February 26, 2013

Introduction to the Theory of Law: History and the Unity of Legal Things

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Available at: https://works.bepress.com/john_lunstroth/5/
Abstract: I propose a general theory of the law. I begin with the history of the western legal tradition. When tracing laws, or legal things, over long periods of time it is apparent that the positivist theory is inadequate to describe law. Natural law similarly fails to explain what is seen in the historical record. I suggest an historicist theory best describes the law when seen as a conceptual and historical whole. I then identify a fundamental break in the historical record, the Enlightenment, when the scientific worldview became dominant. The scientific gaze splits nature (including law) into two parts, moral and scientific, and it holds the moral in low esteem. Accordingly, legal positivism only recognizes the scientific part. Positive laws are the most impermanent kinds of legal things in the historical record; whereas such legal things as consent, constitution, and just war persist over very long periods of time. If such a legal thing is analyzed in the scientific age I argue we must re-unite it with its moral part to fully understand it (the Unity Thesis). It is only in the reunification that ideology/critique can be neutralized, the dialectic resolved. The US Constitution is an Enlightenment legal thing. Positivist ideology causes us to see it as democratic, when in fact it is oligarchic; to think everyone has equal rights, when in fact right is possible only with power. Democracy and rights lead to tension between the rich and poor, whereas a vision of the state unified with the Common Good may lead the few and the many to cooperate for that Good.

1. Introduction

From an ahistorical point of view it is easy to think of law as being norms passed by legislatures and similar kinds of rules, as positive law. But when studying law over long periods of time,
especially in the study of the history of law that reaches into the late middle ages, into the origins
of the western legal tradition, the positivist idea of law is impoverished. It is so reductionist it
does not permit a comprehensive study of the things of which the law consists. In this paper I
expand the idea of the law to encompass the kinds of legal things one sees when one studies the
history of law. Such legal things include positive law, but also include more general concepts
(such as consent, just war or a constitution) that neither come into existence nor end with the life
cycle of a positive law or legal regime. I characterize legal things, and then generalize a theory to
account for them. I do not reject the ideas of positive or natural laws, but subordinate them to an
historicist vision of the law.

I begin the paper (Part 2) by dwelling on some general characteristics of the law and
distinguishing it generally from its context. I then move, in Part 3, to a discussion of legal things
in which I introduce the Unity Thesis, a way of interpreting Enlightenment and post-
Enlightenment knowledge. I then identify (Part 4) different ways legal things can be transformed
in the historical process, with a special focus on Enlightenment transformations. With the
foregoing as background, I outline a general historicist theory of law in Part 5, illustrating it with
a brief analysis of the US Constitution.

2. The Necessity and Nature of History; History and the Law

... a vague memory has no power against
the vitality and freedom of the present.1

Some general comments about my approach to history are necessary.2 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,
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.

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1 G.W.F. Hegel, Reason in History: A General Introduction to the Philosophy of History 8 (Robert S. Hartman
2 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.
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:

Original History
Reflective History
Philosophical History.”

“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 about the events. He lives the spirit of the events, he does not yet transcend them.”

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.

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

Universal
Pragmatic
Critical

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4 HEGEL, 3.
5 Id. at, 4.
6 Id. at, 10.
Fragmentary

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.” 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.”

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.

“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 kind of reflective history is “conceptual,” and if it

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7 Id. at, 3-10.
8 Id. at, 7.
9 Id. at.
10 Id. at, 8.
11 Id. at.
12 Id. at.
13 Id. at, 9.
14 Id. at, 10.
“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 external thread and order of events and actions, that they are indeed their internal, guiding soul.”

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.

“...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.”

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.” He follows this opening statement with a most complex 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.” 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 … .”

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

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14 Id. at.
15 Id. at, 10.
16 Id. at.
17 Id. at.
18 Id. at, 10.
19 Id. at.
20 Id. at, 9.
histories, elsewhere in Hegel we understand that Reason and morality are deeply linked through the institution of the state.\(^{21}\)

What Hegel was getting at is that the identity of the historical thing is more or less a product of reason. Just war, e.g., 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., \textit{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 be operated on by reason in a certain, restricted way.\(^{22}\) 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.\(^{23}\) 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 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 something is universal it is ahistorical (Platonic form), but without history of some kind it has nowhere to exist (Aristotelian form). This raises questions of substance and form that have long plagued philosophers. Scientism holds that there is only physical matter and accident, and accordingly.

\(^{21}\) See e.g., G.W.F. HEGEL, Elements of the Philosophy of Right (Allen W. Wood ed., Cambridge University Press. 1991). Hegel, through his theory of the state, has been understood to, and argued he did, destroy the idea of natural law, in the sense natural law represents some kind of universal. He argued that Right (\textit{ius}) is the reason of the state expressed through its will, it is the essence of the ethical state, and therefore. ALESSANDRO PASSERIN D'ENTREVES, Natural Law: An Introduction to Legal Philosophy, 72-4 (1951). (\textit{Recht or ius} Hegel defines in the most extensive sense as the realization of “free” or “ethical” will.) In turn, Hegel got the idea of the “general will” from Rousseau. Id. at, 75. It is not clear to me that there is a substantive difference between understanding natural law to emanate from or inhere in nature or human nature or thinking of it as emanating from or inhering in the state or history. In both cases law can be understood as essence or form. It may that Hegel was not fighting the Aristotelian idea of natural law, but the Christian one, in which natural law was a kind of downgraded divine universal law, that like divine law did not inhere in nature. Wil WALUCHOW, Constitutionalism, The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), (2008). I lump together all non-positivist theories of law into the phrase “natural law” for simplicity in this paper, although that usage violates some important theoretical boundaries.

\(^{22}\) See discussion in Part 4 below.

neither the possibility of history or universals, 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 universal and the particular, other
than to avoid positions in which the only thing that exists is the universal or the particular. For
example, scientism, or legal positivism, must be rejected a priori, otherwise there is no history.

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 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 evil is connoted by the label immoral. So,
when I say I want to include the moral in the definition of law, what I am not saying is 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 e.g., 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

24 LORENZ KRUGER, Does a Science Need Knowledge of its History (1978), in Why Does History Matter to
25 See note ___. [on Right=ius]
26 ALASDAIR MACINTYRE, After Virtue: A Study in Moral Theory 38 (University of Notre Dame Press 3rd ed.
1981/2007); see also note ____.
27 See e.g., JAMES TURNER JOHNSON, The Holy War Idea in Western and Islamic Traditions (The Pennsylvania
State University Press. 1997); JAMES Q. WHITMAN, The Origins of Reasonable Doubt: Theological Roots of the
Criminal Trial (Yale University Press. 2008). The discussion of time that follows is simplistic, although I think
functional. See e.g., QUENTIN SKINNER, The State, in Political Innovation and Conceptual Change 23, 104-124, 346-
7, (Terence Ball, et al. eds., 1989). See also, JOHN EDWARD SULLIVAN, Prophets of the West: An Introduction to the
understood to be a bad thing.\textsuperscript{28} It is the presence of evil in just war that is the cause of its being so problematic; and it is the 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, archaelogy 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 [positivist] 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.\textsuperscript{29}

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

\textsuperscript{28} \textsc{MacIntyre}, 176.

\textsuperscript{29} See Harcourt note
narrative of how the ideas of consent and just war are institutionalized in constitutional legal regimes engages 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. The Unity Thesis holds 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) Utopias and Legal Things

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 neijing) 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. 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.

