The Intellectual Commitments of Modern Juridical Thought

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To modern writers, the distinctive achievement of twentieth-century jurisprudence can be viewed as its emancipation from the narrow confines of English utilitarianism, and the subsequent development of perspectives rooted in the fundamental values of justice and rights. The central jurisprudential task of the new century is thus the exploration of a deeper, more elusive moral standpoint, the most profound intellectual commitments of which are yet to be fully digested and understood.

My aim in this essay is to reveal something of the character of those commitments by considering the relationship of our present thinking about law and morality to its historical development. I shall begin by contrasting one (broadly received) understanding of this history to a rival understanding which I think better illuminates the present thinking. Such intellectual histories are worth exploring: the juridical thought of any age embodies certain understandings of those aspects of the human condition it seeks to clarify: in this case, the gradual self-transformation of society under the rule of law.¹ We can therefore expect each generation of jurisprudential thinking to reflect its own philosophical biases, by regarding certain questions as central to philosophical progress whilst marginalizing or suppressing others. The reasons why philosophical doctrines wax and decline are not straightforward; they tend to unfold in historical time and are seldom fully articulated in the explicit arguments and propositions of philosophical writers. They represent rather the framework of assumptions within which the argumentation takes place, and may therefore rank among its deepest intellectual commitments.

In speaking of the ‘commitments’ of the present age, I thus do not have in mind anything as specific as a set of entailed propositions, but something more akin to Hegel’s or Collingwood’s idea of the general morphology of a civilization. As Leszek Kolakowski observes, ‘Collingwood suggests that each historical period has a number of basic (‘absolute’) presuppositions which it is unable clearly to articulate and which provide a latent inspiration for its explicit values and beliefs, its typical reactions and aspirations.’² If this suggestion is correct, Kolakowski continues, then we might hope to construct for ourselves a history of mentalities (as opposed to a history of ideas) of the lives of our ancient or medieval ancestors, ‘but

¹. See, e.g., R. Dworkin, Law’s Empire (London: Fontana, 1986) at ch. 11: ‘Law Beyond Law’; L. Fuller, The Law in Quest of Itself (Chicago, IL: Foundation Press, 1940) at 140, who writes of ‘the eternal process by which the common law works itself pure and adapts itself to the needs of a new day.’

we are in principle prevented from revealing them in our own age, unless, of course, the owl of Minerva has already flown out, and we are living in the twilight, at the very end of an epoch. I believe, at least in some respects, that we are. And it is my purpose in this essay to explore certain aspects of our current thinking (which amount to less, perhaps, than can be brought under the heading of ‘modern jurisprudence’), in order to construct the beginnings of a history of mentalities. Some of the dominant mentalities of the current age, I shall argue, have served to suppress jurisprudential questions of great importance.

One might point to an ‘Enlightenment mentality’ within the ‘received’ history of twentieth-century jurisprudence that I am about to trace. It is defined by a sense of having broken through ‘the sacred circle’ which had shaped and constrained medieval thought. The medieval writers related questions of law and justice to broader conceptions of a universe that exhibited meaning, orderliness and purpose. Law, as a normative order, was related to the human condition not simply as a political community requiring regulation, but as a moral-spiritual community in need of salvation. The ends of law and politics concerned both heaven and earth: presupposed in such ends were not only freedom, security, stability; but also a theodicy, a soteriology, and an eschatology. By contrast, reflections upon law and justice in the ‘modern’ era address a world supposedly denuded of cosmic significance. To modern writers, it seemed as if the activity of reflecting on law and justice can, and perhaps must, be pursued in detachment from metaphysical and religious questions. The ground of morality, and of the collective improvement of the human condition, came to be interpreted as purely earthly concerns, requiring ‘interpretation’ in the light of concepts and categories that arise through the emergence of a shared ‘interpretative attitude’.

But despite the emergence of this anti-metaphysical (or perhaps anti-cosmological) mentality, I would like to suggest that the older questions, of salvation, of the ultimate destiny of human beings, and of the ‘ultimate meaning’ of human practices and human societies, though they became suppressed and marginalized, were not eliminated from legal and political thought (how could they be?). Rather they were merely transformed into something else. Chief, I think, among these, is a concern with human progress, as I shall describe below. The burden of my argument will be to challenge the limitedness of this Enlightenment mentality (and its darker twin), and to suggest that a broader view is required in order to appreciate the full significance of jurisprudential concerns.

3. Ibid.
4. I shall nevertheless use the term ‘modern jurisprudence’ and its equivalents in this essay to refer to the tradition I have in mind. This, as I have indicated, particularly concerns the intellectual agenda set by Rawls, which has had a massive influence upon jurisprudential thinking in the late twentieth and early twenty-first centuries.
7. See, for instance, Law’s Empire, supra note 1 at ch. 2.
The Received History of Modern Juridical Thought

Let me begin by presenting the historical development of modern jurisprudential concerns as it is usually understood, in order to identify the mentality which is implicit in it. If one were to ask a modern jurisprudential writer to list the greatest achievements of present juridical thinking, central amongst them would likely be the transition from the rather straightjacketed utilitarian thinking which dominated the nineteenth century, to the predominance of visions of law and society which place questions of justice at the centre. Rawls’s publication of A Theory of Justice in 1971 is rightly held to mark a watershed in political theory. In that book, Rawls conceives of himself as responding to a political scene dominated by utilitarianism. Utilitarian arguments form the focus of his attack, to the extent that ‘his criticisms of utilitarianism go to inform the structure and assumptions of his own theory.’

The effect of Rawls’s work was indeed to bring about a sea-change in Anglo-American political thought. To a great extent, the political project of the current age (in the hands of Rawls and his successors) is not that of maximizing overall satisfaction of an array of conflicting preferences, but of discovering a theory of justice capable of grounding a common framework for the pursuit of competing preferences whilst treating each person as of equal value. Progress in such an endeavour is thus a matter of refining our understandings of justice as they apply to a context of actually functioning institutions. We can think of this notion of ‘progress,’ and its pursuit, as forming the implicit mentality of modern jurisprudential and political thought. The progress that is sought is at once intellectual and philosophical (as we refine our understanding of the ideals that it embodies), as well as social and moral (as we strive to move society ever closer to the concrete expression of those ideals).

