appeal from colonial courts to the crown, effectively codifying the idea that all subjects had the right to appeal to the justice of the king (see Smith 1950, 74ff.). This was a significant deviation from English constitutional practice, for it had been enacted in 1641 that "neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction" over the property of subjects, "but that the same ought to be tried and determined by the ordinary courts, and by the ordinary course of the law."

Colonial legislatures and courts were expected to pass and apply laws which would be "as consonant and agreeable to the laws and statutes of this our realm of England as [...] the circumstances of the place will admit" (Thorpe 1909, vol. 89: 1865). However, it was unclear how much of the common law actually applied in America. Substantive law at the periphery could vary significantly from the metropolitan model, as it was adapted to local circumstances by the magistrates applying it, and judges had great discretion in deciding what was and what was not suitable law for the colonies (see Goebel 1969; Haskins 1960, chap. 8; Konig 1979, 37). Moreover, when American

rules were challenged in appeals, the Privy Council's decisions proved inconsistent, showing that even Whitehall was unclear how far the precise rules of the common law were to be followed on the frontier (Smith 1950, 562–72). It often remained unclear whether the common law to be applied in the colonies was the *current* law (as explained, as the case might be, by legislation postdating the colonial settlement), or that at the time of settlement. Similarly, it might be unclear whether statutes predating the settlement applied in the colonies, or were not to be applied since they were unsuitable for them (Smith 1950, 487–95). As a result, many an early eighteenth century commentator complained that it was almost impossible to know what law was in the colonies (see, e.g., Greene 1986b, 26; Smith 1950, 472).

This made it impossible for Americans to make the kind of precise legalistic arguments in defence of their rights which Selden had made in seventeenth century England. Indeed, when Americans thought of the common law, it was often more as a set of broad principles, a kind of *mentalité*, rather than as the kind of reasoning which would find favour in Westminster Hall. As Robert Beverley wrote, early Virginian courts determined

every thing by the standard of equity and good conscience. They used to come to the merits of the cause, as soon as they could without injustice, never admitting such impertinences of form and nicety, as were not absolutely necessary. (Beverley 1705, 19–20)

Faced, in the 1760s, with an assertion of parliament's sovereignty, American lawyers therefore found themselves in difficulties in their attempts to marshal common law arguments against Westminster. When James Otis sought to argue that the power of parliament was limited by a fundamental law, he echoed Coke's voice in *Bonham's case* in stating that "an act against the constitution is void: an act against natural equity is void" (Adams 1850–1856, vol. 2: 522, see also Bailyn 1965, 449; cf. Adams 1977, vol. 1: 152). Nevertheless, Otis at the same time argued that "[t]he power of Parliament is uncontrollable but by themselves, and we must obey," adding that there would be "an end of all government" if subjects "or subordinate provinces should take upon them so far to judge of the justice of an act of Parliament, as to refuse obedience to it" (Bailyn 1965, 448). Otis's apparently contradictory position has been much debated (see Bailyn 1965, 102, 416–7; Bailyn 1992, 176–81; Wood 1993, 263–4; Grey 1978, 872). He appeared to take the view that parliament would only enact such legislation if it were misled or mistaken, and that the constitution was so arranged that the legislature and courts would "inform" each other of mistakes (Bailyn 1965, 455). This argument assumed that the legislature would not want to violate constitutional fundamentals, and would correct its own legislation if it interfered with people's rights, once the equitable interpretation of the courts showed the violation of these norms. If this was Otis's view, however, it was answered by the Stamp and Declaratory Acts, which showed that parliament was not, after all, acting in error.

Much American writing of the later 1760s contained the language of disappointed loyalty mingled with protest. Writers like John Dickinson noted that the connection with the mother country was a necessary one. "We are but parts of a whole," he said, "and therefore there must exist a power somewhere to preside, and preserve the connexion in due order" (Morison 1965, 39). For men like him, when parliament legislated for trade, it was for the benefit of the empire as a whole; but when it legislated to raise internal revenues without consent, the rights of Americans were invaded. There was much political debate over the nature of representation, with imperialists making the argument that the House of Commons did not represent only its electors, but "virtually" represented all England, and by extension, the empire (see Jenyns 1765; Wood 1993, 173ff.). This view was challenged by American Whigs, who argued that while members of parliament and electors in England would both be bound alike by acts passed, and thus might share a community of interests, "not a single actual elector in England might be immediately affected by a taxation in America" (Dulany 1765, 10). This argument proved politically persuasive, by 1783, even to the British. However, until the revolution, it remained *legally* difficult to challenge parliament's authority to legislate on matters internal to the colonies.

Otis himself admitted in 1764 that in "special cases," parliament could legislate, though he added that the spirit of the constitution "must make an exception of all taxes, until it is thought fit to unite a dominion to the realm" (Bailyn 1965, 467). A decade later, when John Adams and James Wilson attempted a legal argument to deny parliament's authority to legislate, they cited as authority an argument made in *Blankard* v. *Galdy* by Sir Bartholomew Shower. Drawing on a case concerning Ireland from 1484, cited by Coke (*English Reports* 77: 1388), Shower had claimed that residents of Jamaica were not bound by English statutes since they sent no representatives to Westminster (Adams 1977, vol. 2: 351; Wilson 1896, vol. 2: 531). However, the precedent was problematic, for both Shower and Coke added the rider that a colony was bound by a statute if specifically named. Adams and Wilson sought to answer this by arguing that such comments were *obiter dicta*. Those attempting a legal argument were also faced with the problem of precedent, for Britain had in the past legislated for the colonies, as for instance with the Post Office Act of 1713 (Reid 1991, 246–73). Before the Stamp Act, men like Otis accepted such legislation on the basis that it was enacted for the benefit of the people and was therefore not an imposition (Bailyn 1965, 468). By 1774, however, Thomas Jefferson, denounced the Post Office Act as part of a series which "too plainly prove a deliberate and systematical plan of reducing us to slavery." His view was simple: "The true ground on which we declare these acts void is, that the British parliament has no right to exercise its authority over us" (Jefferson 1999, 69). Wilson similarly was in the end prepared to abandon the legal argument, and argue as a matter of principle that the

mere fact than an unrepresented colony was named could not confer absolute power on the distant legislature. Even a thousand judicial decisions, he argued, could not make this law.

As the 1770s progressed, the debate over the relationship between metropolis and periphery constantly ran up against the issue of sovereignty. Westminster and its agents rejected the idea that it only had authority to legislate for imperial matters. "I know of no line," Governor Thomas Hutchinson told the Massachusetts General Court in 1773, "that can be drawn between the supreme authority of Parliament and the total independence of the colonies: it is impossible that there should be two independent Legislatures in the same state" (Wood 1993, 344). By now, an increasing number of American Whigs accepted this logic. The argument now moved from the idea that parliament was bound by a customary constitution to respect the rights of Americans, to the notion that the colonies and Great Britain were separate states under the same king. "Those who launched into the unknown deep, in quest of new countries and habitations," James Wilson wrote, considered themselves the king's subjects, but did not consider themselves represented in or bound by parliament. "They took possession of the country in the *king's* name," he said, " they established governments under the sanction of *his* prerogative, or by virtue of *his* charters" (Wilson 1896, vol. 2: 537; cf. Hamilton 1961–1987, vol. 1: 90, 102).

An argument for this position could be made using the language of the common law. Citing *Calvin's Case*, Adams argued that the colonists' allegiance was to the natural person of the king, not to the body politic of Great Britain (Adams 1977, vol. 2: 347–8). Alexander Hamilton invoked the language of feudalism, pointing out that, as feudal overlord, the king was the original legal proprietor of all land in England. "Agreeable to this rule," he proceeded, "he must have been the original proprietor of all the lands in America, and was, therefore, authorized to dispose of them in what manner he thought proper" (Hamilton 1961–1987, vol. 1: 93, 108). Hamilton examined a number of sixteenth and seventeenth century grants and charters, showing that no power over the colonies was given to parliament, but that the early Stuart kings rather regarded their American colonies as being beyond the realm and jurisdiction of parliament. In the colonies, he suggested, the crown gave up sole legislative and executive powers by instituting governments on the English model.

The argument that American rights derived from charters granted by kings was nevertheless a difficult one to sustain. Firstly, not all the colonies had charters, and where charters had been granted, they varied in detail. Secondly, the crown had revoked charters in the past, treating them as grants rather than as contracts of government. Thirdly, politicians in London considered colonial charters as essentially of the same type as corporation charters, which were subject to the jurisdiction of parliament. By that view, colonial assemblies and governors were similar to mayors and aldermen, with the power to

issue by-laws (Reid 1991, 172ff.). In any event, many Americans also felt un-comfortable with rooting their rights in a feudal past, and sought to move away from such legalistic arguments. Adams argued that seventeenth century monarchs, acting under the influence of canon and feudal law, erroneously thought they "had a right to all the land their subjects could find," and the settlers, equally deluded, accepted lands granted by charters presuming regal authority. If the argument was effective in denying any parliamentary author-ity, Adams did not accept the legal premises behind the original grants (Adams 1977, vol. 2: 331). Jefferson agreed: "Our ancestors," he said, "were farmers, not lawyers. The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real; and accordingly took grants of their own lands from the crown" (Jefferson 1999, 78).

By 1774, Adams and Jefferson therefore argued that the rights of the colo-nists were to be found more in nature than in the common law constitution. For Jefferson, the settlers had a natural right to emigrate in search of new habitations, and to establish "new societies, under such laws and regulations as to them shall seem most likely to promote public happiness" (Jefferson, 1999, 65). This, Adams said, was precisely what the Plymouth planters had done, having bought land from the Indians and exercised "all the powers of government, legislative, executive and judicial, upon the plain ground of an *original contract* among independent individuals for 68 years" (Adams 1977, vol. 2: 317). This led easily to an argument that the relationship between the colonists and the king was one defined by an original contract, confirmed by charters (ibid., 321, 331, cf. Hamilton 1961–1987, vol. 1: 90). Charters were not grants from an absolute monarch, but had their binding force "wholly from compact and the law of nature" (Adams 1977, vol. 2: 354).

Where did this leave the common law? Adams said that New Englanders obtained their laws "not from parliament, not from the common law, but from the law of nature and the compact made with the king in our charters" (Adams 1977, vol. 2: 328). Jefferson agreed: having settled the wilds of America, the emigrants "thought proper to adopt that system of laws under which they had hitherto lived in the mother country" (Jefferson 1999, 66). The common law in America came not from ancient custom or inherent au-thority, but from free choice. In this context, the legalistic arguments of West-minster Hall, were replaced by Lockean natural law arguments. "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records," Hamilton wrote: "They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself" (Hamil-ton 1961–1987, vol. 1: 122). Arguing that no man in a state of nature had the right to deprive another of his life, liberty or property, he noted that all gov-ernments could only arise from compacts between the ruler and ruled, and "be liable to such limitations, as are necessary for the security of the *absolute rights* of the latter; for what original title can any man or set of men have, to

govern others, except their own consent?" (Hamilton 1961–1987, vol. 1: 88). As Jefferson saw it, "every society must at all times possess within itself the sovereign powers of legislation." While bodies were in existence to which the people had delegated those powers, they alone exercised such powers. But when they were dissolved, "the power reverts to the people, who may exercise it to unlimited extent" (Jefferson 1999, 76–7).

In 1776, Jefferson drafted the Declaration of Independence. Its preamble was cast in the language of natural law, proclaiming the "self-evident" truths that all men were created equal and endowed with unalienable rights to life, liberty and the pursuit of happiness. The main body of the text however was an indictment of the king, relating "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states" (Jefferson 1999, 102–3). George III was accused of acting in a tyrannical manner, of combining with the British parliament to subject Americans to a "jurisdiction foreign to our constitution," of "taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments," and of abdicating "government here, by declaring us out of his protection and waging war against us." 1776 was America's 1688, as Jefferson perceived (Mayer 1994, 37). It was constitutionally justified by Blackstone's principle that if the magistrate subverted the constitution, he could be said to have abdicated. Yet it was a political, rather than a legal event, looking not to Coke, but to what Adams in 1775 called the revolution principles "of Aristotle and Plato, of Livy and Cicero, of Sidney, Harrington and Locke" (Adams 1977, vol. 2: 230). Moreover, removing the king forced them to follow the Lockean route rather than the Blackstonian one. For there was no replacement king to fill George III's shoes, nor was there a local aristocracy to preserve the balance. Instead, the revolution returned power to the people a whole.

5.2. The Federalist Idea of a Constitution

"How few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate for themselves of their children!" (Adams 1850–1856, vol. 4: 200). In May 1776, under John Adams's urging, the Continental Congress, faced with Westminster's declaration that the colonies were in a state of rebellion, declared that all authority under the crown should be suppressed and that new constitutions should be drafted (Wood 1993, 132). By 1777, each of the colonies had drafted constitutions, generally on the model of their previous instruments of government, but usually with a significantly weakened executive. The constitution makers, under the influence of a Radical Whig suspicion of the tendency of power holders towards corruption, sought to strengthen legislatures and to make them as representative of the people as possible (Wood 1993, 161ff.). At the

same time, several of the constitutions gave constitutional protection to key rights, such as trial by jury or freedom of the press. Virginia's bill of rights declared that all men were by nature free and equal and had certain inherent rights which they could not contract away: "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety" (Swindler 1973–1988, vol. 10: 49). Such instruments reflected a Lockean view, affirmed in Jefferson's later comment that the true of legislation was "to declare and enforce only our natural rights and duties, and to take none of them from us" (Jefferson 1892–1899, vol. 10: 39, quoted in Mayer 1994, 75).

In spite of these declarations, however, the state constitutions of 1776–1777 reflected more strongly the notion that there had to be a supreme lawmaking power in the state, and that it had to be under the control of the people. The new democratic legislatures soon proved troublesome. In the aftermath of the war of independence, with many states in financial crisis, and many individuals in debt, legislatures began passing acts issuing paper money, giving debt relief, and setting aside contracts, thereby undermining rights of property (see Madison, Hamilton, and Jay 1987, 25). The new constitutions, which were not the creatures of special conventions but of ordinary legislatures, were not treated as supreme governing laws. A number of state legislatures in the 1780s amended their constitutions through ordinary legislative procedures, acting as if they were as sovereign within their domain as Westminster (Wood 1993, 275). In this context, writers began to argue that constitutions should be seen as fundamental laws limiting the power of the legislature. John Adams was the first to argue that constitutions should be drawn up by representatives of the people in conventions, whose proposals would subsequently be ratified by the people, and which would not be capable of being changed by ordinary legislation (Thompson 1998, 39–43; cf. Jefferson 1892–1899, vol. 3: 225–9). This procedure was adopted in Adams's native Massachusetts in 1780. The notion developed that a constitution was a social contract between the people, with governments being merely the people's magistrates (Wood 1993, 281–91).

By the 1780s, it had become clear that the constitution of the Union also needed revision. When the Articles of Confederation were passed by the Continental Congress in 1777, it was assumed that republican government required the creation of small states. There was no attempt then to create a national unified government, but only a confederation to fight the war against Great Britain. Each state retained its sovereignty and independence, as well as every power, jurisdiction and right not expressly delegated to the United States. The only institution created was the single chamber Continental Congress, and government was administered by a committee of this body. It had no power to tax directly, but could only demand quotas and requisitions from the states, which were free to collect them in their own way. It had no power to

regulate commerce. Legislation required the assent of at least nine states, while changing the Articles required unanimity among the thirteen. With the Continental Congress unable to enforce its decisions, and states unable to agree, and following their own paths, the union looked increasingly weak. The incentives for co-operation diminished with the end of the war, and many feared that confederation might collapse as states looked to their own interests. In this context of crisis, a Virginian initiative led to a meeting at Annapolis in 1786 to debate how to resolve disputes in interstate commerce. Among the few delegates attending were James Madison of Virginia and Alexander Hamilton of New York, who wanted a convention to discuss all the political and economic problems facing the nation. Though the Continental Congress did not call one, it soon endorsed a convention, for the purposes of revising the Articles.

The framers of the Constitution meeting at Philadelphia in 1787 had to reconcile two presumptions which lay behind the revolution, which seemed to have come into conflict in the decade thereafter: the notion that there were natural rights which needed protection and the idea of popular sovereignty. It also had to address the problem of the relationship between the national government and the state governments, seeking to resolve in the United States the question which had agitated imperialists in the 1760s, whether sovereignty could be divided. During the discussions and negotiations at the convention, and with strong guidance particularly from Madison, answers were gradually found to these questions. After the constitution was drawn up, and pending its ratification in state conventions, Madison, Hamilton, and John Jay set out a defence of the document in a series of articles, the *Federalist Papers*, under a single *nom-de-plume*, Publius.

In this work, it was demonstrated that the constitution was not to be an agreement of sovereign states, but would rather be a fundamental law deriving its authority directly from the sovereign people (Madison, Hamilton, and Jay 1987, 184). As Madison explained in *Federalist* No. 46, the federal and state governments were "different agents and trustees of the people, constituted with different powers and designed for different purposes" (ibid., 297; cf. Banning 1995, 139). There would therefore be no *imperium in imperio*. It was also eventually agreed at the convention that the federal government needed to have power directly over the people, on whom it depended for its authority, rather than acting through a power of compelling the states to comply with its decrees. Arguing for such a power in *Federalist* No. 15, Hamilton said that the very notion of government implied the power of making law. Essential to the idea of a law, he added, was "that it be attended with a sanction," for without the threat of "punishment for disobedience," it would be mere counsel. Such a penalty could only be inflicted through courts acting on individuals, or through military force exerted against bodies politic. "In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state

of war; and military execution must become the only instrument of civil obedience," he said: "Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it" (Madison, Hamilton, and Jay 1987, 149, cf. 203).

If Congress was to have strong powers, how was it to be prevented from acting arbitrarily? The solution adopted was to ensure a separation of powers between branches of government whereby each branch would be responsible to the people, and would guard against abuses by the others (Wood 1993, 447ff.). In Madison's view, Montesquieu had not favoured a total separation of powers, but rather feared that where all the power of one department was exercised by the same hands which had all the power of another, a free constitution was subverted (Madison, Hamilton, and Jay 1987, 304). He pointed out that although state constitutions had sought to include the separation, the legislature had a tendency to draw "all power into its impetuous vortex" (ibid., 309). Hamilton agreed that while the people could never betray their own interests, they might be betrayed by their legislatures. Therefore, it was safer to have "the concurrence of separate and dissimilar bodies" in every public act, which meant giving a presidential power to veto legislation (ibid., 372). For Madison, "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard" against encroachments (ibid., 312). "Ambition must be made to counteract ambition," he said: "The interest of the man must be connected with the constitutional rights of the place" (ibid., 319).

Madison's awareness that the political working of the constitution was as crucial as its structure was also reflected in his arguments that the people's rights could be better protected in a larger union than in small republics. The legislation of the previous decade had shown him that people had a tendency to pursue their own selfish ends, and that minorities were liable to oppression by majorities. In *Federalist* No. 10, he argued that a well constructed Union would be able to "control the violence of faction." Man's very nature, he said, contained within it the seeds of faction, for men had different capacities and "unequal faculties of acquiring property." Every society necessarily broke into "different interests and parties." Although little could be done to control the causes of faction, the principal task of modern legislation was the regulation of their ill effects (ibid., 124–5). In small pure democracies, he said, it was relatively easy for one faction to dominate in the legislature, and to promote its particular interests; but in a large representative republic there would be two natural checks against it. Firstly, unworthy men were less likely to be elected in large states, for the votes of the people would tend to go to "men who possess the most attractive merit and the most diffusive and established characters," whose wisdom "may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary of partial considerations." Secondly, the larger the extent of the republic, the

larger the number of distinct interests and parties. By extending the size of the republic, "you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens" (ibid., 126–7). While all authority in the republic would be derived from and dependent on society, "the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority" (ibid., 321).

The question of what the relative powers of the federal and state governments should be proved highly controversial, both in 1787 and in the decades which followed. The constitution defined some powers as exclusive to the national government and some as concurrent with the states. The federal government was given power to raise taxes, borrow money, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes," to coin money, to declare war and to raise armies. It also obtained power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers given it under the constitution. Under the constitution, the states were forbidden from passing *ex post facto* laws, or laws "impairing the obligation of contracts." The wording of the constitution proved controversial, for Anti-Federalists feared that it conferred too much potential power to the centre. In the *Federalist*, Madison and Hamilton sought to address these fears, claiming that these clauses were inserted in a defensive spirit, to guard against any attempts "to curtail and evade the legitimate authorities of the Union" and thereby sap its foundations (ibid., 224). Madison agreed that without the "necessary and proper" clause, the constitution would be a dead letter, while a complete enumeration of all the powers to be given to Congress "would have involved a complete digest of laws on every subject to which the Constitution relates" which would have been far too extensive (ibid., 289). They also gave a defensive interpretation of the clause stating that the constitution and the laws and treaties of the United States made under its provisions "shall be the supreme Law of the land." Hamilton defended it in positivist terms. "A LAW, by the very meaning of the term, includes supremacy." If a federal law were not supreme, it would be a mere treaty, dependent on the good faith of the parties to uphold it (ibid., 225). According to federalist theory, a failure to stipulate that federal law would be supreme would be to make the new union as weak as the old confederation. In practice, it would be limited to its enumerated powers (ibid., 143). Where the Anti-Federalists were afraid of their opponents' ambitions for the United States, Madison pointed out that the people's attachments were primarily to their states, so that even federal representatives would look first to the interests of their local constituents (ibid., 299). The people's loyalty, Hamilton agreed, would always be directed primarily to the state, which administered ordinary civil and criminal justice, and which was "the immediate and visible guardian of life and property" (ibid., 156–7).

Leading Anti-Federalists, notably in Virginia, continued to oppose ratification of the constitution. Men like George Mason felt that, with its powerful Senate and President, federal government would "commence in moderate aristocracy," and would be likely to terminate in either "a monarchy or a corrupt oppressive aristocracy" (Bailyn 1993, vol. 1: 349). As draftsman of Virginia's bill of rights, he was especially concerned at the absence of such an instrument in the constitution, which left ambiguous implied powers with the centre. In the end, after prolonged debates, ratification of the constitution was secured, in return for its amendment to include a bill of rights. Why had such an instrument initially been excluded? Madison had clearly seen the dangerous tendency of the post-1776 democracy to invade private rights, and regarded the constitutional prohibition on the states on passing *ex post facto* laws and laws interfering with contracts as "a constitutional bulwark in favor of personal security and private rights," necessary in light of the confederation experience (Madison, Hamilton, and Jay 1987, 288). Indeed, he perceived that people's rights were more likely to be threatened by state legislatures than by Congress, and hence supported the proposal in the Virginia plan of a national power to veto state legislation considered contrary to the articles of union. Though largely designed to prevent state encroachments on national powers, it was also a tool to protect individual rights (Banning 1995, 117–27). At the national level, rather than proposing a bill of rights, the Virginia Plan sought to set up a Council of Revision, on the model of New York's 1777 constitution, comprising the executive and a number of judges with power to examine and reject every act of the national legislature. However, both this and the national veto were rejected by the convention.

However, the Federalists remained initially unconvinced of the need for a bill of rights. Hamilton pointed out that instruments such as Magna Carta or the Petition of Right were reservations of rights not surrendered to the king. "Here, in strictness," he countered, "the people surrender nothing; and as they retain everything they have no need of particular reservations" (Madison, Hamilton, and Jay 1987, 475). Any enumeration of the rights which were protected would be dangerous:

They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? (Ibid., 476; cf. James Wilson, in Bailyn 1993, vol. 1: 64, 808)

"Let any one make what collection or enumeration of rights he pleases," James Iredell told North Carolina's ratifying convention, "I will immediately mention twenty or thirty more rights not contained in it" (quoted in Sherry 1987, 1163). However, Anti-Federalists took the reverse view, arguing that all rights not expressly reserved had been granted by implication to the rulers. In the end, Madison was won over to their view that such an instrument was

needed, and it was he who prepared it (Banning 1995, 265–7). He may have been motivated in part by a desire to remove an obstacle to ratification; but he was perhaps also influenced by the arguments in favour of a bill of rights put forward by his friend Jefferson (Mayer 1994, 155–8). Although Madison, having lost his federal veto, supported the idea that some parts of the national bill of rights should extend to the states, this was rejected by the Senate. The first ten amendments were duly ratified on 15 December 1791.

5.3. Early Ideas on Judicial Review

If the constitution was a supreme law, how were breaches of it to be dealt with? Despite the eighteenth-century American experience of having laws and judgments subjected to the scrutiny of the Privy Council, the notion of judicial review was still undeveloped in the debates in 1787. Discussing the "necessary and proper" clause, Hamilton noted that "the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last" (Madison, Hamilton, and Jay 1987, 224–5). If the national legislature exceeded its powers, Madison wrote, its success would depend in the first instance on "the executive and judiciary departments, which are to expound and give effect to the legislative acts" and in the last resort on the people, who could annul their acts by displacing them at elections (ibid., 290). If this was to suggest a judicial role, James Wilson noted that the judges might not be strong enough to prevent encroachment: "Laws may be unjust, may be unwise, may be dangerous, may be destructive," he wrote, "and yet not be so unconstitutional as to justify the Judges in refusing to give them effect" (Farrand 1937, vol. 2: 73). He therefore sought judicial participation on a Council of Revision.

Nonetheless, there were already by 1787 some signs of state courts asserting a power of judicial review. In the Virginian case of *Commonwealth* v. *Caton* of 1782, Judge George Wythe stated that if the legislature

should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet [it] at my seat in this tribunal; and, pointing to the constitution will say, to [the legislature], here is the limit of your authority; and hither, shall you go, but no further. (Quoted in Snowiss 1990, 18)

A similar position was taken in the North Carolina case of *Bayard* v. *Singleton* in 1787 (1 Martin 42) in which the court refused to proceed under a statute which allowed a judge to settle certain disputed titles to property without a jury, declaring that by the constitution of the state, "every citizen had undoubtedly a right to a decision of his property by a trial by jury" (quoted in Sherry 1987, 1143). James Iredell, who was counsel in the case, had already argued in the press that legislation inconsistent with the constitution was void. If judges applied it, they would be "disobeying the superior law" and acting

"without lawful authority." Since judges acted "*for the benefit of the whole people*" and were not "*mere servants of the Assembly*," they would usurp no power in refusing to apply unconstitutional laws (Iredell 1858, vol. 2: 148). These were not the only cases to raise the notion of judicial review, but they were perhaps the first to link it to constitutions.

Although setting up a Supreme Court whose power extended "to all Cases, in Law and Equity, arising under this Constitution," the constitution did not grant an explicit power of review to judges. However, Alexander Hamilton, in interpreting it in *Federalist* No. 78, took up Iredell's arguments. He pointed out that the constitution gave only limited powers to the government, and that such limitations could only be preserved if the courts had the power to pronounce unconstitutional acts void. The constitution was to be regarded as a fundamental law, whose meaning was to be determined by the judges, just as they determined the meaning of ordinary legislation (Madison, Hamilton, and Jay 1987, 438–9; cf. Oliver Ellsworth's comments quoted in Casto 1995, 213; Wilson 1896, vol. 1: 416–7; cf. Carrese 2003, chap. 8). This did not mean that the judicial branch was superior. Indeed, it was the least dangerous branch, since it had no influence over the sword or the purse, and had no force or will, but only judgment. Rather, it was the people's power which was supreme, and which was to guide the judges (Madison, Hamilton, and Jay 1987, 438–9). In fact, for Hamilton, the constitution bound even the people until "by some solemn and authoritative act" they "annulled or changed the established form" (ibid., 440).

This theory of judicial review was clearly informed by a notion of statutory construction whereby a superior constitution controlled the inferior statute. However, some also felt that the legislature had no power to pass legislation inconsistent with natural justice. In his lectures at the College of Philadelphia, James Wilson approvingly cited *Dr. Bonham's Case*, and dismissed the doubts of Blackstone and Wooddeson that it would be subversive of government to allow judges to pronounce as void statutes against the law of nature (Wilson 1896, vol. 1: 413). Moreover, judges in a number of early cases in both state and federal courts did invoke natural law and common law constitutionalism when exercising judicial review (see *Bowman* v. *Middleton* 1 Bay (SC) 252 (1792) at 254–5; and *VanHorne's Lessee* v. *Dorrance* (2 US (2 Dall.) 304, 308 (1795))). One New Hampshire Supreme Court judge indeed went so far as to observe that the jury was expected "to do justice between the parties not by any quirks of the law out of Coke or Blackstone—books that I have never read and never will—but by common sense as between man and man" (quoted in Sherry 1992, 177).

With this in mind, some historians have argued that the founders intended to give protection not merely to the constitutional rights set out in the text, but to broader natural rights. Debate has centred on the meaning of the Ninth Amendment. This clause, which stated that the "enumeration in the

Constitution of certain rights shall not be construed to deny or disparage others retained by the people" was clearly designed to address the concern that any enumeration of protected rights might imply governmental power to infringe non-enumerated ones. For some historians, the clause was only designed to prevent Congress from exceeding its enumerated powers (see McAffee 1990; 1992a; 1992b; Wilmarth 1989; Amar 1998, 123; cf. Michael 1991). Others, however, have argued that the founding fathers were committed to a broader notion of natural rights protected by an unwritten constitution. They suggest that the written constitution was not considered as the only source of fundamental law; and that the Ninth Amendment was intended to guarantee protection of unspecified, natural rights (Grey 1978; Sherry 1987; 1992; Massey 1992; Barnett 1989).

The Founders' precise intent is impossible to recover, given the uncertain articulation of ideas on judicial review in 1787–1788. However, question of whether judges should look to natural law was debated by the Supreme Court judges in *Calder* v. *Bull* in 1798 (3 US (3 Dall.) 385). Justice Chase appeared to endorse a natural law view when he noted that there were "certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power." He proceeded to say that a statute "contrary to the great first principles of the social compact" could not be "considered a rightful exercise of legislative authority" (ibid., 388). By contrast, Justice Iredell observed that if a legislature passed a law within the general scope of its constitutional power, a court could not void it "merely because it is, in their judgment, contrary to the principles of natural justice," for ideas of natural justice were not regulated by any fixed standard.

If this rhetoric suggested divergent views of the court's power, Chase and Iredell agreed that the court should only intervene (as Iredell put it) "in a clear and urgent case." Chase himself had articulated the rule that in cases of doubt, the benefit should be given to the legislature and the statute allowed to stand (*Hylton* v. *United States*, 3 Dall. 171, 175 (1796)). This may have reflected a reticence in the 1790s for one branch of the constitution to interfere with the acts of another. Thus, in 1791, President George Washington consulted Jefferson over whether he should veto Hamilton's plan to create a national bank. Though Jefferson felt the measure was unconstitutional, he advised Washington that the veto should only be used in clear cases of error by Congress; and in the event Washington declined to exercise the veto (Mayer 1994, 197). It has been argued that judicial review in the era before John Marshall became chief justice was limited to legislation which was concededly unconstitutional, and that "[d]eterminations of unconstitutionality were not then legal acts but public or political ones" (Snowiss 1990, 37). By this view, judges saw themselves as political defenders of a social contract, and their interventions were in effect political substitutes for revolution. Nevertheless, while it is true that courts in the 1790s did not look exclusively to constitu-

tional texts, they were moving towards a more textual approach. As Judge St. George Tucker of Virginia observed in 1793, the constitution was not an ideal thing, but a real existence: "its principles can be ascertained from the living letter, not from obscure reasoning or deductions only" (quoted in Snowiss 1990, 26).

5.4. The Supreme Court under John Marshall

In 1801, John Marshall was appointed Chief Justice of the Supreme Court by President John Adams. He was to dominate the court for 34 years and to forge a new constitutional jurisprudence for the United States (see Haskins and Johnson 1981; White 1988; Currie 1985; Faulkner 1968; Shevory 1989; Shevory 1994; Hobson 1996; Johnson 1997; Newmyer 2001). He played a crucial role in cementing the judiciary's role as a fully co-ordinate branch of government, and ensured that the Supreme Court would be the key interpreter of the constitution. Marshall's appointment came at a difficult time for Federalists. After the defeat of John Adams in the election of 1800, the Supreme Court bench was the only institution controlled by men of their persuasion. The new Republican president, Thomas Jefferson, had always been suspicious of judicial discretion, and of judges independent of the people (see Mayer 1994, 259). As President, he was sceptical of any idea that the judges should have the sole power to interpret the constitution, holding that it should be for the legislature and executive to determine whether they were acting within its bounds within their respective areas. If they erred, they would be evicted from office by the people. In this atmosphere of political partisanship, in 1806, an unsuccessful attempt was made by the Republican Congress to impeach Justice Samuel Chase, which was seen by many as an assault on the independence of the judiciary (Schwartz 1993, 57–8).

At a time when the Republicans sought a narrow view of the constitution, Marshall took a broad view. A committed Federalist, he feared that the Union was under threat from the centrifugal forces of the states, and therefore sought to defend the strong powers of the central government as a counterweight to the states. Moreover, he sought a well-regulated democracy, where the excesses of the people would be held in check. He was also committed to the principle of the rule of law, with the highest law being the constitution. Marshall defended the principle of the rule of law and asserted the court's powers to declare statute unconstitutional in 1803 in *Marbury* v. *Madison* (5 US (1 Cr.) 137 (1803)). The case arose from the last-minute appointments made by John Adams, at the end of his presidency. In the rush of last minute duties, John Marshall, at the time secretary of state, had failed to deliver William Marbury's commission as a justice of the peace, although it had been signed by the President. Marshall's successor, James Madison, refused to deliver it, and Marbury sought the court's aid to compel him to do so by a

mandamus. It was a particularly difficult case for Marshall, as it was evident that the executive was likely to ignore any *mandamus* issued. In his judgment, Marshall therefore sought to assert the court's powers, but without endangering its ability to exercise them. He criticised Madison's failure to deliver the commissions, saying that he had a duty to conform to the law. However, having noted Marbury's vested right, he ruled that the court had no jurisdiction to grant a remedy. Section 13 of the Judiciary Act of 1789, which purported to give the court powers to issue a *mandamus*, was unconstitutional, for it sought to enlarge the original jurisdiction of the Supreme Court which had been set by the constitution. Marshall was careful to assert the court's power to review even federal statutes. He noted that the people had an original right to establish such principles of government as they felt were conducive to their happiness. However, since the exercise of this right was a "very great exertion," he said—in a comment which showed both an implicit criticism of Jefferson's earlier views that constitutional disputes should be settled by conventions and his own distrust of placing too much power in the hands of the people—that it should not be frequently repeated. Rather, it was, he said, "the very essence of judicial duty" to determine the question in cases of conflict between the constitution and legislation. Any doctrine which denied the court this power "would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits" (ibid., 176, 178): It would allow legislation in effect to alter the constitution. Marshall's declaration of the power of judicial review was not novel, but its context was politically highly significant.

It has been suggested that Marshall helped to inspire a more textual approach to the constitution, reading it as a positive controlling statute (Snowiss 1990, 77, 113ff.). In *Marbury*, for instance, he repeatedly stressed that the constitution was *written* and should be treated as a superior law. However, he also declared in a subsequent case that "we must never forget that it is a *constitution* that we are expounding" (*McCulloch* v. *Maryland* 4 Wheat 316, 407 (US 1819)). While he saw the written constitution as a supreme law made by the people, he sought to interpret it using the broad, "equitable" canons of interpretation derived from the common law tradition, rather than in a narrow, strict way. Marshall did not see the constitution as static, but interpreted it in such a way as to extend to new situations. This can be seen in his decision in *Dartmouth College* v. *Woodward* (17 US (4 Wheat) 518 (1819)), in which he interpreted the contract clause in the constitution, which forbade states from passing laws "impairing the obligation of contracts" (Article I, Section 10), in such a way as to insulate corporations from interference by the state. The case centred on an attempt by the New Hampshire legislature in 1816 to alter the charter of a college incorporated by royal charter in 1769, and to put it under the control of a board of overseers appointed by the governor. For Marshall, the original charter was to be interpreted as a contract.

Discussing how far the contract clause extended, Marshall accepted that the clause could not be read to extend to contracts such as marriage, thereby invalidating divorce laws. However, looking to the mischief of state laws before 1787, Marshall said that the clause was intended to relate to "contracts respecting property, under which some individual could claim a right of something beneficial to himself" (ibid., 628). Admitting that the case before him had not been in the framers' minds in 1787, he stated that the constitution should be interpreted according to its own words, and cases which fell within these words should only be excepted if it was clear that the framers would have excluded them, had they considered them (ibid., 644). He took a similar approach to the text in *Sturges* v. *Crowninshield* (17 US (4 Wheat) 122 (1819)), in which the court voided a retrospective bankruptcy statute. Discussing whether the framers had intended to cover bankruptcy laws, Marshall observed that the court should only disregard the plain meaning of a provision on the grounds that the framers "could not intend what they say" if the "absurdity and injustice" of applying the provision would be "monstrous" (ibid., 202–3).

Marshall's broad constitutional interpretation was often guided by principles drawn from natural law (see Lynch 1982; Wolfe 1986, 112–3; White 1988, 604–6; Currie 1985 128–32; Snowiss 1990, 126–30; Hobson 1996, 78; Newmyer 2001, 210–66). This can be seen from his first case turning on the contract clause, *Fletcher* v. *Peck* (10 US (6 Cranch) 87 (1810)). In this case, a challenge was made to a Georgia statute of 1796 which declared void all sales of land made under a statute of 1795. This statute, which authorised the sale of thirty five million acres of Yazoo land at less than two cents per acre, had passed after members of the legislature were assigned shares in the purchasing companies (see Magrath 1966). Nevertheless, the Supreme Court declared the second statute void, with Marshall holding that the legislature could not revoke a grant after it had been made. He interpreted the grant of land as a contract, and hence covered by the words of the constitution, holding that a grant contained an implied promise by the grantor not to reassert the right conveyed. He also ruled that the contract clause did not merely apply to private contracts, but also to those involving states. At the same time, he invoked general principles of justice. "It may well be doubted," Marshall said, "whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where they are to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation" (ibid., 135). Justice Johnson similarly declared the statute void "on a general principle, on the reason and nature of things […] which will impose laws even on the Deity" (ibid., 143). This was to say that there were vested property rights which could not be violated by legislation.

In interpreting the text, Marshall and his brother justices continued to draw on arguments based on natural law. In *Terrett* v. *Taylor* (13 US (9

Cranch) 43 (1815)), while denying the legislature's power to repeal statutes creating private corporations, Joseph Story declared that his opinion stood "upon the principles of natural justice, upon the fundamental laws of every free government" as well as "upon the spirit and letter of the constitution of the United States" (ibid. 52). Marshall himself invoked deeper principles in one famous dissent. In *Ogden* v. *Saunders* (25 US (12 Wheat) 213 (1827)), he found himself in a minority in holding that even prospective state bankruptcy laws fell foul of the contract clause, for they interfered with the private contracts between debtors and creditors. For Justice Johnson, such a conclusion could only result from "a severe literal construction" of the constitution (ibid., 286). However, Marshall argued that the aim of the constitution was to create a single commercial nation, which involved reducing the state's powers to legislate on contractual matters. In arguing that such laws did impair the obligation of contract, he sought to rebut the majority's view that since contracts derived their force from positive law, a prospective law could hardly impair the obligation it created. For Marshall, "individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties" (ibid., 346).

Marshall made use of the contract clause to protect private property rights from legislative interference. He also used the commerce clause to defend the powers of the federal authorities from encroachment by the states, preventing the states from developing their own commercial policies. The key case heard by Marshall's court was *Gibbons* v. *Ogden* (22 US (9 Wheat) 1 (1824)), which concerned New York legislation which granted exclusive privileges to operate steamboats within the state. In the case, Marshall ruled that licenses granted under an act of Congress gave full authority to vessels to navigate, notwithstanding any New York statute to the contrary. The state law was void, insofar as it conflicted with federal law. In so deciding, Marshall rejected a narrow construction of the constitution "which would cripple the government, and render it unequal to the objects for which it is declared to be instituted," and sought rather to look at the words in their natural sense (ibid., 188–9). The word "commerce," he said, should not be read to mean only traffic or the buying and selling of goods, but included all branches of the commercial intercourse of a nation, including navigation. Although Congress did not have the power to regulate commerce purely internal to a state, power over any commerce which extended beyond the bounds of the state was vested in Congress as absolutely as it would be in a single government. This was to attempt to strike a balance between federal and state jurisdiction. Marshall was treading on contentious ground. Republicans remained committed to the idea that the constitution had to be narrowly construed, to prevent what St. George Tucker called "imperceptible usurpations of power" (quoted in Currie 1985, 170). President James Monroe himself stated in 1822 that the only power

granted to Congress by the commerce clause was to impose "duties and imposts in regard to foreign nations and to prevent any on the trade between the States" (quoted in Schwartz 1993, 49).

