History and the Characterization of Law: Just War and Other Legal Things in the Age of Positivism

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Abstract

If what is important in our affairs is that we know the truth, then are there present things about which we must know the past in order to know the truth?

I argue there are, and that one category of those things is legal things, the law. By law I mean political theory, justice, right, rights, positive law and ethics; and all of the various ways those things have been understood by jurists.

The way we reason about the law radically changed in the Enlightenment. By the end of the 18th century science and positivism as general methods of reason had refracted the unity of law into a scientific part and a prudential part, laws of nature and natural law. The natural law part consisted of various concepts that were then each understood to exist independently of the others: morality, positive law, political theory, justice, ethics, etc. In the aftermath positivism dominated the way law was understood. In positivism law is opposed to morality, a categorical term into which all of the prudential concepts are reduced. The prudential fragments also underwrote the development of the social sciences, and operationalized the development of ideology/critique (e.g., Marx, Nietzsche, Freud, Foucault) and the relativization of political values.

Any discussion of a fragment of law must include discussion of the other fragments if the Right or truth of the law is to be understood. Positivism, a fragment, is inherently incomplete as an understanding of the law, and its incompleteness mandates that if truth about the law is sought, then it must be sought in the holistic vision of law.

I generalize to argue that any argument about living things that touches, traverses or occurs after the Enlightenment must take into account the changed nature of historical space originating in the Enlightenment. Nothing in post-Enlightenment historical space, especially legal/moral things, can be taken at face value, including positivism and the US Constitution. We must strive to reassemble or revision Right for an age in which positivism is the best tool of ideology, and the dominant ideologies serve oligarchic ends.
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HISTORY AND THE CHARACTERIZATION OF LAW:
JUST WAR AND OTHER LEGAL THINGS IN THE AGE OF POSITIVISM

1. INTRODUCTION

We cannot avoid the past. Everything we do is constructed and given meaning there. What we can and often do though, is avoid thinking about it, treating the present as though it has always been; or that if the past has any importance it is only the recent past, the state of affairs that immediately preceded the present. If what is important in our affairs is that we know the truth, then are there present things about which we must know the past in order to know the truth?

I argue there are, and that one category of those things is legal things, the law. By law I do not mean the restricted positivist range of definitions that are gathered in the Latin lex, but the broader set of meanings gathered in the Latin ius. Law in this reading encompasses political theory, justice, right, rights, positive law, morality and ethics; and all of the various ways those things have been understood by jurists. This is the way law was understood before the Enlightenment, generally speaking. It is a holistic vision of the law that survives linguistically in various Indo-European languages (Recht, derecho, droit, diritto, dharma, etc.) and can be found in Chinese, Arabic and other languages; but not in English. In the West when we think of certain kinds of law we are thinking of ius, most importantly natural law (ius naturale) and international law (ius gentium).

The way we reason about the law radically changed in the Enlightenment. By the end of the 18th century science and positivism as general methods of reason had refracted

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1 This paper addresses theoretical issues I encountered in a critique of just war doctrine (justum bellum) that I am still working on.
the unity of law into a scientific part and a prudential part, laws of nature and natural law. The natural law part consisted of various concepts that were then each understood to exist independently of the others: morality, positive law, political theory, justice, ethics, etc. In the aftermath positivism dominated the way law was understood. In positivism law is opposed to morality, a categorical term into which all of the prudential concepts are reduced. The prudential fragments also underwrote the development of the social sciences, and operationalized the development of ideology/critique (e.g., Marx, Nietzsche, Freud, Foucault) and the relativization of political values.

Shortly after the Enlightenment fragmentation of ius we see the emergence of the twinned concepts of ideology and critique. Ideology is the way a dominant power uses language and socio-political structures, i.e., meaning, to create and maintain their dominance. Critique is the method used to disclose ideology. We learned the language of false consciousness and truth regimes, and in post-modernism saw the world as irretrievably defined by power using ideology. I argue that ideology and the relativization of political values were operationalized by the fragmentation of ius.

Any discussion of a fragment of law must include discussion of the other fragments if the Right or truth of the law is to be understood. Positivism, a fragment, is inherently incomplete as an understanding of the law, and its incompleteness mandates that if truth about the law is sought, then it must be sought in the holistic vision of law.

I generalize to argue that any argument about the law that touches, traverses or occurs after the Enlightenment must take into account the changed nature of historical space originating in the Enlightenment. Beginning at some point after the Scientific Revolution, and dominant by the mid-19th century, is the understanding that nothing is
really what it seems to be. There is always some expert that understands the thing better, some ideology to be disclosed. Nothing in post-Enlightenment historical space, especially legal/moral things, can be taken at face value. We must strive to reassemble or revision Right for an age in which positivism is the best tool of ideology, and the dominant ideologies serve oligarchic ends.

The insights or methods of this paper can be applied to many classes of knowledge, including things touched by the ideology of science (scientism or naturalism); anything to do with law/politics/morality/right/justice; and ideological things. An example that bears research in light of this paper is the problem of how to interpret the US Constitution. The US Constitution was drafted in the high period of the Enlightenment and any theory of interpretation has to take into account what that means. Another example would be the theory and practice of reasonable doubt as its contemporary meaning emerged (after a lengthy journey) in the same period as the US Constitution.

I lay out the general historical methods on which my argument rests, describe enough of just war ideology to make sense of my argument, and follow this with a brief discussion of each of the methodological issues. I conclude with some general thoughts about the future of Right.

2. THE ENLIGHTENMENT AND HISTORICAL SPACE

The Enlightenment is like a one-way prism for Right. Before it Right was a robust term encompassing ethics, the political, power, justice, and positive law. After it Right had been irrevocably refracted into morality, positive law, power, right, ethics, politics and justice, as separate and independent terms. We explain this to ourselves with a story.
Once upon a time there was natural law and positive law. The Enlightenment opened our eyes to the profound errors and confusions of natural law, and by the beginning of the 19th century natural law was basically dead as a theory. A few people argue for natural law now, but they tend to be Christians and they argue for natural law as a mask for divine (Christian) law. We now understand that the real problem with law is not natural law, but morality. Natural law is a species of the problem between law and morality. Morality and the law must be separate because the existence of immoral laws proves that law cannot be validated by reference to morality. We have the moral order and the legal order, and they relate to one another, but are not identified. That is the end of the main story, but there is a significant sub-narrative. Morality, now representing the main category, is nonsensical, metaphysical, subjective, emotive and altogether unreliable as a scientific matter, and therefore it is not worthy of respect. Real law is scientific law.

For the historian of law whose history terminates in or traverses the Enlightenment the refraction and its story present profound methodological problems. If we limit our historical inquiries to the period after about 1815, we are not necessarily

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3 ALASDAIR MACINTYRE, After Virtue: A Study in Moral Theory 19 (University of Notre Dame Press 3rd ed. 1981/2007). (In that period [the Enlightenment] 'morality' became the name for that particular sphere in which rules of conduct which are neither theological nor legal nor aesthetic are allowed a cultural space of their own. It is only in the later seventeenth and the eighteenth century, when this distinguishing of the moral from the theological, the legal and the aesthetic has become a received doctrine that the project of an independent rational justification of morality becomes not merely the concern of individual thinkers, but central to Northern European culture. at 39).
4 H.L.A. HART, The Concept of Law 185 (Clarendon Press 2 ed. 1994). (… a question [that is said to concern the relation between law and morals] … may still be illuminatingly described as the issue between Natural Law and Legal Positivism, though each of these titles has come to be used for a range of different theses about law and morals. At 185).
5 See note ___ and accompanying text.
6 In general, I use the word "law" in the paper in the broad sense of Right (ius), not in the narrow sense of scientific law (lex). HLA Hart defines ius as the narrower idea of law, but his reading of these meanings must be rejected; they stand common sense on its head. Lex is the narrower meaning, because ius refers to the political/moral context of the law in addition to the lex. See HART, 207-12.
confronted with the problems because we are working in a coherent historical space, bounded by the Enlightenment on one side and the present or future on the other, and perhaps by various socio-political boundaries. But if we venture into the Enlightenment, e.g., by considering the history of the American or French revolutions or constitutions, then we have entered a different historical space. And, if we venture into the late middle ages, when so much of our legal tradition was established, we have gone into yet another historical space. Similarly in that case, if we restrict our history to the late middle ages, or even to the contiguous centuries, we do not necessarily have to confront the problem. But histories of legal things that enter or exist entirely within the Enlightenment must account for the transition from a metaphysically stable historical space before the Enlightenment to the metaphysically unstable historical space that originated in the Enlightenment and which has persisted to the present.