Ought we to embrace this conception of progress? Progress in philosophy is seldom linear; and yet the nature of philosophical argument lends itself easily to forms of narrative history. Philosophy is centrally concerned with Truth, and since the philosophical efforts of previous generations have manifested that truth at best only imperfectly and incompletely, it is tempting to regard ourselves as being in the most favourable position to detect it: standing on the shoulders of giants, we command a clearer view of the terrain than any before us. We can see, in the idea of historical progress, a distinctive mentality at work: not a collection of specific ideas or dogma, but an overall outlook upon history and its broader significance. Such an outlook

8. See J. Rawls, A Theory of Justice, rev. ed. (Cambridge, MA: Belknap Press, 2005) at ch.1. Rawls also targets ‘intuitionistic’ theories of justice, but he devotes far less attention to these than to utilitarianism. H.L.A. Hart, too, noted: ‘I do not think that anyone familiar with what has been published in the last ten years, in England and the United States, on the philosophy of government can doubt that this subject … is undergoing a major change. We are currently witnessing, I think, the progress of a transition from a once widely accepted old faith that some form of utilitarianism … must capture the essence of morality. The new faith is that the truth must lie … with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals’: H.L.A. Hart, ‘Between Utility and Rights’ in Essays in Jurisprudence and Philosophy (Oxford: Clarendon Press, 1983) at 198.

is not an inevitable one, but is grounded in a particular historical self-understanding. Perhaps we can do no more than trace its outlines; but if we did, I suspect we would find that the idea of progress would consist in a distinctly Protestant view of the world, though ultimately shorn of religious associations, and cultivating a hubristic view of human achievements and human powers (and of the arena wherein they can meet with success). The form of narrative intellectual history which lends support to such a notion of progress runs as follows.

The classical political writers focused on the question of how we can lead an excellent and valuable life; consequently their ethical thought gave a central place to the idea of ‘the good life,’ and explored the ways in which politics and law might foster and sustain that life. Requiring political institutions for its realization, the nature of the good life was thought to be intrinsically social, capable of full expression only within the bounds of a common existence rather than being capable of pursuit by individuals acting in isolation from one another.

In the wake of the European Reformation, a new and essentially Protestant mentality began to take shape which rejected key elements of the Classical philosophy of the past. Among the debris to be rejected was the idea that the social world is animated by a single conception of ‘the good life’ that is embodied within and actively promoted by human institutions such as the law. In contrast, law was to be regarded as an unfortunately necessary framework of rules for the maintenance of order and social stability in a world where each person has her own idea of the good or worthwhile life, which she pursues in competition with others. Those who sought to identify a solid foundation for the law’s neutrality between these competing projects found an answer in the idea of natural equality. All men (it was said) are by nature juridical equals, and many of the most important philosophical debates of the seventeenth century and up to the present day centred upon the character of such equalities.

Two traditions of juridical thought were to emerge from these developments, which continue to dominate conceptions of law and politics. On one side stood Grotius and his intellectual descendants, for whom basic equalities were rooted in the suum or domains of self-ownership in which a person is able to make autonomous decisions about his actions, independently of the will of others. The Grotian philosophy thus insisted upon the reality of a framework of non-overlapping entitlements which logically preceded the authority of the state, and which were grounded in notions of self-preservation and the potential for human flourishing: no one (and hence no law) may violate the suum of another in pursuit of her interests.

10. The idea that human effort could bring about progress in the moral status of human society, without operative grace, was not one found within the main tradition of theological ethics, either Protestant or Catholic. It could be found, however, within the Pelagian heresy: see St. Augustine, *Four Anti-Pelagian Writings*, trans. by J.A. Mourant & W.J. Collinge (Washington, DC: Catholic University of America Press, 1992).


13. H. Grotius, *De Iure Belli ac Pacis* (various eds.) at I.2.1.6.
other side was Hobbes, who regarded such basic rights as all-encompassing: all men were equal in that all were equally free to exert their will in whatever way they chose, ‘even [over] one another’s body.’ The function of law was not to realize these basic rights but to restrict them, by creating protected spheres in which each person enjoys certain freedoms from the will of others.

Despite diverging in many ways, the philosophies of Hobbes and Grotius both paved the way for distinctively modern understandings of law. Both, for example, represent a transformation from the medieval understanding of law as an object of moral reflection in which one might come to certain conclusions about the nature of a common good, towards a picture wherein law is presented as an otherwise self-standing framework of rules and concepts to which various notions of the good life might subsequently be applied. More importantly however, both Grotius and Hobbes made decisive steps towards a ‘secular’ view of morality. In founding his moral theory on human equalities, Hobbes depicted a lawless world of chaotic competition in which ‘notions of Right and Wrong, Justice and Injustice have … no place’, unless they be artificial products of ‘men in Society’. Famously, Grotius remarked that theoretical knowledge of God was unnecessary for an understanding of moral truth, for such understanding derives from reflection upon the qualities of the suum: an observation for which he was criticized by other natural lawyers, most notably Pufendorf. Yet in seeking to retain the centrality of a theocentric framework of divine law, Pufendorf himself articulated a standpoint which ultimately facilitated the development of secular moralities. For Pufendorf, actions are not good or evil in themselves, but only as they affect rights. ‘That reason should be able to discover any morality in the actions of a man without reference to a law, [he wrote] is as impossible as for a man born blind to choose between colours.’ But if that law were not divine, but rather human in origin, then any remaining ties to the Classical conception of ethics could be finally cut.

The Grotian tradition of juridical thinking regarded the function of law as being ultimately protective of fundamental rights, and thus as seeking an ideal ordering or balancing among the competing conceptions of the good life to be found in post-Reformation societies. Such an ordering would give central place to conceptions of justice, right and equality. But in the light of Pufendorf’s modulation of the moral foundations of the position, the only possible source of the moral values which would inform notions of justice and right was the will of the ‘autonomous agent’: a view which reached its highpoint in Kant’s *Groundwork of the Metaphysics of Morals*, and which was inherited in a slightly modified form by Rawls and his intellectual allies. The Hobbesian tradition, meanwhile, regarded the function of law as that of achieving some reasonable accommodation or balancing as between the competing conceptions of the good life. This was eventually to develop into the thought of the English utilitarians, who noticed that the premise of divine law in the earlier moral theories served only to link ideas of the human good to that of human felicity, so that the moral injunction to seek the good was just a curiously

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16. S. Pufendorf, *De Iure Naturae et Gentium* (various eds.) at I.2.6 [*De Jure Naturae*].
roundabout way of saying that one should aim to maximize welfare. Despite Pufendorf’s castigation of Grotius for his ‘impious hypothesis,’ other interpreters (such as Barbeyrac) had recognized in Grotius’s remarks a commonplace of seventeenth century moral philosophy, that the obligatory force of natural law derives from the divine will, whereas its content is founded upon the nature of the human condition. This independence of the force of moral laws from determination of their content (as it seemed to the utilitarians) meant that the whole of the weight of morality’s rational intelligibility was to be borne by considerations of utility. If God’s will does not establish any intellectual basis for morality, then considerations of human wellbeing or felicity must themselves ground our standards of right and wrong. Law, as well as other social institutions, must then be interpreted as human conventions whose function is to maximize welfare in society.

