

# THE OLDEST SOCIAL SCIENCE?

Configurations of Law and Modernity

W.T. MURPHY

CLARENDON PRESS · OXFORD  
1997

*Oxford University Press, Great Clarendon Street, Oxford OX2 6DP*

*Oxford New York*

*Athens Auckland Bangkok Bogota Bombay  
Buenos Aires Calcutta Cape Town Dar es Salaam  
Delhi Florence Hong Kong Istanbul Karachi  
Kuala Lumpur Madras Madrid Melbourne  
Mexico City Nairobi Paris Singapore  
Taipei Tokyo Toronto  
and associated companies in  
Berlin Ibadan*

*Oxford is a trade mark of Oxford University Press*

*Published in the United States  
by Oxford University Press Inc., New York*

© Tim Murphy 1997

*All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
without the prior permission in writing of Oxford University Press.  
Within the UK, exceptions are allowed in respect of any fair dealing for the  
purpose of research or private study, or criticism or review, as permitted  
under the Copyright, Designs and Patents Act, 1988, or in the case of  
reprographic reproduction in accordance with the terms of the licences  
issued by the Copyright Licensing Agency. Enquiries concerning  
reproduction outside these terms and in other countries should be  
sent to the Rights Department, Oxford University Press.  
at the address above*

*British Library Cataloguing in Publication Data  
Data available*

*Library of Congress Cataloguing in Publication Data  
Data available*

*ISBN 0-19-826559-X*

1 3 5 7 9 10 8 6 4 2

*Typeset by Hope Services (Abingdon) Ltd.  
Printed in Great Britain  
on acid-free paper by  
Biddles Ltd., Guildford and King's Lynn*

# 1 Introduction: The Measure of the Law

Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, and latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher . . . Government, like dress, is the badge of lost innocence; the palaces of kings are built on the ruins of the bowers of paradise.<sup>1</sup>

'One King, one law, one measure, and one weight': given the chain of events which the French Revolution was to unleash, it is perhaps ironic that this slogan, which appears in more or less the same form in numerous *cahiers de doléances*, marks the apogee of sovereign power. Its logic, after all, is: one king (i.e. not many, certainly not 'every man a king'). One law: in part this is a call for one law for all, rather than one law for the rich and one law for the poor. Here traditional grievances and modern ('our') dreams overlap. In the traditional scheme, however, the demand for one law conceals a number of complications, as viewed from a modern perspective. Most obviously, the demand for an end to 'double standards' conceals an unproblematic assumption (in terms of the frame of reference of the end of the eighteenth century) that married women, or women in general, may be treated differently. But this demand for one king and one law is also a call for one jurisdiction rather than many, for one unified set of institutions rather than a plurality of overlapping jurisdictions, and in this sense for national rather than local law. In this era, the prospect of universalism has not yet been flattened out into the modern preoccupation with the rule of law and equal protection of the laws. The new, perhaps artificial, parochialisms which we have laid over this preoccupation, as a consequence of our own rather abstract apprehension of identity and difference, remain in the future.

One measure one weight: are these equivalent demands, concerned simply with fixing quantity? Certainly, each is rooted in the practical

<sup>1</sup> Paine, *Common Sense*, 65.

point of contact between oppressors and oppressed, exploiters and exploited: short measures, short weights, not being given your due, unequal exchange.

The parts of this slogan unfold a demand in a logical order. No 'one law' unless 'one king'—the French Revolution did away with the king but not with the principle which is embedded here.<sup>2</sup> Uniform law requires supreme authority to be concentrated at one point. And one law, uniform law, national law, is in turn indispensable for the instituting or maintenance of one measure. Is one measure, however, necessary for the achievement of one weight? This question, the question of 'weights and measures' as we now comfortably call them, seems to take us away from law. To weigh something requires a scale. One can feel weight, or compare the relative weights of two objects by holding each object in one hand and asking oneself, through use of the motor-sensory and neurological apparatus, which of the two 'feels' heavier, i.e. to have more weight. And this is what scales which use weights on one side do—they compare the weight of the object to be weighted with a pre-identified weight. This requires a uniform measure. And for weight to be available to all, weights need to be turned into measures by simple, visual means. Dials, scales, and now digital devices, are necessary in order for this to be achieved (though the use of these devices requires, in turn, the dissemination through society of at least basic skills of numeracy and literacy). One weight needs one measure. One answer is a device like the imperial metre. In time this leads to philosophical debates and conundra to which we will make reference in due course.

Let us retrace our steps through the sequence of the slogan: one weight (a primary requirement of 'social justice') requires one measure (which requires the development of institutional guarantees of the truth of the measures), which requires one uniform national (and in due course international or transnational) law (in order to ensure compliance with the truth of the measures), and this in turn requires a single source of authority (under the ægis of which the law enforcers act). In the *cahiers*, all four stages of this sequence are presented as goals to be achieved—or (because this is the idiom of the time) as lost features of past arrangements which need to be restored. But what begins as the descent from the most general to the most particular—from king to weight—now has to be read in the opposite direction. But this opposite reading, under the burden of modern history, is not a neat rever-

<sup>2</sup> For the One and Indivisible, see Hayward, *Governing France*; Bluche, *Louis XIV.*

sal of this descent. The ascent from weight and measure to sovereignty is no longer simple or 'just' a matter of logic. What has been learned in the course of implementing the demands registered in the *cahiers* is something more complicated. Some reflection on these complications may help us to grasp some of the general dynamics of the role of law in modern society.

In the early nineteenth century Constant was to lament:

One code of laws for all, one system of measures, one set of regulations . . . this is how we perceive today [1813] the perfection of social organisations . . . uniformity is the great slogan. A pity, indeed, that it is not possible to raze all towns to the ground so as to be able to rebuild them on one and the same pattern, and to level mountains everywhere to a single preordained plan.<sup>3</sup>

Compare, a century or so later, Wittgenstein:

There is *one* thing of which one can say neither that it is one metre long, nor that it is not one metre long, and that is the standard metre in Paris.—But this is, of course, not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a metre-rule.<sup>4</sup>

Presumably the French peasants had no mere metaphor in mind when they made their demand for a measure. Werner Marx, by contrast, entitling a post-Heideggerian work of immanent critique *Is there a measure on earth: foundations for a nonmetaphysical ethics* is operating at a metaphorical level,<sup>5</sup> which here presupposes the 'reality' of ordinary measures. Donald Kelley's book, *The Human Measure*, takes its cue from the assumption that 'If the book of nature is "written in the language of mathematics" . . . the book of human nature in its social forms has been written, in the most practical contexts, in the language of the law'<sup>6</sup> and so writes a history in which the consideration of 'human "intention", context, accident, and perhaps bad faith' has 'contributed to its

<sup>3</sup> Quoted in Kula, *Measures and Men*, 286, which also includes a tabulation of references to weights and measures in the *cahiers* at 224–5.

<sup>4</sup> Wittgenstein, *Philosophical Investigations*, 25e. This is in turn the focus of a critique by Kripke, *Naming and Necessity*, which is in turn analysed and criticized by Shanker, *Wittgenstein and the Turning-point in the Philosophy of Mathematics*, 323 ff.

<sup>5</sup> 'Unlike Schulz, I do not believe that the concepts of "good" and "evil" are the ultimate determinants of ethics; the ultimate determinant is rather the concept of "measure". Thus, for example, Schelling saw "divine" love as the measure that enabled man's "universal will" to discover what is good when man takes measure, and evil was seen to be rooted in the fact that the radically egoistic, particular will excludes divine love. And this measure thus provided the motivation for preferring good to evil.' Marx, *Is there a Measure on Earth?* 1.

<sup>6</sup> Kelley, *The Human Measure*, 12.

complexity and “double focus” as it developed from common sense judgement and naive hopes of retrospective mind-reading to sophisticated and professionalised theories of interpretation, criticism, and reconstruction.<sup>7</sup> And his conclusion is that in ‘this human world, . . . however modified by demography, technology, genetics, and psychotherapy, and whatever we may suppose or pretend, King Nomos still rules’.<sup>8</sup> It is this perspective or set of prejudices above all which I wish here to contest.

This emphasis on the ‘human’ is, I argue here, mistaken, though not because of some equally dogmatic commitment to some so-called ‘anti-humanism’. After all, in an era of democratic government coupled with the triumph—at least thematically—of human rights, the individual, and his or her freedom appear to have been consecrated, even if, in some quarters, doubts about this are raised purportedly within the same logic of human (individual) emancipation.<sup>9</sup>

In the domains of natural science and much social science, the concept of law has become metaphorical, or rather, because ‘metaphor’ is rather imprecise here, a shorthand, a condensed form of expression, for, essentially, what can be taken for granted and/or not thematized as such. Such ‘laws’, it should also be noted, cannot be used just anywhere—in the street for example—but require special places and settings, dedicated to the purpose of using these laws: paradigmatically the laboratory (though there is a dispute about what is or is not a laboratory).<sup>10</sup>

What should lawyers learn from this? My answer would return to this business of measures. The key point is the change these effect in the superficial flatness or, at least, seriality of king, law, measures, etc., with which we began. Until something is changed (and if it is, as Latour suggests, the consequences can be immense), these measures operate as constants, and as such underpin all societal operations. They presuppose sovereignty and law—they are, we like to think, their guarantee. But a change occurs here by comparison with previous societies, so far as we can observe them. What does law say? Respect the output of the machine! Make sure that the machines comply with previously agreed (and legally required) standards, whatever they happen to be!

<sup>7</sup> Kelley, *The Human Measure*, 13.

<sup>8</sup> *Ibid.* 283.

<sup>9</sup> See, e.g., Etzioni, *The Spirit of Community*—a complicated and polemical transposition of the ideology of the Kibbutz, which itself owes more than a little to the *gemeinschaftlich* tendencies of much German Idealism.

<sup>10</sup> Notably, here, the debate between Hacking and Latour: see Hacking, ‘On the Self-vindication of the Laboratory Sciences’.

Previously, the flatness was only superficial and an effect of listing demands *seriatim* on a page. It proceeded in a logical and hierarchical order: king, law, measure, etc. The earlier the term in the series, the higher it was in a hierarchy of social, and perhaps ontological, organization. This is not the position today, although we often forget this, and our epistemology at least still resorts to the sedimented imagery which is the legacy of such a scheme of 'reality' and the epistemic processes of ascension and subordination which were intrinsic to it.<sup>11</sup>

But exactly! Once a king said 'Give me a measure' or the people said 'give us a measure'. Neither wished to be cheated any more. We are still cheated, no doubt. This apprehension registers the transformation of the cunning of history or, if you wish, the class struggle into irony. Because the measure is beyond measure. We cannot measure it. Quite the opposite: we use it to measure things, to measure everything. But law is now irrelevant to these ordinary operations. We do not use the measure because the law requires us to do so. We use them because we have to. But this 'have' is the have of a code—a have in Durkheim's sense, a social fact of the strong kind which we encounter, learn, and use as individuals. It is not a rule in the penetrative sense. (Durkheim, of course, did not make this distinction and from his failure to do so many problems flowed.)

But this it is not just a matter of rules, or an exemplification of sovereignty. Indeed, it might be quite premature to conclude that the efficacy of this depended on such factors. What is different—what marks out 'our' modernity—is the role of intervening and of instruments in securing these results. Law cannot, does not, has not, produced measures. Law has no instruments, or, rather, it has no *modern* instruments. It can say 'This is the measure' although, as has been suggested, it has come to do so largely at the request of history. The more important point is that the production of these measures—which give the world (or society) a certain regularity—requires instruments, and such instruments in turn need to be made. You cannot make instruments with theory; you cannot make instruments without theory; the relation between theory and practice is in fact uninteresting. What is interesting is what results from these combinations, and what socio-legal

<sup>11</sup> This scheme persists today in the invocation in psychoanalytically-oriented theory of the *Nom-du-père*, but, in the modern spirit, the roles envisaged are detached from the players or actors who occupy—or fail to occupy—them, and (which is only to say the same thing differently) law is detached from law. This is especially observable in Lacan: see Lacan, *Écrits: A Selection*; Lacan, *The Seminar of Jacques Lacan Book I*. More generally, cf. the resort to 'Law' carrying all these levels of meaning in Goodrich, *Oedipus Lex*.

studies need to do is to look at the processes through which such combinations (which now, importantly, include the formalizations of mathematics), are achieved, manipulated, and stabilized. The simple central point is precisely that 'King Nomos' does not still 'rule'. It is not a matter of 'modifying' the 'human world' through demography, technology, genetics, and psychotherapy, but of reconstituting it (although my list of candidates for this process of reconstitution would differ somewhat from Kelley's, as is elaborated at the end of Chapter 5 below).

So I wish here to ask: What are the role and function of law in modern society? How do the answers to this question relate to the increasingly elaborate corpus of modern legal theory and to current achievements in socio-legal studies? What are the implications of these answers for the developing role of law in the future? To explore this, I wish to go back to some basic issues: to look critically at some of the underlying assumptions which shape our current understanding of the role and purpose of law, and which, usually uncritically, are invoked in relation to the function of law in society. My approach involves focusing on adjudication as a social practice and as a set of governmental techniques. From this anchorage it explores how the relationship between law, government, and society has changed in the course of history in significant ways. The spine of this book is the elaboration of the notion of 'adjudicative government'. Contrary to those viewpoints which equate modernity with the rise to pre-eminence of the rule of law, I trace the 'displacement of law' from the centre stage of the practice(s) of modern, 'bureaucratic' government.

Pursuing the same problem from another angle, I argue that the relationship between law and society cannot be conceived in the same way in the era of economics, sociology, anthropology, and statistics. The argument is that the epistemic impact of the latter disciplines is both constitutive of 'modernity' and unfolds a different role for law. In other terms, I argue that the traditional vision of the role of law (both from the adjudicatory point of view and from the viewpoint of the 'requirements' of social life) is rooted in a complex set of hierarchical assumptions, and that an adequate perspective for the contemporary 'position' of law needs rather to place the accent on horizontal or parallel relations. In so doing, I seek to draw out the implications of such a different way of thinking for both legal theory and legal practice in modern times.

At the centre of this project is the attempt to dig into a difficult and seemingly contradictory problem: this is the question of the appropri-



ate place or positioning of the normative within our current understanding of social life and its reproduction. Following Luhmann rather than Habermas in certain respects, I try to argue that this continued resort to normative assumptions is misconceived, and that far from seeking to construct a new normative basis for law in the face of the emergence of some different form of social organization, we must explore ways of developing a different role for law: in a slogan, law *in* society rather than law *and* society.

## 2 Law and Society: The Penetrative Scheme and the Juridical Soul

[I]n the case of these contraries which we call good and evil, the rule of the logicians, that two contraries cannot be predicated at the same time of the same thing, does not hold . . . although no one can doubt that good and evil are contraries, not only can they exist at the same time, but evil cannot exist without good, or in anything that is not good. Good, however, can exist without evil. . . . And these two contraries are so far co-existent, that if good did not exist in what is evil, neither could evil exist; because corruption could not have either a place to dwell in, or a source to spring from, if there were nothing that could be corrupted; and nothing can be corrupted except what is good, for corruption is nothing else but the destruction of good.<sup>1</sup>

What is the nature of law? By this question I do not mean to ask in what its validity or justification lies. I am interested rather in its modes of application, in its presuppositions as it moves into action, and in, as it does, so, what it claims to know about the targets of its operations. All these 'its' are of course problematic. In many respects my resort to this usage is no more than a convenient rhetoric, a discursive economy to permit much ground to be covered relatively briefly. Yet although I have reservations about the lavish deployment of terms like 'The West' or 'Occidental Reason', there is, I think, a distinctive attitude to law, government, and society which forms in the West, crystallizes, and congeals out of a complex, even tortuous, history and which, once formed, acquires the status of an almost natural fact.<sup>2</sup>

\* \* \*

I wish here to explore the close and complex relationship between the rise of Christianity and the emergence of certain deep presuppositions

<sup>1</sup> Augustine, *Enchiridion on Faith, Hope and Love*, 15–16. This contains many of the essentials of the argument against Manicheism.

<sup>2</sup> For the contrasts between East and West, see especially Needham, *The Great Titration*. For 'the West', see the essays in Carrier (ed.), *Occidentalism*; also the Tönnies plus hierarchy thesis elaborated progressively in Dumont, *Homo Hierarchicus*; Dumont, *From Mandeville to Marx*; Dumont, *Essays on Individualism*; most recently, Dumont, *German Ideology*.

about the nature and role of law. Just as, when we look at the past, we tend to do so through Christian prisms, so that Christianity succeeds paganism within some overarching continuum called 'religion', so too, with law, there is the assumption that one of its underlying schemes which here I call the penetrative scheme—is also to be found at work in all societies. In the case of religion, this may be only of scholarly interest—a field of historical and anthropological questions. In the case of law, it is apparent that more is at stake. The question of law implies the question of modernity as well, even the question of the future: not just the question of the appropriateness of these presuppositions for understanding the 'pagan' Roman Republic<sup>3</sup> or early Empire or the dispute settlement arrangements encountered by colonialists and later anthropologists<sup>4</sup> but also the workings of law and legal institutions in our society and what functions we can postulate or project for these in the future.

What follows involves a number of obvious simplifications. No attempt is made even to summarize a vast literature on the diversity of Christianity, nor is much energy devoted to questions of chronology and periodization. The essential starting point is the Christianity of the High Middle Ages, but the approach adopted here is primarily designed to emphasize what seem to be some core structural themes relevant to law in the Christian mode of thought which are present within it throughout much of its history.<sup>5</sup>

At this stage the same simplification occurs in relation to law and government. Especially from the standpoint of law and religion, there is an elaborate story to be told, too vast for a single lifetime, which discriminates at this point between canon law, Roman law, and common law. That too, for the most part, must be set to one side for present purposes.

Finally, we must recognize that to try to find an ultimate origin in this huge field or to attribute in a decisive way this or that element of the story to law or to religion would be foolish as well as entirely beyond my present scope. In the most sweeping of terms, we are talking about the co-evolution of two interlocking frameworks—that of

<sup>3</sup> For the historiographical theme and treatment of paganism, see MacMullen, *Paganism*, and (for more nuance) Brown, *Power and Persuasion*; Brown, *Authority and the Sacred*.

<sup>4</sup> Cf. Comaroff and Roberts, *Rules and Processes*; also Chanock, *Law, Custom and Social Order*.

<sup>5</sup> To illustrate: the relationship between the worldly and the heavenly. Christianity did not have one answer to the question which unfolds here; but any version had to have an answer to the question.

Western Law and that of Western Christianity. I would make the claim that they depend on each other—the Church on kings and emperors, and vice versa. And linkage or co-evolution, even overlapping and intermixing, does not, and perhaps never did, mean that they were not differentiated. Indeed, the opposite tends to be the case, although the reasons for this seem to vary at different historical periods. All I am concerned with is the parallel evolution of the two most deeply rooted (surviving) institutional features of the Western cultural landscape.<sup>6</sup>

\* \* \*

Law developed an understanding of the character of the relationship between ruler and ruled, and thus of its mode of action, drawn largely from core elements of the emergent Christian tradition. Conversely, the Christian Church developed its institutions and conceptions of law and government modelled largely on existing Roman practices.<sup>7</sup> Over time, even if this is right, there was increasing two-way traffic: and in some cases, e.g. sacerdotal kingship, a complex bricolage of almost all the key elements of these two inheritances.<sup>8</sup>

Since I am concerned with configurations of law and modernity, most of this does not matter very much. What is important is to delineate certain core features of this complex co-evolution which bear directly on the shape in which, I argue here, we have inherited the question of law: the penetrative scheme and the juridical soul.