In a number of other cases, Marshall used the constitution to define the relation between the states and the federal government. Crucial here was the case of *McCulloch* v. *Maryland* (17 US (4 Wheat) 315 (1819)). At issue in the case were the questions of whether Congress could charter a national bank (as had been done first in 1791, and once again in 1816), and whether a state could tax it (as Maryland attempted to do in 1818 by imposing a stamp tax on all banks not chartered by the state legislature). In the case, the Supreme Court gave a robust defence of national powers. The court was presented with rival Jeffersonian and Hamiltonian versions of the constitution. Counsel for Maryland argued that the constitution was an act of sovereign and independent states, and that the powers delegated to the federal government had to be exercised in subordination to the states. Rejecting this view, Marshall stated that the constitution was an act of the people as a whole, and that the federal government, "though limited in its powers, is supreme within its sphere of action" (ibid., 405). Although Marshall noted that the power to create a bank was not one of the enumerated powers of Congress, he said that a constitution could not contain details of all the powers conferred. The nature of a constitution required that only its "great outlines" and "important objects" should be set out, and that "the minor ingredients which compose those objects [should] be deduced from the nature of the objects themselves" (ibid., 407). Taking up the arguments Hamilton had urged on Washington when proposing the First National Bank in 1791, Marshall stressed that Congress had implied powers to pass laws "necessary and proper" for executing its enumerated powers. Where Maryland sought a narrow interpretation of this clause of the constitution, Marshall took a more expansive view. In his view, the words did not restrict Congress to laws essential for carrying through the enumerated powers. Rather, if the end was legitimate and within the scope of the constitution, then the appropriate means were constitutional. Since the constitution was "intended to endure for ages to come," it would have been unwise to have prescribed the means by which it should always operate, in the manner of a legal code. To have done so would have "been to deprive the legislature of the capacity to avail itself of experience, to exercise its discretion, and to accommodate its legislation to circumstances" (ibid., 415). At the same time, he ruled that while the state had the power to tax, this power could be restrained where it was "in its nature incompatible with, and repugnant to, the constitutional laws of the Union" (ibid., 425).

Marshall's ruling came at a time when a Jeffersonian notion of states rights was being reasserted, particularly in Virginia. Marshall's decision was severely criticised, notably by Spencer Roane, President of the Virginia Court of Appeals. In a series of essays, Roane reiterated the view that the United States

was a compact not of one sovereign people, but of the peoples of different
states. He argued further that the Supreme Court could never be an impartial
judge in any contest between a state and the national government, as it would
be judging in its own cause. Since that the compact was between sovereign
states, only they could decide if the compact had been broken (see Gunther
1979, 138–54). Similarly, John Taylor argued that the Supreme Court was not
given unlimited jurisdiction to interpret the constitution, since such a power
would allow it to remove any constitutional limitation. The power to interpret
the constitution could not be the exclusive preserve of either the federal or
state courts. Rather, both had jurisdiction within their own sphere. As Con-
gress could not repeal state laws, so the federal judges could not control state
judgments, nor could they pronounce on the constitutionality of state laws
(Mayer 1994, 281–2). Marshall replied to Roane, denying his premise that the
constitution was a compact between states. He repeated the classic Federalist
notion that the judiciary, who were only agents of the people, were the safest
body to which to entrust the power of decision. He added, moreover, that the
national government would be entirely undermined if great national questions
were to be decided "not by the tribunal created for their decision by the peo-
ple of the United States, but by the tribunal created by the state which con-
tests the validity of the act of congress, or asserts the validity of its own act"
(Gunther 1979, 213).

   The power of the Supreme Court to review the judgment of a state court
had already been challenged in 1816 in *Martin* v. *Hunter's Lessee* (14 US (1
Wheat) 304 (1816)) in which Joseph Story had delivered the judgment. Vir-
ginia's Court of Appeals maintained that section 25 of the Judiciary Act which
attempted to extend the appellate jurisdiction of the Supreme Court to state
courts was unconstitutional, and that it had its own power to interpret the
constitution. Story however confirmed the jurisdiction of the Supreme Court.
Noting that the constitution was made by the people, and not by the states in
their sovereign capacities, he stated that "appellate jurisdiction is given by the
constitution to the supreme court, in all cases where it has not original juris-
diction." This view was reiterated in 1821 by Marshall in *Cohens* v. *Virginia*
(19 US (6 Wheat) 264 (1821)). In this case, he stressed that the general gov-
ernment was supreme in its sphere, and rejected the idea "that the nation
does not possess a department capable of restraining peaceably, and by au-
thority of law, any attempts which may be made, by a part, against the legiti-
mate powers of the whole" (ibid., 377).

   Marshall was the dominant force in his time on the bench. In his judg-
ments, he cited relatively few precedents, preferring broad arguments from
principle. He never forgot that the constitution was a written text to be inter-
preted. In a time when the supreme court's role was often controversial, he
ensured that its role was anchored in the original act of the people, rather
than in a vaguer idea of fundamental law. Nonetheless, he treated that act as a

constitution, and not as a statute, and one that had to be interpreted expansively. At the same time, his interpretations, notably of the contract clause, were informed by background natural law ideas on rights, notably of property, which had to be preserved. In the era between the framing of the constitution and the death of Marshall, a new notion of judicial review was thus developed in America. Although there were some antecedents to be found in English law, notably *Bonham's Case*, the common law gave very few materials on which to build this jurisprudence. Instead, judicial review was a fruit of the revolution, informed by the natural law thinking which had provoked revolt, but focused on the foundational text agreed in 1787.

5.5. Federalist Jurisprudence

If Marshall's Federalist vision was expressed through his decisions on the bench, a more scholarly view of it was also presented by two other Supreme Court Judges, James Wilson and Joseph Story, and by Chancellor James Kent of New York. While defending a vision of the constitution shared by Marshall, these men also defended and developed a view of the common law in America at a time when it was under attack. Although the common law had been venerated in the 1760s and 1770s, in the decades after the Revolution, there was increasing scepticism about its value. Firstly, it was associated with technicalities and tricky lawyers, who were perceived to conspire against the simple justice demanded by the people (Miller 1966, 99ff.). Secondly, it was associated with England and its corrupt monarchical system. As a result, a number of states forbad the citation of British cases after 1776 (Chroust 1965, vol. 2: 64–8; Waterman 1969). By the 1820s, there were strong calls for a code and much criticism of judge-made law (see Cook 1981). "No man can tell what the common law is," Robert Rantoul argued in 1836, in Benthamic vein, "therefore it is not law" (quoted in McClellan 1971, 91). It was against such a background that Wilson, Story and Kent developed their jurisprudence. Jurists of Wilson's generation defended the Revolution in Lockean terms, and rejected Blackstone's positivism. However, in an era of increasing calls for codification, Federalists wanted both to preserve the common law, and to defend the role of the expert judge as expounder of law. They therefore turned to a defence of that law as a customary system, developed by the judges, which reflected an inductive natural law. Like Blackstone, however, they were not often deep juristic thinkers, and so tensions sometimes remained in their theoretical ideas.

Born near St. Andrews, in Scotland, in 1742, James Wilson had emigrated to America in 1763, where he had studied law with John Dickinson. Having played an important part in the making of the constitution, he was appointed to the Supreme Court in 1789, where he served until his death in 1798. In 1790, he was also appointed law professor at the College of Philadelphia (see

Hall 1997; Smith 1956; Nedelsky 1990, chap. 4). Wilson told his auditors there that the common law was the wisest of laws (Wilson 1896, vol. 1: 423). It had been carried to America by the settlers, who had only taken as much of the common law as was suitable to their situation, and who were not bound by subsequent alterations, since "to such alterations they had now no means of giving their consent" (ibid., 462–4). For Wilson, the common law was indeed purer in North America than in England: it "bears, in its principles, and in many of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the Saxon, than to that law, as it was disfigured under the Norman government" (ibid., 445).

Wilson described the common law as a developing customary system, reflecting the needs and manners of the people. In doing so, he drew largely on the ideas of seventeenth century common lawyers such as Coke and Hale, while rejecting the positivist positions adopted in England. Following Hale, he argued that the common law was a developing body. "The jurisprudence of a state, willing to avail itself of experience, receives additional improvement from every new situation, to which it arrives," he wrote, "and, in this manner, attains, in the progress of time, higher and higher degrees of perfection, resulting from the accumulated wisdom of ages" (ibid., 454). The common law had wrought out "errors, distempers, and iniquities" and reinstated "the nation in its natural and peaceful state and temperament" (ibid., 457). Following Bacon, he also stated that the virtue of the common law was that it looked primarily at particular cases, which were only gradually reduced to general rules. Citing Coke, he described it also as a social system, able to settle questions by drawing on sources outside itself.

Wilson rejected Pufendorf's notion that law came from the command of a superior, which (he said) had been adopted by Blackstone. For Wilson, all law was based on consent, not command. It was "a general convention of citizens" (ibid., 91). The very "notion of a superior" was "unnecessary, unfounded, and dangerous" (ibid., 88). Governors were only trustees, for the people could have no superior. For Wilson, the most significant source of law was custom, which carried "internal evidence, of the strongest kind, that the law has been introduced by common *consent*; and that this consent rests upon the most solid basis—experience as well as opinion" (ibid., 57). By a process of trial and experience, he said, "our predecessors and ancestors have collected, arranged, and formed a system of experimental law, equally just, equally beautiful, and, important as Newton's system is, far more important still" (ibid., 184). Wilson's rejection of a positivist view of law also influenced his explanation of the origins of law. He argued that while monarchy was probably the oldest form of government, the first kings were elected and had few powers. "The first kings were, indeed, properly no more than judges," he said, "who had no power to inflict punishments by their own authority, and without the consent of the people" (ibid., 350).

Although Wilson admitted that God's will was the source of moral obligation, he rejected the idea that its content could be discovered by the use of reason. Rather, following Kames, he said that moral obligations were known by intuition. This could be seen in the fact that children had a sense of right and wrong, as well as in the pleasures which were derived from aesthetic experience (ibid., 110). Like Kames, he argued that the moral sense was to be found in savages, but in a less developed degree; and that it was in developed societies that one saw the moral sense most refined, for reason illustrated and proved what the moral sense suggested (ibid., 114). In his view, the law of nature was therefore immutable, having "its foundation in the nature, constitution, and mutual relations of men and things," but also "progressive in its operations and effects," which helped to explain the developing nature of the law (ibid., 124, 127).

James Kent (1763–1847), a Federalist New York lawyer, was appointed to a law professorship at Columbia College in 1793, which he held until 1797. In the following year Governor John Jay appointed him to the bench of the New York Supreme Court, where he sat until 1814, when he was appointed Chancellor. Having resigned in 1823, he returned to lecture at Columbia College in 1824, giving the lectures which would be published between 1826 and 1830 as *Commentaries on American Law* (see Langbein 1993; Horton 1969). Like Wilson, Kent also premised his view of the common law on a foundation of natural law. He explicitly rejected the idea, derived from Hale and mentioned by eighteenth century English judges (e.g., Wilmot J. in *Collins* v. *Blantern* (1767), *English Reports* 95: 850 at 853; see also: this volume, chap. 4), that the common law had a positive origin, consisting of statutes worn out by time. For him, the common law was "the application of the dictates of natural justice and of cultivated reason to particular cases," and a "collection of principles, to be found in the opinions of sages, or deduced from universal and immemorial usage" (Kent 1844, vol. 1: 471–2). Using Blackstone's terms, he spoke of absolute rights to personal security, liberty and to acquire property, noting that these were "natural, inherent and unalienable" (ibid., vol. 2: 1). Having read Kames's *Sketches of the History of Man*, he also spoke of a sense of property inherent in the human breast, which developed over time as man advanced towards civilisation (ibid., vol. 2: 318).

Kent's theoretical discussions of the foundations of the common law were not profound, and in some areas, seemed inconsistent. This can be seen in his discussion of the origin of property. On the one hand, he challenged Blackstone's comment that the power to transmit property by will did not derive from natural law, but came from society, countering that the right to provide for one's offspring "is dictated by the voice of nature." For Kent, a sense of personal property was the first to develop in early societies. The natural and original mode of acquiring property, he said, was through occupancy, and was founded on feeling prior to reason. At this stage, property ended when occupation ended. On the other hand,

Property in land was first in the nation or tribe, and the right of the individual occupant was merely usufructuary and temporary. It then went by allotment, partition, or grant from the chiefs or prince of the tribe to individuals; and, whatever may have been the case in the earliest and rudest state of mankind beyond the records of history, or whatever may be the theory on the subject, yet, in point of fact, as far as we know, property has always been the creature of civil institutions. (Ibid., vol. 2: 319–20)

Kent's theoretical inconsistencies may be explained by the fact that he was attempting to write an institute explaining and legitimating the common law. Thus, he had to explain the fundamental maxim of property law that all land was held of the king, which had been adapted in America to the "settled and fundamental doctrine" that all titles were "derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the revolution" (ibid., vol. 3: 377). Kent's natural law was in effect closely tied to the English common law. Thus, the right to personal security in America was guarded "by provisions which have been transcribed into the constitutions in this country from *magna charta*, and other fundamental acts of the English parliament" (ibid., vol. 2: 11). Kent's view of the common law was not parochial, however. He wrote that:

In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened jurisprudence, of republican principles, and of sound philosophy, the common law has become a code of matured ethics and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. (Ibid., vol. 1: 342)

Moreover, in his work, he went out of his way to incorporate into his work learning and citation from continental legal materials, though foreign examples were cited "primarily to show that the foreign source was congruent with the result that the English common law reached" (Langbein 1993, 570).

By contrast with Wilson and Kent, Joseph Story was a Republican in his youth. Born in Massachusetts in 1779, he built a successful law practice in Salem, before his election in 1805 to the Massachusetts legislature, and in 1808 to the national House of Representatives, where he sat as a Jeffersonian. Nonetheless, he very quickly tired of party politics, and found that his beliefs were more suitable to Federalist than Republican positions (see McClellan 1971; Dunne 1970; Newmyer 1985). Story became ever more conservative and suspicious of popular assemblies, and ever keener to preserve the union, and in later life was a strong opponent of Jacksonian democracy. Throughout his life, Story devoted much time to scholarly exposition of the common law, and he remained a prolific publisher. In 1809, he edited Joseph Chitty's treatise on Bills of Exchange and two years later produced editions of Edward Lawes's treatise on assumpsit and Charles Abbott's on shipping. In 1811, he became the youngest ever appointee to the Supreme Court, and was to prove

the most scholarly member of the court. In 1829, Nathan Dane offered $10,000 to endow a chair at Harvard, on condition that Joseph Story was appointed to lecture on natural law, commercial and maritime law, equity and constitutional law. Story's presence gave great cachet to the law school, while his tenure of the Dane Professorship underlined his scholarly credentials. It was from lectures then delivered that he published his great commentaries on equity jurisprudence, the conflict of laws, and the constitution, as well as a number of other treatises on law (Chroust 1965, vol. 2: 201; Story 1832; 1833; 1839a; 1839b; 1841; 1843; 1845; 1846).

For Story, the "whole structure of our present jurisprudence stands upon the original foundations of the common law" (Story 1833, vol. 1: 140, §157). Although he felt that the common law had adapted to American conditions, he wrote to an English correspondent in 1840 that every American lawyer "feels that Westminster Hall is in some sort his own" (quoted in Miller 1966, 125). He therefore sought to develop the intellectual ties between lawyers in the two countries. Like Wilson, he defended an incremental common law. "The narrow maxims of one age," he said, "have not been permitted to present insurmountable obstacles to the improvements of another" (ibid., 127). He thus rejected the idea that the common law was "an absolutely fixed, inflexible system," noting instead that it was "a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country" (Story 1852, 702). It had always been administered by practical men, he argued, rather than speculators. "Common sense," he said, had "powerfully counteracted the tendency to undue speculation in the common law, and silently brought back its votaries to that, which is the end of all true logic, the just applications of principles to the actual concerns of life" (quoted in McClellan 1971, 85 and Newmyer 1985, 244–5). Story continued to remain wedded to common law principles of interpretation. This led him controversially (and unsuccessfully) to maintain that the federal courts had a common law jurisdiction over crimes, even after the Supreme Court had ruled that no such authority existed (see Jay 1985a; Jay 1985b; Palmer 1986; Preyer 1986; Presser 1991). For Story, the constitution and the laws of the United States were predicated on the existence of the common law. It would be extraordinary, he said, for the common law to be the basis of the jurisprudence of the states "and yet a government engrafted upon the existing system should have no jurisprudence at all" (Story 1833, vol. 1: n. 141, §158).

Like Kent, Story did not spend much time setting out his theoretical premises, and when he did, the positions he set out were not wholly consistent. His views were set out in two entries written for Francis Lieber's *Encyclopaedia Americana* in the 1830s. In a contribution on "Natural Law," he set out a voluntarist theory which owed a great deal to Pufendorf. The obligatory

force of natural law, he argued, came from God's will, which it was man's duty to ascertain and obey. Story followed Pufendorf's division of duties to God, to oneself and to others, as well as the division of perfect and imperfect rights. He described the evolution of political society as families grew into tribes and thence into larger associations, and argued that government arose from voluntary consent, long acquiescence or superior force (McClellan 1971, 317). The right to property, he said, "is a creature of civil government." Similarly, while the obligation of contract was conformable to God's will, it was only in civil society that contracts could be properly enforced. In every society, he said, it was indispensable "that there should be somewhere lodged a power to make laws for the punishment of wrongs, and for the protection of rights" (ibid., 320–2). Similarly, in his essay on "Law, Legislation and Codes," Story stated that legislation "includes those exercises of sovereign power, which permanently regulate the general concerns of society." Law was defined as "a rule, prescribed by the sovereign power of a state to its citizens or subjects, declaring some right, enforcing some duty, or prohibiting some act" (ibid., 357). Story had clearly digested the same theoretical sources Blackstone had used, and came up with positivist conclusions.

Nevertheless, Story also severely qualified the role of his legislature. "Law is founded, not upon any will," he said, "but on the discovery of a right already existing; which is to be drawn either from the internal legislation of human reason, or the historical development of the nation" (ibid., 354–5). The office of legislation was "not so much to create systems of laws, as to supply defects, and cure mischiefs in the systems already existing" (ibid., 363). Story said that in the origins of society, principles of natural justice were recognised before any common legislature was created. Habits became customs, which in turn became rules. He therefore dismissed those who traced the origin of the English common law to positive legislation, observing that much of that law was of modern growth, independent of legislation. Not only did every system of law begin in custom, but customary law provided the bulk of any system. "A man may live a century, and feel (comparatively speaking) but in few instances the operation of statutes, either as to his rights or duties," Story wrote, "but the common law surrounds him, on every side, like the atmosphere in which he breathes" (ibid., 365). Even when statutes were passed, parties had the right to litigate all questions to discover the meaning of the law. Since it would be "obviously unfit" for the legislature to settle its own meaning retrospectively, it was left to the courts to settle the meaning of laws. "When, then, in America and England, it is asked what the law is," he said, "we are accustomed to consider what it has been declared to be by the judicial department, as the true and final expositor" (ibid., 358).

Story shared Wilson's Baconianism and his view of the evolution of law. If natural law was universal, its application depended on local and historical circumstance, and its principles should be sought inductively. For Story, a sci-

ence of law could be created through proper classification, systematisation and arrangement (see LaPiana 1994, 35; Newmyer 1985, 281–9). In common with a number of early nineteenth century American jurists, Story did not seek to separate law and morals, but saw them as interacting. This attitude led him, both on the bench and in print, to support the notion of vested rights and obligations derived from sources beyond law. He was willing therefore to invoke the "great principles of Magna Charta" in defence of property, and to declare that "government can scarcely be deemed free, when the rights of property are left solely dependent upon the will of a legislative body, without any restraint" (McClellan 1971, 214; Miller 1966, 228). Discussing *Ogden* v. *Saunders*, he stated that obligations were measured

neither by moral law alone, nor by universal law alone, nor by the laws of society alone; but by a combination of the three; an operation, in which the moral law is explained, and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. (Story 1833, vol. 3: 243, §1372)

While contractual obligations could not exist contrary to positive law, they could "exist independently of it; and it may be, exist, notwithstanding there may be no present adequate remedy to enforce it" (ibid., vol. 3: 247, §1376). Like John Marshall, he thus considered that the obligatory force of a contract derived primarily from universal or natural law.

The eclectic nature of early nineteenth century American legal thought is perhaps best reflected in the lectures of David Hoffman. A leading member of the Maryland bar, in 1817 he published *A Course of Legal Study*, and in 1829 *Legal Outlines*, based on his course of lectures at the University of Maryland (see King 1986, 160–80). Hoffman was widely read, and he drew on Hobbes and Locke, Grotius and Pufendorf, Hume, Smith, Ferguson and Kames, as well as Bentham. His *Legal Outlines* set out a theory of natural law. "Natural jurisprudence," he wrote, was "fixed and immutable in her decrees" and was ascertained by reference to "the intrinsick character of man in all ages." Civil jurisprudence, by contrast, was variable, and derived its principles from what was "extrinsically added to the character of man" (Hoffman 1836, 10). For Hoffman, natural law contained rules of conduct which promoted human felicity. In explaining this, the influence of his Scottish reading was evident. Mankind, he argued, had a particular moral constitution, which distinguished it from other creatures. Sociability and the pursuit of happiness was in man's nature. He was particularly keen to establish (against the polygenetic theory found in Kames's *Sketches of the History of Man*) that all humanity had a common root, in order to show that human ideas on obligation were neither limited to particular communities, nor resulted from mere expedience (ibid., 33–6). Man's nature made him sociable, and sociability was essential to his happiness. "To this foundation," he wrote "may be referred the duties of benevolence and affection, of mildness, of charity, of compassion; of all those natural

sentiments, in short, which have no relation to *positive* institutions, and which are found existing through the earth, independently of them" (ibid., 42–3). Man's need to be sociable was also, however, the foundation of government. Again echoing Scottish readings on the moral sense, he wrote that man had a sense of the beautiful and deformed in morals, which allowed him to be a judge of the actions of others, and of his own acts (ibid., 65).

Hoffman was not especially concerned with whether the motivation behind moral obligation was labelled reason, moral sense or utility. Indeed, in his work he referred to all three terms, though the key point was that man's essential nature had to be pursued. To be obliged to obey the law of nature, he wrote, "is to be under a moral necessity of consulting our happiness by those modes which right reason, conscience, and just experience have found best for that purpose" (ibid., 70). The foundation on which moral obligation was built was, he added, "Happiness, or (in its other name) Utility" (ibid., 71), while natural law was "a system of rules of action suitable to promote the greatest utility to man in all stages of his being; an abstract perfection, after which legislation labours in all modifications of human existence and society" (ibid., 86).

Drawing on eighteenth century natural jurisprudential sources, Hoffman proceeded to discuss perfect and imperfect rights, natural and adventitious rights, and alienable and inalienable rights. "The primary object of society and law is to protect our absolute rights, these being the gift of nature, and essential to our well-being," Hoffman wrote, "the secondary object of law is to guard us in our relative or adventitious rights, these being posterior to, and merely consequent upon the formation of society and laws" (ibid., 121). He then listed as absolute the right to life, to the fruits of one's labour, to reputation, to personal liberty, to patrimony and to bequeathe by will. When he came to define law "in the concrete," however, he gave a positivist definition. Law, he wrote, always supposed a superior, competent to prescribe a rule, and a sanction" (ibid., 253). For Hoffman, it was inconceivable for law to spring from any other source than a "supreme power." While the original authority to make laws came from a compact of the people, laws subsequently made came from the legislature. Moreover, "if the law be made by the legislature, then the whole community, *quoad* the law, is the inferior, and the legislature is the superior" (ibid., 268). Even customary law was not itself law until it was "established as valid by the judicial power, which itself springs from the legislative power, or from the constitution (ibid., 270). Hoffman had read Bentham, and was influenced by the Englishman's view of motives, though he found Bentham's *Introduction to the Principles of Morals and Legislation*, "very peculiar, and a little too eccentric for a work so grave and didactic" (ibid., 291). Moreover, under Bentham's influence, he did give an outline of the categories of a code. Nonetheless, Hoffman also portrayed the common law as historical and evolutionary, and as the offspring of experience, and saw practical dangers in experiments at codification (Miller 1966, 127, 252).

When it came to the constitution and matters of public law, American legal thinkers and practitioners in the half-century following the revolution were able to develop a theory which saw authority as deriving from a constitution agreed by the people, a constitution which was interpreted by the judges. However, when it came to private law, those who resisted a codification which would make all law the positive act of the legislature were less able to offer a coherent jurisprudential vision of law. Some, like Wilson, aimed to create a coherent theory which could explain the common law without resort to Blackstone's positivism, by rejecting the sources the commentator had relied on in favour of a newer, Scottish moral theory. Others, however, were less concerned with consistency, and were happy both to speak in a positivist language when it came to discussing abstract questions, while using the language of custom or nature when it came to the common law. In part, this was because men like Kent or Story were not setting out to answer philosophical questions, but rather to digest and explain the materials which practitioners and students needed in an expanding society.

Chapter 6

THE AGE OF BENTHAM AND AUSTIN

Hobbes's attack on the common lawyers had presented jurists with the problem of how to reconcile a view which conceived of law in terms of authority, rather than reason, with the existence of a body of rules which were developed by courts over a period of time. Hale's answer to Hobbes was to agree with his positivist conception of law, but to argue that the foundational rules of English law had originated in a past agreement, and were subsequently developed by judges. He had shown that judges, who had expertise in the law and experience of the world, could apply the rules of law to the new facts which came before them, judging when an old rule should be extended by analogy, and when there had to be resort to reason. However, while he spoke of the law as growing, Hale did not give a very detailed account of the methods judges were to use in developing the law, particularly in novel cases. Nor did his successor, Blackstone, add a great deal of enlightenment. Indeed, if the commentator was able to show that the fundamental rules of property could be clearly summarised and applied, in many other areas of crucial importance in a commercialising society, he was unable to explain how judges developed law, save by referring to ideas of natural equity.

When Jeremy Bentham (1748–1832) attended Blackstone's lectures at Oxford, he therefore found that many fundamental questions about the nature of common law reasoning remained unanswered, hidden beneath a rhetoric which tended to invoke custom and the law of nature at the same time that it lauded parliamentary sovereignty. Bentham was to look more clearly than any previous writer at how the common law sought to develop its rules; and the closer he looked, the less adequate he found it. He saw that earlier common law writers had not solved the problem of how to show the law to be authoritative and coherent. Ultimately, Bentham felt that the common law could not adequately generate the rules which were needed for social co-ordination, and he derided the idea that there was a natural law which could be used by judges in the process of adjudication. The only solution to the problem was to create a comprehensive code issued by the sovereign legislature based on the principle of utility. The intellectual project of creating a code occupied him for the rest of his life and remained unfinished at his death in 1832 (see Dinwiddy 1989b; Lieberman 1989, 219–90; Long 1977, 13–25; Crimmins 1990, 28–40; Burns 1989).

In the 1770s, Bentham worked steadily on analysing legal concepts, in order to clear the ground for his legislative project. At the same time, he sought to set out the principles on which a code could be established. In 1776, he published part of his critique of Blackstone, *A Fragment on Government*, and in 1789, he published *An Introduction to the Principles of Morals and Legisla-*

tion. Moreover, a preliminary outline of a code, written in the mid-1780s, formed the basis of the *Traités de Législation Civile et Pénale* edited by Étienne Dumont in 1802. However, much of his most important early theoretical work, notably *Of Laws in General*, was not published until the twentieth century, and much important material remains unpublished. From the mid-1780s, Bentham's focus of attention turned to more practical projects, including his plan to construct a Panopticon prison (Semple 1993). He also wrote on matters such as the Poor Laws, Police and Political Economy. In the era of the French Revolution, he began to consider constitutional questions more directly, as well as turning his attention to matters of judicial and legislative organisation. In 1803–1808, he composed the material for his *Rationale of Judicial Evidence* and wrote other works on judicial organisation. Frustrated by the failure of his Panopticon project, Bentham now became increasingly critical of vested interests, particularly in the state, law and church. Convinced that real reform would be impossible under current political arrangements, by 1809 he converted to the cause of radical political reform (Dinwiddy 1975). Henceforth, he gave increasing attention to the problem of sinister interests and how they could be controlled within a constitutional system. He also now began to solicit invitations to write codes of laws for various states, including the United States. In the 1820s, Bentham worked on a *Constitutional Code*, hoping to see its implementation in Portugal or Greece (see Bentham 1998; Rosen 1992). A first volume was published in 1830, and Bentham turned to writing more on civil law matters, beginning to plan the outline and purposes of a civil code. By the end of his life, he was still engaged on manuscripts entitled "Blackstone Familiarised," and had yet to complete a code of laws. By then, however, he had a large following of disciples, both in England and abroad, and had played a significant role in a transformation about legal thinking in England.

6.1. Jeremy Bentham on the Foundations of Law

Following Hume, Bentham rejected the common lawyers' notion that political authority rested on a social contract (Bentham 1977, 97). Instead, he defined political society in terms of the people's habit of obeying the commands of a certain sovereign ruler. "A number of persons accustomed or agreed to act in all things as a certain person or persons shall command," Bentham wrote, "is called a State" (Bentham Manuscripts, UC lxix, f. 87; cf. Bentham 1970, 1). For Bentham, it was in man's nature to seek happiness, which was best promoted in political society. For if a state of nature was a state of liberty, it was also one of great insecurity (Bentham 1970, 253–4; Bentham 1838–43, 3: 219). However, there was no single point at which people emerged from the state of nature into a political society. The habit of obedience was cultivated by experience, which had patriarchal roots. "It is in the bosom of a family," he wrote,

"that men serve an apprenticeship to government" (Bentham Manuscripts, UC lxix, f. 204; cf. Bentham 1838–1843, 2: 542; see Long 1977, 31–5, 211; Burns 1993). It was when people saw the good of government that the habit emerged.

Bentham's concept of the habit of obedience has been much debated. H.L.A. Hart argued that the concept is unable to account for the normativity of a sovereign's command: it cannot explain the development of criteria determining the validity of laws, or explain such notions as legally limited government. For Hart, if the command of a lawgiver acts as a "content independent and peremptory" reason for obedience, the fact of the command is not a reason in itself for normative acceptance (Hart 1982, 243). There must rather be an external, social rule, generating a "general recognition in a society of the commander's words as peremptory reasons," something like his own "rule of recognition" (Hart 1982, 258; Hart 1994, 91–110). Hart's view has been challenged by Gerald Postema. He points out that for Bentham, political society was not a collection of individuals who happened to obey one man. Rather, the obedience given to any particular law of any ruler rested on a general habit of obedience, which had foundations in a broader custom or disposition (Postema 1986, 218, 240). Bentham's understanding, he suggests, was not far from Hart's, for his habit of obedience was interactional, not mechanical. In Bentham's view, for a command to count as law, each person addressed had to accept it as authoritative law, which depended in turn "on one's beliefs and expectations regarding the behaviour and attitudes of most of the other members of the community" (ibid., 237). Like Hart himself, Bentham felt that the foundations of law "do not consist in acceptance of some indefinitely specified set of *substantive* legal or constitutional standards, but rather in certain morally neutral, formality- (or "pedigree"-) defined criteria of validity" (ibid., 262). For Bentham, subjects were thus only in the habit of obeying the laws of a recognised sovereign which were passed in a recognised way. Certain formalities were needed for the passing of a law, since without them people would not know what were the authentic commands of the sovereign (Bentham 1970, 126n; cf. Postema 1986, 239). Hence, they would not obey laws not validly passed, since they would not be recognised as laws.

At the same time, there was also a substantive basis to the habit of obedience. It existed if a sufficiently large number of people obeyed a ruler, from a conviction that his rule was necessary for their happiness. Although the habit was "at present firmly rooted in our own and every other civilized nation that we know of" (Bentham Manuscripts, UC lxix 69, ff. 203–4), Bentham pointed out that it was in fact never perfect. The state of nature and perfect political society were therefore poles: the more disobedience existed, the more society was like a state of nature. The habit was "more or less *perfect*, in the ratio of the number of acts of *obedience* to those of *disobedience*" (Bentham 1977, 430 note o, 14). A certain level of obedience was necessary to constitute a government, but even this was liable to suffer periodic interruptions (ibid., 433–4).

However, society could not subsist if every man could disobey any law he disliked. People were therefore bound in conscience to observe the laws of their country, unless they were persuaded by a "thorough and reflective conviction" of their inutility (ibid., 86). Bentham's theory also explained how revolutions occurred and sovereignty was lost. If enough people came to the conclusion that the probable mischiefs of rebellion exceeded the probable mischiefs of obedience, the juncture for resistance arrived (ibid., 57, 481). There was no common sign by which this juncture could be known. Each individual would act on "his own internal persuasion of a balance of *utility* on the side of resistance" (ibid., 484). Resistance would be a political act and each person resisting would know that his act was illegal and that he would be liable to be punished for it (ibid., 25). For instance, Bentham said that if the legislation were passed to give statutory force to royal proclamations,

I will take up arms, that is if I can get what I think enough to join with me: else I will fly the country. I well know I shall be a Traitor and a Rebel: and that as such the Legislature would act consistently and legally in setting a price upon my head. (Ibid., 57; cf. ibid., 436)

Bentham's revolution was thus defined in sociological rather than legal terms. Political society would be dissolved when a sufficiently large number of people chose to rebel and succeeded (cf. ibid., 491). In effect, this discussion sought to provide a more convincing explanation of the revolution of 1688 than was to be found in Locke's contractual theory in the *Second Treatise* (cf. ibid., 442–3).

Revolution, or its prospect, was not however the only limit to the ruler's power. Bentham acknowledged that a ruler could set limits to his own power by "constitutional laws *in principem*," a "transcendent class of laws," which "prescribe to the sovereign what *he* shall do" (Bentham 1970, 64). These were covenants entered into by the ruler concerning his conduct. Such limitations were not judicially enforced, for "within the dominion of the sovereign there is no one who while the sovereignty subsists can judge so as to coerce the sovereign" (Bentham 1970, 68; cf. Bentham 1977, 487–8). However, his acts might be considered *unconstitutional*, "by being repugnant to any privileges that may have been conceded to the people whom it affects" (Bentham 1970, 16). Constitutional laws *in principem* therefore rested on the moral or religious sanctions, which experience showed were effective in keeping the sovereign in check (Bentham 1970, 70–1). They also set new standards for the habit of obedience. "The effect of such a concession," Bentham said, "is to weaken on the part of the people, in the event of its being violated, that disposition to submission and obedience, by which the power of the sovereign, in point of fact, is constituted" (ibid., 16). While succeeding sovereigns would not be bound by the covenants of earlier ones, it would become customary for them to adopt them, for the obedience of the people would come to be conditional their adoption (ibid., 65–6).

At some points in his early writings, Bentham spoke of the limitations on the sovereign in a way as to suggest that any act by the sovereign exceeding them would be regarded simply as *ultra vires*. Once the supreme body had marked out bounds to its authority, "the disposition to obedience confines itself within these bounds" and "beyond them the subject is no more prepared to obey the governing body of his own state, than that of any other" (Bentham 1977, 489). This was to suggest that the people would simply ignore some of the sovereign's mandates, although in all other respects they would continue to obey him. In illustrating this, however, Bentham gave examples from federal constitutions, such as the Swiss cantons or the Holy Roman Empire, rather than domestic ones (Bentham 1977, 484 note k, 489).

Bentham's early work did not look in detail at questions of constitutional law, for he then regarded it as the least important aspect of law for the reformer (Hume 1981, 77). At this point, Bentham saw government in private law terms, as a trust (Bentham 1970, 249, 86). However, from around 1788, Bentham began to look more deeply at constitutional questions, and to reformulate his terms. In the years before the revolutionary Reign of Terror in France, and again after 1809, Bentham began to develop a democratic theory of government which would culminate in his *Constitutional Code* in the 1820s. In these writings, Bentham took up the question, raised in the *Fragment*, of how to blend the interests of the governors and the governed. In doing so, he began to recast his notion of sovereignty, and ceased to talk of constitutional laws *in principem* (see Burns 1973). He now distinguished between two aspects of sovereignty. The first was the sovereign efficient power (Hume 1981, 116), or Supreme Operative Power as he later called it. This was "the power by which every thing that is done in the way of government is done" (quoted in Rosen 1992, 65). In his *Constitutional Code*, the Supreme Operative Power effectively took the place of the "sovereign" of his earlier work. The supreme legislature, which held this power, was omnicompetent and had the "power of imposing upon persons of all classes, obligations of all sorts, for purposes of all sorts, and with reference to things of all sorts: obligations such as are not capable of being annulled or varied by any other power in the State" (Bentham 1983, 41; Bentham 1989, 6). By contrast, the Sovereign Constitutive Power, which rested in the people, was "the power of determining at each point of time in the hands of what individual functionary or individual functionaries the correspondent operative power shall at that time be lodged" (quoted in Rosen 1992, 65). For Bentham, potentially everyone should share in the power to constitute the governors, but only the latter should have the power to make law.

"The sovereignty," he now wrote, "is in *the people*" (Bentham 1983, 25). There has been some debate among scholars whether this change in his discussion of sovereignty represents a change in his theory. According to H.L.A. Hart, Bentham's later formulation involved "a quite different theory of law"

from his earlier language (Hart 1982, 228). Hart argued that whereas
Bentham's earlier writings saw law in terms of commands issued by the sover-
eign, the constitution which conferred the supreme constitutive power on the
electors was itself a law which derived its status not from any command, but
from the fact that it was generally acknowledged to be in force. Moreover, he
claimed that Bentham's new definition could not constitute a general theory,
since he himself acknowledged that there were states—such as hereditary
monarchies—lacking a supreme constitutive power. Against this view, how-
ever, it may be suggested that Bentham's later constitutional thought was in
effect a refinement of his earlier ideas, linked to a positive programme of po-
litical reform (cf. Postema 1986, 261).

For Bentham, of course, the people had always "constituted" the govern-
ment by the fact of their obedience (see Bentham 1989, 279). The *Constitu-
tional Code* was a mechanism to make the influence of the people over the
government more direct and constant. "The true and efficient cause and meas-
ure of constitutional liberty, or rather security," he wrote, "is the dependence
of the possessors of efficient power upon the originative power of the body of
the people" (Bentham 2002, 409). Bentham's aim now was to create a chain of
responsibility leading ultimately to the people and to make the particular in-
terest of the rulers mirror the universal interest of the people. The two powers
were interdependent. For Bentham, the Supreme Operative Power

performs the office of the main spring in a watch; the [Supreme Constitutive Power] that of the
regulator in a watch. Without the regulator, the main spring would do too much: without the
main spring, the regulator would do nothing: viz. one with one another and antagonizing with
one another, in so far as they are aptly proportioned to each other, they will do that which is
required. (Bentham 1989, 135)

Bentham was clearly aware that in most states—notably in hereditary monar-
chies—the power of locating the ruler did not directly lie with the people (see
Bentham 1838–1843, 9: 97). In seeking to put the power of location and dislo-
cation directly in the people via regular elections, he was therefore seeking to
establish the best possible constitutional system, with the least scope for mis-
rule (see Bentham 1989, 53, 117; see also Schofield 1991–1992). Outside a
representative democracy, the control people exercised over their rulers was
blunt. While they always had the power of dislocation, it could scarcely be ef-
fected in a monarchy "without either a homicide or a war" (Bentham 1838–
1843, 9: 103, cf. Bentham 1990, 122). Moreover, although rulers might be in-
fluenced to act for the good of the community by "fear of inferior sufferings,"
such as popular obstructions to the exaction of taxes, or the execution of
judgments (Bentham 1990, 124), they were often able to hide their sinister in-
terest, and make the people believe that the government was acting for their
good (see Bentham 1989, 152–82). In the system of the *Constitutional Code*,
there would be no need for substantive limitations on government, since the

checks built into the system would prevent the ruler from acting against the universal interest.

The constitution itself was made by the legislator. As Rosen has argued, for Bentham, the origin of constitutive power came in the operative power of government itself (Rosen 1992, 65–6). He did not see constitutions as the organic product of community custom, nor as the creation of the people as a whole. Rather, he retained a patriarchal view of constitution-making. A people, needing a government, would follow the ruler who could give them the constitution which satisfied them. He was himself attracted by the prospect of writing a constitution for Greece, seeing it as a "clean slate," a place which had not yet acquired settled habits of rule and obedience (Rosen 1992, 99; cf. Bentham 1990, 146). The *Constitutional Code* was thus a law set by the legislator and enforced ultimately by the moral sanction of the Public Opinion Tribunal, or the people, just as the constitutional laws *in principem* which he had previously discussed were seen as laws set by the sovereign enforced by the moral sanction (see Bentham 1990, 30, 139; cf. Ben-Dor 2000, 183–4). The principles of the constitution, Bentham made clear, were not to be protected by any form of judicial review (Bentham 1983, 45).