We leave ordinary historical space when we encounter and must account for something like the Enlightenment, with its unique distortions of the way we understand life. It represents a comprehensive transformation of the dominant ontology and epistemology, and in the way all ethical topics are treated. Moreover, and of equal importance, it changed the values of historical inquiry by privileging ahistoricism; in other words, history itself lost status as a form of knowledge, and historical inquiry became in some ways quaint, the predisposition of moth-eaten academics seeking some unscientific self-fulfillment. The Enlightenment in time resulted in the crises of post-modernism, in which language is disconnected from meaning and history. It is no longer possible to approach an historical entity or argument assuming anything, including the

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I use the words morals, ethics, law, justice, politics and right somewhat interchangeably, as they all share a common meaning, reflecting different aspects of the idea of right.
idea and functioning of history, has an agreed meaning. Things are reified differently after the Enlightenment than before, if it can be said they are reified at all. My goal is to address the methodological issues encountered when tracing the historical development of a legal idea in and through ordinary and unordinary historical spaces.

I am concerned only with the history of ideas, although the issues I raise may apply in other areas of history. Idea is perhaps not the clearest way to express what concerns me. I am interested in word-concept linkages over very long periods of time. To say it is an idea implies it is one thing that persists through the period under consideration. However, at least with the word-concept I look at most closely, just war, both the verbal formulas and the concepts change, making it unclear what it is that bears identity throughout the transformations. Idea works as long as it is not understood to mean something so close to the universal as to be almost meaningless as a historical thing.

3. **TYPES OF HISTORICAL TRANSFORMATIONS**

There are several kinds of transformations a concept/word can undergo over the course of time. In addition, there are interpretive issues arising from the more abstract interplay between the realm of ideas we necessarily use to understand or organize history and the actual unfolding of historical events and things themselves.

The methodological issues are:

1. Morphological transformations;
2. Semantic transformations;
3. Transformation into an historical institution;
4. Transformations from changing temporal perspective;
5. Transformations in the epistemological environment brought on by the Enlightenment; and

6. Background assumptions about the necessity and nature of history itself.

These features overlap and interpenetrate, and although I discuss each in turn it is difficult to do so without referring to the other concepts. Features 1-3 occur in normal historical space; i.e., historical space in which no metaphysical assumptions about history change in the period of time under examination, and in which history is read for a standard purpose, either for understanding the development of a thing over a fixed period of time, or to understand something about the present.

I will use two word/concepts to illustrate my points. The first is the idea of consent, and I use it to illustrate transformations 1 and 2. The second and main illustrative word/concept is just war. Today just war is represented in a complex discussion among philosophers, political scientists, sociologists, anthropologists, and historians who are trained in or opine on morals or ethics; international lawyers; and military thinkers. Military thinkers study just war in search of reasons for military acts; international lawyers study it as a set of legal doctrines to be applied in various circumstances; and the others moralize about it because they feel no-one else is paying sufficient attention to the problematic of war, it excites them in some way, or they know little about it.

The ideology of just war opens with a solemn invocation, beginning with the Latin phrases *ius ad bellum* and *ius in bello.* These phrases are explained. *Ius ad bellum* refers to the three to six rules by which the justice of initiating war can be determined,

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8 *Ius* and *jus* are the same.
and *ius in bello* refers to the three to six rules by which the justice of acts taken during the war can be determined. Then follows the teaching that these are independent sets of rules. A war can be unjustly initiated, but the belligerents are obligated to follow the *in bello* rules anyway. There can be an unjust war fought justly; or a just war fought unjustly. Then the reader’s attention is directed to the names of past just war savants: Augustine, Thomas Aquinas, Grotius, etc.; sometimes with an explanation of which first wrote the rules. Once the invocation is over, the reader is often treated to some lengthy philosophical grinding about proportionality, combatant immunity, etc.

The ideological picture painted above, while dominant today, is grounded in a historical narrative that only bears indirect relationship to the ideology. I summarize that history in the following table, and then follow it with some explanatory notes as background for the methodological analysis.

**Table 1. The history of just war [originates with Augustine]**

<table>
<thead>
<tr>
<th>Period</th>
<th>Law of war</th>
<th>Language of ethics of war</th>
<th>Philosophy of law</th>
<th>Language of right</th>
<th>Language of science of law</th>
<th>Language of morals</th>
</tr>
</thead>
<tbody>
<tr>
<td>~400-1650</td>
<td><em>Iustum bellum</em></td>
<td><em>Iustum bellum</em></td>
<td>Natural and positive law (&amp; divine and human)</td>
<td><em>Ius, lex</em>, law, justice, ethics (mores)</td>
<td><em>Ius, lex</em>, ethics (mores)</td>
<td>none</td>
</tr>
<tr>
<td>1650-1815 Enlightenment</td>
<td><em>Iustum bellum</em></td>
<td><em>Iustum bellum</em></td>
<td>Natural and positive law</td>
<td><em>Ius, lex</em>, law, justice, ethics, morals</td>
<td>Law, <em>ius</em>, <em>lex</em>, justice, morals, ethics</td>
<td>Morals</td>
</tr>
<tr>
<td>1815-1919</td>
<td>None</td>
<td>none</td>
<td>Positivism</td>
<td>Law, justice, ethics, morals</td>
<td>Law (lex)</td>
<td>Morals</td>
</tr>
<tr>
<td>1965-present</td>
<td>UN Charter, <em>ius ad</em></td>
<td>Positivism</td>
<td>Law, justice,</td>
<td>Law (lex)</td>
<td>Morals</td>
<td></td>
</tr>
</tbody>
</table>
Note the following:

- The discontinuity that manifests in the law and language of war in the first period after the Enlightenment (1815-1919).
- That in the Language of Right column the terms after the Enlightenment are considered to be separate, as there is no word that brings them together.
- Justice, after the Enlightenment, is generally understood only in a normative sense, as some kind of correlative to morals. The idea of justice as descriptive of the legal system is subsumed by the language of positivism and virtually disappears.
- “Just war” is a bad translation of *iustum bellum* and has led to a plethora of bad interpretations of justice in the context of war. The better translation is the legitimacy, right or law of war. The term has to do with the lawfulness of war, thus law of war is the most literal translation.
- That today the phrase “law of war” is often used to refer only to the Geneva and related Conventions, and does not include reference to the other law of war found in the Charter.
- Morality emerges in the early Enlightenment, as Right is being unbundled and dissociated from power.

a) Morphological and Semantic Transformations

When tracing a concept/word through very long time periods the form and meaning of a word will change. Changes in form occur as language develops, or the
concept/word is assimilated into another language. Changes in meaning occur as the context and function of the word/concept develop.

I illustrate using the concept/word of consent rather than iustum bellum because it is a better example for transformations 1-2. In Justinian consent meant something that high status people had the right to do because they had power. Many centuries later, in the 12\textsuperscript{th} and 13\textsuperscript{th} centuries, consent became a token or power high status people gave to lower status people, and from that set of juridical meanings the idea of due process developed, and in time became an organizing principle of our constitutionalism.\textsuperscript{10} Today it has a much reduced set of meanings because its important meanings have been constitutionalized.

Consent began life, for our purposes, in Justinian (c. 526-532),\textsuperscript{11} in which it reflects a rule in the law of guardianships:

\begin{quote}
"Necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur. (It is necessary that everyone exercise his own authority so that what touches everyone may be approved by everyone.)" Justinian's Code 5.59.5.2
\end{quote}

In the late middle ages it gets refracted through Gratian (c. 1148) into important and formative juristic writings, both in canon and civil law.\textsuperscript{12}

\footnotesize
\textsuperscript{10} Id.; see also the next section.
\textsuperscript{11} For earlier uses see DAVID JOHNSTON, A History of Consent in Western Thought, in The Ethics of Consent: Theory and Practice (Miller F. & A. Wertheimer eds., 2009).
\textsuperscript{12} TIERNEY, 24-5.;
Gratian, D.12 c.6 (Justinian's Institutes 1.1): “Diuturni mores consensus utentium approbati legem inmitantur.” (Long standing usages (mos) approved by the consent (consensus) of those following them are like ordinances (lex)).

Pope Boniface VIII (1294-1303), Liber Sextus, 5.12.29: "Quod omnes tangit debet, ab omnibus approbari (What touches all must be approved by all)"  

Codex iuris canonici 1983, Canon 119 § 3: “Quod autem omnes uti singulos tangit, ab omnibus approbari debet.” (Can. 119 With regard to collegial acts, unless the law or statutes provide otherwise: … 3/ what touches all as individuals, however, must be approved by all.)

In was familiar in English common law by 1251:

“quod enim omnes angit et tangit ab omnibus debet trutinari.”