A utopia is an ideal or aspirational state; it is an idea that seems to be universal, of a better life, of a life that could be but for historical and other contingencies. The unified concepts I seek to elucidate are a bit like utopias. They existed and functioned in the past, they are identifiable but somehow non-existent now, and they can exist in the future. I cannot argue they will exist in the same way as they did in the 4th century BCE, or the 14th century CE, because historical

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circumstances will have changed too much. But I can argue the concepts are universal enough to exist in the future in a way fundamentally identical to the way they existed in the past. The unities I speak of are somewhat utopian inasmuch as they abut the universal, and things universal are always utopian. They are not utopian inasmuch as they are, by this work, being reintroduced into actual political discourse as a way of describing facts on the ground.

e) Families of Law, Living Things and the Future

There are two families of law. The central example of the first family of laws is the law of gravity, and we think of this class of laws in Enlightenment terms as the laws of nature. These are laws that describe the behavior of inanimate substances, and they are very precise. Since the late 19th century there are classes of these laws that are described in statistical terms, but even though we might understand that concrete things are at some level statistical in nature, we are able to rely on our understanding of these laws to make extremely reliable things like spaceships that go to and return from the moon, bridges, cell-phones, and to organize, build and maintain a vast and exceedingly complex network of electronic communications over the surface of the earth. Typically these laws are gathered in the academic disciplines of physics and chemistry, and their sub-disciplines. I am going to call these “Scientific” laws (norms, rules, etc.).

Scientific laws are excellent for predicting the future. If conditions are such that a scientific law can be applied, then we can predict the future with great certainty with regard to things to which the law is applied or to which it is applicable. Not only that, we can do it without regard to the purpose of the application. We can build a very reliable and sturdy bridge, and we can predict with precision the weight it will carry, its likely life-span and so on. And those things will be accurate whether or not the bridge is used for its intended purpose [of being a bridge]. The applicability and reliability of this family of laws operates independently of purpose.

The second family of laws is those governing living things. This is a much more diverse set of laws, and within this family there are only a few laws that have the same kind of certainty that can be found in the first family. There is a profound and absolute metaphysical gap between living things and non-living things, and therefore the family of laws relating to living things, with the exceptions I mentioned, only bear a resemblance to Scientific laws. I am going to call the second family of laws “scientific” laws (norms, rules, etc.).

With regard to living things there are only a few Scientific laws, and these were identified by Aristotle. Living things:

- Only come from other living things;
- Need nutrition;
- Regenerate to varying degrees;
- Have consciousness or life (Gr. psuche);\(^{32}\)
- Have the capacity to reproduce;

• Mature, and then die.

There are many subsidiary Scientific laws regarding living things, such as those around death. We are very, very good at knowing how to kill living things, and how to manipulate their bodies physically. But our knowledge of the best ways to maintain living things is miserable and fraught with uncertainty.

From one perspective of the second family of laws there are three sources of norms. After I describe these three sources, I will introduce some puzzles that suggest the relationship between these classes of norms, and the typology itself, although apparently self-evident are problematic. The three classes of norms are those originating in the sub-organism level, from the organism level, and from the group or super organism level.

Sub-organism level norms are typically associated with a vision of living things as machines. We might say here, e.g., that a person is sick if their body hosts an overgrowth of a certain kind of bacterium; or that depression is a chemical malfunction of the brain. This level contains all the rules relating to genes, and manipulation of genes; neuroscience; physiology; and so on. Although there are areas of great certainty in this realm of laws, it is very clear all of those laws must be understood statistically, with some version of the normal distribution.

These norms were thought in the Enlightenment to behave with the same kind of regularity and reliability of the Scientific laws. Newton’s mechanical idea of nature was the guiding light. Even though now they are understood to function under the more general overarching, but less-precise, laws of neo-Darwinism, the community of life-scientists treats its laws as though they are of the same nature and have the same stature as Scientific laws, creating and sustaining the ideology of the life sciences. The rules emanating from this level do not have a language for the organism per se, because they are all based on a reductionist theory, that the higher levels of organization can be understood entirely by rules from lower levels. The whole is not greater than the sum of its parts. The general inefficiency of rules from this level is widely accepted. Laws from this level cannot give rise to, nor regulate, dignity, morality, political order, etc. The main reason this is so is because none of the theories by which this level is understood to work include an understanding of life itself, psuche, the animating principle. That being said, geneticists, neuroscientists, evolutionary theorists and others frequently announce ways in which their laws have jurisdiction over the realm of dignity.

Another class of norms originates from the level of the organism. We usually think of the human as being the only source of norms in this category, but arguably other animals share significant norm-related features with humans. I will only be referring to humans, or human animals.

Laws that originate from this level include positive laws and all of the various forms of reasoning, the sciences and philosophies broadly speaking. Ideas of dignity originate here. Central to a comprehensive theory of law at this level is the theory of the human at the

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33 Statistics ….
34 Life scientists misrepresent the effectiveness and reliability of their knowledge in order to maintain their social authority and funding. See e.g., SHEILA JASANOFF, Designs on Nature: Science and Democracy in Europe and the United States (Princeton University Press, 2005).
organismic level. Since in the popular imagination, and in the academy, the life scientists have been providing the dominant theory of the human, in spite of the theoretical impossibility of it, there is considerable confusion over exactly why humans should have moral value. Confusing the landscape even more is the other dominant theory, Christianity (or its siblings, Judaism and Islam). Neither the life sciences nor Christianity can provide satisfactory explanations of life, of living things. I have explained the life sciences. Christianity explains nothing by reference to God, or Jesus, because it uses those references as general causal mechanisms with no explanation of how they work; nor do they provide any kind of conclusive reasons why their theory or description of God is any better than anyone else’s, although they claim their God is exclusively entitled to be called “God”; nor does Christianity, Judaism or Islam provide a consistent theory of fairness for non-believers. It fails as a source of norms for humankind considered on a global level.

The unique feature of life at the organismic level is the capacity of humans to make decisions, to choose, to exercise free will, etc. It is this feature that cannot be explained by the life sciences or religion. The Abrahamic tradition posits free will, but that assumption is contradicted by the dogma that God is all powerful. If God is all powerful, then no-one can have free will, since God knows what will happen in advance, and if so then a free decision is only the illusion of a free decision. Both Islam and Christianity struggled with this problem, in very interesting ways, and both reached some kind of consensus that although God was all-powerful, man had free will too (for various reasons). Once free will is recognized though, then the importance of God, and the relationship between man and God, is altered in fundamental ways that easily lead to complications in distinguishing man from God. Science is the atheistic heir to this tendency, having concluded man is the ruler over nature. My point here is not to establish conclusive arguments against the life sciences or the Abrahamic traditions, rather to distinguish and carve out an area of human life that is free from either of them, for both distort the public sphere and keep us from exercising freedom with their claims to universal knowledge.

Free will is inherently limited. It is limited by the sub-organismic factors, and it is limited by super-organismic factors. Nonetheless central to all theories of law (including political theory) is the capacity of healthy, adult human beings to make significant decisions freely. Since the ideologies of the life sciences and the Abrahamic religions act to limit those choices based on mistaken or misinterpreted universalist norms, their influence must be limited in the public sphere. At the core of what I referred to above as the “dignity realm” is the bounded capacity of the healthy adult human to make real choices.

The third class of norms arises from or at the super-organism level, from group identity. There are two kinds of norms in this class: norms recognized, identified or discovered by social scientists and those arising from political activities.

The laws arising from the social sciences suffer from the same conceptual weaknesses as the norms from the life sciences, although many life scientists (and hard scientists) think the social sciences cannot produce rigorous quantitative norms. These laws are produced using the scientific gaze on populations or groups of people, so they are subordinate to the dignity realm. The scientific gaze cannot recognize the free capacity to choose.

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35 See e.g., Hallaj on Iblis.
Political activities arise from the free choices of many people, and laws coming from this subclass of activities are also core elements in the dignity realm. I argue in this paper that law, including political associations and theory, among other things, arises from history; yet here I say law most directly arises from the free choices of healthy adult humans, and that laws also arise from the life and social sciences. This echoes the religious dispute in which there is a tension between purely man-made laws and God’s law. Instead of reading God into nature as a source of law, we instead recognize that the life-world has laws that determine us in part. Those laws establish the unfolding of nature as history as the context within which freedom is exercised.  

i. Puzzles

The three sub-classes of law I have just described make some sense if the division of knowledge in the academy makes sense. But it is far from adequate, and when considered substantially reveals so much circularity as to break down entirely.