The persistence of the system rested ultimately on the holders of the supreme operative power acting in accordance with the people's constitutional expectations. It was, Bentham admitted, conceivable that the holders of this power might conspire to change the constitution in ways that were harmful to the interests of the people. In so doing, the legislature might be acting in a legally *valid* way, given their power to change any part of the code. In such a situation, the only redress was mass petitioning by the people, demonstrating to the chief executive "a contest tending to a revolution" (Bentham 1989, 35). For those living under the *Constitutional Code*, however, the juncture of resistance was more clearly signalled than in a monarchy:

Upon [the people's] compliance or non-compliance, all power, as has been seen, necessarily depends. On any occasion towards producing, on their part, non-compliance, all that can be done by a constitutional code, is to give them the invitation. If by such invitation, power is not limited, by nothing else can it be limited. (Bentham 1838–1843, 9: 120)

The invitation Bentham here had in mind was to an act of revolution. This would still be an act of political judgment: since the legislature had power to alter even constitutional rules (Bentham 1983, 44), revolt would only ensue when the change in the system was so great in the people's eyes as to justify resistance (but contrast the views of Ben-Dor 2000, 157).

Bentham's idea that the constitutional rules were created by the ruler, but generated expectations in the public, led to his holding something of a teleological view of constitutional development, leading to the system of democracy he championed. In his view, people entered political society to obtain happiness. Over time, concessions, such as Magna Carta or the Bill of Rights,

were made by rulers, which both generated expectations which would not otherwise have existed, and which gave some kind of security against misrule. Change was also promoted when rulers violated expectations. So long as a monarch ruled in accordance with popular expectations, "the people would not be likely to feel much inclination to change: but, supposing them at any time infringed by him, it would be for them to make themselves amends, and provide for that purpose whatsoever security seemed to them most efficient" (Bentham 1990, 140, 127n). Nonetheless, Bentham remained pessimistic in the 1820s about the prospects of change. England, he said, would not establish a real constitution "till the present system of corruption has dissolved in its own filth." At the same time, while her political system remained unreformed, she would not get rid of that corruption (Bentham 1995, 127). Bentham's increasingly polemical writings of the 1820s were clearly aimed at persuading the people of the malign effect of sinister interest. If a government was in its very essence acting in opposition to the universal interest, he wrote, it was useless to replace the current rulers with a new set acting under the same system, since they would be subject to the same temptations of sinister interest. In such a situation, all a man could do was either to lie down and submit "or rise up—and in conjunction with as many as he can get to join with him, rise up and endeavour to rid the country of the nuisance" (Bentham 1989, 128).

6.2. Bentham's Critique of the Common Law

"The property and very essence of law," Bentham wrote, "is to command" (Bentham 1970, 105). Law was "an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons" (ibid., 1). It involved coercion: "To make a law is to do evil that good may come" (ibid., 54). Moreover, "Command, prohibition, and permission" all "point at punishment" (ibid., 133). In Bentham's analysis, there were thus two parts to a law: a directive part, which contained the complete expression of the legislator's will concerning an act, and a prediction of punishment. For law to be effective, the prediction had to come true, and so the legislator had to "issue a second law, requiring some person to verify the prediction that accompanied the first" (ibid., 137–9). This subsidiary law was addressed to the judge, and was accompanied by a host of subsidiary laws regulating procedure and the enforcers.

In setting out his understanding of law, Bentham argued that what many saw as the traditional sources of the common law were not in fact law. Firstly, he attacked the idea that the validity of a law depended on its consonance with the law of nature (Bentham 1977, 52–4). Natural law, he said, gave no precepts by which men were commanded; and even if such precepts existed, there would be no need for reason to attempt to infer God's will (ibid., 13–4,

22). In fact, what men called the law of nature was "neither a precept nor a Sanction, but the mere opinions of men self-constituted into Legislators" (Bentham Manuscripts, UC xcvi, f. 109, quoted in Lieberman 1989, 230). If a judge said that a law was contrary to reason, all he meant was that he disliked it (Bentham 1977, 198). Bentham argued that reason offered no fixed and certain standard on which men could agree (ibid., 159), and that it was always better to talk of utility when judging a law. Nevertheless, utility could not be used as a criterion of *validity*, for society could hardly subsist if every man could declare a law void and disobey it simply because he felt it was inexpedient (ibid., 25). Utility could guide individuals in determining whether they disliked a law strongly enough to resist it (ibid., 86); but it could not tell a judge whether a law was valid or not.

Secondly, Bentham attacked the notion that the common law came from the immemorial custom of the people, and in so doing attacked Blackstone for his historical inconsistencies (ibid., 178–9, 133). No single item of the common law, Bentham wrote, seemed to fit the image of immemoriality which Blackstone claimed for the whole system (ibid., 164). This immemoriality was a fiction of the lawyers:

A Decision of Common Law upon a new point never seems to have set up de novo the general rule that may be deduced from it. It supposes contrary to the truth that rule to have been set up already. It supposes therefore that the rule ought always to have been conformed to. It can fix no era to its commencement. (Bentham Manuscripts, UC lxix, f. 6)

Bentham pointed out that unwritten law was "made not by the people but by Judges" (Bentham 1977, 223). Customs which existed in the community—customs *in pays*—were not obligatory. To be legalised, they required an act of public power: the intervention of judges, whose orders the community in question were in the habit of obeying (ibid., 232). Moreover, these judges "must not be persons of that assemblage of whose acts the Custom has been composed" (ibid., 183). Law, as command, could not arise spontaneously from the community:

who is it makes a Custom? (I mean a custom *in pays* that is become a legal one) any one? no, but the Judge who first punishes the non-observance of it after it has become a custom *in pays*. (Ibid., 191; cf. ibid., 188–9)

For Bentham, the custom of the courts—customs *in foro*—were more important than the customs of the country. Not only did superior court judges control the law without reference to community custom, but their treatment of local customs was designed to maximise their own power and to marginalise local courts. By requiring that local customs be shown to have an immemorial existence, they shut their eyes to the fact that they had also been legalised through judicial acts in local courts. However, in being able to point to a time before the custom in question had been pronounced in court, judges could

conclude that it could not have generated strong expectations in the community, and that it would not be against utility to deny it. Thus was their own power over the law bolstered (ibid., 235–6).

In explaining how judges decided cases, Bentham pointed out that judges were motivated by considerations of utility. There were two relevant kinds. Firstly, original utility concerned acts which directly produced a balance of pain over pleasure. Certain acts were so clearly harmful, he argued, that people committing them would have a natural expectation of punishment by those in authority, without having to be told in advance. Thus, a foreigner accused of theft, fraud or assassination could not plead ignorance of the local laws, since "he could not but have known that acts, so manifestly hurtful, were every where considered as crimes" (Bentham 1838–1843, 1: 323; cf. Bentham 1970, 215; Bentham Manuscripts, UC lxx (a), f. 119). Secondly, utility resulting from expectation concerned acts which caused pain resulting from the disappointment of previously generated expectations (Bentham 1977, 231). Such expectations could vary. Although, for instance, it would be equally unjust to commit murder in Kent or Essex, it would be just to have equal inheritance in Kent, and primogeniture in Essex, because the rules followed local expectation (Bentham Manuscripts, UC lxx (a), f. 19). Local customs could therefore generate expectations prior to the establishment of any particular rule of law, generating reasons for the courts to take them into account (e.g., Bentham 1977, 334, 306 n. c; cf. Bentham Manuscripts, UC lxix, f. 72*). "Where Original Utility is neuter, as in many points relating to the course of succession," Bentham wrote, the judge should "consult popular Expectation—From thence results a derivative Utility—where that Expectation is neuter, Utility follows Certainty fixed on either side" (Bentham Manuscripts, UC lxx (a), f. 20; cf. Postema 1986, 227–8).

Nonetheless, the most important expectations were generated not by community custom, but by legal decisions (Bentham 1977, 233). If a passive custom—such as allowing others to walk over one's field—could arise spontaneously, it only became a right when legalised by a court which punished the denying of entry. Discussing the origin of property, Bentham said that when a man found something and conceived that it would give him pleasure, he occupied it and gained "a Pleasure of Expectation" of possession (Bentham Manuscripts, UC lxx (a), f. 12). Mere occupancy therefore generated expectations which should be recognised by law. However, until they actually were thus recognised, a man's occupancy was precarious, and limited to that which he could defend for himself (Bentham 1838–43, 1: 30; cf. Kelly 1990, 82–3).

This meant that if some laws developed from spontaneous customs which were legalised by judges, it was more frequent to find legal decisions which were based on the appearance of a single example of conduct. Bentham gave the example of perjury. The judges first decided this, he said, not on the basis of a custom of not committing perjury, but because of the mischievousness of

the first example brought before them (Bentham 1977, 218). Indeed, a single decision could generate a custom. Thus, Bentham said that the rule of primogeniture emerged when an elder brother first asked a court to punish his younger brother for entering the land:

From that time, younger brethren seeing this to be the case, fell into the custom of yielding to their elders: and thus it became a custom that the eldest brother *shall be* heir to the second, in exclusion of the youngest. (Ibid., 185)

In another example, he wrote,

[w]hen the corrupting of another man's wife for instance was an act constantly follow'd in past instances when detected by a certain punishment [...] the observation of such uniformity of punishment in past instances of corruption had begot an uniformity of forbearance in subsequent instances of temptation, an uniform disposition in persons at large to expect such punishment. (Bentham Manuscripts, UC lxix, f. 142)

This was again to suggest that custom followed law.

If legal decisions could generate expectations which subsequent courts—and legislators—could not disregard, such expectations did not generally derive from single decisions. Rather, there had to be a custom among the judges to follow a rule, seen either in a succession of cases, or by the habit of superior courts overturning lower courts which violated the rule. However, it was precisely in the articulation of rules that the common law was most lacking, for it was unable to generate rules which would give a clear focus for expectations. The elements of the common law, Bentham wrote, were real commands respecting individual actions. But the "body composed of them is fictitious. It is not the work of authority. It is left to every man to compose for himself at his own hazard, according to his own authority" (Bentham Manuscripts, UC lxix, f. 115). General rules had to be inferred from the reasons given by judges for their decisions, or from "an uniformity observ'd in the application of punishment to particular actions fashioned by abstraction of the unessential circumstances to sorts of actions" (Bentham Manuscripts, UC lxix, f. 107). While statute announced the rule for all to know, common law could never be known. All that a citizen or judge could do was to attempt a prediction of how the judge would decide. Furthermore, the common law was *ex post facto* law (Lieberman 1989, 238). Just as a master waited until a dog misbehaved and then beat him for it, so "They won't tell a man beforehand what it is he *should not do* [...] they lie by till he has done something which they say he should not *have done*, and then they hang him for it" (Bentham 1838–1843, 5: 235).

Although Bentham continued to insist that the common law was a "nonentity," which did not exist (Bentham 1998, 123–4), he did not deny that there were rules to be found in its materials. While the number of maxims of law was infinite—since any one could make a maxim—the number of rules different in substance, though vast, was "limited by the number of customs

and judicial usages they serve to announce" (Bentham 1977, 191). He there-fore argued that where doctrines had been established by express decisions, and even where settled opinions existed which people were "accustomed to take for Law," they should be followed (ibid., 149). The rule regarding inher-itance of the half-blood, for instance, "is supposed to be the determination of a court competent to determine," he said: "that being the case, so long as it remains uncancelled by a superior court it must be law" (ibid., 204). How-ever, Bentham was dissatisfied with the rules to be obtained from the common law. Firstly, he worried about the *authority* of judges to make law. Although they constantly protested that they did not make, but only declared law, Bentham pointed out that where the rule in question had never previously been articulated, the judge "in so declaring it, and acting upon it, take[s] upon himself to make a law" (Bentham 1998, 126). But in his view, a judge had no title to make law. Secondly, he saw that the stage had been reached where much detail about law could not be known. If everyone knew from ex-perience that courts upheld people's engagements and dispositions of prop-erty, they could not know the myriad of exceptions and qualifications of the rule, made by the courts (Bentham 1838–1843, 6: 520). Furthermore, the ma-terial to be drawn from case law was uncertain, for it was open to objec-tions, forced constructions and distinctions being raised in any case. Moreo-ver, if any court could overthrow the authority of a particular rule, "in this way may the authority of the whole system of Common Law be shaken: shaken, and with it, in so far as the contrariety is known, the confidence hith-erto so generally, but always so unwarrantably, reposed in it" (Bentham 1998, 131). For Bentham, the common law had reached a crisis point in which many of the rules to be teased out of it were unjust or unsuitable, but could not be departed from by judges without undermining the stability of expectations. He came to argue that common law judges should follow a path of *stare deci-sis* (Postema 1986, 192–6). In deciding cases, he therefore argued, judges should always follow the line of analogy rather than utility, so that they did not assume the role of the legislator, and so that those citizens who acted in any new case could better be able to conjecture beforehand what would be the decision in the case (Bentham Manuscripts, UC lxiii, f. 49). However, he came to realise that this attitude was ultimately unsustainable:

If the laws are not in harmony with the intelligence of the people—if the laws of a barbarous age are not changed in an age of civilization, the tribunals will depart by degrees from the ancient principles, and insensibly substitute new maxims. Hence will arise a kind of combat between the law which grows old, and the custom which is introduced, and in consequence of this uncer-tainty, a weakening of the power of the laws over expectation. (Bentham 1838–1843, 1: 325)

For Bentham, the time was ripe to recast the law, for the common law was in-efficient and unsuitable for the modern age. The time had come, he argued, to rethink the form of the law.

In understanding Bentham's critique of the common law, his historical understanding of the development of law should not be overlooked. All law, he said, began in an *ex post facto* way. In the infancy of jurisprudence, "there was no such thing as any command to men not to steal, but if a man stole, an order went out to another man to go and hang him" (Bentham Manuscripts, UC lxix, f. 98). This "arbitrary mode of judicature" was unavoidable before "that general and habitual course of submission, which is necessary to the establishment of legislative authority, had taken root" (Bentham 1838–1843, 6: 529n). Indeed, there was a time, he suggested, when unwritten law was a blessing. Until the emergence of the fictitious rules of common law, every decision was "completely arbitrary: every Judge had to begin afresh." But once the judges and others were able to deduce general rules from past practice, these rules "formed—not only a *light*, by which the paths taken by succeeding Judges were lightened,—but a *barrier*, by which they were in some degree kept from going astray" (Bentham 1998, 136). Indeed, before legislation could be embarked upon, there had to be a stock of cases which had already been presented for adjudication before a judge, providing experience for the lawmaker (ibid., 226). However, once a regular legislature was set up, the mass of fictitious law became a nuisance. By that token, the common law was imperfect and outdated. It needed to be recast into statutory form.

6.3. Bentham's Code

By the 1780s, Bentham had become convinced that it was not enough to digest existing law into statutory form: rather, a whole new *pannomion* had to be constructed. However, in seeking to outline the principles of morals and legislation, he became troubled by the question of the boundary between the penal and civil branches of legislation. To understand this, he concluded, one needed to understand "what sort of thing *a* law is" (Bentham 1996, 282). In determining this question, Bentham noted that every complete law terminated with the creation of an offence and comprised both penal and civil parts (Bentham 1970, 209, 196). Intellectually, the two parts stood together. They needed to be separated out for the purpose of discourse, or good arrangement (ibid., 197). Thus, a legal title to a piece of property was defined by the penal prohibition on all save the title-holder from meddling with it; but a law forbidding entry to property by those without title also required the exposition of what "title" meant (ibid., 182, 177). Similarly, a law regarding offences against the person might exempt particular people from punishment in certain cases, including husbands, parents or judges. Their powers were exceptions to the law, which might "constitute the matter of several bulky titles," none of which perhaps referred to punishment. These titles would constitute a part of the civil branch of law (ibid., 200–1).

In constructing a code, Bentham argued, the legislator should strive to make laws which were complete in expression, containing complete commands, and in design. As things stood, however, the parts of every code of laws lay scattered up and down at random, "with little notice taken of their mutual relations and dependencies" (ibid., 159). A law was incomplete in its design, he said, if it appeared to regulate all manner of things not intended to be covered. An example was the well-known Bolognese law punishing anyone who drew blood in the streets, which required interpretation by judges (ibid., 161). Whether they read it expansively or restrictively, their reading would alter the law (ibid., 163). A *complete* law, by contrast, could not have any unexpressed exceptions. It would be the measure of the citizen's conduct and of the judge's decision, while the legislator would "be able to see from the code what he had done and what remained to be done." In a system constructed on this plan, "a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency." There would be "no *terrae incognitae*, no blank spaces" (ibid., 346).

No such code was yet in existence. "Before any such specimen can be found," Bentham argued, "a perfect plan of legislation must first have been produced: perfect in method at least, whatever it be in point of matter" (ibid., 183). With this in mind, Bentham began in the late 1770s, to construct "an expository treatise of universal Jurisprudence" which would represent the rights, powers, duties and restraints which subsisted in any state (Bentham Manuscripts, UC lxix, ff. 126–7). This would ascertain the universal terms by which the "terms of the particular jurisprudence of any country" were explained (Bentham Manuscripts, UC lxix, f. 152). Bentham thus engaged in an analytical exercise to determine the meaning of legal terms, such as possession, or right. At the same time, however, he also set himself a normative task, for as a substantive law reformer, he wanted to construct a system based on the principle of utility. The rules concerning what was meet and what unmeet for punishment, and the principles on which the division of offences were based, Bentham argued "will hold good, so long as pleasure is pleasure, and pain is pain" (Bentham 1838–1843, 1: 193). His task was to work out these principles. "To make a (perfect system of) good laws will be acknowledged to be none of the easiest tasks," Bentham wrote in 1775, "but this task, arduous as it is, is a light and easy one in comparison of that of giving a systematical development of principles on which those laws are grounded" (Bentham Manuscripts, UC xxvii, f. 148). "When a model of absolute perfection is once exhibited," he wrote, "the business will be to make the institutions as nearly conformable to it as they will bear" (Bentham Manuscripts, UC xxvii, f. 126). Bentham noted that he was only concerned with "human nature in general: the particular dispositions and exigencies of particular countries did not come within my plan" (Bentham Manuscripts, UC xxvii, f. 152). "To apply such of

these general principles then as are applicable to the particular institutions of his own country, and to supply such other general principles as the exigencies of these particular institutions may require" was a work for the particular lawyers of every other country (Bentham Manuscripts, UC lxix, f. 14).

For Bentham an "all-comprehensive code of substantive law" was required, each part of which would be present to the minds of the people to whom it was addressed (Bentham 1838–1843, 2: 13). Nothing would be law which was not in the code. If individual events could not be foreseen, their species could be. "A narrow-minded and timid legislature waits till particular evils have arisen, before it prepares a remedy," he wrote, "an enlightened legislature foresees and prevents them by general precautions" (Bentham 1838–1843, 3: 205). In such a system, there would be no need for legal interpretation. "A Vocabulary once composed, the Law will cease to be a science," Bentham said, "The only questions debated in Courts of Justice would be questions of Fact" (Bentham Manuscripts, UC lxix, f. 134). In the future, technical lawyers would disappear: "they will then be Orators. The *Advocates* will remain, when the legislator is no more" (Bentham Manuscripts, UC lxix, f. 181). Indeed, if statute law were what it should be, "the science of Jurisprudence would be at an end," for knowledge of statute would require no more science than knowledge of newspapers did (Bentham Manuscripts, UC lxix, f. 197; cf. Postema 1986, 423).

This would suggest that judges under the code were merely to apply the law in a mechanical way (Letwin 1965, 128; Lobban 1991, 145). Bentham's desire to reduce the judicial role is evident from his efforts to narrow the role of legal interpretation. In his early writings, he suggested that where the legislator had failed to express his will clearly because of "haste or inaccuracy of language," or inadvertence, then "strict" interpretation was permitted to attribute to the legislator the will supposed to have been entertained at the time of making the law (Bentham Manuscripts, UC c, f. 90; cf. Bentham 1977, 99, 115). However, his entire legislative project was designed to clarify the language, and thereby to reduce the scope for inadvertence. Chapter 16 of the *Introduction to the Principles of Morals and Legislation* was hence designed to give the legislator guidance so that he would not misexpress himself, something which would "render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary" (Bentham 1970, 240).

Against this, Gerald Postema has suggested that Bentham sought in his code to combine general guidelines with flexibility in adjudication, giving institutional expression to a system of equity. The legislator provided the judge "not with fixed rules, but with appropriate powers; he should set out fundamental ends, and include instructions, or the best evidence available, on the best means for achieving these ends" (Postema 1986, 406). The judge would therefore be free to decide individual cases on direct-utilitarian lines. As Étienne Dumont put it,

this Code will rather be a set of authentic *instructions* for the judges, than a collection of peremptory ordinances. A greater latitude of discretion will be left to them than was ever left by any Code: yet their path being every where chalked out for them, as it were between two parallel lines, no power that can be called *arbitrary* is left to them in any part of it. (Bentham 1998, 116)

In support of his interpretation, Postema points out that in his writing on judicial procedure, Bentham insisted that there should be no inflexible rules. "Of the several rules laid down in this code," there was no one "from which, in case of necessity, the judge may not depart." However, for every departure from the rules, the Public Opinion Tribunal would seek a reason, and the reason would "consist in an indication of the evil which, in the individual case in question, would result from compliance with the rule" (Bentham 1838–1843, 2: 32, quoted in Postema 1986, 411). Ultimately, the judges would be controlled not by rules, but by their responsibility to the Public Opinion Tribunal. For Postema, Bentham's comments to procedure also applied to the whole code. Yet this may be doubted (see Dinwiddy 1989a). While Bentham was sceptical about the value of fixed rules of procedure, preferring a "natural" form in which the judge acted as a kind of *paterfamilias*, his vision of substantive law required clear rules to focus expectation. As P. J. Kelly has pointed out, if individuals and judges only respected a right when a utility calculation justified their doing so, "that right will not serve as a condition of expectations" (Kelly 1990, 64). If his substantive rules were merely general guides, they would fall into the common law's trap of being simply too indeterminate. Bentham's motto for the good citizen stated in the *Fragment* was "*To obey punctually; to censure freely*" (Bentham 1977, 399). Just as the common law judge should not alter the law, and assume the legislator's role, neither should the judge under the code.

There were, of course, cases in which it would unjust to apply the rule in the code, or where a new rule was needed. However, for Bentham, in such cases, the judge's views should form the basis for legislation. In his early writing, he stated that where a liberal interpretation of the law was needed, the judge should declare openly that he had made such an interpretation, "at the same time drawing up *in terminis* a general provision expressive of the attention he thinks the case requires, which let him certify to the legislator: and let the alteration so made if not negatived by the legislator within such a time have the force of law" (Bentham 1970, 241). This idea was later incorporated into the *Constitutional Code*. Where it appeared to the judge that the execution of a judgment in accordance with the code would "be productive of injustice, and thence of contravention to the intentions of the legislat*ure/or*," he could propose an amendment to the law. Three decrees would be issued, one putting into execution the law as it stood, one putting into execution the law as amended, and one suspending both until the legislature had made its will known (Bentham 1838–1843, 9: 508). The judge could propose amendments to the code, but any policy changes were for the legislature (ibid., 505–6).

Similarly, matters of contested interpretation would be referred to the legislature for ultimate decision (ibid., 502–3). Bentham admitted that this procedure might create retrospective law. This, however, was ultimately a lesser evil than the "production of evil" which would follow "by admission or omission of this or that word in a law, through inadvertence or otherwise." Indeed, "giving execution and effect to the imperfectly expressed portion of law in question" might render "a severer shock" to "public confidence, than by forbearing to do so" (ibid., 509). However, the better expressed the law, the less occasion there would be for such amendment.

The content of the code would not be static. The number of laws would change, "owing to the continual occasion there will ever be for new" ones (Bentham 1970, 172). For Bentham, the form of the code—the categories developed in his legal metaphysics—would remain the same, but the content could grow and be fleshed out in detail. Classes of offences, he noted, could be distinguished from one another *ad infinitum*. However narrowly a class was defined, it could be made to contain any number of subordinate classes. At any single point, there would be only so many offences provided against in the code—*species infimae*—"as there happens to be thought occasion to distinguish" (Bentham 1970, 170–1). It might be found necessary over time to include more divisions, reflecting new separate species of delinquency (see James 1973, 109). Bentham was worried that the growth of law might upset the symmetry of the code, and so in his later writings, he proposed the office of a conservator of laws who would "propose for the *substance* of the new law, a *form* adapted to the structure of the Code" (Bentham 1998, 265).

For Bentham, the categories of law were as universal as the principles of pleasure and pain. Local sensibilities, and expectations generated by existing laws and practices, might generate local substantive differences between systems, Bentham admitted; but they would diminish over time under the guidance of a legislator. In 1782, Bentham wrote that a legislator should have before him both an ideal body of law, and a list of the circumstances influencing sensibility in the country for which he was drawing a code, including moral and religious ones (Bentham 1838–1843, 1: 173; cf. Bentham 1970, 244). A law might be good for one country and bad for another, "because in one nation the people may be disposed, in another they may not be disposed to acquiesce in it" (Bentham Manuscripts, UC xxvii, f. 121). However, he also believed that prejudices "may be got over with a little management" (Bentham 1838–1843, 1: 182). In a well-constituted government, he said, men's religious sensibilities weakened, and their moral sensibility became more conformable to the dictates of utility (Bentham 1996, 68). For Bentham, it was ultimately preferable to have a foreigner draw up the code of laws, for universally applying circumstances were much more extensive than local, exclusively-applying ones. The outlines of a code, the great *genera* of injuries, would be universally the same. Only the detailed species would dif-

fer according to sensibility: and filling this out could be left to a local legislation committee (Bentham 1998, 291–2).

In the event, Bentham never completed a workable code of laws. He found that, while he could draw up an analytical language, a code would never be complete in the abstract. It required location in a particular context, where policy choices would be made. This can be seen from his discussion of the distinction between civil and criminal law and their content. For Bentham, since all law terminated in an offence, "no very explicit line of distinction" could be drawn between penal and civil law (Bentham 1970, 209). Their separation was for convenience of discourse, with the "circumstantive" matter dealt with in the civil part, and the "penalizing" in the penal part (ibid., 199; cf. 218–9). Bentham noted, however, that another distinction, between civil and criminal law, was often spoken of. In describing wrongs as "criminal," people looked to their mischievousness, odiousness and the quantum of punishment annexed to them. They also spoke of the actor's criminal consciousness, making intention a distinguishing characteristic. For Bentham, these distinctions between "civil" and "criminal" wrongs were unstable. Firstly, the degree of mischievousness of an act, its odiousness or the magnitude of punishment annexed to its commission were all open to so much variation that it was impossible "so far to mark out the boundaries of the criminal branch of the law as to determine with precision what offences it shall *not* extend to" (ibid., 210–11). Secondly, the notion of intention could not be the basis of a distinction, for in "certain cases where the mischief is such as appears to be very great, rashness and heedlessness, without criminal consciousness, are put upon the footing of criminality" (ibid., 217). Thirdly, the quantum of punishment imposed reflected a policy choice which had been made. The treatment of offences, he said, "as every one knows is in great measure different in different countries; so that it can never come under any single description whatsoever" (ibid., 210). Moreover, "the same offence at different times and places will stand, and to different persons will appear to stand, in a different light in point of criminality" (ibid., 217).

Fleshing out the detail of the civil law also proved difficult. In some areas of private law, universally applicable legal principles could be established, for instance that "[e]ntire liberty for contracts" should be the "general rule," and that the sovereign declare some kinds of contract invalid, such as those against the public interest, the parties' interest or those of a third party (Bentham 1838–1843, 3: 190). Bentham similarly listed some factors which might vitiate any contract, including mistake, misrepresentation, incapacity and duress (Bentham 1838–1843, 6: 514; cf. ibid., 1: 330–2,). However, his discussion of other areas of private law, such as property law, was informed by policy choices. These choices were utilitarian ones: the promotion of subsistence, abundance, equality and security. In his later work, Bentham discussed the disappointment-prevention principle as a principle on which "the law of

property rests" (Bentham 1983, 345; cf. Kelly 1990, 175). Frederick Rosen has suggested that this principle was elaborated as part of Bentham's project for radical reform, when he sought to justify compensating office holders who might otherwise oppose constitutional reform (Rosen 1983, 129; cf. Kelly 1990 176–7). It was thus a principle introduced to balance a policy of reform with the need to respect existing expectations. Bentham realised that the legislator never began with a clean sheet, but always worked in the context of expectations generated by existing practices. The legislator could modify the existing patterns of expectations, but in so doing, he needed to act cautiously. The security-providing principle, which advocated an equal distribution of rights protecting person, property, condition and reputation, needed to be balanced by the disappointment-prevention principle. A redistribution of property on utilitarian lines could best be achieved through regulating the laws of succession. Bentham thus held out the idea of the perfect utilitarian code as the long-term goal. But the disappointment-prevention principle acted as a brake on the speed at which the goal would be achieved (Kelly 1990, chap. 7).

6.4. The Foundations of John Austin's Jurisprudence

Although John Austin (1790–1859) declared that his aim in life was only to disseminate the doctrines of Jeremy Bentham, it was the younger man who became the most influential English jurist of the nineteenth century (see Rumble 1985, 17–8; Hamburger and Hamburger 1985, 29; Morison, 1982; Agnelli 1959; Moles 1987; Löwenhaupt 1972; Lobban 1991, chap. 8; see also Schofield 1991). His life, however, was largely unsuccessful and unfulfilled. Appointed to a chair of Jurisprudence and the Law of Nations at the University of London in 1826, he began lecturing in 1829, after spending six months preparing in Germany. However, he lectured only until 1833, having attracted very small classes (Rumble 1996). Although he published *The Province of Jurisprudence Determined* in 1832, it was not until its republication after his death in 1859 that it made a considerable impact (Stephen 1861, 474; cf. Rumble 1991). Austin's reputation was enhanced in 1863 with the publication of his *Lectures on Jurisprudence*, which were drawn from his courses prepared three decades earlier. His work was now widely read and reviewed, and soon became the standard fare for students in jurisprudence as legal education began to revive (Lobban 1995).

Austin was certainly more congenial to the conservative legal profession than the radical Bentham, many of whose ideas stood at the core of his theories. Although a committed Benthamite as a young man, sharing the master's radicalism (see Austin, 1824), his political views grew increasingly conservative (Austin 1859). Unlike his mentor, moreover, Austin sought to reform rather than revolutionise the English legal system. Under the influence both

of Bentham and German legal scholars, he developed an analysis of legal concepts to help make sense of the law he found, and to point the way to reform (Schwartz 1934; Campbell 1957–1959; Lobban 1995). Where Bentham's work was designed for the service of the censor, Austin devoted little time to the science of legislation, confining jurisprudence to an analysis and description of positive law. It was not that he had no interest in legislation. The *Province* included a lengthy discussion of the principle of utility in which he stated the hope that ethics could become a science capable of demonstration; while in 1844 he expressed a desire to write a general work "to show the relations of positive morality and law [...] and of both to their common standard or test" (Austin 1873, 141; Ross 1893, 201). However, Austin never completed the project, and the rigid separation of law and morals in his jurisprudence led many to see him as the ideal theorist for the growing nineteenth century state.

For Austin, jurisprudence was concerned with positive laws "considered without regard to their goodness or badness" (Austin 1873, 176–7). The separation of law from morality, which stood at the heart of his project, prevented morality becoming the measure of law's validity, and meant that law would not be the touchstone of morals (Hart 1957–1958, 596–9; Stumpf 1960, 117–20). However, the distinction Austin drew between law and morality was more a practical one than a philosophical one. For Austin, law "properly so called" was a command issued by a determinate rational being, backed by the threat of a sanction, or punishment (Austin 1873, 93–4, 356). This was a voluntarist definition of law, which applied to both human and divine law, and which aimed to counter the notion that law could be known by an innate moral sense (ibid., 221n, 148–56). There were three types of such laws "properly so called." Firstly, there were those which God set to man, backed by sanctions which came "by the immediate appointment of God" (ibid., 174, 106). Secondly, there were those set by political superiors to inferiors, or by private individuals in pursuance of legal rights which derived from those political superiors. These laws were backed by political sanctions. Finally, there were rules of positive morality which did not come directly or indirectly from a sovereign or God, but "being *commands* (and therefore being established by *determinate* individuals or bodies), they are laws properly so called: they are armed with [moral] sanctions, and impose duties, in the proper acceptation of the terms" (ibid., 184). A rule imposed by a club on its members was therefore a rule of positive morality, but one which could be properly styled a "law" (ibid., 187).

In contrast to laws properly so called, there were also rules of positive morality such as those of fashion or honour, which could only be called law by analogy, since there was no determinate group or individual which commanded the conduct, and no determinate person to impose the sanction. A breach of etiquette might make it likely that conduct would be disapproved of, which in turn might make it likely that a member of the group would in-

flict an evil. But insofar as it was not determinate, it was not properly called a law. Austin included international law under this heading, defining it as "positive international morality." It was *morality* since its rules did not derive from a political superior; but, since they were set by general human opinion, they were *positive* rules, which could be identified by the jurist without regard to their quality, and be studied as a practical science.

Austin distinguished positive human law from other laws "properly so called," not by its philosophical nature, but by the nature of the body issuing and enforcing the command. Positive law, or law "strictly" so called, was set by a sovereign to members of the independent political society over which it ruled (ibid., 181). Every such law presupposed a *polis* or *civitas*. Austin's definition of the province of jurisprudence as the study of positive law was therefore aimed to focus the student's attention on the body of rules enforced by the courts, rather than on any other body of enforceable rules. What, then, was the relationship between positive and divine law? Following William Paley (Paley 1785), Austin argued that a benevolent God designed human happiness, and therefore enjoined all acts which tended to it. Utility was the index to divine commands. "Knowing the tendencies of our actions, and knowing his benevolent purpose," he said, "we know his tacit commands" (Austin 1873, 109). However, if utility should be consulted by the legislator when making positive law, it was not, for Austin, a standard against which to test its validity. Indeed, Austin did not recognise the potential problem of positive human laws which so clearly violated divine ones that they ought to be disobeyed. Utility, he argued firstly, could not clearly be perceived by isolated individuals, but could only be properly understood in a social context (ibid., 151). This was to argue for a rule-based utilitarianism, by which the whole tendency of any kind of action was considered, rather than the individual act. "The question to be solved is this," he said: "If acts of the *class* were *generally* done, or *generally* forborne or omitted, what would be the probable effect on the general happiness or good?" (ibid., 110). Utility demanded rules, because individuals would be partial or misinformed in calculating utilities for their own situation. Secondly, utility was itself a fallible test, one which would never perfectly replicate the divine will but could at most approximate to it (ibid., 141–2). Instead of a notion of divine law undermining human laws, Austin's invocation of the principle of utility allowed him to defend a command-based theory of law against notions such as the moral sense theory which he felt might allow individuals to disobey too easily.

Austin's principle of utility was as much descriptive as prescriptive. Legislators and judges, by and large, did (he thought) follow what utility dictated. If they failed to do so, the public would initially criticise them by invoking arguments from utility, and ultimately rebel. In general, utility dictated obedience to governments: "Disobedience to an established government, let it be never so bad, is an evil: For the mischiefs inflicted by a bad government are

less than the mischiefs of anarchy" (ibid., 121). Nevertheless, under a bad
government, the utilitarian rule of obedience might be dislodged by a direct
calculation weighing the mischief wrought by the existing government against
the benefit attending a new one (ibid., 122, 221n, 287n). If resistance led to
better government, then it would be useful, for the anarchy of revolution
would be short, while the benefits of better government would be more per-
manent. Austin acknowledged that such resistance would undermine the legal
system. In a manner reminiscent of Bentham, he noted that it would be "ille-
gal or a breach of positive law, though consonant to the positive morality
which is styled constitutional law, and perhaps to that principle of utility
which is the test of positive rules" (ibid., 275). Again like his master, however,
he noted that if the community and government considered their relative po-
sitions from the viewpoint of utility, they would come to compromises short
of revolution (ibid., 122).

For Austin, the sovereign in a state, who issued the commands which
made up positive law, was legally illimitable, for the notion of a limited sover-
eign was "a flat contradiction in terms" (ibid., 270). Austin's identification of
the sovereign echoed Bentham's, while modifying the master:

If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual*
obedience from the *bulk* of a given society, that determinate superior is sovereign in that soci-
ety, and the society (including the superior) is a society political and independent. (Ibid., 226)

Just as Austin's definition of positive law was a practical one, which sought to
demarcate the rules he was interested in studying from others which might
philosophically be denominated law, so his definition of political society
sought practically to demarcate the societies he was concerned in studying
from those he was not. Native North American tribes, which occasionally
came together under one leader to repel common enemies before dispersing
again into families rendering obedience to their own chiefs, were not in his
view political societies, since there was no *habitual* obedience to one common
leader. That being so, by definition, there could be no positive law common to
the community, but only customary rules, set by general opinion but not en-
forced by legal or political sanctions. Nevertheless, Austin admitted that if
one applied the term "political" to very small societies, each independent
family could indeed be seen as an independent community under a head, in
which case the same customary law would fall into his definition of positive
law. Austin rejected this, arguing that a "political" society had to be a large
one, or there would be no concept of a "natural society" (ibid., 238–9). Aus-
tin's distinction between these societies was a practical one, for his main con-
cern was to mark out a subject for law students in London, who wanted to
make better sense of the law in their country than Blackstone had been able
to do. Since he was interested in the study of broader systems of law, and "the
various principles common to maturer systems" (ibid., 1107), he chose to ex-

clude tribal societies. Austin however admitted the indeterminacy of his definition. For he admitted that one could never fix precisely the number of people necessary to constitute a political society (ibid., 239). Moreover, in borderline cases—as in England during the civil war—it might be impossible to settle the question of when a natural society became a political one, even if all "the facts of the case were precisely known" (ibid., 234). If Austin's subject was law as enforced by the state, the question whether in particular contexts a state existed or not could not ultimately be settled by definition.

Austin's notion of sovereign constituted by a habit of obedience was criticised by Hart in terms which echo his criticisms of Bentham. The mere fact of obedience, Hart said, could not explain the continuity of sovereignty and the persistence of laws made by past sovereigns, as well as the legal limitations which exist on sovereign power (Hart 1994, 51–61). However, like Bentham, Austin did not regard the habit as merely a regular course of conduct shared by many. Rather, he stated three reasons why people obeyed governments, each of which was related to the principle of utility. Firstly, people perceived that the end of government was human happiness. This alone would suffice if government were perfect. Since that was not the case, there was a second reason for obedience: people feared the anarchic consequences of disobedience. The third reason for obedience was custom or sentiment having "no foundation whatever in the principle of general utility" (Austin 1873, 302). However, even here, calculations of utility entered indirectly. Indeed, "a perception, by the bulk of the community, of the utility of political government, or a preference by the bulk of the community, of any government to anarchy," Austin said, "is the only cause of the habitual obedience in question, which is common to all societies, or nearly all societies" (ibid., 303). This was not merely uncritical obedience.

Austin's view on how the habit of obedience limited government echoed Bentham's. In defining the sovereign as *legally* illimitable, Austin was concerned with the power of the supreme authority within the state. If sovereigns had the power to change constitutional law, any laws which they imposed on themselves or their successors would be "merely principles or maxims which they adopt as guides, or which they commend as guides to their successors in sovereign power. A departure by a sovereign or state from a law of the kind in question, is not illegal" (ibid., 271). Nevertheless, the conduct of earlier sovereigns did generate expectations in the population. An act would be regarded as unconstitutional if it was inconsistent with a maxim or principle adopted by the sovereign, or habitually observed by it, for it would thwart the people's expectations "and must shock their opinions and sentiments" (ibid., 274). This, in turn, would affect their habit of obedience. Therefore, although the monarch was superior to the governed in being able to enforce his will, "the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of

rousing to active resistance the might which slumbers in the multitude" (ibid., 99). Indeed, "the power of the sovereign flows from the people, or the people is the fountain of sovereign power" (ibid., 304). For that reason, "every government defers habitually to the opinions and sentiments of its own subjects" (ibid., 248, 242). However, by Austin's definition, that which limited the sovereign could not be *law*. Since the sanction on the sovereign—disobedience— was exerted by an indeterminate body, it was by his definition not law properly so called, but a law set by opinion.