By the penetrative scheme, I mean a division, and from that a relation between inner and outer, where the outer is in a hierarchical position and moulds or shapes the inner according to its own pattern. This is a structure of thought visible in Augustine's treatment of the relation between God and Man and which endures through to, say, Althusser's 'theory' of interpellation.<sup>9</sup> This relation between outer and inner is not, it should be stressed, to be equated with that elusive relation between

<sup>6</sup> For the supposedly 'Indo-European' scope of the separation of spiritual and military 'functions', see, e.g., Dumézil, *L'oubli de l'homme*, and, with much modified emphasis, Dumont, *Homo Hierarchicus*. Renfrew, *Archaeology and Language*, offers a critical perspective on this approach. Assessment of the merits of these long-running debates—of which these are only the most recent examples—is both beyond my present scope and competence. But it is necessary always to remember that they lurk in the background.

<sup>7</sup> Herrin, *The Formation of Christendom*.

<sup>8</sup> Kantorowicz, *The King's Two Bodies*. I should also emphasize that the question of the precursors of Christianity, and in particular the role of Judaism, is entirely perhaps wrongly—beyond my scope. For interesting discussion, see Van Seters, *In Search of History*.

<sup>9</sup> Althusser, *Essays on Ideology*, 1–60.

society and the individual. It is rather the relation between ruler and ruled, where law (as rule or institution) is the medium (not yet merely the instrument) of that relation. However, even if we narrow it in this way, the character and identity of both ruler and ruled perhaps remain obscure.

What is ruled, in this scheme, is the constitutive principle of the individual, which can be called the juridical soul. In order to rule, this soul must be reached. The surface—the body—must be penetrated to get at this soul. But the body can also be an instrument for reaching this soul, and can serve as a sign for the state of this soul (indeed, an elaborate notation can be envisaged at this point). But the aim is to secure belief, obedience, loyalty, and love, all of which require the active movement and consequent involvement of the soul. The inner so conceived thus involves a field of investigation and interrogation, both by others and by its proprietor.<sup>10</sup>

What of the ruler? The ruler requires the prior existence of the King of Heaven for this scheme to work. I will be your God and you will be my people provides the motif for rulership.<sup>11</sup> But the peculiar combination of universality and evangelism developed in Christianity is necessary for this motif to afford an adequate analogy between the temporal and the spiritual, and institutionalized into a Church, a terrestrial anticipation of the kingdom to come, a parallel organization of hierarchy—or of power and hierarchy—in which a double penetrative scheme comes into play.<sup>12</sup>

The Juridical Soul involves a condensation of several elements: first, that all humans possess a soul; secondly, that this is in some sense higher than the body in which it resides (temporarily, i.e. for a limited time and 'inside' time); thirdly, that this soul is eternal, is itself 'outside' time; and fourthly, that its eternal fate is something about which at some point at the end of time a decision will be made, a judgment delivered.

The combination of these two dimensions produces in general terms a distinctive model of human subjectivity, of a person's relation to being or existence,<sup>13</sup> a very general scheme open to all kinds of refinement

<sup>10</sup> Cf. the self-analysis in Augustine, *Confessions*. To leap centuries, one can compare the approach in Descartes, *Passions of the Soul*.

<sup>11</sup> Cf. Oakley, *Omnipotence, Covenant and Order*; also Oakley, *The Medieval Experience*.

<sup>12</sup> Southern, *Western Society and the Church in the Middle Ages*, remains the outstanding general treatment.

<sup>13</sup> Cf. Morris, *Western Conceptions of the Individual*; for distinctiveness cf. Heelas and Lock (eds.), *Indigenous Psychologies*; Marsella et al. (eds.), *Culture and Self*.

and development. The scene of judgment can become very court-like, at least, presumably, if courts are a familiar feature of the society—the soul awaiting judgment can invoke in aid endless advocates from Jesus or Mary downwards.<sup>14</sup> Equally, the same judge can be so omniscient that he does not need to hear argument—or indeed has already pre-decided all the judgments he will ever give in an extremely busy session of World Creation. The framework of the problem which haunts modern social theory of agency and structure is in this sense already in place in these alternative answers to the same question: can human action make a difference?<sup>15</sup>

But until the Reformation, extreme determinism and fatalism, and therefore the paradox which could come in their wake—a futility attached to the care for the soul while imprisoned on earth—was avoided or tempered by other elements of this scheme: advocacy, mercy, *justitia dei*, compassion, and charity.<sup>16</sup> But as even the sophisticated Augustine always emphasized, this required attention to the soul, to a process of self-monitoring which was attuned to the decipherment of the inside of the subject.

It was also the case that extreme determinism was always potentially in tension with the initial problem generated by the postulate: if God had made up his mind at the beginning, but was at the same time (*a priori*, as it were) omnipotent, what was to stop him changing his mind?<sup>17</sup> The distinction between ordinary and absolute power emerges around this speculative problem: but it is a problem which arises on earth in the activities of princes, kings, and popes just as much as in Heaven.<sup>18</sup>

Problems not solutions: this is what matters here. Some solutions, like full-blown Gnosticism, were more or less banished to the margins of serious 'scientific' thought.<sup>19</sup> Other solutions, like those Protestant ones

<sup>14</sup> Cf. Southern, *Saint Anselm*, 214–27, where the rise to prominence of intercessors with God is seen as a distinctive feature of the High Middle Ages, mirroring institutional developments in 'feudal' society.

<sup>15</sup> Cf. Durkheim, *Suicide*, 325 n. 20 on the continued relevance of classical themes of free will and determinism in the light of his sociological theory. For opaque but challenging discussion of aspects of these problems, see Rose, *The Broken Middle*.

<sup>16</sup> Cf. McGrath, *Iustitia Dei*.

<sup>17</sup> Useful material dealing with these themes is collected in Ockham, *Predestination, God's Foreknowledge, and Future Contingents*.

<sup>18</sup> Pennington, *Prince and the Law*, 54–75.

<sup>19</sup> See, e.g., Lambert, *Medieval Heresy*; Jonas, *The Gnostic Religion*; Herrin, *Formation of Christianity*. Regarding the significance of Gnosticism, see also the intriguing, if not entirely convincing, Rossbach, 'Gnosis, Science and Mysticism', which seeks to situate Luhmann's work within what is presented as a long tradition of gnostic thought.

which devised an enhanced direct line to Heaven for the individual and devalued or abolished the mediatory role of the priest, awaited political fissures between consolidated national monarchies and perhaps the arrival of print and vernacular translations of the Bible.<sup>20</sup> Yet other problems rumble on for centuries, albeit in different circumstances: the role of monks and the relationship between monasticism and the world outside the monastery; the choice between eremitic and coenobitic modes of religious life;<sup>21</sup> the compatibility between wealth-holding and true Christian allegiance.<sup>22</sup>

### **Christian Interiors: Inside the Subject**

Christianity reworked the existential schemes of antiquity<sup>23</sup> by constructing an alternative city and an alternative citizenship, and through that device replaced perishability with permanence. It re-routed unleashed desire from the world to heaven, where, because of the permanence (and purity) of its objects, it could be allowed or even encouraged to be excessive.<sup>24</sup> Thus, broadly, was assumed the shape and structure of the problem which religion has posed for secular authority ever since—enthusiasm, zeal, sacrifice, and martyrs.

Christianity unleashed desire. It also linked (and thereby confused) desire and law and love. The Christian (who is ultimately beyond the things of the world) desires God, and God is law and God is love. What becomes Christianity does not substitute Christian love for Judaic law, but rather overlays love on law (or claims that law is the servant or instrument of love). Perhaps we could say that a tension is established between law and love, between liturgy and spontaneity, between meditation and immediacy—and antinomies such as these have been of decisive importance in the history of Christianity. But these antinomies are at the same time different modulations of one single underlying governing structure, and these tensions unfold (in history) within it—let God into your heart, focus your desires on him, live for the day when

<sup>20</sup> Cf., e.g., Eisenstein, 'Some Conjectures about the Impact of Printing'; Eisenstein, *Printing Revolution in Early Modern Europe*.

<sup>21</sup> Although relevant for present purposes, the former loses out by the fifth century to the latter and is not part of the agenda of most Protestant strands of the Reformation movement.

<sup>22</sup> Markus, *End of Ancient Christianity*; Little, *Religious Poverty and the Profit Economy*.

<sup>23</sup> Cf. Humphreys, *The Family, Women and Death*; Garland, *The Greek Way of Life*; Garland, *The Greek Way of Death*; Vidal-Naquet, *The Black Hunter*.

<sup>24</sup> Brown, *Making of Late Antiquity*; Brown, *Body and Society*; Doran, *Birth of a World View*.

you will be fully at one with him. How to love God? In the end, by obeying him, by doing his will. Desire for God is thus uncontained. It cannot know excess. Leave your father and mother.<sup>25</sup> The law demands desire, and that desire which is demanded exceeds city, 'society', and what pagans had called nature.<sup>26</sup>

Christianity redirected self-control and moderation away from this world and towards its version of a higher world, in which the resurrection of the body stripped of sex would occur. Everything 'passionate' about all human experience, all those departures from reason which contour our experience, were to be channelled into a relationship with a higher being, a relationship more intense, more important, than any relationship on earth. Sex, along with gluttony and pride, was just one of the potential obstacles to the immediacy of this most valued and pure relationship. Indeed, purity loses its ritual connotation: that one must abstain from sex before sacrificing to a God, as was commonplace in pagan ritual practice<sup>27</sup>—and becomes rather the idealized mode of a whole way of life. 'Blessed are the pure in heart; for they shall see God'.<sup>28</sup> But what, in Christianity, does such a proposition come to mean?<sup>29</sup>

It means, first of all, assigning priority to intention over act,<sup>30</sup> the promotion of the importance of 'inner states', of interiority over action.<sup>31</sup> It means, as it comes to be elaborated over centuries by generations of theologians, a pressure towards conceiving of one's relation to one's self in terms of a deep hermeneutics of the self—one is oriented to the self in a mode of deciphering one's intentions, of rooting them out and purging oneself of their impure elements. One's orientation to one's self is fundamentally negative. One rummages about within one's

<sup>25</sup> More precisely: 'If any man come to me, and hate not his father and mother, and wife, and children, and brethren, and sisters, yea, and his own life also, ye cannot be my disciple': Luke 14:26.

<sup>26</sup> MacMullen, *Paganism*; MacMullen, *Christianising*; Brown, *Authority and the Sacred*.

<sup>27</sup> Dodds, *The Greeks and the Irrational*; Foucault, *The Care of the Self*.

<sup>28</sup> Matt. 5:8.

<sup>29</sup> 'Christian teachings on sex and marriage were part of a wider ethic, concerned with human desire and human sin: explicit words on the subject were not many, though the Gospels omitted some supposed sayings of Jesus. No area of Christian teaching has had more effect in subsequent Christian lives: it extended widely, to divorce and second marriage, abortion and contraception, homosexuality, the degrees of "kindred and affinity", the status of women and the merits of never indulging in sex at all': Lane Fox, *Pagans and Christians*, 340.

<sup>30</sup> Cf. *actus non sit reus nisi mens sit rea*.

<sup>31</sup> Cf. Arendt, *The Human Condition*; and for brilliant discussion, Villa, *Arendt and Heidegger*.



self for one's sinful acts, and expiates them through confessing them and paying the price: if we confess our sins, he is faithful and just and will forgive us our sins and cleanse us from all unrighteousness.<sup>32</sup> In this sense, Christianity inserts the criminal law, the law of forbidden acts and intentions and correlative penalties, into the core of existence, into, that is, how one relates as a person to one's existence in the world and to one's relations with others. Within Christianity, the attainment of hygiene and health, *mens sana in corpore sano*, comes to mean the astringency of a Flash and Brillo of the soul.

\* \* \*

The Jewish God was a national God, a transcendental ruler, jealous and angry as well as protective, but fundamentally just, and their God alone, a God bound by his covenant to one nation—I will be your God and you will be My people. But the Christian God presided over an egalitarian community of all believers. Ancient Judaism was a religion of blood, of consanguinity, and of constitutive, identity-conferring law,<sup>33</sup> Christianity became a religion of belief and of regulative law.<sup>34</sup> Law and its observance did not define Christians; it provided rather a scheme for their submission to God, for obedience rather than observance, which required 'inner' assent or compliance.

In what became the dominant strands of Christianity, God the Father—the God Christians sublated through the path of Judaism—is a shadowy figure without clear attributes: thinking about him became essentially the province of medieval philosophy, and, in that sense, thinking about God becomes the seed bed of the conceptual armoury of modern science and modern understanding of the principles of causality. But in place of the Judaic God, whose will and pleasure bound a people to its destiny, the Christian God binds the world to a condition of inferiority through the criterion of an eternal sexless purity; this, fundamentally, will be the yardstick by means of which the sheep will be separated from the goats on the day of Christian judgment. The Judaic God would judge his people with reference to the extent to which they conformed or deviated from the requirements of ritual practice; his displeasure would be felt if they worshipped false gods. But the Christian God would take the measure of the soul and assess its degree

<sup>32</sup> I John 1:9.

<sup>33</sup> Cf. Rose, 'Would That They Forsake Me but Observe my Torah'.

<sup>34</sup> Cf. Needham, *Belief, Language and Experience: Price, Rituals and Power*.

of purity. God became like an assayer of common coin, an expert in discerning the quantum of gold or silver in a metallic thing that shone. When Jesus expels the moneylenders from the Temple in Jerusalem, God and money are combined: it is pure coin, not base coin, whose acquisition and cultivation should be the true goal of the Christian. It is ironic that it should be the Jews that medieval Christians came to associate with money and its circulation, through money-lending; it was Christian thought which elevated a real problem—the quality of coinage in circulation—into a metaphysical principle: the degree of purity of the soul.<sup>35</sup>

\* \* \*

What is seen in the course of introspection? The 'true' Christian must look inwards in order to look upwards—the ascent to Heaven demands and commands both the inner and the outer in encompassing all of existence. How does this process of searching or gazing inward relate to Truth, to Solitude, and to the body? A casual glance at some of the well-known Catholic texts will indicate how frequently the terms 'truth' or 'true' occur in opposition to falsehood, to error, to the false. Without any noticeable shift in reference, the same usage spans 1,000 years of ascetic writing—from Augustine to Thomas à Kempis. Truth is used synonymously with 'light' and 'good' and 'pure'. What is involved is a very simple moral and emotional economy (not that it did not generate a highly complex theology). It is on the surface (without any need for depth semantics or semiotics) dualistic, and in many ways this dualism generated the central problem of Christianity—not only the Manichean heresies, but the moral geography of heaven, hell, purgatory, and earth, and, in particular, the articulation of body/flesh, mind, will, and soul. One might say that there was an inherent theoretical tendency to slide into complete (heretical) dualism (heretical because it conflicted with private (including ecclesiastical) property and mortification of the flesh).<sup>36</sup> Perhaps more precisely, one may distinguish a pervasive dualistic psychology from a more narrowly based ontology (of a Manichean variety). The former did not dictate the latter, but, clearly,

<sup>35</sup> Cf. Shell, *Art and Money*; Shell, *Money Language and Thought*.

<sup>36</sup> Consider the 'private' practice of the hairshirt, and the linkage of mortification and authority: see Asad, 'Notes on Body Pain and 'Truth'' and more generally Asad, *Genealogies of Religion*.

effort was required to keep the dualistic psychology in check.<sup>37</sup> In other words, 'truth' was articulated within a simple dualistic moral economy, but the very simplicity of this dualism generated complexity on the part of the authorities because, like it or not, the Church (or at least the Church militant) was in the world. One might express this opposition differently—between the One and the Many, between simplicity and complexity, between the Path and the (several) detours. The Truth was one and pure and, for ascetics, transcendental; the immanency of the Host was good for divine thought, a strengthening of the will.<sup>38</sup> Sin was multiple, incoherent, chaotic, and devious.

In St Paul we encounter the squaring of the circle necessitated by the origin of a religion with claims to universality—Christianity—in a particularistic and exclusive tradition—Judaism:

The true Jew is not he who is such in externals, neither is the true circumcision the external mark in the flesh. The true Jew is he who is such inwardly, and the true circumcision is of the heart, directed not by written precepts but by the Spirit.<sup>39</sup>

Paul skirts around the law because the law, within the rabbinical tradition from which he came, is constitutive of the Jew. The Torah defines the Jew's relationship to God; the problem for early Christianity is that God does not change, though he made himself flesh. Rather, it is the subject of divine law which changes, since a universe of all believers is now promised. So on the one hand belief rather than law becomes decisive;<sup>40</sup> on the other, God, who, remaining unchanged, is no less legalistic than he was before the Incarnation ('if our injustice serves to bring out God's justice, what are we to say? Is it unjust to God . . . to bring retribution upon us? Certainly not! If God were unjust, how could he judge the world?'<sup>41</sup>), still speaks in the name of law. Hence what becomes a foundational statement for natural law:<sup>42</sup>

<sup>37</sup> Cf. the sophisticated psychology of Augustine, *Confessions*; and the more 'immediate' dualism of body and soul in à Kempis, *Imitation of Christ*.

<sup>38</sup> Cf. Bossy, 'Some Elementary Forms of Durkheim' on the frequent communion changes in the time of à Kempis.

<sup>39</sup> Rom. 2:29.

<sup>40</sup> Cf. Needham, *Belief*.

<sup>41</sup> Rom. 3: 5, 6. Cf., for the pre-Christian vision, discussion of these issues in Lloyd-Jones: 'In the *Iliad* the plan of Zeus is accomplished; the actions of gods and men all finally conduce to the fulfilment of his will . . . Zeus himself, in furthering his plan, has caused them to commit . . . injustices . . . how can it be just that Zeus should punish them?': *The Justice of Zeus*, 27.

<sup>42</sup> Though at the price of becoming 'certainly figurative'; see Forbes, *Hume's Philosophical Politics*, 7.

When Gentiles who do not possess the law carry out its precepts by the light of nature, then, although they have no law, they are their own law, for they display the effect of the law inscribed on their own hearts.<sup>43</sup>

### **The Truthful Self: Devotion and Obedience**

Foucault's influential notions of disciplinary and bio power hinted at certain continuities between modern knowledge—especially psychoanalysis and Christian confessional techniques.<sup>44</sup> But, first, the medieval technology of the truthful self did not produce truth in a manner remotely comparable with Foucault's power/knowledge scheme (which is rooted in the production of positivities which I discuss in later chapters). Secondly, 'confession' was juridical in conception and implementation, and was concerned with the identification of what was to be avoided. Thirdly, its linkage with the Truth was via the problem of self-deception, which was the pilgrim's greatest peril.

Salvation depended upon seeking God (the Truth). The subject in search of such salvation was driven in this pursuit by a love of God and a desire for his love.<sup>45</sup> It was unworthy to be motivated merely by fear of his wrath, though clearly, fear might characterize moments of weakness or 'depression'. This kind of orientation laid a heavy premium upon the will.<sup>46</sup> From this resulted the need for watchfulness, steadfastness, humility—the problem of distraction from the Path. It is because distraction is conceived voluntaristically that choice is the organizing principle of this indigenous psychology. Correspondingly, there is the danger of self-deception or bad faith. It is at this point that Weber's important discussion of Catholic confession is both right and wrong.<sup>47</sup> Weber was correct in isolating the framework within which what is at issue is discrete sinful acts (including thoughts, because

<sup>43</sup> Rom. 2:14. In the Greek version, the word for 'effect' in the NEB translation is *ergon*, on which Heidegger: 'Even when the Greeks—that is to say Aristotle—speak of that which the Romans call *causa efficiens*, they never mean the bringing about of an effect . . . That which consummates itself in *ergon* is a self-bringing forth into full presencing; *ergon* is that which in the genuine and highest sense presences': Heidegger, 'Science and Reflection', 160.

<sup>44</sup> Foucault, *History of Sexuality I*. Similar links are emphasized in de Certeau, *Heterologies*.