There is sound science arising from social epidemiology that demonstrates socio-economic status is one of the strongest predictors of the health of a population. Socio-economic status is the result of political will (free decisions made by those with power; and it becomes a kind of force acting through history to limit the free choices of healthy adults. The “externalities” of resource extraction, manufacturing and transportation also create a backwash onto the health and well-being of living things. The manipulation of the genome of food crops and other living things creates another backwash, one we know little about except that it seems exceedingly foolhardy.

Pollution is permitted by the political order. Pollution creates changes in the biological organism that lead to illness and/or death; or lead to other states that are easy to describe as originating the sub-organism level. In such cases, in which of the three realms does the cause arise? Does disease come from choices about eating pesticides? From the pesticides themselves interacting with an organisms genetic propensities? Or from the political or economic decision to permit the pollution? Obviously it comes from all three, with the dominant or final cause being the decision to permit it. In cases of illness and death such as these, it is disingenuous to say disease is caused by a genetic propensity, by neurological determinants, by evolutionary pressures, by social science causes, or by anything other than the political. The interaction between the political and the sub-organismic level suggests that science is always subordinate to law, to the political, when living things are the subject. That is, the three level taxonomy, while obvious, seems to fall apart when the web of life is considered. Central to the falling apart is man’s freedom.

Man’s activities create substances and conditions that directly lead to unnecessary death and suffering. At the individual level though these causes are hard to distinguish, but that they so function is indisputable. The foregoing leads to puzzles about health and disease. Is all disease natural? Social epidemiology establishes what I stated above, that people who live in poverty have a greater burden of disease. When a poor person does to the doctor though, he or she is treated as though he or she has a disease, but the disease or cause is not understood to be poverty.

36 This is Hegel; and it is consistent with important eastern theories. Central is the freedom of consciousness or the life principle, and its inherent unboundedness.
Since even those who flourish get diseases, suffer and die, then how do we distinguish at the individual level what the cause of disease is, and whether it is or should be prevented?

**ii. Law at the edges of the Dignity Realm; Psuche and the Future**

There are two poles between which all law arises (ahistorically). On the one hand is the first family of law, the laws of nature, the proper subject of Science. These laws, such as gravity, and the laws of material Science, cannot be changed by the intentions of any living earthly being. On the other end of the spectrum are the laws created by the intentional activities of man. One of the strongest examples of those laws are positive laws. The first family of laws provides a stable substratum for the existence of living things; they are, in Aristotelian terms the material cause, or determinative of the material cause. They can be said to have an internal principle, or telos, but it is a low level, especially when compared to the teloi of living things.\(^{37}\) There are very good reasons to say the subjects of this family of laws, and the laws, are morally neutral because of the lack of animate purpose.

The second family of laws has a core set of purposes that apply to all living things:

- Eat;
- Regenerate;
- Reproduce;
- Grow, mature, and then die.

These purposes only occur in things organized with a life principle, or consciousness (Gr. psuche).\(^{38}\) Living things have the thing or principle of life. Aristotle identifies it as a kind of form on a form; eastern philosophies as some kind of non-physical energy or consciousness that resides in matter and determines its form. I am not sure there is much difference.\(^{39}\)

About living things then, we can say they can live better or worse. If they can well fulfill their core purposes, then they can flourish. If the food they eat is not well fit with the needs of their organism, or if other requirements are scarce, then the organism cannot flourish. We say something is flourishing when it enjoys circumstances in which all of its capacities can be expressed. Just as there is a best way to live, there is a best way to die. The best way to die is at the end of a flourishing life, quickly, like a fruit dropping from the tree. There are many variations of the flourishing life and the good death. That is the central case of life itself.

\(^{37}\) Rather, let me clarify that the assessment the internal principles of the material substrate are “low level” is a conceit. I am not going to attempt to pull within the scope of this explanation the experiences and sciences of advanced meditators and shamans who claim to have the power to interact in a meaningful way with various elemental entities that control such things as the weather. Being able to control, e.g., hail in Tibet, is an extremely important function. That such considerations are well within reason can be inferred from the status of the material substrate in Nagel’s recent mainstream but controversial metaphysical assessment of consciousness. His ontology does not recognize a distinction between living and non-living things, and he establishes consciousness at the apex, or controlling center; therefore, the material substrate, on his theory, also has consciousness as its central characteristic. Nagel.

\(^{38}\) This is both obvious and very complex. See e.g., Ackrill.; Nagel. See generally, Aristotle, De Anima (On the Soul).

\(^{39}\) Assuming his assertion in De Anima, Bk. III, Chap. 5 about the immortality of the active intellect is true.
The edges of life, or what I am calling the edges of life, are conditions under which life is difficult or impossible. Living things in general have an aversion to these circumstances, and it is well understood that living things fight death, disease and disability. Buddhism teaches that all beings get sick, suffer and die, suggesting that the fight against disease and suffering may be futile. We recognize this, but assume that some disease and suffering is avoidable.

There are laws arising from the desire to avoid death, disability and disease (suffering and death; coercion and disorder); and laws arising from the goal of a flourishing life and good death. Arguably all laws in the second family of laws fall into these categories. One defines the state we aim for, and one the state we move away from or seek to stop, avoid or prevent.

These are the basic purposes of law, and they apply to all living things. In this way perhaps we can call these natural conditions for the law, or natural laws. They are universal, but they are not grounded in reason. Obviously I use reason to describe and explain them, but I am describing something all living things know directly. They are not universal in the sense of a Platonic form, not in the sense of the law of gravity, and not in the sense the Christians say God is universal. They are universal only to the extent there are living things. They are a characteristic of life.

All life then is towards something, and that something, the good life, exists in a strange temporal state. Because it is always becoming, it exists now and into the future. The existence of the goal, the telos, in the living thing, means the present and the future are not only continuous, but that the telos is the thread of that continuity, the thread of identity. Since all laws are about the good life, then all laws are about the future. All laws are teleological. We make law, we find law, always in relationship to a desired future state.

Physical laws, the first family of laws, are also teleological, but in a different way. Whereas life-laws aim for a desired state, the outcome of the law is uncertain; but in physical laws the outcome is always certain, assuming the proper application of the law to the initial conditions. In both cases the law is about determining the future. We seek to know and make laws to determine the future.

The dignity realm emanates from the core purpose of life, the good life. The goal of the good life is the measure of all laws, is the core meaning of right. Right, in the geometric sense, means alignment with the means that manifest or are intended to manifest the good life. While this is obvious with regard to any individual, regarding groups of things the measure of right becomes highly conditioned by historical contingency. That is why history plays a core role in law. We understand that right is also just; but how do we evaluate acts and intentions that lead to death and suffering, that lead away from the good life, on a community level? Over time we have developed legal regimes, whether enacted, by custom, or otherwise, to manage individual transgressions and transgressors. But when political decisions are the subject of the analysis, how do we determine what is right, and correlative, what decisions we will proscribe? Again, the answers to this question can only be made in historical context, no matter how abstract the idea of the good life is.
iii.  Sacrifice; the Role of History

One way we talk about different life forms is with the taxonomies used in the biological sciences, the language of species and genus. I have been using this language already, families and classes of laws; but now want to continue thinking about the edges of the dignity realm at the species level.

It is clear that not every living thing can lead an unqualifiedly good life. An important question then is how to determine right if the goal of the good life is unrealistic for most people. I speculate about this as a political matter at the end of the paper; but now want to consider the idea that however we solve problems of right at the species level, sacrifice is always part of the answer. When we consider law that is intended to avoid death and suffering, we build in looseness that equates to a certain amount of death and suffering (e.g., environmental externalities); and in some cases we do not even consider the death and suffering that will result (e.g., animals raised for food). We permit economic systems to dominate political systems and create widespread poverty. We permit weapons’ manufacturing and sale to numerous murderous and cruel regimes. We tolerate America’s behavior towards its indigenous populations, and its worldwide kill programs; China’s behavior to the Tibetans; and Israel’s behavior to the Palestinians. We tolerate the Christian intolerance for birth control of any kind; and the intolerance of the faithful towards the unfaithful.