To its later idealist critics, the utilitarian philosophy was flawed not in its intellectual basis, but in the conceptual priorities it perceived as flowing from that basis. Having removed the theological framework from ethics, utilitarianism was arguably grounded in the premise of equality between persons. Rather than interpreting such equalities as establishing equal rights to pursue and realize certain dimensions of value, utilitarianism viewed individuals as potential maximizers of units of utility, the value of which derives from their being the object of preferences. My conception of ‘the good’ is no more or less valuable than anyone else’s; and thus no more or less worthy of legal protection. The reasonable ordering or balancing of competing interests is thus one in which the allocation of rights and obligations tends to realize the greatest levels of utility across society. The modern idealist writers saw in this a misconceived and unsuccessful attempt to realize a sound and basic moral value: that of equality.

Utilitarianism seeks to give effect to equality between persons by according priority to the ‘good’ over the ‘right,’ at the same time as maintaining a neutral position over the identity of ‘the good’ (through the use of abstract terms such as ‘utility,’ ‘welfare’ and the like). Modern philosophers, on the other hand, regard the value of personal equality as finding clearer and more profound expression in a theory of rights. The present position of Anglophone jurisprudence is therefore closer in its essentials to the tradition of Kantian philosophy, and its central questions, concerns and motivations are to an appreciable extent shaped by that proximity. One thinks, in particular, of the essentially juridical picture of morality to be found in Kant (moral principles being those universal laws that are willed by the autonomous agent), and of the difficulties of reconciling the apparent tensions between autonomy, justice, liberty and right that such a position engenders:

17. See J. Barbeyrac’s translation of Pufendorf’s *De Iure Naturae*, ibid.
18. This brief description ignores numerous differences which obtain between variant forms of utilitarianism, which are irrelevant to the present discussion. For a useful account of these, see W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2001).
‘Nothing,’ wrote Dworkin in a recent book, ‘is easier than composing definitions of liberty, equality, democracy, community and justice that conflict with one another. But not much, in philosophy, is harder than showing why these are the definitions that we should adopt.’

The questions raised by Dworkin are widely taken to be the most profound or pressing philosophical questions which face the modern age. But it is only in virtue of a particular mentality (or general outlook upon the world) that they occupy such a central place: one in which human beings began by seeking an understanding of ‘the good life’; and, having shorn that conception of transcendent or religious significance, must find a means of grounding it in something more permanent and satisfying than mere subjective notions of ‘utility.’ The deepest intellectual commitments of this outlook are not likely to be transparent to those who have adopted a view of the historical trajectory of jurisprudential and political thought along the lines lately explored.

Let me therefore develop an alternative historical narrative to the one just offered, in order to trace out the deeper intellectual commitments of modern thinking. Historical narratives are invariably problematic and incomplete in the view they give of modern thought; but though it is perhaps no more complete, the alternative picture I wish to offer seems to me to reveal those intellectual commitments in a deeper and more satisfactory way.

An Alternative History of Modern Juridical Thought

On the alternative picture I wish to develop, the central concern of juridical thought is not with the idea of the ‘the good’ in human affairs, but rather with the problem of evil. This is the question of how evil comes to be present in the world, and what is its significance? Though it may seem remote from ordinary jurisprudential concerns, its proximity to understandings of law and society is easily demonstrated. When understood in the context of the problem of evil, many of the concerns discussed above appear in a greatly altered light.

The problem of evil is an ancient one; but for present purposes its origins as a specifically jurisprudential problem lie in a series of theological debates in the late seventeenth century. Some understanding of that context is necessary for the alternative picture I offer. Among the aspects of the problem of evil that are most relevant to jurisprudence are that of the origin of evil and the extent to which it can be overcome by reason. These questions are linked. If God is creator of the universe, then is God also the source of evil? The presence of evil in the world (hunger, suffering, war, death) would seem to testify to the imperfection, even malevolence, of God. If He is not the source of evil, then God’s omnipotence is undermined, for then sin is not permitted to exist but rather suffered. Similarly, if evil is an expression of free will, then in what sense can free will count as a ‘gift’ of God? These dilemmas surrounding the existence of evil had been the subject of philosophical and theological debate since ancient times.

It was Pierre Bayle who, in his *Dictionnaire Philosophique*, suggested that the only possible way out of the problem was to admit that the presence of evil cannot be rationally explained: it is to faith, not reason that we must turn for enlightenment and salvation. Bayle’s arguments were subjected to criticism by Leibniz, who saw in Bayle’s attack upon human reason a more profound source of scepticism than any of the difficulties associated with the rational explanation of evil. Evil, according to Leibniz, was to be understood as an unavoidable but essentially negative phenomenon, and its presence in the world was to be taken as evidence that, of all possible worlds, our world contains and preserves the utmost order that is consonant with the utmost beauty and truth. The world was not created solely for human happiness, but in accord with a divine plan that transcends human needs and interests; therefore, the world must be interpreted as the best of all possible worlds.

This optimistic view of the world was regarded by later writers, such as Voltaire, as generating an ultimately fatalistic, and so paradoxically pessimistic, philosophy. For if the world of the present is understood to embody the best possible conditions, then it would seem that all human endeavour (and therefore law) must be directed, if at anything, towards the preservation of current arrangements. Such an apology for the status quo makes impossible any general belief in the transformational capabilities of law and society to achieve progress.

As I suggested earlier, the Rawlsian-inspired jurisprudence of the present day, which takes the achievement of the just society as its central aim, is characterized by just such an ethic of progress. Consequently, such efforts cannot be altogether shielded from these broader questions. For we must ultimately face the question of why progress towards a just society is thought possible, or even desirable. Why not, for example, view the history of human society as the gradual loss of innocence, in the manner of a Rousseau, or of freedom, in the manner of a Nietzsche or (in some ways) a Kant? Or as a fall from classical Athenian civility into barbarism (or away from God), the recovery of the former state demanding unfortunately necessary laws in place of true virtue or Christian love? These questions can be suppressed but not eliminated; and philosophical perspectives which regard them as mistaken or irrelevant must themselves rest upon a cosmology that is, in its own terms, equally fundamental. In this way, all substantive political theories rest on an implicit analogue of an eschatological vision.