<sup>45</sup> Cf. Leclercq, *Monks and Love*.

<sup>46</sup> For the complexities at this point, see especially Augustine, *On Free Choice of the Will*. Cf. modern philosophical discussion in Gosling, *Weakness of the Will*.

<sup>47</sup> Weber, *The Protestant Ethic*; essays in Lehmann and Roth (eds.), *Weber's Protestant Ethic*.

thoughts are acts in this psychology). But his Pietist background led him astray in supposing that the result of this scheme was a non-unified personality, or that, at least, the full realization of the unified personality was a development which had to await Protestantism.<sup>48</sup>

Both before and after the Reformation, within the Christian scheme these sins must be sought out and confessed.<sup>49</sup> At this point, self-deception or bad faith is pivotal. First, confession of specific sins (which requires their acknowledgment) makes possible the doing of penance so that they can be wiped out. Secondly, detection of specific sins makes possible their avoidance through watchfulness, and in particular it makes it possible for individuals to 'isolate' sins which they are particularly prone to commit<sup>50</sup> and thus take particular prophylactic measures (including knowledge of the identity of appropriate saints to select as recipients of help-seeking—medicinal prayer).<sup>51</sup> Self-deception is a problem in relation to those sins one is particularly prone to commit—the danger of fooling oneself as to the extent to which one has overcome particular sins and returned to the Path. Such is the complex psychology of salvation: one acknowledges sin and thereby hopes for salvation, yet the acknowledgment of sin endlessly reinforces the notion that one does not deserve God (indeed, to suppose that one does involves exposure to the sin of pride). This is the basis for the attraction, not just for the 'religious', of intercessory prayers for the dead, such that one's moment of death is not the last chance for salvation.<sup>52</sup> But in the end, man's worthlessness is only redeemed by God's grace (and the help of Jesus, Mary, and the Saints). Truth and Grace are intimately linked. In this psychology, God's word is the ultimate guarantor of hope in the face of despair. His promises, his statements about himself, as mediated by Jesus, the prophets, the evangelists, and the Apostles were the Truth which guaranteed God's Grace, which, in turn, alone gave hope.

\* \* \*

<sup>48</sup> Weber, *Protestant Ethic*, 119–28.

<sup>49</sup> The issue rather became whether confession should be made to or through a priest or to or through a congregation, and whether it should be made by individuals or groups in collective confessional prayers.

<sup>50</sup> Augustine is very revealing here, assessing himself in terms of sins—e.g. gluttony, drunkenness, sexual desire, and, especially, pride: Augustine, *Confessions*. To the extent that this suggests a libidinal plurality and does not, as I read it, privilege sexual desire, I would take issue with the general argument in Foucault and Sennett, 'Sexuality and Solitude'.

<sup>51</sup> Anselm, *Prayers and Meditations*, provides a good example.

<sup>52</sup> Ariès, *Hour of our Death*.

Of the technologies which supported and fostered this Truthful Self, it is obvious to single out confession and the hermeneutical techniques associated with this practice. But as decisive a technology for unleashing the play of the inner and the outer, the penetrative scheme and the juridical soul, is that of devotion—or prayer. Devotional practices were the core mechanism of the complex individualism produced by Christianity. According to Ward, ‘the tradition of private devotion in the two centuries before Anselm was strongly liturgical.’<sup>53</sup> What called forth the admiration of laymen in the ninth and tenth centuries was the monastic organisation of prayer in an ordered life of dedication to God; it seemed the proper response of mankind to the command to “pray without ceasing”.<sup>54</sup>

Ward suggests that in the eleventh century, a private tradition of prayer was charged with the idea and the experience of a personal relationship with Christ.<sup>55</sup> But from a technological point of view, what is interesting is that ‘prayer’ has a wider meaning than liturgical devotion.

[P]rayers are . . . in some sense also meditations . . . and belong to that assimilation and rumination of divine truth through the reading of the scripture which is *lectio divina*. . . . For Anselm and his predecessors [reading, meditation, and prayer] were different aspects of the same thing, not separate exercises in their own right. Reading was an action of the whole person, by which the meaning of a text was absorbed, until it became prayer. It was frequently compared to eating: ‘Taste by reading, chew by understanding, swallow by loving and rejoicing’, and the text ‘O taste and see how gracious the Lord is’ was applied more often to the reading of the scriptures than to the Eucharist before the 12th century.<sup>56</sup>

This technology can be traced, via the Rule of Benedict, back to Cassian’s teaching on prayer and Origen’s theology.<sup>57</sup> ‘Here the way

<sup>53</sup> Cf. Brown, ‘Introduction: The Carolingian Renaissance’ on the importance of uniformity of liturgy; for the later period, see Rubin, *Corpus Christi*; on computing, see Borst, *The Ordering of Time*. The legalism of liturgy survives: this is now well captured in Bursell, *Liturgy, Order and the Law*.

<sup>54</sup> Ward, ‘Introduction’, 35–6. One might recapitulate, from Southern, the following sales pitch: ‘strenuous is the warfare which these castellans of Christ wage against the Devil; innumerable are the benefits of their struggle. Who can recount the vigils, hymns, psalms, prayers, alms, and daily offerings of masses with floods of tears, which the monks perform? . . . [In] a castle . . . manned by monks against Satan . . . the cowed champions will resist Behemoth in constant warfare for your soul!’ Southern, *Western Society and the Church*, 225.

<sup>55</sup> Ward, ‘Introduction’ 39.

<sup>56</sup> Ward, ‘Introduction’, 43–4. See also Southern, *Anselm*, 91–112.

<sup>57</sup> Markus, *End of Ancient Christianity*; Origen, *Contra Celsum*; Origen, *Exhortation to Martyrdom*; Cassian, *Conferences*; general discussion in Chadwick, *Early Christian Thought and the Classical Tradition*.

into prayer was through meditative reading, with the aim of purity of heart and compunction of tears'.<sup>58</sup> 'Strive to apply yourselves to holy reading so that this continual meditation may finally impregnate your soul and form it in its own image.'<sup>59</sup>

'The centre of Anselm's teaching on prayer is in the word compunction'. By reading the prayers one is to be 'moved to the love or fear of God, or to self-examination'. 'The steady discipline of attention in reading continues until one is moved by love or fear, which generally begins by awareness of sin and personal self-abasement. It is a matter of seeing steadily and truly the real situation of man before his Creator . . . Redeemer and Judge. Each of [Anselm's] prayers contains a long passage of self-scrutiny, where the horror of sin is brought to light by knowledge of the love of God.'<sup>60</sup> In the words of Gregory the Great:

For the fire of tribulation is first darted into our mind from a consideration of our own blindness, in order that all mist of sin may be burnt away, and when the eyes of our heart are purged from sin, the joy of heaven is disclosed to us . . . for the intervening mist of sin must first be wiped away from the eye of the mind, and then it is enlightened by the brightness of unbounded light that is poured upon it. When the virtue of compunction moves our hearts, the clamour of evil longings is silenced.<sup>61</sup>

These prayers had a specific aim and were part of a purposive technology of the self which goes back at least to Cassian: '[Anselm] is not using words for their own sake; . . . if their language is subtle and complex, demanding an effort, this is part of the *excita mentem* which is the first stage of the way. The effort required "stirs the mind" from its "torpor", not for the sake of the words, but for the freeing of the soul itself for God.'<sup>62</sup> Prayer then was much more closely connected with asceticism than confession.<sup>63</sup> Indeed, it was precisely one of the main activities in which distraction could occur, including sloth, in which the God-seeking individual could succumb to one or more of those 'active forces' which could keep the soul from loving God, and the threat of which required the Will to be both watchful and resolute in its true purpose.

<sup>58</sup> Ward, 'Introduction', 45.

<sup>59</sup> Ward, 'Introduction', 45.

<sup>60</sup> Ward, 'Introduction', 53-4.

<sup>61</sup> Ward, 'Introduction', 55.

<sup>62</sup> Ward, 'Introduction', 57. Cf. German Idealism's appropriation of this preoccupation with torpor, and its philosophical corollary, with the *labour* of the notion. See also Markus, *End of Ancient Christianity*, 159-60; 166-7 on lukewarmness.

<sup>63</sup> For asceticism, see, more generally, Hadot, *Philosophy as a Way of Life*, which contains one of the best appraisals of Foucault's last work.

Prayer was central in all forms of asceticism, even if, in the mendicant orders especially, emphasis was also placed upon activity in the world. Moreover, it is prayer (in its undifferentiated form) which constitutes the link between human activity and the Truth. This is the moment of the revelation of God's will. A double hermeneutics is here in play—a hermeneutics of God's will in the individual and of the individual's sin.<sup>64</sup> In monastic asceticism, prayer is both a central activity—in relation to which one can fail through the weakness of the flesh or the will—and the primary technology of Truth. In this context, Foucault's 'truth' revealed or elicited in the confessional is a reflective (and occasional) monitoring of one's inner performance during prayer. Yet even this reflexivity does not enable us to view the confessional moment as crucial; rather, reflexivity is required too in prayer itself, in watchfulness in the early hours against distraction and weakness as one is engaged in the primary business of prayer, watchfulness against the active forces obstructing one knowing the Truth, attaining or sustaining an immediate relation with God and his will. The will to know is to know, without obstacle, the Truth in the sense or shape of God's will. In other words, what is elicited in the confessional is how far one is attaining this relation of immediacy with the Truth. Sin is an obstacle in relation to Truth; the truth of Sin is the truth of obstacles to Truth—the truth of error, not the Truth of Truth.<sup>65</sup>

The strategy of the confessional can be seen as *one* means of registering what is prohibited and what is to be avoided. It is not a means of assembling a hitherto unknown knowledge of the self except in terms of exposure and susceptibility to particular types of sin and the need for extra vigilance. Beyond this, there is no 'what I really am' that is not already known. Rather, it is a matter of how far one has broken the 'law', insofar as that leads to an estrangement from God. In ascetic practice, the desire is not to produce a 'knowledge' of self or of 'Man' but, rather, to attain a knowledge which is the same as a 'communion' or a marriage—the knowledge of being with God. This requires a transcendental orientation, a reaching beyond or above in which earthly

<sup>64</sup> Paradoxically, privatized prayer was more a feature of monastic asceticism than the communal prayer focus of so-called individualistic Puritanism, which is not to ignore the role of guilds and confraternities.

<sup>65</sup> Cf. Puritan spiritual account books and the commonplace books and more generally the relation between autobiography and subjectivity: Spufford, *Small Books and Pleasant Histories*, 1–44; essays in Graff (ed.), *Literacy and Social Development in the West*; Vincent, *Literacy and Popular Culture*.



'things' (the body, the emotions, desires) are or threaten to become obstacles, weights holding one down, veils clouding the Truth.<sup>66</sup>

### **Gift and Redemption: Justice, Mercy and Charity**

The other dimension of the basic soteriological and eschatological scheme which might be singled out as of especial relevance to law and assumptions about law is the themes of gift and redemption. The creation of the world by God is common to a wider range of traditions and is part of a general metaphysics which Christianity inherited. (In relation to this metaphysics, we can perhaps leave to one side whether the accent is on the demiurge as an explanatory principle for the existence of the world or whether the accent is on a metaphysical rather than epistemological insistence on the primacy of the One and the existence of the world as the assertion of his will or the realisation of his essence.<sup>67</sup>) But while the themes of gift and redemption are severable from the penetrative scheme, both in provenance and consequences, there is also an intimate connection between the two.

Christian thought involves a re-entry of the distinction between God and mankind established as ontological in Hebraic thought and as epistemological in Platonic thought—into itself. God himself is distinguished into the Divine and the Human, the nameless and the named. It was not that there was another, new, second, creation of the world but rather a renewal of humanity through God becoming man (while remaining God at the same time<sup>68</sup>). Christ was at once divine and human, and this enigma was different from the occasional Greek transformation of men into Gods (e.g. Heracles) or the civic posthumous

<sup>66</sup> For these autonomies, see, Lane Fox, *Pagans and Christians* 447 ff. The complex connection between (devalORIZED) living bodies and (highly valorized, if on a selective basis) dead bodies, especially in the form of the relics of martyrs or, later, of saints, is of particular interest at this point, not least because of the dogmatic insistence on the physical resurrection of the body. For relics, see Markus, *End*, 142–50; Southern *Anselm*, 96 ff.; Geary, 'Sacred Commodities'. For saints, see Murray, *Reason and Society in the Middle Ages*, ch. 16.

<sup>67</sup> Superficially at least it seems to me that in Platonic thought God, creation, and myth more generally are used as explanatory or imaginative devices whereas in Hebraic thought the emphasis seems rather to be on the ontological primacy of a single Being who created the world and also struck a bargain with a particular 'people' for the realization of his purposes—which did not yet perhaps include 'history', a view of the divine purpose which is more closely linked with Christianity.

<sup>68</sup> 'My God . . . why hast thou forsaken me?': Matt. 27: 46.

deification of Emperors of Rome beginning with Augustus.<sup>69</sup> God became man in order to die as a sacrifice to God on behalf of mankind. This was a self-cancellation of debt, a redemption of the accumulated deficit owed by mankind to God, but through the agency of God-made-Man rather than (independently) by mankind. What was demanded here of mankind was belief,<sup>70</sup> to follow Christ, to associate with his sacrifice.

And just as this divided or distinguished God was to reunite himself with himself—and presumably the resurrection and ascension is the demonstration and proof of this—so this unfolded the possibility, no doubt supposed or claimed to be imminent at the time, of not a further distinction but the end of all distinctions between heaven and earth and between God and Man. But this promise of the end of distinctions was held out on one condition: the condition of belief, of faith, of following. This was a condition of allegiance not to law as such, which was supposedly the Judaic path, but to God's sacrifice, to the Christ who embodied at every stage the extent of that sacrifice. This condition was the basis of the test which would be applied at the end of time and of the world: in the Last Judgment, that condition would be applied, and used as the basis of a final distinction or solution outside or beyond history—the division of mankind into the good and the bad, believers and non-believers, heaven and hell. Subjectification and individualization, rather than ritual observance and pragmatic instrumental use of the divine, are moved here to the forefront. Law is not a matter of observance but of inner assent. One must make God's law one's own. The penetrative scheme is in this sense the basis of working through the issues which will arise in the court of the Last Judgment at the end of time and the world divided from God. This is the scheme of the future of/for the present—the probable decisions of the court of Heaven which will be convened at the dimming of the day will configure and shape the 'meaning' of an individual's actions in the flux of the present moment.

No doubt this scheme of the death and renewal of God has much in common with many non-Judaeo-Christian schemes which represent via the death of God a cyclical view of the natural and human order.<sup>71</sup> But there are crucial differences. The Christological scheme is not a way of

<sup>69</sup> Though cf. what is reported about Caligula and Elagabalus. In the latter case pre-mortem divinization is attributed to his Syrian origins. In the case of Caligula, the received wisdom is his madness.

<sup>70</sup> Cf. Needham, *Belief*. <sup>71</sup> Cf. Eliade, *Myth of the Eternal Return*; Onians, *Origins*.

explaining or narrating matters largely beyond human control, but a single event imposed from outside upon humanity and the world. It is a sacrificial act on the part of a ruler, a sacrifice made of himself insofar as that on behalf of which the sacrifice is conducted is itself not only an emanation of his will but 'belongs' to him—as is asserted in the prerogative rights of the Last Judgment, where there seems to be no question that God has 'jurisdiction' (this is, rather, self-evident or tautologous).

This was a single, one-off sacrifice. As such, it was an historical event—or, one could say, it inaugurated a new kind of history. On the one hand, this is a history which was eschatological—a Big Bang at the Last Judgment, after which there would be no more judgments nor any basis on which or need to make them.<sup>72</sup> The End of Law is already present in this sense in this scheme. On the other, human reality was historicized with reference to this single event (although this was always offset by chiliasm, and all kinds of end-of-the-world movements which flowed naturally from the starting points already identified). This necessitated the concept of the Holy Spirit.<sup>73</sup> No doubt the complexity of the Trinitarian scheme and the relationships internal to it not only generated endless disputes but permitted endless sophistication in the subsequent elaboration of what was already at its outset a very complex and far from unproblematic metaphysics. For example, within this scheme, what was the relationship between Father, Son, and Spirit? And while I do not think that the way questions of this sort were answered is reducible directly or in some simple fashion to the 'background' circumstances of political and economic life, I think it is implausible that these can be ignored, not least because in all eras there are limits for the most part to the autonomy of the life of the mind or of thought and there is a pervasive tendency to imagine the theoretical or invisible with the aid of the 'concrete', of visible and familiar established social arrangements.<sup>74</sup>

<sup>72</sup> The later invention of purgatory is a symptom of the felt implausibility of this scheme of finality in relation to judgment—for discussion, see le Goff, *The Birth of Purgatory*; Fenn, *The Persistence of Purgatory*.

<sup>73</sup> I sidestep here the theological subtleties of the *filioque* question (i.e. whether the Spirit's source is traceable to God the Father alone or, also, to God the Son). I find it difficult to avoid interpretively the assumption that there is some two-way transfer between theology and the reality of political institutions. In this case, the issue of anticipatory kingship provides an interesting 'real' parallel to theological debates: see Lewis, 'Anticipatory Association of the Heir'; more generally cf. Goody, *Succession to High Office*.

<sup>74</sup> This today provides a central basis for the critique of science, especially by feminists: cf., e.g., Haraway, *Simians, Cyborgs and Women*.

Simultaneously, then, spirit and history are added to or are overlaid upon the basic picture of the penetrative scheme and of redemption of the world by God for God (because if not for God, whom else is it for?). The end of the world now becomes predictable rather than necessary (and this permits the revalorization of techniques of prediction, of forecasts, and prognostications—it sets some minds to work on the future, it brings the future into the present in a whole array of ways which must nonetheless eschew old-style pagan prognostication directed to immediate events, just as old-style dream interpretation is incompatible with the new expectations and proprieties which this Christianity has brought into being<sup>75</sup>).

This complex scheme underpins the conditions for the imitation of Christ which in one form or another<sup>76</sup> continues to punctuate the subsequent history of the spirit—until the later moment when the whole problematic, essentially, is shifted across to universities and to philosophy. On the one hand the ‘task’ or ‘function’ of keeping alive the presence of Christ in the world is now discharged by the movements of the spirit within it;<sup>77</sup> on the other, the fact that this is the case is best demonstrated by the endeavours of those who seek to imitate if not emulate Christ—which means his subordination to the inferiority of the world and the theme of sacrifice.

As Christianity both enters and creates history, two techniques stand out as offering mechanisms for realizing these goals or making the spirit something more than merely spiritual. These are technologies for realizing or enabling the work of the spirit in the world, for the achievement of the presence of the spirit in a world always threatened by the disappearance of the spirit not least through its intrinsically elusive character—first, through the church in its role as anchor of the spirit to hierarchically organized intermediaries<sup>78</sup> and to specialized (Christomimetic) institutions like monasticism; secondly, through the development of technologies of intensive subjectification: specifically, devotion and confession.

There is an elective affinity to use a term I usually try to avoid—between this and law. There is a process of identification at work

<sup>75</sup> Whether they did eschew old-style forecasting is another matter. The point is that Christianity gave a new logic to this activity of telling the future: Dodds, *Greeks and the Irrational*; Foucault, *Care of the Self*; Winkler, *Constraints of Desire*.

<sup>76</sup> Monasticism, Franciscans, new devotion, etc.

<sup>77</sup> Cf. Olson, *Hegel and the Spirit*.