We can describe what we see as a conflict between the individual and the group or state; but this is disingenuous, as the problem is much more complex and involves powerful corporate (i.e., communal) entities that act in the civic order for their own ends, their own good, without regard to the good of all.

As we examine this apparently more negative edge of the law, we are confronted with the question of whether every person, or every living thing, has some kind of right or claim on the good life. Our toleration of sacrifice at the species level suggests we do not recognize an equal claim on the good life. If not, is there anything we do recognize as a right or claim? Perhaps the fact we think, or used to think, that sacrificial things are special means we recognize something special in them analogous to the thing we recognize in those who are not sacrificed; or maybe it is the same, but we act under another force, recognizing sacrifice is not optimal but necessary. But I am not sure those readings capture the idea of sacrifice, because we sacrifice also with regard to the future: either to correct some wrong done in the past that will affect the future negatively; or to establish conditions under which the future will develop well. We sacrifice for the good life; for the future.

The most important political question then, is who chooses whom to sacrifice, for what and when? Aristotle’s constitutional taxonomy answers this question. In theory it can be the one (a monarch or tyrant), the few (the aristocracy or oligarchy), or the many (the polity or democracy). Although we claim that the many do or should make the decision, it has always been the few who decide (except under some tyrannies).

So sacrifice is intimately related to the form and purposes of law. Moreover, it is a deeply historical thing, but not in the Christian mold of history. The Abrahamic tradition, like all such
traditions, is imbued with sacrifice; and the Christian offshoot has human sacrifice as its central tenet. The Christians in time interpreted that one sacrifice as establishing a linear history that functions by efficient causation except for the extraordinary and uncontrollable interventions of God. That artificial reading of history would become the backbone of Enlightenment science. Sacrifice though overruns that sectarian theology, even in the Christian tradition, as that form of sacrifice is reenacted on daily, yearly and other regular schedules to maintain some kind of life in the tradition. Death is enacted for life. Sacrifice functions in a non-linear historical space, arising from historical roots that have been obscured through the processes of life.

Law then enables renewal, growth, even as it recognizes and accommodates sacrifice, disease, suffering, stasis and death. Law is something about the life of the species. We are brought again to Aristotle’s reading of the idea of the constitution. It is the pre-existing thing that organizes a [living] political association. Law is a principle of growth, it is the expression of the stability that permits both necessary and contingent movement of and into future identities. We cannot make commerce of any kind without that fundamental stability of identities, of community.

Law enables order, with death and suffering representing the edges of order, the banks of the river. Ultimately it is death, suffering and sacrifice in the context of moving into the future that teaches positivism and natural law theories of law must be subordinated to the understanding of law as the structure of life in the flow of history. Neither positivism or natural law theories live: one is locked into the material, mechanical world and efficient causation; and the other locked into Kantian reasoning anchored in the even more abstract Rorschach called God. Each contributes norms to law, with natural law ideas tending towards the permanent, and positive laws tending towards the impermanent, but both are determined, molded, embodied, and enacted in and by the flow of life, history. The central case of the law of living things is the flowing water, not the banks.

One can say this historicist theory is a natural law theory, but only if we understand the word “nature” in a kind of classical Roman or eastern sense. Nature on this reading is our world in all of the complexity that consciousness and intention acting in and through bodies give rise to, without Abrahamic and scientific restrictions on the metaphysics of self or history, on what is real and unreal, or what ought or ought not be. Nature is the field of freedom, bounded and created by law, infused with meaning by the freedom of consciousness, and understood through the processes of history.

iv. The Origins of Law in the Dignity Realm

The dignity realm extends from consciousness into human affairs. It is something that is recognized, not inherent. What is inherent is life and consciousness, and for them as such there is no need to recognize dignity or anything else, as healthy consciousness is infused with compassion because it directly apprehends the life in other living things. Fear, greed, ambition, progress, ill-health and the states of being of human life that people fall into as they are influenced by forces from the edges of life lead to ideologies, including ideologies of law and science, that do not see or recognize life and consciousness. These forces inhibit flourishing in unnecessary ways. The recognition of dignity as a legal thing is the healthy human response to those forces. It is native compassion recognizing consciousness and life in other living things.
who are suffering unnecessarily and saying to the forces of disorder and stasis to recognize life in the other directly, not through negative emotion or faulty Enlightenment reason. The dignity realm supervenes on the web of living things; on the web of life and freedom. In this way it becomes a source of justice, a way we can assess positive legal regimes. Do they support flourishing? Or do they result in unnecessary death and suffering, in cruelty and stasis/disorder?

Aristotle observed that all human actions aim at the good life; but distortions of character and intellect, and broader political disorders (stasis) and bad constitutions, lead to the creation of conditions that inhibit its emergence. Dignity does not seek to blame those whose character creates disorder, although they may be blameworthy. It seeks instead always to expand the field of freedom for the web of life as it continuously emerges through law into the future. In this way it determines the expression of all the laws, to a greater or lesser degree, in the second family of laws.

3. Legal Things and Their Transformations in History; the Unity Thesis

I focus now on legal things. A legal thing can be a law, a legal system or a legal concept. I refer to three specific legal things in the course of making my arguments: consent, just war, and the state. Consent is in the nature of a right; just war of a legal doctrine or law; and the state of a comprehensive legal system.

I use the phrase “legal things” because as I studied the effects of the Enlightenment on legal discourse, I realized that the changes were so profound one almost has to start over with a new descriptive language for the law. There were legal things before the Enlightenment, the Enlightenment acted on them, and afterwards the legal things were changed, in some cases unrecognizably disconnected from the thing they were before.

Although the Unity Thesis can be applied to all legal things, the importance of it as an analytic or interpretive tool is much less with some kinds of legal things. Before typing legal things though, I have to say some more about the English word “law.” Since English only has one word for the many things law can be, and since positivism dominates legal discourse, “law” is, or seems to be, synonymous with positive law. But the positivist definition of law is so limited or contentious it is not helpful. However, when we look outside of English we find that most languages have at least two words for law. I use the Latin terms, ius and lex. Lex is the familiar positive law, so what is ius? Historically ius is a very complicated word, but let us put that aside for the moment. Instead of asking what ius is, let us ask what the law is, but not in the sense of positive law. That is, why do other languages (including most Indo-European languages, Chinese and Arabic) have at least two words for law? What could they possibly mean by the other word? Often ius is translated as “right”. That is a correct translation, but it is not the main translation, which is “law”. The core

40 Part ___
41 Part ___
42 Part 5
43 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 H.L.A. HART, The Concept of Law 207-12 (Clarendon Press 2 ed. 1994).
idea of *ius* is that it consists of *lex*, or a system of *lex*, and it includes the purposes for which the *lex* exists. Those purposes are always ethical, in which ethical invokes right, justice, the moral and the political. In other words, in positivist terms, *ius* is *lex* plus the morality of the *lex*. There is no *lex* without *ius*. Therefore, I argue positivism distorts all legal arguments because it denies the identity of *ius* and *lex*, but to understand legal things we must recognize the unity of their scientific and prudential artifacts. That in short is the “Unity Thesis”.

The Unity Thesis holds that the separation of law and morality in all cases leads to misunderstandings about the law because the category of the moral, a residuary category, is artificial and confusing. The confusion arises from Enlightenment ideologies about nature and science that were improperly applied to the ethical order. The Unity Thesis holds that when the confusion is sorted out, it becomes clear that the two artifacts of any legal idea, the scientific and the prudential, must be rejoined if the underlying legal thing is to be understood properly.

Now I can distinguish two kinds or types of legal things. From a historicist perspective we observe that legal things can be described on a continuum from the long-lasting, fundamental or structural to the accidental or contingent. The more fundamental a legal thing is, the stronger its *ius*. The more historically contingent legal things have stronger *lex*. A constitution is a law with strong *ius*, a speed limit one with strong *lex*, yet in neither is there one without the other. The Unity Thesis is most helpful with fundamental legal things, such as the idea of the state, consent, and just war. Those are the kinds of legal things that do not sit easily within the positivist limitations on what it means to be a law.