The notion of law and politics as transformational activities, directed at human progress, demanded a vision of the worldly moral predicament radically different...
from that of Leibniz. In order to create a realm wherein human effort could ultimately meet with meaningful success, there had to be an effective rejection of the idea of the world as an optimum, yet an implicit retention of the notion of evil as a privation: as a fault of the human intellect, located in human ignorance, which better and sophisticated understanding would displace. At the heart of this altered vision therefore lay a shift in philosophical thinking of profound importance. The ground of morality came to be seen as no longer to be found in theology or metaphysics, but rather in epistemology. Locke, in his *Essay Concerning Human Understanding*, had argued that human knowledge of the world derived entirely from sensory experience. The human mind at birth was, therefore, a *tabula rasa* that is morally neutral in its essence. Locke’s sensationalist epistemology was to have a profound effect on writers such as Voltaire. On its basis, Voltaire suggested that improvement of the human lot comes from an increased knowledge of the environment with which human beings interact, so that the mind may profit from the sensory data it receives. Education was therefore of fundamental importance in securing human progress, and in eliminating evil and barbaric tendencies.28 Further developing the idea of sensory experience as the basis of human knowledge, Helvetius asserted that mankind is motivated by the love of pleasure and the fear of pain. A system of laws was therefore required if otherwise morally neutral human beings were to be inclined towards virtuous conduct, by creating an environment that is in harmony with basic human impulses, creating agreeable incentives and disagreeable disincentives. By a series of short intellectual steps, this theory was to develop into the source of English utilitarianism in the writings of Mill.29

Here was the basis for the optimistic belief in human progress: the ultimate assurance of progress was the accumulation of knowledge, based on Lockean sensationalism. Though its proponents tended to think of utilitarianism as a far more clear-sighted understanding of morality, fundamentally separated from ideas of God and metaphysical evil, they saw perhaps less clearly that the notion of utility amounted to an alternative resolution of the problem of theodicy. It rested on an epistemology which made possible the ascription of a meaning to history that was independent of appeals to a structure of divine rewards and punishments. As Turgot put it in his 1750 address to the Sorbonne:

Empires rise and fall … Self-interest, ambition, and vainglory continually change the world scene and inundate the earth with blood; yet in the midst of their ravages manners are softened, the human mind becomes more enlightened … and the whole human race, through alternate periods of rest and unrest, of weal and woe, goes on advancing, although at a slow pace, towards greater perfection.30

This vision of human progress, and of the means by which it comes about, is one which informs both the utilitarian philosophy and our understanding of the place and significance of the modern idealist philosophies (such as that of Rawls) which

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28. See ‘Optimism’, (supra note 24) at 200.
29. *Ibid*.
30. Quoted in ‘Optimism’ at 203.
criticize it. I suggest that it is a vision that seldom appears directly in the propositions that are advanced and defended in philosophical argument, but it is one which informs the context in which the argument takes place. Being congenial to forms of narrative history, philosophical argument is doomed always to regard the history of philosophy as a long litany of mistakes and wrong turnings. The present generation of thinkers therefore almost inevitably regards itself as furthest along the path to truth, as both beneficiaries of the stock of previous effort, and contributors to its advancement. It is for this reason that we must ‘not lose our nerve,’ but hold to a path that others, ‘gaining theirs,’ will surely follow.

Law and Human Progress

At the beginning of this essay, I suggested that the deepest questions of jurisprudence in the modern age are not concerned, as one might have thought, with the extent to which utilitarian thinking has been displaced by theories of justice or rights, but with the relationship between law and human progress. The most profound intellectual commitments of modern jurisprudence, thus interpreted, stem from a deep-seated fixation with epistemologically grounded notions of ethics, and a theodicy that is both tacit and startling. For, having detached morality from ‘unknowable’ religious associations, the concern with human progress emerges as a surrogate for a desire to be religiously saved.

Let me try to spell out more fully these questions of the relationship of law to human progress. I shall then attempt to trace out the intellectual commitments involved as they have come down to us in the West.

As discussed earlier, social institutions (such as law) were viewed by the classical writers of the Aristotelian tradition as nourishers of human potential. By providing a set of constraints upon permissible behaviour, it was thought that the law would serve to incline persons of average temperament towards virtue and goodness through the development of good habits: ‘when all the influences by which we are thought to become good are present [wrote Aristotle], we get some tincture of excellence.’ Here was an implicit vision of human history as containing the potential for the diminution of evil in human affairs. By cultivating virtuous dispositions in people forced into habitual obedience to its norms, the law would play a central part in this process. Law was then both a civilizing influence and an embodiment of the values that would underpin the just and excellent polity. Later eras of political thought modulated, but did not abandon, these ethical assumptions. Hobbes (for example) wrote that ‘whatsoever is the object of any mans Appetite or Desire … he for his part calleth Good: And the object of his Hate, and aversion, Evil.’

31. See my remarks in the preceding paragraph regarding the ‘progress’ and the effect of Rawls’s work. One important exception to this general trend is to be found perhaps in the ‘Greats’ tradition at the University of Oxford. See M. Marion, ‘Oxford Realism: Knowledge and Perception’ (2000) 8 British J. History Phil. at 299 [Pt 1] and 485 [Pt 2].
34. Leviathan, supra note 14 chs. 6 and 24.
Nothing in nature was to be regarded as ‘good’ or ‘evil’ in an absolute sense, but merely in relation to its status as an object of someone’s desire or aversion. Because each person would perceive good and evil in the world in different ways, therefore, a reduction of evil (or ‘infelicity’) would require ‘an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the Rule thereof’.

Despite the darker picture that is offered by Hobbes, jurisprudential thought has never altogether abandoned its sense of law’s aspirational quality: in confronting legal and political institutions, we encounter not only a set of factual arrangements but also a body of transformative ideals.

This aspirational quality is part of the idea of law. Our reasons for having law appear to testify to certain achievements (the establishment and preservation of order, the placement of limits on violence, the reduction of arbitrariness and so forth) that seem intrinsic to the nature of law. Without such achievements, we would find ourselves in a state of barbarism which, from our perspective as cultured beings, can be imagined only in terms of loss. Law, then, represents the attainment of human progress. But the many and various imperfections that present legal arrangements embody force us to interpret this as a partial attainment, awaiting further fulfillment as factual circumstances are brought more closely into alignment with our aspirational ideals. Juridical categories of thought are perhaps inevitably infused with a spirit of optimism concerning the further perfectibility of the human condition; otherwise what could underlie the motivation for judicial refinement or legislative change?

Law in this sense appears as the instrument of human progress par excellence.

Jurisprudential writers have at various times sought to distance themselves from these wider assumptions about the human condition in the spirit of offering a ‘scientific’ or ‘analytical’ account of law that is shielded from ‘normative’ concerns. Law (on this view) is merely an instrument which can be employed in the service of many different ends, evil as well as good. Whether such efforts can establish or maintain scientific neutrality is debatable. For any analysis (positivistic or otherwise) must base itself upon certain assumptions about the object viz., law, that is to be analyzed; and these assumptions are not axioms of a ‘science,’ but rather depend upon an understanding of the role of law as a distinctive kind of social institution. Understandings of this kind are, in effect, abstractions from our experience.

