

THE LEGAL JUNCTION

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The Legal Junction

The Complex Promise of Modern Legal Professionalism

Het juridische knooppunt

De complexe belofte van
modern juridisch professionalisme

Proefschrift

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*A. A violent order is disorder; and
B. A great disorder is an order. These
Two things are one. (Pages of illustrations.)
(Wallace Stevens, 'Connoisseur of Chaos')*

*Consistency is contrary to nature,
contrary to life.
(Aldous Huxley, *Do What You Will*)*

Table of Contents

Introduction	5
1 Law at a Crossroads.....	17
2 The Art of Authority.....	57
3 Freedom's Formalism.....	113
4 Power to the People	171
5 Critical Commitments	231
6 Conclusion: The Legal Junction.....	295
Bibliography	311
Acknowledgements	325
Summary in Dutch	327

Introduction

“The language – and therefore also to some large degree the practice – of morality today is in great disorder,”¹ Alasdair MacIntyre writes, and as long as our moral world is diverse and pluralistic, the confusion will not be easily overcome. Indeed, the legal world is daily confronted with conflicts that result at least in part from the moral confusion that has become our modern fate. Legal institutions and practices are inevitably involved in all sorts of struggles because they have an important function in dealing with conflict as a basic fact of life. We may even say, with Stuart Hampshire, that justice *is* conflict and that the law mitigates and transforms conflicts such that they need not escalate into uncontrollable violence and can somehow be settled or otherwise discharged.² Indeed, legal professionals daily live and work in a world of confusion and conflict; dealing with conflict is what they specialize in and thus we might think of them as “connoisseurs of order” in a society that constantly threatens to disintegrate into chaos and disorder.

However, now that the institutional organization and functioning of the judiciary is the object of political and public debates, confusion and conflict seem to strike at the heart of the legal world itself. We witness a growing critical interest in the judiciary coupled with a demand for both “transparency” and “efficiency,” which has already resulted in several institutional reforms and which has produced many more plans and

¹ MacIntyre, A., *After Virtue*, University of Notre Dame Press Notre Dame Indiana second edition 1984, p. 256.

² Hampshire, S., *Justice is Conflict*, Princeton University Press Princeton NJ 2000.

discussions about further measures.³ Such debates necessarily touch upon the “essence” of adjudication and therefore both in and outside the legal world they are followed with a dubious eye. These discussions concern the professional identity not only of the judges, but also of the other legal professionals – notaries, advocates and public attorneys – who have important roles in the adjudication, mitigation and prevention of social conflict and strife. The reforms of the judiciary and the (political) goals and values behind these reforms also indirectly involve the place and role in the community of these other professionals.

But they are also more directly involved. In the Netherlands notaries are confronted with institutional experimentation and reforms; advocates are challenged by differentiation and the onslaught of the commercialization of advocacy is a matter of concern for many in society at large – as is the politicization and bureaucratization experienced by public attorneys. It is highly probable that those involved experience these changes in an “existential” sense. That is, they touch upon their professional identity, upon what, at bottom, it *means* to be a judge, a notary, an advocate or a public attorney.

Not only the legal professions face a changing world. Professional ethics in general has become “one of the topics of present time.”⁴ Some see the promise of professionalism as a last vestige of moral obligation and practical wisdom. Others are more critical of the “culture of professionalism” and regard professional solidarity as self-serving and elitist. Every profession is a conspiracy against the laity, Shaw famously wrote,⁵ and we are undoubtedly witnessing a growing critical attitude towards both doctors and lawyers. This criticism is partly fueled by the fact that traditional professionalism was often experienced as rather paternalistic and undemocratic and, indeed, one of the important factors in this is the “twilight of authority” in modern societies:

³ Cp. Hol, A., & Loth, M., *Reshaping Justice*, Judicial Reform and Adjudication in the Netherlands, Shaker Publishing B.V. Maastricht 2004.

⁴ Toulmin, S., *Return to Reason*, Harvard University Press Cambridge Mass. 2001, p. 115.

⁵ “The effect of this state of things is to make the medical profession a conspiracy to hide its own shortcomings. No doubt the same may be said of all professions. They are all conspiracies against the laity.” Shaw, G.B., ‘Preface’ to ‘The Doctor’s Dilemma,’ 1911.

claims to authority are more readily challenged today than they used to be.⁶ Another basic topic of the present time is the promise *and* problem of the “bureaucratization” in the professional world reinforcing the “depersonalization” of the professional practices.

The debate with regard to the essence of *legal* public offices is an especially politically sensitive subject because these discussions touch upon the identity of the community. These questions are not merely of “existential” importance for jurists; in these questions our present legal community, our *Rechtsstaat* is at stake, and all the arguments that circulate are more or less sophisticated answers to the question of what our community should become. In a deeply divided modern society, both the urgency and the dangers of such disputes are evident.

However, confusion is here to stay because for many in modern society “pluralism” has become a good in itself. In other words, in an open society diversity has become a part of our ideal world and even the tragic tension that we necessarily experience between our ideals, as the fulfillment of some ideals always excludes the fulfillment of others, has become valuable as it constantly reminds us of our human limitations and imperfection.⁷ This does not imply that any opinion is as good as any other. There is still much room for *rational* argument, which makes it possible to criticize some opinions as at least one-sided, or sometimes even completely wrong.⁸ It does imply, however, that in a morally divided world, legal professionals will have to become “connoisseurs of chaos” and realize that consistency will not always be a virtue. Moreover, they will realize that a virtue in one context is a vice in another; or even that actions can be structurally ambivalent in moral terms.

This study will be concerned with the question: What is the promise of legal professionalism in a modern society? There are at least *four* consistent answers that are explored; answers that are “rational” or “reasonable,” although the implied conception of rationality does differ with each answer. These four answers will also be explored as being in (tragic) tension with

⁶ Nisbet, R, *Twilight of Authority*, Liberty Fund Indianapolis IN 2000; Friedman, L.M., *Total Justice*, Russell Sage Foundation New York 1985, p. 89.

⁷ Cp. Toulmin, S., *Cosmopolis*, The Hidden Agenda of Modernity, The University of Chicago Press Chicago 1990; cp. Toulmin, *Return to Reason*, 2001.

⁸ Cp. Putnam, H., *Reason, Truth and History*, Cambridge University Press Cambridge UK 1981, p. 148.

each other, and I am especially interested in what seems to keep them so fundamentally at odds. But to gain perspective on this we need to start with the “construction” of these answers as rational answers because it is exactly the rationality or reasonableness that makes them understandable and is, to some degree, part of their attractiveness.

Thus rationality is a *criterion*, but I hasten to add that a rather broad conception of rationality is employed such that it includes the four different versions of it that I investigate in this book. Nevertheless, we must be able to recognize these positions as rational because otherwise they would become totally out of our interpretative reach. This is implied in the interpretative method, which of necessity begins by postulating a common humanity between the interpreter and the interpreted. If people are drawn to a certain view of things and we want to understand this perspective, we will have to begin by treating such views as views of “persons” not totally unlike ourselves and, according to Hilary Putnam this means

“[...] attributing to them shared references and shared concepts, however different the *conceptions* that we also attribute. Not only do we share objects and concepts with others, to the extent that the interpretative exercise succeeds, but also conceptions of the reasonable, of the natural, and so on. For the whole justification of an interpretative scheme [...] is that it renders the behavior of others at least minimally reasonable by *our* lights. However different our images of knowledge and conceptions of rationality, we share a huge fund of assumptions and beliefs about what is reasonable with even the most bizarre culture we can succeed in interpreting at all.”⁹

When we postulate a common humanity we should add a second premise. Human knowledge and human reasoning do not take place in some otherworldly realm but are always “situated” in a social world and connected to human interests and values. These interests and values are diverse – we live in a pluralistic world – and sometimes highly personal or intimately related to

⁹ “We are committed by our fundamental conceptions to treating not just our present time-slices, but also our past selves, our ancestors, and members of other cultures past and present, as *persons*; and that means [...] attributing to them shared references and shared concepts, however different the *conceptions* that we also attribute.” Putnam, *Reason, Truth and History*, p. 119.

our social (or class) position. But they most certainly need not be and some interests are surely shared by many in many situations.¹⁰ Basic values and interests that have a strong foothold in modern societies, and are even institutionalized to a large degree, inform the four answers. Moreover, I will argue that we can situate and understand many rational arguments from these basic goods.

This book is Weberian in spirit in that it reasons from the distinction between facts and values. This precludes the resolution of these fundamental tensions in modern law because they are constructed as conflicts of a political and moral nature. The choices that are required cannot be dictated by some kind of self-evident or self-legitimizing scientific truth, logic or rationality.¹¹ What I *can* do is hypothetically make the choice for some basic good (some particular professional promise) that should inform the legal professional's practice and knowledge claims and see what this implies. Thus I construct the traditional professional as aspiring for hermeneutical competency and practical wisdom. This ideal-type subsequently functions as a stepping-stone to construct typically *modern* legal professional types, such as the "formalist", the "pragmatist" and the "activist modernist" lawyer that can also be distinguished on the basis of different basic, typically modern, value-orientations. Once the choice for a basic ultimate good is made, and when we have thus replaced real intentions for *hypothetical* or *ideal* intentions, the perspective and practice of such a professional becomes instrumentally rational or value-rational, and this gives us a chance for *understanding* this perspective and the practices that derive from it.¹²

¹⁰ Some interests might even be shared by all human beings always and everywhere. "Yet these interests are not necessarily shared in all cultures and periods alike: many of them overlap, or change slowly enough to be understood across cultural or historical boundaries." Toulmin, *Return to Reason*, p. 165.

¹¹ Eliaeson, S., *Max Weber's Methodologies*, Interpretation and Critique; Polity Cambridge 2002, pp. 27-28; cp. Collins, R., *Max Weber, A Skeleton Key*, Sage Publications Beverly Hills 1986, p. 36; Posner, R.A., *The Problematics of Moral and Legal Theory*, Harvard University Press Cambridge Mass. 1999, p. xiii.

¹² "In its various forms the trick consists in replacing real intentions of interpreters and interpreted with hypothetical or ideal intentions, whether they attributed to the common mental apparatus of mankind, to history, or simply to explanatory convenience." Unger, R.M., *Knowledge and Politics*, The Free Press New York 1975, p. 115; Weber, M.,

When I say “understanding,” I consciously choose a particular method of inquiry. On the one hand, there is no general aim to “explain” the phenomena that I describe in a causal way comparable to explanation in the natural sciences. That is to say, there is no sustained effort to find hidden causal social structures that explain certain events or facts. On the other hand, there is also no aim to reach my goal by means of the autonomous (philosophical) use of reason in the sense of logical reasoning or conceptual analysis. What I aim for, in short, is *Verstehen*. I want to understand and thus disentangle the complex and confused promise of modern legal professionalism. Compare Roberto Unger’s succinct but adequate description of such a method aiming for understanding:

“The division of the world into an order of ideas and an order of events, with their corresponding methods of logical analysis and causal explanation, must not be accepted as the eternal faith of thought. Between the order of ideas and the order of events, there is a third realm, the order of consciousness, mind, culture or social life, for the understanding of which neither the logical nor the causal method is adequate. Instead, it calls for a method of appositeness or symbolic interpretation.”¹³

The construction of such a perspective, rationally and consistently informed by a value-orientation, is ambitious in the sense that it aims at a *holistic* view.¹⁴ This perspective (loosely) joins together a range of social, moral and political phenomena that are understood with the help of a “deeper” underlying value-orientation that gives meaning to them. Thus the ideal-types are deliberately designed to show how certain kinds of actions and beliefs tend to go together with other kinds. The hope is that this presentation connects experiences, and renders them comprehensible, on a somewhat

‘Kritischen Studien auf dem Gebiet der Kulturwissenschaftlichen Logik,’ in: *Gesammelte Aufsätze zur Wissenschaftslehre*, J Winckelmann, Tübingen: J.C.B. Mohr, 1988, p. 272; Eliaeson, S., *Max Weber’s Methodologies*, pp. 37, 41, 42; cp. Hindess, B., ‘Rationality, and the Characterization of Modern Society’, in: Whimster, S. & Lash, S., *Max Weber, Rationality and Modernity*, Allen & Unwin London 1987, pp. 138-140.

¹³ Unger, *Knowledge and Politics*, p. 107; cp. Hindess, B., ‘Rationality, and the Characterization of Modern Society’, pp. 138, 139.

¹⁴ Cp. Zijderveld, A., *The Abstract Society*, A Cultural Analysis of our Time, Doubleday & Company Inc. New York 1970, pp. 61, 62.

higher level of abstraction such that particular practices and complexities can be understood. Thus, the collision between the traditional professional, the formalist, the pragmatist and the modernist activist helps us to reduce the complexity of our modern predicament.

Chapter One, “Law Caught in a Crossroads,” will preliminarily sketch the tensions that in my view characterize modern law. The tensions of the modern “legal junction” are the tensions between the (reasonable) demand for authority, certainty, effectiveness and critical engagement. I will employ several Weberian notions to construct four “ideal-typical” legal professional “cultures” and in the following four chapters they are explored. *Chapter Two*, “The Art of Authority,” deals with the first type that is foremost concerned with the good of “authority” as it is in many ways connected with the ideal of forging some sort of a community out of the unruly material of modern society. *Chapter Three*, “Freedom’s Formalism,” is a response to a demand for “objectivity” and “transparency” in adjudication, and in legal practices generally, by emancipated modern citizens who demand respect for their rights and freedom. *Chapter Four*, “Power to the People,” explores a third demand, the demand for effectiveness and efficiency, which can be connected with the growth of a modern democratic and technological culture in which structural scarcity of resources necessitates maximizing efficiency. The fourth ideal type, presented in *Chapter Five*, “Critical Commitments,” keeps a critical distance with regard to the tendencies in modern culture and commits all critical and imaginative powers to the construction of alternative visions of community. Thus with these four chapters I stage a head-on collision in an effort to gain perspective on the structural dilemmas and disputes within the modern legal world.

The reduction of complexity by means of abstraction is, of course, the aim of all science. There is always an effort towards the reduction of complexity by finding principles that apply at least a bit more generally than in one particular case. In other words, “science is a way of finding the common principles that transcend particular situations, of extrapolating from things we know to things we do not know, a way of seeing the novel as another

arrangement of the familiar.”¹⁵ But there are several caveats and provisos that I should mention and briefly discuss.

To begin with, the ideal-types that I present here are simplified hermeneutical devices to trace and order historical phenomena and perspectives that in reality structurally exceed or “transgress” my presentation. They do not “describe” actual empirical facts or events in the sense of an exact “correspondence” between the description and the described. Nor are they the product of logical or conceptual (philosophical) analysis. The ideal-types serve as constructions that represent extreme cases or hypothetical possibilities that can, when confronted with each other, be useful in understanding our present modern social world.¹⁶ We should be warned though that the “logic” that is suggested here is a theoretical construction that destroys the logic of social practices as such.¹⁷ Moreover, although I concede an ambitious aspiration for a holistic perspective on modern legal professionalism, there is no claim to exclusivity. There may be other methods and concepts to trace, order, understand or even explain the phenomena that I am interested in.

The method of *Verstehen* – the hermeneutical method – can be criticized as being rather conservative. To be sure, if we want to understand that which is typically human and social about our collective world, we should try to find out what social arrangements and human behavior *means* to human beings. To understand social practices and institutions we have to describe what the participants or the agents think about it and how they experience it, and unless we take the meaning of these practices and institutions seriously, we have missed what is peculiarly *social* about our subject matter. However, if we stay too close to the understandings of the agents and his fellows, we are deprived of a standard by means of which we can distinguish insight from illusion, or

¹⁵ Collins, R., *Conflict Sociology, Toward an Explanatory Science*, Academic Press New York 1975, p. 2.

¹⁶ Weber, M., *Methodologische Schriften*, S. Fischer Verlag Frankfurt am Main 1968, pp. 65-69, 169-173; Weber, M., *Wirtschaft und Gesellschaft*, J.C.B. Mohr (Paul Siebeck) Tübingen 1976, p. 171; Unger, R.M., *Law in modern society, Toward a criticism of social theory*, The Free Press New York 1976, p. 22.

¹⁷ Bourdieu, P., *The Logic of Practice*, Polity press Oxford UK 1990, pp. 11, 12.

“ideology” in a neutral or functional sense from the kind of “masking ideology” and “false consciousness” that we might want to critically expose.¹⁸

The ideal-types that I present in this study provide critical standards only with regard to each other. They do not provide critical standards that can claim universal or objective value because I constructed them as relative to basic interests and values. That they cannot provide such objective standards follows from my initial choice to respect the Weberian distinction between facts and values; there is no objective standard, and no “view from nowhere,” by means of which these positions can be scrutinized.¹⁹

Nevertheless, the kind of “sociology of knowledge” that I try to engage in *does* have a particular critical edge. By correlating professional knowledge claims and commitments with social determinants, we might have a chance of acquiring a certain freedom from those social factors. Compare Pierre Bourdieu:

“[...] it is through the illusion of freedom from social determinants [...] that social determinants win the freedom to exercise their full power. Those who walk into the debate with their eyes closed and a little nineteenth century philosophical baggage would do well to think about this if they don’t want to lay themselves open to the easiest forms of objectification in the future. And so, paradoxically, sociology frees us by freeing us from the illusion of freedom, or, more exactly, from the misplaced belief in illusionary freedoms. Freedom is not something given: it is something you conquer – collectively. [...] I think enlightenment is with those who turn their spotlight on their blinkers.”²⁰

This not only goes for the legal professionals but for the professional investigator of legal professionalism as well. There is one particular blinker that both jurist and scholar should be aware of and constantly scrutinize. This is the tendency to “identify with reason” and to act as the “spokesman for the

¹⁸ Unger, *Knowledge and Politics*, p. 15, 108; cp. Gerth, H.H., & Wright Mills, C., (eds.) *From Max Weber*, Essays in Sociology, Routledge and Kegan Paul Ltd. London 1974, p. 58.

¹⁹ Cp. Nagel, T., *The View from Nowhere*, Oxford University Press Oxford 1986.

²⁰ Bourdieu, P., *In Other Words*, Essays toward a Reflexive Sociology, Stanford University Press Stanford Ca 1990, pp. 15, 16; “In the social sciences as elsewhere, the problem of achieving objectivity is that of learning to counter our own biases.” Toulmin, *Return to Reason*, p. 96.

universal” with regard to the subject matter, in my case the legal professional. The lesson we can learn from both Michel Foucault and Pierre Bourdieu is that truth is *not* the product of a combination of neutral observation and universal reason. Often the idea is that the social scientist somehow, in contrast to the people he studies, transcends the forces that to some degree determine social life and thus reaches some objective point of view. But according to Foucault, “truth isn’t the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded to liberate themselves.” In short, “truth is not outside power” but produced within a particular power structure itself and “it induces regular effects of power”.²¹

Of course, the scholar has an interest in suppressing or “masking” this fact because it tampers with the neutrality, rationality and objectivity of his knowledge claims. Nevertheless, he should turn the spotlight on his own blinkers and critically scrutinize this drive to universality and the identification with reason. Bourdieu says, rather paradoxically, “to escape even a little from the relative, one absolutely has to abdicate from the claim to absolute knowledge, uncrown the philosopher king.” Science is a quintessentially human activity and therefore a social practice like any other. This means that the scholar should also try to gain some critical distance with regard to his own practice and his own knowledge claims, because by means of perpetual critical self-analysis he has a small chance of knowing the limits of his vision as determined by his particular biases and interests.²²

As science generally exhibits a tendency to proceed by arguing for general distinctions that will reduce the complexity of phenomena and resolve observed contradictions, the dichotomous classification that I present here seems therefore to be a typical product of my professional “habitus.” Surely, the “art of distinction” is recognizable for jurists as an important method for resolving hard cases and something similar is tempting for both philosophers and scholars as well.²³ However, “attempts to divide anything into two ought

²¹ Foucault, M., ‘Truth and Power’ in: Rabinow, P., *The Foucault Reader*, An introduction to Foucault’s thought, Penguin London 1984, pp. 67, 72, 73.

²² Bourdieu, *In Other Words*, pp. 32, 33; cp. Bourdieu, P., *Homo Academicus*, Polity Press Oxford UK 1998.

²³ Cp. Rorty, R., *Contingency, irony and solidarity*, Cambridge University Press Cambridge UK 1989, p. 77; Hacking, I., *Historical Ontology*, Harvard University Press Cambridge Mass. 2002, pp. 35 – 39.

to be regarded with much suspicion”, C.P. Snow writes in his famous pamphlet, *The Two Cultures*.²⁴ The danger is that we turn such dichotomies into a moral distinction of good and bad and much prejudice and dangerous dogmatism start with such dichotomies. There is a responsibility here for the social scientist because, as said before, the classifications of social science are interactive with the persons so classified.²⁵ Therefore, we should never forget that, as Stephen Jay Gould reminds us:

“Much of the world comes to us as continua, or as other complex, and far more than two-valued, series of reasonably discrete states. We do construct useful simplifications when we force this complexity into a simple system of successive dichotomous branchings – for such sequential ordering does resonate with the mind’s capacity to grasp a structure within multifarious and hierarchical systems. But what truer or more insightful ways of classification do we miss when we invoke this almost automatic mental scheme without pressing ourselves to consider less congenial, but perhaps more rewarding, alternatives?”²⁶

Thus, the distinctions I propose here are merely devices to order a complex social and cultural world that could also, no doubt, be ordered by means of other distinctions and concepts. Moreover, the four professionals and *The Four Cultures* that they represent, are ideal-types constructed on the basis of ideal or idealized intentions that might or might not be present, but that might, at least, illuminate much of the theoretical disputes on the level of the *ideals* of the legal profession. In order to show that these are not freestanding disputes by “free spirits,” but socially embedded discussions as well, in the following I try to connect these normative discussions on both modern legal professionalism and knowledge with sociologically informed theories on modernity.