There are several kinds of transformations a legal thing 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 types of transformation are:

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

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

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44 Simpson discusses this in his interesting history of Hart’s The Concept of Law. A.W. BRIAN SIMPSON, Reflections on *The Concept of Law* 86 (Oxford University Press. 2011). (… in [Hart’s] famous exchange with Lon Fuller over the vehicle in the park he doggedly maintained the view …[that] … whether a particular thing was a vehicle should be decided without reference to context. In particular any use of the supposed purpose of the legislation was not to be treated as relevant. All you needed was the word, and the normal conventions of ordinary language. Citing HLA HART, *Positivism and the Separation of Law and Morals*, 71 Harvard Law Review 593, 607 (1958).)
the development of a thing over a fixed period of time, or to understand something about the present.

I use the three legal things (word/concepts) identified above to illustrate my points. The first is the idea of consent, and I use it to illustrate transformations 1 and 2. The second illustrative legal thing, for transformation types 3 & 4, is just war (*iustum bellum*, the law of 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.

I discuss Enlightenment transformations in their own section, Part 4, since they are a focal point of the paper. I use the concept of state to illustrate those transformations.

**a) Morphological and semantic transformations**

When tracing a legal thing through very long time periods form and meaning 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 legal thing consent.\(^{45}\) Consent began life, for our purposes, in Justinian (c. 526-532),\(^{46}\) in which it reflects a rule in the law of guardianships recognizing the power of guardians:

"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

In the late middle ages it gets refracted through Gratian (c. 1148) into important and formative juristic writings, both in canon and civil law.\(^{47}\)

Gratian, D.12 c.6 (Justinian's Institutes 1.1): "*Diuturni mores consensu utentium approbati legem inmitantur.*" (Long standing usages (mos) approved by the consent (consensus) of those following them are like ordinances (lex)).\(^{48}\)

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\(^{47}\) Tierney, 24-5;
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)"49

It was familiar in English common law by 1251 ("quod enim omnes angit et tangit ab omnibus debet trutinari."). and in 1295 the English king, Edward I, in an election writ, transmuted the principle from “a mere legal maxim into a great political and constitutional maxim.”

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 that in time is shortened to “quod omnes tangit.” It is not just one word, it is a concept. By the end of the Enlightenment it was broadly disseminated through private and public, constitutional and international, law and legal institutions.51 Today its meaning is generally either confined to discussions in the health sector,52 it is discussed in the way one discusses a constitutional principle,53 or it is used in emerging ways in human rights.54

b) Transformation into socio-political institutions

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 development of the legal system as a whole.55 The main problem iustum bellum was developed to solve was the legality or


51 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. BRIAN TIERNEY, 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. POST.


54 See e.g., MARIANNE VOSS & EMILY GREENSPAN, Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC) 10 (Oxfam America 2012).

55 The world of the late Middle Ages, in which 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. WILHELM G. GREWE, The Epochs of International Law (Michael Byers trans., Walter de Gruyter. 2000). ANTONIO CASSESE, International Law (Oxford University Press 2nd ed. 2005).
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.\footnote{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 18th century. Whitman.} The reasoning of the jurists on this matter were the law of war, \textit{iustum bellum}.

Jurists provided the \textit{iustum bellum} until the early 20th 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, as 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 20th 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.\footnote{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 constitutional Charter law which establishes a policing function for the Permanent Five. That P-5 have in many ways disabled or instrumentalized the policing function is in significant ways beside the point.}

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.\footnote{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.”}

\textbf{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 an episode in the historiography of the twinned Latin phrases that we understand to refer to the laws of war today, \textit{ius ad bellum} and \textit{ius in bello}, to describe this kind of transformation. The question is: what is the provenance of the twinned phrases?

One starts with Michael Walzer’s 1977 work, \textit{Just and Unjust Wars}.\footnote{MICHAEL WALZER, Just and Unjust Wars: A Moral Argument with Historical Illustration (Basic Books. 1977).} Almost every just war commentator writing today begins their analysis with Walzer, and since Walzer popularized the twinned doctrine, Walzer’s sources might be helpful. It turns out his sources are not at all helpful.\footnote{Walzer’s historical understanding of his subject is weak, at best.} However, Robert Kolb, a younger contemporary historian, informs us that the twinned Latin phrases in all likelihood were coined in the early 1930s by Josef Kunz, an international
lawyer and scholar active from the 1920s through the 1960s. When investigating Kunz, I found that he and many of his contemporaries characterized the 19th century as a period in which there was no law of war. That cohort of scholars who were active in the same period as Kunz (Oppenheim, Wright, e.g.) generally understood that the discussions about reintroducing a new law of war began with negotiations for the League of Nations in the aftermath of WW1. That means there was general consensus among international law scholars that in the period from about 1815 (Congress of Vienna) through the end of WW1 there was no *ius bellum*, no *ius ad bellum*, and no *ius in bello*. All of those phrases translate as “law of war,” although the latter two, which were not in use *per se* prior to the 1960s, are understood to be mean, respectively, “law of going to war” and “law of conducting war.”

However, there were two treaties that seem to be anomalous, the Geneva Convention of 1864, and the Hague Conventions of 1899/1907. Both of these established treaty law prohibiting certain conduct during war. These treaties, and their successors, would become known more widely in the 1960 as *ius in bello*, mostly through the writings of Paul Ramsey, and would be canonized as such by Walzer in 1977.

There are substantial questions about the status of these treaties as international law (rather than mere multilateral treaties), but for the sake of argument I will assume they attained that status. So, the initial question has been answered, but it leaves another question in its wake. *Iustum bellum* is the general phrase for law of war through at least the interwar period. The twinned phrases, while coined probably in 1916, did not enter general discourse about war until the 1960s. The lingering question centers on the first Geneva Convention. Would it have come into existence had there been an explicit law of war, *iustum bellum*? I and others believe it would not have on the grounds that without any law of war, a kind of bare framework for how to conduct war seems reasonable. If people are concerned about the ill-effects of war, and many were, and if there was no *ius bellum* regulating war, then something was better than nothing, and this left sovereign decisions about war-making to the sovereign.

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 (because war would already be regulated under the *ius ad bellum*) 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 early 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 entirely legal.

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61 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).
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 positive 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.62

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 and other legal things. That is not only of antiquarian interest, it gives us better access to our own normative environment.

4. Transformations Brought on by the Enlightenment

During the Enlightenment (roughly 1630-1850) the discourse about right was transformed.63 It was one of the most momentous jurisprudential events of written history, as it profoundly affected the relationship between law, science, right, morality and history.64

62 See note 30 (beginning “Marx”)

63 MACINTYRE, 38. (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). See generally, PETER GAY, The Enlightenment: Rise of Modern Paganism, Vol. 1 (W. W. Norton & Company, Inc. 1995);PETER GAY, The Enlightenment: The Science of Freedom, Vol. 2 (W.W. Norton & Company, Inc. 1995);HENRY STEELE COMMAGER, The Empire Of Reason: How Europe Imagined and America Realized the Enlightenment (Phoenix Press. 2000);JONATHAN ISRAEL, Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750 (Oxford University Press. 2002).

64 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., MACINTYRE. Of course, I do not refer to pre-Enlightenment changes in other legal systems, such as the interplay between legalism and Confucianism in China, or the legalistic trend in Indian political philosophy. See e.g. LI MA, A Comparison of the Legitimacy of Power between Confucianist and Legalist Philosophies, 10 Asian Philosophy 49.; G.W.F. HEGEL, The Philosophy of Right (T.M. Knox trans., Oxford University Press, 1942 (1820)). 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., WALLERSTEIN, 51-70.(Beginning at least in the second half of the eighteenth century, the humanist mode [of univeralism] 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 Barbeyrac’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 18th 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 (August 31, 2009); Geoffrey Nunberg, Google Books: A Metadata Train Wreck, Aug 29, 2009, blog entry at http://languagelog.ldc.upenn.edu/nll/?p=1701. NATALIE BINDER, Google's word engine isn't ready for prime time § December 15, 2011 (2010). (http://nataliebinder.wordpress.com/2010/12/17/googles-word-engine-isnt-ready-for-prime-time).