35. Ibid. Hobbes’s characterisation of the infelicitous conditions of the state of nature is found in ch. 13.
37. One might conceive such adjustments to concern only a response to changing conditions, motivated not by the desire for improvement but by avoidance of decline. But whilst this might mark the ambition of a caretaker government, it is not easy to see how political stasis (or vacuum) could exist in ‘normal’ contexts of governance. (I thank Richard Bronaugh for drawing my attention to this point.)
38. See, e.g., M.H. Kramer, In Defence of Legal Positivism: Law Without Trimmings (Oxford: Oxford University Press, 2003), and Kramer, Where Law and Morality Meet (Oxford: Oxford University Press, 2004). It is possible to deny this instrumental view of law: for a recent argument, based on the work of Lon Fuller, see N.E. Simmonds, Law as a Moral Idea (Oxford: Oxford University Press, 2007). The issues I intend to raise are in large measure independent of these arguments.
of the world and hence involve an interpretation of that world which cannot, in the end, remain insulated from our judgments about the purposes and ends served by law and government in human history.  

A view of the law that was morally ‘neutral’ could not therefore achieve its neutrality through scientific detachment, but through an understanding of the human condition itself as intrinsically neither good nor evil. ‘Evil’ is not, of course, as such a coherent goal in the same sense as is, say, governance. The existence of evil or suppressive regimes, similarly, does not make possible a view of law in which the final end in view is the suppression of the human race. For the introduction of oppressive conditions must always serve some further purpose (the advancement of an ideology, concentration of power, the elimination of rival viewpoints, etc.). There is always, as it were, a desire to advance society in a particular direction, as part of an historical narrative or journey, moving (by means of law) from some imagined stage of development to another that lies further down the road. The very deepest assumptions about the phenomenon of ‘law’ thus raise the question of the relationship of the present to the human past and future, and the role of law in shaping human development. Within this eschatological vision, the journey toward human perfectibility is represented as being almost complete: it is the self-image of the good society which falls sometimes short of perfect justice, not that of a barbaric culture that is capable of occasional goodness. Attainment of the ideal is then a matter of refining particular aspects of social institutions and mechanisms of distribution which stand at ‘the end of history.’  

Insofar as this progressive ideal belongs to law, it will seem that its nature cannot be understood apart from the moral and civilized values it serves to advance. The connection of ideas of moral progress with the historical ‘journey’ from barbarism to civility has long been an implicit eschatological assumption of Western thought. Equally however, it may be that the promotion within jurisprudence of ‘morally neutral’ or ‘scientific’ perspectives on law can occur only in situations where there is widespread perception and fear of cultural decline. Then the achievement of the law-state (or rechtsstaat) will seem to possess no historical significance in its own right, but to be a mere harbinger of possibilities: both of civility and of cruelty and destruction. We might, in such instances, be inclined to separate our beliefs about law and government from any aspirational ideals, viewing the latter as connected to the former only contingently. Might we not also come to think that the Owl of Minerva has already flown out, and that ‘When philosophy paints its gloomy picture then a form of life has grown old. It cannot be rejuvenated by the gloomy picture, but only understood’? Did St. Augustine (for example), in writing the City of God, realize that the Roman Empire was truly at an end? In Book III he discusses the impotence of Rome’s sacred symbols and objects in preventing the ruin of that city from fire, natural disaster and attack. His remarks concerning

39. See on this point M. Oakeshott, Experience and its Modes (Cambridge: Cambridge University Press, 1933).
the status and interpretation of such symbols might well apply also to juridical theories in which present manifestations of law and government are transmuted into permanent symbols of human progress:

We Christians would not bring the same objections against such sacred objects, if it was said that they were appointed not for the preservation of temporal goods but to point to goods that are eternal, and therefore though those physical and visible things are fated to perish, their disappearing entails no impairment of the things which were the purpose of their appointment. They can be replaced, to fulfill the same purpose. But as it is, they think, in their astonishing blindness, that by those perishable sacred objects their earthly life and the temporal felicity of their city can be preserved imperishably. Then, when it is proved that the preservation of those objects has not in fact protected men's lives from the onset of extinction or of unhappiness, they are ashamed to change a belief which they are unable to defend.\(^{42}\)

The applicability of Augustine’s words to modern positivistic conceptions of law is striking. For we may read him as offering a warning against an eschatological pessimism that results from the tendency to sublime the concrete achievements of the world into historical stages of human progress. Augustine effectively warns that too enthusiastic an idealism, when circumstances cause it to collapse in ruins around us, leads to the opposite ‘blindness’: a positivism which detaches law from all ideals. Faced with the realities of the fragmentation of one’s culture, one may seek to detach ideas of law and government from the cultural forms of which they were previously thought to be a part. Denuded of such associations, law then appears as an instrument that can be comprehended and analyzed prior to its immersion within specific cultural or political contexts.\(^{43}\) Once law is understood in this way, we are able to retain our sense of the form and function of law as a means of realizing and preserving a mode of earthly life or temporal felicity, whilst at the same time adopting a detached attitude toward the desirability of the particular social forms that it fosters and maintains.

The divided intellectual inheritance that we find in the legacies of Hobbesian and Grotian juridical thought must be understood in the light of these considerations. Hobbes’s conception of law, as seeking a reasonable ordering or balancing as between conflicting interests in society, seems to force upon us the conclusion that the particular ordering that is achieved is the product of the will of an earthly ruler whose values may be those of a Gandhi, or those of a Hitler. There being no intrinsic moral content to the idea of legality, we will regard the meaning of ‘law’ as being determined on the basis of a family resemblance among various existing systems of law whereby typical conditions for the existence of a functioning legal order can be identified. The concept of law ‘is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution.’\(^{44}\) So understood, law is a feature of the human world that


\(^{44}\) Ibid.
is present in social conditions both of good and of great evil, and may be employed in the creation or perpetuation of either kind of circumstance.

We might think of the Grotian understanding of law (as seeking some ideally just ordering or balancing) as giving priority to the law’s aspirational qualities. On the second understanding, by contrast, law is not to be conceived as an abstraction from experience but rather depends upon the elaboration of abstract models, none of which is perfectly embodied in experiential conditions. This second view regards law as a domain of ideas in which a theory of justice is gradually realized and perfected. We are therefore said simultaneously to confront ‘two forms or stages of the same system of law, the nobler form latent within the less noble, the impure, present law gradually transforming itself into its own purer ambition … ’ The presence of evil in human affairs is, on this view, something of which law holds out the promise of eradication: it is a taint affecting ‘the purer form of law within and beyond the law we have.’

I would like to suggest that these opposing traditions of juridical thought ultimately betray a commitment to two alternative conceptions of the human condition. The first tradition (traceable back to Grotius) is closely associated with an optimistic outlook; whereas the second (stemming from Hobbes) is more congenial to a pessimistic understanding of the human condition. I propose to discuss each of these in turn.