In 1295 the English king, Edward I, transmuted the principle in an election writ from “a mere legal maxim into a great political and constitutional maxim.”

I go into some detail to demonstrate that in origin the concept is primarily associated with the Latin cognate for “approval,” and in some circumstances with the Latin cognate for “consent.” More importantly, the concept is associated with a phrase

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15 http://www.vatican.va/archive/ENG1104/__PD.HTM


17 Id. at.128.; see also, TIERNEY, 25.
that in time is shortened to “quod omnes tangit.” It is not just one word, it is a concept; and more, it would go on to be broadly disseminated throughout private and public, constitutional and international, law and legal institutions. \(^{18}\) Today its meaning is generally either confined to discussions in the health sector, \(^{19}\) or it is discussed in the way one discusses a constitutional principle. \(^{20}\)

In this way, then, we can trace the word/concept and its meaning from Justinian to the present in ordinary historical space, as though the Enlightenment was simply another historical period without inordinate influence on the word/concept/meaning. However, to give a full account of its historical development, we would trace the reductions in meaning to the Enlightenment, although I think consent had already been so deeply institutionalized in the state system by the early 17\(^{th}\) century that the changes brought on by the Enlightenment were not comparable to those undergone by \textit{iustum bellum}.

b) **Transformation into Socio-Political Institutions**

\textit{Iustum bellum} developed in the Occident as a way to address certain politico-legal problems that later disappeared because they had been solved more generally in the

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\(^{18}\) Brian Tierney captures the idea of how such an idea is acted on by historical processes when discussing why the generations after Grotius saw him as an innovator, the founder of new theories of rights and international law, when much of what he said is found in earlier scholastic jurists. \textsc{Brian Tierney}, \textit{The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law: 1150-1625} 339 (John Witte Jr. ed., William P. Eerdmans Publishing Company. 1997). (To say that Grotius merely restated old ideas in a new way might seem to trivialize this work; but that would miss the point of his achievement. … Grotius was deploying old arguments, not only in a new idiom, but also in a changed context where they took on new meanings and found a new significance.). It is the basis for all private corporations. \textsc{Post}.

\(^{19}\) \textsc{TOM O'Shea}, \textit{Consent in History, Theory and Practice}, The Essex Autonomy Project, Green Paper Technical Report (2011). The authors of this Report struggle with the same conceptual issues I address in this section. Id. at, 1, fns 1&2. See also, \textsc{Ruth R. Faden} \& \textsc{Tom L. Beauchamp}, \textit{A History of Informed Consent} (Oxford University Press. 1986).

\(^{20}\) See e.g., \textsc{Akhil Reed Amar}, \textit{The Consent of the Governed: Constitutional Amendment outside Article V}, 94 Columbia Law Review 457 (1994).
development of the legal system as a whole.\textsuperscript{21} The main problem \textit{iustum bellum} was developed to solve was the legality or legitimacy of going to war. If the sovereign did not follow divine and/or natural law, then the loss of grace and eternal life was a real and present threat.\textsuperscript{22} As I argue elsewhere, the reasoning of the jurists on this matter \textit{were} the law of war, \textit{iustum bellum}.

Jurists provided the \textit{iustum bellum} until the early 20\textsuperscript{th} century, although the Enlightenment brought changes that resulted in the widespread acceptance and practice of legal positivism. As secular constitutional order and democratic ideals spread, and absolutism seemed to fade, and legislative bodies grew in importance as sources of law, the need for \textit{iustum bellum} in the sense of a set of discriminatory doctrines to guide absolute sovereigns simply disappeared in the increasingly complex positive legal/moral procedures and systems of the sovereign state, and relations among sovereign states.

Through the same period international law remained a parochial, but increasingly influential set of institutions among Occidental states until the 20\textsuperscript{th} century, when its forms, in fits and starts, motivated by the two world wars, did indeed become universal in the UN Charter, the primary purpose of which was to regulate war, after the false starts of the League of Nations and the Kellogg-Briand Pact.\textsuperscript{23}

\textsuperscript{21} The world of the late middle ages, in which \textit{iustum bellum} was refined by the jurists, consisted of three spheres: the Occident, what would become western europe; the Orient, the eastern Christian domain, and the Islamic political entities. International law as we know it developed exclusively among the states of the Occident, and did not achieve universality until the advent of the UN Charter. \textsc{Wilhelm G. Grewe}, \textit{The Epochs of International Law} (Michael Byers trans., Walter de Gruyter. 2000). \textsc{Antonio Cassese}, \textit{International Law} (Oxford University Press 2nd ed. 2005).

\textsuperscript{22} The reality, and enforcement power, of such an idea is central e.g., to Whitman’s portrayal of the ethical problem faced by judges and jurors, and is discussed in numerous places in his book on reasonable doubt. It was a significant feature of legal/political life well into the 18\textsuperscript{th} century. \textsc{James Q. Whitman}, \textit{The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial} (Yale University Press. 2008).

\textsuperscript{23} \textsc{Grewe}, Some see the UN Charter as a symbol of the end of international law because it represents an institutional and categorical shift in the idea of sovereignty. After it all sovereigns are subject to
Certainly at the international level jurists still play a role in developing law that is
denied them in constitutional order, but it is the least important source of law, only
playing a supporting role in interpreting treaties and customary international law.24

We can also understand this development in ordinary historical space, that the
pronouncements by jurists on the legitimacy of war were eventually outmoded by the
development of positive political structures that were established to exclusively provide
legitimacy for the state, not individual kings and lords, to undertake political acts such as
war.

There are two other important and relevant ideas that were institutionalized.

In the 12th-14th centuries there was an intense debate about nature, about the
created world. What, or where, was the origin of natural law? At the time natural law and
what was later to become known as the laws of nature were not distinguished in any kind
of relevant way.25 The problem was that if natural laws were inherent in nature itself,
were Aristotelian essences, then what role did God play in the creation? If he did not
have the power to change the laws as He willed, then how could He be all powerful?26
The voluntarist teaching that God’s will was the ongoing source of all law, including all
natural law, won the day. What was important about this victory was that nature was

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24 See e.g., the Statute of the International Court of Justice, Art 38(d), which provides that “the teachings of
the most highly qualified publicists of the various nations” are the least important sources of law and
should be used only “as subsidiary means.”

25 Jean Bodin (1530–1596), the French jurist who developed our idea of sovereignty, apparently was the
first to use the phrase “laws of nature” in a somewhat modern sense. ALESSANDRO PASSERIN D’ENTREVES,
Natural Law: An Introduction to Legal Philosophy, 67 (1951). [CHECK]

26 TIERNEY, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law: 1150-
1625 98
stripped of content, of essence. There was no inner necessity or law, rather all law flowed from God, an external source.

That framing of nature later combined with another innovation, this one introduced by Protestant and Jansenist Catholic theologians on man’s reasoning powers. They concluded that man could not understand the laws governing his nature because of the Fall. The Fall degraded man’s ability to reason about man, to use reason to understand man’s end. In this innovation man was stripped of his own ends, his own essence. His essence was determined by God, and only knowable by God or His Grace.

These ideas, of an empty nature and of reason powerless to see ends, are the core insights institutionalized in science. The scientific characterization of man remained problematic until the middle of the 19th century because, although the scientific characterization of man as Newtonian machine was widely accepted, Aristotelian explanations about living things were exceedingly difficult to overcome theoretically and empirically. The importance of Darwin was that he provided the theoretical mechanism by which living things could be brought under the physicalist, mechanist umbrella.

MacIntyre explains, correctly I think, that it is with the theory of the person that the contemporary problems with law and morality begin. In the late middle ages man was understood to consist of three elements: an untutored nature that had the possibility of being better if it realized its intrinsic ends (telos); the rational precepts or ethics by which man could reach his telos; and the idea of man as he could be if he realized his telos. When man’s reason was reconceived in the Protestant Reformation as being incapable of seeing his ends, then the human vision of man was reduced to his untutored nature and

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27 MacIntyre, 52-4
the ethical precepts, without a linking concept. Ethics were detached from that person we would become familiar with through Hobbes, the man whose life is “solitary, poor, nasty, brutish, and short.” 29 MacIntyre argues our age is characterized by moral relativism because the ethical norms were unlinked from the untutored human nature by the removal of the idea of human ends. The unlinking results in two artifacts or fragments that should be linked, man and ethics, and sets the stage for the dominance of legal positivism.