The four ideal typical positions that I present the reader with may metaphorically be seen as a “crossroads,” a junction of four distinct

²⁴ Snow, C.P. *The Two Cultures*, Cambridge University Press Cambridge UK 1998, p. 9.

²⁵ Hacking, I., *The Social Construction of What?*, Harvard University Press Cambridge Mass. 1999, pp. 27-34; cp. Giddens, A., *The Consequences of Modernity*, Polity Press Cambridge UK 1990, p. 16.

²⁶ Gould, S.J., *The Hedgehog, the Fox, and the Magister’s Pox*, Mending the Gap between Science and the Humanities, Harmony Books New York 2003, p. 122.

professional cultures, with the modern lawyer in the middle. The four directions are not always and in every situation equally attractive and viable, but I suggest that professionals often experience the tensions between these four value-orientations and the concomitant professional (idealized and typified) commitments. The promise of professionalism is, therefore, a rather *complex* promise, and the argument here is that we can only attempt to reduce the complexity. The resolution of the tensions in any particular case will require choices by legal professionals. In this book I argue that this element of choice cannot be overcome on some abstract general level. In the end, I hope we arrive at a better understanding of what is at stake in these choices.

1.

Law Caught at a Crossroads

In her book on Dutch upper class domestic life around the turn of the twentieth century, Ileen Monteyn tells us about the advice her father gave her when she was still a child. “If you ever get lost in an unknown village or town, ask for the house of the local notary,” her father impressed upon her. As for Ileen Monteyn and many of us today, this paternal advice evokes a lost world, “a secure world of certainties. A world in which in every town the local mayor, the notary and the vicar were waiting in their big houses for the housekeeper to bring in a small girl that got lost.”¹ In that world legal professionals like the notary were “notables” in the community, and their role and commitments seemed to imply that they were deemed highly civilized, public spirited and trustworthy. This explains why Ileen’s father could not think of a better guardian for his little daughter than the local notary.

Indeed, the word “professional” seems to hold a promise. The root “profess” comes from the Latin word “profiteor”, which means, “to acknowledge, confirm, promise, confess.” In the medieval times the word “profession” was generally used when someone swore an oath to a religious organization or to the university (nowadays we would use the word “vow” instead) and indeed in the oldest English usage, the term profession refers to a declaration, an avowal, or to the expression of intention or purpose. The promise it held was that one dedicated oneself to a particular good or purpose

¹ Monteyn, I., *Leven op Stand 1890-1940*, Thomas Rap Amsterdam 1998, p. 7 (my translation).

and surely this promise is still largely part of the concept.² But what exactly is the promise of professionalism in today's world?

If one thinks of the sports world, the first distinction that comes to mind is that of the contrast between the professional and the amateur. Nowadays, we tend to explicitly distinguish the professional, who makes a living with some activity and reaches high standards of achievement, from the amateur, who, in spite of his enthusiasm, will always remain a bit of a dilettante. Thus, we tend to think of an amateur as someone who is either still learning or is not very proficient because the activity is a mere pass time, a hobby. But some might argue that we should, with regard to the legal professional, not make too much of this distinction. Of course, the "profession" to public service has to be *sincere*, and therefore an important part of the promise seems to be that those who profess to such service actually *hold dear* this public good or end that they profess to serve, and further that the professional even *loves* the work he or she does for the good that it brings to the community. Thus, the monk or the priest enters the religious institutional order for the love of God and the university "professor" dedicates his life to knowledge for knowledge's sake. One might therefore say that there seems to be something "amateurish" about these people as they commit themselves out of love and admiration for the particular good they serve.

This might sound rather odd, as the particular meaning of the word "amateur" that is invoked here does not readily come to mind anymore. However, the meaning of the amateur as "a lover" or "an admirer," also comes from a Latin source, "amātor", "lover, devoted friend, devotee, enthusiastic pursuer of an objective," and from its Latin-derived French source, "amateur" with a similar range of meanings. This older literal sense of the word might be more readily associated with the professional than the "dilettante" because the promise the professional holds is that his loyalty is with what he loves or admires as a public or common good, and, importantly,

² "In that usage the word is evaluated positively, implying religious and moral motives to dedicate oneself to a good end." Freidson, E., *Professional Powers, A Study of the Institutionalization of Formal Knowledge*, The University of Chicago Press Chicago and London 1986, p. 20.

he puts this purpose or good ahead of personal/private material incentives or motives.³

Undoubtedly, for many both inside and outside the professional world, professionalism still has this “amateurish” aspect. The concept of professionalism still carries the ideal of following a “vocation,” which implies a dedication to some important public good; be it health for the doctors, knowledge for the scientists or law and justice for the lawyers; and, indeed, many also think of the law as a “calling.” The legal professional is not in it (solely) for the money and the prestige but at least to some extent out of engagement with the good of the community that the law represents. In the words of Kronman when describing his ideal professional lawyer: “The outstanding lawyer [...] is, to begin with a devoted citizen. He cares for the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends.”⁴

Thus, according to Kronman, the legal professional is *both* an amateur who loves or admires the good or purpose that he or she serves (and the knowledge that it requires to serve it well) *and* a professional in the sense of earning a living and being highly proficient in his line of work. But in the ideal that Kronman sketches the love for the good trumps the private need to material well-being and prestige. This love or commitment is what seems to serve as a guarantee that the professional actually lives up to the professional promise – that the promise will be kept.⁵

This professional dedication to some ulterior or higher public good has traditionally been contrasted with the motives of men of trade or industry who are assumed to be “merely” motivated by their private and material ends. The promise of professionalism included a disinterested and independent

³ Professions “are occupations with special power and prestige. Society grants these rewards because professions have special competence in exoteric knowledge bodies of knowledge linked to central needs and values of the social system, and because professions are devoted to the service of the public, above and beyond material incentives.” Larson, M. S., *The Rise of Professionalism, A Sociological Analysis*, University of California Press Berkeley 1977, p. x.

⁴ Kronman, A.T., *The Lost Lawyer, Failing Ideals of the Legal Profession*, Harvard University Press Cambridge Mass. 1993, p. 14.

⁵ Kronman, *The Lost Lawyer*, pp. 371- 375; cp. Posner, *The Problematics of Moral and Legal Theory*, p. 186.

dedication to a public good. According to Kronman, though, this devoted lawyer is a dying breed. Modern lawyers are becoming much more like the commercial traders and industrialists that early modern professionals explicitly tried to distinguish themselves from. The ethos of honorable and principled commitment to the public good is incongruent with the utilitarian instrumental rationality of the world of commerce and industry. If modern professionals fail to live up to their original promise this will, according to Kronman, cause a deep crisis in the legal world and this feeling is widely shared both inside and outside the legal institutions.

However, the traditional professional promise has a serious downside. In their effort to distinguish themselves from traders and industrialists, the professionals strongly identified with the aristocracy.⁶ As they fell in line with the anti-utilitarian aristocratic ethos, their professional ideals became rather perfectionist, exclusive and elitist. Indeed, to cultivate a public spirit the professionals were thought to require a specific education, an education that was thought to be more than merely the acquisition of the required complex body of knowledge and related skills. The aim was broader as it included acquiring “good taste” and “good judgment” and training in the powers of reasoning. Thus from the eighteenth century until well into the twentieth century, legal professional training was a so-called “liberal” education, which was firmly based on the classics.⁷ The idea was that the study of Greek and Latin literature trained them in the sophisticated use of language and literary taste. Of course, as the legal profession and practices had firm roots in classical Roman law, the education of the lawyer also consisted in studying classic legal texts, and this is part of the curriculum in many Western legal faculties until this very day.

In addition, Euclidean geometry was thought to be important to train the powers of reasoning. However, many argued that legal reasoning should *not* be identified with geometrical reasoning because the law has its own particular rationality and deciding cases required sophisticated powers of “judgment” and “practical wisdom.” Thus, a purely technical training would

⁶ Brint, *In an Age of Experts*, The Changing Role of Professionals in Politics and Public Life, Princeton University Press Princeton NJ 1994, pp. 8, 26-30.

⁷ Reader, W.J., *Professional Men*, The Rise of the Professional Classes in Nineteenth-Century England, Weidenfeld and Nicholson London 1966, pp. 9, 10.

never suffice: “Technical training might be good enough for the narrow purposes of a craftsman or trader, but for a gentleman who might have to deal with wide issues of government and policy, it was much more important to grasp general principles of intellectual activity: his education should teach him how to learn.”⁸

The result of such training would be a professional class of lawyers who aspired for a gentleman’s emphasis on trust, discretion, judgment and character. In fact, leading professional men took on much of the cultural ambiance of the old aristocracy. Cultivation and transmission of this ambiance depended greatly on the liberal education in universities and by the rigid preservation of the profession’s gentlemanly standards as distinct from the utilitarian and commercial ethos of the merchant and industrial classes. Indeed, the American sociologist Steven Brint also argues that traditional professionals aspired to the character and values of a gentleman: “trustworthiness, discretion, and judgment in relations with clients and associates, but also an attitude of noblesse oblige, a sense of responsibility for the great affairs of government and society, and a high level of cultivation through the liberal arts.”⁹

These ideals survived the formalization of the profession by means of state regulations of professional institutions and education. This formalization or “legalization” consisted of the demand for credentials in the form of a university education and the institutionalization of licensing systems. Entrance to the professional class and the dispensing of professional competences and powers are now strictly regulated. Today, the requirement of special qualifications, credentials and licenses surely reinforce the idea that the professions are a distinct occupational class and, indeed, formal university training and licenses create a formal boundary, distinguishing professionals from “dilettantes.”¹⁰ The stricter distinction between insiders and outsiders that developed in the nineteenth century also reinforced the idea that laymen could not judge the skill and knowledge of the professional. Thus the professional groups were granted the powers to control entrance into the professions (a large degree of autonomy in the sense of individual and

⁸ Ibidem.

⁹ Brint, *In an Age of Experts*, pp. 30, 8, 9.

¹⁰ Freidson, *Professional Powers*, p. 26.

collective self-government) and the privilege of internally dealing with accusations of malpractice. Not only were outsiders technically incompetent to judge them, such outsiders were not trusted to judge them, since they typically reasoned from private or political interests and not the good that the professionals served.¹¹

If one takes a critical view of this, one might say that such professional groups took on the characteristics of a rather exclusive and elitist medieval “guild.”¹² But it was exactly the *moral aspect* of professionalism (the promise of devotion to the public good) that justifies the lawyer’s privileges and protection. The good that professionals served was thought to be so vital to society that they should be granted the independence and autonomy needed to be actually *able* to take responsibility for the good of the community.

This moral aspect of the idea of legal professionalism is the subject of the present study. Specifically, what exactly is this common good or purpose that the legal professional should serve? In general we can answer this question by saying that legal professionals serve the law and commit themselves to justice as important goods. Although “the law” and “justice” are notoriously ambiguous and heavily contested concepts, an answer to the question seems to be especially urgent now since the legal world, in many Western countries, has seen significant changes in the past decades. Brint documents these institutional and cultural changes in many professional fields, including the legal one. Of particular note is Brint’s description of a trend in which professional commitment has lost its “moral bearings.” More and more the professions have become disconnected from the idea of service and commitment to some public good and, instead, more exclusively connected to the idea of “expert knowledge.” Modern professionals are more and more

¹¹ Brint, *In an Age of Experts*, p. 7.

¹² “The interpretation of these laws by specializes institutions, manned by a relatively independent professional group, steeped in its own craft and techniques of argument, guarantees that the persons whose power the law is designed to restrain will not be the ones to determine, in the final instance, its meaning.” Unger, *Law in modern society*, pp. 70, 52-54; Brint, *In an Age of Experts*, pp. 33, 35; Posner, R.A., *Overcoming Law*, Harvard University Press Cambridge Mass. 1995 pp. 37-60.

thought of as “experts,” agents of formal knowledge that need “no additional moral vaulting.”¹³

Critics of this trend towards such “amoral” professionalism in the legal world rather dramatically speak of a “crisis of morale.” I have already referred to Anthony Kronman who, with regard to American legal culture, explicitly speaks of such a crisis in that profession – a crisis, which is to some degree the result of several important factors, (though there are no doubt others): the bureaucratization of adjudication; the commercialization of advocacy; the politicization of the public attorney’s office and the formalization of legal education. Another example of a critical evaluation of the changing professional world is found in Mary Ann Glendon’s book *A Nation under Lawyers*. The subtitle – ‘How the Crisis in the Legal Profession Is Transforming American Society’ – certainly sounds alarming enough.¹⁴

However, if one has different priorities – if one has a different ideal of legal professionalism – the changes can be seen in a more favorable light. There are lawyers who applaud at least some of these changes, like Richard Posner. Posner’s commitment to a thorough “professionalization” in the sense of becoming more functional, efficient and effective implies that we should be happy if the “aristocratic” type of lawyer leaves the stage. Indeed, in his view, the legal world is still much more traditional and old-fashioned than it should be. The pretension of having some privileged access to the definition of the public good in moral, political or legal terms is a typical example of “professional mystique.” As it is always attractive to justify privileges, wealth or power by means of a claim to greater nobility, honor, politeness, taste and technical skills, we might understand how professional groups will display a tendency to idealize themselves. Indeed, sociological analysis can bolster this scepticism about the professions. What is “professed” is often thought of as an “ideology” in a bad sense; that is, as a strategy to justify a privileged position while *masking* an underlying pursuit of self-interest.¹⁵

¹³ Brint, *In an Age of Experts*, pp. 9-11, 40-43.

¹⁴ Kronman, *The Lost Lawyer*, p. 2; Glendon, M.A., *A nation under lawyers*, How the Crisis in the Legal Profession Is Transforming American Society, Harvard University Press Cambridge Mass. 1994, p. 12.

¹⁵ Posner, *The Problematics of Moral and Legal Theory*, p. xiii; cp. Brint, *In an Age of Experts*, pp. 9, 40.

The idea I want to investigate in this study is that the legal professions have gradually become more and more entangled in social trends and processes that can be associated with “modernity.” For lawyers of the older generations, these trends and processes have changed the legal world beyond recognition. The dispute between a rather pessimistic and nostalgic Anthony Kronman, on the one hand, and an enthusiastic, even impatient Richard Posner, on the other, testifies to the confusion that this has caused.¹⁶ But what is modernity? Modernity is a social-political world that is to a large degree the result of a modern scientific and technological outlook.¹⁷ The social and ideological processes and trends that are associated with modernity can be traced far back into Medieval Europe. However, they became prominent in history somewhere between the Renaissance and the Reformation, when the recognizable modern world began.¹⁸ Since then, though, there has been a steady quickening in pace, and, especially since the Second World War, the legal professional world seems to be ever more deeply affected.

Although they seem strongly related (and yet also heavily contested) concepts, I distinguish modernity from “Enlightenment.” The Enlightenment can be thought of as the explicit and conscious preaching of the gospel of both critical reason and modern technology as a road to socio-political progress. Although the Enlightenment is often thought of as a specific historic period in which this creed became more and more influential – the late seventeenth and eighteenth centuries – many aspects of nineteenth-century “positivism” are still alive today.¹⁹ Richard Posner, for instance, when he argues for a more functional and efficient legal professionalism seems to proudly confess to this modern “scientific” creed.

¹⁶ Cp. Hol & Loth, *Reshaping Justice*, pp. 99-106.

¹⁷ Cp. Zijderveld, A.C., *The Institutional Imperative*, The Interface of Institutions and Networks, Amsterdam University Press Amsterdam 2000, pp. 88-92.

¹⁸ Cp. Collins, R., *Weberian Sociological Theory*, Cambridge University Press Cambridge UK 1986, p. 45; Berman, H.J., *Law and Revolution*, The Formation of the Western Legal Tradition, Harvard University Press Cambridge Mass. 1983, p. 151; Watson, P., *The Modern Mind*, An Intellectual History of the 20th Century Harper Collins Publishers 2001, pp. 52,53; Toulmin, *Cosmopolis*, pp. 13-22, 80-87, 97, 98.

¹⁹ Cp. Dale, P. A., *In Pursuit of a Scientific Culture*, Science, Art and Society in the Victorian Age, The University of Wisconsin Press Madison 1989; Dupré, L., *The Enlightenment and the Intellectual Foundations of Modern Culture*, Yale University Press New Haven and London 2004.

However, this view of the Enlightenment as a self-conscious and actively critical commitment to the “modernization” of law, politics, and society seriously complicates an effort to define both “Enlightenment” and “modernity” as social and historical phenomena. The moment modern man becomes conscious of himself as particularly modern, this “reflectivity” causes “reflexivity:” what a person *thinks* of him- or herself becomes inextricably part of what that person actually *is*. In other words, because all human acts are always acts under some description, modern man and the *idea* of modern man start to interact. What acts are available to us depends on the available descriptions and subsequently these descriptions thus enter the universe of action. From the moment that modern man becomes conscious of modernity, we see a “dialectic” between the self-descriptions of modern man and how he acts. One can rephrase this by saying that there is a dynamic correlation between a social life form and the reflection by its members on social life, which implies that “the manner in which people understand a social arrangement is an inseparable aspect of the arrangement itself.”²⁰ Because these descriptions and understandings are constitutively involved in what modernity *is*, both modernity and Enlightenment (as a commitment and not merely as a historical period) cannot be completely and definitely defined.²¹

However what we can say, though, is that modernity generally seems to lead to an experience of a loss of the “secure world of certainties” that Ileen Monteyn refers to and therefore leads to moral chaos and confusion. Max Weber famously analyzed how modernity and modernization tend to “disenchant” (*Entzaubern*) all overarching communal value systems, religious worldviews or transcendent goals. According to Weber it is the rather sad destiny of the moderns to witness an unending competition between value systems and worldviews: “Many old gods ascend from their graves; they are disenchanting and hence take the form of impersonal forces. They strive to

²⁰ Unger, *Knowledge and Politics*, p. 108.

²¹ Hacking, *The Social Construction of What?*, p. 34; Giddens, *The Consequences of Modernity*, p. 16; Unger, *Law in modern society*, pp. 37-43, 134-137, 265-266; “dynamic exchange, rather than the static rationalism with which it is often identified, characterizes the Enlightenment. It was essentially a dialectical movement.” Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, pp. 4 etc.; Cassirer, E., *The Philosophy of the Enlightenment*, Princeton University Press Princeton 1951, pp. 4, 5.

gain power over our lives and again they resume their eternal struggle with one another.”²²

Thus Richard Posner argues that the growing moral heterogeneity and confusion in the legal world mirrors the growing heterogeneity in modern society. He argues that both the Grand Legal Tradition (and the particular values that it carries) and the traditional ideals of legal professionalism are beyond recovery; and, instead of wallowing in nostalgia, we should embrace the promise of a thoroughly modernized professional world. In his view, modern science and technology is the only road to some common ground in the modern legal professional world. There is a promise in terms of a more rational, effective, and efficient legal order.²³

While Posner considers this road one of great promise, Kronman disagrees. Yet, importantly, their disagreement is not a disagreement on the facts of the present trends and changes in the legal world. Rather, it is about how to appreciate them. Therefore, it is also a disagreement on the question of which direction these developments should take. Kronman thinks of the “scientism” in modern legal faculties and education as a major cause of the present malaise, while Posner thinks that both the professional ethos and legal education are by far not scientific enough. In fact, Posner sees modern science as a cure instead of the disease. In the following paragraphs I want to set the stage for the following chapters by presenting the contrasts that are basic to my analysis. Such a presentation also gives me a chance to introduce some of the fundamental methodological and heuristic concepts that I employ.

Traditional authority and substantive rationality

Richard Posner is well aware of the limits of the modernization of the legal world that he propagates. He argues that law is still highly saturated with moral terms, fairly traditional and backward looking and, although he regrets

²² Weber, M., ‘Science as a Vocation,’ in: Gerth, H.H., & Wright Mills, C., (eds.) *From Max Weber*, p. 149; cp. Eliaeson, S., *Max Weber’s Methodologies*, p. 11.