**Optimism**

Those commitments of the mentality I have described as ‘optimistic’ are relatively easy to articulate at a general level. Having severed evil from its religious and metaphysical associations, we come to associate historical change with progress, whereby the gradual transformation of human societies represents a journey from barbarism toward the highest forms of civility. The problem of evil is then the problem of ‘base’ or ‘barbaric’ human impulses which must be checked and overcome through law. Salvation from evil, in the form of social progress, is thus represented by the optimist as a purely human achievement; one that is realized (insofar as it can be realized) within the world. As with the Christian view of salvation that it supplanted, the vision of human perfectibility offered by optimism is a postponed state, one that remains elusive and only ever partially realized in the conditions of the moment. Yet faith in the partial realization of the ideal is perhaps the most important aspect of this ‘modern’ view. No society can steadily regard itself as one of darkness, barbarism and despair; it will appear to itself, no matter how evil the times, as the guardian of permanent and civilized values against external enemies of enlightenment. Progress towards the ideal is therefore inevitably conceived as a matter of refining institutions and values that we already have: it is not, as it were,

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45. See Modernity on Endless Trial, supra note 2 at 7.
46. Law’s Empire, supra note 1 at 400.
47. Ibid. at 407.
48. Unlike Christian theology however, it is not represented as a transcedent state.
the replacement of the present political form of life by another that is yet to be revealed and understood.\textsuperscript{49}

This optimistic and transformative view of law is premised on what might be called an ‘acquisitive’ conception of culture. Lockean epistemology provides the basis for this view, improvement in the human lot being dependent upon the education of the mind (via the experience of the senses) about the environment it inhabits.\textsuperscript{50} We might then view Voltaire’s employment of this epistemology as signaling the transition from a quantitative to a qualitative view, whereby culture and civility are associated with acquisition of the finest thought and knowledge in human history.\textsuperscript{51} It presents a view of culture that is therefore independent of particular circumstances, embodying rather an objective ideal to be attained. Being rooted in abstract concepts, its central ideas (such as justice, rights, democracy, liberty, etc.) cease to be regarded as the historical achievements of particular cultures, instead being seen as general conditions for the universal civilization to come.\textsuperscript{52} In this way, the central problem of modern political philosophy might well be said to concern the interpretation of conditions of pluralism, individual autonomy etc. as themselves embodying universal standpoints. From this perspective, optimism represents \textit{both} a projection of the West’s self-image onto present global conditions \textit{and} an attempt to realize elements of the universal civilization that such cultural values imply. All too often, then, jurisprudential arguments aimed at defending the central concepts of liberal democracy as ‘the definitions we should adopt’\textsuperscript{53} can descend into a spurious intellectual cosmopolitanism which views all concepts and ideas, irrespective of provenance or context, as equally deserving of attention and thus worthy of exposure to the open competition of a ‘market in ideas.’\textsuperscript{54} These same writings therefore leave the impression of being fabricated escapes from the weary inconclusiveness of thought.\textsuperscript{55}

We might think of the optimistic focus on the aspirational and transformative character of law as giving rise to a peculiar tension. For if law is the engine of progress, it is also the principal institution in society that gives expression to a culture’s accumulated political achievements. Precisely because a society’s self image cannot be one of utter remoteness from the condition that is regarded as proper for human beings, these achievements must be valued not merely as necessary stepping-stones to the end-state in view, but more properly as milestones of civility. Law therefore manifests at the same time an inescapably \textit{conservative} force in society. Every society requires a notion of the sacred: that which is thought to be beyond

\textsuperscript{49} For an interesting, though contrary view, see K. Mannheim, \textit{Ideology and Utopia} (London: Routledge 1936).
\textsuperscript{50} See ‘Optimism’, \textit{supra} note 24.
\textsuperscript{52} John Gray has written extensively on this theme: See, e.g., J. Gray, \textit{Enlightenment’s Wake} (London: Routledge, 1995).
\textsuperscript{53} See \textit{Justice in Robes}, \textit{supra} note 21 at 138-39.
\textsuperscript{54} The notion of free competition between ideas is, of course, itself a reflection of the ethical ideals of a market society.
\textsuperscript{55} John Gray, for example, has noted the inability of modern political thought to deal seriously with the conditions of pluralism to which it has helped to give rise: \textit{Enlightenment’s Wake, supra} note 52 at 169ff.
revision, abandonment or which may be defied only at great peril. At different times, marriage, life, the distinction of the sexes, and differentiations between social classes, have had the quality of possessing a sacred aspect. Their violation or abandonment was (and sometimes is) thought to bring about the annihilation of all value, the loss of a society’s character and understanding of itself: much as, in a different way, the loss of incest, or cannibalism, or racial genocide as taboos—that which must at all costs not be done—would bring to an end society as we know it.

The forces of secularization (both intellectual and material) have done little to diminish the importance of the sacred, in its proper sense. The ideal of the rule of law, individual rights, freedom, dimensions of equality: each has at various times possessed the quality of sacredness within legal and political thought. Kolakowski has rightly drawn attention to the sacred’s tendency to act as a conservative force, reaffirming and stabilizing the forms and arrangements of society, its pre-existing divisions and mechanisms of power. Society cannot exist without such conservative forces, which form the tension between structure and change. This tension is, he says, ‘proper to life; its dissolution would result in death, either by stagnation (if only conservative forces remained) or by explosion (if only the forces of transformation remained, in a structural void).’

The optimistic mentality also possesses, if only implicitly, a recognition of the sacred. Such recognition tends to take the form of not only values that are held to be absolute, but of conditions that are central to the way of life that is thought to be ideal. The prioritization of the right over the good implies (perhaps despite appearances) a notion of the sacred that is structured not in terms of values but in terms of institutional mechanisms. Rights are not simply significant in terms of the substance of whatever values or protections they convey; they represent a specific form of delivery of these goods. Similarly, the value of ‘justice’ cannot be imagined apart from an institutional system through which it is put into operation (through which, in other words, it is possible to make systematic judgments). These reflections illustrate the extent to which the notion of the sacred has given rise in Western societies to a specifically juridical form of morality, in which all traditional ethical categories are depicted in terms of moral rules defining the scope of duties, rights and notions of permissibility. Morality comes to resemble an autonomous body of principles which transcend the mundane facts to which the rules apply. It is not then difficult to generate coherent ideals (as for example Dworkin does) based on the ‘interpretation’ of present institutional arrangements from the perspective of these principles.

56. The religious understanding of the sacred has this difference with the secular: that it is associated with the significance of the afterlife; that what we do here may lead us to heaven or to hell. Religious conceptions of the sacred (and of conscience) take on an additional dimension that is not found within the secular, for which all consequences relate to the here-and-now.

57. Modernity on Endless Trial, supra note 2 at 70.

58. Ibid. at 70

59. Kant’s moral philosophy is not the first, but it is the most clear, expression of this view: see Kant, ‘Groundwork of the Metaphysics of Morals’ in M. Gregor, ed. Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant (Cambridge: Cambridge University Press, 1996) at 37-108 [Practical Philosophy].