<sup>78</sup> Cathedrals and episcopalianism both enact a mimesis of the Two Cities and their hierarchies.

between law and the religious realm, one of emulation or imitation in its own way. And as part of this there is the sacrificial character of judgment, the purity of the judge which we have inherited as impartiality and not yet fully understood, in a new register, as pure difference: a purity which, like that of Christ, demands self-sacrifice, paying with the person, the 'suppression' of personal or individual inclinations and desires in the interests of a wider project.<sup>79</sup> The paradox at work in this scheme is that the promise of the redemption of mankind as a whole is also the guarantee of the salvation (the transporting up into freedom from care) of individuals. As already said, at this point at the end of time all debts will be cancelled and all obligations evened out and the world redeemed by its own mortgagee.<sup>80</sup>

God's gift (of redemption) to the world is unsolicited but given with love for the world which he made. The gift generates—automatically one might say—the need for a return, and this means that the gift (by God, of himself) generates an obligation, the obligation to love God in return. I give so that you may love me. But the love must be true love. Valid love. The circulation of the love of God must be true because God is the truth—and so the problematic of the distinction between true and false, especially true and false coin, is transposed into the problematic of the love of God. (Legal and political theorists have deployed the same oppositions and the same semantic field in order to construct a problem of legitimacy, or true and valid allegiance somehow dependent on the decisions made and processes pursued by power-holders<sup>81</sup>.)

<sup>79</sup> 'If authority is always perceived as a property of the person, it is because *violence douce* demands of the person who exercises it that he pays with his person.' *Logic of Practice*, 128 (translation modified). 'Sade took the virtual criminality of his contemporaries for his personal destiny. He wanted to pay all alone, in proportion to the collective guilt his conscience had invested': Dean, *The Self and its Pleasures*, 173, quoting Klossowski on Sade. On a similar theme cf. Lacan, *Ethics of Psychoanalysis*, 322–3.

<sup>80</sup> 'There is one real social, or 'economic', as we would call it, experience which is ideologically encoded here, and it is the relation of creditor and debtor. In so many traditional societies, debt and crime were not clearly differentiated; Christianity deploys both debt and crime indiscriminately in the manner in which it transcribes from the time-bound historical world of actual experience the nature of the idealized, imagined relation of the individual to the self, embedded within the positive law of God. God becomes, within this scheme, that One to whom the world, and any individual life within and upon it, is owed. For modern discussion, see Sullivan *et al.*, *As We Forgive Our Debtors*.

<sup>81</sup> Cf. the semantic field of *Geltung* and *Gültigkeit*: 'validity'. The root word here is *gelt*—gold—and the root problem of validity is in a sense the validity of coins. Gold transformed into coin. Is the basis of its worth—its validity—its material nature (however that is itself to be judged, especially in Marx's theory of value) or the imprint of the sovereign? And if the latter, then what underpins the imprint, gives it, in turn, validity? Fakes and counterfeits—copies of the true image of the sovereign—are one thing; what about

Validity comes to be applied to that which is presuppositionally valid to God, to law on the same basis, and so on.

In turning its back upon the world, Christianity, in its early phase, turned its back on politics and the state, in the classical sense of these terms identified by Arendt.<sup>82</sup> In its Jewish origins or in its wider sphere of influence, Christianity can be seen as a response to the militarization and centralization of coercive power which was the fact of Roman imperium. Christianity projected a world in which things would happen in the future on to a blank screen. As the moment between the Resurrection of Christ and the Second Coming elongated, so the pressure increased not to intensify or prolong the deferral of this moment but to have it now, or at least to instantiate the pleasures of anticipation. In Catholicism, the Church becomes a bar or barrier, an institution membership of which stands in for membership of the 'True

coins issued by a usurper? Paper money defers the problem; but as long as it stands in for or 'represents' its 'equivalent' in gold coin, this problem retains the same essential shape. Law is intricately into this problem: legal tender. The shift to the concept of gold reserves, which supposedly seek to occupy a relation of adequation to the paper and intrinsically valueless coin in circulation—nickels and dimes, etc.—already involves an abstraction from this scheme, but one in which the imprint of sovereignty is all the more decisive to the question of validity. But adequation, insofar as it implies ratios—i.e. that the value of the gold is only proportional to the 'normal' value of the paper, etc., in circulation—already indicates a shift in the notion of validity. At the same moment as these changes seem to signal the rise of sovereign power, they signal its diminution. Today we see it clearly: we speak of the credibility of monetary policy; and we have a plurality of measures of money—M1, M2 etc.—which few other than specialists understand in detail. And money becomes a commodity—something to be traded. But an entirely immaterial one. The globalized and fast-moving currency exchanges rarely (never?) stop their ceaseless movements to call in or count the gold. The validity of money is now transformed into a series of calculations ultimately related to economic performance and anticipated electoral success and failure. In this world, money makes money or loses money; good or bad bets are placed; and bets are hedged, to maximize possibilities of winning, or to spread the risk of losing. The general point about this state of affairs is that the validity of traded money determines the actual worth of what is itself 'unreal' money. In the process an absolutely central aspect of the sovereign, hierarchical scheme as it has been known for centuries in the West is already lost. (Ironically, from a larger perspective, this might suggest that the EMU might strengthen rather than weaken political forces in this respect, even if it diminished the leverage retained by now localized sovereigns of EU nation-states.) In other words, politics becomes dependent on economics (or, at least, on the operations of financial markets); but financial markets, in their turn, become dependent on the ebbs and flows of politics. Cf. Shell, *Money Language Thought*, 99 ff. Cf. the material collected in Eichengreen (ed.), *The Gold Standard in Theory and History*; and Goodman, *Monetary Sovereignty*; Eichengreen, *Elusive Stability*.

<sup>82</sup> Arendt, *The Human Condition*; cf. Duby, *Age of the Cathedrals*. Discussion of the 're-entury' of Christianity into the world after the conversion of Constantine, and the wide-reaching implications of this, can be found in Markus, *End*; Pennington, *Prince and the Law*; Morris, *Papal Monarchy*.

Christian community—a Church for which (from which) Heaven is always beyond, a Church which ‘aspires’ to Heaven.<sup>83</sup> Hence the significance of reclaiming the Spirit for Protestantism (which could not, institutionally, bring Heaven any closer<sup>84</sup>). Calvinism repeats the exercise of simulating or anticipating something which occurs elsewhere and at another time.<sup>85</sup>

### Truth and Power

After Constantine’s legendary conversion at the Milvian Bridge, a paradoxical train of developments was set in motion with few interruptions:<sup>86</sup> Christianity became, with a steadily growing intensity, the official religion, and the salvation of his people became the core responsibility of a ruler.<sup>87</sup> Church and State became allies not enemies, co-regents in a general sense, vicars of (stand-ins for) God on earth. Inevitably, too, this co-regency was, in a deeply hierarchical world, an endless source of tension and friction, since if the co-regents disagreed, whose decision should prevail?<sup>88</sup> Who possessed the *plenitudo potestatis* on earth, and who in the end could exercise it on God’s behalf? The division between the temporal and the spiritual could not solve even the

<sup>83</sup> Heaven-seeking spires and ladders to heaven represent in due course the basic logic here: cf. discussion of eschatology in Augustine and its loss in Markus, *End*, 79–81, 87–90.

<sup>84</sup> For the many Christianities, and pagan residues in the medieval period, see Schmitt, *The Holy Greyhound*.

<sup>85</sup> This is also the moment of tempered desire, of desire differentiated from excess and from expenditure. In this context, note the revalorization of the examples of the Patriarchs, who were less compelling thought-vehicles for medieval christianity. Cf. Markus, *End*, on the tension between emulating heaven in early asceticism and Augustine’s eschatology. Also useful are: McGrath, *Intellectual Origins of the Reformation*; Torrance, *the Hermeneutics of John Calvin*; Dickey, *Hegel*.

<sup>86</sup> Most notably the brief reign of Julian ‘the Apostate’.

<sup>87</sup> In addition to works cited elsewhere in this Ch., see Barnes, *Constantine and Eusebius*; and cf. Veyne, ‘Foucault révolutionne l’histoire’, which discusses with some subtlety the shift in conceptions of the rationale of rulership between the pre-Christian and Christian eras (though to put it like this is of course to simplify a much more drawn-out process of transformation).

<sup>88</sup> ‘Render unto Caesar’ (whatever it originally meant—see Bruce, ‘Render unto Caesar’) could never solve this problem in the conditions of the West after the disintegration of the established Empire. It could be used to justify the ‘separation’ of church and state. But whether or not kings succumbed to Christology, it was an inadequate answer when Caesar or the Prince was a Christian king. The problem is only solved or reworked when the Christianity of the ruler or the governmental apparatus ceases to be an integral feature of its justification or its title to rule. Secular rule, in the modern sense, means the privatization of religion. Marx saw this very acutely: see Marx, ‘On the Jewish Question’.

intellectual problem here as such. In the case of succession to thrones, for example, or appointments to ecclesiastical positions, who could ultimately resolve this in the event of a dispute, and on what basis? Arguably, the very complexity of these conditions<sup>89</sup> fostered a certain kind of legalism.

But this legalism is already present in the Christian scheme as such: the King of Heaven laying down rules, and demanding obedience to them, but genuine, 'heart-felt' obedience, not mere routine, 'outward' conformity. And it is the analogy with this Kingship of Heaven which imparts to rulership and to the logic behind the issuing of rules by rulers a similar set of properties. But a greater load is carried by the image of God as Judge than by that of God as Lawgiver. The laws, as given, are given. The problem then is whether God is free to change his own laws. The assumption, at least, is that the laws remain in place unless God chooses to dispense with them in an individual case or to change them in general. Similarly with rulers. Indeed, in the case of rulers, it is not obvious that there is a clear line between truth and power at work—what a ruler 'can' do is ambiguous semantically and no doubt in the debates which occur within this scheme. But whatever the arguments which arise at this point, what often receives insufficient emphasis is that they most commonly arise in the scene of judgment. Whether God could make another different world—a sort of Leibnizian problem, perhaps—is not the central question. The central question concerns how, as King of Heaven or his regent on earth, one should judge. And that, in the end, means how to weigh in the balance good and evil, or how to determine what is good and what is evil. This is the character of the question of truth, which is not really imaginable outside the setting of power and judgment. Some kind of *Führerprinzip* may be conceded at an abstract level to God at this point but with much more reluctance to kings and popes or, in generic terms, to 'princes'. The difference between ordinary power and absolute power is the most interesting theoretical distinction to emerge at this point.<sup>90</sup>

\* \* \*

<sup>89</sup> And this is to leave to one side the question of the Holy Roman Emperor—the paradigmatic Prince—whose shifting importance in the European landscape is something which, from an English perspective, perhaps tends to be downplayed. For recent discussion: Pennington, *Prince and the Law*.

<sup>90</sup> More fecund and significant than e.g. *princeps legibus solutus*. The latter, with its own dynamic, tends to overplay the difference between England and Europe and to elevate *avant la lettre* the concept of absolutism as some kind of *Führerprinzip*. Perhaps exaggerating



In the Mirrors of the Prince, self-regarding visions of government, law, and society are unfolded.<sup>91</sup> Government, law, and society are seen in the image of the king. This is to highlight two elements. First, the prince is the principle of legibility of society: a disordered king means a disordered kingdom. This is the practical side of the analogical thinking or the thinking of correspondences and resemblances which is so pronounced a feature of this scheme: as God is to the world so the king is to his kingdom so the soul is to the man.<sup>92</sup> Secondly, this vision of law, government, and society does not mean that the reality of medieval and early modern social 'organization' followed or obeyed this scheme any more than, in our world, market or bureaucratic rationalities in fact determine the course of events or the mode of existence of peoples, nations, and societies. As always it is important to remain sensitive to the fragility of claims to know or to possess this 'reality', of claims which can be used in a secure way to assess the validity of 'ideological' assertions about the mechanisms which promote social integration.

Subject to that, we probably have to hold simultaneously two contradictory thoughts in mind: put simply, that society was politically (or hierarchically) organized and that this mode of organization was largely ineffective and certainly did not have available to it either the resources or the techniques to 'hold society together'. How could such a contradiction not be noticed? The answer perhaps is that there was no alternative, practical or epistemic (if there is a difference), only visions and counter-visions articulated on the same set of premises, and fundamentally underscored by the scheme of the rulership of Heaven.

in the other direction, it might be better to suggest that full-blown absolutism hardly precedes the 20th century, although some – e.g. Macmullen – seem to find it in Constantine: 'To use a terminology close to worship in describing everything imperial struck no one then as excessive. The Sacred Mint, or House, or Mind, or Decree, the Celestial this and Divine that, belonged by right and truth to the position of the emperor. So did panegyric . . . Historians must piece out a picture of the times from sources obviously and deliberately false, from panegyrics and eulogies, from the contorted elegance found even in legal documents, from euphemism, servility, bias, and a sort of affected distaste for the specific. Although these qualities are themselves an aspect of history, casting a characteristic light on the scene that we must observe and having an influence on the behaviour of the actors, yet they have given rise to irremediable uncertainty about almost every point in Constantine's life': MacMullen, *Constantine*, 15–16. For the relevance of the distinction between ordinary and absolute power or jurisdiction to English equity, see Oakley, *Omnipotence Covenant and Order*; Murphy and Roberts, *Understanding Property Law*, 84–5.

<sup>91</sup> I sidestep here the interesting question about who could be a prince.

<sup>92</sup> See Aquinas, *Selected Political Writings*; Foucault, *The Order of Things*. One culmination of this genre is the application of such a mirror to the mirrors: see Frederick of Prussia, *Anti Machiavel*.

The Reformation does not change these aspects of the legalistic vision of reality, whatever else the Reformation did affect.<sup>93</sup> Nor, as such, did the later secularizations and separations of church and state—e.g. in France and, differently, in the USA.<sup>94</sup> Indeed, the question of the impact of and transformation effected by the Reformation is itself quite complex.<sup>95</sup> In retrospect, it is tempting to see it as one step along the (inevitable?) path of European secularization, but this is surely mistaken. Rather, the Reformation played a decisive role in consolidating national identities and nation-states, by eliminating the extra-territorial authority of the papal monarchy (and the dynastic or geo-political interests which at any point in time converged around it or held it captive<sup>96</sup>). The Reformation involved a nationalization of the Christian religion, or the consolidation of a tendency which had long been present, despite the elaboration of a different scheme by the Papacy in Canon Law—the control over ecclesiastical appointments by the kings of nation-states.<sup>97</sup> The Reformation did not do away with the question of the appropriate location of God's vice-regency on earth. It merely made the question more complicated. What it did do, unevenly, was to weaken even the validity (never mind the practical reality) of papal claims to overall competence in matters of legitimacy, including legitimate succession to high office.

The question for 'us' is thus not how to restore the solidary mechanisms which held together most (all?) societies except our own, or how to re-energize some atavistic desire to reinvent an effective penetrative scheme suitably adapted for our own era. I do not presume the efficacy of the penetrative scheme in the past; I do not claim that it ever held society together. But 'our' problem is rather what means were then and are now available for thinking the question of society, for diagnosing causes of pathologies and dysfunctions, for formulating solutions to them, for identifying instruments or mechanisms to bring these solutions about.

The penetrative scheme is no more or less than a fantasy, a chimera. At the same time it is 'effective' as long as it affords a compelling vehicle for problematization of the ills of the world or of existence— as long as it can generate from within itself recipes and remedies, means of

<sup>93</sup> Scarisbrick, *The Reformation and the English People*.

<sup>94</sup> Schama, *Citizens*; Clark, *Languages of Liberty*.

<sup>95</sup> From a vast literature: McGrath, *Intellectual Origins*; Dickey, *Hegel*.

<sup>96</sup> Cf. Mann, *Sources of Social Power I*.

<sup>97</sup> Brundage, *Medieval Canon Law*; Pennington, *Prince and the Law*.

intervention, techniques of governance, and the means of conducting humanity towards its future and its destiny. Such a means was found in what is termed here adjudicative government. Though the origins of this are again diffuse, the key point to note is the elective affinity (here, the term is apposite) between the penetrative scheme of ruler and ruled and a mode of government which comes to privilege the soul and which is based on the divide between the inner and the outer.

In place, therefore, of these artificial divisions between thought or theory, practice or reality, I propose to proceed by linking 'idealizations' to the techniques through which they were and are applied, to their modes of realization. Indeed, we should be suspicious of the idea of 'pure theory', not just because such purity is contaminated (always) by the circumstances of its generation, but also because there are always operations under way in theory: theorizing is always aimed at some set of operations, and we can, here, give some thought to that.

\* \* \*

I develop below the argument. But some might wish to go further. After all, is not the triumph of legality in our age the jewel in its crown? How can *this* be put in question, even if everything else—including science—is fair game for sceptics, and critics?

For some, like Legendre, this is to put the problem the wrong way round: the loss of the legal vision—the loss of the dogmatic function—threatens the destruction of humanity.<sup>98</sup> If this points to a practical conclusion, that conclusion seems to be that we need to reassert the claims of that dogmatic function, the legal vision of subjectivity, against the intrusions and erosions effected by the social sciences. No doubt, if the social sciences were just a matter of language and thought, this would be possible. But to the extent that the world itself as well as human subjects is imbricated with these sciences, such a project of reclamation—whether 'desirable' or not—demands considerably more than can be achieved in the seminar room or the public meeting.

There are two possible bases for 'true' legality: dogmatism or cumulative experience. What these share is an immunity from positivism, from modern facts or expertise. A legality which has to negotiate the truths of the world emanating from elsewhere is a different kind of legality. Where I part company with Legendre is in supposing that

<sup>98</sup> Legendre, *L'amour du censeur*; Legendre, *L'Empire de la vérité*.

there is any sensible way of characterizing this as a deviation from the path of truth. It seems to me rather to be a transformation which has simply occurred. But the effect of this transformation is to leave law and its seemingly foundational role in instituting the relation between ruler and ruled in an obscure place. But what, in turn, does this mean? Should we not let go of our memories? Should we not allow ourselves to be open to the future, and learn to live without the fantasy of security and paternity which the older other vision, which we can now see as a vision, held out, once, to us? I also agree with Legendre that this is a position which science, much as its practitioners might wish, cannot occupy. Quite the contrary—how often do we hear the demand for ethical science, which is really a demand for dogmatic science or a science governed by our supposedly basic intuitions?

By contrast, we need, in my opinion, to be more sensitive to the rather peculiar character of the individualism which has been installed in our age, using the building blocks of so many half-memories, and to recognize that this modern individualism sits alongside epistemic and orientational attitudes and practices through which this same individual is effaced into the average man. The freedom of the individual is triumphant at the same time as the erasure of the institutional and epistemic presuppositions which for so long sustained the individual as a 'meaningful' project.<sup>99</sup>

Principles of hope? Only a God can save us? Each has been tried before—and we still live in the shadow of the aftermath of these attempts.<sup>100</sup> It is for these reasons that among the writers of the past, Max Weber, and of the present, Niklas Luhmann, are so important now. Both are, in a substantial sense, non-apocalyptic theorists, or theorists of the banal.

\* \* \*

I turn to Max Weber and his legacy in the next Chapter. Before that, we should leap, in summary and simplistic fashion, to the end, to the *very*, if not ultra- or post-, modern. In the kind of neo-systems theory which Luhmann has pioneered (a theoretical approach resisted in much sociology through the incantation of 'agency' or 'actors'<sup>101</sup>), the con-

<sup>99</sup> Dumont, *From Mandeville to Marx*; Dumont, *Essays on Individualism*.

<sup>100</sup> Cf. my remarks below on the pessimism of liberalism. For the references, cf. Bloch, *The Principles of Hope*; Heidegger, 'Only a God Can Save Us'.