Austin also considered the question of how sovereigns succeeded each other. He recognised that, in order to have a stable society, those who succeeded to sovereignty "must take or acquire by a given generic mode" of succession (ibid., 196). Indeed, he argued, Rome had suffered since there had been no mode of "legitimate" or "constitutional" imperial succession which was "susceptible of generic description, and which had been predetermined by positive law or morality" (ibid., 197; cf. ibid., 274). Similarly, in a country governed by a multitude, he said, constitutional law determined which people exercised sovereign powers, and how such powers were shared. This was "a compound of positive morality and positive law" insofar as the limits of the power of the collective sovereign body were set by morality, while the rights of individual members of the body were determined by law. Where a collective sovereign body existed, questions of succession could be settled by law. In a country governed by a monarch solely, however, the constitutional rules which determined the person who would bear the sovereignty was "positive morality merely" (ibid., 73). Austin's view of law as a command made him unable to explain how a court might decide as a matter of *law* between two rival claimants to a throne in a country governed solely by a monarch. For Austin, in such an interregnum, the courts would have no authority derived from a sovereign, since there would be rival claimants to sovereignty. The court might act of course as adviser to the people, on the question of whom to obey, providing a focus for their expectations, thereby giving a potential political settlement of the question, by guiding the matter of obedience. However, by Austin's legal definition, this would be an interregnum, where it would be unclear who was the sovereign.

There has been much discussion of Austin's difficulty in locating where sovereignty lay in a number of actual societies, and hence in determining whether his sovereign was only a formal postulate or a verifiable political fact (see Stone 1964, 73; Moles 1987, 71; Lobban 1991, 245–53; Morison 1958– 1959, 221; Rumble 1985, 91–2). Austin sought to locate sovereignty precisely in Great Britain and the United States, in arguments which often look uncomfortable. In so doing, he did not focus on the immediate holders of political power. In Britain, he argued, sovereignty lay jointly in the king, the peers and the body which elected the House of Commons (Austin 1873, 253). Austin argued that members of the Commons were not delegates, but merely (implied)

trustees, in order to avoid holding that sovereignty might oscillate between the crown-in-parliament and the crown, peers, and electorate, according to whether parliament was sitting or not. There had to be continuity of sovereignty, even during elections. After an election, sovereign power was exercised by the crown-in-parliament. The implied trust could therefore not be *legally* effective, since parliament could repeal any law binding members of parliament as trustees, without the direct consent of the electorate. The trust was only effective if backed by the sanctions of positive morality. Although sovereign power was exercised by governors, then, this power itself rested on a wider set of public expectations and social practices. The sovereign was the source of law; but it was itself constituted by what public expectations recognised as that source (cf. Kelsen 1961, xv). Austin recognised that this could be formalised. For he noted that there could be extraordinary legislatures which themselves laid down constitutional rules which bound the ordinary legislatures: rather in the manner of American constitutional conventions.

For Austin, the sovereign was the formal source of all laws enforced by the system. Divine law, natural law or custom might be the "remote cause" of a law, "but its source and proximate cause is the earthly sovereign, by whom it is *positum* or established" (Austin 1873, 565–6). All judge-made law was equally "the creature of the sovereign or state," so that custom could not be seen as law until it was applied by the courts (ibid., 104, 554). Until then, rules of conduct adopted spontaneously by communities were only rules of morality, enforced by the disapprobation or approval of conduct by the community. Austin rejected the view that customary law was positive law by virtue of its immemorial usage, noting that if customs were already binding as law, there would be no need for courts to expound them. In any event, much judiciary law was not of ancient origin, but built either on recent customs or on the judges' own conception of public policy or expediency (ibid., 556). This was to argue that the common law was in effect (as Bentham had put it) the custom of the courts, not the custom of the country. Austin's categorisation of custom attracted much later criticism (see Hart 1994, 44–9), but his position that customs were not law until enforced by courts was perhaps less contentious than it seemed. It was, in one sense, a tautology: if the definition of positive law was that it was a rule enforced by the state, customary rules did not become law until they were enforced by the state's agencies. Nor were the courts legally obliged to apply the norms of customary law. While there might have been a high level of public expectation that they would, Austin was aware of enough decisions contrary to customary practice to see that the link was not a direct one.

6.5. Austin and Common Law Reasoning

Austin's definition of the sovereign owed much to his reading of Hobbes and Bentham. Like them, he faced the problem of how to regard legal rules which

did not derive from legislation. Hobbes, of course, failed to account for a body of such rules, while Bentham sought their translation into a code. Austin was much less insistent than his mentor on codification, seeing it as only a late stage in legal development, and was more explicit in putting the code into an historical context of the development of law. At first, he said, rules were developed by custom or usage. They were subsequently adopted by judges in tribunals, and extended and developed by consequence and analogy. Judges then began to introduce new rules by themselves. This stage was followed by the rise of legislation, the interpretation of which generated new judiciary law and statute law. The conception of a code was the final stage in legal development. It would supersede all other law but would nonetheless need perpetual amendment (Austin 1873, 655–7, 697).

Criticising Bentham for being "disrespectful" towards the judges, Austin countered that judicial legislation was "highly beneficial and even absolutely necessary." It had often made up for the negligence and incapacity of the legislature. Austin therefore set out to defend a common law approach, and to argue that a set of rules could be teased out of a system in which judges were not mere arbitrators, but subordinate legislators. Kept in line by the influence of public opinion, by the supervision of the legislature and courts of appeal, and by the legal profession itself, judicial legislation was not arbitrary, uncertain or incoherent (ibid., 224n, cf. 666). Moreover, while judicial commands were often occasional or particular, "the commands which they are calculated to enforce are commonly laws or rules." If judge-made law were "merely a heap of particular decisions inapplicable to the solution of future cases," he wrote, it would not be "determinate law," but arbitrary adjudication (ibid., 686, 96). Discussing the Chancery, Austin therefore defended the following of precedent, saying that courts which decided "arbitrarily in every case, could not exist in any civilised community."

Where did these rules come from? Austin admitted that the first decision on any point in equity must have been arbitrary (ibid., 640). However, the judge's aim in court was not to establish rules, but to decide cases: he "legislates *as properly judging*, and *not as properly legislating*" (ibid., 642). New rules were thus not overtly introduced. Instead, judges claimed to ascertain existing law by interpretation or analogy. In words which reflected a common law mentality, Austin said that if a new rule

obtains as law thereafter, it does not obtain directly, but because the decision passes into a precedent: that is to say, is considered as evidence of the previous state of the law; and the new rule, thus disguised under the garb of an old one, is applied as law to new cases. (Ibid., 548)

The rule was to be found in the *ratio decidendi* of a case, discovered by a process of induction and abstraction (ibid., 643) Although not a command in form, this was "itself a *law*," proceeding from the sovereign and capable of performing the function of a guide to conduct when statutes were wanting

(ibid., 648). Nor was it (as Bentham would say) fictitious, for if it was known to be the legislator's will "that the principles or grounds of judicial decisions should be observed as rules of conduct by the subjects, and that they should be punished for violating them, the intimation of the legislator's will is as complete as in any other case." In effect, the tacit command issued by the sovereign remained constant: to act or forbear from whatever acts were described in case law. Case law was thus analogous to "all the expository part of statute law," which did not contain the actual command, but described the acts forbidden or permitted (ibid., 663).

Nevertheless, this argument contained difficulties for Austin's theory. The command in question might be indeterminate, for the *ratio* in novel cases was a new ground, not previously law (ibid., 649). Nor was this a problem confined to novel cases, for interpretation and analogical reasoning played a large role throughout case law (ibid., 66). Judges constantly made and applied new rules, analogous to existing ones (ibid., 661). A new case could often not be decided under the old rule since it fell outside its scope, but if it bore a generic likeness to the precedent case, the judge would perceive that both cases should be governed by the same rule. Since the new case could not fall under the existing rule, "a new rule of judiciary law, resembling a statute or rule by which the latter is comprised, ought to be made by the court, and applied to the case in controversy" (ibid., 1039–40). The court, extending the *ratio* of the first case by analogy, in effect identified a broader rule which encompassed both cases and applied it, and in the process made new law (ibid., 1040). Law thus grew; but its growth also involved the making of choices. The analogical reasoning Austin discussed here differed importantly from syllogistical reasoning, for it dealt with contingent matter, which reflected experience, while the resemblances identified between cases were not absolutely certain or necessary. Judges were therefore not simply applying a pre-existing law, but were extending it, by building on experience and public expectation, which might itself limit what they could do (ibid., 668).

Austin was in fact sceptical about quite how determinate rules could ever be (ibid., 683). If in theory a perfectly precise system of rules could be generated, such an "ideal completeness and correctness" was "not attainable in fact" (ibid., 1032). In practice, a judge faced with two indefinite rules, and a case which resembled both in different ways, would be faced with a competition of opposite analogies. Moreover, the rules of case law were necessarily indeterminate, for the terms used by the judge were "faint traces from which the principle may be conjectured" (ibid., 651). Austin therefore admitted the difficulty of extracting the *ratio decidendi* from cases (ibid., 671). Furthermore, "we can never be absolutely certain that any judiciary rule is good or valid law," sufficiently to know that it would be followed in future (ibid., 677). Whether or not a certain *ratio* would be followed in later cases might rest on the number of instances in which it had already been followed, or on

its consistency with the wider legal system, or on the reputation of the judge making the initial decision. Even if a *ratio decidendi* had come to be accepted as a rule, moreover, it could cease to be law, if the ground of the decision ceased (ibid., 652).

Austin's analysis of judiciary law thus sought to defend the common lawyers and their expertise (cf. ibid., 634). However, it did not fit well with his theory of law, for it was hard to square the *ratio decidendi* with a command theory. If the public were commanded to obey the rules of judicial law, there was no way of telling definitively what the *rationes* were which composed those rules. Nor was the judge commanded to follow the *ratio*, for as a subordinate legislator, he could depart from precedent when he felt the reason of the rule had gone. In many ways, indeed, Austin's judiciary law looks more like his "positive morality" than his "positive law." For the "rule" was essentially set by the opinion of judges and jurists. Indeed, Austin said that while it was true that a new rule of judiciary law was always *ex post facto*, the decisions of the courts were often anticipated by the opinion of private practitioners, which "though not strictly law, performs the functions of actual law, and generally becomes such ultimately" (ibid., 673; cf. ibid., 667). The people's conduct was thus guided by what the law probably would be seen to be by the judge. Austin effectively failed to solve the problem faced by earlier jurists of how to reconcile the common law's creation of rules with a positivist theory. The closer one examined the evolution of judge-made law, the less it seemed to fit the command theory.

6.6. Austin's Analytical Jurisprudence

Austin sought in his lectures to analyse notions common to all legal systems, effectively developing what Bentham called a legal metaphysics. There has been much debate over whether this enterprise was a formal and rational one, in which the aim was to develop a framework of concepts with which to analyse the law of existing systems, or an empirical and inductive one, in which his classifications were generalisations from experience (see Stone 1950, 138; Lobban 1991, 225–6, Cotterrell 2003, 59, 81–3; Rumble 1977–1978, 77–9; Hart 1957–1958; Morison 1958–1959, 225; Morison 1982, 145–6). Austin argued that while every legal system had its own specific characteristics, there were also common "principles, notions, and distinctions." Although many of them were to be found in the "scanty and crude systems of rude societies," they were to be found more fully elaborated in maturer systems (Austin 1873, 1107). General jurisprudence was concerned with the exposition of principles which were abstracted from these positive systems. Its object was "a description of such subjects and ends of Law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions" (ibid., 1112).

This was an exercise in definition, not one of observation. Austin described his task as that of analysing "necessary principles, notions, and distinctions." They were necessary, and not contingent, because "we cannot imagine coherently a system of law" at least in a mature society "without conceiving of them as constituent parts of it" (ibid., 1108). Once law was defined as a command, other definitions followed formally from it. Thus, having defined moral and religious rights as "imperfect" because they were not enforced judicially, he could declare that every "right" was the creature of law (ibid., 354). Austin's definitions followed as a matter of logic. By issuing certain people with commands to forbear from certain actions in regard to other determinate parties, the former were placed under an obligation or duty, and the latter were invested with a right (ibid., 408). However, defining the nature of rights in the abstract said nothing about their content. To understand the nature of rights more fully, "[w]e must take a right of a given species or sort, and must look at its scope or purpose," which meant "the end of the lawgiver in conferring the right in question" (ibid., 409). His definitions would create a structure of concepts with which to analyse the content of a legal system, but without dictating that content.

In setting out his definitions, Austin had a reformist aim, for he wanted to make legislators and lawyers aware of issues which might remain hidden, to enable them to make better law. This can be seen in his discussion of intention and negligence. For Austin, "[i]ntention, negligence, heedlessness, or rashness, is *of the essence* of injury or wrong," for unless a person knew or might have known that he was by his act violating his duty, the sanction threatened by the sovereign could not influence him (ibid., 474, 485). However, these various states of mind were different, and might connote different offences. They needed to be distinguished to avoid confusion and lack of order (ibid., 478). Although Austin's own distinctions between these states of mind was not wholly consistent (ibid., 442–4; cf. Smith 1998, 122–7), the point behind the exercise was important: clarity of definition would allow the jurist more clearly to distinguish, for instance, offences such as murder and manslaughter. Some scholars have pointed out that in seeking fundamental, necessary notions, Austin might be taken as subscribing to a kind of natural law theory whereby substantive answers would be dictated by his definitions. However, his aim was not to flesh out the content of the duties in question, but only to point to the range of possibilities to be considered by the lawmaker. Thus, while he might show the legislator that murder was distinct from manslaughter, he would not prescribe the relative penalties for these offences. Nonetheless, doing nothing more than merely pointing out the possibilities was still reformist in nature, and would help clarify what a utilitarian legislator should best do (cf. Austin 1873, 485–6).

Austin aimed at the same time to create a structure of categories into which the substantive law could be organised. This was, in effect, the same

task that civilian Institutists, and Hale and Blackstone, had set themselves (cf. Hoeflich 1985). Austin's map of the law sought to show that legal categories could not be divided according to distinct types of law, but that all law had to be related to rights and duties emanating from the sovereign. He therefore rejected both the traditional division of law into distinct substantive categories of public and private, and the division of private law into the substantive law of persons and of things. In Austin's categorisation, the law of persons was concerned with questions of status, whereas the law of things was concerned with rights and duties "in so far as they are *not* constituent or component elements of *status* or conditions" (Austin 1873, 42, cf. 713). This division was one of convenience only, established since any rule or principle would be understood more easily if abstracted from the particular modifications which came with certain statuses (ibid., 785, 775). For Austin, it made sense to place public law, or that which regarded the status of rulers, under the law of persons, as "our own admirable Hale" had done, rather than under a separate heading (ibid., 70–1n, 416, 752, 776–7; cf. 786). Austin equally felt that the Roman division of the *jus personarum*, *jus rerum* and *jus actionum* was a logical error, for the latter, rather than being a separate *genus*, was merely a species of the other two. All the general matter of the law of actions, Austin argued, should be distributed under the law of things, while the particular procedures used by persons of a given status (such as children) should be gathered under the law of persons (ibid., 751, 761). Finally, Austin made a further distinction between *jura in rem* and *jura in personam*. The former were rights residing in persons which availed against other persons generally, such as property rights, whereas the latter availed exclusively against particular specified individuals, such as contractual rights (ibid., 381).

With this set of concepts in place, Austin showed how the matter of a legal system should be distributed. He divided the law of things into two main categories. Firstly, there were primary (or principal) rights and duties, which were those not arising from delicts. This category divided further into rights *in rem*, which were largely rights in property, rights *in personam*, which were contractual rights, and combinations of these kinds of rights, such as mortgages or assignments (ibid., 788–9). Secondly, there were secondary (or sanctioning) rights, which concerned matters of civil delict and crime. Delict was in turn divided into those rights arising from infringements of rights *in rem* and those from infringements of rights *in personam*. This arrangement was aimed to make better sense of existing law and to provide a model against which to measure it, by revealing inconsistencies such as that seen in the English division of real and personal property (ibid., 59–60n). However, his arrangement sat uncomfortably with his jurisprudence. As Mill and Holmes later pointed out, the concept of duty was more central to his theory than the concept of right, for his jurisprudence suggested that all law was derived from duties imposed on individuals by sovereign commands (Mill 1863, 453).

Austin's organising structure focused primarily on rights of property and contract which were acquired not by direct commands but as a result of power-conferring rules. But, as Hart pointed out, his command theory was unable to account for such rules (Hart 1994, 27). Given the organisation of his material in the body of the lectures, it is unlikely that Austin failed to notice the problem. Unfortunately, his lectures broke off when he was discussing titles to property, and before he came to discuss contracts, and he left only fragmentary notes of his ideas in these areas. However, the material which remains shows that he did not see primary rights as deriving *directly* from commands. He argued that while property rights were sometimes conferred immediately by the law, as where statutes conferred monopoly rights on individuals, in most cases they were conferred through "intervening facts" to which the law annexed rights as consequences (Austin 1873, 906). Since laws could not be made for every property transaction, titles were necessary as signs to determine the commencement and end of rights and duties. They showed which persons belonged to the class of property owners who had rights conferred on them by law (ibid., 912). At the same time, it was the legislator who chose which facts had legal rights assigned to them as consequences, a choice which was made according to utility. A law or command therefore *ultimately* stood behind the facts.

According to Hart, a description of rights such as these in terms of commands and sanctions could only be done by using the strained argument that the treatment of (say) a contract which failed to observe the required formalities as null and void was a "sanction" (Hart 1994, 33–5). Austin did on occasion treat nullification as a sanction, notably in discussing the courts' refusal to enforce contracts which did not comply with the evidentiary requirements of the Statute of Frauds. But it is significant that in these discussions, nullity was for the most part treated as a sanction when discussing "accidental," as opposed to "essential" elements of a contract, such as the requirement to provide preappointed evidence of a transaction, imposed in order to protect weak parties from inconsiderate engagements. These elements (Austin showed) could be policed by other sanctions, such as fines (Austin 1873, 522, 921–3, 934, 940). Although it would have been possible to do so, Austin did not in fact discuss nullity in general terms as the sanction behind primary rights. However, this means that he simply did not fully address the problem Hart pointed to.

Austin's difficulty, it may be suggested, was that he failed to develop clearly the notion of a "complete" law, such as developed by Bentham. There are some suggestions in his work that he was aware of the need for such a notion, for he acknowledged the centrality of the imperative part of law, and indicated that in "describing the primary right and duty apart" he was fragmenting distinct aspects of a complete law (ibid., 794–5). He also acknowledged the centrality of the penal part of law:

There is often to be found no definition of a particular right, only an approximation to a defi-
nition, in so far as the acts and forbearances which are violations of it are declared to be
crimes or injuries, and described in that portion of the law which relates to crimes and inju-
ries. (Ibid., 795)

However, where Bentham began with an analysis of offences, Austin spent lit-
tle time looking at penal law. His map of the law left unstated the command
which his theory claimed was at the root of the system. Instead, he began with
primary rights, "[t]hose which exist *in* and *per se*: which are, as it were, the
ends for which law exists" (ibid., 789).

To some degree, Austin, looking through common law lenses, failed to
grasp the nature of Bentham's definitions and divisions, which had clearly di-
vided the rights set out by the law, from the very flexible rules of procedure
used in vindicating those rights. "If I adopted the language of Bentham," he
wrote, "I should style the law of primary rights and duties, *substantive* law;
and the law of sanctioning or secondary rights and duties, *adjective* or *instru-
mental* law" (ibid., 788). Austin criticised Bentham for including both penal
and civil law under substantive law: for "all rights of action arising out of civil
injuries are purely instrumental or adjective; as well as the whole of criminal
law and the whole law relating to punishments." Although he admitted that
the scope of a right of action was distinct from the procedure used when the
right was enforced, "still it is impossible to extricate the right of action itself
from those subsidiary rights by which it is enforced" (ibid., 792). Unlike
Bentham, Austin did not seem concerned to define the imperative parts of
law, but preferred, in a way almost reminiscent of Blackstone, to describe
remedies. Yet this left gaps in his picture of law. Thus, he argued that second-
ary rights and duties presupposed that obedience to the law was not perfect,
since they arose from imperfect obedience. "If the obedience to the law were
absolutely perfect," he said, "primary rights and duties are the only ones
which would exist; or, at least, are the only ones which would ever be exer-
cised, or which could ever assume a practical form" (ibid., 790). Yet this left
unclear what the command would be which gave birth to these rights.

Austin proved a popular theorist for the common lawyers. His analytical
scheme of concepts proved invaluable to those who accepted his general
theory of law as command, but who also endorsed his defence of the judicial
role in the common law. However, Austin's attempt to reconcile a Benthamic
theory with the method and content of the common law was not successful.
For if the theory was founded on a notion of commands, he found it difficult
to relate the substance of private law to a set of commands. In later life, Aus-
tin resisted all encouragement to publish his jurisprudential work. It has been
suggested that one reason for this may have been that as he became older and
more conservative, he ceased to believe in many of the utilitarian intellectual
premises which lay behind his earlier work (Hamburger and Hamburger
1985, chap. 9). Austin's pen only began to flow freely once more when he

came to writing conservative pamphlets. It may be speculated, however, that Austin's jurisprudential writers' block may have come from the difficulty of reconciling the command theory of the *Province* with his discussion of the purposes and subjects of law.

THE AGE OF MAINE AND HOLMES

Building on the ideas of Bentham, John Austin developed an analytical juris-
prudence which was to prove highly influential in the later nineteenth century.
Although based on a command theory, Austin's version was made more palat-
able to common lawyers since he argued against Bentham that law could be
generated from the decisions of judges, and since he did not call for the aboli-
tion of the common law and its replacement by a code. While being the clear-
est exposition yet published of how the common law might generate rules,
tensions remained in Austin's theory. For although his analytical jurispru-
dence was premised on a definition of law as command, many of the rights
and remedies he described were not clearly related to commands, while the
closer one looked, the harder it was to see the rules which came from judicial
decisions in terms of commands.

 Jurists who succeeded Austin in the mid-nineteenth century began to chal-
lenge his idea that all legal rules came from commands. In an era when evolu-
tionary theories were increasingly in vogue, they returned to an historical ap-
proach to their subject, in the search for principles which underlay the devel-
opment of legal rules. Their approach to history was more akin to that of
Kames (who remained largely unread in the later nineteenth century) than to
that of Selden or Hale, for they sought less the positive origins of the common
law or its doctrines than principles of law which could be seen to emerge over
a period of development. In this chapter, we shall consider two jurists in par-
ticular who used history, albeit in very different ways. In England, Sir Henry
Maine sought to develop a theory which would explain the evolution of a
modern, individualistic political society, while showing that an Austinian ap-
proach was unsuitable to pre-modern societies such as India. In America,
Oliver Wendell Holmes looked to history not for a grand evolutionary theory,
but rather to explain and rationalise the doctrines of the common law. Ulti-
mately, however, history proved unable for both of these jurists to answer the
questions left open by analytical jurisprudence. By 1900, Holmes had come to
the conclusion that the Austinian project of uncovering coherent legal princi-
ples was doomed never fully to succeed. His conclusions opened the way for a
much more sceptical approach to law in the early twentieth century.

7.1. The Early Career of Sir Henry Maine

Henry Maine's *Ancient Law*, which qualified and questioned many of Austin's
assumptions, was published in 1861, the year when Austin's *Province* was re-
published. Henceforth, English jurisprudence was seen to have two ap-

proaches: Austin's analytical one, and Maine's historical one (Stephen 1861; Harrison 1879). Maine had a glittering career which was in many ways the antithesis of Austin's. Born in 1822, he become a tutor at Trinity Hall, Cambridge, in 1844, before being appointed Regius Professor of Civil Law at the university at the age of 25. In 1853 he became Reader at the Council of Legal Education established by the Inns of Court, teaching jurisprudence and Roman law. Maine's lectures proved highly popular, and attracted a broad range of auditors (Cocks 1999). In 1861, Maine was appointed legal member of the Governor-General's Council in India, where he remained until 1869, when he returned to the post of Corpus Professor of Jurisprudence at Oxford University. He continued to advise the government on Indian matters, and was knighted in 1871. Six years later, he was elected Master of Trinity Hall, Cambridge and appointed Whewell Professor of International Law. Throughout these years, he remained a prolific writer, contributing regularly to periodicals and newspapers, as well as publishing his lectures. After *Ancient Law*, he published *Village Communities in the East and West* (1871), *Lectures on the Early History of Institutions* (1875) and *Dissertations on Early Law and Custom* (1883). These scholarly works were succeeded by *Popular Government* (1885), made up of four essays previously published in the *Quarterly Review*, in which he lamented the rise of democratic politics. After his death, Frederick Pollock and Frederic Harrison edited and published his Cambridge lectures on *International Law* (1888). Unlike Austin's, Maine's star burned bright during his lifetime, but his reputation rapidly declined after his death, as scholars questioned his detailed suggestions, and largely eschewed his broad, comparative and historical approach to jurisprudence (see Feaver 1969; Cocks 1988). English legal history would flourish in the age of F. W. Maitland, but English jurisprudence remained largely analytical and positivist, rather than historical.

Ancient Law was published at a time when many theorists were increasingly hostile to speculative, *a priori* methods, and were looking for an inductive, historical approach to their subjects (Feaver 1969, 41–2; Stein 1980, 88). Such an approach was to be found especially in the geological research of Sir Charles Lyell (Lyell 1830–1833) and in the science of comparative philology. The latter was most associated with the work of Max Müller, who lectured on comparative philology in Oxford in the 1850s, and whose *Lectures on the Science of Language* appeared in the same year as *Ancient Law* (Burrow 1966, 149–53). Müller popularised the idea of an Aryan race which was the primitive ancestor of the Europeans. By tracing the common roots of words, he argued, one could trace something of the nature of primitive society (see Stocking 1987, 56–62; cf. Burrow 1967). At the same time, English historians, such as Maine's contemporary J. M. Kemble, were increasingly influenced by German historiographical approaches, notably that of Niebuhr (Burrow 1981, 119–20, 162–3; cf. Cocks 1988, 20–1; Allen 1978, 97–101; Stocking 1987, 117–8). Moreover, after the publication in 1859 of Charles Darwin's *The Ori-*

gin of Species, there was bound to be a receptive audience for theories tracing the evolution of law.

Ancient Law was not however a Darwinian theory. Equally, while the work did show the influence of geological, philological and German historiographical approaches (see Maine 1901, 3, 119, 121–2), it was only in his later works that Maine extensively developed his Teutonic history, his notion of common Aryan ancestry, and his comparative interest in other primitive societies. By contrast, this first book focused largely on the history of Roman law, and drew on the work of Germans such as Savigny. Maine's focus on Roman law was hardly surprising, given that *Ancient Law* grew out of his teaching of the subject at a time when there was a growing interest in England in Roman law as a repository of universal legal principles (see Graziadei 1997). Maine had himself played an important part in encouraging a revival of legal education in England in the 1850s, emphasising historical and philosophical as well as practical learning (Brooks and Lobban 1999). His own attitude to Roman law can be seen from an article he published in 1856, in which he argued that it had a vocabulary of concepts and terms which were necessary for clear thought, but which were lacking in England (Maine 1856, 8). Maine argued that by learning the terminology of Roman law, fundamental legal conceptions could be clarified, and a clearer, more consistent, language could be put in place for legislative draftsmen to use. Indeed, he said, Roman law was "fast becoming the *lingua franca* of universal jurisprudence" (ibid., 17). While acknowledging that there were traces to be found of Roman law in the medieval common law, he observed that

It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together—it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation. (Ibid., 2)

On a practical level, Maine felt that English jurists needed to have a better mastery of legal terms before they attempted to codify existing law into a single body, something he felt was desirable.

Thus far, Maine's approach did not seem much at odds with that of Austin, who had himself argued that codification could only come at a certain stage of development. However, in his lectures, Maine stressed the development and changes in Roman law in ways not done by Austin, and as early as 1853 he was showing an interest in theories of legal progress (Cocks 1988, 30). His interest in these matters may have been increased as a result of the Indian Mutiny in 1857. Having shown no interest in the subject before, between August 1857 and May 1858, almost all of the thirty four articles he contributed to the *Saturday Review* concerned Indian questions. It was at this point that he discovered

village communities, describing the discovery as being "like the first glimpse of a great truth in a course of physical experiment" (quoted in Stocking 1987, 121). Maine's new interest in India was to transform his interests, taking him from the history of Roman law to a wider history of law in Aryan societies. Nonetheless, in his work, he remained more an essayist than a scholar. Often the master of the memorable phrase, he largely eschewed detailed research of his own, drawing instead on the works of continental scholars, newly edited texts on ancient Irish law, and reports generated by Indian bureaucrats, as well as material drawn from private conversations, novels and even street-songs (Maine drew especially on Von Maurer 1856; Morier 1870; De Laveleye 1870; Nasse 1871; Sohm 1911; see also Maine 1871, 115).

7.2. *Ancient Law*

Ancient Law was not a work aimed at an audience of legal practitioners (cf. Tylor 1871a, 177). Although Maine focused on key areas of law, such as property, wills, contract, and delict, he had no theory to explain their essential nature, nor did he seek to give guidance to judges in solving cases. On the contrary, he contended that it was an error for jurists like Austin to assume that there were permanent and necessary notions in law (cf. Maine 1871, 4). As an example, he pointed out that none of the features which modern jurists held to be essential to the notion of a will—that it took effect at death, that it was secret and revocable—were to be found in the testaments from which modern wills descended (Maine 1901, 174). The very concepts jurists saw as essential to law changed over time. Moreover, the changes they underwent were not to be explained by an "internal" history of logical development. Doctrinal developments were often haphazard or accidental; but they had to be seen from a wider perspective of social change. For Maine, legal doctrines were not inevitable, but were shaped by society. Nevertheless, the theorist could trace trends in the evolution of societies. Maine's evolutionary theory at the same time challenged the universality of the central plank of Austinian thought: that law was in its nature the command of a sovereign.

Maine set out a six stage theory of legal development. At first, before the idea had taken root that there might be a distinct legislator, judgments were made by heroic kings deciding not on the basis of prior law, but through divine inspiration (Maine 1901, 8). No custom preceded the judgment. Custom was rather moulded on a succession of such decisions. Over time, the people's belief in the wisdom of their kings eroded, when they experienced weak rulers, and a second stage ensued. This was the era of rule by oligarchs not claiming divine inspiration, but acting as the repositories of the law: "Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste" (ibid., 12). This stage was succeeded in turn by the age of codes. For Maine, the principal impetus to-

wards writing down the law was simply the discovery of writing, and these codes were not based on any principle, but only recorded existing usages (ibid., 14–15). However, once primitive law was embodied in a code, its spontaneous development ended, and henceforth, all changes in the law were "effected deliberately, and from without" (ibid., 21).

Maine argued that the stage at which a society put its law into a code determined whether it would be stationary or progressive in nature. In Rome, law was codified early, in the Twelve Tables. By contrast, in India, a religious aristocracy was able to retain its power for much longer; and when their usages were put into a code, in the Laws of Manu, they included "not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed" (ibid., 17). The lateness of the codification of Hindu jurisprudence meant that it suffered under "an immense apparatus of cruel absurdities" engrafted onto it by irrational imitation of sound customs, and India remained stationary while Rome progressed. Maine argued that in a progressive society, social necessities and opinions always ran ahead of law. Its happiness depended on how the gulf between them was closed. This was done, successively, by fictions, equity and legislation. By "fiction," the first vehicle of change, Maine meant the general pretence that the law was static and unchanging, when it was in fact extended and applied to new situations (ibid., 26). Both Roman *responsa prudentum* and English case law worked on the assumption that they were merely restating the principles of existing law, when in retrospect it was evident that they had changed the law. Although this process was useful in the early stages of development, fictions made the law harder to understand. Modern English law, Maine therefore felt, had to be pruned of these fictions before it could be put into a harmonious order.

The second vehicle of change was equity, or natural law. This was a separate set of principles, regarded as having an intrinsic ethical superiority. Once the Romans had applied Greek ideas on natural law to the *ius gentium*, Maine argued, they regarded the latter not as an inferior law only applicable to non-Romans, but as a universal law which could be used by the Praetors to restore what they considered a simpler, and more natural, order. Maine drew parallels between the Praetor and the English Lord Chancellor. In both Rome and England, he said, the systems of equitable jurisprudence came to be as fixed as law—"as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal" (ibid., 68–9).

The vehicle of change in the final era discussed—the one to which Maine devoted least time—was legislation. This era was presided over by a Benthamic sovereign, for both an autocratic prince or a parliamentary assembly, which passed legislation, were to be seen as "the assumed organ of the entire society." Although the legislature might be restrained by public opinion, it was in theory empowered to pass any legislation it desired, for the obligations imposed derived solely from "the authority of the legislature" and not from

"the principles on which the legislature acted" (ibid., 29). By describing such a legislature as appropriate to contemporary society, and by supporting codification (cf. Maine 1871, 60), Maine showed that he did not seek a different theory of legislation or adjudication for modern polities from that provided by Bentham and Austin. Indeed, by placing the good of the community above any other objective, he said, Bentham had given "a clear rule of reform [...] and thus gave escape to a current which had long been trying to find its way outwards" (Maine 1901, 78–9; cf. Maine 1875a, 227).

Maine's prime target in *Ancient Law* was rather the natural law tradition represented by Rousseau (Maine 1901, 92). Rousseau's error was to construct an *a priori* theory developed from considering an imaginary individual in a state of nature, which Maine regarded as "a social order wholly irrespective of the actual condition of the world and wholly unlike it" (ibid., 89). In speaking of individuals in this state who acquired property by occupation, and who contracted with others to create civil society, natural lawyers read a simplified present into the past (ibid., 249–50). In fact, Maine observed, the very notion that occupancy conferred rights could only be found in developed societies where concepts of property and ownership had already been established (ibid., 256). As one reviewer pointed out, Maine's historical approach showed that "no system of law has ever yet looked upon the community as an aggregate of *individuals*," and that none "had ever renounced its paramount right to mould inheritance, obligation, contract, and wrong in any way it pleased" (Harrison 1861, 472–3). Maine agreed with Bentham that societies always modified their laws according to their views of general expediency. However, he did not find this observation particularly useful in itself. It was more important to uncover the impulse which motivated ideas of expediency. Bentham's error, he said, was to focus only on the modern world. His was "the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients (Maine 1901, 119). To understand how and why laws had changed, it was essential to turn to history.

In *Ancient Law*, Maine sought to trace law's evolution from a primitive patriarchal society to a modern individualistic one. Drawing on a variety of sources, from the Bible, through Tacitus to the Code of Manu, and supported by the history of Roman law, Maine argued that early societies were not collections of individuals, but were aggregations of families, which were treated like perpetual and inextinguishable corporations. The family was headed by the eldest male, who was absolutely supreme within the household. The fact that he could rule by despotic commands accounted for the scanty number of rules of law (ibid., 126). Households were united by common kinship, or at least the fiction of it. In ancient societies, the family unit was defined by agnatic kinsmen, that is, all those descended through the male line (ibid., 148–

52). Over time, this family unit began to weaken, while both the state and the individual strengthened. Initially, civil laws had only been the Themistes of a sovereign, a developed form of the isolated commands issued by heads of households. They were commands addressed only to family units, and were like modern International Law, "filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society" (ibid., 167). Gradually, however, the sphere of civil law enlarged itself, for as societies progressed, "a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals" (ibid., 167). Individuals now came to replace the family as the units of civil laws, and the tie between them which replaced the rights and duties derived from the family was that of contract. As Maine put it in his most famous aphorism, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*" (ibid., 170).

Having set out this theory of development, Maine showed how legal concepts centred on the individual emerged from older family-based forms. Maine claimed that since Roman law "transformed by the theory of Natural Law" had bequeathed the idea that the normal state of property was individual right, the scholar had to look to India and eastern Europe to understand the nature of primitive joint property (ibid., 259–60). By comparing these societies, he said, one could see the gradual disentanglement of separate rights of property from the blended rights of a community, as the patriarchal family divided into separate households, and these in turn were supplanted by the individual (ibid., 269–70). However, for his detailed discussion of how property came to circulate and be held by individuals, Maine turned again to the history of Roman law, much of which he borrowed from Savigny (see Pollock 1890, 152–3; Pollock 1893, 112–3). In early patriarchal societies, he said, the alienation of any of the family's patrimony was difficult to achieve, and could only be done by the use of solemnities scrupulously adhered to (Maine 1901, 271–2). Since this impeded the free circulation of things, "advancing communities" devised means to overcome this problem. While articles of great value—such as land, slaves and beasts of burden in Rome—could only be transferred through a formal procedure of mancipation, less important items—*res non mancipi*—were permitted to be transferred more easily, by delivery (*traditio*). The subsequent history of Roman property law, Maine said, was the history of the assimilation of the former to the latter kind of property, which was achieved by fictions and equity (ibid., 277–9). Similarly, the trend of European legal history, he said, was to see the assimilation of the rules of landed property into the rules of personal property, thereby facilitating transfer.

The ancient Roman formal conveyance, the *mancipium*, was also the source of the two key modern institutions by which individual property was transferred, the will and the contract (ibid., 204). In early societies, Maine said, testate succession was rare, since inheritance involved succeeding to the

entire legal position of the *paterfamilias*, rather than carrying out his inten-
tions after death (ibid., 181). As it was only required when there was no kin to
succeed the *paterfamilias*, the early will was "not a mode of distributing a
dead man's goods, but one among several ways of transferring the representa-
tion of the household to a new chief." It was therefore linked to the practice
of adoption—as it continued to be in stationary India (ibid., 193–4). The an-
cestor of the modern will was the Roman plebeian will, an *inter vivos* convey-
ance alienating the family and its property to the person named as heir. This
descended from the ancient formal Roman conveyance, the *mancipium*, which
was modified when a less formal type of will was gradually permitted by the
Praetors. Nonetheless, even these developments did not entail a desire by tes-
tators to dispose of their property as they liked (ibid., 203–4, 223). Rather,
Maine suggested that the idea of a will as giving the testator power to divert
property away from his family, or to bequeath uneven portions, dated only
from the middle ages, when "Feudalism had completely consolidated itself"
(ibid., 224). The crucial change effected by feudalism was the introduction of
primogeniture, which disinherited all the children save one.

Modern ideas on contract were equally the product of the development of
civilisation, rather than being universal notions. Early law, Maine said, only
sanctioned promises accompanied by elaborate ceremonies: it was not the in-
ternal intentions of the parties but external acts which mattered. Contracts,
like wills, developed from conveyances. At first, the Romans had used the
same word—*nexum*—for all solemn transactions, and the same forms used to
convey property were used in the making of a contract (ibid., 318, 322). The
two concepts became separated over time in commercial contexts, as vendors
gave credit to purchasers of goods, delaying the completion of the *nexum*.
With the development of new contractual forms, the obligation became more
central than the formalities. Having traced the evolution of the four Roman
consensual contracts, Maine sought to prove that what were often seen as the
oldest, and most natural forms of contractual obligation, pacts, were in fact
the product of a longer development.

Maine also discussed the development of torts and crime, an area which
illustrated the development of the state. The older a code was, he argued, the
more prominent and minute was its penal code. This did not however imply a
strong legislator (ibid., 368). For, in early societies, penal law was essentially
the law of torts or delicts, where the victim prosecuted with a view to financial
compensation, and the courts acted as arbitrators. Maine argued that the for-
malities used at the start of Roman litigation were thus a ritualised version of
more a primitive state, in which the parties in the middle of a quarrel agreed
to submit to arbitration by the Praetor. The compensation awarded reflected
what would have been extracted by a man seeking vengeance (ibid., 375–6). It
was only gradually that the state took more general cognisance of criminal law.
Initially, if an offence against the community was committed, it was not left to

the courts to redress, but a legislative act was passed to punish the wrongdoer. Drawing on Roman sources, Maine outlined the evolution of the idea that crime was an injury to the state through four stages. At first, the commonwealth avenged itself by isolated acts against the wrongdoer. A second step was taken when the number of such offences had grown to such a level that the legislature delegated its powers to particular commissions to investigate and punish. In the third, commissions were appointed before any offence had been committed. Finally, these commissions were made into permanent benches of judges, and certain acts were declared to be crimes (ibid., 385).