We see in the institutionalization of these ideas how the theory or vision of nature, science, the theory of the person, and legal theory are intimately linked. We can also argue it is these institutions that, once established, become the bedrock on which the individual 30 and the age of ideology emerge. Since nature has no ends, no essence, and since ethical rules cannot be established in nature, the creative mind of man finds pretext in all explanations. The social sciences find false consciousness, class struggle, regimes of truth, the unconscious, and other quasi-scientific entities to explain why things are not what they seem to be, to fill the lacunae left from the stripping of meaning, of ends, from nature.

c) Transformations from Changing Temporal Perspective

History can be told both from the present towards the past, and from the past towards the present. I will recapitulate some of the argument about just war to describe the kind of transformation I want to describe in this section. Kolb, a younger contemporary historian, informs us that the twinned Latin phrases *ius ad bellum* and *ius in bello* in all likelihood were coined in the early 1930s by Josef Kunz, an international

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30 MACINTYRE, 61.
lawyer and scholar active from the 1920s through the 1960s. I identified Walzer’s 1977 work as a key staging point for the popularity of the twinned doctrine, and I wanted to draw a defined historical line from Kunz to Walzer as part of the argument. As I investigated Kunz and his contemporaries, I saw that many of them characterized the 19th century as a period in which there was no law of war, no *iustum bellum*, no *ius ad bellum*, no *ius in bello*. I could then understand the advent of the Geneva Conventions a certain way. I could argue that what we understand in the twinned doctrine as *ius in bello* could not have come into existence unless there was no *ius ad bellum* (*iustum bellum*).

Thus, to make the argument about the nature of *ius in bello*, that in the presence of *ius ad bellum* it does not make much sense, for reasons I will go into at length elsewhere, I take Kunz et al.’s assessments about the state of the law of war in the 19th century at face value. That is, I gaze back into the 19th century through the historical assessment of Kunz et al, and take their assessment of the law of war as of about 1815 at face value in interpreting the events of that period. But I can change perspectives and look forward from antiquity through Augustine and Gratian into the Enlightenment. I gaze forward into the law of war in the 19th century, and from the perspective of the past have to take into account the Enlightenment, since I must look right through it. From that perspective I can draw a quite difference conclusion about the law of war in the 19th century; rather than concluding there is no law of war, I can argue that indeed war was entirely legal, that the absence of law is not the absence of legality. In the classical period of international law and statism, states could war at will; war was legal.

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31 ROBERT KOLB, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 International Review of the Red Cross 553(1997). In fact, it was probably one of Kunz’s professors at the University of Vienna who coined the terms. HEINRICH LAMMASCH, *Unjustifiable War and the Means to Avoid It*, 10 American Journal of International Law 689(1916).

32 N Berman quoting someone else who thinks this
I could make that argument in any event, and then simply argue Kunz et al are wrong, but that line of reasoning does not quite get at the problem. The problem is not that Kunz et al were wrong, but that had they not been positivists they might have read the law of war in the 19th century differently. They concluded there was no law of war because there was no positive law of war. But what had changed was not the existence of the law of war, rather what changed was that there were no longer any restrictions on going to war, there were no *iustum bellum* rules. States had full right to war at will. The positivists concluded there was no law because there was nothing scientific to identify as law, the moral/legal piece being invisible to them. Looking forward then, the interpretation of Kunz et al can be read as containing an element of false consciousness, of being influenced by the ideologies of science and positivism.33

If we reject or bracket the Enlightenment splitting of law into scientific and prudential artifacts, then we are less apt to misread the normative environment concerning war. That is not only of antiquarian interest, it gives us better access to our own normative environment.

d) TRANSFORMATIONS IN HISTORICAL SPACE BROUGHT ON BY THE ENLIGHTENMENT

During the Enlightenment (roughly 1630-1850) the discourse about *right* was transformed.34 It was one of the most momentous jurisprudential events of written

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33 See note 30 (beginning “Marx”)
34 MACINTYRE, 19. (In that period ‘morality’ became the name for that particular sphere in which rules of conduct which are neither theological nor legal nor aesthetic are allowed a cultural space of their own. It is only in the later seventeenth and the eighteenth century, when this distinguishing of the moral from the theological, the legal and the aesthetic has become a received doctrine that the project of an independent rational justification of morality becomes not merely the concern of individual thinkers, but central to Northern European culture. at 39).
history, as it profoundly affected the relationship between law, science, right, morality and history.  

35 The introduction of Justinian’s Code into the Occident through Gratian and his predecessors was of more moment; and perhaps the introduction of Christian universalism into the jurisprudential stream was of equal importance; but there can be no argument the Enlightenment deeply changed our moral/legal environment. See e.g., id. at. Of course, I do not refer to pre-Enlightenment changes in other legal systems, such as the interplay between legalism and Confucianism in China. See e.g. Li Ma, A Comparison of the Legitimacy of Power between Confucianist and Legalist Philosophies, 10 Asian Philosophy 49. However, it is clear that the Enlightenment ideology of science functions as a powerful epistemological, ontological and moral disjunction with the past in all political entities in which it takes hold. See e.g., Immanuel Wallerstein, European Universalism: The Rhetoric of Power 51-70 (The New Press. 2006). (Beginning at least in the second half of the eighteenth century, the humanist mode [of universalism] came under severe attack. Many came to perceive an inherent weakness in the claims of humanist universalism. The dominant humanism of the modern world - Western Christian values (transmuted into Enlightenment values) - was cognitively a self-validating doctrine, and therefore could be taxed with being merely a subjective set of assertions. That which was subjective seemed to have no permanence. As such, its opponents said that it could not be universal. Beginning in the nineteenth century, the other principal modern style of universalism - scientific universalism - consequently gained in relative strength in terms of social acceptance. After 1945, scientific universalism became the unquestionably strongest form of European universalism, virtually uncontested. at 51). Note that Wallerstein argues, along with others, that scientific universalism develops from Christian universalism. id. at, 51; Francis Oakley, Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas 38-62 (Continuum. 2005). See also, Robert N. Proctor, Value-Free Science? Purity and Power in Modern Knowledge (Harvard University Press. 1991). (There is also an institutional aspect to the early exclusion of values from science. … In the twentieth-century formulation, propositions about “what ought to be” can never be derived from propositions about “what is”; facts cannot be derived from values. … Beginning in the nineteenth century, it becomes popular to suggest that the scientific attitude is exceptionally fitted to the resolution of social conflict. Science in this view is a great and neutral arbiter, an impartial judge to whom social problems may be posed and from whom “balanced” answers will be forthcoming. Science provides a neutral ground upon which people of all creeds and colors might unite, on which all political contradictions might be overcome. Science is to provide a balance between opposing interests, a source of unity amidst diversity, order amidst chaos. At 7,8).

Jurists were quick to develop the “science of law.” See e.g., Sir James Mackintosh, A discourse on the study of the law of nature and nations: introductory to a course of lectures on that science to be commenced in Lincoln’s Inn Hall, on Wednesday, Feb. 13, 1799; Georg Friedrich von Martens, The law of nations: being the science of national law, covenants, power, etc founded upon the treaties and customs of nations in Europe, 1829; Henry Wheaton, Elements of international law: with a sketch of the history of the science, 1836; James Reddie, Inquiries elementary and historical in the science of law, 1840. The “science of law” is known to us as positivism. Hans Kelsen, Pure Theory of Law (Max Knight trans., University of California Press. 1967). (The Pure Theory of Law is a theory of positive law. … It is a science of law (jurisprudence) … at 1).

A search of Google books for the phrase “science of law” in titles returns only one hit for the 18th century, Macintosh in 1799, although Barbyrac’s introduction to Pufendorf’s On the Law of Nature and Nations uses the phrase “science of morality.” The same search for the 19th century returns numerous (~20-40) uses of the phrase in the title of law books, as demonstrated above. A search of the exact phrase “science of law” in text or title from 1400-1800 returned only one out of 86 results prior to 1700, and that on a gravestone. Of the remaining 85 uses of that phrase the large majority occurred in the latter half of the century. The same search for the 19th century returns about 19,000 hits. There are many reasons searches in Google books are not sufficient for authoritative answers to questions, but the results in this case cannot be ignored: the attitude towards and understanding of the law changed dramatically from the 18th to the 19th century. GEOFFREY NUNBERG, Google's Book Search: A Disaster for Scholars, The Chronicle of Higher Education
The Enlightenment refers to a set of philosophical doctrines centered on the idea that nature has no Aristotelian or Christian essence, that nature can be known objectively, that the best way to know objective nature is through empirical science, and that metaphysics, natural law, the moral order and similar “things” are subjective, not subject to empirical techniques and therefore nonsense or not capable of ever being objective knowledge or science. The apotheosis of knowledge is Newtonian mechanics, and such knowledge aspires to be ahistorical, universal. These ideas came to be collected in the word positivism in the first part of the 19th century. Positivism developed in intensity.