<sup>101</sup> Among the most distinguished, or widely read and articulate: Touraine, *Retour de l'acteur*; Crozier and Friedberg, *L'acteur et le système*.

cept of 'society' acquires a residual or virtual character, serving to indicate a selective awareness of a part of the available environment of a system. But this almost supplementary notion of society does not refer to anything which exists. Society is a sort of virtual desktop or container of a plurality of programs. Moreover: neither society nor its subsystems has centres. This hierarchical view, so central for the conception of politically organized society (and one trace of which is the importance which we accord, even today, to law) is replaced by one in which society does not co-ordinate its subsystems according to some master plan, and in which subsystems are 'co-ordinated' and reproduced only through their continual diffuse activity. Weber's emergent organization theory, pinned together by top-down relations of command, is displaced. As Luhmann says tersely of Weber, 'a command, the direct translation of authority into communication, is far too simple a structural category to do justice to the complex conditions for maintaining and rationalizing a social system'.<sup>102</sup>

In much pre-sociological political theory (*i.e.* in the self-thematization of politically organized society), and in much of the sociology of law, so tenacious are well-cultivated intellectual traditions, the question of law and society has served as one of the driving problematics. This continuity, however, is superficial; beneath it are transformations which we need to take into account. When, instead of 'society', the question of group identity was phrased in terms of belonging to the 'kingdom' or the 'realm', the defining characteristics of a group were inevitably conceived in jural terms. There were individuals and families, the groups or 'communities' which encompassed them,<sup>103</sup> and the principality or kingdom in a larger sense. Law was at one and the same time the unifying and the constitutive principle of society. Living under a common set of laws, within one kingdom, provided the *differentia specifica* for comparing societies or, more precisely, nations. Here an idea of law is embedded at the core of social thought.

I follow Luhmann here in assuming, broadly, that this is no longer the case. Once 'society' emerged as an independent idea, a theme in its own right, a 'reality' separate from law, it became possible to put into question the nature of the relation between law and society. This, for the most part, has constituted the dominant theme of what is understood by the endeavour of the sociology of law. And this question of the

<sup>102</sup> Luhmann, *The Differentiation of Society*, 36. For discussion of Weber, see further Ch. 3 below.

<sup>103</sup> Dumont, *Homo Hierarchicus*.

relation is conventionally posed in terms of a 'gap' of some sort: in brief, either a gap in which society lags behind law or a gap in which law lags behind society. What these approaches have in common is that they share a preoccupation with the alignment of what is perceived to be the normative order of society with the normative content of the books of the law at any one time. Yet the irony of much modern sociology is that it both neglects law—or takes for granted what lawyers have to say about it—and at the same time provides the basis for a radical scepticism about the sociologically constitutive possibilities of law.

Autopoiesis creates the possibility of cutting loose from these formulations, of radicalizing the insight that this emergent, dejuridicalized notion of 'society' contained within it the seeds of its own disappearance, and so it creates the possibility of providing the means for a highly improbable conceptualization in which law has very little to do with society, at least in those traditional senses in which this relation between two supposed entities was constructed. Not the least of the reasons for this is that the term 'society' has ceased to refer to anything useful. The sharing of responsibility for problems in society and the thematization of these social problems through/in systems is not the same as 'society' in the traditional problematic of *e.g.* law or government 'and society'. It may be a theoretical advance that within neo-systems theory we therefore recognize that 'society' 'is'—can be no more than—the sum total of such thematizations and resonances (and even this 'sum total' is purely theoretical; there is no reason to suppose that it can be achieved or known in reality). But if we proceed in this direction, then in its wake (just behind it) another type of difficulty comes into view. This is the question of the unthematized, the socially opaque, the unknown. This opacity will be a marginal theme in what follows. I pick it up again, briefly, in the conclusion of the present work.



## 7 Legal Individualism and the Ethical Space

Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.<sup>1</sup>

The previous chapter addressed the problem of the idea of social integration through law and government and suggested general frameworks through which one could grasp how law still played a role in relation to the 'total social system' but not the overarching, encompassing role which had driven visions of society and social integration in the past and which some—especially lawyers and political theorists—continue to attribute to law in our world.

This Chapter sketches the basic features and domains of current and future legal operations—what is going on 'inside' the modern legal system. For the purposes of this discussion, we can perhaps assume that the legal system is configured in part by a weight of traditional assumptions about the role, purpose, and nature of law, some of which are directly in contradiction with the displacement of law discussed above. From the viewpoint of the legal system, that is, an assumption of the durability of its encompassing role can survive when from a different, 'external' viewpoint this is not the case. The consequences of such perspectivism and the fluidity which this generates for the cognitive dissonance which then arises between law and other social systems are also

<sup>1</sup> Tocqueville, *Democracy in America*, 290. Cf. Jack and Jack, *Moral Vision and Professional Decisions*.



explored. In particular, it is suggested that law's commitment to the individual is both a product of its historical practice and more or less a precondition for the continued viability of its core *modus operandi*—the trial, legal representation, the delivery, and administration of justice—while at the same time the core phenomenal reality of our world at the levels of government and administration is in fact aggregative and statistical—numerical and positive—and this reality is alien to that of the law, even as the 'new reality' seeps into and corrodes the basic framework and presuppositions of the legal system.<sup>2</sup>

The argument is that there was indeed at some time in the past a special affinity between law and society in the sense that the categories of society were legal categories and that the categories of law were therefore social categories. There was not for many purposes a distinction between the two, and therefore the kinds of problems of translation between the two which exist today did not exist in their modern form.<sup>3</sup> In this sense law was the oldest social science and a rich though not the only—reservoir for the language of politics. Even the question of form and substance within this traditional scheme is a distinction which appears within law and society simultaneously and in the same shape.

This is why there is nothing exorbitant about the claim that legal knowledge was privileged in the past and that law and lawyers played a decisive role *vis-à-vis* the organization of society. But this is not the case today; in modern times, all talk of privileged knowledges is misconceived. The principal consequence of this for law and for lawyers is an intensified (because it is far from entirely new) fragmentation and dispersal of law what is usually referred to innocently as specialization. The link between law and administration remains close but the relationship between the two has been reversed. Whereas in the past administration took the form of adjudication, today law increasingly tends to take the form of administration.<sup>4</sup>

<sup>2</sup> e.g. in the use of statistics in discrimination issues—or more generally in deploying the concept of representativeness.

<sup>3</sup> Whether the same would hold true of those societies whose legal cultures came to be more marked than those of common law countries by the scholastic study of Roman law in the middle ages is a matter for further investigation.

<sup>4</sup> Adjudication sections of the social security network do not operate as courts but as bureaux processing paper claims. (Interestingly, one of the criticisms of the Crown Prosecution Service is that it makes its decisions whether to prosecute on paper and in the light of quantitative performance indicators—exactly what is to be expected of a modern, 'cost-conscious' bureaucratic organization.)

In what follows, I seek to draw attention to the implications of two different but complementary trends: the growing perception of legal operations as operations which require 'professional' management; at the same time, the growing emphasis upon the specifically legal—and more narrowly adjudicatory—domain as the ethical space or conscience of society. These two dimensions will be considered in turn.

### **Managing Law**

There is much scepticism about as well as hostility to the application of modern cost-control and management techniques to the activities of government and law. The opposition to this is perhaps particularly acute in the case of law, on the assumption, for example, that no price can be put on justice. But where a budget can be controlled then it will be, other things being equal; and where levels of expenditure can be identified and attributed, control measures will follow. The primary reason for this has long been known—the pressure on public expenditure throughout the Western world derived from the budgets aimed at sustaining and reproducing society—health, education, and welfare, and the large expenditure commitments, closely interwoven with productive economies, international trade, and R & D, associated with defence, both in terms of personnel but also procurement.<sup>5</sup> Even if the costs of the legal system are relatively modest compared with others,<sup>6</sup> it is a commonplace of the UK budgetary process, studied at close hand by Hecla and Wildavsky<sup>7</sup> and confirmed annually by media reporting and orchestrated leaks, that all budgets are scrutinized for cuts or for savings on growth projections, and that, to simplify, the general logic at work here is one of percentages which thus potentially bite equally whatever the size of the budget. In such an environment, no price on justice is pious and attractive—but an illusion.

Public expenditure considerations affect the possibilities of legal systems largely indirectly. Such policies are not an instrument of policy for governing the legal system, but set limits on what might otherwise be

<sup>5</sup> Cf. Kennedy, *Rise and Fall of the Great Powers*. It remains the case that there is a somewhat mysterious necessity at work here. In part I think it follows from the very process of objectification of public accounts and their circulation in the political and public arena itself. For a critical appraisal, see especially McSweeney, 'Management by Accounting'.

<sup>6</sup> And the identification of costs would be spread across more than one department in the UK and is not identified as a single departmental budget—i.e. prisons, police, courts/judges. There is a useful comparative enquiry to be undertaken here.

<sup>7</sup> Hecla and Wildavsky, *The Private Government of Public Money*.

possible in a determinate form. (E.g. the bureaucratic constraints of legal aid may constrain the kind of evidence which the defence can produce in a trial, or at least involve that decision being taken external to the lawyer-client relation.) Furthermore, these general budgetary parameters, within which individual expenditures are incurred and decisions to incur them made, are themselves the outcome of a larger governmental financial decision-making process which takes place in the light both of concerns internal to government, to politics, to public finance, and beyond that into the domestic and world economy, at least as observed or mediated by, on the one hand, the financial apparatus of the state—the Treasury—and the financial players—the capital markets and currency speculators—on the other.<sup>8</sup> We witness, in short, some kind of transition from welfare-oriented 'unmet need for legal services' to a market-oriented focus on the provision of legal and financial services, and a shift in thematic emphasis from litigation to dispute management. Lawyers are exposed—like other professionals—to new performative scrutiny, or demands for it, and cost—not least public costs—becomes a core variable in play at this point.

Once we move beyond identification or restatement of the basic functions of a legal system or the basic tasks performed by lawyers—the writing and interpretation and application of rules, the fixing of private transactions in legal form, the advocacy and adjudication of disputes, the sentencing of offenders—there is the question of the frame(s) in which these activities are to be understood. The general thematic shift from welfare to markets and the renewed emphasis on the value of competition in recent years provide one example. In the welfare era, the notion of the availability of legal services primarily designated some adjunct to the provision of social security and other aspects of the provision of welfare as an aspect of basic citizenship entitlements. In the 1980s, legal services came increasingly to refer by contrast to what lawyers and courts provided to purchasers in markets for services. Legal services become strongly analogous to the services provided, for example, by accountants. So far as the clients of the welfare state are concerned (here of course client has as much its old as its new meaning<sup>9</sup>) viewing a legal system through this market for services frame puts the state as customer more firmly in the picture, and enables a reconceptualization of the state's involvement as a bulk purchaser or as a franchisor. Through franchising, for example, the state may hope to

<sup>8</sup> Cf. Timmins, *The Five Giants*, 455–6.

<sup>9</sup> Cf. essays in Wallace-Hadrill (ed.), *Patronage in Ancient Society*.

drive down costs through imposed competition in an area notoriously resistant to open competition. The general point is that economic categories gain a new purchase within this frame on the relationship between state, public expenditure, and the legal system.

Once the legal system is viewed in these terms, other possibilities present themselves. Courts too can be uncoupled from the apparatus of the state, at least so far as their administrative operations are concerned. They can be required to be self-financing, more generally subjected to a managerial regime aimed at maximizing the efficient use of resources and keeping to a minimum additional calls on state funding.<sup>10</sup>

From another, related, perspective we can see that the legal system, drawing a very loose analogy with financial and banking systems, splits into two. On the one hand, there remains a domestic, relatively captive market, where professionalism and the protocols which surround it<sup>11</sup> (which include national boundaries or national schemes of credentialization) operate to constrain the development of an open market. On the other hand, there comes into prominence an internationally competitive market, where English law (at present, but it is essential to state that there is no long-term reason why English law should continue to occupy this position) plays a role somewhat analogous to that once played by sterling, and English courts operate in a mode analogous to the role once discharged by the Bank of England and the City of London in relation to the stability of international currency exchanges.<sup>12</sup> Certainly, the prestige (and perhaps the prosperity) of the legal profession as a whole might be thought to depend upon the vibrancy of this work, remote though it is from the work of the high-street lawyer. And it may be that in Britain this involvement of a segment of the legal system in the international political economy distorts the relatively small system as a whole, draining off the most talented lawyers, even distorting conceptual development in areas where international or global business is concerned.

The English perspective on these issues is perhaps somewhat distorted, given that English lawyers have advantages disproportionate to the size of their profession. The profession shares a legal culture broadly similar to that of the USA, the world's largest economy. It is based in a nation-state with a long imperial history which has exported its legal

<sup>10</sup> This also applies to police and prisons.

<sup>11</sup> e.g. limits on advertising and open competition.

<sup>12</sup> Cf. Cain and Hopkins, *British Imperialism* (2 vols.); also Rubinstein, *Capitalism, Culture and Decline*.

culture to its former dominions and which continues to engage extensively in overseas investment, as well as being situated at the heart of one of the world's crucial financial entrepôts. It also enjoys the simple advantage of the English language as the *lingua franca* of the world. It is precisely here—along with the rise in alternative dispute resolution in international business which takes disputes beyond the reach of the courts of nation-states—that we should locate the rise of legal globalization, matching, if unevenly, the rise of modern international capital markets and multinational corporations.<sup>13</sup> For the moment, the 'national identity' of such globalized law firms is likely to remain clearer than is the case with some multinational corporations. Many will see limits to possibilities of scale and scope which will constrain expansion and organizational strategies taking advantage of economies of scale and scope. But these present real pressures for lawyering to become more business-like in every respect.

Much legal theory has sidestepped the role of the legal profession and concentrated its attentions on the enterprise of adjudication. Taking adjudication or the more diffuse theme of 'law-making' as its central focal point, what lawyers do is peripheral. For the most part, the starting point, for lawyers and others, seems to be that a legal system is a public good barely differentiated from police, military, and the other forces of 'law and order' and national and international security. As such, it is usually said, its costs should fall upon society as a whole. In the modern world, this view of courts and adjudication systems in particular is linked by academics and pressure groups to a view of adjudication as the development of the law through cases which stretch its boundaries. Except in the case of such public interest litigation where a party is able to succeed in meeting the costs through a public appeal for funds, there has always been something odd about this model insofar as it assumes that the public benefit—the development of the law—should be paid for by private litigants with a self-interest in the outcome. It may be a public good that such a forum is available—law rather than war—but it is not obvious that the costs should fall other than on those for whose benefit the process takes place. And here the development of the law is an incidental benefit, a sort of interpretive overlay imposed on adjudication by the proliferation of commentary.

But as legal specialists recast themselves from the litigation model to the dispute-management model, simulate trials with independent mock

<sup>13</sup> Stopford and Strange, *Rival States, Rival Firms*; Ruijgrok and van Tulder, *Logic of International Restructuring*. See also essays in Teubner (ed.), *Global Law Without a State*.

adjudicators, and seek to settle before entering the courtroom, a sort of virtual law comes into existence, stored in the internal files of the law firms. Set alongside the phenomena to which Teubner has recently drawn attention<sup>14</sup>—the international *lex mercatoria* generated outside the structures of national adjudication systems—we can see that in certain domains at least the court systems have ceased to encompass society and that the dispute-resolution function of such systems has to a degree migrated elsewhere—including, and this is the interesting point, into the law firms themselves.<sup>15</sup>

What follows from this is the dispersal and fragmentation of law in a way which is—at least at present—largely unconnected with adjudication systems. If lawyers once followed judges and clustered around courts, now increasingly lawyers follow the client. The cumulative consequence of this is that lawyers or service providers become more important than law, or at least (I would argue) there is a shift in the operational relationship or balance between the two in which lawyers move into the more decisive position. In some respects, it might be claimed, no structural or radical change arises here. In England, the English Bar was always a crucial support of the judges, and opinion at the Bar a crucial element and in some domains—e.g. conveyancing—a decisive one in the state of the law at any point in time, but this is very much a matter of the old-style guild-like character of the traditional mode of encompassment of society by law. The difference is that modern lawyers are organized in firms. If organization theorists have become interested again in the legalistic organization, perhaps it is also necessary to become more interested (in parallel) in the organization of law and legal services, that is, in the impact upon the functioning of law of the organization of those who deliver it rather than ‘make’ it.

As dispute settlement moves away from national courts—or as the possibility of such a move feeds back into the mode of operation of such courts—so the historical privileges of particular law firms are weakened. Client loyalty diminishes or at least cannot be guaranteed. In a more globalized world, competition intensifies, and one response here is to pursue economies of scale or scope.<sup>16</sup> Several things may follow.

<sup>14</sup> Teubner, ‘Breaking Frames’.

<sup>15</sup> Alongside this is the migration of other lawmaking and ‘adjudication’ into the bureaucratic realm—though in the US, lawyers are prominent here too. For discussion of some of the consequences, see Galanter, ‘Predators and Parasites’.

<sup>16</sup> For this see now Flood, ‘Megalawyer in the Global Order’: see also Abel, ‘Between Market and State’.

Partnership structures may come under pressure, especially for reasons of limited liability. Simultaneously, a rise in forum shopping may occur, driven by relative costs and efficiency, and perhaps perceptions of more or less desirable qualitative outcomes. Within established international adjudicative fora, more pressure is likely to be placed on traditional values like the impartiality and incorruptibility of judges, not least through the less and less deferential transnational mass media.

Meanwhile, nation-states may become more and more impatient with the costs of their legal systems, whether to themselves as clients or quasi-clients, or of the court systems which they provide as a supposed public good. Indeed, why not privatize them and introduce performance pay for judges? Use money or the market mechanisms to set the legal system free, in its entirety, every component of the system paying its way, and perhaps with the added spur of international competition?

The new nominalism in the management of public finance has hollowed out not so much the state as the privilege or acceptability of the insider perspectives of professionals. This occurs in particular not in relation to their individual one-to-one operations and decisions, but in relation to the aggregative consequences and impact of these decisions. It is as if the aggregate outcome should be privileged over and feed back into the individual outcome, and the aggregate level be used as the measure of effectiveness, efficiency and general consumer satisfaction. This is obviously the case where the domain in question is that of government and administration and the question of the relation between inputs and outputs. The significance of the shift of gravity in the legal profession from guild structures to firms is however potentially of the same kind—that these aggregative measures become the key means of evaluating ‘ongoing’ group activity. Senior partners—and in the future perhaps Chief Executives and their accountants—devote their energies to the information displayed on the balance sheet.

\* \* \*

It is not that everything—including power or authority or law or love can be bought.<sup>17</sup> It is rather that everything can be measured in terms of money, or, if one wishes, since money too can be measured, in terms of cost. Yet in the light of the centrality of statistics and statistical aggregation, the real significance of this is not the role of money or other cost

<sup>17</sup> In addition to the work of Shell referred to above, the essays in Parry and Bloch (eds.), *Money and the Morality of Exchange*, offer a valuable wider perspective.

measures in relation to individual decisions or acts or transactions. At this level, it is often possible to differentiate economic transactions from non-economic transactions. But at a more aggregated level, money does become a measure which acquires an allure of certainty amidst fluidity—the allure or seduction of numbers which, by virtue of their pure transparency (their pure convertibility into other numbers, even into numbers of one's own choosing, driven by one's own purposes) seem to provide a now abstract measure in place of devices like the law.

What is new here is not the linkage of money and law, or of law and calculation. What is new is the subjection of law to an alien logic—to attempts to link inputs to outputs, to think of law as a set of processes, to 'analyse' (or decompose) it in the interests of cost-effectiveness and quality. That these processes—in which traditional rule-making as the regulatory technique for securing objectives is displaced by other forms of controls—are less advanced in relation to law than in some other areas—e.g. health and its administration, or even education—is perhaps in part because of its lower place on the political agenda, which in turn is related to its smaller demands on public expenditure and perhaps the relatively lower demand for legal services compared with health or education. The other difference is that whereas it is possible to recast the delivery of health or educational services in functional or instrumental terms, with professional ethics primarily playing a regulatory role closely attached to ideas of quality assurance and consumer rights, the position in relation to core legal activities is more intricate, because of the association of law with justice and judgment. The paradox is that if law increasingly becomes a business, it is a business which operates within an unfolding ethical space.