²³ Richard Posner explicitly refers to Jeremy Bentham, one of the philosophers of the Enlightenment and early modernizers of law: “Bentham sought to place law on a scientific footing – to make it a practical human instrument for the achievement of definite social goals. In this limited but important respect Bentham is the originator of the pragmatic concept of law advocated in this book.” Posner, *The Problems of Jurisprudence*, Harvard University Press Cambridge Mass. 1990, p. 14.

it, this will never be completely overcome. Moreover, the “irremediably authoritarian character of law” especially limits the scope for a modern scientific ethos in the law.²⁴ But why is the authoritarian character of law irremediable? And, in addition, why does this fact limit the modernization of legal practices, legal science and education? To investigate this question I propose to construct an ideal-typical “traditional professional” and confront it with the construction of an ideal-typical “modern professional” as promulgated by Posner. In an effort to understand the traditional legal perspective, I will particularly investigate the interconnection among the ideas of authority, community, and the legal tradition with regard to professional ethics and legal judgment.

The construction of the ideal type of traditional professionalism that I present in the second chapter of this book serves a twofold purpose. In the first place, it can help us understand the new modern discourses that I explore in the subsequent chapters. The modern can be explored by contrasting it to what it tries to overcome. The second chapter thus serves as a stepping stone to the subsequent chapters. However, with Bruno Latour we can argue that “we have never been modern.”²⁵ Many aspects of the ideals and the practice of the traditional outlook are, although receding, still viable and maybe even vital. When we confront this viewpoint with the perspective of the modern professional as an expert armed with the scientific method, we might come to understand why the law is still “saturated with morality,” fairly traditional and “irremediably authoritarian.” This confrontation might help us see that the value orientation that informs my construction of traditional authority is not a thing of the past, but rather it is indispensable.

The construction of the ideal type should start with a conception of legal authority. We might start by noting that political communities tend to present and re-present themselves, not only with flags and banners, but also with authorities. To put it as simply as possible: such an authority represents a group and can therefore act and speak *on behalf* of this group.²⁶ When we

²⁴ Posner, *The Problematics of Moral and Legal Theory*, p. 207; Posner, *The Problems of Jurisprudence*, p. 26.

²⁵ Latour, B., *We Have Never Been Modern*, Harvard University Press Cambridge Mass. 1993.

²⁶ Cp. Bourdieu, *The Logic of Practice*, pp. 108, 298, 299; Bourdieu, P., *Language and Symbolic Power*, Polity Press Oxford UK 1991, pp. 75, 76.

think of the law as a storehouse of the basic norms and values of the community, we might consider legal officials, when they speak on behalf of the law, as representatives of the community that the law expresses. These basic norms and values can be thought of as “natural” in the sense of universal and timeless – as “natural law” – but this is not necessary. The legal tradition can also be thought of as the product of an historic evolution; when you think of community values as perpetually changing, the tradition is also continually evolving.

In an ideal-typical traditional view, the subjects experience the submission to legal rules and rulings of the law as a submission to the community, the law being constituted of the norms and values that the subject *qua* member of the community identifies with. Conversely, the legal subjects identify with the law and submit to its authority because the law expresses the basic norms and values of their particular community. Ideally, the law provides a shared meaningful and normative order that is part of the basic “cement” of the community because, as such, it has an important binding quality. Legal authorities are both competent and authorized to speak or act as representatives of the law and thus they serve the common good: they protect the community as a meaningful normative force against the disruptive powers of violence and conflict. Within the community, they represent a basic common morality that has ‘hardened’ into law embedded in “a venerated and time-honoured tradition,” and embodied in the institutions of the law.²⁷ Indirectly, the law and its representatives therefore represent the larger community and thus the legal tradition itself becomes an important symbol of the community.

The basic idea that I propose to investigate more extensively in the second chapter is that in guarding the authority of the law and its officials, the professionals will have to engage with the particular needs, values and the conceptions of well-being in the community.²⁸ Such needs, values and conceptions surely have a cultural aspect; they are not universal but relative to local and particular social life forms. When we succinctly think of “culture”

²⁷ Zijderveld, *The Institutional Imperative*, pp. 125, 152-154; cp. Berman, *Law and Revolution*, pp. 1-10.

²⁸ Gray, J., *Endgames*, Questions in late modern political thought, Polity Press Cambridge 1997, pp. 89, 90.

as “inherited ethical habit,” keeping in touch with these ethical habits and social customs will strengthen the authority of the law.²⁹ In any particular community these norms, values and conceptions of well-being are not completely formal, procedural or “thin.” By contrast, they are substantial or “thick” as they prescribe particular ends and values as worthy as opposed to other ends and values. The legal tradition and its institutions aspire to be a repository of such “substantial rationality.”

As the wording suggests, such substantial or “material” rationality is to be contrasted with “formal” rationality being “pure form” that can incorporate any content whatsoever.³⁰ The traditional professional expressly aspires after substantive rationality as it provides him with a “horizon” that gives meaning to facts and actions that, from a legal standpoint, are in need of interpretation. “In every society [...] law grows by ‘interpretation’ when applied to new problems and conditions, whence again the centrality of hermeneutics in following the career of *Nomos*.”³¹ This “*nomos*” is essentially built out of “narratives” and is the product of an edifying history of individual case histories that grew step-by-step into a symbolic legal order, an order made of language. This means that legal interpretation is thought to be essentially “hermeneutical” and good sound judgment is the result of practical wisdom or “prudence.” Both hermeneutics and practical reason are rather suspect from a scientific point of view because these methods cannot be formalized and the resulting “knowledge” cannot be objectively tested. But indeed, hermeneutics “has seldom pretended to scientific status: bound to language and to literary texts, hence to human convention and empirical scholarship (if not myth), it has been content to be regarded as an art (*techne*), at most a form of practical wisdom (*phronesis, prudentia*) and in this sense ‘local knowledge.’”³²

²⁹ Fukuyama, F., *Trust, The Social Virtues & the Creation of Prosperity*, The Free Press New York 1995, pp. 34, 36.

³⁰ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 220, 298, 299; cp. Whimster, S. & Lash, S., *Max Weber, Rationality and Modernity*, Allen & Unwin London 1987, p. 30, 40, 41, 45, 305; cp. Zijderfeld, *The Institutional Imperative*, pp. 22, 36, 159, 160, 201.

³¹ Kelley, D.R., *The Human Measure, Social Thought in the Western Legal Tradition*, Harvard University Press Cambridge Mass. 1990, p. 10; cp. Gadamer, H.G., *Truth and Method*, The Continuum Publishing Company New York 1990, pp. 269, 281, 282.

³² Kelley, *The Human Measure*, p. 13; This knowledge is certainly “anti-algorithmic” and resists scientific systematization in order to make the methods and practices more

This implies that the lawyer has to be really free – that is to say, independent and autonomous with regard to outside forces that try to force the law their way – to speak and act on behalf of the law. From this implication some of the most conspicuous features of the legal institutional order can be understood. The chief characteristic of this order is “the formation of specialized, relatively autonomous legal institutions that claim a qualified supremacy within defined spheres of competence.”³³ This autonomy has substantive, institutional, methodological, and occupational aspects.³⁴ The substantive autonomy refers to the autonomy of the legal tradition as the set of particularly legal norms and values of the community, distinct from wider morality (prescribed by religion, for instance), and from both economic and political interests, beliefs and norms. The law is institutionally autonomous when the law is applied by specialized institutions whose main task is adjudication or dispute settlement, which in the modern liberal state is thought of as particularly distinct from the tasks of administration and legislation.

Methodologically, the legal tradition provides a justification for the legal acts that differs from those in other practices or institutions. That is to say, “legal reasoning has a method or style to differentiate it from scientific explanation and from moral, political, and economic discourse.”³⁵ In the traditional perspective, this means that the specific “art” of legal hermeneutics and good judgment is the product of intensive legal training and cultivation of taste by means of the liberal arts. Lastly, there is *occupational* autonomy, which refers to the fact that there is a special group of professionals that is entrusted with specific competences and privileges with regard to the application and further development of the law over time. This group of professionals mans the autonomous institutions of the law, devoting its energy and intellect to its well-being, and thereby this group serves the community.³⁶

In addition to Weber’s idea of substantive rationality, the Weberian ideal type of “traditional authority” is also very useful. Weber distinguishes such

transparent. Cp. Posner, *The Problematics of Moral and Legal Theory*, pp. 188, 189; Unger, R.M. *What Should Legal Analysis Become?*, Verso London 1996, p. 62.

³³ Nonet, P. & Selznick, P., *Law and Society in Transition, Toward Responsive Law*, Transaction Publishers New Brunswick and London 2001 (1978), p. 53.

³⁴ Unger, *Law in modern society*, pp. 53, 54.

³⁵ Ibidem.

³⁶ Ibidem.

traditional authority from what he calls “charismatic authority” – the authority of the hero, the prophet, or the saviour: “Charismatic authority is in some ways the polar opposite of traditional authority: it is the authority of the unprecedented, the magical, the impact of some remarkable and unique personality.”³⁷ Some judges or advocates are highly charismatic personalities and owe their authority in the community more to some mysterious personal appeal than to the fact that they represent the law. However, usually the traditional professional has authority because he or she can speak authoritatively in matters concerning the law. One might say that their authority is therefore a “derived” authority, and the authority of the law is fundamental as an ultimate good. The norms, values and institutions that are embodied in the legal tradition (i.e. the legal customs of the community) demand *respect* from the community members. The tradition thus has a certain “sacredness,” deriving from its basic customs it binds the individual members of the group into a community and prescribes obedience to the law’s officials.³⁸

The Weberian contrast between the ideal types of the “traditional community” and the “modern society” is also very useful. In traditional communities – where traditional authority is the rule – every single member of the community is born into a particular class with a particular social station and role. The norms and institutions, by means of which the whole community is pre-arranged, are not “formal” but specify a great deal of particular and fixed content or substance.³⁹ The substantial ends and values that they prescribe can be thought of as part of the harmonious social whole articulated in the network of places, duties, and obligations. Importantly, the individual members derive their *total* personal identity from this station and role because through it they are connected to the larger whole of the community, there is “no separation between a person’s identity as a person

³⁷ Friedman, L. M., *The Republic of Choice*, Law, Authority, and Culture, Harvard University Press Cambridge Mass. 1990, p. 212; Gerth & Wright Mills (eds.), *From Max Weber*, pp. 295, 296.

³⁸ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 296-301.

³⁹ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 220, 298, 299; cp. Whimster & Lash (eds.), *Max Weber, Rationality and Modernity*, pp. 30, 40, 41, 45, 305; cp. Zijdeveld, *The Institutional Imperative*, pp. 22, 36, 159, 160, 201.

and his or her definite social role.”⁴⁰ The particular stations, and the values and goals that are associated with it, are both fixed and complete, and they predetermine how to be a respected member of the community.

To some extent, this still seems to be an inspiring idea in the contemporary legal world. In the traditional view of the legal professional, the station and role of the lawyer is (to a large degree) *defining* for the identity and self-image of the professional. The legal tradition – and the customs, values and institutions that it embodies – forms the aspirant to such an extent that eventually he talks, thinks and acts like a lawyer. The aspirant lawyer should aspire to *be* a lawyer completely – it should become his “second nature” – and he achieves this by strongly identifying with exemplary authoritative members of the legal community and by internalizing the values and customs of the group. When an individual chooses to follow this vocation he, in the words of David Kolb, “internalizes the identity offered by the group. This helps to order his desires and impulses from within.”⁴¹

The particular training and education that the aspiring legal professional goes through to become a lawyer is meant not only to make sure the aspirant acquires good taste and judgment but also builds “character” so that the desires and impulses are ordered from within.⁴² That is, this professional can then be safely trusted with his particular competences and with the large discretion and autonomy in how to employ them. Indeed, *trust* will often come up as a basic concept in the presentation of traditional legal authority and substantive rationality. Of course, there is no guarantee that the lawyer, out of love for the public good, will, unlike those who use the law merely to advance their private ends, actually be “prepared to sacrifice his own well-being for it.”⁴³ However, although we can never be totally sure that the individual interests or preferences of the lawyer have been completely

⁴⁰ Kolb, D., *The Critique of Pure Modernity*, Hegel, Heidegger, and After, The University of Chicago Press Chicago 1986, p. 29; cp. MacIntyre, *After Virtue*, p. 123.

⁴¹ Kolb, *The Critique of Pure Modernity*, pp. 104, 109; cp. Berger P.L., & Luckmann, T., *The Social Construction of Reality*, A Treatise in the Sociology of Knowledge, Anchor Books New York 1967, pp. 138-163.

⁴² Kronman, *The Lost Lawyer*, pp. 15, 16, 367; Brint, *In an Age of Experts*, p. 8.

⁴³ Kronman, *The Lost Lawyer*, p. 14; “The problem is to show that the so-called deeper element really is common and not just another particular interest masquerading as universal.” Kolb, *The Critique of Pure Modernity*, p. 114.

superseded by the common good, the traditional lawyer is dedicated to the task of showing himself worthy of our trust as the guardian of the law. This is the promise that the traditional legal professional tries to fulfil.

The disenchantment of authority and instrumental rationality

Richard Posner finds such a traditional view of the law and legal professionalism very unattractive and argues for an alternative, specifically *modern* ideal of professionalism. This ideal is inspired by the success of modern (social/economic) science and tries to place the law and its practices on a more scientific base. From this perspective the great new promise of a truly scientific ethos will be objectivity and functionality.⁴⁴ Legal judgment will be easier to test, and its institutions and practices will be more effective and efficient. Although Kronman associates the modernization of law with a thorough “demoralization” it can very well be argued that it is morally motivated as well. Moreover, this particular new “moral aspect” seems to be becoming more and more attractive. By confronting the ideal-typical “pragmatist” lawyer, as Posner calls him, with the traditional legal professional we might gain some perspective on the ensuing moral confusion. When we do so we will find that the modern scientific and traditional ethos are in many aspects diametrically opposed.

As I indicated above, Steven Brint describes a trend in which professional commitment has lost its “moral bearings” and describes modern professionals as mere “experts,” agents of formal knowledge that need no additional moral vaulting. Brint tends to see the traditional type of professional as idealistic and committed, while the modern expert professional is amoral and rather “nihilistic.” However, although there is no explicit or implicit pledge of allegiance to the good of some Legal Tradition and the basic substantial legal values and norms that bind the community, in my view the modern legal pragmatist type is driven by a commitment to something else, something that is also regarded as an important good in modern society. Compared to the traditional lawyer, the modern professional is motivated by a completely different value orientation. Moreover, this good can be achieved without any

⁴⁴ Cp. Brint, *In an Age of Experts*, p. 35.

use of the concept of authority,⁴⁵ and here lies an important “selling point” of this ethos.

“Human knowledge and human power come to the same thing, because ignorance of cause frustrates effect. For nature is conquered only by obedience,” Francis Bacon famously wrote in the sixteenth century.⁴⁶ And indeed, the modern scientific method promises a conquest of nature since when science has discerned the laws that govern it, man can use this knowledge to his own good purpose. Hobbes famously defined the power of man as “his present means, to obtain some future apparent Good.”⁴⁷ One of the promises of the Enlightenment is just this: science can give man concrete influence over our (social) environment and this power can be used to good purposes. What we look for is technological progress leading to new ways of socio-political governance and coordination, without the paraphernalia and ideology of authority. Authority is a claim to “legitimate rule” or, to the enforceable right to command others. By contrast, modern science promises “influence” over the social environment, which is much more subtle. Influence is the ability to *manipulate* the social environment by the use of socio-political technology, “thereby increasing the pressures on others to act in accordance with one’s own wishes.”⁴⁸

Moreover, the epistemology and ontology of the Enlightenment does not leave much room for the rather mysterious and vague metaphysics that claims to authority often imply. Authority can be consistently thought of as being part of a “nomos,” a meaningful and normative world that is fundamentally relative to time and space. This local and historical nomos, the legal

⁴⁵ Cp. Kennedy, D., *A Critique of Adjudication*, Fin de Siècle, Harvard University Press Cambridge Mass. 1997, p. 111.

⁴⁶ Bacon, F., *The New Organon*, Cambridge University Press Cambridge 2000, p. 33 (Book I. Aphorism 3).

⁴⁷ “The Passions that most of all cause the differences of Wit, are principally, the more or less Desire of Power, of Riches, of Knowledge, and of Honour. All of which may be reduced to the first, that is Desire for Power. For Riches, Knowledge, and Honour are but several sorts of Power.” Hobbes, T., *Leviathan*, Cambridge University Press Cambridge 1991, pp. 53, 62; cp. Parsons, T., *The Social System*, The Free Press New York 1951, p. 121.

⁴⁸ Lenski, G. E., *Power and Privilege*, A Theory of Social Stratification, The University of North Carolina Press Chapel Hill and London, 1984 (1966), pp. 55; cp. Foucault, M., ‘Discipline and Punish’, in: Rabinow, P. (ed.), *The Foucault Reader*, pp. 206-213.

traditional narratives that reflect it and the image of the authoritative jurists who represent it, is grist for the mill of modern science. The new “empiricism” rigidly founds scientific knowledge on *observation* and the truth of a hypothesis is only accepted when it is experimentally tested against the *facts* of the world. In the quest for objectivity, the modern scientific ontology is, in the expression used by William James, “tough-minded” – that is, intangibles such as “narratives,” “meanings” and “values” are considered to be “soft” and “subjective” and are eschewed “in favor of the hard world of concrete, particular, physical objects.”⁴⁹

What could this mean for the law? In the first place all reference to vague, abstract and metaphysical entities should be rigorously avoided: “Law is dissolved into physical force, also an abstract entity but one that has a more solid ring and, more important can be interpreted in behavioral terms.”⁵⁰ The selling point here is that human behavior can be brute facts of experience and such facts can be known without much interpretation; they can simply be observed.⁵¹ The project is to re-conceptualize legal institutions and practices in “naturalistic” terms: terms with sufficient scientific respectability. This is what the so-called “naturalization of the law” is about; it implies a focus on the actual, on particulars and on the facts. The law is conceptualized as the exercise of power, or better, as a powerful instrument in the service of human needs and goals. In short, it is conceptualized as a “technology” and the law is thought about as wholly instrumental or functional.⁵² In Weberian terms, the substantial rationality that the traditional lawyer aspired for is superseded by

⁴⁹ “You get, in short, a materialistic universe, in which only the tough-minded find themselves congenially at home.” James, W., *Pragmatism*, Harvard University Press Cambridge Mass. 1978, p. 15; Hamlyn, D.W., *Metaphysics*, Cambridge University Press Cambridge UK 1984, p. 34.

⁵⁰ Posner, *The Problems of Jurisprudence*, p. 223; “Perhaps Faust was right, and nothing and nothing is at work in the law but the deed – unrationalizable official acts, will and force.” Luban, D., *Lawyers and Justice, An Ethical Study*, Princeton University Press Princeton NJ 1988, p. 30.

⁵¹ “[...] theorists from the nineteenth century on sought to anchor authority in something objective, something scientific, something ‘there’.” Luban, D., *Legal Modernism*, The University of Michigan Press Ann Arbor 1994, pp. 30-32; cp. Hollis, M., *The Philosophy of social science*, an introduction, Cambridge University Press 1994, p. 44.

⁵² Posner, *The Problems of Jurisprudence*, pp. 18, 19, 26, 28, 29, 223; cp. Posner, *Overcoming Law*.

the ethos of “functional” or “instrumental rationality” that places emphasis on “means, methods, and procedures developed for the effective and efficient realization of certain goals.”⁵³

From this perspective, the reference to both “meaning” and to “value” (or the “common good”) becomes suspect in the materialist or naturalist ontology and consequently much of the characteristic rhetoric of traditional legal professionalism is thought of as “ideology” in a bad sense of the word. This obviously has implications for the characteristics of the traditional legal world. The claim to autonomy in all its aspects – substantive, institutional, methodological, and occupational – is justified in terms that come under serious attack.

Recall the claim that the values and norms embodied in the legal tradition and institutions are specifically *legal* and therefore distinct from non-legal beliefs or norms – the claim to substantive autonomy. Indeed, the legal order was thought of as substantially distinct from economics, politics or morality in general, and this distinction also legitimizes the institutional autonomy of adjudication from legislation and administration. Posner’s ideal professional, however, generally rejects this vague and useless distinction between *legal* norms and values applied by specialized institutions and non-legal norms and values. The law is merely what the community chooses to enforce and, as a result, the autonomy claimed for a specifically *legal* method concerned with specifically legal materials and values will be looked upon with suspicion. Moreover, this legal method and discourse is likely to be thought of as highly “obscure” and “esoteric.” Especially since there is no way an outsider can test, or in any objective way verify (or falsify) these claims, such claims to rightness in legal discourse become a major problem. And why should the members of the political community trust the members of this rather exclusive “guild” with the significant power they have? ⁵⁴

In accordance with this, occupational autonomy (and its related demanding qualifications, system of cooptation, peer-review, licensing, and life-time employment security – in short all the aspects that make professional groups look like modern versions of the medieval “guilds”) becomes problematic from this perspective. The moral aspect invoked is now thought of as

⁵³ Zijderveld, *The Institutional Imperative*, pp. 95-97, 201.

⁵⁴ Cp. Posner, *The Problems of Jurisprudence*, pp. 293-309.

“professional mystique,” merely masking the interests of the professional in being beyond reproach and control. The use of terms like “vocation” or “calling” to serve the law as a good can be seen as self-idealization, as ideology masking the material interests of the professionals: “What is professed may mask the pursuit of self-interest.”⁵⁵

Particularly in the discipline of economics, a modern social science with firm roots in the empiricist and naturalist (or positivist) scientific method, “the pursuit of self-interest” is thought of as a much more realistic and empirically founded basis for human action than “altruism” or (legal) “morality.” In the context of law, it is much more realistic to presume that the legal professional cares for his own well-being rather than that he would structurally sacrifice it for something as vague and abstract as the well-being of the community.