60. See Law’s Empire, supra note 1 at ch. 3.
Focus upon the aspirational and idealistic characteristics of law exhibits strongly the ‘Enlightenment’ mentality described at the outset of this essay. But it is one mired in delusion if its assumptions are thought to escape involvement in the deepest and most difficult metaphysical questions. It is therefore ironic that Kant’s *Groundwork of the Metaphysics of Morals* should have had such a profound impact upon the shape of Rawls’s *A Theory of Justice* and the work of other modern writers in the idealist tradition: Christine Korsgaard (for example) arguing that Kant’s theories of personal and moral relations ‘provide some answers’ to pressing social problems, whilst making us ‘more transparent to ourselves.’

For the worldview which ultimately makes sense of such idealistic optimism is one in which evil appears as a privation (or absence of good), rooted in human ignorance or barbarism, which the acquisition of knowledge and civility will displace. It is precisely this view that is foundational to Voltaire’s and Turgot’s optimism. Yet for Kant, evil represents ultimately neither a privation, nor a fault of the intellect, but rather a fault of the human will: moral darkness ‘lies not in lack of understanding but in lack of resolution and courage to use it without direction from another. *Sapere aude!* Have courage to make use of your own understanding! … ’

The moral philosophy of Kant’s *Groundwork* is often thought to embody a view that is confident of the transformational and progressive powers of human beings: powers that can then be brought to bear on politics for the improvement of social arrangements and institutions. But Kant himself was much less confident: moral evil, he states, from the will’s production of bad rather than good maxims as grounds for action. Evil is defeated where the will selects good maxims. Yet the evil human beings must ultimately face is a ‘radical’ evil:

> it corrupts the grounds of all maxims; as a natural propensity, it is also not to be *exirpated* through human forces, for this could only happen through good maxims—something that cannot take place if the subjective supreme ground of all maxims is presupposed to be corrupted.

The problem could scarcely be clearer: we inherit from Kant the thought that normative politics is possible because our self-chosen decisions, policies and goals are those of beings who can identify the good, and pursue choices that are transparent in their direction and motivation. But in the *Religion*, we find Kant following a different thought, the Pauline realization that ‘I do not understand my own actions. For I do not do what I want, but I do the very thing I hate.’

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61. C. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996) at 188 and 197. See also A *Theory of Justice*, supra note 8 at xviii: ‘What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant … The theory that results is highly Kantian in nature.’

62. Kant, ‘An Answer to the Question: What is Enlightenment?’ in *Practical Philosophy*, supra note 59 at 8:35 [original emphasis]. The literal translation (from Horace, Epodes I.2.40) is ‘Dare to be wise!’


64. Romans 7:15.
*Lectures on the History of Moral Philosophy* makes clear that it was only in the mid-1980s, decades after the publication of *A Theory of Justice*, that Rawls revised his university lectures on Kant to correct their ‘too intense’ focus on the Groundwork, by considering the *Religion Within the Bounds of Mere Reason.*

Kant’s more gloomy understanding of the power of human beings to escape evil (whatever their level of knowledge and civility) points towards an ultimately more pessimistic view of the human condition: one in which the grand theories of justice, integrity and other such values are revealed as ‘compensatory fantasies’ wherein the shortcomings and injustices of the present are transformed into a theory of the ideal society that represents an odd permutation of the society of the moment. Pessimism might therefore be described as the Enlightenment mentality’s darker twin.

**Pessimism**

The intellectual commitments of the pessimistic view are much less easily traced than those of optimism, in part because of the association of its central ideas (law’s serviceability for both good and evil) with dogmas of modern analytical legal positivism. Pessimism is congenial to the Hobbesian tradition of juridical thought which regards the function of law as achieving a reasonable ordering or balancing between competing interests in society, rather than the pursuit of an ideal of optimal justice. Questions are therefore raised by the thought that law exists within circumstances of both good and evil, and may be instrumental in the creation and perpetuation of either situation. It is tempting to regard pessimism as similarly bound up with those forms of positivism which regard the concept of law as therefore analytically separable from all ideals, with which it may enjoy contingent connections.

Perhaps the most important question raised by pessimism is that of the relationship between culture and moral progress. Optimism, as we have seen, tends to conflate these ideas: human history is represented (at least implicitly) as the gradual transition from primitive and barbaric beginnings to the highest attainments of civility and peace. Yet this result has not been the actual historical experience of the West: the actions of leading Nazis, who could commit the most terrible atrocities and contemplate high art, poetry and music, and the methods of the Inquisitors in the early-modern Church, testified to the possibility of evil even amid the most civilizing influences. This does not suggest that culture is ‘neutral’ with respect to evil, but merely that the influence of culture is not sufficient to impede the presence of evil. Optimism thus rests upon a mistake. Shifting to a pessimistic view, we might therefore think of law in the following terms.

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66. On his understanding of the relationship between justice and integrity, see *Law’s Empire*, supra note 1 at 176.
68. For instance: that law is equally present in conditions of good and evil does not imply that law is equally serviceable for good and evil ends. For an argument that it is not, see *Law as a Moral Idea*, supra note 38.
Law, as Fuller says, exists to ‘reduce the role of the irrational in human affairs.’ But, he goes on to say, ‘there is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality. We can create the conditions essential for a rational human existence.’\(^69\) As we have seen, the clearest expression in philosophy of a ‘rational existence’ that is centred upon the idea of law is that of Kant. Kant viewed the moral point of view as wholly independent of any other, being rooted neither in experience nor in considerations of humanity, but in the moral law alone:

I do not … need any penetrating acuteness to see what I have to do in order that my volition be morally good. Inexperienced in the course of the world, incapable of being prepared for whatever might come to pass in it, I ask myself only: can you also will that your maxim become a universal law?\(^70\)

But the systemized model of abstract, self-consistent willing that Kant saw as the basis of morality is (as Kant’s twentieth century German critics pointed out) at the same time equally the basis of the universal sadism of de Sade’s worldly vision.\(^71\) Both visions are premised upon the idea that the world is ‘rational’ because it admits the possibility of self-consistent universal willing; and there is (according to his German critics) nothing in Kant’s philosophy that could prevent such a world from also being utterly inhuman. For, as Geuss declares, in Kant’s view ‘a feeling of “humanity” that was detached from, or anything more than, a conception of full rational consistency of willing is merely a “pathological” state of no standing whatever as a guide to moral action.’\(^72\)

Law is not, in this pessimistic sense, divorced from its ideality (the ideal of realizing conditions for a rational existence); but we may view that ideal—indeed any set of ideals—as leading to no more than an endless permutation of the present predicament, and not an escape from it. We inhabit a world, on this view, that is as much an imperfect and partial instantiation of de Sade’s fully rationalized existence as it is a partial achievement of Kantian justice and morality. Moreover, the pessimistic view represents these states not as alternative ideals at which to aim, but as opposing dimensions of the only ideal that it is possible to pursue. If the human condition is always beset by evils, law can emerge only as a means of managing the consequences of those evils, not a means of ameliorating them. In consequence of this, it is tempting to separate the idea of rationality from any moral ideals, and to suggest that the nature of law may be studied without reference to moral ideas.