Austin uses the phrase “science of law,” and in the same breath refers to Bentham’s use of the phrase “science of deontology.” John Austin, The province of jurisprudence determined, 1832 (Consequently, an all-important object of the science of ethics (or, borrowing the language of Bentham, "the science of deontology") is to determine the nature of the index to the tacit commands of the Deity, or the nature of the signs or proofs through which those commands may be known. —I mean by "the science of ethics" (or by "the science of deontology"), the science of law and morality as they respectively ought to be: or (changing the phrase) the science of law and morality as they respectively must be if they conform to their measure or test. At xiii,iv).(Bentham coined "deontology. " ROBERT LOUDEN, Toward a Genealogy of ‘Deontology’, 34 Journal of the History of Philosophy 571, 573 (1996).) Hart does not use the word science to describe what he does. HART.

In an interesting historical development then, whereas once law provided the analytic methods by which the natural sciences could develop (the Scholastic methods of textual exegesis), in the 18th century science returned the favor and provided ideological methods by which law could develop (if that is what legal positivism is). See e.g., Berman, 151-159. The idea of the science of law led to the late 18th and 19th century focus on constitutional-level, comprehensive, hierarchical and ahistorical statements of the law, or codes, although the idea as such did not manifest in Anglo-American jurisprudence. See e.g., FREDERICK CHARLES SAVIGNY, Of the Vocation of Our Age for Legislation and Jurisprudence (Arno Press. 1975). ROGER BERKOWITZ, The Gift of Science: Leibniz and the Modern Legal Tradition (Harvard University Press. 2005). Other types of codification though, such as legislative and non-legislative systematic compilations of existing laws covering specific sub-constitutional bodies of law, would heavily influence American jurisprudence. See e.g., NILS JANSEN, The Making of Legal Authority (Oxford University Press. 2010).

36 MACINTYRE. id. at.; See also, JOHN LAMONT, Fall and Rise of Aristotelian Metaphysics in the Philosophy of Science, 18 Science & Education, 862-3 (2009).

37 Auguste Compte coined the word “positivism” in his Course of Positive Philosophy (1830-1842), but the origins of the movement or ideology lay in Hume, especially A Treatise of Human Nature (1739/40). The idea of positive law as a type of law is endemic in legal systems and can be found in the earliest jurisprudential thought. But the positivism discussed here is a metaphysical project, not a description of a
and became more restrictive under the late 19th, early 20th, century influence of Russell, Moore and the logical empiricists.

Ian Hacking, the philosopher of science, summarizes the key ideas of positivism:

1. An emphasis upon verification (or some variant such as falsification): significant propositions are those whose truth or falsehood can be settled in some way.

2. Pro-observation: What we can see, feel, touch, and the like, provides the best content or foundation for all the rest of our non-mathematical knowledge.

3. Anti-cause: There is no causality in nature, over and above the constancy with which events of one kind are followed by events of another kind.

4. Downplaying explanations: Explanations may help organize phenomena, but do not provide any deeper answer to Why questions except to say that the phenomena regularly occur in such and such a way.

5. Anti-theoretical entities: Positivists tend to … restrict reality to the observable [given (1)-(4)].

6. Positivists sum up (1) to (5) by being against metaphysics. Untestable propositions, unobservable entities, causes, deep explanations – these, says the positivist, are the stuff of metaphysics and must be put behind us.38

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38 IAN HACKING, Representing and Interviewing: Introductory Topics in the Philosophy of Natural Science 41-52 (Cambridge University Press. 1983).
When science (i.e., the laws of nature) ended its formal relationship with natural law, the nature of legal discourse was fundamentally changed. Legal positivism, the science of law, became the dominant ideology of law. Natural law discourse went underground, and was replaced by the idea of the moral. The moral is the residue of

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39 Science is a complex word that does not refer to anything concrete. It is a genus to the many species of the different sciences. It is abstract, philosophical. Like all philosophical objects, its meaning is contested. Since it is a dominant philosophical concept, there are innumerable philosophical arguments about its meaning, and little consensus. The Oxford English Dictionary offers a succinct and sensible outline of the taxonomy of science. The first five definitions recapitulate the historical development of its meaning and demonstrate how the meanings fit together like a Russian doll.

At its most general, the word refers to “the state or fact of knowing.” (OED, 1). Less generally, but still very general, it means “knowledge acquired by study.” (OED, 2). The third meaning in the OED is the genus (for my purposes), “a particular branch of knowledge or study.” At this level that both science and morality/law are sciences.

Since science and morality were both sciences of equal standing prior to the Enlightenment, we need a more restricted meaning of the word, and the OED provides that as the fourth meaning. Science is

[i]n a more restricted sense: A branch of study which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truth within its own domain.

This is the level of granularity at which science is distinct from the moral order, because, naturalists assume that the demonstrated truths and observed facts can only relate to the material, physical world. Sense 5.b. in the OED captures these distinctions:

In modern use, [science is] often treated as synonymous with ‘Natural and Physical Science’, and thus restricted to those branches of study that relate to the phenomena of the material universe and their laws, sometimes with implied exclusion of pure mathematics. This is now the dominant sense in ordinary use.

Science in this sense is opposed to and rejects the moral order. This version of science is an ideology, referred to as scientism or naturalism, that is strongly associated with positivism. “Scientism” was first used in 1895 to describe the “habit and mode of expression of a man of science.” (OED, 1989). In time it came to have two, often pejorative, meanings. Friedrich von Hayek, quoted with approval by Karl Popper in 1972, said it was the “the slavish imitation of the method and language of (natural) science”, [especially by social scientists.]” (OED, 1989). It also came to mean, more broadly, “a belief in the omnipotence of scientific knowledge and techniques” and is used in this sense synonymously with “naturalism.”(OED, 1989).

40 See note 19 above Macintyre and the history of morality. Understanding the is/ought distinction is essential for bridging the conceptual gap from a world in which natural law was ubiquitous, to a world in which it barely exists. See notes ___ & on Hart. The teleological understanding of living things dictates that is and ought are never separate, but part of a continuum. In the “is” they are a close fit, but as the potential goals are considered the fit can get quite loose or probabilistic. Hart discusses the theory, HART.185-200. A main problem with the Humean is/ought distinction is that teleology makes it meaningless; in any event, Hume’s words themselves have lent themselves to controversy about their meaning. DAVID HUME, A Treatise of Human Nature Bk. III, Pt. 1, Sects 1&2, pp 455-476 (L.A. Selby-Bigge ed., Oxford University Press 1973); see e.g., HART, 185-212. JOHN FINNIS, Natural Law and Natural Rights 33-48 (Oxford University Press. 1980). RONALD DWORKIN, Justice for the Hedgehogs 44-46; 428-430 (Harvard
natural law/right after its legal nature has been stripped from it. It is an ethics without political content; no right, and no power. Everything regarding law and right is scientifically reduced to positive law; and law is opposed to a vague, emotivist, subjective, powerless morality. No jurist after this admitted to doing anything but “science.”

In spite of the scientific distaste for the moral, until the latter part of the 19th century it was thought that there was some part of it that could be brought under the discipline of Newtonian rules. This movement, associated with Compte, led to the development of statistics (i.e. knowledge of the state), and the social sciences.

Eventually, as positivism became more rigid and analytic, the idea of legal science likewise became more restrictive, and contemporary legal positivism emerged with Kelsen and Hart as its founders.

This historical development presents profound challenges to the historian of law whose work focuses on the meaning of legal concepts, such as consent, or *iustum bellum*. The entire nature of legal discourse changed in that period. The Age acted as cleaver,
cleaving every concept that entered it into a scientific part and a moral/political/legal (prudential) part, and the latter part was banished to the realm of the metaphysical, the subjective, the non-existent, and the nonsensical. All of natural law went this way. This was extremely problematic for international law as it was not only deeply infused with natural law principles, it lacked the institutional support that Bentham and Austin and their successors would associate with the science of law, or positive law. It did not emanate from a constitution, it was not passed by a legislature or judge, and there were no other similar sources of legitimacy. We should not be surprised then to see *iustum bellum* disappear as international law by the first part of the 19th century, its death still solemnly remarked on 100 years later by jurists responding to the world wars. Its apparent disappearance is far from the end of the story, but suffice it to be a sign of the profundity of the change in the legal landscape.