This discipline can help to make legal science more scientific. A first premise then is that human individuals are “rational actors” – free to choose, unfettered by substantive contextual values and ways of life, from a range of possible actions. Another premise is that means are always scarce and that the actors will choose the action with maximum satisfaction at the minimum of costs; in other words, that the choice will be “rational.” “Scarcity is thus, in the economist’s view, a basic fact of life, and rationality – the elimination of waste – is the equally basic human response to it.”⁵⁶ Motivated by this desire to be both effective and efficient, (and who will deny that human beings are generally purposeful beings who have to be economic with scarce resources and means?) human action is roughly rational or can be thoroughly “rationalized.”⁵⁷

⁵⁵ Posner, *The Problematics of Moral and Legal Theory*, p. xiii; cp. Brint, *In an Age of Experts*, pp. 9, 40; Kolb, *The Critique of Pure Modernity*, p. 114.

⁵⁶ Kronman, *The Lost Lawyer*, p. 227; “The economic theory of Rational Choice treats us as rational, self-interested individuals, each intent on maximizing our own utility.” Hollis, *The philosophy of social science*, p. 116.

⁵⁷ “Rationalization is the organization of actions aimed at the attainment of an optimal combination of ends – whether the actions be those of a single individual planning his own course of action or whether they be those of a large number of individuals. Rationalization is the systematization of belief; it is the systematization of action.” Shils, E., *Tradition*, The University of Chicago Press Chicago 1981, p. 291; cp. Kolb, *The Critique of Pure Modernity*, p. 10.

Surely, if we think of the law as merely an instrument to order society according to the wishes of the political community, there are strong incentives to make it as effective and efficient as possible. Effectiveness and efficiency will then become an important *norm* that functions as a central criterion by means of which we can decide whether the law and its institutions and practices are rational or not. Such a criterion can be an empirical concept if we focus on the maximization of some good that is both concrete and measurable. If this good or purpose is universally deemed important, we do not need to wait for the political community to state the purpose of some law but we have a yardstick to see whether the law, or some part of it, lives up to our expectations. The good that utilitarians seek to promote (“happiness,” “welfare” or “well-being”) seems concrete and measurable enough, and it does not in any way depend on some dubious metaphysical entity.⁵⁸ This good is something we actually desire, “something we all pursue in our own lives, and in the lives of those we love.”⁵⁹

Being concrete and measurable implies that we can also actually check (and therefore know and predict) whether some rules or policies have actually done some identifiable good. “Utilitarianism’s two attractions, then, are that it conforms to our intuition that human well-being matters, and to our intuition that moral rules must be tested for their consequences on human well-being.”⁶⁰ Indeed, Richard Posner argues from a utilitarian perspective when he makes recommendations about legal policy: “I am guided mainly by the kind of vague utilitarianism, or ‘soft core’ classical liberalism, that one associates with John Stuart Mill.” He hastens to add that this moral and political commitment is not metaphysically grounded but merely something that “sketches a form of life that when properly understood is attractive to many people in the United States and similarly wealthy modern societies, and

⁵⁸ Cp. Hampsher-Monk I., *A History of Modern Political Thought*, Major Political Thinkers from Hobbes to Marx, Blackwell Oxford UK 1992, p. 312.

⁵⁹ Kymlicka, W., *Contemporary Political Philosophy*, An Introduction, Clarendon Press Oxford 1990, p. 10.

⁶⁰ Kymlicka, *Contemporary Political Philosophy*, pp. 10, 11, 21; cp. Dale, *In Pursuit of a Scientific Culture*, pp. 175, 68; Kaplow, L., & Shavell, S., *Fairness versus Welfare*, Harvard University Press Cambridge Mass. 2002, pp. xvii, 41, 42.

not just me. That is ground enough for me to indicate how I would resolve particular issues.”⁶¹

If we have knowledge of the concrete factual *consequences* of the rules, measures and policies, we have knowledge that we can use to maximize the results according to our purposes. Thus law as social science can give us concrete influence over our socio-political environment. The power to make our lives better is an important good to modern man. By contrast, when we actually have the knowledge of social/economic systems to achieve this good, not using it will be frowned upon and in need of justification in modern societies.

Modern citizens will find it hard to accept wasting scarce resources, and in such a society, growth in welfare or well-being is a good in itself, trumping many other goods. This modern outlook has certainly affected legal institutions and practices. In a rapidly changing, highly rationalized modern society characterized by a strongly technological culture, there is a strong call for “regulation that is actively intrusive, firmly consequentialist, and forward-looking in character.”⁶² To this end, the “law can use a big dose of disenchantment that accompanies real professionalization under the conditions of modernity,” Richard Posner argues.⁶³ This professionalization should consist of acquiring a much more scientific ethos, which he calls “in essence, an attitude of respect for fact,” and which requires a focus on “measurable consequences” and the formulation of “objectively testable” and “falsifiable” hypotheses tested by means of “controlled experiments.”⁶⁴

There is no need for the mystique and paraphernalia of authority and allusions to high-minded moral commitments. What Posner defends here is the ideal of the lawyer as an “expert professional” who intervenes in political struggles in the name of, or informed by scientific truth.⁶⁵ However, from the perspective of the traditional professional ideal type this professional comes dangerously close to the utilitarian and materialistic ethos of the men of trade

⁶¹ Posner, *The Problematics of Moral and Legal Theory*, p. xiii.

⁶² Luban, *Legal Modernism*, p. 111.

⁶³ Posner, *The Problematics of Moral and Legal Theory*, p. 208.

⁶⁴ Posner, *The Problems of Jurisprudence*, pp. 69, 70; Posner, *The Problematics of Moral and Legal Theory*, pp. viii, 241.

⁶⁵ Cp. Foucault, M., ‘Truth and Power’ in: Rabinow, P. (ed.), *The Foucault Reader*, p. 70, 71; Brint, *In an Age of Experts*, pp. 9-11, 40-43.

and industry. Moreover, Anthony Kronman explains the growing malaise in the legal professions to be as a result of the fact that many of the traditional virtues of legal professionalism now appear as vices and vice versa.⁶⁶

Rational-legal authority and law as formal rationality

The “positivist” or “scientific” attitude is both a promise of freedom and a threat to it. On the one hand, the disenchantment of traditional authority and the shedding of the substantive limitations imposed by the traditional values and ways of life open up a wide new field of possibilities and in this respect Enlightenment is liberating. Indeed, Enlightenment is “the emergence of man from a state of self-incurred immaturity,” as Immanuel Kant famously put it.⁶⁷ Individual human beings are intelligent and rational enough to think for themselves, to decide for themselves what they think is good and worthwhile to pursue in their lives, and therefore they should emancipate themselves from the arbitrary substantive prescriptions of the community and its authorities.

Freed from “arbitrary” substantive constraints, modern man has much more room for choice and the idea of man as unfettered or having free individual “will” now more prominently enters the historical stage. Moreover, during modernity the self-image of modern man has tended to become more and more one of a “distanced self, formally defined in terms of its power to choose.” Thus modern man is “correlated to an “empty” self, defined by its formal role of maximizing chosen satisfactions or attaining its goals with greatest efficiency.”⁶⁸ And this can most certainly be associated with an idea of freedom.

⁶⁶ Kronman, *The Lost Lawyer*, p. 231.

⁶⁷ Kant, I., ‘An Answer to the Question: ‘What is Enlightenment?’ in: Kant, I., *Political Writings*, Cambridge University Press Cambridge UK 1991, p. 54; cp. Foucault, M., ‘What is Enlightenment?’ in: Rabinow, P. (ed.), *The Foucault Reader*, pp. 32- 50.

⁶⁸ Kolb, *The Critique of Pure Modernity*, pp. xii, 11; “the subject, now sole source of meaning, lost all objective content of its own and became a mere instrument for endowing an equally empty nature with a rational structure. [...] Contemplation, for the Greeks the highest end of life, became an instrument in the hands of, and for the benefit of, an all-powerful subject. This explains the utilitarian streak of the Enlightenment. Reason ceases to be an ultimate good. Henceforth it functions in a system where everything has become both end and means.” Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 17.

But we should not cry victory too soon. The modern attitude, with its utilitarian and instrumentalist focus on future consequences seems, on the other hand, to be a serious *threat* to the individual freedom of choice. There are two basic problems that I want to briefly discuss to set the stage for a different ideal of modern legal professionalism – the legal formalist – investigated more thoroughly in the third chapter. The first problem is that there is a structural disregard for backward-looking entitlements. The second problem is that the instrumentalist attitude is sometimes fundamentally at odds with basic moral intuitions regarding individual freedom. A brief presentation of Immanuel Kant’s conception of freedom will serve to introduce these problems.

Kant famously founded individual freedom and morality on the conception of “autonomy” or “self-rule.”⁶⁹ A basic point in the moral and political philosophy of Kant is that the “will” – which is thought of as an unfettered “empty self” – in order to become capable of moral action has to be *disciplined by reason*. That is to say, actions motivated by the “unfettered will” can never be moral actions; there is a criterion provided by reason by means of which the action has to be tested. Importantly, as mature adults are all endowed with the faculty of reason, the fettering of arbitrary will does not come from the outside (from the values and norms of the wider community and its authorities) but from the “inside.” Thus, the moral man does not give free rein to his arbitrary and capricious will but remains free nevertheless. This particular conception of freedom as autonomy is structurally different from that of most utilitarian conceptions of freedom.

Let us now consider the first problem with forward-looking consequentialism to illustrate a basic tension in modern law. It is part of our everyday morality that when you have loaned me some money I should return it. You have an unqualified entitlement to the money, and I have a corresponding obligation to return it as agreed. We can refer here to an age-old moral and legal adage: promises should be kept. This justification for returning the money is seen as sufficient; generally no further justification is

⁶⁹ “Autonomy of the will is the sole principle of all moral laws and of the duties conforming to them.” Kant, E., *Critique of Practical Reason*, Hackett Publishing Company, Inc. Cambridge 2002, p. 33 (48); cp. Kronman, *The Lost Lawyer*, p. 48.

asked.⁷⁰ However, this justification is exactly of the vague (and metaphysical) kind that a modern scientific attitude eschews. Surely, the Bible can be quoted, or an endless list of both legal and philosophical authorities all the way back to classical Athens and Rome; but why should we accept their authority?

Still the justification for the obligation to return the money refers to some fact in the past – the agreement to money-lending – and in principle we feel that this obligation stands as it is, regardless of future consequences of returning the money. We generally feel that we should *not* make any calculations on whether returning the money as agreed is maximizing our personal or collective welfare. We should not even make these calculations in those rare circumstances that not returning the money might be more advantageous for the other party involved in terms of future consequences. We think that deciding on this issue is *unfair* to the other because we are thinking and deciding *for* him. This is at odds with basic moral intuitions regarding individual freedom and autonomy; in principle the promise should be kept regardless of consequences.⁷¹

There is a second problem: instrumentalism clashes with our basic moral intuitions. In the consequentialist perspective there is no criterion by means of which we can judge the choices people make. The preferences and tastes are taken as *given*; the scientist can only subsequently help to rationalize human action by showing what would be the most effective and efficient way to realize human desires. But we generally *do* feel that we should distinguish between legitimate and illegitimate (or “unfair”) preferences, because they are unreasonable or discriminating.⁷²

For instance, a taste for racial or sexist prejudice should not be on equal moral footing with, let’s say, a taste for beautiful paintings. The problem is that such prejudice hurts those individuals that are discriminated against on the basis of such a preference or taste; human beings can be hurt this way like

⁷⁰ Kymlicka, *Contemporary Political Philosophy*, pp. 10, 11, 21.

⁷¹ Cp. Weinrib, E., *The idea of Private Law*, Harvard University Press Cambridge Mass. 1995, pp. 50–55; Guyer, P. (ed.), *The Cambridge Companion to Kant*, Cambridge University Press Cambridge UK 1992, p. 320; Kaplow, & Shavell, *Fairness versus Welfare*, pp. 156-165.

⁷² Rawls, J., ‘Kantian Constructivism in Moral Theory’, *Journal of Philosophy*, 77/9 1980, pp. 528-30; cp. Kymlicka, *Contemporary Political Philosophy*, p. 26.

ugly paintings cannot. We feel that such discrimination is especially immoral if those branded by prejudices did not *choose* to be what they are. “A taste for prejudice is not the same as other tastes because it restricts and injures individuals – it prevents them from exercising their own options. It stunts and ghettoizes them for being black, a woman, gay, or in a wheelchair – aspects of the person which have no basis in individual choice.”⁷³ The intuition is that it is wrong *in principle* to discriminate on the basis of such characteristics regardless of whether or not we desire the particular consequences of behaviour based on such tastes or preferences. Such preferences are unfair and therefore illegitimate; the question of evaluating the consequences does not enter our considerations at all.

From the consequentialist perspective, it is hard to explain both the intuition that backward-looking entitlements should be respected and that some preferences are illegitimate *regardless* of consequences. Therefore consequentialists generally dismiss such a principled attitude as dogmatic and irrational. However, the Kantian conception of autonomy does give an appealing explanation for these phenomena. We disregard the freedom of the other party by deciding for him in terms of future consequences what is best for him. Not returning the money on the basis of some calculation, or some weighing of the desirable consequences will not pass the formal test of reason because it fails to take the moneylender seriously as a free autonomous human being. The same goes for the preference for prejudice. We fail to take human beings seriously as free human beings if we restrict and injure them on the basis of our preferences. If we discriminate on the basis of such characteristics as skin colour or sexual preferences, we treat human beings as mere *means*, mere instruments in our goal attainment, and thereby we fail to treat them as autonomous. In the Kantian view it is not consistently rational (and therefore not moral) that we treat others as means in the achievement of our goals while we wish ourselves to be treated as an end in itself. This explains the duty to return the money and to abstain from discrimination on the basis of arbitrary prejudices: they are demands of (practical) reason. “Here we return to the Enlightenment view that it is the development of reason

⁷³ Friedman, *The Republic of Choice*, p. 87; cp. Taylor, C., *The Ethics of Authenticity*, Harvard University Press Cambridge Mass. 1991.

which makes this will effective, it is no longer instrumental rationality which transforms us, however, but rather the demands of universality.”⁷⁴

Such moral intuitions, made coherent with the help of the ideas of human freedom and reason, can provide the first axioms of a modern system and practice of law. The demand will now be that modern law and its representatives respect human dignity and freedom by aspiring to neutrality, objectivity and fairness. I will argue that this morality entails a principled respect for individual rights – entails “Taking Rights Seriously” – and an emphasis on universally valid, objective legal rules, legal principles and fair procedures.⁷⁵ The legal professional is *not* to examine issues of policy or the effects of the legal decisions but to narrow the differences between the parties by reasoning from shared premises provided by the law and its procedures. The courts claim a special expertise as guardians of due process, and the integrity of procedure becomes the legal value par excellence. In this expertise, and in this value, the courts find their basic source of legitimacy.⁷⁶

We owe it to the members of the community – whom we should treat as (legal) subjects and not as “objects” – to make legal reasoning as fair and predictable as possible. Therefore, we should aspire to a level of predictability that political or moral reasoning do not possess, and this requires, if not a complete codification, at least a thorough rationalization of the law. We need to make the law into a coherent, consistent system of rules and procedures, because we cannot derive unequivocal and objective solutions to legal conflicts from inconsistent law. Theorizing from the basic formal building blocks of the law and strengthening its coherence and transparency is generally thought to be the task of modern legal science.

When the law is thus rationalized and systematized with the help of dogmatic theory, legal practice becomes more transparent and legal professionals receive a new justification and role in modern society. Formalist

⁷⁴ Taylor, C., *Sources of the Self*, The Making of Modern Identity, Cambridge University Press 1989, p. 411.

⁷⁵ Cp. Dworkin, R., *Taking Rights Seriously*, Harvard University Press Cambridge Mass. 1977; Rawls, J., *A Theory of Justice*, Oxford University Press Oxford UK 1973; Weinrib, *The Idea of Private Law*.

⁷⁶ “The idea that the ends of justice *can* be served by a purportedly detached, impartial, autonomous system of rules and procedures.” Nonet & Selznick, *Law and Society in Transition*, pp. 4, 58, 59, 66.

professionals are experts in formal law (or agents of formal legal knowledge in Steven Brint's sense), nothing more and nothing less. These professionals do not need any further moral vaulting, and the legal knowledge they represent does not need to be esoteric and intractable for outsiders. The argumentation does not need to be a "narrative" (and the product of hermeneutics plus practical wisdom) but can be strictly rational and analytical instead.⁷⁷ Application of the law becomes merely a matter of the *analysis* of the meaning of the legal rules at hand, and of *deducing* conclusions for the present case. Such reasoning can be thought of as independent of value judgments and therefore objective.⁷⁸ But here the ideal of legal reasoning borders on the kind of formalistic "geometrical reasoning" that, as we saw, the traditional lawyer explicitly rejects.

In addition, as this legal expert merely stays on the analytical level there is no need to deeply identify with the norms and values of some legal tradition. Moreover, there is no need to build character or to be formed and moulded according to some perfectionist ethical ideal of what it means to be a lawyer. The private or personal and the public role can be strictly distinguished, and in a complex modern world where people play many different, often incongruent roles in their lives, and where "authenticity" as an ethical ideal has become dominant, this distinction plays an important role. When we stay on the level of objective rules and procedures, the personal and private can stay out of the picture, and this makes it possible to keep the personal at some distance from the public role. Being a legal professional is a job like any other that just requires a corpus of rather abstract and complex technical knowledge. But this is all there is to it; there is no further claim to superior powers of reasoning or judgment.⁷⁹

⁷⁷ Cp. Gaakeer, J., *Hope Springs Eternal*, An Introduction to the Work of James Boyd White, Amsterdam University Press Amsterdam 1998, pp. 39, 40; White, J.B., *The Legal Imagination*, Studies in the Nature of Legal Thought and Expression, Boston, Little, Brown and Co. 1973, pp. 624, 625, 859.

⁷⁸ Cp. Kennedy, *A Critique of Adjudication*, p. 27; Posner, *The Problems of Jurisprudence*, pp. 40, 41; Kronman, *The Lost Lawyer*, p. 172; Posner, *The Problematics of Moral and Legal Theory*, p. xi.

⁷⁹ Kelman, M., *A Guide to Critical Legal Studies*, Harvard University Press Cambridge Mass. 1987, p. 63.

In chapter three I argue that the objectivity that is aspired to in the law and legal practices is the result of a “drive to the universal.” The project will be to find basic universal legal categories that “ground” the legal system and through which the jurist can understand legal conflicts and find their solution. For the ideal-typical formalist lawyer, this universality is the only kind of objectivity that is available. The quest for universality makes an autonomous scientific legal discipline and practice possible, enabling lawyers to make impartial and objective juridical judgments.⁸⁰

For instance, Ernest Weinrib writes that *in terms of its form* law has an immanent rationality that makes legal reasoning and analysis structurally different from political or economical reasoning; and he explicitly argues that it is the Kantian idea of individual rights and the idea of justice as fairness (more specifically “corrective justice”) that describes this specific form. The law can have all different sorts of “content” or “substance.” What type of content should be settled by an argument outside rather than inside the law, but as form it makes sense on its own terms as long as it is coherent and fair. One might say that this provides the law with its specific grammar (or syntax) as opposed to the actual content and meaning (or semantics) of legal discourse: “Corrective justice and Kantian right are as immanent in the legal discourse as principles of syntax and logic in discourse generally.”⁸¹

Weinrib emphasises that “nothing about formalism precludes indeterminacy,” but the “forms of justice are both determinate and indeterminate.” They “are indeterminate in that they do not predetermine exhaustively the particular results they govern.”⁸² And indeed, this formalism is explicitly *not* about results or consequences: it is thoroughly anti-consequentialist. A focus on consequences would even structurally threaten legal objectivity because it would imply, as Posner puts it, “a messy encounter with empirical reality.”⁸³ Instead, the objectivity is sought in the *forms* of

⁸⁰ “Thus, though we can never see facts naked, we can see them through the lens of a universal language, the categories of understanding. This universality is the only kind of objectivity open to us.” Unger, *Knowledge and Politics*, p. 34.

⁸¹ Weinrib, *The Idea of Private Law*, p. 14.

⁸² Weinrib, E., ‘Legal Formalism: on the immanent rationality of law’ 97 *Yale Law Journal* 949 1988, p. 1011; cp. Ward, I., *Introduction to Critical Legal Theory*, Cavendish Publishing Ltd. London Sydney 1998, pp. 41, 42.