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 B. 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, The Concept of Law.

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 JANSSEN, The Making of Legal Authority (Oxford University Press. 2010).
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.\(^\text{65}\) 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 19\(^{th}\) century.\(^\text{66}\) Positivism developed in intensity and became more restrictive under the late 19\(^{th}\), early 20\(^{th}\), 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.\(^\text{67}\)

When science (i.e., the laws of nature) ended its formal relationship with natural law, the nature of legal discourse was fundamentally changed.\(^\text{68}\) Legal positivism, the science of law, became

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\(^\text{65}\) MacIntyre, id. at.; See also, John Lamont, *Fall and Rise of Aristotelian Metaphysics in the Philosophy of Science*, 18 Science & Education, 862-3 (2009).

\(^\text{66}\) 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 kind of law, and it the word is taken up in modern jurisprudence it refers to the metaphysical project, not to the mere description of a kind of law.


\(^\text{68}\) 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
the dominant ideology of law. Natural law discourse went underground, and was replaced by the idea of the moral.\textsuperscript{69} The moral is the residue of 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.”\textsuperscript{70} In spite of the scientific distaste for the moral, until the latter part of the 19\textsuperscript{th} 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

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\item first five definitions recapitulate the historical development of its meaning and demonstrate how the meanings fit together like a Russian doll.
\item 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 both science and morality/law are sciences.
\item 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
\begin{quote}
[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.
\end{quote}
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:
\begin{quote}
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, 1898). 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, 1898). 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, 1898).
\end{quote}
\item See note 56 above [Macintyre and the history of morality]. The is/ought distinction is the clearest expression of the separation thesis. 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. A 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, The Concept of Law.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, The Concept of Law 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 Universities Press. 2011). The distinction is intimately related to the formation of positivism and our ideology of science (naturalism), the privileging of empiricism, and the rejection of natural law (for the new empirical “science of law”). HACKING, 41-52.
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(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, the state, 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 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 juriprudes since, but for us it raises another issue. We recognize 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 18th century as two halves of a whole, seeking always to be united, but forbidden by the positivist rules of legal discourse (the Unity Thesis). In assessing the law of war and similar legal things we have not only to 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 but it was nothing other than the assertion

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71 See generally, IAN HACKING, The Taming of Chance (Cambridge University Press. 1990); LORENZ KRUGER, et al., The Probabilistic Revolution: Ideas in History § 1 (The MIT Press 1987); LORENZ KRUGER, et al., The Probabilistic Revolution: Ideas in the Sciences see id. at § 2; J. ROSSER MATTHEWS, Quantification and the Quest for Medical Certainty (Princeton University Press. 1995).

72 See e.g., BRIAN LEITER, The Demarcation Problem in Jurisprudence: A New Case for Skepticism, Oxford Journal of Legal Studies 1, 9 (2011). (Kelsen and Hart, as everyone knows, were both metaphysical anti-realists about moral norms: that is, they denied that such norms had any objective existence, they denied that the best metaphysical account of what the world contains would include facts about what is morally right and wrong.) Brian Leiter is a kind of shill for positivism. He thinks “science [is] perhaps the most important and transformative human artifact of recorded history.” (at 8). He fails to understand the relationship between science and positivism, that when he privileges science he is determining his choice for positivism, since it is science, not legal positivism, in which the metaphysical rejection of the moral order transpires. The Enlightenment functions as a metaphysical barrier to the world view of naturalists, such as Lieter, and so he will never understand that what he sees as absolute others, who are not constrained by the Enlightenment, will see as dependent or contingent.

73 That is, until Harold Koh, who had been a vocal critic of Bush administration policies, was appointed legal advisor to the Department of State. Once there is adopted he began to justify Bush policies, at which point most critics of the Bush policies went peacefully along. See e.g., PAUL STAROBIN, A Moral Flip-Flop? Defining a War,
of *iustum bellum* in all of its medieval glory, despite the fact *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 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 the split of legal things into the scientific and prudential parts gives rise to critique as the intuitive attempt to rejoin the parts using the language of ideology, false consciousness, truth regimes, etc. 74 We can define a kind of ordinary 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. 75 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.

## 5. Introduction to the Theory of Law

Legal theory is obsessed with the origins of law. I think this is so because law, regardless of how it is defined, and I’ll get to that in a moment, has a kind of embeddedness. Law is always related to the things it governs, somehow being over those things and somehow being in those things. A law against speeding exists in the law books, embodied in a larger system of statutes, but at the same time it is embodied in the act of driving faster than the limit established in the abstract...
statute, and it is embodied in a much larger set of laws and acts if a policeman “busts” or catches
the speeder, issues them a citation that in turn sets into motion a whole series of acts. Law is
abstract and yet it determines behavior on a mass scale. Law thus has a peculiar kind of power
over people and their institutions, and like for anything that has power, we want to know how to
get more of it, or how to control it. If we understand the source of law, we understand a very
important source of power, and presumably we can then accumulate and control the power.

A unique power of law is that it links ideas or the abstract with concrete things and acts. It has a
linking power. It is like one of those set-ups in which the scientist must handle something very
toxic and be protected at the same time. They build a box in which there is a robot arm/hand that
is controlled from the outside. The scientist inserts their arm/hand into a gloved mechanism, and
the arm/hand in the box tracks the movement of the scientist who is entirely outside of the box.
The law is something like that mechanism. The abstract rule is the scientist moving his arm/hand
in a certain way, the mechanism that links the movement of his arm/hand with the movement of
the robot is the law, and the civic body is the robotic hand/arm that moves in sync with the
scientist’s intention. The law is in an interesting and significant way removed from the
things/entities it governs. The simulacrum of the law is embedded in the particular, the empirical,
the flow of events, what we otherwise know as history.

An easy understanding of the law is that it is the thing passed by legislatures. That kind of law is
distinct, it is identified as law, and it is widely understood that if someone can control the
legislature they can control the law, and if they can control the law they are exercising a kind of
power that can be used to make lots of money, accumulate more power, and so on. The
legislatures are intense places because of the intense competition by interest groups to get their
laws passed. All the theories of law recognize this kind of law, and distinguish it by its origins.
They all call it positive law. One school of legal theory, legal positivism, says that these kinds of
laws are the only kinds that really qualify as law. The other theories do not go that far, saying
it is only one kind of law, and in some ways the least important.

A weakness of positive law is that it has a difficult time explaining how law and values (morals,
ethics) relate, since it is facially apparent law and values are deeply related. Once the positivists
proudly announced they had conclusively determined law was a social fact, something concrete
and value neutral, they immediately fell to explaining how their theory deals with values. There
is no positivist theory that does not explain the relationship between law and morals (values,
ethics, justice). The problem, simply put, is that a positive law, or the regime of positive law, has
drawn the vision or understanding of the law too narrowly. In philosophical terms the scientific
or analytic idea of the law is too reductionist. Law is inherent in political structures that embody
values, systems of justice, ethics and morality. It has a scientific part, but it is as though to say
the body alone is the human being. We understand the body to be important to the expression of
human nature, but we do not mistake the body for the person. I allude to many technical
arguments, but appeal to common sense. We understand, expect even, law to tell us what is right

76 The discussion about whether the civic body is mechanically determined by the law, and if so, to what extent, has
a long and interesting history of its own that I will not discuss in this paper. See e.g., HACKING, The Taming of
Chance.
77 Positivism has many meanings. See e.g., PETER HALFPENNY, Positivism and Sociology: Explaining Social Life
(Gregg Revivals. 1992).(describing 12 kinds of positivism).
and wrong. We understand, at the same time, that the law embodies our sense of right and wrong. We study the foreign and ancient laws and use such studies to inform ourselves of the morality of the time. What is the point then, of asserting that law is separate from and independent of the justice it obviously embodies?