### **The Ethical Space**

Few now share the optimism of law and science movements of earlier parts of the century.<sup>18</sup> The dominant response is a combination of distance and scepticism *vis-à-vis* new knowledges. This scepticism is fuelled by the adjudicative position, from which no doubt science in general is seen in its worst light, and the rhetorics of science most cruelly exposed (as if they should not exist, or as if the fact of their existence proves that science is masquerade).

The focus of lawyers' scepticism is not that of Popper, that truth can only be had at the price of the possibility of untruth—which is not a

<sup>18</sup> e.g. Wiener, *Reconstructing the Criminal*.



scepticism about scientific proof or experiment, or about the credentials of scientists as judges of the distinction between true and false. Lawyers have no interest in any notion of scientific advance or development. They do not conduct experiments. They do not seek to develop methodologies.<sup>19</sup> In these respects, legal scepticism is ungrounded and perhaps even tends towards a certain epistemic nihilism.

What appears to save law from nihilism is at the same time the pivotal tool in the deployment of legal scepticism—the concept of the individual. This enables lawyers to position themselves as spokesmen of the ‘ordinary man’ and of societal common sense.<sup>20</sup> The sanctity of the individual is not just an ideological figure; it is a kind of conceptual baseline. Such an individual is in a strong sense in-dividual:<sup>21</sup> it cannot be subdivided (or, rather, knowledges which claim to subdivide it fruitfully are regarded with scepticism) nor can it be unitized and combined with other units into an aggregate individual or made representative of anything other than it itself, in its uniqueness, is. In this sense, it is not a potential object of positive knowledge in a cumulative or developmental sense; trials are not experiments.<sup>22</sup> Such development as there can be is conceptual—the drawing of distinctions.<sup>23</sup>

Thus lawyers cling to this figure of the individual in a largely negative way *vis-à-vis* modern knowledges, as a figure to be defended against these subversions and appropriations. The themes of freedom and submission to authority operate in a kind of suspension against the backdrop of these (only ever partially) excluded modes of forbidden knowledge, whose development is other people’s affair, and which, it is suspected, depend upon the credulity of others.

In terms of the epistemic capacities and capabilities of modern societies, legal systems have thus at once a primitive and a sophisticated understanding of those subjected to them through legal processes. The sophistication largely lies in the possibilities of scepticism and in the opportunities to outlaw (at least in court) alternative epistemic claims—

<sup>19</sup> It may be commonplace to speak of the experimental character of tax avoidance schemes. But this is a metaphor, the reverse of the process through which the term ‘law’ was borrowed by science and social science.

<sup>20</sup> Cf. Lindblom, *Inquiry and Change*, on social science and ordinary knowledge; Wynne, ‘Establishing the Rules of Law’.

<sup>21</sup> Cf. linkage of this to Western lay culture in Strathern, *Gender of the Gift*; Strathern, *After Nature*.

<sup>22</sup> Cf. Shapin, *Social History of Truth*. We should recall, however, that modern experiments are rarely repeated: see Porter, *Trust in Numbers*; cf. Galison, *How Experiments End*.

<sup>23</sup> Cf. von Förster, *Observing Systems*, applying Spencer Brown, *Laws of Form*.

or at very least to 'judge' them.<sup>24</sup> The primitiveness resides in the conceptual baseline of the individual or legal subject.

The legal subject presents 'itself' to the law as a face, or a sur-face, which is to say a screen on to which various projections will be effected. The process of determining, through the activity of judgment, guilt or innocence, praise or blame, of where 'right' lies (which is often rationalized in terms of attribution and theorized in terms of justifications of attribution), is the exemplary manner in which this relation is established. So far as such ratiocinations are concerned, the core issue is the inference of states of mind from acts as proved and evidenced. But, at least in difficult cases and areas of the law, it is apparent that this very process brings into play an array of predispositions and prejudices on the part of judges and juries, preprogrammed interpretive schemes for interiorizing the driving forces of human behaviour, forces which are not visible and require interpretation, because the underlying assumption is that motives are not transparent but can only (or often only) be inferred. Indeed, the idea of operating upon the subject in terms of his or her actions alone, without regard (a convenient metaphor) to the inner intent or purpose, is often viewed as repugnant; it is as if what is inside is what is true or real; or, at least, the proper basis for forming judgements about the conduct of individual subjects.

Yet if the sophistication resides in scepticism and the primitiveness in what can perhaps only be called obscurantism and naivety, the question is why law continues to seem so important in our age. To some degree, it could be argued that the explanation resides in a reprise of the 'Future of an Illusion' under changed circumstances,<sup>25</sup> that law and the legal process have become a way of compensating for our sense of the inadequacy of the world we have created. In the drama of the courtroom in particular, we re-enact the idea that the individual matters and is a proper focus of attention. In this dramatic setting, the language of responsibility seems appropriate;<sup>26</sup> here, mechanisms of blame and of hierarchy come naturally. And in this setting the rest of the world, its interests, obsessions, and criteria, can be kept at bay. The dissemination of legal events through the mass media serves to intensify and focalize these developments.<sup>27</sup>

Law is a way of being sure of individuals. Conversely, the notion of

<sup>24</sup> Smith, *Trial by Medicine*; Wynne, 'Establishing the Rules of Law'; essays in Clark and Crawford (eds.), *Legal Medicine in History*.

<sup>25</sup> Freud, 'The Future of an Illusion'.

<sup>26</sup> Cf. Kelley, *The Human Measure*. For one of the best recent historical studies of this dissemination process, see Cohen, *Talk on the Wilde Side*.

<sup>27</sup> For focalization cf. Sperber, *Rethinking Symbolism*.

the individual provides a grounding for the operations of the law. In this sense legal individualism is both a method and an object. Some of the problems associated with this intimate connection are very familiar, especially in the growing range of areas where 'the law' has come to engage with persons it is constrained (by the way the world is) to recognize who are not individuals.<sup>28</sup>

Carving out an ethical space is the ideological and institutional presupposition of the rule of law, with all its importance more generally to the world order. This 'rule of law' requires in the end two things: a barrier between the inside and the outside of the courtroom, and a means of marking the distinction—means for determining the difference between what is relevant and what is irrelevant to/for the discourse which unfolds inside. Thematically, inside and outside are crucial, and it seems more than a coincidence that this is mapped on in due course to the inner/outer distinction which comes to govern sociology. But within the history of law there is a movement or process at work between concrete and abstract, a process of decontextualization which seems to lead to a collective anamnesis of the specific conditions in which conceptual configurations first emerged, once these have in some sense been cut loose from the conditions of their generation. Divergent histories of common and civilian systems only underscore this point. What continues to serve a configuring role/function is the category of the individual. But should we regard this as functioning in a stable and unchanged manner throughout the turbulences of historical events and transformations?

Against the backdrop (from legal viewpoints) of the emergence of statistics, measurement, counting, calculation, and picturing, the idea of the individual is carried forward in the law, but deprived at the same time of its traditional housing. Morality now becomes a matter of supposedly subjective opinion rather than a cognitive device for ordering the reality of the world. Enlightened opinion thus positions itself to make judgements on the domain of morality; and the possibility of a difference emerges between what is moral and what is ethical. This distinction often seems obscure—Habermas has given it its most elaborate contemporary form, but the essentials of his argument in this respect are already contained in the project which unfolds within the *Philosophy of Right*.<sup>29</sup> In the separation of law and morality which unfolds in the

<sup>28</sup> Cf. the issue of corporate manslaughter or, more generally, of the 'collective actor'.

<sup>29</sup> Habermas, *Between Facts and Norms*; Hegel, *Philosophy of Right*; cf. sophisticated discussion of Habermas in Bernstein, *Rediscovering the Ethical*; also Power, 'Habermas and the Counterfactual Imagination'.

wake of this development can be located the problem of the individual which remains at the centre of Occidental social thought. It operates, one might say, as a category suspended between law and morality, deprived of ontological support. In technologies of modern government, by contrast, the individual becomes increasingly a statistical creature (and it is in this sense more than any other that governments pursue strategies of normalization—which are essentially operations conducted on statistics and with reference to statistically constituted horizons). Rhetorical deployments of the figure of the individual should not be allowed to obscure the reality of this transformation in practices.<sup>30</sup>

Law operates with a category which for it is irreducible, but does so—such is the burden of the endless (dialectical if one wishes) process of enlightenment—in the half-knowledge that this category is reducible and at the same time too reduced (from the statistical or Durkheimian point of view, where it appears as mere variation). To this we must add that the process of democratization further complicates the picture, introducing as it does the sanctity of a certain irreducibility (of individual ‘opinion’) all of its own. In addition, of course, is the allure of the Kantian perspective-exchanging simultaneous affirmation and denial of subjectivity recently reinvigorated by Habermas.<sup>31</sup>

This appears to introduce a set of incompatible values and assumptions. Neo-systems theory provides a vehicle for understanding how this might be handled. But the resistance (e.g. among lawyers) to systems theory is itself revealing, suggesting the tenacity of the concept of the individual and the continued attraction which this flawed irreducibility continues to exert.<sup>32</sup> Law is the moral ‘individual’ moment in the face

<sup>30</sup> Thus I am at once close to Miller and Rose, ‘Governing Economic Life’, and in disagreement with them. The passage between governmentality and self-government (as the ultimate? form of individualism) is, I would argue, more problematic than has been recognized. What in particular needs to be understood is what is involved in the elaborate processes through which, as medical, psychological, historical, etc. subjects’ individual identity is probabilized in terms of an often incoherent mélange of characteristics and sub-individual elements, propensities, or dispositions. The many appeals to holistic therapies bear witness to the very fragmentation of the individual at work here. But it is the linkage of the sub- and supra-individual which is of the greatest strategic significance. And so whatever he intended to achieve, Foucault’s last work only serves to demonstrate the irrelevance of the concerns of late antiquity (the *point d’appui* of these volumes) to those of late modernity.

<sup>31</sup> Most recently in Habermas, *Between Facts and Norms*.

<sup>32</sup> It might be thought that at best this analysis applies only to criminal law and closely related areas. But these underlying themes and displacements are more pervasive than that. They infuse the law of property—willful breaches, relief, indeed, more deeply, the question of what is assumed in giving effect to intentions—and not a few of the more

of objectivism and technology. The incompatibility between these moments or orientations is handled through differentiation, which is a way of dispersing incompatibility and contradiction—specifically, that which makes or equates the individual with the marginal. The individual in Law also serves as a bridge between the realms of the inner and the outer. People feel at home with or in the law; it does not coerce their inner secrets; it is not confessional;<sup>33</sup> and it gives to each individual his due.

There is, however, an instability built into this which is embedded in the juxtaposition of the notion of human rights and the modern multi-level notion of difference. The latter fragments and unravels the idea of the individual as a differentiated unity which is ignorant of or 'beyond' the process of its determinations (or which represents the outcome of the historical process of working through the determinations of (its) being, both sub-individual and supra-individual).<sup>34</sup>

Inner secrets and external allegiances dismantle the black box individual which is the initial premise of civil and political rights. Inner secrets move outwards. This is what Freud, for one, intended in his cathartic conception of the analytic encounter, except that he hoped that analysis would lead to the dissipation of pathology, whereas now the search is for an inner core or identity which can be externalized or raised up to consciousness.<sup>35</sup> External allegiances, by contrast, move inwards. The voluntary association of self-contained but 'like-minded' individuals becomes redefined as a constitutive process of the mobilization and valorization of difference which feeds back into and reconstitutes the members of a group who have unity in their difference, who belong to 'communities of spirit'.<sup>36</sup>

\* \* \*

The rise of political economy and 'individualism' casts doubt on traditional collective ways of posing and deploying morality and moral

intricate issues which arise in fields like contract (e.g. mistake). The *soi-disant* 'fast-moving' domain of restitution, replete as it is with neologisms, is an exemplary case of the renovation of these tendencies.

<sup>33</sup> Or at least the common law: cf. Stephen, *Liberty, Equality, Fraternity*.

<sup>34</sup> Hence the accusations of fetishism and formalism (e.g. Pashukanis, *Law and Marxism*).

<sup>35</sup> Freud, 'Repression'; Lacan, *Ethics of Psychoanalysis*, 243–7. For excellent critical appraisal, see Healy, *The Suspended Revolution*.

<sup>36</sup> Richards, *Foundations of American Constitutionalism*; Etzioni, *Spirit of Community*.

questions. This is visible in 'liberals' like Mill. Mill's elitism<sup>37</sup> was not yet 'democratic'.<sup>38</sup> The contrast with Hart's later 'adaptation' of Mill in the context of a seemingly analogous debate—Hart and Devlin, Mill and Stephen<sup>39</sup>—also reveals the difference, especially in terms of Hart's psycho-social paternalism.<sup>40</sup> America has gone down a different path, if we follow Glendon, in which Mill's individualism has simply been extended to all; but it too has come up against a series of psycho-social impasses.<sup>41</sup>

What has changed since Mill is the waning of the moralism against which he argued.<sup>42</sup> This, in fact, is visible in the passage from Moore to Ayer<sup>43</sup> and the increasing formalization and proceduralization of ethics which emerges as a reaction or response to Ayer,<sup>44</sup> but also in the way in which analytical philosophy decomposes or recodes moral statements.<sup>45</sup> Deontology thus becomes one position among many, and above all a specialized academic procedure with few, if any, institutional vectors to carry it and its conclusions beyond the university into the maelstrom of contemporary positions except in areas where ethics is governmentally necessary, like embryology and genetic engineering.<sup>46</sup> Meanwhile the family continues to flourish as the site of psycho-social administration, even as it remains the crucial instrument for the moral awakening 'movements' which come and go.<sup>47</sup> We might add

<sup>37</sup> His free moral choice presupposes education and maturity: see Glendon, *Rights Talk*, where the implications of this are brought out well.

<sup>38</sup> Cf. Joyce, *Democratic Subjects*; see also Collini, *Public Moralists*.

<sup>39</sup> Mill, *On Liberty*; Stephen, *Liberty, Equality, Fraternity*; Hart, *Law, Liberty and Morality*; Devlin, *The Enforcement of Morals*.

<sup>40</sup> See also Newburn, *Permission and Regulation*.

<sup>41</sup> See Hacking, *Rewriting the Soul*; cf. Healy, *Images of Trauma*. For discussion of some limits to this, see Goldberg, 'Introduction'.

<sup>42</sup> Cf. Wiener, who registers both the bureaucratization of criminal justice systems and therefore the seepage into it of psycho-social norms; and the doubt about morality which arose in the period of differentiation and displacement of law at the end of the 19th century.

<sup>43</sup> Moore, *Principia Ethica*; Ayer, *Language, Truth and Logic*. Of course Ayer is now too radical for the new deontologists. But their arguments are framed against the background of the kinds of arguments developed in this work, rather than, for example, on the basis of the truth of revelation via the bible.

<sup>44</sup> e.g. Hare, *The Language of Morals*; Hare, *Freedom and Reason*; cf. Habermas, *Communication and the Evolution of Society*; Habermas, *Moral Consciousness and Communication Action*; Habermas, *Postmetaphysical Thinking*.

<sup>45</sup> Cf. discussion of emotivism in Dunn, *Rethinking Modern Political Theory*, 144–5.

<sup>46</sup> See also the problem in relation to patenting the oncomouse—Sherman, 'Governing Science', 179 ff.

<sup>47</sup> Craig, *Germany*, 627–31, on Nazis, women, and the family; see also Nolan, *Visions of Modernity* on Fordism and housework in Weimar Germany; more generally, see Donzelot, *Policing of Families*.

that it is not without significance that much European philosophy since Husserl has sought to purge itself of 'psychologism'—few domains today more threaten the traditional academic philosophical endeavour than cognitive psychology.<sup>48</sup>

In one sense we have a continuation of projects which go back to the early nineteenth century—the moralization of society, in which women play an important role as moral exemplars and leaders.<sup>49</sup> This is again most visible in family matters, but extends to other domains (by analogy?) like consumer affairs or ecology.<sup>50</sup> But alongside that are new ethical opportunities—business and professional ethics, anti-discrimination in hiring and personnel decision-making; a 'project' of some kind of ethical equality, the detailed working through of which is left to the courts, either through the interpretation of statutory rules (which even in the United Kingdom the courts have to develop because of the general and non-technical way in which the law is written<sup>51</sup>) or through judicial review.<sup>52</sup> Alongside swarms of lawyers specializing (increasingly) in non-transferrable technical domains, with their own global focus, orientation, and expertise, are the ethical entrepreneurs, whose reference points are also increasingly global or 'world-wide'. This latter, which everywhere has been Americanized discursively in the sense that everyone now talks in terms of rights or utilizes the conceptuality of the products of rights-based litigation, is not an illusion<sup>53</sup> nor simply an Ideological State Apparatus<sup>54</sup> though it is undoubtedly a means of deferral and displacement.<sup>55</sup> In many respects it is genuinely independent of political processes, at least in much of the West. But courts so positioned have to operate in an environment in which what is closest to them is the political system and its plurality of controls, if not over individual judges then over the legal system as a whole. Independence in the end becomes less a moral or individual person-to-person (or personnel power) question and more a systemic attribute. And so we have evolved an institutionalized systemic form for debating what are

<sup>48</sup> It is worth noting here the influence of Moore on Keynes and his circle: see Skidelsky, *John Maynard Keynes: Hopes Betrayed*, 152–4, and Skidelsky, *John Maynard Keynes: The Economist as Saviour*, 82–9. And also note here Hayek, *The Sensory Order*.

<sup>49</sup> See Colley, *Britons*, 237–81.

<sup>50</sup> Cf. discussion of new social movements in Calhoun, 'Social Theory and the Politics of Identity'; Touraine, 'Triumph or Downfall of Civil Society'.

<sup>51</sup> As in the category of 'genuine material difference' in equal pay legislation.

<sup>52</sup> e.g. the issue of the possibility of participation by lesbians and gays in the armed forces.

<sup>53</sup> Cf. Marx, 'On The Jewish Question'.

<sup>54</sup> Althusser, *Essays on Ideology*; see also Ch. 6 above.

<sup>55</sup> See above Ch. 6.

by definition largely matters of public morality, and where discrimination law provides the pivot.

Discrimination law is open to the future in an exemplary way for this new kind of ethicalization, which I am distinguishing from the moralism of would-be popular movements which take some kind of moral rearmament as their objective. In this ethical space, new discriminations can always be identified by analogy with old, already recognized, and forbidden ones, and difficult choices which can look like insuperable antinomies can appear on the horizon.<sup>56</sup>

\* \* \*

Modern law, it is common to say, is concerned with the regulation of a diverse range of social activities. Such projects of modern regulation involve standard setting and the creation of specialist policing agencies and watchdogs. The systems and networks of politics, administration, and truth conduct investigations, produce reports and proposals, recommendations for new laws and regulations, establish agencies to 'implement' them and so on. Judges deal with these things according to law, when asked. Unlike some traditional courts and judicial commissions, which literally went in search of business, or, more exactly, of revenue, modern law courts are almost entirely responsive. Not only do they await society, but they require society to present itself to them in the forms and with the evidence acceptable to them. (Courts do not determine standards of truth but regulate the 'admissibility of evidence'.) Once, a sacral quality attached to these forms and to this evidence; today, all these rules are changed or critically subjected to the possibility of change as and when seems convenient, judged again in terms of the requirements of the court as a self-reproducing activity.

The potential role of courts is relatively limited *vis-à-vis* the overall enterprise of regulation, confined to activities like entertaining applications for judicial review of one sort or another due to agencies exceeding their powers; administering fines when a regulation is proved to be broken. (In any event, it is well known that regulators are commonly constrained, both through lack of resources and through the logic of the situation, to negotiate and compromise with those they regulate. Indeed, they are continually open to the charge—whether fairly levelled or not is beside the point for present purposes—of seeing things

<sup>56</sup> A (difficult) example is the tension between hate speech and free speech.



too much from the point of view of the regulated and insufficiently from the point of view of society.)