⁸³ Posner, *The Problems of Jurisprudence*, pp. 40, 41.

legal reasoning. These forms “are determinate in that they establish the bounds of coherence for the particulars that fall under them, thus making these particulars intelligible as the sorts of things that they are”. In essence, Weinrib concludes, in its governance of juridical relationships, “formalism is universality with a variable content.”⁸⁴

What arises from this aspiration is a different vision, not only on legal knowledge and reasoning, but also on legal authority. I propose to analyse this formalist vision of the modern legal order in terms of what Max Weber called “formal rationality” and the authority that the formalist professional represents is of a, so-called, “rational-legal” type.⁸⁵ Such legal-rational authority is an impersonal form of authority that can be contrasted with both traditional and charismatic authority because it is based on legitimacy as the result of a system of consciously made rational rules. Such legitimacy derives from claims to rationality and universality and is rather formal, bureaucratic and legalistic; it is committed to rules and processes. “Fundamentally it rests on universal norms, rather than on the grace and favor of particular holders of power. It outlaws the arbitrary, the ad hoc.”⁸⁶ It does so because arbitrary and ad hoc rulings are not reasonable, and therefore fail to do justice to legal subjects as both free and rational human beings.

Modernism and substantive rationality

Both formalism and instrumentalism are often attacked as rather one-sided. But there is more to the Enlightenment than formalism and naturalist instrumentalism. According to Louis Dupré the Enlightenment “was first and foremost a breakthrough in critical consciousness. Those who criticize its one-sidedness are unquestionably right, but they ought to remember that they attack the movement with the very weapon forged by the object of their

⁸⁴ Weinrib, ‘Legal Formalism: on the immanent rationality of law’, p. 1011; cp. Ward, *Introduction to Critical Legal Theory*, pp. 41, 42.

⁸⁵ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 79, 220, 298-301, 331; Turner, S.P. & Factor, R.A., *Max Weber and the dispute over reason and value*, A study in philosophy, ethics and politics, Routledge and Kegan Paul London 1984, pp. 72, 73, 79; cp. Nisbet, R., A., *The Sociological Tradition*, Basic Books Inc. Publishers New York 1966, p. 143.

⁸⁶ Friedman, *The Republic of Choice*, p. 212.

attack: that of critical reflectiveness.”⁸⁷ Like Louis Dupré, I propose to interpret so-called “modernist” tendencies in modern culture in terms of the critical consciousness that turns on the Enlightenment project *itself*, especially since the metaphysics and (political and moral) ideology that the Enlightenment gave rise to are the object of much modern critical thought. In my fifth chapter I will explore this criticism of modern culture. “Legal modernism” will be presented as the aspiration to broaden the Enlightenment’s both highly formalist and instrumentalist concept of reason, intent, according to Dupré, “on saving the traditional *content* of reason.”⁸⁸ This critical project has been largely dominated by the political progressive left, especially in the United States:

“Some of those who criticize the individualism and rationalism of the ruling theory represent what is often called, in political discussions, the ‘left.’ They believe that the formalism of legal positivism forces courts to substitute a thin sense of procedural justice, which serves conservative social policies, for a richer substantive justice that would undermine these policies.”⁸⁹

An important strand in the criticism of modern formalist-instrumentalist thought derives from Friedrich Nietzsche. As opposed to neo-Kantians, who think of universal conceptual categories as an essential ordering of reality, Nietzsche thinks of abstract conceptual thought as a “*Verstellung*,” that is as a structural displacing or disarranging of reality. Therefore, conceptual thought is always a falsification of the world; reality in all its multiplicity and richness, always both exceeds and escapes those conceptual categories that are brought in to order and master it.⁹⁰

⁸⁷ Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, pp. xiii, 17 (emphasis added); Hacking, *The Social Construction of What?*, p. 41; Cassirer, *The Philosophy of the Enlightenment*, pp. 18, 19, 197-201, 325, 333; Luban, *Legal Modernism*, p. 11.

⁸⁸ Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 17 (emphasis added); Lash, S., ‘Modernity or Modernism? Weber and Contemporary Social Theory’, in: Whimster. & Lash, *Max Weber, Rationality and Modernity*, pp. 355-377.

⁸⁹ Dworkin, *Taking Rights Seriously*, p. x.

⁹⁰ Megill, A., *Prophets of Extremity*, Nietzsche, Heidegger, Foucault, Derrida, University of California Press Berkeley and Los Angeles 1985, pp. 49, 53, 59, 65, 75, 94; cp. Bourdieu, *The Logic of Practice*, pp. 11, 12.

One of those falsifications is the idea of human beings as “empty” and “autonomous selves,” selves that can be formally defined merely by their power to choose, a fiction that is part of the very core of the formalist-instrumentalist view of modern law.⁹¹ William Lucy gives an impression of how we can criticize this anthropology as a typically “masking ideology” that critical thinkers want to expose:

“First, because it is not us and, second, because it is complicit in legitimising existing power structures. Those structures are portrayed as a product of this self when in fact they produce it; moreover, this produced self is a seductive myth unrelated to how we really are. The effect of the myth is to legitimate power structures – their legitimacy derives from the fact that they are supposedly subject to the rationality and authority of the relatively autonomous self. [...] This, then, is the point at which the argument about the disappearance of the self invokes the ideology critique.”⁹²

Thus the self as an empty and autonomous subject can be thought of as a “myth” that serves to legitimize the existing (unequal or otherwise unjust) distribution of power in modern liberal democracies. However, there is no alternative to myths or narratives as such. Nietzsche argued that we need other narratives or “myths” that provide a road toward a richer and fuller understanding of human reality. Similarly, Louis Althusser argued that all human beings actually need ideology in the sense of a number of unproven ideas, myths, or representations that preserve their identity as a social being.⁹³ Indeed, much modernist discourse is self-consciously developing conceptions of identity and self-hood by means of narratives and methods derived from literary analysis and criticism; methods that try to stay clear of any kind of “naturalism” and “scientism.” Here we may seem to be back at the traditional position that I began with, but I will later sketch a picture of a lawyer at a four-way crossing that addresses this issue. The modernist explicitly

⁹¹ Cp. Nisbet, *The Sociological Tradition*, p. 146.

⁹² Lucy, W., *Understanding and Explaining Adjudication*, Oxford University Press Oxford UK 1999, pp. 223, 224.

⁹³ Megill, *Prophets of Extremity*, pp. 49, 53, 59, 65, 75, 94; Althusser, L., ‘Marxism and Humanism,’ in: *For Marx*, Penguin Books Harmondsworth UK 1969, pp. 231-241; cp. Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 10.

distinguishes himself from traditionalism, as he cannot experience the authority (and legitimacy) of the tradition that the lawyer is thought to represent.

In a quest for meaning and justice, the modernist does not “flee backwards” into the embrace of timeworn substantial traditions handed down by previous generations. Rather he or she feels that those traditions fail to do justice to the complex world we presently find ourselves in. The “canonical narratives” of the tradition might be experienced as just as impotent to give sense and meaning to our present lives and struggles, as might be the formalist-instrumentalist perspective of the Enlightenment. The general basic experience might thus be one of “estrangement” or of “homelessness.” Thus, one may feel that, in the words of David Luban in his book *Legal Modernism*, “neither tradition nor universal law provides a meaning-giving context for what we do and suffer.”⁹⁴

Instead, the modernist radicalizes critical consciousness and points his critical arrows at both the Enlightenment project and traditionalism. The criticism of the Grand Legal Tradition might start with a criticism of its tendency to “historicism.” The traditionalist strongly identifies with the Legal Tradition and derives a sense of dignity and worth from it as a professional. He may therefore find it hard to resist the idea of the historical development of the Grand Legal Tradition as both necessary and objective, as the realization of a “higher” and “necessary” order – in short, as a capitalized “Grand Narrative.”⁹⁵ But the lure of historicism should be resisted because it cannot survive critical scrutiny.

For the modernist the most important problem with traditionalism is that there seems to be an inherent *conservatism* in this attitude. By contrast, the “estranged” do not feel that there is much worth conserving in the tradition; they do not experience the claim to authority and legitimacy. If you do not experience this claim by history the perspective becomes radically different. Lenski nicely summarizes this: “Conservatives insist that might is employed only as the handmaiden of right, to restrain and rebuke those who put self-

⁹⁴ Luban, *Legal Modernism*, pp. 37, 38; cp. Nisbet, *The Quest for Community*, A Study in the Ethics of Order and Freedom, Institute for Contemporary Studies San Francisco 1990, pp. 8-16.

⁹⁵ Luban, *Legal Modernism*, p. 38; Eliaeson, *Max Weber's Methodologies*, p. 8.

interest above the common good, while radicals maintain that the state employs might to suppress right, in defence of selfish interests.”⁹⁶

The modernist (or Lenski’s radical) therefore chooses not to flee backwards from the modern world and its dominant ideological narratives, but forward into the future. A wholesale attack on the traditional and modern ideologies might make room for new forms of substantive rationality and for new ways of realizing justice. A fundamental critique of modern society and the modern law that constitutes and supports it should make room for creative and innovative social and political theory. For example, Roberto Mangabeira Unger is self-consciously and proudly modernist in this sense. The critique Unger develops aims at exposing all the “false necessities” – those of historicism as well as those of the present formalist-instrumentalist paradigm – that *inhibit* present social and political thought. In his work he offers exactly such a fundamental critique and also inventive ideas on how to realize goods like participation, substantial equality, autonomy and solidarity in modern societies. This is appealing especially when one feels that modern societies are wanting in those respects.⁹⁷

Duncan Kennedy is another self-declared modernist. Kennedy fights the false appearance of determinacy and necessity in the modern social world, which, in his words, “hides a true determination by human agency.” The appearance of determinacy and necessity is thus false and this means that people “alienate their powers” without really knowing it.⁹⁸ Kennedy suggests that in some sense it is better *not* to alienate our powers and to determine our fates ourselves. This may not be an easy task. Max Weber was rather pessimistic about human freedom because there are strong forces to be reckoned with in modern societies. Weber thought of modernity as becoming a gloomy bureaucratic state where administered uniformity (and all the determinacy and necessities that this invokes) severely limited human freedom. Moreover, Weber thought that if there was an escape from this “iron

⁹⁶ Lenski, *Power and Privilege*, pp. 41, 50, 51; cp. Unger, *What Should Legal Analysis Become?*, p. 128.

⁹⁷ Unger, *Knowledge and Politics*; Unger, *Law in modern society*; Unger, R.M., *False Necessity*, Anti-necessitarian social theory in the service of radical democracy, Verso New York 2004 (1987); cp. Lucy, *Understanding and Explaining Adjudication*, pp. 9, 10.

⁹⁸ Kennedy, *A Critique of Adjudication*, pp. 18, 19; cp. Lucy, *Understanding and Explaining Adjudication*, pp. 9, 10.

cage” of bureaucracy and formal rationality, it lay in the *will* and *not* in reason: “Freedom and democracy are only possible where the resolute will of a nation not to allow itself to be ruled like sheep is permanently alive.”⁹⁹

The famous “iron cage” that imprisons modern man is the product of a modern rational or analytical consciousness. This consciousness severely inhibits creativity and innovation and, moreover, one might even feel that certain values and goods are structurally repressed in modern liberal democratic states. Institutional languages, like that of the law and its practices, are typically languages that impose a conceptual framework that easily (and sometimes radically) excludes other, alternative languages and voices.¹⁰⁰ Much modernist work can be thought of as trying to “disrupt the rational grid” in order to make room for these alternative voices; the disruption may thus make room for narratives that express meanings and values that are now structurally repressed. Once the traditional and modern depictions of law (and the concomitant methods and strategies of legal interpretation) are thought of as “ideology” masking the self-interest of the rulers and as instruments to justify existing power structures, one might feel an urgent need for a critical perspective and method in the law. One might feel a need to “disrupt the rational grid” of legal formalist-instrumentalist reasoning.¹⁰¹

With Alan Megill, we can interpret the work of influential critical thinkers like Nietzsche, Heidegger, Foucault and Derrida as engaging in a rebellion against the iron cage of modern rationality and bureaucracy. As I argued, this is a rebellion both with and against Kant. The ideal of constructing a social science modelled on natural science, in both its instrumentalist and formalist versions, came under attack by these thinkers with the help of the intellectual resources that Kant gave them.¹⁰² Indeed, we see that much modernist thought in the legal world aims at breaking open and disrupting the “iron cage” of legal practices and is inspired by the ideas and methods these revolutionary thinkers provided. In its most radical and revolutionary form, what is

⁹⁹ Gerth & Wright Mills (eds.), *From Max Weber*, p. 71; Kolb, *The Critique of Pure Modernity*, pp. 10, 11; Whimster & Lash, *Max Weber, Rationality and Modernity*, p. 12.

¹⁰⁰ Gaakeer, *Hope Springs Eternal*, p. 28.

¹⁰¹ Kennedy, *A Critique of Adjudication*, pp. 7, 8, 346; Gaakeer, *Hope Springs Eternal*, pp. 28, 29, 30.

¹⁰² Megill, *Prophets of Extremity*, p. 4.

generally aimed at is a “crisis” within the system; a crisis that makes a profound transformation of the styles of thought and life possible. The ultimate goal of such revolutionary thought is “a radical transformation of the whole symbolic dimension of everyday existence.”¹⁰³

Here lies a link with modernism in art. After many schools of art (and art criticism) that were devoted to purely formal goals, modernist art has achieved a conscious and critical reflectivity with the process of its own creation; a consciousness which manifests itself in a constant revolution and the invention of new forms. What we see is the emergence of the modernist artist as a typical modern self in the sense of a self “who chooses his styles and defines himself over and against the fixity of some tradition, in this case the tradition of modernism itself.”¹⁰⁴

But how are legal modernists to rebel against the “tradition of modernism itself” within the legal world? Duncan Kennedy argues for “eclecticism.” All methods that make it possible to criticize and transcend the “necessities” of modern legal doctrine and practice are welcomed. “We don’t believe only statistics, and we don’t believe only prose that sings totality. Why not use both?”¹⁰⁵ But if one looks at his *A Critique of Adjudication*, one can say that he focuses to a large degree on the “soft methods” developed in the human sciences, in philosophy, and in literary and art criticism. Thus he generally displays a loss of faith in modern naturalist science that is characteristic of the Romantic “reaction” to the Enlightenment (which Dupré rather sees as a “deepening” or a “broadening” of the critical consciousness characteristic of the Enlightenment). Importantly, the route to “transcendence among romantics is characteristically by way of aesthetic creation”¹⁰⁶ and indeed in

¹⁰³ Bourdieu, *Homo Academicus*, p. 193; cp. Sennett, R., *The Fall of Public Man*, Norton & Company New York 1992, pp. 183-194; Nisbet, *The Sociological Tradition*, pp. 143, 145.

¹⁰⁴ Kolb, *The Critique of Pure Modernity*, pp. 18, 19.

¹⁰⁵ Kennedy, *A Critique of Adjudication*, p. 17, 18; David Luban: “I suggest that we need narrative as well as causal explanations to make sense of political and legal experience.” Luban, *Legal Modernism*, p. 14.

¹⁰⁶ Dale, *In Pursuit of a Scientific Culture*, p. 5; cp. Gaakeer, *Hope Springs Eternal*, p. 28.

Kennedy we see a return to narratives as he invests much hope in the disrupting potential of cultural “artefacts.”¹⁰⁷

This modernist quest for “transcendence,” and the substantive rationality that it makes possible, may even be regarded as an ultimate good. If one feels that there is a constant tendency towards closing the famous “iron cage”, like Max Weber argued, the disrupting of the rational grid can be experienced as a good in itself, requiring no further justification. However, if one does feel the need to legitimize the project, one might express the hope that it brings us a step closer to some better world, a world that is at least partly foreseen in an alternative theoretical blueprint or system. Roberto Unger provides us with glimpses of such a better future in his work; he tries to offer a *vision* that justifies this rather destructive critical attitude as a means to an important good: a better future.¹⁰⁸

Duncan Kennedy, however, does not offer such a vision. Kennedy aims at a perpetual liberation from experiences of constraint by reason, “in the name, not of justice and a new system, but of a dialectic of system and anti-system.”¹⁰⁹ This kind of modernism refuses to be settled within any set of rules or forms, and it even refuses “what in many other areas of life is a typically modern desire for unity and system, for the *pure* form.”¹¹⁰ The necessities that are informed by the desire for rationality, unity and system Kennedy associates with “death,” which makes him long for “liveliness” and creativity.¹¹¹ Here the dialectic of system and anti-system becomes a goal in itself and we seem to have reached the outer extreme of modernism, the point where it borders on a post-modernist ethos.

Each of next four chapters serves to give more flesh to the four ideal-typical professionals that I introduced here. Together these chapters also serve to investigate tensions in modern law by taking these tensions seriously – even if this means exaggerating them occasionally. Importantly, this is motivated by

¹⁰⁷ Kennedy, *A Critique of Adjudication*, pp. 7, 8, 16-18, 346; cp. Kronman, *The Lost Lawyer*, p. 245.

¹⁰⁸ Lucy, *Understanding and Explaining Adjudication*, pp. 9, 10.

¹⁰⁹ Kennedy, *A Critique of Adjudication*, p. 340; cp. Lucy, *Understanding and Explaining Adjudication*, pp. 9, 10.

¹¹⁰ Kolb, *The Critique of Pure Modernity*, pp. 18, 19.

¹¹¹ Kennedy, *A Critique of Adjudication*, pp. 15-19.

the effort not to come to some synthesis or to somehow “overcome” these tensions because taking these tensions seriously, at bottom, means genuinely allowing for difference.

2.

The Art of Authority

Already in the early nineteenth century, Alexis de Tocqueville pointed to the risks of the dismantling of customary or “traditional” authorities who had an important function in maintaining the cultural contexts and the traditions of the community. De Tocqueville predicted that in modern liberal democracies political power would invade more and more spheres of the lives of citizens, and foresaw an ever greater risk of political opportunism and of a tyranny of public opinion and dominating majorities. At the same time, however, in his book *Democracy in America*, de Tocqueville also argues that it is particularly the legal profession that shows signs of maintaining traditional authority. He deems this important because the autonomy and the high status of both the lawyers and the legal tradition in the United States counterbalances the dangers of democracy. A flourishing class of lawyers is indispensable to keep political passions in check.¹

Indeed, one can argue that legal professionals occupy a special place in modern society. Because legality is thought of as an important good, specific professionals – judges, advocates, notaries and state attorneys – are granted special competencies, immunities and privileges in order to be able to serve this good. As legal professionals they are thus bestowed with *authority* with regard to the settlement of legal conflicts in the community, and they do so by means of the application and the administration of the authority of the law.

¹ De Tocqueville, A, *Democracy in America*, Vintage Books New York 1955 volume II, pp. 334-339; cp. Nisbet, *The Sociological Tradition*, pp. 125, 130; Glendon, *A nation under lawyers*, p. 3; Kronman, *The Lost Lawyer*, p. 155.

The other side of the coin is that they are expected to live up to specific expectations of those subject to the law.

The legal authority of the legal professionals can be justified by a general commitment to a specific social order, or the “community” that the law makes possible. In the present chapter, I explore this link between authority and community and its implications for the promise of legal professionalism. The fundamental idea is that the authority of the law and its administrators are means to serve the political order as a particular *community*, which implies that the professionals will have to take seriously the needs, values and conceptions of well-being of the community. More specifically, the law serves as a means to an important political goal, which is safeguarding society from the escalation of social strife and conflict into potentially highly disrupting violence. At the same time, guarding the law also means creating and defending a “nomos,” a shared world, both meaningful and normative, which implies guarding part of the common cultural understandings that can be thought of as the “backbone” of the community.² Those common “meanings” also have a normative aspect because they make a group of individuals into a community.

This professional commitment leads to a particular professional ethos that emphasizes “independence” and personal “disinterestedness.” What is also required is “character” to resist all temptation to abuse the professional powers for personal gain at the expense of the community. The professional’s independent posture and character helps to strengthen the confidence of the members of the community that the legal professionals can be trusted with power. In addition, cultivated judgment is required, which means that the lawyer knows where the good of the community in a particular case lies and how he should act to realize it. Character, independence and good judgment are the qualities that are prized in the traditional professional culture.³

² Kelley, *The Human Measure*, pp. 1-4, 8-12, 276-283; cp. Luban, *Legal Modernism*, pp. 14-16, 34; Zijderveld, *The Institutional Imperative*, pp. 83, 96.

³ Cp. Brint, *In an Age of Experts*, pp. 8, 27, 28, 30.

Community and authority

“Politics is always the pursuit of order,” Anthony Kronman states in his book on legal ethics, *The Lost Lawyer, Failing ideals of the Legal Profession*.⁴ No society can afford to neglect the pacification of society by means of authoritative judgments, and therefore every community has political and legal institutions to serve this goal. *The Lost Lawyer* gives us an interesting and inspiring picture of what this means for professional ethics and the specific ideals and commitments that are expected of the professional. By explicitly linking the law to the pursuit of order, Kronman has expressed the central political concern of the ideal lawyer that serves as an inspiration in his book. This “lawyer-statesman” is largely concerned with order and the good (or *virtue*) that makes it possible, i.e. “political fraternity.” This, according to Kronman, should be the countervailing power against “the forces of disorder that threaten all our human works”⁵ and thus make community possible.