Fluently written, and avoiding difficult detail, *Ancient Law* proved immensely popular, catching the enthusiasm of the time for grand historical explanations of the growth of civilisation. Nonetheless, theoretical shortcomings remained. Maine did not attempt a theory of why societies progressed, which was rooted in the nature of humanity, as Kames had done. His was rather a description of aspects of the development towards a modern individualistic society (Burrow 1991; Cocks 1991; Collini 1991). Moreover, his vision of the *telos* sometimes lacked theoretical coherence. For instance, he clearly approved of the movement towards the contract-based modern society and abhorred any fetters which governments sought to impose on the freedom of contract. He consequently praised the science of political economy, which was "directed to enlarging the province of Contract and to curtailing that of Imperative Law, except so far as law is necessary to enforce the performance of Contracts." In modern society, he argued, legislation was unable to keep up with human activity:

and the law even of the least advanced communities tends more and more to become a mere surface-stratum having under it an ever-changing assemblage of contractual rules with which it rarely interferes except to compel compliance with a few fundamental principles or unless it is called in to punish the violation of good faith. (Maine 1901, 305–6)

This view, which represented the politically conservative Maine's hostility to an interventionist state, was hard to reconcile either with his historical argument that legislation was the modern means by which law and opinion were kept united, or with his Benthamic definition of the modern legislator. It was also hard to square with his description of the evolution from a society in which the *paterfamilias* subjected his family to his arbitrary imperative commands towards a state based on law. The emancipation of the individual from the family was described as necessarily accompanied by a growing number of private law rules, effected by fiction, equity and legislation, and regulated by public authority. This raised the question of the jurisprudential basis of civil law—Maine's "surface-stratum"—and the relationship between the penal and civil branches which had so concerned Bentham. However, Maine ignored the question, and failed to define what he meant by his legal terminology and to relate it to his wider theory. For contemporary readers, however, this hardly

mattered: for a definition of legal terminology, they could always read Austin. Maine's theory thus seemed to show the march of history towards a society whose law could be analysed in Austinian language; and then to describe the modern state in terms congenial to the mid-Victorian generation which looked to a *laissez-faire* state rather than one associated with Bentham's Panopticon.

7.3. After *Ancient Law*

On his return from India, Maine sought to develop some of the theories put forward in *Ancient Law*. His later work exhibited far less interest in the evolution of Roman doctrines, however. Instead, Maine now looked more to evidence from Germanic communities, ancient Ireland, and India, that "great repository of verifiable phenomena of ancient usage and ancient juridical thought" (Maine 1871, 22; Maine 1875b, 10). This later work has received a mixed reception from scholars. While some have argued that he now set the terms of debate for a generation of writers on the evolution of property and political institutions, others have seen a decline in his work as a jurist, with Maine "no longer sure of his capacity to produce some all-embracing theory which could account for the totality of legal phenomena" (Collini, Winch, and Burrow 1983, 210; Cocks 1988, 111, 101). This later work is important, both for its development of themes found in *Ancient Law*, and for some new ambitions. This can be seen by looking at Maine's aims in these works.

Firstly, Maine sought to address policy questions. His work always had a reformist element to it. At the very least, he felt that comparative law could show that the results produced by the tortuous and technical common law system could be reached by "shorter routes" (Maine 1871, 6). Moreover, given that English property law needed explanation in historical terms, Maine's analysis of the roots of absolute and common property contributed both to an understanding of that law, and to facilitate reform as a result of that understanding (Maine 1901, 292–3). Indeed, some reviewers, notably Mill, used his ideas to challenge the very system of land tenure in England by which 30,000 families controlled almost all the soil, even if Maine did not endorse such views (Mill 1871, 549; cf. Maine 1875b, 30). In *Village Communities in the East and West*, Maine sought to address Indian policy questions in particular. In his view, British policymakers who did not properly understand Indian society had erred in trying to apply juristic and economic ideas which were not suitable to the subcontinent. The often disastrous land policy of Indian governments resulted from a failure to understand the nature of Indian village tenures (Maine 1871, 105).

Maine also showed the error of applying the conclusions of political economy in India, as if they were timeless and universal. While the lessons of this science were appropriate to modern individualistic societies, they were

not usable in ancient ones. Members of village communities, he said, such as existed in India, did not exchange goods on the basis of market principles, but according to custom. Indeed, the very concept of absolute property bearing competition value and capable of creating a fund from which rent could be paid was the product of a lengthy evolution, which may have been completed in England, but had not been in India (see ibid., 159, 185). Maine argued that political economists assumed that practice universally reflected theory, assuming that certain motives always acted on human nature without a clog. This was to ignore the "frictions" generated by custom and inherited ideas. His aim was to show that these frictions were themselves capable of scientific analysis (Maine 1875b, 32, 37).

It was in this context that a second feature of Maine's later work emerged: its focus on the nature of customary law, and its accompanying critique of the relevance of Austin's theory to primitive societies. Maine accepted that Austinian analysis was essential to give "clear ideas either of law or of jurisprudence," and held that his idea of sovereign commands "correspond to a stage to which law is steadily tending and which it is sure ultimately to reach" (ibid., 67, 70). Nonetheless, these ideas were not only philosophically inappropriate in explaining the nature of Indian customary law, but their application in India had undesirable consequences. Indian village communities, he said, were managed by elders who acted both in a quasi-legislative and a quasi-judicial way, declaring the custom of the community. Once declared, it was regarded as having always been the custom (ibid., 74, 110). This was a living law, but one which did not use the terms of Austinian jurisprudence. Customary law was enforced only by the general disapproval of the community if its norms were violated. There was no concept of rights or duties here: "a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society" (Maine 1871, 68). When the British introduced courts of justice with compulsory execution of decrees, they therefore wrought a significant change, for rigid sanctions were introduced which had not hitherto existed. Given the interdependence of Austin's concepts, the concomitant notions of command, right and duty were also necessarily imported. This had the effect of revolutionising Indian law and ossifying custom. For where it had once been flexible and organic in the hands of the village elders, it now became fixed in the records of the courts, and was obeyed not as usage, but as a command of the sovereign (ibid., 72). With this system in place, if an Indian lawyer found no local rule in the books, he looked to England to help him out. This made Maine pessimistic for the future of Indian customary law. As he saw it, the only way forward was to enact uniform, simple codes of law for India.

In the *Early History of Institutions*, Maine articulated more clearly his theoretical criticism of Austin. Looking at India, he questioned whether "the force which compels obedience to a law [had] always been of such a nature

that it can reasonably be identified with the coercive force of the Sovereign" (Maine 1875a, 375). Runjeet Singh, the ruler of Punjab, he noted, had been an absolutely despotic ruler, yet it was to be doubted "whether once in all his life he issued a command which Austin would call a law" (ibid., 380). Instead the rules under which the Punjabi people lived were "administered by domestic tribunals in families or village-communities," units too small to count as Austinian political societies. Nor could it be said that Runjeet Singh commanded the laws in the sense that he had the power to change them, for Maine said it would never have occurred to him to alter them. Throughout the east, Maine said, rulers raised taxes and armies, and issued occasional commands to their followers, punishing disobedience severely. But they did not change the law.

If Austin's theory was logical for a homogeneous community with "a Sovereign whose commands take a legislative shape," it was inappropriate for eastern societies, where the people derived their rules from customs regarded as always having existed (ibid., 399–400, 392). Moreover, to say that the customs observed in the Punjab—an independent political society—were merely "positive morality" until they were enforced by courts was "a mere artifice of speech" (ibid., 364). Maine's point was well received by many scholars, who came to consider Austin's view of custom inadequate (e.g., Holland 1900, 57). However, Austin's very definition had sought to exclude the primitive societies Maine discussed, for pragmatic reasons: he had only wished to analyse those legal concepts which were applied in a court-based system, such as was to be found in England. As Maine made clear, the Indian communities he discussed did not have this system of courts until introduced by the British. Moreover, Maine's notion of customary law was not aimed at assisting the jurist seeking to understand and apply the law in court. As he saw it, in primitive societies,

it is extremely difficult to draw the line between law, morality, and fact. It is of the very essence of Custom, and this indeed chiefly explains its strength, that men do not clearly distinguish between their actions and their duties—what they ought to do is what they have always done, and they do it. (Maine 1871, 191)

Maine's comments on custom thus sought to show how Austin's ideas could not be applied in India, and to show that a different understanding of rules and norms was required if one sought to understand primitive society. However, this insight was not used to examine modern English law. Nor did Maine seek to address the problem long faced by common lawyers of explaining the evolution of customary common law rules.

A more significant challenge to Austin's notion of law perhaps came from his theory—which echoed Kames's—that law emerged in an adjudicative rather than in a legislative context. Drawing on his comments in *Ancient Law* on the origins of Roman jurisdiction, he argued that courts originated in the

attempts of rulers to channel private quarrels and acts of revenge. In early so-
ciety, he wrote, "Courts of Justice existed less for the purpose of doing right
universally than for the purpose of supplying an alternative to the violent re-
dress of wrong" (Maine 1875a, 288). The judicial power of the state was slow
to emerge because its coercive power was weak. Too weak to forbid "high-
handed violence" or even to assume "active jurisdiction over the quarrel
which provoked it," early authorities sought to limit the quarrel by "prescrib-
ing forms for it, or turning it to new purposes" (ibid., 265–6). Disputes could
be controlled by referring them either to immediate or future arbitration.
They could also be judicialised by allowing the claimant to seize the goods of
the absent defendant, in order to force him to come to later arbitration. The
traces of such a system were to be found in the Roman *Pignoris Capio*, and in
English and Irish rules on distress. Maine argued that there was increasing
regulation by the rulers of this process, beginning with such rules as to what
kinds of property could be distrained and how, and leading to a moment
when the entire process was in the hands of the sheriff. However, it took a
long period of time before the state was strong enough to take the whole dis-
pute into its own hands from the beginning (ibid., 268–9). Procedure was
thus the heart of early law. As he famously put it, "substantive law has at first
the look of being gradually secreted in the interstices of procedure; and the
early lawyer can only see law through the envelope of its technical forms"
(Maine 1883, 389; cf. Maine 1875a, 252). In this argument, Maine made the
crucial point that the decisions courts made reflected the feelings and expec-
tations of the society which resorted to them. However, he did not develop a
theory about those feelings and expectations. He remained more interested in
giving an "external" description of law and societies developed, than in giving
an "internal" discussion of how courts should proceed.

Maine's later work is significant for a third ambition. In it, he tried to com-
plete his theory of the evolution of a modern individualistic society by tracing
the development of individual property out of the system of joint-property to
be found in primitive communities bound together by kinship and custom
(Maine 1875a, 65–8). In this enterprise, Maine had to explore the nature of
land tenure, and the role of feudalism in social development, matters he had
touched on in *Ancient Law*, but had not explored in detail. These questions
could not be answered by looking at Roman law, but had to be explored by
looking at Indian, Irish, Russian, and Sclavonic societies. In examining these
societies, Maine abandoned his earlier distinction between progressive and sta-
tionary societies, and sought instead a theory of development which would em-
brace all Aryan societies. For Maine, India was now to be seen as a living exam-
ple of Europe's past, where "these dry bones live" (Maine 1871, 103, 148).

By tracing the process by which kinsmen settled on land, and how ideas
regarding property subsequently altered, he argued, one could trace both the
evolution of modern notions of sovereignty and modern notions of landed

property (Maine 1875a, 77). In *Village Communities*, Maine dated the beginning of the development towards private property (and hence also towards contract) from the moment when families first began to acquire separate lots on the arable mark of the village (Maine 1871, 80, 112). In *Early History of Institutions*, he traced it to an earlier stage still: "from the moment when a tribal community settles down finally upon a definite space of land," he wrote in, "the Land begins to be the basis of society in place of the Kinship" (Maine 1875a, 72). Its evolution could be seen by comparing the Hindu Joint Family, the southern Sclavonian house community, and the Russian village community (ibid., 80–8). The first of these was held together only by ties of blood, rather than land. Instead of having particular holdings in any piece of land, "the various households reclaim the land without set rule." In the second stage, the joint family had expanded by adopting outsiders, and had "settled for ages on the land." This stage saw the rise of "the system of exchanging lots" of land. In the third stage, the village was made up of a collection of separate dwellings, and village lands were no longer the collective lands of the community. In this society, "the portions of land are enjoyed in severalty": arable lands had been fully divided, pasture partially divided, and only waste remained common (ibid., 113). These separate holdings, Maine suggested, were the ancestors of socage tenure and equal inheritance. However, there were also other forms of modern property which derived from feudalism, which he now sought to explain more fully than before.

In *Ancient Law*, Maine had seen feudalism as a "mixture of refined Roman law with primitive barbaric usage" (Maine 1901, 135). The feudal system, he said then, grew from benefices granted by barbarian invaders of Roman provincial lands, in return for military service. Although the lord with his vassals "may be considered as a patriarchal household, recruited, not as in the primitive times by Adoption, but by Infeudation," it was transformed by Roman law, for lawyers familiar with Roman jurisprudence introduced conceptions of absolute proprietorship which were alien to archaic patriarchy (ibid., 229–38). In *Village Communities*, however, following Von Maurer, Maine argued that all primitive proprietary systems had a tendency to develop into feudalism (Maine 1871, 21). Although communities were first democratic, leadership in them was often accorded to the person regarded as having the purest line of descent from the common ancestor of the village. This man's power gradually grew into a kind of lordship, as he began increasingly to sever his land holdings from those of the rest. In this process, waste land came to be regarded as the lord's waste, and the commoners seen to have acquired their rights only on the sufferance of the lord (ibid., 141–2). Over time, "a group of tenants, autocratically organised and governed," replaced "a group of households of which the organisation and government were democratic" (ibid., 133–4). For Maine, this was a desirable development, for an autocratically governed manorial community was better able to bring into cultivation waste

lands than a village community. Whereas pre-feudal holdings were enslaved to the rules of custom, the holding of the lord was a kind of absolute property, which could be exploited efficiently (ibid., 164). Studying the village community had not given Maine Rousseau's love of the primitive past.

Maine expanded his theory in *The Early History of Institutions*, where he traced the transmutation of the patriarch into a chief over time. In the house community, he said, the eldest male need not be the parent of everyone in the household, but was regarded as having the purest blood line. Neither *paterfamilias* nor owner of the family property, he was "merely manager of its affairs and administrator of its possessions" (Maine 1875a, 117). Over time, the tradition which connected the chief with the common ancestry of all the kinsmen decayed. However, as he lost authority derived from blood-ties, he was able to consolidate his power through military leadership. Drawing on the Brehon laws (ibid., 130), Maine argued that the chief was both a military leader and rich in cattle, gained from the spoils of war. At the same time, his power over waste land allowed him to increase his wealth, which in turn helped the feudal relationship to evolve, as inferiors put themselves under his protection, both in order to acquire cattle and to obtain security (ibid., 142, 157–8, 166–7).

If socage tenure derived from "the disentanglement of the individual rights of the kindred or tribesmen from the collective rights of the Family or Tribe," absolute ownership and primogeniture therefore derived from "the special proprietorship enjoyed by the Lord, and more anciently by the tribal Chief, in his own Domain" (ibid., 120, 126). Nonetheless, both the rise of the modern state and the evolution of property as an exchangeable commodity required the collapse of the feudal groups (Maine 1875a, 86–7). Maine did not devote much attention to the decline of feudalism, regarding this as nothing less than the later history of western societies. However, in an essay on the decay of feudal property in France and England, he pointed out that kings were merely to be seen as lords of very exalted manors (Maine 1883, 306). In contrast to the French, he argued, English kings allowed no lord to be absolutely interposed between themselves and their subjects, while they also interfered in ways to weaken the manorial court, and to facilitate the expansion of socage tenures. Maine clearly approved of the fruits of this development. There could, he felt, "be no material advance in civilisation unless landed property is held by groups at least as small as families." He therefore supported reforms which would make land freely exchangeable (Maine 1875a, 126; Maine 1883, 325).

Maine's discussion of property thus sought to complete the analysis begun in *Ancient Law* of the development of modern, individualistic, property-holding societies, while also showing the different roots of varying kinds of property which still existed. Thus, he argued, there were still vestiges of the common cultivating community in England, which could not be explained in terms of feudal rules, but had to be understood in different terms (Maine 1871, 90ff.). Although critics like Harrison argued that the historical method

was useless for the daily practice of law (Harrison 1879, 120), Maine's histori-
cal approach offered a way to understand the nature of extant property law
which was potentially as useful as that of the analysts—who for the most part
had avoided detailed discussion of this area.

Although Maine's broad brush proved an inspiration to others, the detail
of his arguments was soon eroded. As Pollock wrote to Holmes, "I do not
think [he] will leave much mark on the actual structure of jurisprudence, al-
though he helped many others to do so" (Howe 1961, 31). Anthropologists
challenged his patriarchal view of early society, Romanists qualified the his-
tory on which much of his early work relied, while historians of medieval law
challenged his conclusions on feudalism (see Maine 1883, chap. 7; Macfarlane
1991; Cocks 1988, 23; Pollock and Maitland 1968, 2: 240–4). Although he
was followed in the field by Paul Vinogradoff, historical jurisprudence failed
to establish itself among jurists, where Austinian analysis, suitably qualified,
continued to hold sway. Instead, historians such as Maitland turned to the de-
tailed research into the feudal era which Maine had eschewed.

Maine's legacy was ambiguous, for he made important qualifications to the
Austinian vision, without clearly setting out the agenda or goals of historical
jurisprudence. Maine showed that law functioned in a different way in primi-
tive societies, and thereby opened a path for legal anthropologists to explore.
However, short of a few generalisations, he did not himself set out to explore
the nature and working of customary law in such communities. Equally,
Maine importantly showed that there were no universal, necessary notions in
law. However, he did not use this observation to argue that one could rethink
modern concepts of contract or property. Instead, since he saw a society
based on contract as the natural result of progress, for Maine the evolution of
these modern concepts was a necessary accompaniment to progress. Explain-
ing the current meaning of these notions was still left to the analysts. Maine's
project stressed how law changed and developed, reflecting the society in
which it was to be found. However, his aim in this project was in large part to
show how societies such as nineteenth century England had developed to ar-
rive at their current state. Although he argued that to understand the present,
one had to look at the primitive atoms of which it was composed, he was
more concerned with the intermediate developments through which the sys-
tem had been transformed, including, most importantly, feudalism. Nonethe-
less, his own theories of feudalism were flawed, and invited specialist scholars
to make revisions. Maine's point that a better understanding of past develop-
ments would help give a better understanding of present law was hardly a new
one; but in the event, the kind of detailed historical research provided by men
like Maitland was of limited relevance to lawyers. Maine's vision was a useful
ideal corrective to the legal evangelism of English administrators in India. But
his intellectual horizons remained by the fact that he wished, as far as England
at least was concerned, to remain on the same ground as Austin.

7.4. The Rise of Formalism in America

The same era, after 1860 which saw the ascendancy of Austinian ideas in England also saw the decline of natural law thinking in America (Nelson, 1974). Austin himself began to be read in America and a new "formalist" approach emerged (Feldman 2000, 91; LaPiana 1994, 77; King 1986; Sebok 1998, chap. 2). This approach involved looking at law from within, considering legal doctrines but not their social contexts. Formalists saw law as a science, in which a limited number of overarching principles and categories could be obtained by reasoning inductively on the materials of the legal system found in case law. These principles formed a conceptually coherent system from which answers to legal questions could be rationally deduced. Legal problems could thus be solved by using demonstrative, rationally uncontroversial, formal reasoning.

This kind of approach to law was encouraged by two developments, Firstly, beginning in New York in 1848, procedural reforms abolished the old forms of action, replacing them with a single civil action in which only the facts which constituted the cause of action could be pleaded (LaPiana 1994, 70–5; Friedman 1985, 391–411). Lawyers now had to understand the principles on which the law was based, rather than following the forms of action. Secondly, the postbellum years also saw the transformation of American legal education (Stevens 1983, 35–91). Mid-nineteenth century legal education at Harvard and elsewhere, largely in the hands of practitioners, had become little more than a formality (LaPiana 1994, 48–54). However, legal education was revolutionised after 1869, when Christopher Columbus Langdell (1826–1906) was appointed professor and dean of the Harvard Law School (Carter 1997). Langdell's most famous innovation was to introduce the case method of teaching. In place of simply lecturing on principles, or seeking to impart information, he required students to explain the arguments presented in a defined number of cases, while he questioned them on the arguments presented, thereby helping to extract principles from the cases. Although he wrote relatively little, Langdell came to be seen as the father-figure of formalism. In 1870, he published the first part of a casebook on Contracts, with the full text following in 1871. It echoed the method of his classes: cases were presented in chronological order, but without a commentary. It was only in his second edition of 1879 that he added a summary of the topics covered in the cases at the end, discussing his views as to whether the cases were rightly decided or not (Langdell 1879). In 1880, this summary was separately published. Although he also published another casebook, as well as a number of articles (Langdell 1872; Landgell 1908), his main influence came through his teaching and that of his followers.

For Langdell, law was an autonomous, technical science (Gordon 1995, 1245). The main business of the lawyer was to study the law "*as it is*". The study of law as it ought to be was not "specially" the concern of lawyers

(LaPiana 1994, 77). Langdell and his followers sought to remove any political element from legal questions, searching for the pure principles of the common law. They were therefore primarily interested in private law, untouched by statute and unaffected by state regulation. Statute law was seen as haphazard, while public law was excluded from the teaching curriculum as unsuitable for scientific study (Grey 1983, 34). Langdell's highly logical approach to the law led him to denounce certain views of law as wrong, and to ignore broader questions of justice. For instance, he rejected the recently formulated mailbox (or postal) rule, according to which a contractual offer was deemed to have been accepted as soon as the letter of acceptance was put in the post, as doctrinally incorrect. He acknowledged supporters of the rule "claimed that the purposes of substantial justice, and the interests of the contracting parties as understood by themselves" would best be served by it. But this, he said, was "irrelevant" (Langdell 1880, 20–1; Grey 1983, 4–5; Sebok 1998, 84–6). Langdell clearly felt that judges could get the law wrong, and sometimes exasperated his colleagues with his view that law was something different from what the judges said it was (see LaPiana 1994, 19; Carter 1997, 54n).

Some scholars have therefore seen Langdell as striving to uncover a science of self-evident immutable and unchanging principles, in the manner of latter day natural lawyer (Gilmore 1977, 42–3). Others, such as Holmes, suggested that he was rather striving for logical cohesion in law. "[T]he end of all his striving, is the *logical* integrity of the system," Holmes wrote: "he is less concerned with his postulates than to show that the conclusions from them hang together" (Holmes 1995g, 103). Langdell clearly sought principles to direct the lawyer. A true lawyer, he wrote, was one who had such a mastery of the principles and doctrines of law that he was able "to apply them with constant facility and certainty to the ever-tangled skein of human affairs." The number of fundamental doctrines was smaller than was usually supposed, he said, which would be seen if each were "classified and arranged [...] in its proper place" (Langdell 1879, viii, ix). However, these principles were not the abstractions of natural law, but were to be taken from cases, found in the library, which Langdell said was the laboratory of the legal scholar (Carter 1997, 76). Langdell's principles and doctrines were not timeless, for he insisted on the development of law over time, as his chronological listing of cases demonstrated. Law could never be a purely deductive science: it

has not the demonstrative certainty of mathematics; nor does one's knowledge of it admit of many simple and easy tests, as in case of a dead or foreign language; nor does it acknowledge truth as its ultimate test and standard, like natural science; nor is our law embodied in a written text, which is to be studied and expounded, as is the case with the Roman law and with some foreign systems. (Quoted in LaPiana 1994, 57)

There was nothing inevitable about the evolution of certain doctrines in the common law. In some areas—as with the original establishment of the doc-

trine of consideration—Langdell noted that it might have been more rational to take a different course; but the issue was by now settled (Langdell 1880, 60–1). Nonetheless, coherent principles and doctrine could be extracted from cases, and any legal decision inconsistent with them was anomalous. At the same time, an anomalous decision which was followed by judges in later cases could itself develop into a doctrine which would have to be accommodated by the theorist (Grey 1983, 25–6). Langdell's task was thus best to make sense of the common law tradition, and to encourage judges to reason in the best manner possible to find answers dictated by the principles of the system (Sebok 1998, 95).

Langdell's desire to present rational and coherent principles of the common law was hardly new; but the context in which he wrote changed the nature of the undertaking. Langdell needed to engage in a similar task as Blackstone, but without relying on natural law or the forms of action to give organising categories. In place of a multiplicity of large treatises describing particular areas of law, organised according to factual subject matter—what T.E. Holland might have called mere indexes to the chaos of the common law—Langdell sought to outline the essential principles of key areas such as contract. Nonetheless, the assumptions of his "scientific" method were in some ways flawed. His classifications and arrangements were designed to be descriptive of legal principles, yet in the process of selecting and ordering cases, he was himself giving a prescriptive view (Carter 1997, 59). The Harvard method helped the student to learn to think like a lawyer. But it did not necessarily give an overview of all the essential principles of law.

Langdell's view also left some questions unanswered, about how law developed. He did not discuss the jurisprudential issues of the nature of law or sovereignty. If this reflected the fact that he was more concerned with explaining doctrine than elaborating theory, it nevertheless created problems for his view of law, and how it developed. Although he has sometimes been seen as a positivist (Sebok 1998, 91), Langdell did not look to a legislator to generate new rules. Nor did he regard the common law as a set of rules resting either on a positive past set of *capitala legum* elaborated by judges or on a natural law derived from divine commands. At the same time, he did not develop a theory of how law reacted to changing demands in society. This begged the question of how law changed. For Langdell, Thomas Grey argues, "the fundamental principles of the common law were discerned by induction from cases; rules of law were then derived from principles conceptually; and finally, cases were decided, also conceptually, from rules" (Grey 1983, 19). This meant, Grey argues, that it was the legal scientist who was the key to progress in Langdell's common law, for it was the scholar or scholarly lawyer who discovered previously unrecognised principles that both explained existing decisions and reflected the changing needs of society (ibid., 31). However, this view (never fully articulated in these terms by Langdell) entailed some problems. If it was

part of the jurist's role to reflect the changing needs of society, he would become in some sense a legislator or policy maker, which would raise questions about the nature of his authority and about the true source of his principles. If, on the other hand, the only source he used was the law as found in cases, this again the question of how law developed in court. If Langdellian judges were constrained to follow only the true doctrines and principles of the law, then the only motor of legal change might turn out to be judicial errors which took root. As shall now be seen, these kinds of questions were taken up by Oliver Wendell Holmes.

7.5. The Early Work of Oliver Wendell Holmes

Born in 1841, Oliver Wendell Holmes was always as interested in scholarship as in success at the bar. He began to write book reviews for the *American Law Review* from its launch in 1867 (the year when he also entered legal practice) and edited the journal from 1870–1873. At the same time, he worked on the twelfth edition of Kent's *Commentaries* with James Bradley Thayer and lectured at Harvard on constitutional law. In 1880, he delivered a series of lectures at Boston University, which were published in the following year as *The Common Law*. Although he accepted an invitation to join Harvard Law School, the success of his *magnum opus* seemed to dull Holmes's enthusiasm for scholarship, and he left Harvard after only three months in 1882 to become Associate Justice of the Supreme Judicial Court of Massachusetts. He began to produce significant works of scholarship again in the 1890s, publishing a series of articles and speeches. In 1903, after twenty years on the Massachusetts bench—an intellectually unfulfilling time, when Holmes was given little scope and showed little appetite for applying his broad theoretical ideas about law—he was appointed to the United States Supreme Court, where he sat until his retirement in 1935 (see Howe, 1963; White 1993; Tushnet 1977).

Holmes's ideas on law developed and changed over time. Much of *The Common Law* was a reworking of articles written in the 1870s, a decade when his intellectual approach changed in significant ways. As a result, it has been described as a book "at war with itself" (Gordon 1982, 720–1). While regarded as a classic of American scholarship, it "is very rarely read in its entirety, and perhaps even less rarely understood" (White 1993, 149; cf. Horwitz 1992a, 32; Alschuler 2000, 131). Indeed, rather than being a consistent legal thinker, it has been said that Holmes's "greatest gifts and most ardent tastes were for clarifying *aperçus*, rather than for systematic thought" (Howe 1963, 281; cf. Touster 1982, 684). As a result, Holmes's thought has been interpreted in various different ways over the years (see White 1971). He has often been seen as part of a revolt against formalism, which was to lead to legal realism (White 1963, chap. 5; Twining 1973b, 15–20). Unlike the formalists, he did not distrust legislation or public law, and encouraged judges to be aware

of policy. Moreover, his famous dissents, notably in *Lochner* v. *New York* (198 U.S. 45 (1905)) made him appear to be a progressive liberal, at a time when formalism was associated with the conservatism of the turn of the century Supreme Court majority (see Grey 1983, 34–5; Gordon 1995, 1250–1). On the other hand, a number of recent scholars have held that there were in fact close affinities between Holmes and Langdell, and that his apparent break with formalism was not as abrupt as was once argued (Gilmore 1974; Gilmore 1977; Touster 1982; Grey 1989). Indeed, one recent commentator, who describes Holmes's insights as unoriginal and his thinking as muddled, sees him as marching arm-in-arm with Langdell in a "revolt against natural law" (Alschuler 2000, 100). Furthermore, on the bench, he often remained drawn more to broader philosophical questions than to policy ones, and often took positions at odds with his liberal reputation (Rogat 1962–1963; Rogat and O'Fallon 1984).

Holmes's early writings were concerned with the Austinian project of analysing "the fundamental notions and principles of our substantive law," and arranging the content of law logically "from its *summum genus* to its *infima species*" (White 1993, 130; Holmes 1923, 219; Holmes 1995e, 47). Nor did he ever wholly abandon this commitment (see Holmes 1995i, 388). Nevertheless, he did not see the common law as a matter of deduction. "It is the merit of the common law," Holmes wrote in 1870, "that it decides the case first and determines the principle afterwards." It was only after a certain time that it became necessary to "reconcile the cases," and "by a true induction to state the principle which has until then been obscurely felt" (Holmes 1995a, 213). Holmes therefore was sceptical of projects of codification. A code could never be perfect, he said, for new cases would always arise which had been unprovided for. If the code had to be rigidly followed, the court would have to "decide the case wrong"; if not, it would be little more than a "text-book recommended by the government." If he opposed a *code*, he nonetheless felt that such a *text* would be of value, and in a number of articles written in the early 1870s, he sketched out an arrangement of law around the concept of duty (Holmes 1995c; Holmes 1995d). Though he rejected Austin's arrangement based on rights, holding that duties preceded rights both logically and chronologically, his analysis was premised on the Austinian assumption that legal sanctions were the defining characteristic of law (Howe 1963, 68).

At the same time, Holmes qualified Austin's command theory. He pointed out that the definition of law as the command of a political superior was "of practical rather than philosophical value." "[B]y whom a duty is imposed," he noted, "must be of less importance than the definiteness of its expression and the certainty of its being enforced" (Holmes 1995a, 215). In the nature of things, a dress-code might be as much a law to a person subject to it as a statute. Philosophically, there might therefore be "law without sovereignty" or law generated by other bodies "against the will of the sovereign" (Holmes

1995b, 295). If this was to acknowledge the point that Austin was primarily concerned only with those rules which happened to be enforced in courts, Holmes showed that this had ramifications which Austin had missed. For if the law relevant to lawyers consisted of what courts enforced, then jurists would need to look at a wider range of sources than Austin had allowed to understand those rules. Holmes pointed out that even if the will of the sovereign was the formal source of law, "lawyers' law" was made by judges, who had other motives besides the will of their sovereign. Moreover,

whether those motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered. (Ibid.)

The sovereign was in fact weaker than Austin suggested. A statute was only "law" insofar as people believed that it would induce judges to act in a certain way, and shaped their conduct accordingly; but judges could ignore precedents and render statutes meaningless by interpretation. To understand law, one therefore had to look at what motivated the judge. To see whether a judge would be induced to act, one first had to look at the facts which might suggest a rule of law to him, which were multifarious. In some cases, Holmes said, "the fact, the belief which controls the action of judges, is an act of the legislature; in others it is public policy, as understood by them; in others it is the custom or course of dealing of those classes most interested; and in others where there is no statute, no clear ground of policy, no practice of a specially interested class, it is the practice of the average member of the community" (Holmes 1995d, 330).

As he reflected on these issues, Holmes began to think of law less in terms of duties and sanctions than in terms of liabilities and remedies. "A legal duty cannot be said to exist," Holmes said, "if the law intends to allow the person supposed to be subject to it an option at a certain price" (Holmes 1995b, 296). A protective tariff, he pointed out, did not create a duty not to import goods, but merely imposed a tax on doing so. Equally, in civil litigation, "[l]iability to pay the fair price or value of an enjoyment, or to be compelled to restore or give up the property belonging to another, is not a penalty." Strictly speaking, a command, and a consequent duty, did not exist unless the breach of it was denied all protection by law, for example by invalidating contracts to perform the forbidden act. By this definition, there were very few strict commands and duties imposed by law (at least outside the criminal law), but the law rather taxed certain conduct. Liabilities, moreover, could be imposed solely on grounds of public policy, regardless of questions of fault, if desired (ibid.; cf. Grey 1989, 830–1).

Holmes thus began to develop the idea that law reflected contingent policy choices; but he continued to seek an arrangement of the law and a set of concepts which could give it coherence. At the same time, his notion that law was to be found in what the courts enforced made him ever more sceptical about claims that pure, timeless, concepts could be found; and he became increasingly interested in looking at history as a way of understanding the law. Challenging Austin's notion that culpability, as a matter of logic, was "an essential component part" of liability (Austin 1873, 474), he pointed out that some wrongs given a remedy at common law imposed a strict liability, some involved culpability as an essential element, and some fell in between. These distinctions could not be explained *a priori*, but were rather the result of development:

Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty. (Holmes 1995d, 327)

Exactly where any line was drawn was "a question for Mr. Darwin to answer." As Holmes looked at history, he discovered (as Maine had before) that doctrines which were justified in a certain way in modern society in fact originated in different contexts with different justifications. There was, he said, a "paradox of form and substance" in the development of the law. In form, the growth of law was seen to be logical, and theory taught that each decision followed syllogistically from existing precedents. But in substance, law did not develop in this way. It developed according to "considerations of what is expedient for the community." This meant that many "precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten." It was hence pointless to see the law as a purely formal system: law always approached but never reached logical consistency, for "It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off" (Holmes 1995f, 75–6; cf. Holmes 1923, 35–6). Reviewing Langdell's casebook, he reiterated this view in a famous phrase:

The life of the law has not been logic: it has been experience. The seed of every growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. (Holmes 1995g, 103)

7.6. Holmes's *The Common Law*

These words, echoed on the first page of *The Common Law*, seemed to promise a jurisprudence exploring the relationship between the law and the forces external to it which determined its growth (Touster 1982, 684). Yet this was not was a work sensitive to historical contexts or to the complexity of social relations. Much of its history was either that of doctrine, as traced through reported cases, or was premised on universal psychological truths read into the primitive past. In this work, Holmes not interested in writing a theory of historical development or a legal anthropology: he was still searching to make sense of the common law, as in their ways, Blackstone and Austin had sought to do. "I shall use the history of our law," he declared, "so far as it is necessary to explain a conception or interpret a rule, but no further" (Holmes 1923, 2).

For Holmes, to understand law, one had to look at what judges did. Judges were not arbitrary legislators, but were motivated by influences which came from the community, including custom or expectation. To that extent, law was a product of its community, mediated by judges. He also felt that the jurist could discover the best interpretation of the community's law, by looking at the history and policy of its doctrines. But because he felt that the law had to reflect the community's needs and desires, he was prepared to criticise ancient doctrines if they no longer served any purpose or lacked a coherent basis.

In this work, Holmes reiterated his scepticism of the power of *a priori* reasoning. His target in *The Common Law* was not Langdell, but German jurists, notably in their theories of possession (Reimann 1992). "The first call of a theory of law," Holmes observed, "is that it should fit the facts," for law, "being a practical thing, must found itself on actual forces" (Holmes 1923, 211, 212–3). "Every right," he said,

is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him [...] any word which denotes such a group of facts connotes the rights attached to it by way of legal consequences. [...] There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by law to that group. The former generally offers the only difficulties. (Ibid., 214–5)

In *The Common Law*, Holmes sought to look at the material of the common law to tease out the principles which best explained it. In seeking an organising principle in the 1870s, he had come to focus his attention on liability as the key notion, rather than duty. His larger task now was to discover a "general principle of civil liability at common law" (ibid., 77). The key to this liability was to be found in a theory of torts: the very area which had hitherto produced no general theory, and which (in the era of the abolition of the forms of action) most needed one. One possible theory, Holmes noted, was to say that man acted at his peril, and was liable for any damage caused by his

voluntary actions regardless of whether harm was intended or due to his neg-
ligence. According to this view, "the party whose voluntary conduct has
caused the damage should suffer, rather than the one who has no share in pro-
ducing it" (ibid., 82, 84). Although there was some older case law to support
this proposition, Holmes doubted whether this was in fact the theory of the
common law (ibid., 89). Instead, he said, the general principle of the common
law was that losses from accidents lay where they fell, even where the instru-
ment of misfortune was a person. Accidents, he noted, could not be foreseen,
and hence could not be avoided. Liability was only imposed when the defend-
ant had a choice to avoid the consequence of his act. This meant that he had
to be able to foresee the consequence, since "[a] choice which entails a con-
cealed consequence is as to that consequence no choice" (ibid., 94).

In developing this argument, Holmes drew on early-modern English case
law, as well as contemporary American decisions, to show that the "act-at-
peril" theory could not explain the cases of the common law. However, Hol-
mes was not merely interested in making sense of the decisions of the *past*, for
he also said that it was not supportable on grounds of policy. "As action can-
not be avoided, and tends to the public good," he said, "there is obviously no
policy in throwing the hazard of what is at once desirable and inevitable upon
the actor" (ibid., 95). Similarly, he felt it was undesirable policy for the state
to make itself into a mutual insurance company against all accidents by pro-
viding the means of compensating those who suffered from the acts of others,
through its laws and courts. Thirdly, Holmes invoked justice. It was no more
just, he said, to make a man indemnify another for a harm which he caused,
but which could not have been foreseen, than it would be "to compel me to
insure him against lightning" (ibid., 96).

Having rejected the strict liability theory, Holmes turned to the second
theory, which rooted liability in the personal culpability of the defendant.
Holmes rejected Austin's contention that since sanctions were penalties for
disobeying the sovereign's commands, they should only be imposed where
there was subjective fault (Austin 1873, 440, 474, 484). Instead, he said, the
law created an objective, external standard of liability, considering what
would be blameworthy in the average man. Courts could not take into ac-
count personal blameworthiness, for "the impossibility of nicely measuring a
man's powers and limitations is far clearer than that of ascertaining his knowl-
edge of law." But in any case, "when people live in society" it was "necessary
to the general welfare" to set up "a certain average standard of conduct"
(Holmes 1923, 108). The standard of liability of the "ideal average prudent
man" was "under given circumstances [...] theoretically always the same"
(ibid., 111). Holmes admitted that there were cases involving strict liability,
such as *Rylands* v. *Fletcher* in 1868 (LR 3 HL 330, 339), which imposed such
liability on the owner who kept anything on his land likely to do harm if it
escaped. Liability was imposed here not because it was wrong to keep poten-

tially hazardous things on land. It was rather the result of a policy choice; for "as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken" (Holmes 1923, 117).

Although the common law used the language of morals in attributing liability, it was not, Holmes argued, concerned with personal morality. The internal state of a wrongdoer's conscience was wholly irrelevant: "[A] man may have as bad a heart as he chooses," Holmes observed, "if his conduct is within the rules" (ibid., 110). The law referred to a moral standard—that of the reasonable man—only to give them a fair chance of avoiding doing harms before they were held responsible for them. This was a matter of policy. "It is," he said, "intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury" (ibid., 144).

The community's sense of reasonableness was to be taken initially from the decision of a jury. However, standards thus articulated could be fixed as law by the courts, giving clearer rules for guidance (ibid., 112). When courts submitted questions involving the standard of conduct to juries, Holmes said, it was because they did not entertain "any clear views of public policy applicable to the matter" and felt that answers should rather be dictated by men of practical experience. The conclusions they reached would reveal either that the conduct complained of was generally regarded as blameworthy, in which case it could be set down as law, or juries would oscillate without giving a clear lesson, and the court would have to make up its own mind on the standard to be set. In either case, the jury's role would diminish, and individual judges would come to understand "the common sense of the community in ordinary circumstances far better than an average jury" (ibid., 123–4, cf. 151). The jury's role would remain strongest in the "debatable land" or the penumbra where lines had to be drawn to demarcate where one general principle began and another ended (ibid., 126).

For Holmes, the objective, external standards thus derived did not apply only in tort but also in other areas. In a largely analytical chapter on contract law, he noted that the law had nothing to do with the actual state of the parties' minds, but judged people by the external evidence of their conduct (ibid., 309). Thus, he said, "a representation may be morally innocent, and yet fraudulent in theory of law," if made by a person while aware of facts which by the average standard of the community were sufficient to give him notice that it was probably untrue (ibid., 325). Moreover, many key questions—such as where to draw the line between conditions and warranties, or how large a defect in the quality of goods would void a contract for repugnancy—were to be settled by experience, not logic (ibid., 312, 332). As with his analysis of torts, Holmes felt his analysis of contract law could have practical benefits. A correct understanding showed that contract law essentially concerned a pro-

misor's assumption of risks. The contractual promise was only to pay in case the events promised did not occur, and so the promisor was free to break the contract if he chose (ibid., 300–2). This analysis helped clarify questions on the law of damages. If breach of contract were regarded in the same way as a tort, he said, the party in breach would be held liable for all the consequence of a breach which had been brought to his attention in the course of performance. Yet the proper view was that a party to a contract only undertook the risks which were present to the parties mind when they made the contract.