The change in the discourse of law meant that law was reduced to positive law, and the other part of law, now known as morality, was no longer defined or understood as law. This unnatural state of affairs has been the bane of juriprudens since, but for us it raises another issue. We will recognize, later in the argument, that the “moral” or “natural” or “prudential” part of the law never really disappeared, it just got reassigned to other, non-legal, categories of existence. These two streams then have come down from the late 18th century as two halves of a whole, seeking always to be united, but forbidden by the positivist rules of legal discourse. In assessing the law of war then, we have to not only take account of the positivist laws, but seek out and identify the natural side of the law to see how it functions, as certainly it continues to function in the same normative space as the positive law. This could not be clearer than in the post 9/11 attitude adopted
by the Christian United States against “terrorism,” identifying it with an entire religion, and based on that attitude stripping the enemy of the rights conveyed by the Geneva Conventions. The liberal academy was aghast at this\textsuperscript{44} but it was nothing other than the assertion of \textit{iustum bellum} in all of its medieval glory, despite the fact \textit{iustum bellum} per se was dead, that there is a positive legal regime, albeit deeply conflicted, outlawing war, and that there is another body of positive law granting Geneva Convention rights to everyone, including “terrorists.”

It should be somewhat clear now why I categorize the influence of the Enlightenment as a unique event. There is no ordinary historical space for the law when the Enlightenment is taken into account, or when legal concepts are traced from pre-Enlightenment periods into post-Enlightenment periods. Once the post-Enlightenment period is reached we enter a conceptual space in which we must account for ideology, false consciousness, things not being what they seem.\textsuperscript{45} We can define a kind of ordinary

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\item[\textsuperscript{44}] Until it was put in charge of key legal departments in the administration, e.g., the appointment of the vocal critic of Bush, Harold Koh, who upon appointment to the state department legal department became a champion of the Bush policies, at which point most critics of the Bush policies went peacefully along. See e.g., PAUL STAROBIN, \textit{A Moral Flip-Flop? Defining a War}, New York Times August 7, 2011. 2011. OWEN FISS, \textit{Leary Lecture: Aberrations No More}, 4 Utah Law Review 1085, 1095-99 (2010).
\item[\textsuperscript{45}] Marx, the student of the great philosopher of history, Hegel, got the ball rolling with the idea of false consciousness, and it was later elaborated by Nietzsche, Freud, and others. Foucault focused on the same problem, but from the perspective not of falsity, but of regimes of truth. For a brief overview, see BERNARD HARCOURT, \textit{Radical Thought from Marx, Nietzsche, and Freud, Through Foucault, to the Present: Comments on Steven Lukes’ ‘In Defense of False Consciousness’}, U of Chicago, Public Law Working Paper No. 355. (2011). ( Notice the shared idea that our dominant ways of talking about “just punishment” somehow mask the true forces at play … The explicit reasons on which we ground our judgments about punitive practices … are not really, in the end, the driving force behind those punitive practices. Something else is driving them. At 9) See also, Susan Marks, \textit{The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology} (Oxford University Press. 2000). Ideology is the way “meaning serves to establish and sustain relations of domination.” At 10. International jurists, practitioners, policy makers, corporations and diplomats employ various strategies to mobilize and reinforce the ideology of international law and neutralize, dismiss or stigmatize the critique of international law. Strategies of domination include legitimation, dissimulation, unification, reification and naturalization. Marks, 2000:19-25; Thompson, J. 1990. \textit{Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication}. 60 et seq Cambridge, Polity Press.; Eagleton, T., 1991. Ideology: An Introduction. chap 2 London, Verso.
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historical space in the post-Enlightenment period, and in fact we find many legal and other naturalists writing as though the Enlightenment is the beginning of history. But these histories are all degraded by positivist values, they cannot function with the full authority history can command, because positivism does not understand history as a source of real knowledge.

4. **BACKGROUND ASSUMPTIONS ABOUT THE NECESSITY AND NATURE OF HISTORY ITSELF**

... a vague memory has no power against the vitality and freedom of the present.  

Some general comments about my approach to history are necessary to complete this analysis. The project of justifying a position on the problem of the one and the many is far beyond the scope of this paper. However, anyone with a philosophical nature who dwells on the past quickly encounters the strangeness of history. It is about the past but everything we know about it exists in the present. It appears we are constrained by nature from existing either in the past or in the future, although if we look closely at the whole enterprise of knowing we might be forgiven to thinking it exists entirely just in the immediate past. When we stop being in the present, we turn our attention to memories,

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46 Brian Leiter is a prime example. Harcourt also provides an interesting example of this. He argues that it is only when economic science emerged that our attitude about punishment came into existence. In other words, economic science is naturally twinned with a moral/legal/political attitude; a scientific artifact is linked to a prudential artifact. HARcourt, 17. *(The idea of natural order in economics emerged in the 18th century hand-in-hand with an ideal of punishment despotism, or in other words with the idea that the quasiexclusive competence of the state was in the area of security. It is this paradoxical juxtaposition that has facilitated the growth of the penal sphere—not just during the period of neoliberalism during the past 40 years, but also at the beginning of the 19th century with the birth of the penitentiary. Periods of strong belief in free market ideals have gone together with the birth and expansion of the carceral domain.)*


48 I have been deeply influenced by Alasdair MacIntyre’s approach to and uses of history, and to the importance he ascribes to Aristotle in After Virtue, although I do not share all of his perspectives on either.
sensations, feelings, thoughts, language, and other phenomena and it is easy to think that means we are in some kind of past, or non-present. We might ask, where are we when we are not engaged here and now? For that matter, where are we when we do engage in the here and now? As we turn to these questions it should be clear that we are on the verge of a theory of the person, or a theory of mind, or some kind of overarching coordinating theory about life. Western philosophy does a spectacularly bad job of dealing with these questions, with perhaps the exception of Aristotle and Hegel. In any event, I am only interested in these questions as mechanisms to open the mind of the reader to a broader idea of history, to sensitize the reader to the idea history is more than factual accounts of what happened in the past.

a) The Universal and the Particular

A set of inquiries that flow from the foregoing concerns itself with the identity of what we are paying attention to, thinking about, seeing, feeling or otherwise experiencing. We can group together the answers to these inquiries as history. History is more than mere recitations of things that happened in the past. Aristotle says that “poetry is something more philosophic and graver import than history since its statements are of the nature rather of universals, whereas those of history are singulars. By a universal statement I mean one as to what such or such a kind of man will probably or necessarily say or do ….” Here Aristotle introduces the notions of the singular and the universal in the discussion of history, but his explication is not entirely useful because he does not develop the idea very clearly. Much later Hegel does develop the idea in a useful way. He reflects that there are three “methods of treating history:

1. Original History

2. Reflective History

3. Philosophical History.\textsuperscript{50}

“Original historians … transform the events, actions, and situations present to them into a work of representative thought.” But the scope of such histories is limited, because … their essential subject is what is actual and living in their environment. The culture of the author and that of the events created in his work, the spirit of the author and that of the actions he relates are one and the same. … He is not concerned with reflections \textit{about} the events. He lives the spirit of the events, he does not yet transcend them.\textsuperscript{51}

Hegel holds up Herodotus as an exemplary original historian, and it is also to Herodotus that Aristotle looks as his model historian.

In the history of an idea that ranges over hundreds of years, such as just war, original history is not possible. Hegel is well aware of that, and it is in his other categories that we see histories that look more familiar. I believe we are safe in understanding Aristotle’s comments about poetry to apply to the categories of reflective and philosophical history, for although in these “thinking is subordinate to the data of reality,” as it must be in history, yet there is no way to avoid the intervention of the historian’s predilections and culture, his creativity and reason, in these histories.\textsuperscript{52}

The category of reflective history, “that kind of history which transcends the present – not in time but in spirit,” has several subcategories:

\textsuperscript{50} Hegel, 3
\textsuperscript{51} Id. at, 4.
\textsuperscript{52} Id. at, 10.
1. Universal

2. Pragmatic

3. Critical

4. Fragmentary\textsuperscript{53}

Universal history concerns itself with surveying long periods of a people, a country or the world. It covers so much material it “must give up the individual representation of reality and abridge itself by means of abstractions, not only in the sense of leaving [things] out,” but also by concentrating great things into simple thoughts or sentences. For example, Livy simply says of a series of important wars: “This year war was carried on with the Volsci.”\textsuperscript{54} This kind of history can be closely linked with original history.

Pragmatic history is written when, after study of the past,

“… there opens up for the mind an actuality which arises out of its own activity and as a reward for its labor. The events are many, but their universal idea and their inner connection are one. This nullifies the past and makes the event present.”\textsuperscript{55}

This is extremely interesting, as Hegel begins to describe the method by which history becomes abstract. The historical events continue to exist in their historical space, but the understanding of them not only extends over the events themselves, it extends into the present.

\textsuperscript{53} Id. at, 3-10.
\textsuperscript{54} Id. at, 7.
\textsuperscript{55} Id. at.
“Here belong, in particular, moral reflections and the moral enlightenment to be derived from history, for the sake of which history has often been written.”