But what is a community? We should start with the premise that humans are social beings and that they feel most safe and complete in a group of kindred spirits. In the words of the sociologist Gerhard Lenski, “Man is a social being obliged by nature to live with others as a member of society. On this proposition at least, radicals and conservatives agree.”⁶ Seen from an external point of view any group of people is nothing but a flock of discrete individuals. But striking facial resemblances between members of a small group might already justify the assumption of a special bond and loyalty among them; they are most likely members of the same family. And indeed, both historically and symbolically the family is the archetype of the community.⁷ But the loyalty of individuals generally expands beyond the family, and the bigger the group the less “natural” and the more “cultural” the common features and the shared identity become. What makes such bigger groups into specific “communities,” what makes them “belong together,” is hard to discern from the outside unless one can “read the signs.”

To find out whether we are dealing with a certain community or just an arbitrary set of discrete individuals, we need to “enter” into the minds of the

⁴ Kronman, *The Lost Lawyer*, p. 108.

⁵ Ibidem.

⁶ Lenski, *Power and Privilege*, p. 25; cp. Berger & Luckmann, *The Social Construction of Reality*, p. 128; Unger, *Knowledge & Politics*, pp. 223-226.

⁷ Nisbet, *The Sociological Tradition*, p. 48.

group members and see how they experience special loyalties and commitments to certain others and how they express these special loyalties and commitments. From the inside, the group as distinct from individual members is often experienced concretely in certain feelings of respect for, and belonging to, a community as expressed by particular persons, symbols, narratives, rituals, traditions and institutions. From this internal perspective the group can be experienced as highly stable and concrete.⁸ Moreover, in shared respect for symbols, rituals and institutions the individual members of the group recognize each other as members of the same group. They might, for instance, even come to recognize each other as having a kind of special relationship that is akin to the special loyalty one feels to family members. One might even express this by referring to them as “brothers” and “sisters” and in tightly knit (religious) communities this is exactly what one can expect to find. The political ideal of “political fraternity” refers to the special meaning these familiar bonds have for us.⁹ This means that a community is constituted by shared understandings. Compare Roberto Unger:

“[...] the presence of commonly held moral and cognitive orientations is always what makes organized life possible. Shared beliefs allow people to understand one another and to know what to expect from each other. The basic scheme of human conduct is therefore the internalization of shared understandings and values.”¹⁰

The community consists of individuals sharing meaning in their symbols, customs, rituals and institutions. Importantly, they are experienced as having a *normative* aspect because these shared understandings are constitutive of the community. Only if the individuals experience these meanings as valuable and worthy of respect can there be a community of meanings that “transcends” the individuals. Hegel stated that such a community must constitute a common life in which all individuals find their place and identity. What makes a “heap” of people into a community is thus a shared morality in

⁸ Cp. Bourdieu, *The Logic of Practice*, p. 108.

⁹ Cp. Bourdieu, P., *Practical Reason*, On the Theory of Action, Polity Press Oxford UK 1998, pp. 64-73; Durkheim, E., *Professional Ethics and Civic Morals*, Routledge London and New York 2001, pp. 25, 26.

¹⁰ Unger, *Law in modern society*, p. 30.

the sense of shared values and meanings. In other words, it is *Sittlichkeit* or the “ethical life” that has its basis in custom.¹¹

The internalization and realization of these shared understandings makes the (by nature possibly egoistic and selfish) individual into a social being. By paying respect to the community’s “ideology,” the individual can prove him- or herself to be a virtuous and loyal member of the group. Obviously, “ideology” has a negative connotation that we generally owe to Marx. For Marx it refers to the (super-structural) ideas that legitimize the rule of the powerful but in fact only serve the interests of the dominant class. However, Louis Althusser argued that ideology – the unproven ideas, myths, or representations of a group – forms an indispensable part of every social structure, not necessarily one that supports only the interests of one class. He argues that all groups need to hold on to a number of unproven assumptions to preserve their identity.¹² Seen in this light, ideology is a collection of shared understandings that individuals experience as an essential part of their identity as social beings.

For Hegel, the moment of truth is when the group goes to war, and the community calls on its members to maintain its substantial unity “at the risk and sacrifice of property and life.”¹³ Only someone who is truly committed to the community will actually risk life and property; and we generally can call this motivating sentiment “patriotism.” In other words, human beings as social beings need to have something in common with their fellow human beings that they value both in them and in themselves. This commonality has to be taken seriously by the members of the community, and they should be prepared to submit to this as a common good. The individuals should be prepared to “open” or “give” themselves to this good, conform to it, be formed by it, and inform their actions by it: “The task of forging a common

¹¹ Taylor, C., *Hegel*, Cambridge University Press Cambridge UK 1975, pp. 439, 444, 458; Kolb, *The Critique of Pure Modernity*, p. 36; cp. Unger, *What Should Legal Analysis Become?*, p. 108.

¹² Althusser, *For Marx*, pp. 231-241; cp. Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 10.

¹³ Hegel, G.W.F., *Philosophy of Right*, Oxford University Press Oxford 1967, § 324; cp. Hampsher-Monk, *A History of Modern Political Thought*, p. 474; cp. Collins, *Weberian Sociological Theory*, pp. 155-157.

citizenship among a vast and disparate people invites more strenuous forms of *soulcraft*.”¹⁴ In one word, they should accept its “authority.”

In his *Spheres of Justice* Michael Walzer is also especially concerned with the common meanings and values that make a group of discrete individuals into a community, and Walzer points specifically to the common language, history and culture as producing some kind of “collective consciousness.” Walzer warns us not to “reify” this collective consciousness but he argues that “[...] the sharing of sensibilities and intuitions among the members of a historical community is a fact of life.” Moreover, since “in matters of morality, argument simply is the appeal to common meanings,” morality in his view is closely tied to such common understandings.¹⁵ The “moral community” is, then, constituted as a “nomos,” a collective consciousness of meanings and norms, inspiring the individual members with the feeling of communality and a specific identity and place. These shared understandings become concrete and (relatively) stable not just in ritual and symbols of the group, they also become concrete in the phenomenon of “authority” as the community presents and represents itself in authoritative texts, figures, institutions, and practices. James Boyd White aptly describes the link between community and authority:

“A claim for – or against – the authority of an institution or a set of practices is always, among other things, an invitation to create a community, both with one’s interlocutor and with those others one speaks about, a community for which authority is claimed.”¹⁶

When we explore the idea of “authority” we can start with the classic Weberian contrast between “authority” and “power” (or “naked power”). Power in social relations is simply the ability to make others do what you want them to do. An authority can make others obey his or her will by making them feel that submission to the authority’s power is obligatory rather than

¹⁴ Sandel, M., *Democracy’s Discontent*, America in Search of a Public Philosophy, The Belknap Press of Harvard University Press Cambridge Mass. 1996, p. 319.

¹⁵ Walzer, M., *Spheres of Justice*, A defense of Pluralism & Equality, Blackwell Oxford 1983, pp. 28, 29.

¹⁶ White, J.B., *Acts of Hope*, Creating Authority in Literature, Law, and Politics, Chicago University Press Chicago 1994, p. xii.

coercive. Those who are subject to the authority, and who are thus forced into order, feel that the authority has the *right* to do so; authority is the *legitimate* exercise of power.¹⁷ “The power of the Catholic Church over Catholics is traditional, but its power over heretics who are persecuted is naked. The power of the State over loyal citizens is traditional, but its power over rebels is naked,” Bertrand Russell writes.¹⁸ We might say that when there is authority there is not only outward conformity, in the sense of doing as demanded, but also an “inner” conformity: the demand is experienced as legitimate. Legitimacy is therefore the crucial ingredient. Moreover, legitimacy can be thought of as the “invisible glue that holds society together.”¹⁹ We see then how authority and community are closely linked concepts and phenomena.

Max Weber described three ultimate principles, or three types, of legitimacy. Two types of authority (“traditional” and “charismatic”) are of a “personal” nature and the third, “rational-legal authority,” is, by contrast, “impersonal.” Legitimacy is here grounded in a system of consciously made, rational and universal rules.²⁰ The rationalization and formalization processes that lead to this rational-legal type will be explored in the next chapter. But, although the legal professional might be immediately attracted to this idea, in the present chapter I am most interested in the concept of traditional authority, the authority that is closely woven into the fabric of tradition, community and customary morality. I will do this for two reasons. In the first place this exploration can serve as a foil for the next chapters. Secondly, I will argue that aspects of this type of authority and the idea of community that is linked with it are still with us today and may even prove to be indispensable for the understanding of the promise of legal professionalism.

Traditional authority should be contrasted with charismatic authority, which refers to rule over others that is experienced as legitimate because of some extraordinary personal qualities of the ruler, qualities that give the ruler an almost magical appeal. Surely this is a “personal” type of authority and many lawyers may have this special quality. The ideal type of “traditional

¹⁷ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 180, 294-301.

¹⁸ Russell, B., *Power, A new Social Analysis*, Routledge London 2004 (1938), p. 63.

¹⁹ Friedman, *Total Justice*, p. 30; cp. Unger, *Law in modern society*, pp. 29-30.

²⁰ Friedman, *The Republic of Choice, Law*, pp. 112, 113, 211, 212; Unger, *Law in modern society*, pp. 29-30.

authority” is also personal in the sense that particular persons represent an ancient tradition that is expressive of the collective identity, one that individual members of the community can identify with, and preferably on a “deep” emotional level. The authority is experienced as the privileged spokesperson of a tradition that has an inherent worth and which carries, in the words of Robert Nisbet, an “inherent and unassailable wisdom transcending any one man’s reason.”²¹ Moreover, because such authorities represent such a tradition, they have a special status within the community and such authority is cultivated and transmitted through special institutions, practices and processes of education.²²

If we take seriously that community, morality and authority are strongly linked, we can think of traditional authority as “functional,” at least to a certain degree. That is to say, authority can be thought of as having an important, indispensable function in the constitution and maintenance of morality and thereby of the community. Nisbet argues that authority which is rooted in moral values, not only buttresses moral life, but that it *is* moral life:

“Only when traditions, codes, and roles have the effect of coercing, directing, or restraining man’s impulses can it be said that society is genuinely in existence. [...] Man cannot become attached to higher aims and submit to a rule if he sees nothing above him to which he belongs. To free him from all social pressure is to abandon him to himself and demoralize him.”²³

Moreover, it is exactly because authority is not totally irrational that we can understand the practice and institutions of authority.²⁴ The first basic function of authority figures is to *represent* a group of people such that their separate individual wills are bound into one. This representation makes it possible for the authority to both speak and act *on behalf* of the group.²⁵ Although, as we

²¹ Nisbet, *The Sociological Tradition*, p. 142.

²² Gerth & Wright Mills (eds.), *From Max Weber*, p. 296.

²³ Nisbet, *The Sociological Tradition*, pp. 151, 154, 158; Durkheim E., *Moral Education, A Study in the Application of the Sociology of Education*, The Free Press of Glencoe Ill. 1961, pp. 31-64.

²⁴ Brint, *In an Age of Experts*, pp. 6, 7; Gerth & Wright Mills (eds.), *From Max Weber*, p. 296.

²⁵ Bourdieu, *The Logic of Practice*, pp. 108, 298, 299.

will see later on, the materialist philosopher Thomas Hobbes is not the most likely candidate to start with when one is interested in the link between authority and some substantial community, his definition of authority is canonical:

“A multitude of men, are made one person, when they are by one man, or one person represented; so that it be done with the consent of every one of the multitude in particular. For it is the unity of the representers, not the unity of the represented, that makes the person one.”²⁶

Such an authority figure is functional in the community because the symbols and rituals of the group, although they do generate a sense of communality and bonding, cannot *act* on behalf of the group. By contrast, an authority can represent the group and be authorized to act in its name and thus through the authority the group can act collectively. Such actions can be directed at individual outsiders or other collectivities, but such an authority can now also act collectively toward individuals *within* the group who threaten to disrupt the unity with selfish and aggressive behavior. This is what Hobbes saw as the primary function of the authority in the political community.

Traditionally, the relation between the authority and the subjects is thought of as top-down, with God as the ultimate authority from which all earthly authority derives its legitimacy.²⁷ Extrapolating from the family experience wherein the father is the central authority figure, we might come to refer to such authorities as “fathers” who can speak on behalf of a group as a kind of family. We call those communities “patriarchal” where the power of the highest authorities is seen as “but little different from that exercised by fathers over sons, priests over communicants, and masters over apprentices.”²⁸ By contrast, in modern political philosophy, commonly thought to start with Hobbes’s *Leviathan*, there is a “bottom-up” relationship between the authority and the subjects based on the “consent” of the subjects; to the modern mind the authority speaks on behalf of the group which is the ultimate “author.” Hobbes thought of authority in contractual terms to emphasize the idea that

²⁶ Hobbes, *Leviathan*, p. 114; cp. Hegel, *Philosophy of Right*, § 279.

²⁷ Cp. Hampsher-Monk, *A History of Modern Political Thought*, pp. 36-45, 97-103.

²⁸ Nisbet, *The Sociological Tradition*, p. 108; Gerth & Wright Mills (eds.), *From Max Weber*, p. 294.

the whole political order is ultimately grounded in consent, and thus a whole new tradition of modern liberal philosophy thinks of the legitimacy of power as deriving from the consent of the people. While the subsequent exercise of power is certainly top-down, it acquires legitimacy from the initial rational consent of the subjects.²⁹

Hobbes thus conceives of the authority figure – the sovereign – as the person who unifies the group because he is himself one and indivisible. When the individual group members feel that such a figure can speak on behalf of them all and unite their separate wills into one, they experience such a figure as authorized, and the power that he exercises as legitimate rule. This idea is contrasted with the idea that God authorizes authority top-down but the objective, if not the result, is the same. In both perspectives “authority refers to a kind of bonding, a link of legitimacy between someone or other that commands and the subjects who follow or obey.”³⁰ There is thus a bonding link between the authority and those who obey the commands, but there is also a bonding link *amongst* the “subjects” of such an authority: the authority binds the community. Robert Nisbet thus argues:

“The function of authority is integrative, the indispensable cement of association, the constituent tie of human loyalties. Loyalties and obligations to the group would waver, would be constantly threatened with atrophy, were it not for the hard, unyielding structure of authority that serves not only the mission of the group and its values but also the vital tie between individual and group.”³¹

As said before, this authority could flow from the individual charismatic qualities of some leader, but generally it derives from some supra-individual

²⁹ “True sovereignty, it had been argued from Hobbes to Rousseau, has its origin in, not tradition, not the historic social authorities, but in the nature of man and in contractual consent, either actual or implicit, and it gains its rationality from its independence of all other types of authority.” Nisbet, *The Sociological Tradition*, p. 116.

³⁰ Friedman, *The Republic of Choice*, p. 112; “the theory of legitimacy or consensus [...] starts with society or group and its shared values and understandings.” Unger, *Law in modern society*, pp. 29-30.

³¹ Nisbet, *The Sociological Tradition*, p. 163; cp. Parsons, T., ‘A Sociologist Looks at the Legal Profession’, in: *Essays in Sociological Theory*, The Free Press New York 1954, pp. 378, 379; Aubert, V., *The Hidden Society*, The Westminster Press Inc. Totowa NJ 1965, p. 65.

power – God, the state, the community, a tradition – that “clothes a person with a reputation, a dignity, a power of ultimate decision, which could never flow from his individuality.”³² Of course, such an authority should show genuine *commitment* to their role because otherwise they will lose credibility and the respect of the subjects. “Nothing is demanded more absolutely by the political game than this fundamental adherence to the game itself, *illusio*, *involvement*, *commitment*,”³³ writes Pierre Bourdieu. Indeed, authority and overt cynicism about its role in the community do not readily combine.³⁴ But when the authority shows commitment, he is bestowed with a dignity that deserves the respect of the group members. In this respect for the authority, the members of the group express their respect for, and submission to, the community as a whole. The group is now bound by the “symbolic significance” that such an authority can attain in the group and to make this symbolic significance more concrete, authorities are often decorated with distinctive “marks” and “insignias” – qualifications and symbols like stripes, uniforms and all sorts of other attributes.³⁵

Respect seems to be a basic ingredient for the effectiveness of authority. The marks of respect that are given to the authority figure are a constant confirmation of the symbolic reality of authority. Bourdieu considers such marks of respect as “valid as oaths of allegiance” and “proofs of recognition” that relate to both the authority figure and the institution that instituted him. Interestingly, Bourdieu argues that the symbolic investment in authority by some group, and the distinctive marks that symbolize this, actually tends to change the person bestowed with authority. Once invested with authority, a person will generally (at least to some degree) live up to the expectations and the perceptions of the public. The moment he is in his role, he really *is* what

³² Wolff, K.H., (ed.), *The Sociology of Georg Simmel*, The Free Press of Glencoe Ill. 1950, p. 183.

³³ Bourdieu, *Language and Symbolic Power*, pp. 152, 179, 180.

³⁴ As Richard Posner says about judges: “It is easy (even for a judge) to be a cynical observer of judges, but it is difficult to be a cynical judge.” Posner, *The Problematics of Moral and Legal Theory*, p. 206.

³⁵ Bourdieu, *Language and Symbolic Power*, pp. 123, 126; “The trappings of judicial authority – the robe, the elaborate deference, the solemn rhetoric, and so forth – are clues to the political nature of that authority.” Posner, *The Problems of Jurisprudence*, p. 82.

everyone believes him to be and thus he lives up in reality to his appearance.³⁶ When this authority is actually based on collective belief and not merely on personal pretensions, the authority truly represents the group and thus can perform the integrative function.

The question that I would now like to address more fully is: What kind of arguments could support the idea of the fundamental rightness of an authority's rule? This is an important question because, according to Lawrence Friedman, "the permanence and survival of any society – or, at any rate, its governing structures – depend on some mix of force and authority. Authority is basic."³⁷ Indeed, it is next to impossible for political power to be effective without at least some legitimacy within the community. Moreover, legitimacy as "invisible glue" of society is indispensable in modern societies where authority ultimately derives from the consent of the subjects. This question is crucial "because a culture cannot survive without authority; it cannot survive without legitimate rule; it cannot survive without shared norms, which are the heart and mind of the social body. When authority degenerates, society will tend to disintegrate too."³⁸

Authority from the inside

Asking for the fundamental rightness of this rule, however, is asking for a *normative* theory that can establish the legitimacy of the power of those who rule from a more internal point of view. As Emile Durkheim argues, "We cannot account for an institution simply by demonstrating its social function. Beyond this, it must not encounter insuperable resistance in people."³⁹ What, seen from within the shared understandings of a particular community, can legitimate the right to act in the name of the community? Or, to put it as simply as possible: what, in their own eyes, justifies the power the authority has over community members? To understand the normative force of authority I propose to use Thomas Hobbes's political philosophy as a first introduction. By identifying the rather "thin" rational basis that Hobbes offers for the constitution of a genuine community, we can understand why from the

³⁶ Bourdieu, *Language and Symbolic Power*, p. 126.

³⁷ Friedman, *The Republic of Choice*, p. 211.

³⁸ Friedman, *The Republic of Choice*, p. 12; cp. Friedman, *Total Justice*, p. 30; Unger, *Law in modern society*, pp. 29-30.

³⁹ Durkheim, *Moral Education*, p. 38.

normative point of view we might come to argue for a “ thicker,” more substantial legitimation.

Hobbes famously defends the idea of the modern state as a “Leviathan,” which is the artificial person that is created by all the individual members of the group as its “personification.”⁴⁰ On the title page illustration of the first editions, we see this extremely potent figure as literally composed of all the heads of the citizens that comprises the modern state. The basic point of Hobbes’s argument is that it is *rational* (or at least reasonable) for the citizens of the modern state to subject themselves to the authority of one central and sovereign power because such an institution is highly functional in keeping society from going to pieces. Only a sovereign power, one and undivided, can pacify society such that the state of war of all against all (in which life famously is “nasty brutish and short”) can be overcome.

Order is a precondition for a thriving civil society and prosperous economy, and therefore Hobbes argued that the peace that can be established by a Leviathan state that “keeps everyone in awe” is a prerequisite for something that we should all want. People only experience the security they need for genuine freedom of choice when there is high regard for constituted authority. Therefore, political order is a prerequisite not only for prosperity but also for individual freedom.⁴¹ Thus it is rational to submit to the sovereign authority of the modern state; and as people subject themselves they become the Leviathan’s “subjects.” However well advised this choice for the functional authority of the state might be, Hobbes’s theory of political authority must have been shockingly revolutionary for many of his contemporaries, and not only to his contemporaries. Even today Hobbes is considered controversial as a political philosopher.

For one thing, his theory posits the absolute authority of the state without deriving it from the superior and ultimate authority of God and without any

⁴⁰ Hobbes, *Leviathan*, p. 114; cp. Hampsher-Monk, *A History of Modern Political Thought*, pp. 36- 45; “Group made man, he personifies a fictitious person, which he lifts out of the state of a simple aggregate of separate individuals, enabling them to act and speak, through him, ‘like a single person.’ Conversely, he receives the right to speak and act in the name of the group, to ‘take himself for’ the group he incarnates, to identify with the function to which ‘he gives his body and soul,’ thus giving a biological body to a constituted body.” Bourdieu, *Language and Symbolic Power*, p. 106.