In seeking to show that criminal liability was also based on the same theory as liability in tort, Holmes rejected two rival theories of punishment. According to the first, punishment aimed to reform the criminal. This theory was easily disposed of. If it were true, Holmes said, the incorrigible would never be punished, prisoners would be released as soon as they were reformed, and no one would ever be sentenced to death (ibid., 42). According to the second theory, the aim of punishment was retribution. The criminal, who had committed a wrong, had to be punished in proportion to the severity of the crime, in order to pay for the harm done by the crime. Holmes associated this theory with the philosophy of Kant and Hegel, which rejected any utilitarian justification of punishment on the grounds that it treated the criminal as a means, rather than as an end. Holmes answered this by saying that "[i]f a man lives in a society," he was indeed liable to find himself treated as a means: "No society has ever admitted that it could not sacrifice individual welfare to its own existence." Even private relations were shaped by "justifiable self-preference" (ibid., 44, 43). Rules of law could accordingly not be based on a principle of absolute unselfishness. Instead, the purpose of punishment was to induce external conformity to any rule which criminalized activity. This meant that the law was prepared to punish people even where they were ignorant of the law. Here, "[p]ublic policy sacrifices the individual to the general good" (ibid., 48).

As in the law of torts, internal motivations were irrelevant: the law required the individual at his peril to come up to a certain standard. However, this standard was not to be determined in the abstract, for instance only by a calculation of utility. As with civil law, so criminal law also involved notions of blameworthiness, for any law "which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" (ibid., 50). The standard imposed had to reflect the general moral feeling of the community, for "[t]he first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong" (ibid., 41). Just as he sought to explain the existing law of torts, so Holmes sought to explain current principles of criminal law. He admitted that not all was susceptible of consistent explanation, for much of it was the product of haphazard historical developments (ibid., 73). Nevertheless, a theory of liability could be put forward. In general, the test of criminality was the degree of danger which expe-

rience showed was likely to attend acts in certain circumstances. In imposing liability, the law did not require actual wickedness, but only the failure to act up to the standard of the prudent man (ibid., 75). However, in some cases, the legislator could impose the a higher degree of risk on the actor, for reasons of policy, to prevent consequences which were not foreseen by common experience. This was done, for instance, by the felony-murder rule, under which a person was liable for murder when a killing inadvertently resulted during the commission of a felony (ibid., 59).

Holmes's three chapters on tort and crime were largely "doctrinal" discussions which sought to explain the current principles of law in the clearest way. Elsewhere, he turned to history. His first chapter on "Early Forms of Liability" sought to give historical backing to his argument that while law used the language of moral fault, it "was constantly transmuting those moral standards into external or objective ones, from which the actual guilt of the party is wholly eliminated" (ibid., 38). Drawing on the work of anthropologists such as Tylor (Tylor 1871b), Holmes argued that in early societies, law was concerned only with intentional wrongs. It aimed to satisfy a desire for vengeance, which was initially aimed against the offending object, itself regarded as blameworthy. Over time, liability was transferred to the owner of the offending object, who was allowed to compensate the victim, in lieu of surrendering it (Holmes 1923, 10). Gradually, the notion developed that liability attached to the owner. When this occurred, his surrendering of the offending object came to be seen as an means to limit his liability, and this right was in many cases removed, and replaced by an action to enforce the owner's general personal liability (ibid., 15). It was not a strict liability, however. The owner of an offending animal was not simply substituted in its place, but instead, "the ground [of liability] seems to have been the owner's negligence" (ibid., 23). The owner in effect came to be punished for being at fault in not coming up to a certain standard. If this looked like a simple historical progression, Holmes nevertheless stressed that policy always intervened. Thus, modern law still treated ships, which were inanimate objects, in a primitive way, as if they were endowed with personality. This was done because it was "supported by an appearance of good sense," and because the judges felt it was reasonable to treat the inanimate ship as if it were alive (ibid., 28–9). It was, in effect, an example of the paradox of form and substance.

Holmes's history thus helped to justify his broader conclusions regarding liability. However, he was less interested in developing the kind of grand theory Maine had set out than in demonstrating that all law was ultimately traceable to considerations of what was currently expedient for the community. History reinforced Holmes's ideas on the contingency of law. As he saw it, since law was always situated in a society, and could never be a timeless perfection (ibid., 36), the theorist had to seek the most coherent theory of law for the present. History played a useful, if often negative, part in this enter-

prise: "When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times," he argued, "we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory" (ibid., 37). In his chapter on "Bailment," Holmes presented a detailed doctrinal history aimed at challenging the current doctrines on the liability of common carriers, by showing that the rules of law here were neither consistent nor rational but reflected particular policy choices dating from the eighteenth century which were unsuitable for the present. He similarly used history to question the doctrine under which the masters were made liable for the acts of their servants. He traced this liability to that of the Roman *paterfamilias* for his slave, which had been extended by analogy to other cases. The modern law could only be explained "by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves" (ibid., 232). As a result, conflicts arose between the demands of tradition and the instincts of justice which could not be resolved by logic. Judges seeing this, he suggested, should refuse to carry the doctrine any further. If history could reveal flaws in doctrine, it could also be used to explain the nature and growth of a useful doctrine. Thus, Holmes approved of the development of the doctrine of consideration in contract law, and traced its evolution from an accident of procedure into a doctrine of substantive law (ibid., 273–4, 289). For Holmes, then, doctrines could be explained by reference to their history. But if the jurist found no coherent explanatory principle—or if the principle was merely the remnant of ancient forms which could not be justified by modern policy—then the law should be reformed.

Holmes's approach to doctrine in *The Common Law* was largely a pragmatic one. Pragmatic philosophers, such as Charles Sanders Peirce and William James, who Holmes knew via the Metaphysical Club, argued that knowledge was to be grounded in the habits and practices of social life, rather than in a set of rationally certain principles (Menand 2001, 201–5, 339–47; Grey 1989). Theory sought to make sense of current experience rather than explaining absolute truths; so that if a theory lost its usefulness, it had to be modified or abandoned. In this vein, Holmes sought to create a theory which could best make sense of the law as it had developed in its history, while making sure that those rules were useful for the present day. Doctrine should follow what was convenient, not merely what was logical. Holmes thus rejected Langdell's logical argument against the mailbox rule by noting "[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption" (Holmes 1923, 305).

7.7. Holmes's Later Work

Having in the 1870s arrived at a view that judges could develop coherent doctrine, by the 1890s Holmes began to have doubts about the possibility of executing the enterprise. Most importantly, he began to doubt the external theory of liability which stood at the heart of *The Common Law* (see Horwitz 1992a; Horwitz 1992b, 109–43). In "Privilege, Malice and Intent," Holmes noted that in some situations, men were not liable for harms which they foresaw would harm others, as when one shopkeeper drove another out of business by opening a rival shop. Although it did damage, such an act was classed a privilege, not as a harm. Holmes noted that the line between privilege and harm was drawn by considerations of policy. In the example given, it was "the economic postulate that free competition is worth more to society than it costs" (Holmes 1995h, 373). Crucially, the external standard could have no application in privilege cases, for the actor was precisely aware of the consequences of his action.

This raised the problem of how to decide when the exercise of a privilege became a harm. Holmes had in mind in two recent English cases: *Mogul Steamship Company Ltd* v. *McGregor* ([1892] App Cas 25), which held that it was lawful for merchants to combine to exclude a competitor by offering rebates to clients who refrained from dealing him; and *Temperton* v. *Russell* ([1893] 1 QB 215), which held that it was unlawful for a trade union to instruct its members not to handle the goods of a supplier, who dealt with firms using non-union labour. In both cases harm ensured from the exercise of the privilege not to deal with certain people. Following the House of Lords' view on the first case, Holmes suggested that a person's motive in acting might be relevant. Since there was "no general policy in favor of allowing a man to do harm to his neighbour for the sole pleasure of doing harm," a privilege could be lost if used for a malicious motive. Such an argument of course brought in the very subjectivism Holmes's external standard had sought to eliminate. At the same time, however, there was also a policy issue: the policy allowing the defendant freedom of action might be qualified to forbid him "to use for the sake of doing harm what is allowed him for the sake of good" (Holmes 1995h, 375). By this account, the ground of decision rested less on motive than on "a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants." This raised the possibility that "judges with different economic sympathies" might decide such cases differently" (ibid., 376). It also meant that such cases could not be decided by an objective test such as the standard of the community's morality, as reflected in the reasonable man. Policy now became central. "The time has gone by," Holmes said, "when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies" (ibid., 377). Judges

had to make legislative choices, which should be articulated clearly and explicitly, and not left as "unconscious prejudice or half conscious inclination."

Holmes took this further in 1897 in "The Path of the Law." In many ways, Holmes at this time still retained his earlier ambitions to seek "an accurate anatomy" of the legal system, based on an external standard of liability (Holmes 1995j, 401, 395). He also endorsed his older methodology:

> The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price. (Ibid., 404)

Moreover, he reiterated that logic was not the only force at work, for in law, many matters were "battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place" (ibid., 397).

Holmes now famously articulated his "bad man" theory, which stressed the separation of law and morals. The law might attach certain consequences to acts, he said, but it was not concerned with their morality. To understand the law, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience" (ibid., 392). Law was not an *a priori* system generating abstract answers. The jurist therefore had a more practical job of prediction: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law" (ibid., 393). However, Holmes did not argue that there could be no such thing as a body of law. Law reports abounded with scattered predictions of what would be done in a following case. The job of the jurist was "to make these prophecies more precise, and to generalize them into a thoroughly connected system" (ibid., 391).

Much of the "Path" thus restated views which Holmes had held in the 1870s and early 1880s. However, there was now a change of tone, with greater emphasis on policy. "I think," Holmes now said, "the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage" (ibid., 398). For Holmes, the future now became more important than the past. Though the study of history was still necessary as a "first step toward an enlightened scepticism" regarding existing rules, he now looked forward "to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them" (ibid., 402–3; cf. Holmes 1995k, 412). For the rational study of law, "the man of the future is the man of statistics and the master of economics"

(Holmes 1995j, 399). Answering legal questions would entail more attention to answering policy questions, which would be done by specialists in those areas. Thus, a judge who had to decide what terms were implied in a factory worker's contract of employment was making a decision of policy, which could be seen as "a question for scientific determination, that is, for quantitative comparison by means of whatever measure we command" (Holmes 1995k, 415).

Where in *The Common Law*, Holmes felt that certain rationally justifiable principles of law which reflected the felt necessities of the community could be teased out of its history, and could be used to generate answers to legal cases, in the 1890s, he rejected the notion that the historical common law could be interpreted in a way that reflected the needs of the community, and saw that the judge might have a far greater role in policy. Indeed, he said, where there was a conflict between rival social desires in cases, "the judges are called on to exercise the sovereign prerogative of choice" (ibid., 419). The choices were neither dictated by the legal system, nor was there a single answer to be found in the community's desires. Rather, the answer had to be found in considering the consequences of the decision, which required an awareness of an end in view. This in turn might take the jurist into the realm of social science and make the judge into a pragmatic or utilitarian decision-maker.

Holmes's argument in the "Path" has generated a vast amount of debate and interpretation (see especially Burton 2000; Alschuler 2000, chap. 7 and sources cited at 200–2). His prediction and "bad man" theories have been viewed variously as the progenitors of an amoral jurisprudence suitable only for totalitarian regimes (see Seipp 1997, 554–5), of an economic approach to law which focuses on rational economic agents who see legal rules in terms of prices for action, and of a Realist approach requiring a sceptical treatment of rules. Holmes's short address thus opened the way for many approaches in the twentieth century which conceived of law in instrumental terms, and abandoned the search for deeper principles within the law. However, we should note that in this address, he was not seeking to put forward a complete theory of law, but had more limited aims. Holmes was not intending to set out an "external," sociological theory of the behaviour of legal institutions or its actors. According to such a theory, a "bad man" predicting behaviour would first want to weigh the chances of his being apprehended or prosecuted, and so would examine the behaviour of all actors within the system, and not merely the judge. Moreover, regarding the latter, he would take into account any factor which might motivate the judge, down to his choices for breakfast. But Holmes was not concerned with these wider sociological questions. He focused on the workings of court, and on predictions of motives which would apply "in the generality of cases." The prediction his bad man was interested in concerned how courts would treat doctrine.

If Holmes did not seek to create a theory of law based on examining the workings of courts from a external point of view, his concentration on the

predictions made by a bad man was nevertheless criticised by H.L.A. Hart for ignoring the "internal point of view." As Hart pointed out, actors in a legal system do not merely obey rules because they predict they will suffer sanctions if they disobey. Rather, participants within a legal system recognise certain rules as creating obligations. An understanding of law requires not merely the external view which observes regularities of behaviour, but also an internal view which explains why people treat rules as reasons for action. Both Holmes and Hart agreed that there were both good and bad men in any society (Hart 1994, 90; Holmes 1995j, 392). Why then did Holmes focus his attention on the bad man? One reason was that unlike Hart, Holmes's aim was not to understand the larger theoretical question of the nature of law in society, which needed to be explained by considering the internal motivations of the good man. His audience was one of law students, and his aim was to teach them to think like "the practitioner who counsels private clients" (Grey 1989, 835). They needed to be able to identify the content of rules at the point of their application in court. This was best done by looking from the view of those, as Hart would put it, "who reject the rules and attend to them only from the external point of view as a sign of possible punishment" (Hart 1994, 91). The hard outer edges of law were best identified by seeing how the system handled those who breached the rules. Holmes was also making a point about the separation of law and morals. He did not intend to argue that the two were unrelated. Indeed he cautioned against being taken as a cynic, noting that "law is the witness and external deposit of our moral life" (Holmes 1995j, 392). He rather wanted to argue that moral words which appeared in legal texts should be read not in their moral sense, but in their legal sense (see Luban 2000, 40).

This narrow focus meant that Holmes's prediction theory simply did not address certain questions. Most crucially, he avoided addressing the "internal" point of view of the judge. Judges could hardly be seen as "bad men." Moreover, the prediction theory was unable to tell them what to do. An attempt has been made to "save Holmes's account" by pointing out that "if the law is ultimately a prediction of what the highest judges will *do*, it is meaningless to ask how *they* can use prediction to discover the law"; for law is not a thing they discover, but it is their activity: "they just act as best they can" (Posner 1990, 225). This is to say that judges make law when they act, in a pragmatic way, by weighing past expectations, possible consequences and policy considerations. However, there are two difficulties with this interpretation. Firstly, Holmes said he did not "expect or think it desirable that the judges should undertake to renovate the law" (Holmes 1995k, 418). Secondly, an argument that judges decided pragmatically on a case by case basis raised problems for a theory which suggested to lawyers that doctrinal developments could be subject to prediction. In any event, the working of the legal system as a whole could not be explained in terms of predictions. As has often been pointed out, a predic-

tion theory which focused on judicial behaviour presupposed the existence of a legal system, which was itself defined by rules, and which could not ultimately be explained in terms of predictions (see Twining 1973a, 284). What gave the judges authority needed a broader explanation of the judicial system as a whole. This needed a larger theory of society, whether based on a social contract, habit of obedience or rule of recognition.

On occasion, Holmes gave hints that the broader theory of law to which he would subscribe would echo a Benthamic or Austinian view of sovereignty based on a habit of obedience (see Pohlman 1984, 64). He wrote to Harold Laski in Austinian terms that while the sovereign was legally illimitable, there was a "large margin of *de facto* limit in the common consciousness that various imaginable enactments would provoke a general uprising" (Howe 1953, vol. 1: 115; cf. Holmes 1995j, 393). Moreover, on occasion, he showed signs of understanding the "internal" viewpoint (see Holmes 1995l, 447). However, this was not much explored in the "Path." It may be suggested that Holmes did not devote much time to developing a Benthamic theory of sovereignty, since it would not much assist his quest to make sense of doctrine and what the courts did. He had himself spent too much time revealing the problems in Austin's attempt to reconcile such a theory with an idea that coherent doctrine could be drawn from cases to make such an attempt himself. Instead, his earlier work suggested the need for a theory of law which would explain how law emerged from society, through the voice of the judges. In the "Path," this theory ran out. Holmes had long held that the lawyer could only predict, and not know as a matter of logic how doctrine would develop in courts. But in viewing law as susceptible to prediction by lawyers, Holmes had implied that judges would know how to find and develop the law. In the "Path," however, he retreated from a notion that a legal theory could guide the judge. At the end of the address, however, Holmes appeared to indicate a continuing belief in the possibility of a grand theory, which would help guide the evolution of law. Holmes praised recent improvements in theory, and argued that abstract speculations translated into practical benefits. Citing the "works of the great German jurists" he had derided in the *Common Law*, he observed "how much more the world is governed to-day by Kant than by Bonaparte" (ibid., 405). He ended his address by speaking of the "remoter and more general aspects of the law" which gave it "universal interest," through which the lawyer became "a great master in your calling" (ibid., 406). All this seemed to imply that law was not just the arbitrary decisions of judges, but the quest for better, authentic answers. Those answers, Holmes now seemed to suggest, were to be found with the assistance of other sciences than those of the jurist.

By 1900, then, the grand aim of jurists to develop an overarching theory of law which could explain and make sense of doctrine appeared to have run into the ground. Austin's attempt to show that the jurist could put existing common law into a coherent framework by using the analytical jurisprudence

derived from a Benthamic command theory was undermined by the insights of successor jurists such as Maine whose history revealed that law did not originate in command, and that in many contexts, the Austinian theory was an inappropriate one to use. Maine's work showed that law reflected its society, and underwent changes as society changed. Maine did not seek to challenge the relevance of Austin's jurisprudence for contemporary society, however, and was not much interested in current legal doctrine. By contrast, Holmes sought to engage in the Austinian project of finding a coherent explanation of existing doctrine by examining what happened in court. Although Holmes claimed not to have been much influenced by Maine, he shared the Englishman's notion that law changed as societies changed. Until the 1890s, he appeared to believe that coherent doctrine could be found not in the abstract, but in the practices of the community's courts. To some degree, his efforts paralleled those of Lord Kames, though unlike Kames, Holmes did not build his jurisprudence around a moral theory which could explain legal development. In the end, he came to believe that no coherent theory could be found to explain law, though he appeared to hope that other sciences might in future generate answers. Early twentieth century jurists thus retreated from the grand ambitions which had driven common law jurists for three centuries. In early twentieth century England, jurisprudence remained a barren field (see Cosgrove 1996, chap. 6); while in America, Holmes's path seemed to point towards scepticism.

CONCLUSION

In the previous chapters, we have traced various attempts by English-speaking jurists to explain the nature of law and legal reasoning. As has been seen, in the early seventeenth century, particularly as exhibited in the work of Sir Edward Coke, the common law was seen as a system of reasoning on the basis of customary foundations. Common law reasoning was a forensic exercise, with lawyers in court using an "artificial" reason, drawing on logical and rhetorical skills, to apply broad principles or maxims of the common law to the complexities of the case before them. Coke himself was a champion of this view of the law, in part to defend the common law as the particular preserve of judges. However, his view was problematic in a number of respects. Firstly, Coke's vision made it difficult to explain and rationalise the content of the law. If law was portrayed as the specialist knowledge of lawyers, how could people be sure that the reason of the judge was not merely arbitrary? Secondly—and most importantly in the early seventeenth century—the notion that the common law was an immemorial system explained by the reasoning of the judges failed to provide convincing arguments against a king threatening to act in ways which were seen as arbitrary, by invoking a royal prerogative beyond the ambit of the common law. The nature of the relationship between the common law and royal prerogative was not one which could be settled on the basis of the pronouncements of "artificial reason" alone.

In the context of the constitutional crises of the early seventeenth century, a number of theorists therefore began to think about both the nature of the constitution, and the nature of law, in different ways. In the work of John Selden and Matthew Hale, there was a move away from Coke's concept of the law as artificial reason based on an immemorial constitution to a more positivist conception of law as the command of a sovereign ruler, who derived his authority from an original agreement with the people, which determined both the extent of the ruler's powers and the criteria of validity for his acts. For Selden and Hale, law was to be seen more in terms of authority than in terms of reason. I have used the term "positivism" to describe their view; but this is not to suggest that they considered that positive law was arbitrary or immoral, or that law and morality might be opposed to each other. Rather, their command-based theories of law were built on natural law foundations: in particular, the obligation, derived from God's command to the sons of Noah, to keep one's promises. All human law, Selden argued, was based ultimately on the law of nature, but it developed in particular contexts through the mechanisms of human institutions. If Selden and Hale articulated this theory in a novel way, there were also sixteenth century versions of a theory by which obedi-

ence was morally due to the positive law enacted by the constitutionally established authorities. Both Christopher St. German and Richard Hooker had developed theories which rooted ultimate political power in parliament, whose authority came from the consent of the people, and whose enactments were to be obeyed since it was to be presumed that in the complex matters of human affairs—which were matters of probability rather than certainty—the enactments of parliament would be the best. For thinkers such as these, law was to be seen as a command which came from human imposition (either current or past), and which was to be presumed to be consonant to natural law. The law of nature was not a standard by which human law could be judged, except in the simplest and most obvious cases.

Selden and Hale abandoned Coke's idea of an immemorial constitution with timeless ancient rights, and instead saw the constitution and laws as developing on positive foundations. This allowed answers to questions about the extent of royal power to be sought in historical records. It also allowed the law to be seen as a developing body, whose principles and rules could be traced over time, and whose content could be explained in a systematic manner. In the mid-seventeenth century, common lawyers like Hale had come to agree with Hobbes that law was based on authority. Hobbes's attack on Coke (elaborating arguments found in *Leviathan*) set out a powerful argument rooting all law in the commands of the current sovereign; but he did not (as Bentham later would) propose a complete code of laws to be issued by the sovereign. This presented a problem for his theory of law, for it left him unable to explain the content of the rules of law, notably in crucial areas such as the law of property which did not rest either on the legislative pronouncements of the sovereign or on the latest *dictum* of a court. Hobbes, of course, was not a common lawyer and was not seeking to develop a theory which could explain the workings of a system of private law. But Hale, who answered Hobbes, was such a lawyer, and he was aware of the need to account for a system of rules of law which developed over time, but owed their validity to authority rather than mere reason. In Hale's thought, the common law was built on original positive foundations, and was developed over time by the application of these original rules by judges to new situations. Custom and authority were thus linked. The judges could develop the law on the basis of reason alone, he argued, but only in the last resort.

Hale was the first common lawyer since *Bracton* seriously to contemplate putting the content of the common law into a comprehensive framework. However, he never completed his plan and his task was in effect executed by Blackstone in the eighteenth century. It has often been assumed that Blackstone, writing after 1688, took a Lockean view of the law, based on a theory of natural rights. But in fact, his vision—inconsistent and incoherent as it sometimes seemed—stood in the "positivist" tradition of Selden and Hale. His constitutional ideas echoed theirs, for he rooted sovereignty in the crown-

in-parliament, rather than in the people directly; and like them he saw the law in terms of a set of original positive rules agreed over time. If this could explain the rules of property and crime, however, he had far greater difficulties in explaining the law of obligations, which was increasingly important in the developing eighteenth century commercial society, in those terms. Blackstone was able to present a theory which could account for the validity of rules elaborated in court by judges drawing on sources extraneous to the common law, by arguing that the flexible remedies offered by the courts derived from positive foundations empowering the judges. But he could not explain the coherence of these rules and how they should develop.

The vision espoused by Selden, Hale and Blackstone may have been the dominant common lawyers' view in England by the mid-eighteenth century; but it was not the only one available. By the mid-eighteenth century, this vision was facing challenges on a number of fronts. The first challenge to the English common lawyer's view came from across the Atlantic, where American Whigs challenged the very positivist premises on which the notion of parliamentary sovereignty was based. They did not accept the historico-positivist view of the origins of the common law, which permeated the work of Selden, Hale and Blackstone. Instead, they held to a vision of ancient fundamental rights reminiscent of Coke's jurisprudence. One reason for this was that the "technical" view of the common law espoused in England, which sought precise authority for propositions of law, often did not work well in America. For the status of particular legal rules was often uncertain in the new world, and here the common law was seen more as a set of principles, a *mentalité* rather than a technical toolbox. In America, this *mentalité* focused in particular on the fundamental principle that all law required consent. This was an idea associated with the common law; but it also informed broader political theories which sought to root sovereignty in the people. As lawyers on both sides of the Atlantic in the 1760s and 1770s began to dispute the meaning of the common law, and as Americans found it increasingly difficult to make conclusive arguments in terms of this law, so many of them began to move away from Coke's common law language to John Locke's natural rights language.

Americans, like Englishmen, based their ideas of a constitution on the principle of consent, as found in an original contract. However, their vision of this contract was very different from that of Hooker, Selden or Hale. Unlike the English common lawyers we have explored, they did not see all law as coming from the command of the superior sovereign constituted by an original contract between various interests, which could not be changed without the consent of all parties. For them, the constitution was instead made by a sovereign people, conferring power on governors who were trustees, while retaining sovereignty. The premises of their constitutional theory lay in a Lockean view of natural law. They took this a step further by creating a written constitution as a supreme law. It was on the basis of this text that writers like Alexander Hamil-

ton and judges like John Marshall developed the idea of judicial review. Although English lawyers had from the sixteenth century developed canons of interpretation which allowed equitable readings of statutes, they had not (despite the celebrated dicta of Coke in *Bonham's Case*) argued that the common law could directly control parliamentary statutes. However, in America, the constitution was seen to be supreme above ordinary legislation, and guarded by the judiciary. While the Supreme Court judges began to look primarily to the words of the text in constitutional adjudication, they still made use of natural law concepts beyond the text itself in their decision making.

American and English thinking about the nature of sovereignty and the role of the judiciary in the constitution thus diverged in the eighteenth and early nineteenth centuries. However, when it came to private law, American lawyers in the early nineteenth century continued to embrace the *content* of the common law, eschewing demands for codification. Indeed, in many ways, the treatises written by men like Kent and Story were well in advance of those written by their English counterparts. If they accepted the common legal heritage, they nonetheless espoused different views of the basis of authority on which it was built: Blackstone's "positivism" was not the only available view. One of the positions they followed was that developed in Scotland by Lord Kames, who put forward a distinct jurisprudential theory around the same time that Blackstone was writing his *Commentaries*. While a number of Scottish institutional writers, under the influence of Pufendorf, had developed voluntarist definitions of law, Kames (following Shaftesbury and Hutcheson) looked to a natural jurisprudence based on the moral sense inherent in mankind, refined into the common sense of the community. A Scottish judge, working in a legal system in which little legislation was passed by a sovereign parliament now seated in Westminster, Kames sought a theory which could explain the development of the principles of law—and notably of obligations—without recourse to positive enactment. Instead of seeking to explain the positive foundations of particular rules (as English jurists did), or to put them into a comprehensive institutional structure (as his Scottish antecedents and contemporaries did), he sought to explain the principles of law by relating them to the nature of man in his social context. Kames's attempt was to develop an "external" theory of legal development which would explain the "internal" workings of legal doctrine over time. In the end, however, Kames's theory was a noble failure, for it did not solve the problem he had set himself: to root the principles on which legal obligation developed in a theory of man's moral nature. The master and friend of both David Hume and Adam Smith, he ultimately invoked both the principles of a moral sense and of utility without fully reconciling them in his theory.

The most celebrated attack on Blackstone came not from American Whigs nor from enlightened Scots, however, but from another Englishman, Jeremy Bentham. Bentham's attack on the common lawyers embraced both private

and public law. Following Hume, the young Bentham rejected the kind of contract theories espoused in America and by Blackstone and his common law predecessors, using instead the concept of the habit of obedience as the foundation of his theory of political society. In his mature work, he developed a theory according to which law was the command of a Supreme Operative Power in a state, which itself owed its authority to the Supreme Constitutive Power, or the people. He sought in this way to reconcile a positivist vision of law with a democratic political structure in which all the holders of political power would be responsible to the people. From his early career, Bentham had attacked the notion that there was a higher natural law, with authority to control positive human law. In his view, natural law amounted to no more than private opinion. He therefore rejected the natural law on which earlier thinkers had built their theories of law, looking instead to the principle of utility, and on the social fact of a habit of obedience. It was this which lay beneath his division of law and morals. Bentham did not hold that moral principles were irrelevant to law for ultimately the habit of obedience depended on the number of people whose sense of utility made them continue to obey the sovereign. However, he felt that while the habit remained in place, the validity of a law could not be determined by invoking purely moral principles. A legal system had to be explained in terms of an authoritative system of laws derived from the sovereign. It could not be understood in terms of vague moral principles.

Like his common law predecessors, Bentham thought of law in terms of authority rather than reason; but as a young man, he realised that the common law could not be conceived of as law in those terms. He felt that Blackstone's attempt to explain and justify the common law had failed: and that in place of the common law with its fictitious commands, a complete code of laws would have to be enacted. Bentham was convinced that a rational code could be constructed, based on the principle of utility and taking into account the various sensibilities found in human nature; and he spent much of his life outlining the principles of such a code. The *Pannomion* would be the answer to the problem left unresolved by Hobbes. A system of law would be created, derived directly from the sovereign lawgiver, and leaving no terra incognita for judges to explore. Nonetheless, he never completed his task; and indeed, he found that, since the legislator had to work in the context of existing expectations (which themselves might derive from the inferential rules to be found from the common law), such a code would be difficult to construct.

Although there would be many projects for codification in both Great Britain and America in the nineteenth century, a code never came about. Instead, in England, John Austin tried to adapt the Benthamic vision to the common law. Austin derived his command theory and his concept of a political society largely from Bentham. However, he attempted to accommodate into this framework both existing judicial practice—the common law form of adjudication which Bentham had abhorred—and the existing substantive law.

It was this which made him such a popular and influential jurist in the nineteenth century. But in fact he ran into difficulties in both areas. His attempt to explain the *ratio decidendi* of common law cases in terms of sovereign commands ultimately did not work. Equally, he had problems in explaining the content of the common law in terms consistent with his Benthamic positivist theory. Austin certainly developed an analytical jurisprudence of abstract concepts with which to think about law. However, this jurisprudence was based on a concept of rights rather than duties, and Austin did not spell out where those rights come from. They were not in his theory clearly related to commands in the way Bentham had attempted to sketch out. Since the content of the common law which he outlined was not clearly related to a notion of command, and since its intrinsic content was not coherent, Austin was only able to offer a set of tools with which better to handle the materials one had, without fully explaining them. In effect, he was unable to complete the project of providing a coherent account of the common law as a system of rules which derived from the authority of a sovereign's commands.

Austin's jurisprudence proved highly influential in both England and America after 1860. Although his idea of law as the command of a sovereign legislator sat ill with the theory of the American constitution, his analytical jurisprudence, which sought to uncover the "principles, notions, and distinctions" common to all mature legal systems, proved congenial to scholars on both sides of the Atlantic, who saw the common law as a developing system and who sought to make sense of it. Thus, scholars like Langdell, who focused on private law, felt that law was an autonomous, technical science. It was not the mere will of the legislator, but rather there was a logical and coherent structure within the law, which could be uncovered by the trained jurist examining the materials generated by case law. This approach assumed an innate coherence in the law, but without explaining the law's foundations. It was to accept one part of Austin, while ignoring the other.

Austin continued to maintain a grip over many university law courses, notably in England, in the later nineteenth century. Nevertheless, this era saw two attacks on his theory of law by those who conceived of it as a social artifact, and who felt it needed to be understood through its history. In England, his jurisprudence was attacked by Henry Maine in a number of ways. Firstly, Maine attacked Austin's positivism, showing that his definition of a law was not one which could be applied universally. Maine showed that law often grew through a process of adjudication, in systems based on customary expectations where the judge could not be seen as a subordinate legislator. A colonial administrator, Maine showed in particular that Austin's theories were not helpful when applied to Indian society. Secondly, Maine showed that there were no necessary and timeless principles in law, but that the very structure of legal ideas reflected the societies in which they were to be found; and that they changed over time. Maine sought to trace the evolution of law "from sta-

tus to contract," from the patriarchal family to the modern individual. In his project, he was not concerned with understanding the internal doctrine of particular areas of law, nor was he concerned with how judges would develop doctrine in future. Nor, indeed, did he challenge Austin's understanding of current law in advanced societies. Instead, he aimed to show that in order to understand the nature of law and its basic premises, one had to look not at an abstract theory of sovereignty but at its external and social history over time.

In America, the Austinian vision came under attack from Oliver Wendell Holmes. Holmes shared many of Austin's aims. He also sought to develop an analytical framework which would explain the law which had developed over time; and he sought to relate this to a theory of the nature and foundations of law in a way Langdell had failed to attempt. Moreover, like Maine, Holmes realised that law could not be seen merely from the jurist's "internal" point of view. He found both Austin's notion that all law derived from the commands of the sovereign and Langdell's assumption of an innate rational coherence in law to be unsatisfactory. Holmes had the insight that law came not from an abstract source, but from what courts in fact *did*. It reflected the policy choices made by societies at various points in time. Substantive law was thus not a formal science, but followed perceptions of expedience. But unlike Maine, Holmes was also interested in the doctrinal developments of modern private law, seeking to explain the principles on which the law grew. His ambitions were thus in some ways similar to those of Kames; and he developed a similar view of the nature of obligation to Kames's, based on an external "objective" standard of liability. Holmes did not derive this notion from a conjectural history and theory of the moral sense, as Kames did. Instead, he sought the best interpretation of his community's laws as found in the records of its legal history and practice. However, he found in these sources a notion of the law not unlike Kames's common sense, for he argued that law reflected the "felt necessities" of a community.

Just as Kames's theory ultimately lacked the coherence which would allow it to fulfil the author's aims, so Holmes came to realise the flaws in his theory of the common law, which undermined his aim to make the law a matter of juridical prediction. Besides seeking to explain the law in terms of what the community had done, Holmes also spoke of what was the best policy for the community. In his earlier thought, he felt that the best policy was to be found in the actual practices of the community. However, by 1890 he had come to doubt whether there was an objective sense of community values, which the jurist could uncover and use. Law was to be seen more clearly in terms of policy choices, the content of which could neither be determined from within the law, nor found in a cohesive set of community values. The grand jurisprudential project of explaining the nature and coherence of legal doctrine, and relating it to a theory of the foundations of law, which jurists had been working at in the period we have been covering, thus remained unachieved.

BIBLIOGRAPHY

Acherley, Roger. 1736. *The Jurisdiction of the Chancery as a Court of Equity Researched*. London: Joel Stephens. (1st ed. 1733.)

Adams, John. 1850–1856. *The Works of John Adams*, 10 vols. Ed. Charles Francis Adams. Boston, Mass.: Little, Brown and Co.

———. 1977. *Papers of John Adams, vol. 1* and *vol. 2*. Ed. Robert J. Taylor, Mary-Jo Kline, Gregg G. Lint. Cambridge, Mass.: Harvard University Press.

Agnelli, A. 1959. *John Austin alle origini del positivismo giuridico*. Turin: Giappichelli.

Allen, J. W. 1957. *A History of Political Thought in the Sixteenth Century*. London: Methuen & Co.

Allen, Peter Lewis. 1978. *The Cambridge Apostles. The Early Years*. Cambridge: Cambridge University Press.

Alschuler, Albert W. 1996. Rediscovering Blackstone. *University of Pennsylvania Law Review* 145: 1–55.

———. 2000. *Law without Values: The Life, Work, and Legacy of Justice Holmes*. Chicago: University of Chicago Press.

Amar, Akhil Reed. 1998. *The Bill of Rights: Creation and Reconstruction*. New Haven, Ct.: Yale University Press.

Anonymous. 1651. *Certaine Observations Concerning the Office of the Lord Chancellor. Composed by the Right Honourable and Most Learned Thomas, Lord Ellesmere, Late Lord Chancellor of England*. London: Matthew Walbanck.

Anonymous. 1681. *Vox Populi: of the Peoples Claim to Their Parliaments Sitting*. London: Francis Smith.

Anonymous. 1902. Arguments, Proving from Antiquity the Dignity, Power and Jurisdiction of the Court of Chancery. In *English Reports*, vol. 21: 576–98. London: Stevens and Son. (1st ed. in *Reports of Cases Taken and Adjudged in the Court of Chancery in the Reign of Charles I Charles II and James II*, 2 vols. London: J. Walthoe, 1693.)

Anonymous. Undated (a). *Concerning the Oaths of Allegiance & Supremacy & New Oaths Imposed in Lieu of Them. How Far the Obligation of the Former Ceases in Respect of King James?* Unpublished manuscript. British Library MS Stowe 293 (ca. 1700).

Anonymous. Undated (b). *A Vindication of yᵉ Revolution or a Hearty Endeavour to Unite All the Members of the Church of England to the Present Government in a Dialogue between a Jacobite Tory and a Williamite Tory wherein the Common Scruples Are Endeavour'd to Be Answer'd & Mistakes Remov'd*. Unpublished manuscript. British Library MS Stowe 291.

Aristotle. *Nicomachean Ethics*. Ed and trans. Roger Crisp. Cambridge: Cambridge University Press, 2000.

Ashcraft, Richard. 1986. *Revolutionary Politics and Locke's Two Treatises of Government*. Princeton: Princeton University Press.

Austin, John. 1824. Disposition of Property by Will—Primogeniture. *Westminster Review* 2: 503–53.

———. 1859. *A Plea for the Constitution*. London: John Murray.

———. 1873. *Lectures on Jurisprudence, or the Philosophy of Positive Law*. 4th ed. Ed. Robert Campbell. London: John Murray.

Avery, M. E. 1969. History of the Equitable Jurisdiction of the Chancery before 1460. *Bulletin of the Institute of Historical Research* 42: 129–44.

———. 1970. An Evaluation of the Effectiveness of the Court of Chancery under the Lancastrian Kings. *Law Quarterly Review* 86: 84–97.

Bacon, Francis. 1857–1874a. The Argument of Sir Francis Bacon, Knight, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland. In *The Works of Francis Bacon*. Ed.

James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 7: 641–79. London: Longmans.

———. 1857–1874b. "Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms" (in *De Augmentis Scientiarum*, Book 8). In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 5: 88–110. London: Longmans.

———. 1857–1874c. Maxims of the Law. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 7: 307–87. London: Longmans.

———. 1857–1874d. Memorial for a Declaration in Council. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 12: 349–54. London: Longmans.

———. 1857–1874e. Proposition Touching Amendment of Laws. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 13: 59–71. London: Longmans.

———. 1857–1874f. Speech on Taking His Seat in Chancery. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis and Douglas Denon Heath, vol. 13: 182–93. London: Longmans.

———. 1857–1874g. A View of the Differences in Question betwixt the King's Bench and the Council in the Marches. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath, vol. 10: 368–82. London: Longmans.

Bacon, Matthew. 1832. *A New Abridgement of the Law*, 8 vols. 7th ed. Ed. Sir Henry Gwillim and Charles Edward Dodd. London: A Strahan for J. and W. T. Clarke and others.

Bailyn, Bernard. 1992. *The Ideological Origins of the American Revolution*. Enlarged edition. Cambridge, Mass: Harvard University Press. (1st ed. 1967.)

———, ed. 1965. *Pamphlets of the American Revolution, 1750–1776: Vol. 1, 1750–1765*. Cambridge, Mass.: Harvard University Press.

———, ed. 1993. *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles and Letters During the Struggle over Ratification*, 2 vols. New York, N.Y.: The Library of America.

Baker, J. H. 1986a. The Common Lawyers and the Chancery: 1616. In J. H. Baker, *The Legal Profession and the Common Law: Historical Essays*, 205–29. London: Hambledon.

———. 1986b. English Law and the Renaissance. In J. H. Baker, *The Legal Profession and the Common Law: Historical Essays*, 461–76. London: Hambledon.

———. 1986c. Learning Exercises in the Medieval Inns of Court and Chancery. In J.H. Baker, *The Legal Profession and the Common Law: Historical Essays*, 7–23. London: Hambledon.

———. 2000. The Third University of England. In J. H. Baker, *The Common Law Tradition: Lawyers, Books and the Law*, 1–28. London: Hambledon.

———. 2002. *An Introduction to English Legal History*. 4th ed. London: Butterworth's.

———. 2003. *The Oxford History of the Laws of England. Volume VI: 1483–1558*. Oxford: Oxford University Press.

———, ed. 1977. *The Reports of Sir John Spelman*, vol. 2. London: Selden Society, vol. 94.