Traditional regulation in politically organized society took the form of appropriating a portion of sovereign power through delegation or authorization by parliament or the Sovereign to engage lawfully in a social activity. In this sense, the guild system, for example, involved a politically determined differentiation of function and a politically regulated determination of how the needs of society should be met. Inevitably, too, it involved a considerable degree of delegation of power—power to make rules, to control admission to membership, to expel members, to punish, and so on (features later appropriated by trades unions). Such delegated power is still power; indeed, it is the same power in different hands (analogies with the notion of title in property law are entirely apposite at this point). It is delegated and, as already said, differentiated, power. Difference is regulated by the distinction between the lawful and the unlawful, and that distinction is posed with reference to this ‘same power’ which is delegated, with reference, that is, to the possibility of fixing an act of power as either *intra vires* or *ultra vires*. This was the focal point of the English ‘prerogative powers’ of *mandamus*, *certiorari*, and *prohibition*, all organized in terms still familiar to the English Chancery lawyer of the nineteenth century dealing with disputes about the exercise of private power which rested upon the ownership of property rather than the rulership of a state.

The new nomenclature of the application for judicial review in which, in England, these powers are today wrapped up together, can be read as a symptom of changes in law and power. The notion of delegation of power, and the scope for exceeding the boundaries of the delegation which cannot but accompany the fact of delegation, the whole project of organizing the ‘metes and bounds’ of power with reference to its origin—this entire operational framework is now displaced. Instead, judges operate with notions of reasonableness and of administrative competence. This is of course only appropriate to the extent that hierarchical organization is replaced by decentred systems, and where horizontal communication and the negotiation of boundary problems pose large energy requirements for systems.

Delegation of power did not multiply power though it made the exercise of power more manageable and its retention more perilous.<sup>57</sup> In principle, though, sovereigns of politically organized societies delegated

<sup>57</sup> The analyses in Weber, *Economy and Society* and Elias, *The Civilizing Process II: State Formation and Civilisation*, remain essential.

power over matters they could have regulated themselves, if time and inclination had permitted. This is also the logic within which kings remained for so long final courts of appeal. Such power was homologous throughout the system of government and thus amenable to the scrutiny of the law (i.e. of royal officials) when exceeded because it was always the same power, the power which was known at and derived from the centre or the apex, the king himself. Power, hierarchy, and the penetrative scheme were seamlessly interwoven.

This scheme has been displaced and archived. It is no longer sensible to maintain a zero-sum view of power in which power is a finite quality. In its place is something more fluid, amorphous, and expansionary. Indeed, this 'new view' of power has almost become a commonplace. It may well be that legal theory owes this to Foucault rather than autopoietic theory.<sup>58</sup> But this perspective is also intrinsic to a neo-systems approach.<sup>59</sup> What is still inadequately acknowledged is the new discursive figure which this new view of power (with all that it implies for law and regulation) is nurturing. Briefly: energy displaces will, or is revealed as underwriting will, which becomes just one manifestation of energy.<sup>60</sup> 'Will' takes humanity—indeed, the individual human being—as its presupposition; it is 'in the frame' of the individual. The 'measure' of power is the reach of the king.<sup>61</sup> This is precisely the horizon of the concept of politically organized society. And it is this metaphor which is displaced. 'In political thought and analysis, we still have not cut off the head of the king',<sup>62</sup> Foucault famously wrote. Foucault's own resolution of this is unclear, but seems to stop short at the project of 'Every Man a King'.<sup>63</sup> The alternative response is precisely to articulate the model of energy flows.

In this latter sense, society now has power too, and not just liberty. Banks, business, unions, the press, the police, men, adults, whites, heterosexuals, are all too powerful (all can plug in to energy sources); correlative, manifestos of resistance and the resurrection of subjugated knowledges are commonly phrased in terms of the need for empower-

<sup>58</sup> e.g. essays in Foucault, *Power/Knowledge*.

<sup>59</sup> The early reception of Luhmann and Foucault was unfortunate in the equivalence it established between these emergent bodies of theory on the one hand and the emblems of political or cultural allegiance on the other.

<sup>60</sup> Wrigley, *Continuity, Chance and Change*; Debeir *et al.*, *In the Servitude of Power*.

<sup>61</sup> '[T]he supposed lifespan of a governing ruler was a permanent feature of the political calculus of probability . . . the dimensions of historical time were measured by natural human qualities'; Koselleck, 'Modernity and the Planes of Historicity', 178.

<sup>62</sup> *History of Sexuality I*, 88–9.

<sup>63</sup> Murphy, 'Foucault: Rationality against Reason and History', 149.

ment. This new jargon of empowerment does not easily rid itself of 'old' ideas of power, not least because repressive social 'management' techniques are all too present in liberal democracies. But the logic of many new social movements precisely centres around whether a 'difference' can achieve a degree of self-thematization and of resonance within communicative sub-systems so as to articulate itself into a differentiated system of communication (e.g. 'women' or 'gender'). An energy model seems to capture the key aspects of this situation.

These reflections on power are essential to an understanding of the difference between the modes of self-thematization available to politically organized and functionally differentiated society. And they are perhaps particularly difficult for law—or for lawyers—because of the intimate connexion between law and 'old' power in politically organized society. In the university, this is registered in an uncertainty about the proper domain for the academic study of law—is it any system of regulation or ordering, any legislation, law properly so called? Within this 'new' perspective of horizontal differentiation in place of hierarchy, law becomes 'one way' of doing things, one register of communication. It is not the case that all systems are subject to law; the position is rather that law is a 'parallel' activity and its boundary conditions therefore include enforcement mechanisms. This means, sometimes, that law is just one medium of communication which can be chosen from a menu of such media. But, more generally, this 'horizontal' perspective draws attention to the displacement of the view that all activity is governed by, and under, law—the grid of *intra* and *ultra vires*, discussed above. It is not denied that the Rule of Law, *Rechtsstaat*, *Etat du droit* involve a re-articulation of sovereignty and law in which it seems that law is no longer an emanation of sovereignty, but sovereignty rendered subject to law.<sup>61</sup> Not the least of the problems of modern politics and administration is how it is possible to co-ordinate law and politics in circumstances where the legality of politics becomes largely part of politics' self-description, which in turn has not too much connexion with what lawyers take legality to be.

Although it is not usually presented in these terms, the generic shift towards reasonableness also registers the collapse of the penetrative scheme insofar as it marks a change in emphasis towards reconstructible decision pathways which in turn rely at least in part on the

<sup>61</sup> Though for a persuasive argument that the thematic modernity of these notions is often exaggerated in the standard evolutionary accounts, see Pennington, *Prince and the Law*.

objectified recording of the observation of processes and procedures in place of the inner absorption of hierarchically laid-down rules. The general problematization of decision-making involved in judicial review, this chance to use courts as a forum in which retrospectively to assess the acceptability of decisions, is no longer orchestrated primarily around the 'rule-of-law' question of the proper exercise of powers delimited in advance (even if these limits can only 'truly' be known after the fact when the question of *ultra vires* is put to a court for decision). Instead, it is essentially a question of the reasonableness of what has been decided, or the acceptability in a courtroom of what is said to have been taken into account or the unacceptability of failing to take account of something. This is not the place to linger on the proliferation within the legal discourses of judicial review of a plurality of semantic refinements and distinctions which convert this generalized notion of reasonableness into something more precise, legally arguable, specialized, even technical.<sup>65</sup> It suffices here to note that this is an exemplary instance of a number of delays and deferrals and displacements. Political and administrative decision makers cannot know in advance the legality of their decisions—they can only do their best in the light of what has already been decided (or, increasingly, in the light of the legal advice they receive at the time). They cannot be expected to know for themselves; their responsibility to legality is exhausted in having and using legal advisers. In the courtroom the decision-making scenario is in a sense rerun, but in a simulated way. There is a difference between making decisions and making decisions about the appropriate outcome of a review of a decision already made: in a review, the decision is not the court's decision and the court can only interrogate the decision in the light of relatively ideal factors governing the decision-making. The court in a sense uses a model of rule- or principle-guided decision-making. Political/administrative decision-making and the legal model of political and administrative decision-making are—or have the tendency to become—in this sense quite separate. Such pressures towards idealization, however, mean that ethical pressures insinuate themselves in this area of judicial activity.

This ethical space which now opens up in the law is a decontextualized space in the sense that it is cut off from the contexts of application or implementation. This is probably a precondition for the develop-

<sup>65</sup> The steady but relentless expansion of administrative law books provides an example.

ment and crystallization of this kind of legal practice. What is practicable is at very least abstracted into the kinds of arguments which can be put in a courtroom and is detached from the concrete settings of administration or politics which give contextual meaning to the invocation of practical considerations. Inevitably, decontextualization, removal from the scene of the action, also means the possibility of exposing and scrutinizing prejudices. Such legal argument and the other communications which grow up around it like academic commentary have therefore a critical potential. Even the abstraction of this critical potential—the abstraction inherent in anti-discrimination law or in rational grounds for decision-making—is sustained by the decontextualized setting and by the detached position of ethically engaged lawyers and judges. Moreover, the more law is detached from politics in systemic terms—i.e. the further we move away from the era of adjudicative government—the more ‘irresponsible’ both lawyers and judges become, or at least, the more they can claim (and perhaps feel) that their primary responsibility is to ‘the law itself’, or ‘the rule of law’, or ‘legality’, self-referential labels or, in other terms, myths.<sup>66</sup> Similarly, within a globalization perspective including international conferences—such loyalties can be shifted away from national traditions and orthodoxies and towards another kind of decontextualized frame of reference: the common work of lawyers and judges in different jurisdictions in the developed and developing world to advance or defend human rights, legality, the rule of law, and the cause of freedom, a set of tasks which have acquired new pertinence and urgency since the fall of the Berlin Wall, the collapse of Yugoslavia, and subsequent events. This has the added attraction to the West that the discovery of freedom and the rule of law in these parts of the world needs western help, while at the same time its previous absence is not readily attributable to what the West itself has done in the past. Western lawyers can present themselves and help and give advice in good conscience and without any post-Imperial guilt, unlike, of course, the position *vis-à-vis* the Third World, where the charge of neo-colonialism is more readily available and where self-determination carries the load of ‘not in the image of the West’ and the peril of identification.<sup>67</sup>

<sup>66</sup> Cf. the use of autopoiesis to characterize myth in Nancy, *Inoperative Community*. See also Fitzpatrick, *Mythology of Modern Law*; Cotterrell, *Law's Community*.

<sup>67</sup> Fuss, *Identification Papers*; Fanon, *Black Skin, White Masks*; Bhabha, *Location of Culture*. See also Žižek, *Tarrying with the Negative*. Cf. the argument over the continuing role of the Westminster Privy Council as final court of appeal, especially in capital punishment cases.

Legal institutions have increasingly acquired the role of making retrospective ethical judgments on the conduct of others whether in the light of legislative rules, previous decisions, or internal or self-regulatory codes of practice. In line with this we can anticipate—in indeed in many legal systems it has already happened—a general loosening of the bonds which keep judges in line with the wider process and orientation of government. This is partly because of the unravelling of legal professional identity as a monolithic identity (even in a sense, in the United Kingdom where the traditional subordination of solicitors to barristers and the exclusivity of the bar *vis-à-vis* judicial appointment meant that a divided profession was not divided against itself—indeed, each side benefited from the division of labour). There is also the element identified by Dezalay of meritocracy replacing family connexions and the transformation of lawyers from gentlemen into yuppies. Dezalay brings out the ambiguity which arises here: on the one hand business lawyers have to become more businesslike;<sup>68</sup> on the other there are pressures to become more technical in order to differentiate themselves from the accountants and other consultants whom in cultural and more general ‘input’ terms they are coming more and more to resemble. (In this respect they have to become *more* lawyer-like or ‘professional’ than, say, in the less sharply differentiated nineteenth century.<sup>69</sup>)

But the other aspect of this is the increasing differentiation of these professionals from legal professionals working in other fields. Thus it is unsurprising that general legal practitioners or high-street lawyers are looking increasingly to expand their services to include mediation.<sup>70</sup> But the ethicalization of modern law also serves to loosen the commitment to some imagined orthodoxy or traditionalism in legal decision-making.

It is only a complex of social changes which seem to make it possible for adjudication to assume or resume this kind of ethical role, which is somehow more open-ended or diffuse than the previous concern to achieve legality, especially so far as public activity was concerned. But these same changes threaten certain assumptions about impartiality. A concern with discrimination in society becomes also a concern with discrimination in the legal profession and, in a related but separately identifiable development, becomes a concern with the representativeness of

<sup>68</sup> Cf. Dezalay, ‘The Big Bang and the Law’. Cf. Mackie, *Lawyers in Business*.

<sup>69</sup> For a good discussion, see Sugarman, ‘Blurred Boundaries’.

<sup>70</sup> Cf. now Dezalay, ‘The Forum should Fit the Fuss’.

the judicial personnel *vis-à-vis* society as a whole, understood in terms of socio-cultural categories and statistical data relating to them.<sup>71</sup>

### **The Conscience of Society**

The conclusion of this analysis is that the adjudication system has open to it the possibility of becoming the conscience of society, to play again with old memories. But as such it sits alongside other practices and activities. It does not govern them. For many it is thus something to be manipulated or outmanoeuvred; and it has very little independent scope for initiatory action. But it provides an ethical space in which everything can be subjected to a particular kind of often 'uninformed' or decontextualized critical scrutiny.

At the same time, the decontextualization inherent in the unfolding of the new ethical space of the law is mirrored by a counter decontextualization in managerial and bureaucratic systems and networks, in which law, detached from the scene of judgment, is anticipated in decision-making and, in that rather refracted sense, enabled to shape or steer organizations.<sup>72</sup> This is linked in turn to the decontextualization of the mass media – the oxygen of publicity. Taken as a whole, we have a sequence or cycle of decontextualized frames, all thematizing law or legality; none of these operations should be confused, however, with the survival of the penetrative scheme.<sup>73</sup>

It does not follow from this analysis that the ethical space of the legal system dovetails with the normative frameworks which structure and horizon individual or local relationships. Nor is it claimed here that the ethical aspects of legal discourse are not remote from the moral discourses which give coherence and identity to social groups. From these viewpoints, legal systems can be just as distant and dissonant as the most labyrinthine government bureaucracy. The most that could be claimed is that the ethical space and 'ordinary' common sense share certain structural features, in that they both function in large measure pre-positivistically and non-experimentally. In each, there is a larger place for prejudices and pre-understandings (though it is not claimed

<sup>71</sup> Such a perception could be seen as one starting point for arguments in favour of a career judiciary in common law systems, or, more moderately, for the desirability of extending judicial training programmes, however much one may doubt their viability.

<sup>72</sup> See e.g. Randall and Baker, 'The Threat of Legal Liability and Managerial Decision Making'.

<sup>73</sup> For apposite discussion of the implications of this for regulation, see Teubner, 'Regulatory Law'.

for a moment that these are absent from the social sciences). What gives law its special privilege is that it is more or less open to anything, and the critical engagement which the courtroom makes possible is an engagement which in modern society has no obvious or necessary limits beyond those limits derived from the nature of the courtroom itself—as an agonistic place in which opposing sides must be taken, rather than a co-operative place where people come together in a consensual search for truth as agreement and/or mutual understanding or an experimental laboratory in which one can investigate (and reach and publish conclusions, however provisional, about) cause and effect in social life.

This ethical space—the unfolding of the legal system as some kind of conscience of society—involves primarily the critical and often uninformed scrutiny of *decisions*. Whether or not a considerable degree of stability in the political and administrative institutions of a society is a necessary precondition for the assumption of this kind of ‘irresponsible’ role by the legal system is a question for further investigation. Consequentialism has its place in legal argumentation; but it is in essence one technique among others, and as mere technique can be harnessed just as easily to ethical as to pragmatic or practical considerations.<sup>74</sup> The beauty of these arrangements, for lawyers and for ideologues, is that they permit a mode of thought in which we continue to live ‘under’ law—or even arrive at this state for the first time in history. The danger which lurks here—though I am not entirely sure from what vantage point this danger can be observed—is the danger of overburdening the legal system with hopes and expectations, with impossible demands which may in part flow from society itself but which probably flow primarily from the very activities of lawyers and legal commentators. Opened up as ethical space, as conscience of society, there is a proliferation of an ethical public discourse, which embeds itself in legal discourse and argumentation, and which multiplies in the pages of legal magazines and journals, in the quality press, and the broadcast media, and even, in some cases, in political manifestoes. In this sense the critiques of law which have developed since the 1960s are to be seen as a constitutive element of this ethical space.<sup>75</sup>

<sup>74</sup> Luhmann, ‘Legal Argumentation’.

<sup>75</sup> For a recent example, cf. Kennedy, *Sexy Dressing*.



## 8 Conclusion

Perhaps, Kublai thought, the empire is nothing but a zodiac of the mind's phantasms. 'On the day when I know all the emblems,' he asked Marco, 'shall I be able to process my empire, at last?' And the Venetian answers: 'Sire, do not believe it. On that day you will be an emblem among emblems.'<sup>1</sup>

Critique, cynicism, and a somewhat ambiguous notion of simulation can be deployed to insinuate (through a collection of anecdotes, counterfactual instances, and so-called 'thought-experiments') that 'beneath' the plurality of systems or frames which configure the shape of modern society is 'something else' which variously resists, refuses, appropriates, plays — 'lives', a kind of pre- or anti-sociological version of Foucault's great Unsaid which only the foolish would suppose they could raise up to rational or articulate speech.<sup>2</sup> In some areas, especially in anthropology, the problem this presents to theory acquires explicitly ethico-political inflections.<sup>3</sup> More generally, the somewhat negative projects which emerge at this point make strategic use of phenomena which it used to be convenient to call the traditional or irrational, while explicitly distancing themselves from all projects which assembled the modern as the antithesis of the traditional (so that the terms traditional and irrational are dismissed with derision).

Alternatively, a kind of philosophical anthropology<sup>4</sup> seeks to pursue a less negative path. Habermas's thesis of the lifeworld-ed basis of resistance to systemic colonization, in particular, is a partial articulation of the fundamental problem of the (vertical) boundary of the legal (or of any other sub-system). Foucault's positive, almost programmatic, signal (almost despite himself) towards 'subjugated knowledges' is another.<sup>5</sup> In some postmodern versions, the objection seems to be the attempt to

<sup>1</sup> Calvino, *Invisible Cities*, 21.

<sup>2</sup> Foucault, 'The Order of Discourse', 48. Some pertinent examples are: de Certeau, *The Practice of Everyday Life*; Baudrillard, *In the Shadow of the Silent Majorities*, and the now (paradoxically) classic Debord, *Society of the Spectacle*. For resistance see arguments in Dumm, *Foucault and the Politics of Freedom*.

<sup>3</sup> Clifford and Marcus (eds.), *Writing Culture*; Geertz, *Works and Lives*; Bailey, *The Prevalence of Deceit*; Gellner, *Postmodernism, Reason and Religion*.

<sup>4</sup> Murphy, 'The Habermas Effect'.