⁴¹ Cp. Nonet & Selznick, *Law & Society in Transition*, p. 5.

reference to the authority of the traditional “fathers” in the community: the heads of the families, the religious authorities, the aristocracy, or the regional community leaders. Moreover, Hobbes seemed to work from the revolutionary liberal idea that all individual citizens or subjects are *equal* within a political community and bound together by the sovereign state power that essentially acts as a referee and peacekeeper. Whoever is the role-occupant of the sovereign power (a King or a parliament) is contingent and irrelevant. The only basis for the legitimacy of this power is that the sovereign can effectively keep the peace and maintain order.⁴² If that was not shocking enough to his contemporaries, even more shocking might have been the fact that in Hobbes’s theory of political authority the sovereign power does not establish or maintain anything more than a community held together by “awe,” or *fear*.⁴³

Looking at its underlying logic, the reason that Hobbes gives for the respect that is due from the subjects for this authority figure is the subject’s rational self-interest. The effective pacification of society by a sovereign power is a prerequisite for pursuing their interests or accomplishing any of their personal goals. The basic method available to the sovereign to achieve this goal is to keep all citizens in awe such that they do not dare to break the law. There is no further legitimation of the authority by means of reference to the kind of moral community that such authority should establish, embody or maintain; and there is also no further reference to the kind of moral example that such a figure or institution should set to the individual members of the community. Although Hobbes does not seem to present it as such, the ultimate consequence of his logic is that there is no further need for a specific substantial or perfectionist ethics that the sovereign should realize in his actions which would make his rule just and legitimate. There is also no need for particular *virtues* that the sovereign should make his own to merit the respect and loyalty of the people. The sovereign need not aspire for anything less profane than the maintenance of political order by means of fear, although the sovereign might need the rhetoric and appearance of virtue if it

⁴² Cp. Finer, S.E., *The History of Government*, Oxford University Press Oxford UK 1997, p. 97.

⁴³ “Of all passions, that which inclines men least to break the laws is fear. Nay, (excepting some generous natures) it is the only thing, (when there is appearance of profit, or pleasure by breaking the laws,) that makes men keep them.” Hobbes, *Leviathan*, p. 206.

suits his purposes.⁴⁴ Such a profane view is generally referred to as a “realistic” as opposed to an “idealistic” view.⁴⁵

From the inside this “thin” liberal theory of legitimacy often seems to be too cynical and prosaic, and I will argue that in political practice it is next to impossible to remain consistent and not refer to the existence of a community as a justification. Politicians – and I will argue that this also goes for legal professionals generally but judges more particularly – will often express a more idealistic view. For instance, a view deriving from Hegel that justifies authority by referring to the particular moral community it represents.⁴⁶ Referring to rational self-interest and fear is not a very attractive justification for obedience. There is generally a preference to obey an authority because by doing so one thereby obeys the larger community. Moreover, by identifying with an authority, one identifies with the community that one feels one belongs to. Only then will submission be experienced as having a genuine moral aspect.

Emile Durkheim argues that there is a need to “put ourselves in harmony with the social world of which we are members,” and he connects this to morality. Above and beyond human individuals there are groups of many kinds: the family, society, the nation, and even humanity as a whole. Moral action implies pursuing impersonal objectives, or better objectives that are “supra-personal” and submitting to a communal good or interest, if necessary at the expense of one’s personal interest. In other words, “to act morally is to act in terms of the collective interest.” Durkheim states:

⁴⁴ This seems to be the ultimate logic of Hobbes’s reasoning. Hobbes, however, *did* refer to particular virtues that the sovereign should take seriously. Cp. Skinner, Q., *Reason and Rhetoric in the Philosophy of Hobbes*, Cambridge University Press, Cambridge UK 1996.

⁴⁵ Hobbes’s ill reputation still today matches that of Machiavelli’s just for this reason. Compare footnote 186.

⁴⁶ “The state is the actuality of the ethical Idea.” Hegel, *Philosophy of Right*, §§ 256, 257; Taylor, *Hegel*, p. 444; cp. Hampsher-Monk, *A History of Modern Political Thought*, pp. 464, 473; “The state is the fuller community within which civil society has its concrete existence and is given rational limits [...] In the state the unity is differentiated and contains particular content built into the way individuals recognize one another in the social whole.” Kolb, *The Critique of Pure Modernity*, pp. 37, 103.

“This proposition, in effect, prescribes that man acts morally only when he works toward goals superior to, or beyond, individual goals, only when he makes himself the servant of a being superior to himself and to all other individuals. Now, once we rule out recourse to theological notions, there remains beyond the individual only a single, empirically observable moral being, that which individuals form by their association – that is, society.”⁴⁷

Authorities are expected to subjugate their individual personal interests to the public good because otherwise the feeling grows that they cannot be trusted with their power in the community. Authority is made in the eyes of the public and as such it is merely a matter of perception, or of shared understandings. As such authority is rather ephemeral and vulnerable, and we realize this most clearly when some authority figure fails to live up our expectations. When the people feel that some authority figure has abused their trust and used his power to hurt or damage the community and its collective meanings and values, from one moment to another such an authority can be seen as fake, as a mere pretender. The authority is suddenly exposed or “unmasked,” and because he has betrayed the trust of the group, he has placed himself outside the community and falls from grace. Those who are bestowed with authority in the community are especially vulnerable for de-legitimation when they do not show respect for the shared understandings and goals of the community they represent.⁴⁸

This particular phenomenon can be better understood from the idealistic rather than the realistic theory of the legitimation of the authority’s power. In Hobbes’s realistic perspective, the individual subjects share a rational interest in obeying an authority as long as he effectively keeps the peace. There are no moral or ethical demands made on this authority that make him deserve or justify his power and status within the community. However, generally people *do* set certain moral standards for the behavior and actions of authorities.

⁴⁷ Durkheim, *Moral Education*, pp. 60-61; “Cp. Bourdieu, *Practical Reason*, p. 142; Dworkin, R., *Law’s Empire*, Belknap Press Cambridge Mass. 1986, pp. 187, 188.

⁴⁸ This connects to the fact that authorities are not free to dispose of the meanings and values of the group exactly because they are of communal origin: “There is no private ownership of values. That would contradict their communal origin.” Aubert, *The Hidden Society*, p. 90; Therefore, such communal values are also less vulnerable on factual grounds. Friedman, *The Republic of Choice*, p. 71.

Especially in their public role, but even in their private lives, they are always followed by the public eye. Machiavelli knew very well that an authority should appear as a person of compassion, good faith, and integrity. He added, however, that *appearance* of integrity is enough and that he should not hesitate to violate that what is regarded as virtuous or moral when he has to maintain his state.⁴⁹

By contrast, in the idealistic view, the authority figure is supposed to be *sincere* in his commitment to the political community and its specific culture, values, needs and goals. To put it in rather “heroic” terms, authority figures are the “champions” of the group as long as they are seen as serving the common good and the public interest.⁵⁰ To be effective, the authority figure will have to be seen as sincerely committed to this common good and, as we have already seen, the person bestowed with authority will generally live up to this demand. But, the moment the authority is exposed as a self-serving opportunist who hurts the community and thus abuses the trust that was invested in him, things change radically. As Schmitt famously argued, the defining distinction of politics is that between “friends” and “enemies” and there is nothing much in between.⁵¹ If disloyal, one easily turns from friend into enemy and loyalties are totally reversed. What might explain this “all-or-nothing” logic?

The fragility of authority

Let us start by looking upon authority as a specifically cultural phenomenon. Above I hinted at the fact that in the cultural realm it is hard to distinguish between normative and factual aspects of phenomena.⁵² The community is

⁴⁹ Machiavelli, N., *The Prince*, Penguin Books London 1981, pp. 100, 101; This is why Machiavelli’s ill reputation matches that of Hobbes’s. *The Prince* is a classical work of “Realpolitik” and the introducer states that already in the seventeenth century “it became as acceptable to call the Devil Machiavellian as it was to call Machiavelli diabolical.” p. 9; cp. Kronman, *The Lost Lawyer*, pp. 101-108.

⁵⁰ This might explain why individuals in the group will feel offended when some outsider offends someone with authority in their community; this attests to the strong identification of the members with the community as it is represented by such an authority figure.

⁵¹ “The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.” Schmitt, C., *The Concept of the Political*, Rutgers University Press New Brunswick 1976, p. 26.

constituted through shared understandings that have an irreducible *normative* aspect because they make the group into a specific community. But I propose to take a step back from the cultural realm and take a more external view. The Kantian distinction between the normative and factual realms makes it possible to explore their different logics. The normative is the realm of “validity” as opposed to “facticity,”⁵³ and I will argue that this realm of validity has an all-or-nothing logic compared to the factual. Natural science allows for *degrees* of truth as it allows for probabilistic reasoning. By contrast, in the normative realm there does not seem to be any use for probabilistic reasoning, and thus it is harder to think of truths in ethical matters in terms of statistical percentages or degrees.

Modern natural science is very successful in explaining natural phenomena because it works from the distinction between facts and norms. That is to say, with regard to the factual realm, modern science postulates a contingent world that has no “intrinsic” worth or purpose; a natural world that can be known by means of empirical experimentation and probabilistic reasoning. Scientists seek “statistical” or “probable” truths, and there is a wide consensus that the mathematical formulas that describe natural laws are only approximately true. Moreover, they are also *relative* truths, relative to certain (circumstantial) factors and the standpoint of the researcher. Modern science deals in probabilities that are statistically sound and that have survived extensive empirical testing. Thus modern science does not deal in “Absolutes.” Speculation on the “deeper” structure, the deeper meaning or worth of the natural order, is relegated to the domain of metaphysics.⁵⁴

⁵² “The perception of fact and the choice of values are joined together on the deepest levels of consciousness.” Unger, *Knowledge and Politics*, p. 109.

⁵³ “From the theoretical perspective of the scientist, there arises a strict distinction between the spheres of being and of validity and, correspondingly, between descriptive and evaluative statements.” Habermas, J., *The Theory of Communicative Action*, Volume 1 Reason and the Rationalization of Society, Beacon Press Boston 1984, p. 186.

⁵⁴ “Laplace’s point was that we can never know with absolute certainty; we can only know with greater or lesser degrees of probability. [...] The right answer is, in a sense, a function of the mistakes. By uncoupling the idea of precision from the idea of a single absolute value, statistics and probability theory allowed scientists to achieve far greater degrees of precision than they had ever imagined possible. Statistics conquered uncertainty by embracing it.” Menand, L., *The Metaphysical Club*, A Story of Ideas in America, Farrar Straus and Giroux New York 2001, p. 182.

Thus the factual realm, the domain of “being,” seems to allow for relative, probable and approximate truths. In this realm some scientific statements can be incompletely or partially true and all depends on how probable it is, how the chances are, statistically. Moreover, facts are thought to be both contingent and *not* normative, and scientists generally think it is of great importance to keep the factual and the normative apart, however difficult this may be. In Kantian terms, *sein* is the domain of being (and this is what scientific knowledge aims to describe) and *sollen* is the domain of the desirable, or better, the domain of the will.⁵⁵ However, if we return to an internal perspective, in the cultural sphere authority is both a meaningful and normative phenomenon. Authority is something that is irreducibly in the minds of those who accept such authority, and it is irreducibly experienced as aimed at something good, something that binds, presents and represents the community. From this point of view, meaning and value are fundamentally entangled, and therefore we seem unable to reduce the phenomenon of authority to something factual without seriously distorting the experience of “the believers.”⁵⁶

Indeed, in the cultural realm we do not speak about such cultural phenomena in probabilistic and statistical terms but in terms of validity. Because there is a normative aspect to it, a claim to authority is valid or invalid within a certain group. Surely, there is nothing “out there” in the factual world that approximately or partially *corresponds* (in whatever meaning of this word) to such a claim to validity. To repeat, we therefore cannot think about validity in terms of probability or statistics, and this explains why we experience such claims to be of an all-or-nothing nature: validity or non-validity, there seems to be nothing in between. As we can only investigate such a phenomenon from the inside, and not scientifically, we seem to be constantly driven to the “absolute.” Compare Habermas: “The ‘oughtness’ of binding norms has the absolute sense of an unconditioned and universal obligation; what “one ought to do” claims to be equally good for all.”⁵⁷

⁵⁵ Kant, I., *The Metaphysics of Morals*, Cambridge University Press Cambridge UK 1991, p. 42.

⁵⁶ Cp. Bourdieu, *Language and Symbolic Power*, p. 126.

⁵⁷ Habermas, J., *Between Facts and Norms*, Contributions to a Discourse Theory of Law and Democracy, The MIT Press Cambridge Mass. 1998, p. 255.

We might speculate that the experience of deception can be understood from a fundamental human longing (or psychic need) for “integrity.” “To live is to put ourselves in harmony with the physical world surrounding us and with the social world of which we are members,” writes Emile Durkheim in his book on moral education.⁵⁸ Human beings long for the feeling that their beliefs are consistent and true and, furthermore, in perfect harmony with the world; this seems to be exactly the kind of “well-being” or “perfection” that human beings should strive for in classical philosophy. The moment one of their beliefs proves to be untrue, man experiences chaos in his belief system, and a critical break with the world around him. This is experienced as disagreeable or even painful and in Greek philosophy the broken integrity or “wholeness” of the human soul is even seen as a loss of the soul’s “being” because it fails the test of well-being. Moreover, it thereby fails to be a harmonious part of the cosmic order.⁵⁹ However, this longing for falling in line with the cosmic order might be remote for many moderns because they might find it hard to think of the cosmos as a normative order, at all.

But we need not become metaphysical to understand this longing for integrity. *Qua* social beings humans long to be part of a community, and they identify with its meaningful and normative shared understandings, or its “collective spirit.” The communal order is seen and experienced as harmonious, and the individual member needs to fit in or “harmonize” with it.⁶⁰ Furthermore, within this community the individual member wants to be seen and experienced by fellows as in harmony with this collective order, desires to be seen as virtuous, loyal and trustworthy – in short, a moral member of the community. The moment one of his beliefs is questioned and proven to be false, man experiences a break with his community, and the resulting experience of disharmony and chaos is rather frightening. The more tightly connected the questioned beliefs are with the communal identity, the more obstinately the beliefs will be defended by the members of the community.

⁵⁸ Durkheim, *Moral Education*, p. 48.

⁵⁹ Kronman, *The Lost Lawyer*, pp. 80, 84; Rorty, *Contingency, irony and solidarity*, p. xiii.

⁶⁰ “Political fraternity is to communities what integrity is to individuals. It is what gives them their unity and preserves them from disintegration.” Kronman, *The Lost Lawyer*, p. 92; cp. Dworkin, *Law’s Empire*, pp. 176-224.

The phenomenon of authority here serves as an example. Previously I argued that authority is made in the eyes of the public, that it is a matter of perception. I also argued that this makes the phenomenon of authority highly fragile and vulnerable. The moment the public feels that some authority figure has abused the trust invested in him, one generally sees two rather radical reactions. On the one hand, the fact that an authority figure has abused its power over us and hurt the community can be ardently and passionately denied. Not only will people deny the evil – the immorality – of certain actions, sometimes people even go as far to ignore or deny certain scientific, or even the most obvious, *facts* about those actions. Indeed, the farther they go in their loyalty and rationalizations, the harder it might become to convince them of the contrary, because they have invested so much in these beliefs. Thus authority and a scientific respect for facts are sometimes uneasy bedfellows. Compare Richard Posner:

“Systems of thought that emphasize hierarchy, tradition, authority, and precedent disvalue the kind of critical inquiry that tests beliefs and advances knowledge, and as a result the truths that such systems accept are not robust. This is notoriously true of religion, an activity in which the perceived costs of free inquiry are often very high. It is also true of law, and is one reason that the scientific attitude is not at home in the legal enterprise. [...] The hierarchical structure of a legal system and the desire for stability [...] impede the search for truth. We come to see law as an uneasy compromise between science, where inquiry is sovereign, and theology, where authority is sovereign.”⁶¹

But authority can also, from one moment to the other, be seen as fake, and someone or some institution can easily and quickly fall from grace.⁶² In the language of “heroic” morality, the authority who posed as a hero of the community demanding respect and loyalty is now exposed, or unmasked as a “traitor” who should be excommunicated; the pretender proved to be totally unworthy of our trust and loyalty. Former authority figures who are thus

⁶¹ Posner, *The Problems of Jurisprudence*, p. 82.

⁶² “The group only fully accepts those who publicly show that they recognize the group. The sanctions of political scandal will inevitably befall the spokesperson who is disloyal, who does not really give the group what the group’s recognition is worth to him.” Bourdieu, *Practical Reason*, p. 142.

publicly exposed and humiliated will, from that moment on, not have many friends left.

“It is expensive to obtain a reputation, for it only attaches to distinguished qualities, which are as rare as mediocrities are common. [...] It is easy to get a bad reputation because it is easy to believe evil but hard to eradicate. The wise therefore avoid such incidents, guarding against vulgar scandal with constant vigilance. It is far easier to prevent than to rectify.”⁶³

When a reputation is ruined by some scandal the exercise of power will no longer be seen as legitimate. Authority dissolves into naked power that will most likely be resisted.

This is a constant risk for countries with a political culture depending strongly on centralized bureaucratic authority structures. France would be a case in point. Because it has a long-standing history of centralism and absolutism, the system can easily lose legitimacy and fall into anarchism. As Francis Fukuyama states, “When pressures for change build to a breaking point, participants in the system lurch to the opposite extreme, revolting and questioning all authority.” Fukuyama suggests that this accounts for the revolutionary past of the French and its relatively conflict-ridden labor relations.⁶⁴

The same logic seems to be at work in the communitarian concern with community. To repeat, a community only seems possible if individuals are prepared to submit to the collective meaningful and normative order, to the “collective consciousness” of the group. They also have to be prepared to conform their behavior to it and to be formed by it, even to be “disciplined” by it in their upbringing and education.⁶⁵ This cultural communal order becomes part of their individual identity and both this order and the complementary identity are experienced as specific goods, goods that deserve protection, respect and loyalty. Indeed, emphasizing the importance of the specific cultural contexts, or “forms of life,” is a specifically “communitarian”

⁶³ Gracián, B., *The Art of Worldly Wisdom*, Shambhala Boston & London 2001, pp. 36, 39.

⁶⁴ Fukuyama, *Trust*, p. 121.

⁶⁵ Durkheim, *Moral Education*, pp. 31-63.

concern.⁶⁶ And here again there is a tendency to the absolute because making these contexts relative to something else threatens to thoroughly devalue them.⁶⁷ People should experience actions in conformity with the demands of the communal contexts as morally superior to actions motivated by petty individual interests and concerns. The common good should be seen as an ultimate good and by making this relative, it will lose its power to inspire the citizens to conform their actions to it.

This might explain why cultural traditions and institutions that claim authority over us are rather “greedy” in the sense that they demand from people “complete loyalty and undivided commitment.” Compare Anton Zijderveld:

“One serves the greedy institution and is, as it were, completely consumed by it. [...] Most traditional institutions bear greedy features as they impose on the individual strict and demanding norms and values which are binding. Traditional institutions require loyalty and a commitment which in modernity are rather rare and very hard to come by.”⁶⁸

If the good is experienced as an ultimate good, as a “Good in itself,” it will be most effective in inspiring people in their actions and inspire complete loyalty and undivided commitment. From the inside it is precisely the experience of “absoluteness” of this Good that seems to make it possible to see such a Good as an *objective* Good.⁶⁹ In the cultural realm one easily slides from fact to

⁶⁶ “In a communitarian society [...] the common good is conceived of as a substantive conception of the good life which defines the community’s ‘way of life.’ This common good, rather than adjusting itself to the pattern of people’s preferences, provides a standard by which those preferences are evaluated. The community’s way of life forms the basis for a public ranking of conceptions of the good, and the weight given to an individual’s preferences depends on how much she conforms or contributes to this common good.” Kymlicka, *Contemporary Political Philosophy*, p. 206.

⁶⁷ For instance Alasdair MacIntyre thus presents us with a rather absolute choice: either we accept the authority of some cultural contexts have over us, or we are left at the mercy of the uncontrolled Nietzschean will to power. MacIntyre, *After Virtue*, pp. 109-120, 256-263.

⁶⁸ Zijderveld, *The Institutional Imperative*, p. 124; cp. Coser, L., *Greedy Institutions, Patterns of Undivided Commitment*, The Free Press New York 1974.

⁶⁹ “We explore from within the human life form. We find that within this form, humans are irresistibly given to accord certain things significance. Certain matters are the invariable

value and back, and therefore it is only a relatively small step to completely “reify” the Good and see it as a “thing.” Thus the Good might come to be experienced as objective like all other objects in the factual world. Political philosophers who grounded the authority of the law in the Divine authority of God serve as an example.⁷⁰ Such metaphysical theories generally amount to a “reification” of a common morality in the sense that it is seen as something that has an existence comparable to the existence of natural phenomena. Such a morality can take on a “thing-like” appearance, or becomes “objective.” With regard to the morality of the community, it can now be seen as in accordance with “natural law.”⁷¹

The critical reader will note that my method of inquiry cannot do justice to the experience of the objectivity of the good because it makes the experience of objectivity relative to a collective experience within a moral community, a shared universe of meanings and values.⁷² Surely, this shatters the experience of objectivity in this universe. As Weber wrote, “Many old gods ascend from their graves.” One might even say that it is exactly this kind of relativist analysis that has destroyed the allure of objectivity of the meaningful and normative contexts of community. In turn, this may explain why the kind of loyalty and commitment that traditional institutions require is hard to come by in modern society; a theme that I will explore in the later chapters of this book. However, the conclusion that authority is both indispensable for communities and highly fragile and ephemeral makes sense of much of the ideas that I want to explore in the coming pages.