Bankton, Andrew Macdouall, Lord. 1751–1753. *An Institute of the Laws of Scotland*, 3 vols. Edinburgh: R. Fleming, for A. Kincaid and A. Donaldson.

Banning, Lance. 1995. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca, N.Y.: Cornell University Press.

Barnett, Randy E., ed. 1989. *The Rights Retained by the People: the History and Meaning of the Ninth Amendment*. Fairfax, Va.: George Mason University Press.

Barton, J. L. 1968. Bracton as a Civilian. *Tulane Law Review* 42: 555–83.

———. 1993. The Mystery of Bracton. *Journal of Legal History* 14 (3): 1–142.

Baumer, Franklin Le Van. 1940. *The Early Tudor Theory of Kingship*. New Haven, Conn.: Yale University Press.

Behrens, Georg. 1999. Equity in the *Commentaries* of Edmund Plowden. *Journal of Legal History* 20: 25–50.

Ben, Anthony. 1615. *Mr Anthony Ben His Discourse Touching the Praemunire Brought Against Serjeant More and Others for Prosecution of a Cause in Equity after Judgments Given Thereof at Common Law*. Unpublished manuscript. British Library, MS Lansdowne 174, ff. 205–15.

Ben-Dor, Oren. 2000. *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism*. Portland, Oreg.: Hart.

Bentham, Jeremy. 1838–1843. *The Works of Jeremy Bentham*, 11 vols. Ed. John Bowring. Edinburgh: William Tait.

———. 1970. *Of Laws in General*. Ed. H. L. A. Hart. London: Athlone.

———. 1977. *A Comment on the Commentaries and a Fragment on Government*. Ed. J. H. Burns and H. L. A. Hart. London: Athlone.

———. 1983. *Constitutional Code*, vol. 1. Ed. F. Rosen and J. H. Burns. Oxford: Clarendon.

———. 1989. *First Principles Preparatory to Constitutional Code*. Ed. Philip Schofield. Oxford: Clarendon.

———. 1990. *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece*. Ed. Philip Schofield. Oxford: Clarendon.

———. 1995. *Colonies, Commerce, and Constitutional Law*. Ed. P. Schofield. Oxford: Clarendon.

———. 1996. *An Introduction to the Principles of Morals and Legislation*. Ed. J. H. Burns and H. L. A. Hart, intro. F. Rosen. Oxford: Clarendon.

———. 1998. *Legislator of the World: Writings on Codification, Law and Education*. Ed. Philip Schofield and Jonathan Harris. Oxford: Clarendon.

———. 2002. *Rights, Representation, and Reform: Nonsense upon Stilts and other Writings on the French Revolution*. Ed. Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires. Oxford: Clarendon.

———. *Manuscripts.* Bentham Manuscripts, University College, London.

Berger, Raoul. 1969. Doctor Bonham's Case: Statutory Construction or Constitutional Theory? *University of Pennsylvania Law Review* 117: 521–45.

Berkowitz, David Sandler. 1988. *John Selden's Formative Years: Politics and Society in Early Seventeenth-century England*. Washington, D.C.: Folger Shakespeare Library.

Berman, Harold J., and Charles Reid Jr. 1996. The Transformation of English Legal Science from Hale to Blackstone. *Emory Law Journal* 45: 437–522.

Berry, Christopher J. 1997. *Social Theory of the Scottish Enlightenment*. Edinburgh: Edinburgh University Press.

Beverley, Robert. 1705. *The History and Present State of Virginia*. London: R. Parker.

Blackie, J. W. G. 1981. Stair's Later Reputation as a Jurist. In *Stair Tercentenary Studies*. Ed. David Walker, 207–27. Edinburgh: Stair Society, vol. 33.

Blackstone, William, Sir. 1979. *Commentaries on the Laws of England*: *A Facsimile of the First Edition of 1765–1769*, 4 vols. Ed. Stanley N. Katz, A. W. Brian Simpson, John H. Langbein and Thomas A. Green. Chicago, Ill.: University of Chicago Press.

Boote, Richard. 1766. *An Historical Treatise of an Action or Suit at Law*. London: W. Johnston, and G. Kearsly; W. Owen; W. Griffin; and W. Flexney.

Boyer, Allen D. 1997. "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review. *Boston College Law Review* 39: 43–93.

———. 2003. *Sir Edward Coke and the Elizabethan Age*. Stanford, Calif.: Stanford University Press.

Boynton, L. 1964. Martial Law and the Petition of Right. *English Historical Review* 79: 255–84.

Brady, Robert. 1680. *A Full and Clear Answer to a Book written by William Petit, Esq*. London: Samuel Lowndes.

———. 1681. *The Great Point of Succession Discussed*. London: H. Rodes.

———. 1685. *A Complete History of England from the First Entrance of the Romans under the Conduct of Julius Caesar unto the End of the Reign of King Henry III*. London: Thomas Newcomb for Samuel Lowndes.

Brand, Paul. 1992a. Courtroom and Schoolroom: The Education of Lawyers in England prior to 1400. In Paul Brand, *The Making of the Common Law*, 57–76. London: Hambledon.

———. 1992b. "Multis Vigilis Excogitatam et Inventam": Henry II and the Creation of the English Common Law. In Paul Brand, *The Making of the Common Law*, 77–102. London: Hambledon.

———. 1992c. *The Origin of the English Legal Profession*. London: Blackwell.

———. 1996. The Age of Bracton. *Proceedings of the British Academy* 89: 65–89.

———. 1999. Legal Education in England before the Inns of Court. In *Learning the Law: Teaching and the Transmission of Law in England 1150–1900*. Ed. Jonathan A. Bush and Alain Wijffels. London: Hambledon.

Brooks, Christopher W. 1986. *Pettyfoggers and Vipers of the Commonwealth: the "Lower Branch" of the Legal Profession in Early Modern England*. Cambridge: Cambridge University Press.

———. 1998a. Litigation and Society in England, 1200–1996. In C. W. Brooks, *Lawyers, Litigation, and English Society since 1450*, 63–128. London: Hambledon.

———. 1998b. The Place of Magna Carta and the "Ancient Constitution" in Sixteenth Century English Legal Thought. In C. W. Brooks, *Lawyers, Litigation, and English Society since 1450*, 199–229. London: Hambledon.

———. 2002. Contemporary Views of "Feudal" Social and Political Relationships in Sixteenth and Early Seventeenth Century England. In *The Presence of Feudalism*. Ed. Natalie Fryde, Pierre Monet, and Otto Gerhard Oexle, 109–35. Göttingen: Vandenhoeck & Ruprecht.

Brooks, Christopher W. and Michael Lobban. 1999. Apprenticeship or Academy: The Idea of a Law University, 1830–1860. In *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900*. Ed. Jonathan A. Bush and Alain Wijffels, 353–82. London: Hambledon.

Brooks, Christopher W., and Kevin Sharpe. 1976. History, English Law, and the Renaissance. *Past and Present* 72: 133–42.

Burgess, Glenn. 1992. *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642*. London: MacMillan.

———. 1996. *Absolute Monarchy and the Stuart Constitution*. New Haven, Conn.: Yale University Press.

Burns, J. H. 1973. Bentham on Sovereignty: An Exploration. *Northern Ireland Legal Quarterly* 24: 399–416.

———. 1985. Fortescue and the Political Theory of Dominium. *Historical Journal* 28: 777–97.

———. 1989. Bentham and Blackstone: a Lifetime's Dialectic. *Utilitas* 1: 22–40.

———. 1993. Nature and Natural Authority in Bentham. *Utilitas* 5: 209–19.

Burrow, J. W. 1966. *Evolution and Society: a Study in Victorian Social Theory*. Cambridge: Cambridge University Press.

———. 1967. The Uses of Philology in Victorian England. In *Ideas and Institutions of Victorian Britain. Essays in Honour of George Kitson Clark*. Ed. R. Robson, 180–204. London: G. Bell & Sons.

———. 1981. *A Liberal Descent: Victorian Historians and the English Past*. Cambridge: Cambridge University Press.

———. 1991. Henry Maine and mid-Victorian Ideas of Progress. In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Ed. Alan Diamond, 55–69. Cambridge: Cambridge University Press.

Burton, Steven J., ed. 2000. *The Path of the Law and its Influence*. Cambridge: Cambridge University Press.

Cairns, John W. 1984a. Blackstone, an English Institutist: Legal Literature and the Rise of the Nation-State. *Oxford Journal of Legal Studies* 4: 318–60.

———. 1984b. Institutional Writers in Scotland Reconsidered. In *New Perspectives in Scottish Legal History*. Ed. A. Kiralfy and H.L. MacQueen, 76–117. London: Frank Cass.

———. 1985. Blackstone, the Ancient Constitution and the Feudal Law. *Historical Journal* 28: 711–7.

———. 1988. John Millar's Lectures on Scots Criminal Law. *Oxford Journal of Legal Studies* 8: 364–400.

———. 1997. The Civil Law Tradition in Scottish Legal Thought. In *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*. Ed. David L. Carey Miller and Reinhard Zimmermann, 191–223. Berlin: Duncker & Humblot.

———. 2000. Historical Introduction. In *A History of Private Law in Scotland*, 2 vols. Ed. Kenneth Reid and Reinhard Zimmermann, vol. 1: 14–184. Oxford: Oxford University Press.

———. 2003. Legal Theory. In *The Cambridge Companion to the Scottish Enlightenment*. Ed. Alexander Broadie, 222–42. Cambridge: Cambridge University Press.

Cairns, John W., and Grant McLeod. 2000. Thomas Craig, Sir Martin Wright, and Sir William Blackstone: the English Discovery of Feudalism. *Journal of Legal History* 21: 54–66.

Campbell, Archibald Hunter. 1954. *The Structure of Stair's Institutions*. Glasgow: Jackson, Son and Company.

Campbell, Enid. 1957–1959. German Influences in Legal Education and Jurisprudence in the Nineteenth Century. *University of Western Australia Annual Law Review* 4: 357–90.

Cargill Thompson, W. D. J. 1980. The Philosopher of the "Politic Society": Richard Hooker as a Political Thinker. In *Studies in the Reformation: Luther to Hooker*. Ed. C. W. Dugmore, 131–91. London: Athlone.

Carrese, Paul O. 2003. *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*. Chicago, Ill.: University of Chicago Press.

Carter, W. Burlette. 1997. Reconstructing Langdell. *Georgia Law Review* 32:1–139.

Casto, William R. 1995. *The Supreme Court in the Early Republic: the Chief Justiceships of John Jay and Oliver Ellsworth*. Columbia, S.C.: University of South Carolina Press.

Chambers, Robert, Sir. 1986. *A Course of Lectures on the English Law Delivered at the University of Oxford 1767–1773*, 2 vols. Ed. Thomas M. Curley. Oxford: Clarendon.

Chrimes, S. B. 1936. *English Constitutional Ideas in the Fifteenth Century*. Cambridge: Cambridge University Press.

Christianson, Paul. 1996. *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635*. Toronto: University of Toronto Press.

Chroust, A. 1965. *The Rise of the Legal Profession in America*, 2 vols. Norman, Okla.: University of Oklahoma Press.

Cocks, Raymond C.J. 1988. *Sir Henry Maine: A Study in Victorian Jurisprudence*. Cambridge: Cambridge University Press.

———. 1991. Maine, Progress and Theory. In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Ed. Alan Diamond, 70–5. Cambridge: Cambridge University Press.

———. 1999. Who Attended the Lectures of Sir Henry Maine: And Does it Matter? In *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900*. Ed. Jonathan A. Bush and Alain Wijffels, 383–96. London: Hambledon.

Coke, Edward, Sir. 1602a. *Le Second Part des Reportes del Edward Coke*. London: Thomas Wight.

———. 1602b. *Le Tierce Part des Reportes del Edward Coke*. London: Thomas Wight.

———. 1604. *Le Qvart Part des Reports del Edward Coke*. London: Thomas Wight.

———. 1605. *The Fift Part of the Reports of Sr Edward Coke*. London: The Companie of Stationers.

———. 1607. *La Size Part des Reports Sr Edw Coke*. London: The Societie of Stationers.

———. 1611. *La Hvictme Part des Reports de Sr Edw Coke*. London: The Societie of Stationers.

———. 1613. *La Nevfme Part des Reports de Sr Edw Coke*. London: The Societie of Stationers.

———. 1614. *La Dixme Part des Reports de Sr Edw. Coke*. London: The Societie of Stationers.

———. 1642. *The Second Part of the Institutes of the Lawes of England, Containing the Exposicion of Many Ancient and Other Statutes*. London: M. Flesher and R. Young.

———. 1644a. *The Fourth Part of the Institutes of the Laws of England*. London: M. Flesher for W. Lee and D. Pakeman.

———. 1644b. *The Third Part of the Institutes of the Laws of England, concerning High Treason and other Pleas of the Crown and Criminal Causes*. London: M. Flesher for W. Lee and D. Pakeman.

———. 1671. *A Book of Entries*. 2nd ed. London: John Streater, James Flesher, and Henry Twyford, assigns of Richard Atkins and Edward Atkins. (1st ed. 1614.)

———. 1794. *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton*. Ed. Francis Hargrave and Charles Butler. 15th ed. London: E. and R. Brooke.

Collini, Stefan. 1991. Democracy and Excitement: Maine's Political Pessimism. In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Ed. Alan Diamond, 88–95. Cambridge: Cambridge University Press.

Collini, Stefan, Donald Winch, and John Burrow. 1983. *That Noble Science of Politics: a Study in Nineteenth-Century Intellectual History*. Cambridge: Cambridge University Press.

Cook, C. 1981. *The American Codification Movement: A Study of Antebellum Legal Reform*. London: Greenwood.

Cook, Harold J. 1985. Against Common Right and Reason: The Royal College of Physicians versus Dr. Thomas Bonham. *American Journal of Legal History* 29: 301–22.

Coquillette, Daniel R. 1992. *Francis Bacon*. Edinburgh: Edinburgh University Press.

Cosgrove, Richard A. 1996. *Scholars of the Law: English Jurisprudence from Blackstone to Hart*. New York and London: New York University Press.

Cotterrell, Mary. 1968. Interregnum Law Reform: The Hale Commission of 1652. *English Historical Review* 83: 689–704.

Cotterrell, Roger. 2003. *The Politics of Jurisprudence: a Critical Introduction to Legal Philosophy*. London: LexisNexis. (1st ed. 1989.)

Cowell, John. 1607. *The Interpreter*. Cambridge: John Legate. (Facsimile ed. Amsterdam: Theatrum Orbis Terrarum, 1973.)

———. 1651. *The Institutes of the Lawes of England, Digested into the Method of the Civill or Imperiall Institutions*. Trans. W. G. Esquire. London: Thomas Roycroft for Jo. Ridley. (1st ed. in Latin 1605.)

Craig, Thomas. 1934. *The Jus Feudale by Sir Thomas Craig of Riccarton*, 2 vols. Trans. James Avon Clyde. Edinburgh: William Hodge & Company.

Crimmins, James. 1990. *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham*. Oxford: Clarendon.

Croft, Clyde. 1989. Lord Hardwicke's Use of Precedent in Equity. In *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference, Cardiff 1987*. Ed. T. G. Watkin, 121–55. London: Hambledon.

Cromartie, Alan. 1995. *Sir Matthew Hale 1609–1676: Law, Religion, and Natural Philosophy*. Cambridge: Cambridge University Press.

———. 1999. The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England. *Past and Present* 163: 76–120.

Currie, David P. 1985. *The Constitution and the Supreme Court: The First Hundred Years, 1789–1888*. Chicago, Ill.: University of Chicago Press.

Cust, Richard. 1987. *The Forced Loan and English Politics, 1626–1628*. Oxford: Clarendon.

Dalrymple, John. 1759. *An Essay towards a General History of Feudal Property in Great Britain*. 4th ed. London: Millar. (1st ed. 1757.)

Davies, John. 1869–1876a. A Discourse of Law and Lawyers [preface to "Le Primer Report des Cases et Matters en Ley resolues adiudges en les Courts del Roy en Ireland," London 1615]. In *The Works in Verse and Prose of Sir John Davies*. Ed. Alexander B. Grosart, vol. 2: 243–87. Privately printed.

———. 1869–1876b. The Question Concerning Impositions, Tonnage, Poundage, Prizage, Customs, Etc. In *The Works in Verse and Prose of Sir John Davies*. Ed. Alexander B. Grosart, vol. 3: 1–116. Privately printed.

De Haas, E., and G. D. H. Hall. 1970. *Early Registers of Writs*. London: Selden Society, vol. 87.

De Laveleye, Emile. 1870. Land System of Belgium and Holland. In *Systems of Land Tenure in Various Countries: A Series of Essays Published under the Sanction of the Cobden Club*, 228–78. London: Macmillan.

De Lolme, J. L. 1821. *The Constitution of England*. London: Baldwin & Co. (1st ed. 1771.)

Diamond, Alan, ed. 1991. *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Cambridge: Cambridge University Press.

Dickinson, H. T. 1979. *Liberty and Property: Political Ideology in Eighteenth Century Britain*. London: Methuen.

Dinwiddy, John R. 1975. Bentham's Transition to Political Radicalism, 1809–1810. *Journal of the History of Ideas* 36: 683–700.

———. 1989a. Adjudication under Bentham's Pannomion. *Utilitas* 1: 283–9.

———. 1989b. *Bentham*. Oxford: Oxford University Press.

Dodderidge, John. 1629. *The Lawyer's Light: Or a Due Direction for the Study of the Law*. London: Beniamin Fisher. (Facsimile ed. Amsterdam: Theatrum Orbis Terrarum, 1973.)

———. Undated. *Sir John Dodderidge's Treatise about the King's Prerogative*. Unpublished manuscript. British Library MS Harl. 5220.

Doe, Norman. 1989. Fifteenth Century Concepts of Law: Fortescue and Pecock. *History of Political Thought* 10: 257–80.

———. 1990. *Fundamental Authority in Late Medieval English Law*. Cambridge: Cambridge University Press.

Dulany, Daniel. 1765. *Considerations on the Propriety of Imposing Taxes in the British Parliament, for the Purpose of Raising a Revenue, by Act of Parliament*. Annapolis, Md.: Jonas Green.

Dunne, Gerald. 1970. *Justice Joseph Story and the Rise of the Supreme Court*. New York, N.Y.: Simon & Schuster.

Eccleshall, Robert. 1978. *Order and Reason in Politics: Theories of Absolute and Limited Monarchy in Early Modern England*. Oxford: Oxford University Press.

———. 1981. Richard Hooker and the Peculiarities of the English: The Reception of the "Ecclesiastical Polity" in the Seventeenth and Eighteenth Centuries. *History of Political Thought* 2: 63–117.

Egerton, Thomas. 1641. *The Priviledges and Prerogatives of the High Court of Chancery*. London: Henry Sheapheard.

———. 1710. *The Lord Chancellor Egerton's Observations on the Lord Coke's Reports*. London: John Nutt, assignee of Edward Sayer, for Bernard Lintott.

———. 1942. *A Discourse upon the Exposicion and Understandinge of Statutes*. Ed. S. E. Thorne. San Marino, Calif.: Huntington.

Elton, G. R. 1953. *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII*. Cambridge: Cambridge University Press.

Elyot, Thomas. 1962. *The Book Named the Governor*. Ed. S. E. Lehmberg. London: Dent.

English Reports. 1900–1932. 178 vols. London: Stevens and Son.

Erskine, John. 1773. *An Institute of the Law of Scotland in the Order of Sir G Mackenzie's Institutions of that Law*, 2 vols. Edinburgh: John Bell.

Evans, Jim. 1987. Changes in the Doctrine of Precedent during the Nineteenth Century. In *Precedent in Law*. Ed. Laurence Goldstein, 35–72. Oxford: Clarendon.

Farrand, Max, ed. 1937. *The Records of the Federal Convention*, 4 vols. New Haven, Conn.: Yale University Press.

Faulkner, Robert. 1968. *The Jurisprudence of John Marshall*. Princeton, N.J.: Princeton University Press.

Feaver, George. 1969. *From Status to Contract: A Biography of Sir Henry Maine, 1822–1888*. London and Harlow: Longman.

Feldman, Stephen M. 2000. *American Legal Thought from Premodernism to Postmodernism: an Intellectual Voyage*. New York: Oxford University Press.

Filmer, Robert, Sir. 1991a. *The Freeholder's Grand Inquest*. In R. Filmer, *Patriarcha and Other Writings*. Ed. Johann P. Sommerville, 69–130. Cambridge: Cambridge University Press.

———. 1991b. *The Necessity of the Absolute Power of all Kings; and in particular of the King of England*. In R. Filmer, *Patriarcha and Other Writings*. Ed. Johann P. Sommerville, 172–83. Cambridge: Cambridge University Press.

———. 1991c. *Patriarcha*. In R. Filmer, *Patriarcha and Other Writings*. Ed. Johann P. Sommerville, 1–68. Cambridge: Cambridge University Press.

Finch, Henry. 1759a. *A Description of the Common Laws of England*. London: A. Millar. (1st published in French as *Nomotechnia* in 1613.)

———. 1759b. *Law, or a Discourse thereof*. London: H. Lintot. (1st ed. 1627.)

Finnis, J. M. 1967. Blackstone's Theoretical Intentions. *Natural Law Forum* 12: 163–83.

Fonblanque, John, ed. 1820. *A Treatise of Equity*. 5th ed. London: Clarke. (1st edited by Fonblanque 1793; 1st edition [probably by Henry Ballow] 1737.)

Fortescue, John, Sir. 1869a. De Natura legis naturae. In *The Works of Sir John Fortescue, Knight*, 2 vols. Ed. Thomas Fortescue and Lord Clermont, vol. 1: 59–333. London: Privately published.

———. 1869b. Defensio Iuris Domus Lancastriae. In *The Works of Sir John Fortescue, Knight*, 2 vols. Ed. Thomas Fortescue and Lord Clermont, vol. 1: 503–16. London: Privately published.

———. 1885. *The Governance of England: Otherwise Called the Difference between and Absolute and a Limited Monarchy by Sir John Fortescue*. Ed. Charles Plummer. Oxford: Clarendon.

———. 1942. *De Laudibus Legum Angliae*. Ed. and trans. S. B. Chrimes. Cambridge: Cambridge University Press.

———. 1997. *On the Laws and Governance of England*. Ed. and trans. Shelley Lockwood. Cambridge: Cambridge University Press.

Foster, Elisabeth R., ed. 1966. *Proceedings in Parliament 1610*. 2 vols. New Haven, Conn.: Yale University Press.

Francis, Richard. 1727. *Maxims of Equity*. London: E. and R. Nutt, and R. Gosling.

Fraunce, Abraham. 1588. *The Lawiers Logike, Exemplifying the Praecepts of Logike by the Practice of the Common Lawe*. London: William How, for T. Gubbin, and T. Newman.

Friedman, Lawrence M. 1985. *A History of American Law*. 2nd edition. New York: Simon and Schuster. (1st ed. 1973.)

Fulbecke, William. 1620. *A Direction or Preparative to the Study of the Law*. London: Company of Stationers. (1st ed. 1600.)

Fuller, Nicholas. 1607. *The Argument of Master Nicholas Fuller, in the case of Thomas Lad, and Richard Maunsell*. London. (Facsimile ed. Amsterdam: Theatrum Orbis Terrarum, 1975.)

Gardiner, S. R., ed. 1899. *The Constitutional Documents of the Puritan Revolution, 1625–1660*. 2nd ed. Oxford: Clarendon.

Gilbert, Jeffrey, Sir. 1737. *The History and Practice of the Court of Common Pleas*. London: E. and R. Nutt and R. Gosling for C. Ward and R. Chandler.

———. 1738. *An Historical View of the Court of Exchequer, and of the King's Revenues, there Answered*. London: E. and R. Nutt, and R. Gosling, for T. Waller.

———. 1758. *The History and Practice of the High Court of Chancery*. Dublin: Richard Watts.

Gill, Paul E. 1971. Politics and Propaganda in Fifteenth-Century England: The Political Writings of Sir John Fortescue. *Speculum* 46: 333–47.

Gilmore, Grant. 1974. *The Death of Contract*. Columbus, Ohio: Ohio State University Press.

———. 1977. *The Ages of American Law*. New Haven and London: Yale University Press.

Goebel, Julius G. 1969. King's Law and Local Custom in Seventeenth Century New England. In *Essays in the History of Early American Law*. Ed. David H. Flaherty, 83–120. Chapel Hill, N.C.: University of North Carolina Press.

Goldie, Mark. 1980. The Revolution of 1689 and the Structure of Political Argument: An Essay and Annotated Bibliography of Pamphlets on the Allegiance Controversy. *Bulletin of Research in the Humanities* 83: 473–564.

Goldsworthy, Jeffrey. 1999. *The Sovereignty of Parliament: History and Philosophy*. Oxford: Clarendon.

Gordon, Robert W. 1982. Holmes' *Common Law* as Legal and Social Science. *Hofstra Law Review* 10: 719–46.

———. 1995. The Case for (and against) Harvard. *Michigan Law Review* 93: 1231–60.

———. 2000. Law as a Vocation: Holmes and the Lawyer's Path. In *The Path of the Law and its Influence*. Ed. Steven J. Burton, 7–32. Cambridge: Cambridge University Press.

Gough, J. W. 1955. *Fundamental Law in English Constitutional History*. Oxford: Clarendon.

Gray, Charles M. 1972. Bonham's Case Revisited. *Proceedings of the American Philosophical Society* 116: 35–58.

———. 1980. Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke. In *Culture and Politics from Puritanism to the Enlightenment*. Ed. Perez Zagorin, 25–66. Berkeley, Calif.: University of California Press.

———. 1992. Parliament, Liberty, and the Law. In *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War*. Ed. J. H. Hexter, 155–200. Stanford, Calif.: Stanford University Press.

Graziadei, Michele. 1997. Changing Images of the Law in Nineteenth Century English Legal Thought (the Continental Impulse). In *The Reception of Continental Ideas in the Common Law World, 1820–1920*. Ed. Mathias Reimann, 115–63. Berlin Dunker & Humblot.

Greene, Jack P. 1986a. From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution. *South Atlantic Quarterly* 85: 56–77.

———. 1986b. *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and United States, 1607–1788*. Athens, Ga.: University of Georgia Press.

———. 1994. The Colonial Origins of American Constitutionalism. In Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History*, 25–42. Charlottesville, Va.: University of Virginia Press.

Grey, Thomas C. 1978. Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought. *Stanford Law Review* 30: 843–93.

———. 1983. Langdell's Orthodoxy. *University of Pittsburgh Law Review* 45: 1–53.

———. 1989. Holmes and Legal Pragmatism. *Stanford Law Review* 41: 787–870.

Gross, Anthony. 1996. Unending Conflict: The Political Career of Sir John Fortescue, 1455–1471. In A. Gross, *The Dissolution of the Lancastrian Kingship: Sir John Fortescue and the Crisis of Monarchy in Fifteenth Century England*, 70–90. Stamford, Lincs.: Paul Watkins.

Gunther, Gerald, ed. 1979. *John Marshall's Defence of McCulloch v. Maryland*. Stanford, Calif.: Stanford University Press.

Guy, John A. 1982. The Origins of the Petition of Right Reconsidered. *Historical Journal* 25: 289–312.

———. 1985. Introduction. In *Christopher St. German on Chancery and Statute*. Ed. J. A. Guy. London: Selden Society, Supplementary series, vol. 6.

———. 1986a. Thomas More and Christopher St. German: The Battle of the Books. In *Reassessing the Henrician Age: Humanism, Politics and Reform 1500–1550*. Ed. A. Fox and J. A. Guy, 95–120. Oxford: Basil Blackwell.

———. 1986b. Law, Equity, and Conscience in Henrician Juristic Thought. In *Reassessing the Henrician Age: Humanism, Politics and Reform 1500–1550.* Ed. A. Fox and J. A. Guy, 179–98. Oxford: Basil Blackwell.

Haakonssen, Knud. 1981. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge: Cambridge University Press.

———. 1996. *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*. Cambridge: Cambridge University Press.

Hake, Edward. 1953. *Epieikeia: A Dialogue on Equity in Three Parts*. Ed. D. E. C. Yale. New Haven, Conn.: Yale Law Library.

Hale, Matthew, Sir. 1707a. *The Original Institution, Power, and Jurisdiction of Parliaments*. London: Jacob Tonson, Benjamin Barker, and Charles King.

———. 1707b. *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters relating to that Subject*. London: Richard and Edward Atkyns, for D. Brown, and J. Walthoe.

———. 1739. *The Analysis of the Law: Being a Scheme, or Abstract, of the Several Titles and Partitions of the Law of England, Digested into Method*. 3rd ed. London: E. and R. Nutt, and R. Gosling for T. Waller. (1st ed. 1713.)

———. 1787. Considerations Touching the Amendment or Alteration of Laws. In *A Collection of Tracts Relative to the Law of England, from Manuscripts*. Ed. Francis Hargrave, vol. 1: 253–89. Dublin: Lynch.

———. 1791. Sir Matthew Hale's Preface to Rolle's "Abridgement," Published 1668. In *Collectanea Juridica, Consisting of Tracts Relative to the Law and Constitution of England*. Ed. F. Hargrave, vol. 1: 263–82. London: E. & R. Brooke.

———. 1924. Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes his Dialogue of the Law. In W. S. Holdsworth, *A History of English Law*, vol. 5: 500–13. London: Methuen.

———. 1971. *The History of the Common Law of England*. Ed. with intro by Charles M. Gray. Chicago, Ill.: University of Chicago Press. (1st ed. 1713.)

———. 1975. *The Prerogatives of the King*. Ed. D. E. C. Yale. London: Selden Society.

———. Undated (a). *Extracts from a Manuscript of Sir Matthew Hale Concerning the Government and Laws of England*. Unpublished manuscript. British Library MS Additional 14291.

———. Undated (b). *Reflections by the Lord Cheife Justice Hale on Mr. Hobbs His Dialogue of the Law*. Unpublished manuscript. British Library MS Additional 18235.

———. Undated (c). *Treatise of the Nature of Lawes in Generall and Touching the Law of Nature*. Unpublished manuscript. British Library MS Hargrave 485.

Hall, G. D. G., ed. 1993. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*. Oxford: Clarendon.

Hall, Mark David. 1997. *The Political and Legal Philosophy of James Wilson, 1742–1798*. Columbia, Mo.: University of Missouri Press.

Hamburger, Lotte, and Joseph Hamburger. 1985. *Troubled Lives: John and Sarah Austin*. Toronto: University of Toronto Press.

Hamburger, Philip A. 1994. Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London* v. *Wood*. *Columbia Law Review* 94: 2091–153.

Hamilton, Alexander. 1961–1987. *The Papers of Alexander Hamilton*, 27 vols. Ed. Harold C. Syrett. New York, N.Y.: Columbia University Press.

Hanson, Donald W. 1970. *From Kingdom to Commonwealth: The Development of Civil Consciousness in English Political Thought*. Cambridge, Mass.: Harvard University Press.

[Harrison, Frederic]. 1861. Maine on Ancient Law. *Westminster Review* 19 (n.s.): 457–77.

Harrison, Frederic. 1879. The English School of Jurisprudence. *Fortnightly Review* 25: 114–30.

Hart, H. L. A. 1956. Blackstone's Use of the Law of Nature. *Butterworth's South African Law Review* 169–74.

———. 1957–1958. Positivism and the Separation of Law and Morals. *Harvard Law Review* 71: 593–629.

———. 1982. *Essays on Bentham: Jurisprudence and Political Theory*. Oxford: Clarendon.

———. 1994. *The Concept of Law*. 2nd ed. Oxford: Clarendon. (1st ed. 1961.)

Haskins, George Lee. 1960. *Law and Authority in Early Massachusetts: A Study in Tradition and Design*. New York, N.Y.: Macmillan.

Haskins, George, and Herbert A. Johnson. 1981. *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Vol. 2: Foundations of Power: John Marshall 1801–1815*. New York, N.Y.: Macmillan.

Hatton, Christopher, Sir. 1677. *A Treatise Concerning Statutes, or Acts of Parliament, and the Exposition Thereof*. London: Richard Tonson.

Havinghurst, A. F. 1950. The Judiciary and Politics in the Reign of Charles II. *Law Quarterly Review* 66: 62–78, 229–52.

———. 1953. James II and the Twelve Men in Scarlet. *Law Quarterly Review* 69: 522–46.

Hill, W. Speed. 1971. Hooker's *Polity*: The Problem of the "Last Three Books." *Huntington Library Quarterly* 34: 317–36.

Hinton, R. W. K. 1960. English Constitutional Theories from Sir John Fortescue to Sir John Eliot. *English Historical Review* 75: 410–25.

Hobbes, Thomas. 1969. *The Elements of Law, Natural and Politic*. Ed. Ferdinand Tönnies. 2nd ed., with intro by M. M. Goldsmith. London: Frank Cass.

———. 1971. *A Dialogue between a Philosopher and a Student of the Common Laws of England*. Ed. and introd. Joseph Cropsey. Chicago, Ill.: University of Chicago Press.

———. 1991. *Leviathan*. Ed. Richard Tuck. Cambridge: Cambridge University Press.

———. 1998. *On the Citizen*. Ed. and trans. Richard Tuck and Michael Silverthorne. New York, N.Y.: Cambridge University Press.

Hobson, Charles F. 1996. *The Great Chief Justice: John Marshall and the Rule of Law*. Lawrence, Kans.: University Press of Kansas.

Hoeflich, M. H. 1985. John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer. *American Journal of Legal History* 29: 36–77.

Hoffman, David. 1836. *Legal Outlines: Being the Substance of the First Title of a Course of Lectures Now Delivering in the University of Maryland*. Baltimore, Md.: No named publisher.

Holland, Thomas Erskine. 1900. *The Elements of Jurisprudence*. Ninth ed. Oxford: Clarendon. (1st ed. 1880.)

Holmes, Oliver Wendell. 1923. *The Common Law*. Boston: Little, Brown and Co. (Reprint of 1881, London: Macmillan edition.)

———. 1995a. Codes, and the Arrangement of the Law. In *The Collected Works of Justice Holmes*, 3 vols. Ed. Sheldon M. Novick, 1: 212–21. Chicago: University of Chicago Press. (Also *Harvard Law Review* 44 (1931): 725–37.) (1st ed. 1870.)

———. 1995b. Book Review. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 1: 294–7. Chicago: University of Chicago Press. (Also in *Harvard Law Review*, 44 (1931): 788–91.) (1st ed. 1872.)

———. 1995c. The Arrangement of the Law-Privity. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 1: 303–18. Chicago: University of Chicago Press. (Also in *Harvard Law Review* 44 (1931): 738–58.) (1st ed. 1872.)

———. 1995d. The Theory of Torts. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 1: 326–35. Chicago: University of Chicago Press. (Also in *Harvard Law Review* 44 (1931): 773–85.) (1st ed. 1873.)

———. 1995e. Possession. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 37–60. Chicago: University of Chicago Press. (1st ed. 1878.)

———. 1995f. Common Carriers and the Common Law. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 60–76. Chicago: University of Chicago Press. (1st ed. 1879.)

———. 1995g. Book Review. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 102–4. Chicago: University of Chicago Press. (1st ed. 1880.)

———. 1995h. Privilege, Malice and Intent. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 371–80. Chicago: University of Chicago Press. (1st ed. 1894.)

———. 1995i. The Bar as a Profession. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 386–90. Chicago: University of Chicago Press.

———. 1995j. The Path of the Law. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 391–406. Chicago: University of Chicago Press. (1st ed. 1897.)

———. 1995k. Law in Science and Science in Law. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 406–20. Chicago: University of Chicago Press. (1st ed. 1899.)

———. 1995l. Natural Law. In *The Collected Works of Justice Holmes*. 3 vols. Ed. Sheldon M. Novick, 3: 445–8. Chicago: University of Chicago Press. (1st ed. 1918.)

Hooker, Richard. 1977. Of the Laws of Ecclesiastical Polity. Ed. Georges Edelen, W. Speed Hill and P. G. Stanwood. In *The Folger Library Edition of the Works of Richard Hooker*, vols 1–3. Cambridge, Mass.: Belknap Press of Harvard University Press.

Horton, John T. 1969. *James Kent: A Study in Conservatism, 1763–1847*. New York, N.Y.: Da Capo. (1st ed. 1939.)

Horwitz, Morton J. 1992a. The Place of Justice Holmes in American Legal Thought. In *The Legacy of Oliver Wendell Holmes, Jr.* Ed. Robert W. Gordon, 31–71. Edinburgh: Edinburgh University Press.

———. 1992b. *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*. New York and Oxford: Oxford University Press.

Howe, Mark DeWolfe, ed. 1953. *The Holmes-Laski Letters: the Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935*. 2 vols. London: Geoffrey Cumberlege.

———, ed. 1961. *The Holmes-Pollock Letters: the Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932*. Cambridge, Mass.: Harvard University Press.

———. 1963. *Justice Oliver Wendell Holmes: The Proving Years 1870–1882*. Cambridge, Mass.: Harvard University Press.

Howell, T. B., ed. 1816–1826. *A Complete Collection of State Trials*, 33 vols. London: T. C. Hansard for Longman, Hurst Rees, Orme and Browne et al.

Hudson, John. 1996. *The Formation of the English Common Law*. London: Longman.

Hume, L. J. 1981. *Bentham and Bureaucracy*. Cambridge: Cambridge University Press.

Hunton, Philip. 1643. *A Treatise on Monarchie.* London: John Bellamy and Ralph Smith.

Hutton, Gordon M. 1981. Stair's Public Career. In *Stair Tercentenary Studies*. Ed. David Walker, 1–68. Edinburgh: Stair Society, vol. 33.

Ibbetson, David J. 1999. *A Historical Introduction to the Law of Obligations*. Oxford: Oxford University Press.

Iredell, James. 1858. *Life and Correspondence of James Iredell*, 2 vols. Ed. Griffith J. McRee. New York, N.Y.: D. Appleton & Co.

James, M. H. 1973. Bentham on the Individuation of Laws. *Northern Ireland Legal Quarterly* 24: 357–82.

Jay, Stewart. 1985a. Origins of the Federal Common Law: Part I. *University of Pennsylvania Law Review* 133: 1003–116.

———. 1985b. Origins of the Federal Common Law: Part II. *University of Pennsylvania Law Review* 133: 1231–333.

Jefferson, Thomas. 1892–1899. *The Writings of Thomas Jefferson,* 10 vols. Ed. Paul Leicester Ford. New York, N.Y.: Putnam's.

———. 1999. A Summary View of the Rights of British America. In *Jefferson: Political Writings*. Ed. Joyce Appleby and Terence Ball, 64–80. Cambridge: Cambridge University Press.

Jenyns, Soame. 1765. *The Objections to the Taxation of our American Colonies by the Legislature of Great Britain, Briefly Consider'd*. London: J. Wilkie.

Johnson, Herbert A. 1997. *The Chief Justiceship of John Marshall 1801–1835*. Columbia, S.C.: University of South Carolina Press.

Johnson, Robert C., Mary Frear Keeler, Maija Jansson Cole, and William B. Bidwell, eds. 1977–1983. *Commons Debates 1628*, 3 vols. New Haven, Conn.: Yale University Press.

Jones, W. J. 1961. Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth I. *American Journal of Legal History* 5: 19–37.

———. 1967. *The Elizabethan Court of Chancery*. Oxford: Clarendon.

Kames, Henry Home, Lord. 1758. *Essays on the Principles of Morality and Natural Religion*. 2nd ed. London: C. Hitch & L. Hawes, R. & J. Dodsley, J. Rivington & J. Fletcher and J. Richardson. (1st ed. 1751.)

———. 1767. Preliminary Discourse, Being an Investigation of the Moral Laws of Society. In Henry Home Lord Kames, *Principles of Equity*. 2nd ed. Edinburgh: Kincaid and Bell.

———. 1774. *Sketches of the History of Man*, 2 vols. Edinburgh: W. Creech.

———. 1777. *Elucidations Respecting the Common and Statute Law of Scotland*. Edinburgh: W. Creech.

———. 1778. *Principles of Equity*. 3rd ed. Edinburgh: J. Bell and W. Creech. (1st ed. 1760.)

———. 1780. *Select Decisions of the Court of Session from 1752 to 1768*. Edinburgh: Bell.

———. 1792. *Historical Law-Tracts*. 4th ed. Edinburgh: T. Cadell. (1st ed. 1758.)

Kay, Richard S. 2000. William III and the Legalist Revolution. *Connecticut Law Review* 32: 1645–64.

Keir, D. L. 1936. The Case of Ship-Money. *Law Quarterly Review* 52: 546–74.

Kelly, P. J. 1990. *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*. Oxford: Clarendon.

Kelsen, Hans. 1961. *General Theory of Law and State*. Trans. A. Wedberg. New York, N.Y.: & Russell.