<sup>5</sup> Foucault, *Power/Knowledge*, 81.

impose any perspective at all, whereas with Habermas, the objective is to find the basis for reassembling an integrated moral (human) intersubjectivity which resists or overcomes the objectification and fragmentation which drives and results from the theory of functionally differentiated society.<sup>6</sup>

Diverse though these positions are, they perhaps share the intuition that there is a 'residuum' and that systems theory can only seek to absorb or to ignore it—that it has no theoretical resource for co-existing with it. Part of the point here is that systems theory cannot exhaust all the useful perspectives to be had even upon the behaviour of actors in systems.<sup>7</sup> It may therefore be that the problem is less that of where in the 'real world' systems effects stop as the question of what other perspectives are relevant and how to integrate them. But it is at such points that theoretical self-generation can become reductionist and lean towards a closure which somehow comes too soon. The objection is not the exclusion of real people or real worlds but the theoretical exclusion of other perspectives. But the problem, in some cases, is a more general objection to theory, to the project of 'knowing the other'.

Syncretism is no doubt foolish or impossible in the face of such heterogeneity. But perhaps what one can do is to inspect the categories of systems rationality for their deficiencies confronted with this 'noise' and hold back from any *a priori*ism, including that which favours narrative and/or thick description as the only possible alternative stratagem for 'codifying' the noise. Almost by definition, the question is whether we can find a way of understanding that does not presuppose the institutions for which systems theory has already provided a mode of analysis, a theory which thus is not an abbreviated or self-referential statement of already existing institutional arrangements. It is to this task, it seems to me, that attention continues to need to be directed. What is essential at this point is to move beyond this play of inversions or at least to be open to the question of the point at which systems rationality in general or law in particular stops, and to what we find here conceptually if not practically. This is because we proceed, in relation to the pursuit of our 'ideals' at least, too much of the time as if we still inhabit an Augustinian universe of good and evil and the struggle between two such principles.<sup>8</sup> In the context of the persistence or survival of these

<sup>6</sup> Habermas, *Moral Consciousness and Communicative Action*; Habermas, *Postmetaphysical Thinking*.

<sup>7</sup> Crozier and Friedberg, *L'acteur et le système*; cf. Touraine, *Le retour de l'acteur*.

<sup>8</sup> See Ch. 2 above.

old ideas, it is natural to suppose that the choice before 'us', as a society, as a world, is either law or depravity, reason or unreason, a distinction as simple as that which God once undertook to abolish at the historical end of the process of distinction-making itself, of 'either/or'.<sup>9</sup>

\* \* \*

According to Pierre Legendre we cannot dispense with the paternal principle.<sup>10</sup> If we try to, individuals and society malfunction. This is equivalent to asserting the indispensability of the penetrative scheme. It is no coincidence that Legendre is scathing about the epistemic (and implicitly governmental) claims of the human or social sciences. For him, the *dignior heres* of the legal tradition (i.e. the paternal principle) is Freudism, especially in the enigmatic and challenging vehicle of the Benedictine Lacan.<sup>11</sup>

To refer back to what was said above, what this perspective sees as repetitive reproduction of legalism in the categorial schemes of social science, I see as plays on and with social and governmental memory, selective recall, allusion, metaphor but with no underlying significance or continuity.<sup>12</sup> The core difference which arises in how to understand 'modernity' from a legal, political, governmental—and

<sup>9</sup> Von Förster, *Observing Systems*; cf. Kierkegaard, *Either/Or*.

<sup>10</sup> Legendre, *Le crime du caporal Lortie*; discussion in Salecl, 'Crime as a Mode of Subjectivization'.

<sup>11</sup> For this, de Certeau, *Heterologies*, 59–60.

<sup>12</sup> In different terms, etymology can be—and usually is—misleading, except as a purely historical device. Even if the unconscious is structured like a language (and is this, in the end, a 'factual' question or something more *a priori*, immune from empiricism?), we are not required to accept that language possesses or is the repository of the unconscious, especially a collective unconscious. It seems to me that Freud was simply trying to grapple with the complexity of the problem his work had created for itself of the linguistic mediations (including accidents and coincidences—homophony, for example, which is unrelated to 'meaning') involved in his analytic investigations. Given the analytic/therapeutic strategy he came to pursue, language or representations had to serve as a substitute for the intangible or unobservable unconscious—yet this same unconscious always functioned as if it was a thing—why else call it 'the It'? By transporting these real and complex problems onto the plane of language as such, Lacan at once advanced and diminished this project. Advanced, because its departure from medical or more general empirical positivistic science could be justified with reference to other domains like philosophy (however complicated Lacan's relations with that discipline in his time might have been); diminished, because the Freudian project of discovery of the unconscious drifted off into a range of mysticisms which Lacan's own Kabala did little in practice to restrain, whatever his intentions (which are of course still discussed). For these points, see Freud, 'The Unconscious'; Macey, *Lacan in Contexts*; Clément, *The Lives and Legends of Jacques Lacan*; Borch-Jacobsen, *Lacan: The Absolute Master*; Roudinesco, *Jacques Lacan & Co.* In my view it is unfortunate in some respects that what is increasingly crystallizing as 'psychoanalytic jurisprudence' is so dominated by Lacanian theorizing, with all the ambiguities involved in the nature of this operation, and largely disregards the contribution to

above all administrative point of view is the place of statistics in the constitution of the social and natural world. The desire for statistics has always preceded the realization of statistical information. Those who argue that the reliability or meaningfulness of statistics depends upon trust in the information-gatherers, processors, analysers and, perhaps most crucially, in the methodologists whose interests are supposed to be disregarded and for whom the professional goal is 'objective truth' itself are misguided—although no one is going to dispute the value of interest-free enquiry and information provision in a democratic society. (Except someone who is affected or implicated by the information so gathered in an unfavourable way.<sup>13</sup>) Governments endlessly complain—as do, more generally, all involved in 'administration'—about the 'lack' of information. Once techniques of information gathering are perceived to be available, there seems to be no limit (other than cost or irrelevance, which is itself a highly selective and information-availability-dependent concept in these times) upon the need for information. Paradoxically, perhaps, the pressure in this direction is intensified in democratic systems.<sup>14</sup>

In fact, there is no master principle which subsumes, and thereby guides or justifies, other, lower level principles. But how can such a claim be justified itself? I would deny the validity of the question. The problem lawyers have is what 'contribution' they can make to the emerging social formations. But this is a problem specific to lawyers in one sense—in the sense that the penetrative scheme can no longer be deployed as the basis of legal or lawyerly operations.<sup>15</sup>

the 'bigger picture' of the range of work which emerged in the UK over a different time-span and in different conditions. Especially relevant, perhaps, is that group of analysts who sought to disentangle their approaches from the rivalry between Anna Freud and Melanie Klein: see Trist and Murray (eds.), *The Social Engagement of Social Science Vol. I: The Socio-psychological Perspective*; and esp. the essays in Kohon (ed.), *The British School of Psychoanalysis: The Independent Tradition*.

<sup>13</sup> Here cf. Locke, *Collapse of the American Management Mystique*, 224, on the use of statistics in Japan, not for control or surveillance purposes, but in order to make accessible to each member of an organization both the overall performance of the organization and the individual's contribution to it. On the idea of Japanese management distinctiveness, see also Miller and O'Leary, 'The Factory as Laboratory'.

<sup>14</sup> As we have seen, this is a central plank in the argument developed in Porter, *Trust in Numbers*.

<sup>15</sup> It is intriguing that sociologists and others have rediscovered trust. The traditional skill of lawyers, I have argued, was to convert distrust into trust through their instruments, formulae, etc. underwritten by the coercive apparatus of nation-states. Modern society in the end is underwritten by explicitly identified and differentiated underwriters. The insurance—i.e. risk-spreading—principle dominates.

The paradox of legal systems is that the process of adjudication is premised organizationally and conceptually upon the face, the surface, the appearance, on what is visible in court,<sup>16</sup> and yet, in the modern world at least, the governing assumption is distrust rather than trust, scepticism about appearances, doubt regarding how much surface appearances reveal. Surfaces, in general, have become problematic rather than revealing, domains to be penetrated rather than appreciated.<sup>17</sup> Every surface bears with it, it is thought or assumed, a 'beneath'. But for the law this beneath is primarily a philosophical or a prioristic rather than empirical beneath; a domain of will-formation, purpose, intention, and so on. This means that it is not legible in terms of banality or normalization (except and insofar as the notion of the normal permits or facilitates imputation and attribution of intentions). The penetrative scheme has become a postulate rather than an ontological starting point. The modern individual, by contrast, when taken seriously, is revealed as in effect a composite of a range of measurement techniques: psychometric measurement ranged alongside statistical aggregation, the sub- and supra- individual schemes seamlessly combining in the mass media, popular culture, and perhaps therefore in us all, in a new phantasm which holds out to us not fear but hope, possibility not limit—to be free and conscious possessors of ourselves. This is a phantasm not least because its very conditions of emergence undermine its possibilities of realization. But, at the same time, this does not undermine its effectiveness, the kind of effectiveness which was once—and we can now see too narrowly—called the 'ideology' of individualism.

To point out all of this is not—to say that it is wrong. From what position could such a judgment be issued? But it is clearly open to abuse, given the complexity of human subjectivity which is revealed through the focus of a range of disciplines and empirical studies.<sup>18</sup> The return of voluntarism—of just deserts, of contracts, etc.—is accompanied by both rhetorics and practices of management

<sup>16</sup> See Ch. 6 above.

<sup>17</sup> Cf. however the discussion of trust in Japan in Locke, *Collapse of American Management Mystique*.

<sup>18</sup> Regarding the collapse of faith in science, and the re-entry of individualism and punishment, one should note, that it is not—cannot be—a simple matter of switching into reverse. Perhaps the distinction between free will and determinism is a simple oscillation, but one is inclined to think that the distinction is copied into the marked side of the original distinction (i.e. determinism). That is, a space is 'reclaimed' for voluntarism, but on the already established ground of determinism(s).

accounting: the audit society.<sup>19</sup> This is about trusting systems not 'people': indeed, its premise is that unsystemic actors are to be distrusted above all else. In one of many ironies, actor-centred processual emphases in sociology and anthropology here flip over into a focus on process which disregards the actor, or which regards actors as only elements in processes and which is interested even in processes which handle actors—staff training, staff appraisal, and staff development systems, for example. Actors become human resources of organizations. In some political rhetorics it is imagined that this heralds the return of individualism.<sup>20</sup> If in this language systems are treated like actors—with missions, aims, and objectives, and distinctive identities—so, as the corollary, actors (or should we say what used to be called actors?) are analysed and deployed like systems: time-and-motion studies, time management, job satisfaction, personal fulfilment—even mandatory taking of holidays. Individuals cease to be in-dividual and become rather complex combinations of elements both physical and psychic; and these combinations become calculable and thereby manipulable.<sup>21</sup> (In theoretical terms, the formalization inherent in Parsons' AGIL scheme might seem both to belong to this era and to beckon towards its future.<sup>22</sup>)

It is not claimed here that any of these scientific intrusions into the 'lifeworld' of 'people' are effective in the sense that they achieve their stated purposes. These are open questions which can only be answered with reference to particular cases. More interesting is the culture of experimentation, improvization, and permanent change and innovation which these processes inaugurate. If things don't change they must be maladjusted to the rapidly changing demands of the world.<sup>23</sup>

It is inescapable that not everyone has a stake in permanent change. Moreover, the achievement of stability in some contexts serves as the mission of those promoting permanent change. We need in relation to much of this to recognize the collapse of hierarchy and the rise of horizontal relations. This transformation is both most visible and most sus-

<sup>19</sup> Power, *The Audit Explosion*; Power, 'The Audit Society'.

<sup>20</sup> For excellent discussion of this in the British context, see Jenkins, *Accountable to None*.

<sup>21</sup> Cf. Miller and O'Leary, 'Governing the Calculable Person'.

<sup>22</sup> The AGIL scheme sought to formalize sociological analysis in terms of four functions which themselves cluster around the familiar (Weberian) instrumental/expressive divide: 'adaptive' and 'goal-seeking', 'integrative', and 'latent pattern-maintenance' functions. Useful discussion of Parsons' project is now to be found in the essays in Robertson and Turner (eds.), *Talcott Parsons*.

<sup>23</sup> Cf. Touraine, 'Triumph or Downfall of Civil Society'.

pect (in that it is presented as the equivalent of social and economic equality, which it obviously is not) at the level of purposeful organizational (re-)design. But there is a wider logic at work: people become actors, or rather functions; functions, in turn, need to be assessed and reassessed. At the level of functionality and of the location of functions within systemic complexes, no function, and *a fortiori* no incumbent of a function, is (at least in theory) privileged or exempt from criticism and scrutiny. Furthermore, in this environment everything becomes relative: market share, mobile rankings, etc. If it is not an oxymoron, one would say that a statistical sensibility pervades all assessments of achievement, and that all such assessments are permeated with a sense of impermanence, underscored by finite accounting time-frames.

These changes can be lamented and/or their shallow basis revealed through certain modes of critique.<sup>24</sup> Yet perhaps this shallowness is necessary, or at least a constituent element of the developments under consideration here. In the academy this is revealed in the collapse of foundationalism and the parallel rise of methodology. The rather curious position of law faculties in relation to this change is clear enough, if, as in some other disciplines, increasingly concealed. But the same is true in relation to the practical business of government. Indeed, one could argue that this business is increasingly 'theoretical' or that the inescapable pragmatism and opportunism of government is increasingly horizoned by theoretically mediated realities, in which methodology and the assessment of methodological adequacy are themselves increasingly thematized. That decision-making itself could become scientific or even mechanical may have receded as a viable project, and this general recognition itself seems to preserve an important place for law and legal 'takes' on the world. In fact, however, the policy decisions which have to be taken are based on a range of statistical data and on more or less informed assessments of the meaning of the data available. To try to make decisions on the basis of direct vision of realities is seen as an act of ignorance or blindness. Clear vision is statistical vision. Intelligent vision is additionally alert to the methodological dimension which underscores, but does not, in the old sense, found, the data. In practice methodology may be axiomatic just like the old foundationalism; but in principle, methodologically one might almost say, it is not. Rather, it is always open to partial and incremental amendment, adjustment, and revision.

<sup>24</sup> e.g. Power, *The Audit Explosion*.

The main thrust of the argument, stressing as it does the shift from the hierarchical to the horizontal, is directed quite particularly to the way we think about law. I take issue with the general assumption that law is the solution to society's problems. But in so doing I am not able to suggest any other solution. Or rather: without being dogmatic or theory-driven here, it seems that at least in part the whole problem is couched in the wrong terms. We can at least rephrase the questions if we acknowledge that society no longer exists as a stable and identifiable entity (or, if unstable, as a former entity in need of the restoration of its entiti-ness). If in place of this stable supposition we assume rather the reality of mobile configurations of larger or smaller scale, we can begin, perhaps, to come to terms with what it means to live in a world which is not without law (far from it) but in which law—ordinary practical law, theoretical law, or metaphorical/metaphysical law<sup>25</sup>—ceases to work in the old way.

What remains is a situation in which we at one and the same time have become suspicious of the autonomous individual and of the logic—or the idea—of supra-individual systems. Regarding the latter, confidence has ebbed in two respects: first, regarding the real possibilities of systematicity, which the commitment to individualism insists is a perspective whose adequacy is always undermined or subverted by 'people'; secondly, regarding the supposed logic of these systems as such.

All that is argued here is that we have to see the central role law will play in the future in terms of an occluded vision, as a temporary refuge from the squalls of the rest of existence, as a temporary resting place in which we can, for a time, possess ourselves, assert ourselves, take comfort in the achievement of justice or surrender to grief in the face of its failure. And the rest of the time? Well, we are just something else, workers, consumers, citizens, believers, genders, ethnicities, sexualities—in all contexts efficient or inefficient, competent or incompetent, confident or unconfident, rich or poor, optimistic or pessimistic and so on (and on). . . . Sovereign individuals? Hardly. An iron cage? Not at all. But quite a lot of both, along with what are increasingly normalized as the usual tensions and contradictions.

\* \* \*

<sup>25</sup> As in Lacan, *Legendre*, and their camp-followers.



Liberalism is based on a 'realism' which is in a sense an exhausted realism, a pessimism. It is based on fear—fear of humanity or of what humans in groups, mobilized humans, visionary humans, humans armed with 'new new rhetoric' may do.<sup>26</sup> These negative qualities, these repressions, make it rather unattractive. Moreover, it is caught up in a number of contradictions. In particular, its complicity with and dependence on modern social science—on economic forecasting, on statistics, and statistical thinking—mean that its cult of the individual or the family is permanently undercut by its operational practice; it may think or analyse 'micro' but it acts all too often 'macro'—the world of interest rates, trade balances, budget deficits, exchange rates. Its commitment to international order and security is always vulnerable to the fact that its political leaders and representatives are chosen by domestic electorates bounded by the nation-state. These electorates in turn are dependent for their knowledge of the world on information media owned and controlled by multinational corporations. Within the nation state, care and community are bureaucratized through the welfare state and politicized through the electoral system. Individual citizens cease, except through the payment of taxes, to be responsible for the needs of strangers, and there is a widespread suspicion too that the resources of the state are increasingly squandered on the administration of services rather than on their direct delivery—in health, in education, in welfare, and so on.

Nor is the picture much more encouraging with law. The legal system may be perceived to be latent with possibilities—especially in relation to the unfinished project of equality before the law. But for a range of reasons it has proved difficult for legal systems to escape the charge of politicization. This is partly for personnel reasons—the social groups from which lawyers and judges are predominantly recruited—and partly because of genuine doubts, within the liberal model, over what adjudication systems can do, or do appropriately. At the same time, the meaning or social resonance of the supposed autonomous values of legality become increasingly obscure—not least because they become increasingly abstract and theoreticized.

I do not seek to conclude with a battery of prescriptions. There are enough profundities in the world already, wrote Geertz, and the same is true of prescriptions.<sup>27</sup> A world full of theories of everything is a world which needs time to reflect. And the paradox is that this is so

<sup>26</sup> Santos, *Toward a New Common Sense*.

<sup>27</sup> Geertz, *The Interpretation of Cultures*.

difficult because there is little time adequate to the task, precisely because there are so many theories of everything. The danger here is that everything tends towards nothing, towards a kind of overblended soup whose contents are illegible. The positive spin which can be given to the same tendencies invokes possibilization, i.e. experimentation and imagination. What emerges will depend on . . . ? We do not know and cannot tell in general. We can only say that there are open possibilities for thematization. This is the reality now of possibilization. Much more difficult is how themes should or can be framed, and the achievement of the stability which seems to be necessary in order to frame themes such that they are useable in a more than evanescent way.

But we are not left with the *horror vacui*—the ‘displacement’ of law delineated here is not a nihilism. It is no part of my argument to suggest that people should not be (or even want to be) people. ‘Systems’ do not ‘rule’—this is the whole point of the argument! In this register of people—person discourse, I follow, for the moment, in the light of the foregoing, Odo Marquard discussing finite freedom as understood within his sceptical moralist framework:

In general, it is advantageous for man to have many determining factors: not none at all, and not only one, but many; because human beings are not free by virtue of the fact that they copy God (as quasi-omnipotent directors on the world stage, or by having unconditioned capability); rather, they are free through freedoms, in the plural, which fall to their lot because, in the crush of the determinants that bombard them, these determinants hinder each other, reciprocally, in their determining work. It is only by virtue of the fact that each further determinant curtails, impedes, and moderates the determining pressure of each of the others that each human being is and possesses his or her own (modest, entirely finite, limited) individual freedom *vis-à-vis* the sole clutches of each determinant. What makes a human being free is not zero determination—the absence of all determinants—or the superior force of a single determinant, but a superabundance of determinants.<sup>28</sup>

To achieve even this perspective is not easy. What is easy is to claim that such a perspective amounts to the bland leading the blind. Such claims, however, disregard the painful conclusions which an intelligent observer can draw from Western history. It is perhaps uncontentious that we can set higher goals for ourselves than was possible in the past. But at the same time, it makes little sense to set out to do so as if law holds out a mechanism comparable to what one might have claimed for it in those times when law and truth were indistinguishable.

<sup>28</sup> Marquard. *In Defence of the Accidental*, 124.