As with optimism, this pessimistic line of thinking must ultimately be refused. Acceptance of that line of thinking depends upon an assumption that pessimism shares with the optimistic standpoint explored earlier: that of the autonomy of

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70. *Practical Philosophy*, supra note 59 at IV.403.
71. Adorno, Horkheimer and the French thinker Lacan stressed this similarity: see *History and Illusion*, supra note 36 at 83.
morality from the practices to which it applies. Where, as with Kant, moral values are interpreted as products of the will, in the form of general moral laws, morality will occupy just that autonomous standpoint articulated by Pufendorf whereby no intrinsic quality of goodness or evil attaches to the practices themselves, but only when such practices are contemplated ‘by reference to a law.’ Unlike optimism however, the resultant pessimistic perspective is one in which the category of the sacred has not been transmuted but rather annihilated. For there is nothing in the nature of worldly phenomena that could ground such a category, all value being imposed by the rational operations of the autonomous will.

A moral philosophy in which no values are sacred is, I think, a profoundly important dimension of modern thought the significance of which has yet to be fully grasped and explored. The visions of progress in Voltaire and Turgot regarded the final assurance of the triumph of good over evil in human affairs as the gradual attainment of civility, and the disappearance of barbarism. But if values arise from a free will, contemplating an otherwise morally inert world, then there are no aspects of human practices or societies that are intrinsically good (i.e. the goodness of which a genuinely free will is incapable of denying); and hence nothing that is truly sacred or finally deemed beyond revision. An argument may well be made that the optimistic attachment of the sacred to institutions rather than ‘pure’ values is an inevitable consequence of, and reaction to, the development of such a perspective on morality.

Let me therefore propose a different understanding of the intellectual commitments of modern juridical thinking: one which differs radically from both the optimistic and the pessimistic views lately discussed.

An Alternative View

Suppose we return to the theme initiated by Fuller and proceed with it in a different direction. Law (as well as a myriad of other human practices) reduces the level of irrationality in human affairs, thereby producing something approximating to a ‘rational existence.’ This existence, as we know, is capable of instantiating evil as well as good. Now, suppose we further observe that morality itself requires a social context in which to exist, for it is the very absence of rational conditions that renders moral action impossible in a situation of anarchy. Chapter 13 of Hobbes’s *Leviathan* supplies the closest image to that of absolute anarchy: in such a state, Hobbes says, we have a situation of continual warfare of each against all, in which man is a wolf to fellow man. Such conditions leave no room for anything except preemptive acts of hostility in the name of self-preservation. The image of the ‘wolf’ is useful in capturing the essential unreadability of intentions in a situation where shared connections of any kind (including linguistic connections) are absent. There can, as

73. *De Jure Naturae*, supra note 16.

74. This is not to suggest, however, that the values imposed by the will are *arbitrary*, for it is a dogma of the Kantian philosophy and its intellectual descendants that the will is fully realized only in being *rational*.
Hobbes observes, be no moral action in a ‘state of nature’ such as this; only a continual and selfish struggle for survival.

Where a stable framework of social connections does exist, however, virtuous (or moral) action then becomes possible. For here, a shared context of practices (including linguistic practices) provides a background against which to understand and respond to intentions. We can choose, on the basis of these background understandings (as well as explicit foreground considerations such as those of law), to be well-intentioned towards others, or to act in ill-intentioned ways. Actions of all kinds can be viewed as good or bad on the basis of these explicit and background norms. The essential point is that established practices provide the necessary context in which it is possible to act morally or otherwise. Morality, in other words, is an inherent aspect of human practices, not an independent perspective available to a person without imaginative connection to a context of practices and ‘inexperienced in the course of the world.’

The essential locatedness of virtues and morality in existing social practices suggests a vision of law and society that is fundamentally different from that found in modern jurisprudence in either its optimistic or its pessimistic guises. For we may contemplate a scale of possibilities, of which the opposing end-points do not exist. On the one hand, we have the anarchic conditions of the Hobbesian state of nature, in which ‘good and evil have … no place.’ On the other is the vision of social perfection in which justice, equality, liberty, entitlement etc are in perfect and optimal balance. Neither of these states, I submit, is an ideal-type on which to base an understanding of human society. For the truth will always be some permutation of the middle of this scale: a set of circumstances in which a life of consistently virtuous action is possible but constantly difficult and open to perversion or frustration. (This is also one aspect of the meaning of St. Augustine’s pronouncement that the religious man must simultaneously inhabit two Cities, the divine transcending the earthly one.) Law is then an important part of the endeavour to realize conditions within which one may lead the ‘good life’ as fully and as successfully as possible.

It will be evident that such a conception of society under law is not merely material but also spiritual, or religious. Material circumstances directly affect the possibilities open to the spiritual life in a number of ways. But a jurisprudence or political philosophy which begins and ends with material circumstances and which regards the spiritual dimension to life as a matter of ‘personal preferences’ or ‘expression of autonomy’ can only impede an understanding of law and society. Aristotle claimed that the perfect lawgiver pays closer regard to friendship than to justice; and we may see in this a recognition (largely absent from Western philosophy) of the fact that society must finally be contemplated as ‘a feature of the life of minds in relation, not bodies in proximity.’

75. I leave aside here any discussion of the extent to which motive or intention is relevant to, let alone ‘grounds’ morality.
for the expression and pursuit of personal preferences by autonomous agents is not less misleading or distorting than society viewed as the source and meaning of individual ‘selves.’ For both law and society involve the notion of ‘self’ and ‘society’ as organically connected at every point, and thus finally inseparable in meaning. This, in my view, is a much harder question for philosophy than ‘composing definitions of liberty, equality, democracy, community and justice that … we should adopt.’ Whether one is ultimately optimistic or pessimistic about the prospects for such definitions is, I would argue, neither here nor there.

Concluding Observations

The analysis offered in the preceding section differs from the philosophies of optimism and pessimism in that it connects more fully the notion of the individual ‘good’ to that of the collective or public ‘good.’ This is, then, a difference in intellectual commitment: to an understanding of ‘the good life’ that does not demand or imply the separateness of the individual good from the good of society. Rather, the ‘good life’ appears as a complex yet indivisible whole; not a series of discrete objects in search of some final reconciliation.

I have not the luxury to explore the differences between these understandings in more detail in the confines of the present essay. Moreover, the complexity of the idea of ‘the good life’ that I have in mind is such as to defy concerted attempts to articulate it. My aim has been simply to illuminate something of the underlying implications and assumptions of modern jurisprudential thinking, and to suggest the failure of that thinking to comprehend the importance of the idea of the good life that I have indicated herein. Until that idea fully appears in modern thinking, juridical thought seems doomed to oscillate endlessly between forms of optimism and pessimism, without satisfaction or purpose.