Another weakness of positive law is in its relationship with power. We do not understand power to be an intellectual thing per se, rather it is a raw element, a capacity to cause things to happen. There are many theories of power, addressing not only how it is accumulated and maintained, but how it is used. Positive law is generally understood to be one of the institutions through which power can be exercised. The exercise of power through positive law raises questions about right. If the law is supposed to be right, but it is instrumentalized by power, then if we are to evaluate the justness or right of the law, we have to evaluate the goals of the entity exercising power through the law. Justness or right is a characteristic of the outcome of an act. If a large corporation lobbies congress and gets a law passed that favors them in some way, we cannot evaluate the outcome by looking simply to the positive. The positive law cannot inform us whether the law is right, even if we understand that law should be right, or enable some kind of justice. We must look then to another kind of standard to evaluate the exercise of power. This other standard is legal in nature, because it is used to evaluate legal undertakings (the passage and existence of the favorable law). It is this other body of standards that causes theoretical problems for legal positivism because it contains legal norms that are not positive laws. The positivist objects here and says those other norms are not legal, that I am playing a word game by calling them legal. That is one reason we have to explore the meaning of the word law; but even without that we can understand that a legal system of positive laws is not sufficient as an explanation of law because to explain the law we must refer to the other, non-positive elements of the thing we are describing, law. Justice is the way we evaluate whether the use of power through the legal system is right.

Law thus has a linking power, in which the abstract law connects with the particular scenario (to which the law is applied), it has a transmitting power, in which right is applied to the particular scenario, and it has the power of holding and dispensing right (justice).

To understand why positive law is inherently weak, we must directly address the question of what law is. It is exactly in answering this question that the importance of the Enlightenment becomes apparent.

We can ask of anything what it is. What is a table? What is a bird? What is that animal? In turn there are a few well-understood ways we can answer the question. We can identify the thing by its function, like the table. It is a thing on which we place other things that consists substantially of a flat surface. We describe the thing. Often descriptions, or definitions, include an idea of purpose because under one of the more powerful theories of identity, the identity of a thing is intimately related to its purpose. We are in deep philosophical waters now, but I do not intend to let this discussion drift into some kind of analytic hell.
In the Enlightenment the way we answered the question of what something is changed. It did not necessarily change in a common sense way, although even common sense answers changed. Where it changed was in more technical or scientific answers to the question. We came to understand that the best answer to that kind of question was one that did not refer to purpose, and since morality was understood to be a kind of feature of purpose in humans, purpose and morality were linked. When we separated law and morals (which is what the Enlightenment means for the law), it was in conjunction with, and for the same reasons as, getting rid of purpose from our definitions and explanations. A comprehensive and very strange effect of that was to change the very way we understood, and understand, the world and nature itself. The new way of understanding the world and nature was “scientific.”

One of the major arguments I make in this paper is that we should recognize, and then reject, that split (of law and morality, of purpose from nature). For now though, it is simply important to understand what it means for the law. When I ask what the law is, I have two different kinds of answer with which to grapple. In the scientific kinds of answers, I will only recognize positive law as law, and will accept legal positivism as the best way to understand the law. But if I accept that the scientific image of law is insufficient, then there are two additional kinds of answers I can give to the question of what the law is. One is that family of theories gathered under the rubric “natural law,” and the other is the family of historicist theories.

Natural law theories posit that law arises from or shares essence with things that are universal. The idea of the universal is rather abstract for this summary. A more concrete version is that natural law theorists think that law arises from reason, or from God. Law includes, in addition to positive law, a type of rule that is common to all mankind. These natural laws are supposed to be superior to positive laws because they are not as impermanent. Natural law theories are said to originate with Aristotle’s short and enigmatic observation that there are some laws that work everywhere. Note that natural law theories accept positive law, but add other kinds of laws to it; and recognize that these other kinds of laws originate somewhere else, in our abstract understanding of the world, or perhaps nature. A true natural law operates the same everywhere (is universal). Often morality and natural law are said to be the same, although the relationship between morality and natural law is hundreds of years old and complicated. This image of law recognizes that part of the definition of law is purpose. Law embodies purpose.

Historicist theories of law find the law originating in historical processes. Aristotle, although no historicist, described a constitutionalism that was later historicized by Hegel. The constitution, or basic law, is itself the identity of a people. It is both the organizing principle of the people, and the source of their law. On this reading the law itself, the system of justice, is the feature of the group that permits it to flourish. Although there are common features to constitutions, or a constitutionalism, the constitution will inhere in the historical political association as an organizational principle. Savigny’s theory is similar in that it finds the law arising from the folk-

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79 See Part 2(a).
spirit, the spirit of a people. These theories recognize that the spirit of a people can change, and that the spirits of different groups will result in different kinds of constitutions and law. This image of law also recognizes purpose as part of the definition of law.

I began this discussion questioning what the law is. I noted that we can easily identify law as the things passed or enacted by legislators. But although positive law is easy to identify, we find that it is not sufficient to answer questions about right or justice (why is that positive law right?). On the one hand, if we accept the positivist or scientific world-view, our inquiry would end and we would seek to explain the relationship between law and morality as though they were categorically separate things. On the other hand, we intuitively understand that law and right are inseparable, part of the same thing, and that one of the key features of law is its purpose. Since positivism is not in accord with common sense, and since even at more abstract levels it fails to satisfactorily explain why law and right are separate, I explained there are other ways to talk about law. In these other ways we recognize additional sources of law, we recognize additional things as law, and we recognize that the reductionist description of positive law is too restrictive.

We learn something important about the law from all three explanations. From positive law we learn there are features of the law that are very specific and that function well to regulate commerce and other kinds of transactions between humans and their institutions. We understand that the more specific a law is, the more limited its reach and import, the less redolent of justice it is. From natural law we learn that the law is informed by universal values, although we understand that the more universal the value the more problematic it becomes. One danger is linked to religion, because it is a primary source of values that its adherents claim are universal. The other danger is that the universal values are often too abstract and vague to be equally applicable to all forms of human (and animal) life. Nonetheless, the idea of universal values reflected in ideas about justice pervade and determine positive legal systems.

It is only a historicist idea of law though, that provides enough of a context for the concepts of law to enable us to understand law more fully, and more accurately. History is the arena in which public human affairs, as structured and understood by the law, take place. Law is informed and understood using universals or things that are more universal; law is grounded in the empirical, the contingent, the things we recognize as individual and self-contained; but it is only in the flow of life in between the particular and the universal that the law comes into existence, lives and must be understood.

The historicist idea of law must not be understood to mean that each historical narrative, each public history, has its own law. That would be an atomistic error. On the other hand we must not think that each universalism, like human rights, works well in every historical narrative. That would be an ecological error. I do not fully reject the idea of the universal (or the particular), but nor do I fully recognize the autonomy of universals (or particulars) in history. I locate the law in the tension between the universal and the contingent. Instead of thinking of law as consisting of positive or natural laws, however obvious that sounds, it is more accurate to think of law as consisting of legal things. Legal things exist in the continuities between the positive and the universal. Humans use both of them as needed to steer the use of power in the course of public history.
Philosophers have had trouble understanding the origins of knowledge. On the one hand, it has been conceded that “the problem of induction” pervades the scientific method. How can we figure out general rules from looking at individual things? In the physical sciences we can do this in a relatively unproblematic way; but in any kind of science of living things, that move from the particular to the universal is fraught with problems. On the other hand, if we reach conclusions about reality just from our reason, or from some authority such as god, or God, how do we know that knowledge is reliable, useful, valid? As a matter of fact we use the universal and the particular both to make sense of the world, but it is rare indeed that we can pick them apart in our process of knowing things and determine that this or that bit of knowledge is universal or particular, or that it came from the universal or particular. In both common sense and in technical understandings of the life world, the most accurate way of talking about the origins of things is in historical context. It is only in that field or way of knowing that things known exist. This is especially true of legal things.