Kent, James. 1844. *Commentaries on American Law*, 4 vols. 5th ed. New York, N.Y.: Printed for the Author.

Kenyon, J. P. 1977. *Revolution Principles: The Politics of Party, 1689–1720*. Cambridge: Cambridge University Press.

King, Peter J. 1986. *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century*. New York, N.Y.: Garland.

Knafla, Louis A. 1977. *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere*. Cambridge: Cambridge University Press.

Kocher, Paul H. 1957. Francis Bacon and the Science of Jurisprudence. *Journal of the History of Ideas* 18: 3–26.

Konig, D. T. 1979. *Law and Society in Puritan Massachusetts: Essex County 1629–1692*. Chapel Hill, N.C.: University of North Carolina Press.

Lake, Peter. 1988. *Anglican and Puritans? Presbyterianism and English Conformist Thought from Whitgift to Hooker*. London: Unwin.

Lambarde, William. 1602. *Eirenarcha, or Of the Office of the Justices of Peace, in Foure Bookes*. London: T. Wright.

———. 1644. Αρχαιονομια *sive de Priscis Anglorum legibus libri*. Cambridge: Roger Daniel.

———. 1957. *Archeion: Or a Discourse upon the High Courts of Justice in England*. Ed. Charles H. McIlwain and Paul L. Ward. Cambridge, Mass.: Harvard University Press. (1st ed. 1635.)

Langbein, John H. 1993. Chancellor Kent and the History of Legal Literature. *Columbia Law Review* 93: 547–94.

Langdell, Christopher Columbus. 1872. *A Selection of Cases on Sales of Personal Property*. Boston: Little Brown & Co.

———. 1879. *A Selection of Cases on the Law of Contracts with a Summary of the Topics Covered by the Cases*. Second ed. Boston: Little Brown & Co. (1st ed 1871.)

———. 1880. *A Summary of the Law of Contracts*. Boston: Little Brown & Co.

———. 1908. *A Brief Survey of Equity Jurisdiction.* Cambridge, Mass: Harvard Law School Association.

LaPiana, William P. 1994. *Logic and Experience: The Origin of Modern American Legal Education*. New York, N.Y.: Oxford University Press.

Letwin, S. R. 1965. *The Pursuit of Certainty. David Hume, Jeremy Bentham, John Stuart Mill, Beatrice Webb*. Cambridge: Cambridge University Press.

Levack, Brian P. 1987. *The Formation of the British State: England, Scotland, and the Union, 1603–1707*. Oxford: Clarendon.

Lewis, Ewart. 1964. King above Law? "Quod Principi Placuit" in Bracton. *Speculum* 39: 240–69.

Lieberman, David. 1989. *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain*. Cambridge: Cambridge University Press.

Lobban, Michael. 1991. *The Common Law and English Jurisprudence, 1760–1850*. Oxford: Clarendon.

———. 1995. Was There a Nineteenth-century "English School of Jurisprudence"? *Journal of Legal History* 16: 34–62.

———. 1997. The English Legal Treatise and English Law in the Eighteenth Century. In *Auctoritates: Law Making and its Authors*. Ed. Serge Dauchy, Jos Monballyu, and Alain Wijffels, 69–88. Brussels: Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België (*Iuris Scripta Historica* xiii.)

———. 2004. The Ambition of Lord Kames's Equity. In *Law and History*. Ed. Andrew Lewis and Michael Lobban, 97–121. Oxford: Oxford University Press.

———. 2005. Custom, Nature and Authority: the Roots of English Legal Positivism. In *The British and Their Laws in the Eighteenth Century*. Ed. David Lemmings, 27–58. Woodbridge: Boydell & Brewer.

Locke, John. 1975. *An Essay Concerning Human Understanding*. Ed. Peter H. Nidditch. Oxford: Clarendon.

———. 1988. *Two Treatises of Government*. Ed. Peter Laslett. Cambridge: Cambridge University Press.

Long, Douglas. 1977. *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism*. Toronto: University of Toronto Press.

Löwenhaupt, Wilfried. 1972. *Politischer Utilitarismus und Bürgerliches Rechtsdenken: John Austin (1790–1859) under die "Philosophie des Positiven Rechts."* Berlin: Duncker & Humblot.

Luban, David. 2000. The Bad Man and the Good Lawyer. In *The Path of the Law and its Influence*. Ed. Steven J. Burton, 33–49. Cambridge: Cambridge University Press.

Lucas, Paul. 1963. *Ex Parte* Sir William Blackstone, "Plagiarist": A Note on Blackstone and Natural Law. *American Journal of Legal History* 7: 142–58.

Lyell, Sir Charles. 1830–1833. *Principles of Geology, being an Attempt to Explain the Former Changes of the Earth's Surface by Reference to Causes now in Operation*. London: John Murray.

Lynch, Joseph M. 1982. *Fletcher* v. *Peck*: The Nature of the Contract Clause. *Seton Hall Law Review* 13: 1–20.

Macfarlane, Alan D. J. 1991. Some Contributions of Maine to History and Anthropology. In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Ed. Alan Diamond, 111–42. Cambridge: Cambridge University Press.

Macnair, M. R. T. 1997. Common Law and Statutory Imitations of Equitable Relief under the Later Stuarts. In *Communities and Courts*. Ed. C. W. Brooks and M. Lobban, 115–31. London: Hambledon.

———. 1999. *The Law of Proof in Early Modern Equity*. Berlin: Duncker & Humblot.

Madison, James, Alexander Hamilton, and John Jay. 1987. *The Federalist Papers*. Ed. Isaac Kramnick. London: Penguin. (1st ed. 1788.)

Magrath, C. Peter. 1966. *Yazoo: Law and Politics in the New Republic: The Case of Fletcher* v. *Peck*. Providence, R.I.: Brown University Press.

Maine, Henry. 1856. Roman Law and Legal Education. In *Cambridge Essays*, 1–29. London: John W. Parker & Son.

———. 1871. *Village Communities in the East and West*. London: John Murray.

———. 1875a. *Lectures on the Early History of Institutions*. London: John Murray.

———. 1875b. *The Effects of Observation of India on Modern European Thought. The Rede Lecture Delivered before the University of Cambridge on May 22, 1875*. London: John Murray.

———. 1883. *Dissertations on Early Law and Custom*. London: John Murray.

———. 1885. *Popular Government: Four Essays*. London: John Murray.

———. 1888. *The Whewell Lectures. International Law*. London: John Murray.

———. 1901. *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*. London: John Murray. Seventeenth impression. (1st ed. 1861.)

Maitland, F. W., ed. 1895. *Select Passages from the Works of Bracton and Azo*. London: Selden Society, vol. 8 for 1894.

Malcolm, Joyce Lee, ed. 1999. *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*. Indianapolis, Ind.: Liberty Fund.

Massey, Calvin R. 1992. The Natural Law Component of the Ninth Amendment. *University of Cincinnati Law Review* 61: 48–105.

Mayer, David N. 1994. *The Constitutional Thought of Thomas Jefferson*. Charlottesville, Va.: University Press of Virginia.

McAffee, Thomas B. 1990. The Original Meaning of the Ninth Amendment. *Columbia Law Review* 90: 1215–320.

———. 1992a. The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People. *Southern Illinois University Law Journal* 16: 267–305.

———. 1992b. Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis. *University of Cincinnati Law Review* 61: 107–69.

McClellan, James. 1971. *Joseph Story and the American Constitution.* Norman, Okla.: University of Oklahoma Press.

McGrade, Arthur S. 1963. The Coherence of Hooker's *Polity*: The Books on Power. *Journal of the History of Ideas* 24: 163–82.

———. 1985. Constitutionalism Late Medieval and Modern—*lex facit regem*: Hooker's Use of Bracton. In *Acta Conventus Neo-Latini Bononiensis: Proceedings of the Fourth International Congress of Neo-Latin Studies Bologna 26 August to 1 September 1979.* Ed. R. J. Schoeck, 116–23. Binghamton, N.Y.: State University of New York at Binghamton Center for Medieval and Early Renaissance Studies.

McIlwain, Charles H. 1910. *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England.* New Haven, Conn.: Yale University Press.

———. 1947. *Constitutionalism Ancient and Modern.* Revised ed. Ithaca, NY: Cornell University Press.

———, ed. 1918. *The Political Works of James I.* Cambridge, Mass.: Harvard University Press.

Menand, Louis. 2001. *The Metaphysical Club.* London: Flamingo.

Mendle, Michael. 1985. *Dangerous Positions: Mixed Government, the Estates of the Realm, and the Answer to the XIX Propositions.* University, Ala.: University of Alabama Press.

———. 1989. The Ship Money Case, *The Case of Shipmony*, and the Development of Henry Parker's Parliamentary Absolutism. *Historical Journal* 32: 513–36.

———. 1992. The Great Council of Parliament and the First Ordinances: The Constitutional Theory of the Civil War. *Journal of British Studies* 31: 133–62.

———. 1995. *Henry Parker and the English Civil War: The Political Thought of the Public's "Privado."* Cambridge: Cambridge University Press.

Michael, Helen K. 1991. The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights? *North Carolina Law Review* 69: 421–90.

Mill, John Stuart. 1863. Austin on Jurisprudence. *Edinburgh Review* 118: 439–82.

———. 1871. Mr Maine on Village Communities. *Fortnightly Review* 9 (n.s.): 543–56.

Miller, Perry. 1966. *The Life of the Mind in America from the Revolution to the Civil War.* London: Victor Gollancz.

Milsom, S. F. C. 1976. *The Legal Framework of English Feudalism.* Cambridge: Cambridge University Press.

———. 1981. *Historical Foundations of the Common Law.* 2nd ed. London: Butterworths. (1st ed. 1969.)

Mirow, M. C. 1999. Bastardy and the Statute of Wills: Interpreting a Sixteenth Century Statute with Cases and Readings. *Mississippi Law Journal* 69: 345–71.

Mitford, John. 1787. *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill.* 2nd ed. London: W. Owen. (1st ed. 1780.)

Moles, Robert N. 1987. *Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart.* Oxford: Basil Blackwell.

Moore, James, and Michael Silverthorne. 1983. Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth Century Scotland. In *Wealth and Virtue: the Shaping of Political Economy in the Scottish Enlightenment.* Ed. Istvan Hont and Michael Ignatieff, 73–87. Cambridge: Cambridge University Press.

Morice, James. 1578. *A Reading of the Middle Temple full of excellent good discourse and learninge circa 21 Eliz. R.* Unpublished manuscript. British Library, Add. MS. 36081.

Morier, R. B. D. 1870. Agrarian Legislation of Prussia during the Present Century; also A Report on the Tenure of Land in the Grand Duchy of Hesse. In *Systems of Land Tenure in*

Various Countries: a Series of Essays Published under the Sanction of the Cobden Club, 279–327. London: Macmillan.

Morison, Samuel Eliot. 1965. *Sources and Documents Illustrating the American Revolution 1764–1788 and the Formation of the Federal Constitution*. 2nd ed. Oxford: Oxford University Press. (1st ed. 1923.)

Morison, W. L. 1958–1959. Some Myth about Positivism. *Yale Law Journal* 68: 212–33.

———. 1982. *John Austin*. London: Edward Arnold.

Muldrew, Craig. 1998. *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England*. Basingstoke: Macmillan.

Müller, Max. 1994. *Lectures on the Science of Language*: London: Routledge: Thoemmes Press. (1st ed. 1861.)

Munz, Peter. 1952. *The Place of Hooker in the History of Thought*. London: Routledge and Kegan Paul.

Musson, Anthony. 2004. Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition. In *Law and History*. Ed. Andrew Lewis and Michael Lobban, 63–8. Oxford: Oxford University Press.

Nasse, Erwin. 1871. *On the Agricultural Community of the Middle Ages and Inclosures of the Sixteenth Century*. Trans. H. A. Ouvry. London. Macmillan & Co.

Nedelsky, Jennifer. 1990. *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy*. Chicago, Ill.: University of Chicago Press.

Nederman, Cary J. 1984. Bracton on Kingship Revisited. *History of Political Thought* 5: 61–77.

———. 1988. The Royal Will and the Baronial Bridle: The Place of the *Addicio de Cartis* in Bractonian Political Thought. *History of Political Thought* 9: 415–29.

Nelson, William E. 1974. The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America. *Harvard Law Review* 87: 513–66.

Nenner, Howard. 1977. *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660–1689*. Chicago, Ill.: University of Chicago Press.

Newmyer, R. Kent. 1985. *Supreme Court Justice Joseph Story: Statesman of the Old Republic*. Chapel Hill, N.C.: University of North Carolina Press.

———. 2001. *John Marshall and the Heroic Age of the Supreme Court.* Baton Rouge, La.: Louisiana State University Press.

Nottingham, Lord. 1954. *Lord Nottingham's Chancery Cases*. Ed. D. E. C. Yale. London: Selden Society, vol. 73.

Noy, William. 1757. *The Grounds and Maxims of the English Laws*. 5th ed. London: Henry Lintot. (1st ed. 1641.)

Oakley, Francis. 1968. Jacobean Political Theology: The Absolute and Ordinary Powers of the King. *Journal of the History of Ideas* 29: 323–46.

Ormrod, W. M. 1988. The Origins of the *Sub pena* Writ. *Bulletin of the Institute of Historical Research* 61: 11–20.

Paley, William. 1785. *Principles of Moral and Political Philosophy*. 2 vols. Dublin: Messrs Exshaw, White.

Palmer, Robert C. 1986. The Federal Common Law of Crimes. *Law and History Review* 4: 267–323.

Parker, Henry. 1640. *The Case of Shipmony Briefly Discoursed, According to the Grounds of Law, Policy and Conscience*. No place of publication: No publisher stated.

———. 1642. *Some Few Observations upon his Majesties late answer to the Declaration, or remonstrance of the Lords and Commons of the 19 of May 1642*. London: No publisher stated.

———. 1643. *The Contra-Replicant, His Complaint to His Maiestie.* No place of publication: No publisher stated.

———. 1934. Observations upon Some of His Majesties Late Answers and Expresses. In *Tracts on Liberty in the Puritan Revolution, 1638–1647*, 3 vols. Ed. William Haller, vol. 2: 167–213. New York, N.Y.: Columbia University Press. (Facsimile of the 1st ed. of 1642.)

Pawlisch, Hans. 1980. Sir John Davies, the Ancient Constitution, and the Civil Law. *Historical Journal* 23: 689–702.

———. 1985. *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism*. Cambridge: Cambridge University Press.

Petyt, William.1680. *The Antient Right of the Commons of England Asserted*. London: F. Smith, T. Bassett, J. Wright, R. Chiswell and S. Heyrick.

Philbin, Patrick F. 1999. The Exceptiones Contra Brevia: A Late Thirteenth Century Teaching Tool. In *Learning the Law: Teaching and the Transmission of English Law, 1150–1900*. Ed. Jonathan A. Bush and Alain Wijffels, 133–56. London: Hambledon.

Plowden, Edmund. 1816. *The Commentaries or Reports of Edmund Plowden*, 2 vols. Ed. and trans. F. Hargrave. London: S. Brooke. (1st ed. 1578.)

Plucknett, T. F. T. 1926. Bonham's Case and Judicial Review. *Harvard Law Review* 40: 30–70.

Pocock, J. G. A. 1980. The Myth of John Locke and the Obsession with Liberalism. In *John Locke: Papers Read at a Clark Library Seminar*. Ed. J.G.A. Pocock and Richard Ashcraft. Los Angeles: William Andrews Clark Memorial Library.

———. 1987. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with a Retrospect*. Cambridge: Cambridge University Press.

———. 2003. *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*. Princeton, N.J.: Princeton University Press. (1st ed. 1975.)

Pohlman, H.L. 1984. *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence*. Cambridge, Mass.: Harvard University Press.

Pollock, Frederick. 1890. Sir Henry Maine and His Work. In F. Pollock, *Oxford Lectures and Other Discourses*, 146–68. London: Macmillan.

———. 1893. Sir Henry Maine as a Jurist. *Edinburgh Review* 178: 100–21.

Pollock, Frederick, Sir, and F. W. Maitland. 1968. *The History of English Law before the Time of Edward I*, 2 vols, 2nd ed. reissued with a new introduction by S. F. C. Milsom. Cambridge: Cambridge University Press. (1st ed. 1895.)

Popofsky, Linda. 1979. Habeas Corpus and "Liberty of the Subject": Legal Arguments for the Petition of Right in the Parliament of 1628. *The Historian* 41: 257–75.

Posner, Richard A. 1990. *The Problems of Jurisprudence*. Cambridge, Mass.: Harvard University Press.

Post, Gaines. 1968. Bracton on Kingship. *Tulane Law Review* 42: 518–54.

Postema, Gerald J. 1986. *Bentham and the Common Law Tradition*. Oxford: Clarendon.

Presser, Stephen B. 1991. *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence*. Durham, N.C.: Carolina Academic Press.

Prest, Wilfrid R. 1977. The Dialectical Origins of Finch's Law. *Cambridge Law Journal* 36: 326–52.

———. 1986. *The Rise of the Barristers: A Social History of the English Bar, 1590–1640*. Oxford: Clarendon.

Preyer, Kathryn. 1986. Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic. *Law and History Review* 4: 223–65.

Pufendorf, Samuel. 1717. *Of the Law of Nature and Nations*. 3rd ed. Trans. Basil Kennet. London: R. Sare, R. Bonwicke, T. Goodwyn, J. Walthoe, M. Wotton, S. Manship, R. Wilkin, B. Tooke, R. Smith, T. Ward, and W. Churchill.

Reeve, L. J. 1989. *Charles I and the Road to Personal Rule*. Cambridge: Cambridge University Press.

Reeves, John. 1787. *History of the English Law from the Time of the Saxons to the End of the Reign of Philip and Mary*, 4 vols. London: E. Brooke.

Reid, John Phillip. 1986. *Constitutional History of the American Revolution, vol. 1: The Authority of Rights*. Madison, Wisc.: University of Wisconsin Press.

———. 1987. *Constitutional History of the American Revolution, vol. 2: The Authority to Tax*. Madison, Wisc.: University of Wisconsin Press.

———. 1991. *Constitutional History of the American Revolution, vol. 3: The Authority to Legislate*. Madison, Wisc.: University of Wisconsin Press.

———. 1993. *Constitutional History of the American Revolution, vol. 4: The Authority of Law*. Madison, Wisc.: University of Wisconsin Press.

Reimann, Mathias W. 1992. Holmes's *Common Law* and German Legal Science. In *The Legacy of Oliver Wendell Holmes, Jr.* Ed. Robert W. Gordon, 72–114. Edinburgh: Edinburgh University Press.

Richardson, H. G., and G. O. Sayles, eds. 1955. *Fleta [Prologue, Book I, Book II]*. London, Selden Society, vol. 72. (*Books III–VI* published in 1972 [Selden Society, vol. 89] and in 1983 [Selden Society, vol. 99].)

Rinck, H. J. 1960. Blackstone and the Law of Nature. *Ratio* 2: 162–80.

Robbins, Caroline. 1959. *The Eighteenth Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies*. Cambridge, Mass: Harvard University Press.

Rogat, Yosal. 1962–1963. Mr Justice Holmes: A Dissenting Opinion. *Stanford Law Review* 15: 3–44, 254–308.

Rogat, Yosal and James M. O'Fallon. 1984. Mr Justice Holmes: A Dissenting Opinion—the Speech Cases. *Stanford Law Review* 36: 1349–1406.

Rosen, F. 1983. *Jeremy Bentham and Representative Democracy*. Oxford: Clarendon.

———. 1992. *Bentham, Byron, and Greece: Constitutionalism, Nationalism and Early Liberal Political Thought*. Oxford: Clarendon.

Roslak, Oleg M. 2000. *John Selden and the Laws of England: Jurisprudence and Constitutional Theory, 1584–1654*. Unpublished PhD dissertation, University of Cambridge, England,

Ross, Janet. 1893. *Three Generations of English Women: Memoirs and Correspondence of Susannah Taylor, Sarah Austin, and Lady Duff Gordon*. London: Unwin.

Rueger, Zofia. 1982. Gerson's Concept of Equity and Christopher St. German. *History of Political Thought* 3: 1–30.

Rumble, Wilfrid E. 1977–1978. John Austin, Judicial Legislation and Legal Positivism. *University of Western Australia Law Review* 13: 77–109.

———. 1985. *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution*. London: Athlone.

———. 1991. Nineteenth-century Perceptions of John Austin: Utilitarianism and the Reviews of *The Province of Jurisprudence Determined*. *Utilitas* 3: 199–216.

———. 1996. Austin in the Classroom: Why Were His Courses on Jurisprudence Unpopular? *Journal of Legal History* 17: 17–40.

Russell, Conrad. 1990. *The Causes of the English Civil War*. Oxford: Clarendon.

Saint German, Christopher. 1535a. *A Treatyse Concernige the Power of the Clergye, and the Lawes of the Realme*. London: Godfray.

———. 1535b. *An Answere to a Letter*. London: Godfray.

———. 1974a. *Doctor and Student*. In *St. German's Doctor and Student*. Ed. T.F.T. Plucknett and J. L. Barton. London: Selden Society, vol. 91.

———. 1974b. A Lytell Treatise Called the Newe Addicions. In *St.German's Doctor and Student*. Ed. T. F. T. Plucknett and J. L. Barton, 315–40. London: Selden Society, vol. 91.

———. 1979. A Treatise Concerning the Division between the Spirituality and Temporality. In *The Complete Works of St Thomas More*, vol. 9. Ed. J. B. Trapp, Appendix A, 173–212. New Haven, Conn.: Yale University Press. (1st ed. 1532.)

———. 1985. A Little Treatise Concerning Writs of Subpoena. In *Christopher St. German on Chancery and Statute*. Ed. J. A. Guy, 106–26. London: Selden Society, Supplementary series, vol. 6.

———. 1987. Salem and Bizance. In *The Complete Works of St Thomas More*, vol. 10. Ed. John Guy, Ralph Keen, Clarence H. Miller and Ruth McGugan, 323–92. New Haven, Conn.: Yale University Press.

Sanderson, T. 1982. Philip Hunton's "Appeasement": Moderation and Extremism in the English Civil War. *History of Political Thought* 111: 447–61.

Schofield, Philip. 1991. Jeremy Bentham and Nineteenth-Century English Jurisprudence. *Journal of Legal History* 12: 58–88.

———. 1991–1992. The Constitutional Code of Jeremy Bentham. *King's College Law Journal* 2: 40–62.

Schwartz, Bernard. 1993. *A History of the Supreme Court*. New York, N.Y.: Oxford University Press.

Schwarz, Andreas B. 1934. John Austin and the German Jurisprudence of his Time. *Politica* 1: 178–99.

Scott, Jonathan. 1988. *Algernon Sidney and the English Republic, 1623–1677*. Cambridge: Cambridge University Press.

———. 1991. *Algernon Sidney and the Restoration Crisis, 1677–1683*. Cambridge: Cambridge University Press.

Sebok, Anthony J. 1998. *Legal Positivism in American Jurisprudence*. Cambridge: Cambridge University Press.

Seipp, David J. 1997. Holmes's Path. *Boston University Law Review* 77: 515–58.

Selden, John. 1615. *Analecton Anglo-Britannicon*. Frankfurt am Main: Prodeunt ex officina Paltheniana.

———. 1652. *Of the Dominion, or Ownership of the Sea*. Trans. Marchamont Nedham. London: William Du-Gard. (1st ed. in Latin 1635 as *Mare Clausum seu de Domino libri duo*.)

———. 1683. *Jani Anglorum Facies Altera*. In John Selden, *Tracts Written by John Selden*. Trans. Redman Westcot. London: Thomas Basset and Richard Chiswell and Robert Clavell. (1st ed. 1610.)

———. 1725a. De Jure Naturali et gentium juxta disciplinam Ebraeorum. In J. Selden, *Opera Omnia.* Ed. David Wilkins, vol. 1, tome 1: 65–757. London: No named publisher. (1st ed. 1640.)

———. 1725b. England's Epinomis. In J. Selden, *Opera Omnia.* Ed. David Wilkins, vol. 3, tome 1: 1–46. London: No named publisher. (1st ed. 1683.)

———. 1725c. The History of Tythes. In J. Selden, *Opera Omnia* Ed. David Wilkins, vol. 3, tome 2: 1069–344. London: No named publisher. (1st ed. 1618.)

———. 1725d. Notes on Sir John Fortescue, De Laudibus Legum Angliae. In J. Selden, *Opera Omnia.* Ed. David Wilkins, vol. 3, tome 2: 1879–906: London: No named publisher. (1st ed. 1616.)

———. 1725e. Titles of Honour. In J. Selden, *Opera Omnia.* Ed. David Wilkins, vol. 3, tome 1: 85–1058. London: No named publisher. (1st ed. 1614; 2nd ed. 1631.)

———. 1925. *Ioannis Seldeni Ad Fletam Dissertatio. Reprinted from the 1647 Edition with Parallel Translation*. Ed. and trans. David Ogg. Cambridge: Cambridge University Press.

———. 1927. *Table Talk of John Selden*. Ed. Sir Frederick Pollock. London: Quaritch.

———, ed. 1623. *Eadmeri monachi Cantuariensis historiae novorum*. London: Meighen & Thomas Dew.

Semple, Janet. 1993. *Bentham's Prison: a Study of the Panopticon Penitentiary*. Oxford: Clarendon.

Sharpe, Kevin. 1992. *The Personal Rule of Charles I*. New Haven, Conn.: Yale University Press.

Sherry, Suzanna. 1987. The Founders' Unwritten Constitution. *University of Chicago Law Review* 54: 1127–77.

———. 1992. Natural Law in the States. *University of Cincinnati Law Review* 61: 171–222.

Shevory, Thomas C. 1994. *John Marshall's Law: Interpretation, Ideology, and Interest*. Westport, Conn.: Greenwood.

———, ed. 1989. *John Marshall's Achievement: Law, Politics, and Constitutional Interpretations*. New York, N.Y.: Greenwood.

Sidney, Algernon. 1772. *The Works of Algernon Sidney. A New Edition*. London: W. Strahan for T. Becket and Co and T. Cadell, T. Davies and T. Evans.

Simmonds, N. E. 1988. Reason, History and Privilege: Blackstone's Debt to Natural Law. *Zeitschrift der Savigny-Stiftung (GA)* 105: 200–13.

Simpson, A. W. B. 1975. *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*. Oxford: Clarendon.

———. 1986. *A History of the Land Law*. 2nd ed. Oxford: Clarendon.

———. 1987. The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature. In A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law*, 273–320. London: Hambledon.

Skeel, Caroline A. J. 1916. The Influence of the Writings of Sir John Fortescue. *Transactions of the Royal Historical Society*, 3rd series, 10: 77–114.

Skinner, Quentin. 1996. *Reason and Rhetoric in the Philosophy of Hobbes*. Cambridge: Cambridge University Press.

———. 2002a. Conquest and Consent: Thomas Hobbes and the Engagement Controversy. In Quentin Skinner, *Visions of Politics. Volume III: Hobbes and Civil Science*, 287–307. Cambridge: Cambridge University Press.

———. 2002b. From the State of Princes to the Person of the State. In Quentin Skinner, *Visions of Politics. Volume II: Renaissance Virtues*, 368–413. Cambridge: Cambridge University Press.

———. 2002c. Hobbes and the Purely Artificial Person of the State. In Quentin Skinner, *Visions of Politics. Volume III: Hobbes and Civil Science*, 177–208. Cambridge: Cambridge University Press.

Smith, Adam. 1978. *Lectures on Jurisprudence*. Ed. R.L. Meek, D.D. Raphael and P.G. Stein. Oxford: Clarendon.

Smith, Charles Page. 1956. *James Wilson: Founding Father 1742–1798*. Chapel Hill, N.C.: University of North Carolina Press.

Smith, David L. 1994. *Constitutional Royalism and the Search for Settlement, c. 1640–1649*. Cambridge: Cambridge University Press.

Smith, Joseph Henry. 1950. *Appeals to the Privy Council from the American Plantations*. New York, N.Y.: Columbia University Press.

Smith, K. J. M. 1998. *Lawyers, Legislators, and Theorists: Developments in English Criminal Jurisprudence, 1800–1957*. Oxford: Clarendon.

Smith, Thomas, Sir. 1982. *De Republica Anglorum*. Ed. Mary Dewar. Cambridge: Cambridge University Press.

Snow, Vernon F., and Anne Steele Young, eds. 1987. *The Private Journals of the Long Parliament, 7 March to 1 June 1642*. New Haven, Conn.: Yale University Press.

Snowiss, Sylvia. 1990. *Judicial Review and the Law of the Constitution*. New Haven, Conn.: Yale University Press.

Sohm, Rudolph. 1911. *Die Altdeutsche Reichs- und Gerichtsverfassung*. Leipzig: Duncker & Humblot. (1st ed. 1871.)

Sommerville, Johann P. 1984. John Selden, the Law of Nature, and the Origins of Government. *Historical Journal* 27: 437–47.

———. 1999. *Royalists and Patriots: Politics and Ideology in England, 1603–1640*. London: Longman.

———. 2002. King James VI and I and John Selden: Two Voices on History and the Constitution. In *Royal Subjects: Essays on the Writings of James VI and I*. Ed. Daniel Fischlin and Mark Fortier, 290–322. Detroit, Mich.: Wayne State University Press.

Spedding, James, ed. 1869. The King's Decree touching the granting of Praemunires against any for sueing in Chancery afet a Judgment at Common Law. In *The Works of Francis Bacon*. Ed. James Spedding, Robert Leslie Ellis and Douglas Denon Heath, vol. 12: 385–95. London: Longmans

Stair, James Dalrymple, Viscount. 1981. *The Institutions of the Law of Scotland*. Ed. D. M. Walker. Edinburgh: University Presses of Edinburgh and Glasgow. (1st ed. 1681; 2nd ed. 1693.)

Staunford, William. 1567. *An Exposicion of the Kinges Prerogatiue Collected out of the Great Abridgement of Iustice Fitzherbert*. London: Richard Tottel.

Stein, Peter G. 1957. Legal Thought in Eighteenth-Century Scotland. *Juridical Review* 1–20.

———. 1980. *Legal Evolution: The Story of an Idea*. Cambridge: Cambridge University Press.

———. 1981. Stair's General Concepts: 1. The Theory of Law. In *Stair Tercentenary Studies*. Ed. David Walker, 181–7. Edinburgh: Stair Society, vol. 33.

[Stephen, James Fitzjames]. 1861. English Jurisprudence. *Edinburgh Review* 114: 456–86.

Stevens, Robert. 1983. *Law School: Legal Education in America from the 1850s to the 1980s*. Chapel Hill N.C.: University of North Carolina Press.

Stocking, George W. 1987. *Victorian Anthropology*. New York: Free Press.

Stone, Julius. 1950. *The Province and Function of Law*. Sydney: Maitland. (1st ed. 1946.)

———. 1964. *Legal System and Lawyers' Reasonings*. London: Stevens & Sons.

Stoner, James R. Jr. 1992. *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*. Lawrence, Kans.: University Press of Kansas.

Story, Joseph. 1832. *Commentaries on the Law of Bailments*. Cambridge, Mass: Hilliard and Brown.

———. 1833. *Commentaries on the Constitution of the United States*, 3 vols. Boston, Mass.: Hilliard, Gray & Co.

———. 1839a. *Commentaries on Equity Jurisprudence, as administered in England and America*, 2 vols. Boston, Mass.: C.C. Little and J.Brown. (1st ed. 1836.)

———. 1839b. *Commentaries on the Law of Agency*. Boston, Mass.: C.C. Little and J. Brown.

———. 1841. *Commentaries on the Conflict of Laws*. 2nd ed. Boston, Mass.: C.C. Little & J. Brown. (1st ed. 1834.)

———. 1843. *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America*. Boston, Mass.: C.C. Little & J. Brown.

———. 1845. *Commentaries on the Law of Promissory Notes, and Guaranties of Notes, and Checks on Banks and Bankers*. Boston, Mass.: C.C. Little & J. Brown.

———. 1846. *Commentaries on the Law of Partnership*. 2nd ed. Boston, Mass.: C.C. Little & J. Brown. (1st ed. 1841.)

———. 1852. Codification of the Common Law. In *The Miscellaneous Writings of Joseph Story*. Ed. William W. Story, 698–734. Boston, Mass.: Charles C. Little and James Brown.

Stumpf, S. E. 1960. Austin's Theory of the Separation of Law and Morals. *Vanderbilt Law Review* 14: 117–49.

Swindler, William F., ed. 1973–1988. *Sources and Documents of US Constitutions*, 11 vols. Dobbs Ferry, N.Y.: Oceana.

Taylor, John. 1755. *Elements of the Civil Law*. Cambridge: Joseph Bentham for Charles Bathurst.

Terrill, Richard J. 1981. Humanism and Rhetoric in Legal Education: The Contribution of Sir John Dodderidge (1555–1628). *Journal of Legal History* 2: 30–44.

Thompson, C. Bradley. 1998. *John Adams and the Spirit of Liberty*. Lawrence, Kans.: University of Kansas Press.

Thorne, Samuel E. 1938. Dr. Bonham's Case. *Law Quarterly Review* 54: 543–52.

———, ed. 1942. *A Discourse upon the Exposicion & Understandinge of Statutes. With Sir Thomas Egerton's Additions*. San Marino, Calif.: Huntington Library.

Thorne, Samuel E., and J. H. Baker, eds. 1990. *Readings and Moots at the Inns of Court in the Fifteenth Century, vol. II: Moots and Readers Cases*. London: Selden Society, vol. 105 for 1989.

Thorne, Samuel E., and George E. Woodbine, eds. 1968–1977. *Bracton on the Laws and Customs of England*, 4 vols. Cambridge, MA: Harvard University Press.

Thorpe, Francis Newton, ed. 1909. *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories, and Colonies now or heretofore Forming the United States of America*. Washington, D.C.: Government Print Office. (House of Representatives Documents, 59th Congress, 2nd Session, vols. 87–91.)

Tierney, Brian. 1963. Bracton on Government. *Speculum* 33: 295–317.

Touster, Saul. 1982. Holmes a Hundred Years Ago: The *Common Law* and Legal Theory. *Hofstra Law Review* 10: 673–717.

Tubbs, J. W. 2000. *The Common Law Mind: Medieval and Early Modern Conceptions*. Baltimore, Md.: Johns Hopkins University Press.

Tuck, Richard. 1979. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press.

———. 1982. "The Ancient Law of Freedom": John Selden and the Civil War. In *Reactions to the English Civil War 1642–1649*. Ed. John Morrill, 137–61. London: Macmillan.

———. 1993. *Philosophy and Government, 1572–1651*. Cambridge: Cambridge University Press.

Turner, G. J., and T. F. T. Plucknett. 1951. *Brevia Placitata*. London: Selden Society, vol. 66.

Turner, Ralph V. 1985. *The English Judiciary in the Age of Glanvill and Bracton*. Cambridge: Cambridge University Press.

———. 1990. Who Was the Author of *Glanvill*? Reflections on the Education of Henry II's Common Lawyers. *Law and History Review* 8: 97–127.

Tushnet, Mark. 1977. The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court. *Virginia Law Review* 63: 975–1052.

Twining, William. 1973a. The Bad Man Revisited. *Cornell Law Review* 58: 275–303.

———. 1973b. *Karl Llewellyn and the Realist Movement*. London: Weidenfeld and Nicholson.

Tylor, Sir E. B. 1871a. Maine's *Village Communities*. *Quarterly Review* 131: 176–89.

———. 1871b. *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art and Custom*. 2 vols. London: John Murray.

Tytler, Alexander Fraser. 1807. *Memoirs of the Life and Writings of the Honourable Henry Home of Kames*, 2 vols. Edinburgh: Creech.

Van Caenegem, R. C. 1988. *The Birth of the English Common Law*. 2nd ed. Cambridge: Cambridge University Press. (1st ed. 1973.)

Von Maurer, G. L. 1856. *Geschichte der Markenverfassung in Deutschland.* Erlangen: F. Enke.

Walker, David, ed. 1981. *Stair Tercentenary Studies*. Edinburgh: Stair Society, vol. 33.

Walters, Mark D. 2003. St. German on Reason and Parliamentary Sovereignty. *Cambridge Law Journal* 62: 335–70.

Waterman, Julius S. 1969. Thomas Jefferson and Blackstone's Commentaries. In *Essays in the History of Early American Law*. Ed. David H. Flaherty, 451–88. Chapel Hill, N.C.: University of North Carolina Press.

Watson, Alan. 1988. The Structure of Blackstone's Commentaries. *Yale Law Journal* 97: 795–821.

West, William. 1627. *The Second Part of Symboleography, Newly Corrected and Amended*. London: Company of Stationers. (1st ed. 1594.)

Weston, Corinne Comstock, and Janelle Renfrow Greenberg. 1981. *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England*. Cambridge: Cambridge University Press.

White, G. Edward. 1971. The Rise and Fall of Justice Holmes. *University of Chicago Law Review* 39: 51–77.

White, G. Edward, with the aid of Gerald Gunther. 1988. *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Vols. 3–4: History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–1835*. New York, N.Y.: Macmillan.

White, G. Edward. 1993. *Justice Oliver Wendell Holmes. Law and the Inner Self*. Oxford: Oxford University Press.

White, Morton. 1963. *Social Thought in America: the Revolt against Formalism*. Boston: Beacon Press. (1st ed. 1949.)

White, Stephen D. 1979. *Sir Edward Coke and "the Grievances of the Commonwealth," 1621–1628*. Chapel Hill, N.C.: University of North Carolina Press.

Whittaker, William Joseph, ed. 1895. *The Mirror of Justices*. London: Bernard Quaritch.

Willman, Robert. 1983. Blackstone and the "Theoretical Perfection" of English Law in the Reign of Charles II. *Historical Journal* 26: 39–70.

Wilmarth, Arthur E. 1989. The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance between Federal and State Power. *American Criminal Law Review* 26: 1261–321.

Wilson, James. 1896. *The Works of James Wilson*, 2 vols. Ed. James DeWitt Andrews. Chicago, Ill.: Callaghan & Co.

Wingate, Edmond. 1658. *Maximes of Reason: Or the Reason of the Common Law of England*. London: W. Lee.

Wolfe, Christopher. 1986. *The Rise of Modern Judicial Review, from Constitutional Interpretation to Judge-Made Law*. New York, N.Y.: Basic.

Wolffe, Bertram. 2001. *Henry VI*. New Haven and London: Yale University Press. (1st ed. 1981.)

Wood, Gordon S. 1993. *The Creation of the American Republic 1776–1787*. New York, N.Y.: W.W. Norton & Co. (1st ed. 1969.)

Wood, Thomas. 1720. *An Institute of the Laws of England; or, the Laws of England in their Natural Order, According to Common Use*. London: Elizabeth Nutt and R. Gosling for Richard Sare.

———. 1727. *Some Thoughts concerning the Study of the Laws of England, particularly in the Two Universities*. 2nd ed. London: J. Stagg and D. Browne. (1st ed. 1708.)

Woodbine, George E. 1922. The Roman Element in Bracton's *De Adquirendi rerum dominio*. *Yale Law Journal* 31: 827–47.

Wooddeson, Richard. 1834. *Lectures on the Law of England*, 3 vols. 2nd ed. Ed W. R. Williams. London: Richards and Co. (1st published as "*A Systematical View of the Laws of England 1792–1793.*")

Woolf, D. R. 1990. *The Idea of History in Early Stuart England: Erudition, Ideology and "The Light of Truth" from the Accession of James I to the Civil War*. Toronto: University of Toronto Press.

Wootton, David, ed. 1986. *Divine Right and Democracy: An Anthology of Political Writing in Stuart England*. London: Penguin.

Wormald, Patrick. 1999a. *Legal Culture in the Early Medieval West. Law as Texts, Image and Experience*. London: Hambledon.

———. 1999b. *The Making of English Law: King Alfred to the Twelfth Century. Vol. I: Legislation and Its Limits*. Oxford: Blackwell.

Wright, Martin, Sir. 1730. *An Introduction to the Law of Tenures*. London: E. & R. Nutt, & R. Gosling. (1st ed. 1729.)

Wynne, Edward. 1765. *A Miscellany Containing Various Law Tracts*. London: Privately printed.

———. 1785. *Eunomus: Or, Dialogues Concerning the Law and Constitution of England*. 2nd ed. 4 vols. London: Benjamin White & Son. (1st ed. 1768.)

Yale, D. E. C. 1975. St German's Little Treatise Concerning Writs of Subpoena. *Irish Jurist*, new ser. 10: 324–33.

———. 1976. *Hale as a Legal Historian*. London: Selden Society. (Lecture.)

———. 1981. "Of No Mean Authority": Some Later Uses of Bracton. In *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*. Ed. Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White, 383–96. Chapel Hill, N.C.: University of North Carolina Press.

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