When the historian links the events under consideration with a unifying idea, he is not only linking them to the present, he is engaging in a moral undertaking. Hegel warns us though not to think these kinds of history necessarily affect political leaders to do the right thing, because

“in the turmoil of world affairs no universal principle, no memory of similar conditions in the past can help us – a vague memory has no power against the vitality and freedom of the present.”

Only the “deep understanding” of, e.g., Montesquieu in Spirit of the Laws, can make such reflections “true and interesting.”

Critical history is history of historiography, and not relevant.

Fragmentary history “is abstractive but, in adopting universal points of view – for example the history of art, of law, of religion – it forms a transition to the philosophical world history.” This is kind of reflective history is “conceptual,” and if it “succeeds in presenting general points of view and if these points of view are true, it must be conceded that such histories are more than the merely

56 Id. at, 8.
57 Id. at.
58 Id. at. Hegel takes the opportunity to reflect on the difference between German and French historians, noting that “[w]e Germans are content with [pragmatic histories]; the French, however, spiritedly create a present for themselves and refer the past to the present state of affairs.” Foucault’s “history of the present” is surely an example of this.
59 Id. at, 9.
60 Id. at.
external thread and order of events and actions, that they are indeed their internal, guiding soul.”\textsuperscript{61}

Here we find the history of the law. Law is both deeply historical and deeply teleological or purposive. It arises from custom and through such historical processes as legislation, judicial decision and juristic reasoning. It is intended to guide the development of history, of the particular. As such it is also deeply philosophical. This kind of history, fragmentary reflective history, provides the bridge to the third method of history, philosophical history.

Hegel begins by pointing out that original and reflective history need no justification, “their concept was self-explanatory.” Then, even though he suggests philosophical history could have the seemingly unproblematic definition of “the thoughtful contemplation of history,” he moves into his complex territory.\textsuperscript{62}

“In history, thinking is subordinate to the data of reality, which latter serves as guide and basis for historians. Philosophy, on the other hand, allegedly produces its own ideas out of speculation, without regard to given data.”\textsuperscript{63}

The danger then, in philosophical history, is to avoid shaping history by preconceived philosophical commitments. Hegel “explained and refuted” this problem in the bulk of Reason in History: A General Introduction to the Philosophy of History. The “simple concept of Reason,” he says, is the “sole thought which philosophy brings to the treatment of history.”\textsuperscript{64} He follows this opening statement with a most complex

\textsuperscript{61} Id. at, 10.
\textsuperscript{62} Id. at.
\textsuperscript{63} Id. at.
\textsuperscript{64} Id. at, 10.
description of Reason, the details of which are not important for this paper. In short, Reason, as a philosophical matter, is “the infinite content of essence and truth,” and it is “infinite form, for only in its image and by its fiat do phenomena arise and begin to live.”65 We can perhaps, safely think of Aristotle’s ideas of substance and of final and formal causes here; Reason as logos. Hegel will operationalize this idea of Reason in history through the idea of “essence and truth,” since “history is supposed to understand events and actions merely for what they are and have been, and is the truer, the more factual it is … .”66

I am less concerned with the accuracy of the details of Hegel’s taxonomy of history, than with the clarity with which it demonstrates how ideas or reason operate in the construction of history. In the age of science, the Enlightenment and post-Enlightenment period, we value, as Hegel points out, history to the extent it is “true,” and we understand truth to be related to the accuracy of the “facts.” Whether we agree with Hegel or not, what I think he effectively does is show that regardless of what kind of history we do, we must use reason to thread the facts together, and as the subject of the historian becomes less temporally, spatially and culturally confined, the more reason plays a role. Hegel also points out that history becomes connected to morality through reason. Although in the discussion above morality is mentioned only in relation to pragmatic histories, elsewhere in Hegel we understand that Reason and morality are deeply linked through the institution of the state.67

65 Id. at.
66 Id. at, 9.
What Hegel was getting at is that the identity of the historical thing is more or less a product of reason. Just war, the historical thing I am concerned with, began life as a thing of reason, and throughout its life it has been continually used, renewed, restricted and/or expanded through reason. Therefore, when the context and powers of reason changed in the Enlightenment, just war (i.e., *iustum bellum*, the Augustinian law of war) changed also; as did every other prudential concept. After the Enlightenment living things as a class could only by operated on by reason in a certain, restricted way. This restriction of reason, linked to a reduced vision of nature, including human nature, was universal in the Occident, and would become universal in the world after WW2 through the ideology of science. Science, especially the science of living things, law, political theory, the social sciences and other bodies of knowledge about living things, and philosophy itself, were all distorted, or limited, in the Enlightenment transformation of reason. This means, I think, that no “fact” or other form of knowledge or science about anything in these categories can be said to be complete unless it can be demonstrated it does not belong to the family of knowledge growing from one of the positivist fragments.

The idea of the universal runs through the discussions in this section. Reason and law are associated with it; perhaps can be said to exist closer to the universal than to the particular. And yet, as Hegel argues, following Aristotle, if we understand things as having essence, intrinsic identity, then it is through that identity that the particular and the universal are linked. That analysis is impossible for the positivist because positivism, the child of the Enlightenment, does not admit essence. It is easy to understand law as something universal, albeit universal for a time and place. We call it jurisdiction; and we look to the law so constituted to generate and maintain order. We generalize that vision of

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68 WALLERSTEIN.
the law, or coordinate it, with political theory and ideas of justice; and perhaps we can think of those as broader universals functioning in their time and place.

Can the universal or the law exist without history? Some argue that to the extent it is universal it is ahistorical, but without history of some kind it has nowhere to exist. This raises questions of substance and form that have long plagued philosophers. Scientism holds that there is only physical matter and accident, and accordingly there is not even the possibility of history, at least not in the sense history has anything to do with reason and human events that unfolded to some degree as a consequence of choice, free will. More abstract eastern theories, such as Advaita Vedanta, understand consciousness as a formless entity which exists prior and superior to all form and substance; therefore all animate and inanimate things are imbued with varying degrees of consciousness or essence and are subject to the rules of dharma or law, and therefore history, as a condition of their kind of existence. As a philosophical matter, to do the kind of history of the law we have been considering it is not necessary to adopt a position regarding the existence of the universal and the particular, other than to avoid both of them. Scientism, or legal positivism, must be rejected a priori, otherwise there is no history; and it is not necessary to resolve the question of whether law can exist as a universal without history, since we are doing history, not philosophy.

b) RIGHT AND EVIL

Earlier I said I use the word law broadly, and want to emphasize that, especially in light of the discussion about the universal and the particular. We have seen that the

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70 See note ___, [on Right=ius]
word moral is problematic in at least three ways. As a fragment set afloat on the surface of history by the Enlightenment we understand it as being historically contingent. As the word positivists use to describe the thing law is not, we both give it more than it’s due, and at the same time strip it of meaning. As a word created in a Christian matrix, it includes the notion of evil in the label immoral. So, when I say I want to include the moral in the definition of law, what I am saying is not that I want to include a disabled concept with connotations of evil, but that I want references to the law to include references to secular right, justice and political theory. When I use the word law, I mean by it secular Right, *ius*, Recht, etc.

Although we do not get the word moral in its modern sense until the 17th century, I argue that when Augustine philosophized the Christian state he set up the ideas about right and wrong that would eventually be encapsulated or spun off in the idea of the moral. This bears directly on the idea of just war.

Augustine incorporated the idea of evil into the law. Evil is the thing that keeps the Christian from heaven, from the blessings of eternal life promised by Christ. This notion of the bad, or wrong, arises in the context of a different historical sensibility than that found in non-Judeo-Christian thought. The Christian life was unidirectional, the end clearly defined. Evil was to be fought at all costs, for it kept the Christian from his righteous end. Cyclical ideas of life lead to an entirely different sense of the wrong, the unethical. Wrong could lead to suffering, but suffering is far from being evil, even if causing it or being tremendously unjust was widely understood to be a bad thing. It is the presence of evil in just war that is the cause of its being so problematic; and it is the

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71 MACINTYRE, 38.; see also note ____.
72 See e.g., JAMES TURNER JOHNSON, The Holy War Idea in Western and Islamic Traditions (The Pennsylvania State University Press. 1997).; WHITMAN.
presence of evil in the idea of the immoral that makes moral discourse so problematic. The idea of evil is an historical idea, and an historically contingent idea, and to the extent we can extirpate it from the law we are freeing ourselves from a kind of oppression. If being unjust or immoral is not the same as being evil, then the stigma of unjust or immoral can no longer legitimate, underwrite or mask the kinds of claims about the other that drive the incredible cruelties and violence that the Judeo-Christo-Islamo tradition drives. If we are going to be tyrannical, let us just label it for what it is, tyranny, gross violations of human rights, injustice; but let us not think it evil for then we mask our own drive to tyranny.