The beginning and end of positive laws is easy to determine, more or less. But what of such quintessential legal things as the moral order, consent, justice, or constitutionalism? They do not come into existence in legislatures, or by royal fiat, but no idea of law can be understood without reference to them and they are clearly sources of law. We can call those things features of political theory, and avoid the problem by assigning them to a different academic discipline; or we can speculate and say they are universals, features of human nature itself; or we say they only exist to the extent they are written about. The positivist or nominalist understanding of them fails, as mostly legal positivism categorically excludes all of them, except a constitution, from the definition of law. The natural law understanding of them also fails because it does not adequately address historical contingency. If we understand humans beings as have the capacity to speculate and observe, and as having an inherent sense of right, and if we understand that history consists of human actions, that history is about living things, then it is not hard to conclude law arises from within public historical processes, not in the universal, wherever that might be, nor in the particular, as the particular has no inherent organization. We do not know a time in history in which either the universal or the particular was divorced from the historical flow (although we speculate about many kinds of utopias). All knowledge is embodied in books, memories, creations, acts … the flow of humanity is the flow of life, and it is in the public interactions of humans that the idea of right, the essence of the law, is played out. Humans can speculate, and they can live singly, but political friendship and identity, and justice, are inherent features of the res publica.

a) Illustrating the Theory with the US Constitution

The theory can be applied to the US Constitution, a legal thing that came into existence in the Enlightenment. It is a commonplace that every discussion of constitutionalism begins with Aristotle’s discussions of political association in the Ethics and the Politics. Although Aristotle does not use the word “constitutional,” he elaborates in great and interesting detail that thing, that legal thing, that would ultimately come to be known as a constitution. The history of an idea

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80 See e.g., HOWARD GILLMAN, et al., American Constitutionalism 5-6 (Oxford University Press. 2013). Plato’s Republic is the other anchor for discussions of constitutionalism.
is a special kind of history, since it is not the same as a history of something that is expressed in one language, or in one time period. It is a history not only of expression, but of transformations. If we want to know about the constitution, we have to pay attention to the history of the idea of the political association. The state is the quintessential political association today, but that was not always the case. The contemporary idea of the state emerged about the same time as our constitutionalism (~1650). Since constitutions are understood to either be or to form states, then if we wanted to understand the history of the legal thing “constitution” we would have to look in earlier periods for the same or similar idea, which may or may not involve the same word.

In my analysis of the legal thing constitution, I start with the problem of the Enlightenment. I have already described how all legal things changed in the Enlightenment because of the rise of the scientific way of knowing things. Since our contemporary ideas of the state and constitution are determined by the Enlightenment, to understand the history of the idea, and to look more deeply into its meanings, I have to look into pre-Enlightenment ideas of the state and the constitution. I do this using the “Unity Thesis,” the interpretive principle that the scientific worldview of the Enlightenment split legal things into two parts, a prudential (ethical, moral) part and an empirical or scientific part; and then it characterized the prudential part as meaningless\textsuperscript{81}. The Unity Thesis holds that in order to understand something like “the constitution” we must start from the idea that it “really” consists of a prudential piece and a scientific piece, and that we have to re-unite them to achieve the best knowledge of the constitution. It is only then we can make sense of the various interpretations of the Constitution. For example, is the Constitution only the words written at the time with their original meaning?\textsuperscript{82} Is it a living thing?\textsuperscript{83} Is it alive and dead at the same time?\textsuperscript{84} Is it something to have faith in, some kind of deity?\textsuperscript{85} Or is it a fiction, or invisible, or something new?\textsuperscript{86}

When I compare the pre- and post-Enlightenment meanings, I can cast a different light on some of the problems we see in our political life. Why, e.g., do we say we are a democracy, and that everyone has inalienable or some other kinds of fundamental or human rights, when in fact we live in an oligarchy and rights are [still] only found in those that have power? The Unity Thesis teaches that the prudential part of the constitution is our claim about it that it supports a

\textsuperscript{81} See Part ____. I use the word “prudential” instead of the usual “moral” because “moral” is at once too limited and too broad. Originally, moral translated ethics into Latin, but in the Enlightenment it became a residuary category for politics, justice, ethics, right and natural law, and it somehow has acquired a unique association with the Christian idea of evil. Natural law disappeared by the end of the Enlightenment, and by the end of the 19th century the moral came to have almost exclusively negative connotations from the scientific point of view. MACINTYRE, 38-9.

\textsuperscript{82} STEVEN G. CALABRESI, Originalism: A Quarter-Century of Debate (Regnery Publishing 2007).


\textsuperscript{84} JACK M. BALKIN, Living Originalism (Belknap Press 2011).

\textsuperscript{85} SANFORD LEVINSON, Constitutional Faith (Princeton University Press. 2011);GOODWIN LIU, et al., Keeping Faith with the Constitution (Oxford University Press. 2010).

democracy and human rights, whereas the scientific part is that the document itself constitutes and establishes an oligarchy with limited distribution of rights. If we do not reassess these two apparently inconsistent constitutions, then we cannot make progress into a better life for everyone, oligarchs and others. The best way forward may not be rights and democracy, but through the idea of a common good enabled through a middle class in which there is limited but real democracy and rights. The autonomous citizen who is fully in charge of their destiny is transformed into a dependent political being whose life is embedded in a complex unified matrix of meanings and values focused on the other. The greatest virtue becomes compassion, not self-interest.

6. Conclusion

There are three main kinds of theories of law: positivist, natural law and historicist. The theory I develop is historicist. There is nothing wrong with recognizing the existence and functionality of positive law, but that mere recognition is not enough to drive a robust theory of law. Natural law suffers from its intimate links with Christianity (and by default with Islam, since these two major religions are linked through their common origin). Its origins are often traced to comments in Aristotle’s Ethics, a secular work, but the theories of natural law we receive are all embedded in Christian theology, even if they are secular. When we think of law and history, if we think of it at all in a theoretical sense, we think of Hugo and Savigny and the historical school of jurisprudence. If we think more broadly, as I do, while acknowledging Savigny we recognize Hegel as the master of law and history. My secular historicist theory is anchored in Aristotle and Hegel.

The theory permits the investigation of many interesting questions, including the role of history in the origins of the law; the role of Christianity in the origins of both legal and scientific values and norms, even the ones that we understand to be secular; the intimate but invisible identity of law and science; the role of science in the philosophy of law; the falseness of the dichotomy between law and morality; the paucity of coherent thought on the nature of legal things brought on by that false dichotomy; the origins of the social sciences; the intimate link between rights and power; and the origins of the idea of ideology/critique in the separation of law and morality.

The theory provides powerful and unique tools for understanding the law, when the law is understood to be not only statutes, regulations and judicial decisions (positive law) and universal legal concepts (natural law or species norms), but also political theory, ideas of justice, and ethics in its broader senses. By understanding the role of the Enlightenment in restricting our language of the law, we can begin the process of forming a concept of the law in which legal

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87 Oligarchy, which I discuss below in Part 4, is on Aristotle’s account a degraded form of constitution in which the few/rich rule for their own benefit. See generally, MICHAEL PARENTI, Democracy for the Few (Wadsworth. 2001); JEFFREY WINTERS, Oligarchy (Cambridge University Press. 2011); JOHN MCCORMICK, Machiavellian Democracy (Cambridge University Press. 2011); JEFFREY WINTERS & BENJAMIN PAGE, Oligarchy in the United States, 7 Perspectives in Politics 731 (2009); DAVID TABACHNICK & TOIVO KOIVUKOSKI, On Oligarchy: Ancient Lessons for Global Politics (University of Toronto Press 2011).

88 See Part 5. Actually, the common good was a notable feature of political discourse among the Founders, distinguishing the goals of anti-democratic republicans. See e.g., RUSSELL HANSON, Democracy, in Political Innovation and Conceptual Change 68, 77, (Terence Ball, et al. eds., 1989). That is one of the features of the earlier theory of the state that kept on functioning, but now in an entirely different context of Hobbesian men, and other scientific things.
things are not separated into prudential and scientific parts. In academic terms, we can redraw the boundaries of law to include political and ethical theory. This makes sense since the academic departments are the result of an Enlightenment parsing of the organization of knowledge. Law can be, therefore, restored to a dignity that the Enlightenment negated.

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