So by the word law I mean to invoke a family of meanings about right and wrong that does not connote evil in any way. I intend to speak of law more globally, temporally and spatially, and to the extent possible remove the religious currents that still distort it. I mean to recognize and utilize the intimate connection between law and history.

c) IDEOLOGY AND CRITIQUE; GENEALOGY, ARCHEOLOGY AND HISTORY OF THE PRESENT

Once positivism dominated reason, then a new set of problems presented themselves to philosophy and history. They were challenged by sociological and political structures in a dis-coordinated metaphysical space. In response, as I have noted, things were no longer what they seemed to be. Perhaps this is truest of things defined by positivism, as those things were no longer understood to include their metaphysical parts. There were no longer essences, ends, moral or inner nature.

Historians and philosophers found new ways to describe the world, in which their central claim revolved around the idea that the insightful or thoughtful observer could reveal that things we relied on to be true were in fact not true. This is not the same as
claiming there is some inner knowledge that only the philosopher/historian has access to, as there is no inner nature to things. Rather, the trained observer looks to various institutional, sociological, linguistic, political, legal, cultural and other structures and languages to disclose through careful and creative analysis that what we thought is true is not, or who we thought had power did not, or who we thought we were we were not. The idea of power also plays a central role in these structures, as it is in the ends of those with power that we now discern truth or meaning, or the origin of structures that define and convey truth and meaning. Ideology is how we identify the misleading thing, and critique is what we do to disclose the ideology, and ultimately the “real” driving forces behind the things that have power in our lives. We still look to the telos as the identity holder, but now the telos exists in our environment, especially in those individuals, institutions or structures with power. Marx, Neitzsche, and Freud are fathers of ideology/critique; and Mannheim, Geertz, Foucault and others developed the idea.

Foucault is the historian/philosopher par excellence in this field. He developed the notions of history as archeology and genealogy, and described writing a “history of the present.” These kinds of observations are only possible, I think, when doing what Hegel called reflective fragmentary history, when tracking the transformations an idea can undertake. Perhaps the narrative of how the ideas of consent and just war are institutionalized in constitutional legal regimes engage history as genealogy or archeology to the degree those institutions or structures become the context of truth against or within which further subordinate histories unfold. Be that as it may, what is important about the concepts of genealogy and archeology is that in an important way they are histories of the present. A history of the present is an excavation of the past in
order to understand something moral/political about the present. I have argued that post-
Enlightenment thought is all ideological, and here I extend that thought by arguing that
all histories of ideology are histories of the present. Hegel was certainly aware of this
kind of history, describing it as a form of reflective pragmatic history. When the historian
finds the inner connection between past events, that connection “nullifies the past and
makes the event present.” Although Foucault worked from a metaphysics that may have
been unrecognizable to Hegel, inasmuch as for Foucault meaning emanated from power,
structure and language onto a nature without essence, nonetheless Hegel well understood
the kind of history at the heart of Foucault’s project. Because histories that relate to the
Enlightenment all have ideological components, all such histories are to some degree
histories of the present, histories with moral/political overtones.

d) **Utopia**

An idea can be a kind of utopia. Utopias can be found in the past as well as the
future. Platonic, Baconian, and Marxist utopias are of the future; as is human rights.
Classical Rome and Greece, and all the other Edens and Golden Ages, have been or are
utopias of the past. Utopias can be concerned not only with socio-political life, but with
states of knowledge. We often see perfect states of knowledge in the past that we strive
towards today associated with religion in the West; but in the East we find also them
associated with prudential knowledge, e.g., with the highest medical knowledge in China
(The Yellow Emperor's Inner Classic (huangdi neiijing) and Divine Husbandman's
Materia Medica (shennong bencao jing). These works are “canonical in status, that is to
say they are considered to contain a revelation of the wisdom of legendary sages.” That
revealed knowledge will always define the best way to practice Chinese medicine.
Just war is, for some historians, a utopia of ideas or knowledge, and what Moyn says about historians of human rights is equally, if not more, applicable to them.\textsuperscript{73} They “approach their subject, in spite of its novelty, the way church historians once approached theirs. They regard the basic cause … as a saving truth, discovered rather than made in history.” With its solemn use of Latin phrases, and references to immensely learned church fathers and classical jurists with exotic names, just war doctrine is fertile hunting ground for moralists who add weight to their prudential arguments without adding substance.

5. CONCLUSION

In the history of Right there are two kinds of things: pre-Enlightenment things and post-Enlightenment things. The Enlightenment is understood as the period in which Truth (science) prevailed in importance over Good (natural law, morality). Yet, in the order of Right, as soon as Truth became dominant it also became invisible.\textsuperscript{74} Within a historically short period of time after the Enlightenment, or in the very late Enlightenment, we see the development of the idea of “false consciousness;” political things are not what they seem to be. And now, after the ministrations of Marx, Nietzsche, Freud, Foucault and the post-modernists, we have a robust sense of ideology. Ideology is the term we use to say about something, an idea or family of ideas, a system of meaning, it is being used by a dominant power to maintain and legitimate their dominance.

\textsuperscript{73} SAMUEL MOYN, The Last Utopia: Human Rights in History 6 (Belknap Press of Harvard University Press, 2010).  
\textsuperscript{74} Although I speak here of political truth, the same can also be said of scientific truth inasmuch as science \textit{per se} is extremely utopian: we understand science to always be leading to the truth, that “truths” known now are contingent, as yet imperfect, etc. see e.g., THOMAS STURM, et al., Why Does History Matter to Philosophy and the Sciences? Selected Essays by Lorenz Kruger (Walter de Gruyter, 2005).
Ideology means that to understand something one has to know the back story. Once we are sensitized to the presence of ideology, or one of its cognates, we look at things from a skeptical point of view, always thinking of the hidden truth. Not the hidden truth of the essence, the Aristotelian quest, but the hidden truth of who is using the meaning for their benefit, who is hiding something, gaming the system, etc. We, especially those of us in academia, are always seeking to expose the little man from Omaha who promised as Wizard of Oz to restore our true powers. For Marx he is in the political system itself; for Nietzsche in class structures; for Freud in ourselves; for Foucault in history or truth regimes; and for the post-modernists in language. Jurists teach he is in law too.\(^75\)

I am doing it in this paper, arguing that as a practice history produces certain kinds of things, and if we know and understand we can make better histories and perhaps at the same time improve the world, since we are dealing with Right. But I also hope in this paper to be doing something else. I want to point out that our age of ideology and relativism has islands of stability in it, and that by having a better understanding of those islands we can move towards more stable systems of “truth” in the future, rather than simply thinking we will continue in this maelstrom of relativism forever. This is not a thorough critique of critique, I can do no more than begin to frame out some issues. However, I think I provide an anchor for fuller discussion.

In the very long term I do not think there will ever be a stable system; but I think we can move into a different historical space for a significant period of time. We can recognize the dynamic of inherent contradiction, and assist in the emergence of a new

\(^{75}\) See e.g., MARKS, B., TAMANAH, Law as a Means to an End: The Threat to the Rule of Law (Cambridge University Press. 2006).
resolution that will be stable until contradiction arises again. Our system of
Enlightenment ideologies revolves around the idea of Truth, and the contradiction we
face comes from the inherent recognition of the Good. A world in which Good has been
reduced to Truth is not fair, is not Right anymore, and it is not Right because we well
understand now that without Good Truth is what the dominant power says it is.

So, my goal is to open some intellectual space in which we can contemplate a
stable system of Right without getting derailed by confusing it with a stable system of
morality. Morality is an artifact of the Enlightenment derogation of Right, of Good. It is
right without power; it means law without right.

What is significant about these insights is that they demonstrate it is possible to
categorically anchor analysis in a non-moral, non-relative space. If that is possible, and if
therefore we can reframe all post-Enlightenment political discourse, then we can reframe
the future.

I am not suggesting we can or should go back to some better previous state, for
the stability we left was grounded in the Judaeo/Christian/Islamic tradition, and many of
the political problems we now face arise from that tradition. Its internecine struggles have
hurt hundreds of millions of people, wasted trillions of dollars and been central to the loss
of meaning and the economic disability of oligarchy that cripples the body politic. We
need secular order, based on a vision of life that Enlightenment science is incapable of
providing. To reform political order we must reform science. Technology has
transformed the way we live perhaps for the better, but the ideology of science
destabilizes all the ways we experience life, it degrades life. We should have technology
without science; politics without religion or oligarchy; a vision of Good that has not been reduced to a vision of the Truth.

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