Authority and the settlement of conflict

In pre-modern political philosophy, authorities in the community were thought to rule not by fiat of the sovereign people but by the highest authority of the Lord in Heaven. The political community that was made possible by this intricate hierarchy of authorities deriving from God downwards was

objects of moral sentiments, which are by their nature marked off from others by their unique significance” Taylor, *Sources of the Self*, p. 346; cp. Putnam, *Reason, Truth and History*, pp. 137-149.

⁷⁰ Cp. Friedman, *Total Justice*, p. 129.

⁷¹ Unger, *Law and Modern Society*, pp. 76-83.

⁷² Cp. Habermas, *The Theory of Communicative Action*, pp. 186, 187.

ultimately founded on common Christian morality. Such a political theory seems to take the concept of authority to its logical extreme. The legitimacy of the ultimate Rule of God was founded on the fact that God is absolute Truth, Good and Beauty (*Verum Bonum Pulchrum*) and any earthly authority only deserves loyalty and respect from its subjects in so far as this authority proves his complete loyalty and undivided commitment to the Lord.⁷³ The equation of the truth (fact) and value is, since Hume and Kant, considered to be a category mistake and any metaphysical grounding, whether in Divine Will or in Nature, of the law is now generally regarded as both scientifically and philosophically suspect.⁷⁴

In his book *Moral Education*, Emile Durkheim also argues that morality implies that the individual member submits to some higher “superior being” and that this superior authority has an important, indispensable function for the moral order. However, he argues that we do not need to take a religious view to make sense of morality and authority. All we need to acknowledge is that humans are social beings and that they live in a “society” that Durkheim describes as a “moral being” to which individual members submit. Moreover, we saw how Durkheim thinks of the essence of moral action as the subordination of the individual’s own interests and goals to those of this “superior moral being” that is society.⁷⁵ Ideally, an authority represents this superior “moral being,” and this makes the authority figure especially suitable to settle conflicts in a legitimate, definite and, therefore, authoritative way. In submitting to the judgment of the authority, the conflicting parties submit to

⁷³ In *On the Genealogy of Morals* Nietzsche explores the natural law idea deriving from Plato’s doctrine of ideal being – the transcendent unity of “the good,” “the true,” and “the beautiful.” He is especially interested in how it influenced medieval and Renaissance Christian thought. Nietzsche is highly critical of this “fictional translation of morality into the very machinery of nature” which, with disdain, he calls “moral metaphysics.” Allison, D.B., *Reading the New Nietzsche*, *The Birth of Tragedy*, *The Gay Science*, *Thus Spoke Zarathustra*, and *On the Genealogy of Morals*, Rowman and Littlefield Publishers Inc. Oxford 2001, p. 186.

⁷⁴ “The reason is that the empire of liberal doctrine, and of the modern conception of science, has undermined the premises that would make the symbolic method intelligible. The opposition of the order of ideas and the order of events results in the impossibility of seeing the link between reflection and existence in its true light.” Unger, *Knowledge and Politics*, pp. 113, 114.

⁷⁵ Durkheim, *Moral Education*, pp. 60, 61.

the moral community of which they aspire to be a part. By means of submitting to this authoritative judgment they show their loyalty to this larger whole and profess their loyalty to the important good of order that this submission makes possible.

By comparison, the Hobbesian submission to authority seems uncomfortably “nihilistic” and “instrumental.” We can now see that what is thoroughly missing from this realist theory is the moral dimension of the submission to the authority verdict. It seems to be far more attractive to accept the ultimate authoritative judgment, not because it makes order possible (and thereby freedom and prosperity), but because the authority represents a substantial morality that binds the group. In other words, the submission to authoritative judgment is not seen as the result of individual self-interested reasons motivated ultimately by fear, but instead a profession of loyalty to the supra-individual moral community that humans as social beings aspire to be a part of. Submission to authoritative judgment is not motivated by rational self-interest but is an explicitly *moral* act: the citizen accepts the authoritative solution to some conflict because this acceptance is an expression of his or her submission to the moral community. This might explain the popularity in modern political theory of such notions as the “General Will,” “Public Good” and “General Interest” as legitimating certain solutions to conflicts.⁷⁶

From the aspiration to a political community founded on the common good, a more idealistic picture of conflict settlement by authorities can be derived. Now, the simultaneous submission by the conflicting parties to this common good of order and community makes it possible for the authority to establish more than a mere pacification. We can now establish a genuine “reconciliation” between the parties. By confirming and validating the good of peace and harmony and, importantly, the common meanings and values of

⁷⁶ These ideas all seem to be conceptually related to the idea of the *Volonté Générale* (the General Will) of Jean Jacques Rousseau who thus provided us with a secular morality that citizens of modern political communities can submit to; such that our submission is not inspired by prosaic self-interest but is experienced as a *moral* deed. Rousseau, J.J., *The Social Contract*, Penguin Books Harmondsworth UK 1968; cp. Barber, B., *Strong Democracy*, Participatory Politics for a New Age, University of California Press Berkeley Ca 1984, p. 200; Taylor, *Hegel*, p. 402; cp. Unger, *What Should Legal Analysis Become?*, p. 55.

the community, the interested parties may feel that they were brought back from the margins of the moral community to its heart. By reestablishing or reaffirming their communality, the authority can reestablish the community that threatened to fall apart. After the reconciliation by the authority, the parties and others involved have a renewed sense of what ultimately binds them (their common identity as members of a community) instead of what temporarily divided them (their individual interests or goals). They are, furthermore, reconciled on a “deeper” emotional level than they would have been by using mere cold rationality. The moral or political community makes it possible to act collectively and thus develop and perfect the human being qua *social* being.⁷⁷

Only after the group has been pacified can individuals experience a sense of belonging and security in the rituals, symbols and institutions of the community. “Law and order” precedes individual freedom and prosperity and also the experience of community. Authority is the means to such symbolic and moral orders. But not only notions like the “Public Good” or “General Interest” can be explained by the longing for a deeper community. The nation building that many modern states during the past two centuries have engaged in aimed at establishing just that. The state was to be experienced as a “nation,” a moral community that deserved the loyalty of its members not because it satisfies their enlightened self-interest in peace and prosperity but because it satisfies their need to belong to a larger moral community. In such a nation the submission to the judgments of the central authority can be experienced as a submission to this larger moral whole that makes it possible to realize the full social nature of the members of this community. To this effect the nation has to be “materialized” in narratives, symbols, rituals and institutions.⁷⁸

Notoriously, the myth of “national character,” as a quality shared by all within the nation, was devised to bind the people under the authority of the modern nation-state. Some kind of racial or blood kinship was then invoked

⁷⁷ “Like everything else, man is a limited being: he is part of a whole. Physically he is part of the universe, morally, he is part of society. [...] man’s nature cannot be itself except as it is disciplined.” Durkheim, *Moral Education*, p. 51; cp. Nisbet, *The Sociological Tradition*, pp. 150-161.

⁷⁸ Cp. Anderson, B., *Imagined Communities*, Reflections on the Origin and Spread of Nationalism, Verso London revised edition 1991; cp. Nisbet, R., *Twilight of Authority*.

to “naturalize” the solidarity within the group, thereby creating a “fatal community.” Such myths are generally discredited in twentieth-century political philosophy, but again we do not need metaphysics to acknowledge the fact that members of modern societies share a world of collective meanings. “The sharing of sensibilities and intuitions among the members of a historical community is a fact of life,” according to Michael Walzer.⁷⁹ Language, history and culture still provide important common references and, although people always seems to focus on the margins of these common understandings, and on the pluralism in society, they often fail to see how much citizens do have in common and how these common meanings shape their individual and collective actions.

Importantly, experienced from the inside of such a community, such a sharing of meanings is not merely a fact. Such meanings are experienced as having a normative aspect because they are the tissue that binds the individual members to each other. Thus, if we take culture in a broad sense to include both a common language and history we might even concisely say that “[...] culture is inherited ethical habit.”⁸⁰ We should actually strive to find and strengthen these shared understandings and, according to Walzer, the political community is the appropriate setting for this enterprise. This is because “the political community is probably the closest we can come to a world of common meanings,” and it is “to these understandings that we must appeal when we make our arguments,” for in matters of morality, “argument simply is the appeal to common meanings.”⁸¹ Thus, in matters of morality, argument is a matter of common meanings. Conversely, from a communitarian perspective one can also argue that common meanings are also a matter of morality. Now why is all this relevant for the legal professional?

Legal authority and the modern state

In the modern world the central authority – the sovereign power of the state – has become highly abstract and differentiated. However, the modern state is still an important focus point of authority and the fountainhead of many modern authority structures in civil society. This also goes for the authority of

⁷⁹ Walzer, *Spheres of Justice*, p. 28.

⁸⁰ Fukuyama, *Trust*, p. 34.

⁸¹ Walzer, *Spheres of Justice*, pp. 28, 29.

the law and the legal institutions in liberal democracies. One can argue, though, that the law and the legal institutional structure do have a special place within this larger whole. The legal institutions are granted certain autonomy and independence with regard to the political and administrative powers, and this can be understood when one realizes how precarious the authority of the modern state is.⁸² The exercise of power by the state can easily be experienced as arbitrary and unjustified. Moreover, in any modern society the question arises of how political power can be trusted with the enormous power that is concentrated in the modern state. The development of an autonomous “legal order” within the larger political whole made it possible for modern states to ascertain the legitimacy of its rule.⁸³

The potentially (or even intrinsically) repressive nature of such a central authority, which is invested with enormous power, might have some kind of legitimacy in the abstract, but its factual *employment* in concrete instances is always in danger of being tainted by subservience. But no modern regime can endure without some foundation in consent. According to Nonet and Selznick in their book *Law & Society in Transition*, what can be expected to happen is that the subjects, when society is adequately pacified, refocus their attention from a blanket certification of the source of power – the modern state – to a justification of the *use* of this power within society.⁸⁴

The rule of might is both costly and inefficient, and legitimacy (which transforms power into authority) is an indispensable ingredient or “lubricant” in effective and efficient rule. Moreover, ruling elites do not generally find rule by force alone very honorable, and the law and its institutions can play an important role in legitimating the government’s particular acts and policies. Max Weber argued that modern subjects will generally obey by virtue of “legality,” or by virtue of legal statute and functional “competence” based on legal rules.⁸⁵ This means that those who control and employ the powers of the state, the representatives of state authority, should rule by means of legal statutes and within the bounds of the law of the community. Such statutes

⁸² Cp. Friedman, *Total Justice*, pp. 27- 29.

⁸³ “Rulers have only limited credibility as certifiers of their own legitimacy.” Nonet & Selznick, *Law & Society in Transition*, p. 56; Lenski, *Power and Privilege*, pp. 51, 52; cp. Unger, *Law and Modern Society*, pp. 66-76.

⁸⁴ Nonet & Selznick, *Law & Society in Transition*, p. 56.

⁸⁵ Held, D., *Models of Democracy*, Polity Press Cambridge UK 1996, pp. 164, 165.

have a number of important features that can strengthen the legitimacy of the rulers. For one thing, if they are stated in general and impersonal terms, rulings and policies apply to everyone in society equally and as such they are more easily seen as fair. Another important feature is that these rules and statutes both precede and regulate administrative acts. Both these features give law its appearance of neutrality.⁸⁶

Nonet and Selznick explain the rise of a relatively independent and autonomous legal institutional order in modern states as the result of a “historic bargain” between legal institutions and political power. Legal institutions recognize the state as the sovereign power in society and thus submit to its legislative powers. The state, however, delegates to the legal professionals part of its authority, which can be exercised free from political interference. This means that “[...] the legal institutions purchase procedural autonomy at the price of substantive subordination.” The price they pay for this immunity is that they effectively “remove themselves from the formation of policy.”⁸⁷ Those are the terms on which the judiciary wins its independence from political intrusion and a specific part of the political order can now become a legal order or a *Rechtsstaat*.

We can always expect tensions between the political realm and the legal order, and especially in times of crisis, the state will claim the primacy of the *raison d'état*, and the legal order will then be curtailed. However, in most modern states this step is also meticulously regulated by means of legal statutes and rules. Such statutes point to the ultimate authority in the state as the power that can proclaim a “state of emergency” by means of which it can temporarily suspend functioning of the legal order.⁸⁸ However, under normal circumstances the division of powers that is established between the judiciary and the legislative and executive powers is considered to be a basic feature of the modern liberal democratic state. Although the authority of the legal professionals is derived from, and relative to, the authority of the state, they are granted autonomy in the form of certain carefully circumscribed

⁸⁶ Lenski, *Power and Privilege*, pp. 52, 53.

⁸⁷ Nonet & Selznick, *Law & Society in Transition*, p. 58.

⁸⁸ Schmitt, C., *The Concept of the Political*, University Of Chicago Press Chicago Ill. 1996, pp. 8, 38.

competences in the administration of the law in the realm of a basic socio-political function: conflict resolution.

We see how the legal professionals are now thought of as having a specific role and invested with a particular authority in modern liberal democracies. The legal professionals as a group are the officially authorized guardians of something that is now a great public *good* to the political community: *legality*. In other words, these professionals are the guardians of the law (its institutions, procedures and practices) and thereby the keepers and guardians of the good of legality. As such they can grant “legal” status to certain policies and actions by both individual citizens and state actors and thereby legitimate them. In legal procedures, actions (or refusals to act, for that matter) are tested against the legal norms and principles that are in force in the legal community. When actions are deemed legal this validates the deployment of state power to bring the factual situation into accordance with the legal state of affairs.

In the present perspective, legal practices are a special kind of politics. With Talcott Parsons one may think of them as a “secondary line of defense” against conflict in society and therefore mediating between society and the state. As such the legal institutions have an indispensable “integrating task” in modern societies.⁸⁹ The legal institutional structure might even be described as a “detached post” of the state in the pacification of society. The fact that these legal institutions are placed at the “front line” in the fight against conflict and violence in society could explain why they are organized along the lines of an army, in the sense that there is a strong emphasis on authority, hierarchy and ritual. But all this is still very well compatible with a realist view of law and politics. In the following I will argue that such a view is too “thin” and cerebral; we need a “thicker” or more “idealistic” view to see how legal authority could be experienced from the inside and how we make it effective.

Legal authority and the moral community

The settlement or resolution of conflicts has to be done in an authoritative way. That is to say, the settlement has to be experienced as both legitimate

⁸⁹ Parsons, T., ‘A Sociologist Looks at the Legal Profession’, in: *Essays in Sociological Theory*, pp. 378, 379; cp. Aubert, *The Hidden Society*, p. 65.

and definite by those both directly and indirectly involved. The professional is supposed to end the argument or conflict, and he should leave no space for further escalation. In the realistic perspective, the power of the law derives from the state and one might see the legitimacy of the rulings by and judgments of legal professionals as the product of fear for the state power. A no-nonsense realistic view on legal practices might take the Hobbesian stance that the law is essentially a matter of “force” and that if all parties involved are equally afraid of this power they can be expected to comply with these rulings and judgments.⁹⁰ Fear might make the actual use of this power necessary only in relatively exceptional cases. The legitimacy of the power of legal authorities is here based on the interest the public has in peace and order.

But surely one might ask whether this rather thin and prosaic justification is satisfactory; one might even ask whether it will be at all effective. Moreover, it is exactly because the justification of the authority of the modern state is rather fragile and thin, that the law is necessary to strengthen its legitimacy. A thin legitimation of the law might, however, prove not to be much help. From a more idealistic view, the powers of legal officials can be justified by a genuine commitment of both the officials and the legal subjects to the – specifically *legal* – values and norms of the community represented by the law.⁹¹ From this perspective, these legal values and norms can be experienced as an important source of community and social harmony. But how should we see this link between the law and its institutions and practices, and the community?

We might think of the legal order as the ever-evolving product of a “legal tradition” that is an important part of the common cultural identity of the

⁹⁰ “Law, an abstract entity is dissolved into physical force.” Posner, *The Problems of Jurisprudence*, p. 223; cp. Lenski, *Power and Privilege*, p. 50.

⁹¹ “Set against this background, rules become manifestations of the shared values of the group. They perform subsidiary though indispensable tasks: to clarify the implications and the boundaries of [...] collective ends and to reassert them against would-be violators. But the broader the extension, the concreteness, the intensity, and the coherence of the consensus, the less necessary do rules become. It is their nature to survive in the crevices of consensus. Hence, the main reason for which laws are obeyed is that the members of the group accept in belief and embody in conduct the values the laws express.” Unger, *Law in modern society*, pp. 30, 31.

group. From this perspective one might think of legal professionals as representing a common morality ‘hardened’ into law, embedded in “a venerated and time-honoured tradition”, and embodied in the institutions of the law.⁹² The law is the product of generations of legal professionals transforming the basic meaningful and normative order into a legal order. Thus the legal order is the product of the “hardening” or “elaboration” into law of the most basic or fundamental shared understandings, that is, of a particular “nomos.” In other words, the law, its institutions and traditions are as the cultural “expressions” of most precious and basic common morality and thereby a expressions of the communal identity. Indirectly, the law and its representatives therefore represent the larger community and thus the legal tradition itself becomes an important symbol of the community.

The scheme of legal rules, rights and principles might be seen as a “pre-political” scheme that is accepted by the people because they justify certain political actions and are the expression of the fact that we are acting and dealing within a moral or political community. We might even think of these basic legal norms and values as both “natural” and timeless – as “natural law.”⁹³ However, we saw how such a naturalization of the law can easily be discredited, and today not many defend this idea. Generally the legal tradition is conceived as the product of the historic evolution of the moral community worked into a concomitantly evolving legal community.

As a source for law, such a legal tradition originates in well established “customs” – “ways of life in a community” and “structures for mutual recognition.”⁹⁴ Lawyers work these customs and structures into more specific sets of rights and duties that can be used for conflict settlement or resolution.

⁹² Zijderveld, *The Institutional Imperative*, pp. 153, 154; cp. Berman, *Law and Revolution*, pp. 1-10.

⁹³ “Customary law takes shape around a series of interlocking continuities: of law with the actual expectations and claims that people make upon one another according to the social roles they occupy; of normative standards with routinized behavior and belief; and of the acts by which people define what the law is with the acts by which they apply it in particular cases. The cumulative effect of these continuities is to naturalize society.” Cp. Unger, *What Should Legal Analysis Become?*, p. 108.

⁹⁴ “The customs we to give content to our lives resemble Aristotle’s taken-for-granted social background and its virtues that describe what kind of persons we should be.” Kolb, *The Critique of Pure Modernity*, p. 37, 100; Unger, *What Should Legal Analysis Become?*, p. 108.

Subsequently the legal tradition is developed in close concert with the community as it evolves over time in a collective effort of generations of professionals, preferably closely involved with the legal practices and the community at large. This evolution proceeds by means of “stories” in the sense of “cases,” narratives that join in a larger historical chain of legal experience and reasoning. To put it differently, “the understanding of cases is inseparable from our views about narratives: particularly, the kinds of narratives we call case histories.”⁹⁵ We proceed from case to case, from story to story, and thus the collective experience with social conflict is recorded in a legal tradition that can be thought of as a “storehouse” of a common legal culture, a collective memory of narratives. Importantly, the tradition maintains in the present a “bond between past and future;” the law binds the present members of the community but is also a bond between past, present and future generations.⁹⁶

It is through this tradition, and the institutions and roles that are embedded within it, that members participate in history – not just the history of the particular legal institutions but the history of the community as a whole. Identity is thus firmly linked to the past through the reiterated performance of the role occupants.⁹⁷ The legal tradition can thus be a source for “historical consciousness;” that is, it can be a means to better understanding of our collective past and thereby gives us a perspective on the present as well. Such a tradition and its institutions can also be thought of as “thick” as it embodies what Weber would call a specific “substantial rationality.” The legal tradition is thought of as embodying a specific substantive *content*: the substantial values that bind the community. By contrast, formal rationality is pure form

⁹⁵ Toulmin, *Return to Reason*, p. 124.

⁹⁶ Zijderveld, *The Institutional Imperative*, pp. 125, 152-154; cp. Posner, R.A., ‘Pragmatic Adjudication’ in: Dickstein, M., *The Revival of Pragmatism*, Duke University Press Durham and London 1998, p. 238.

⁹⁷ “It is through the performance of institutional roles that the individual participates in history, not only the history of the particular institution, but that of his society as a whole.” Berger, P., Berger, B., & Kellner, H., *The Homeless Mind*, Vintage Books New York 1974, p. 91.

that can incorporate any content whatsoever.⁹⁸ The contrast between substantive rationality – or “practical wisdom” – and formal rationality will be a central topic in the next chapter.

But in the present context, legal professionals expressly strive for substantive rationality and see the legal tradition as the “horizon” that gives *meaning* to the facts and actions of the legal subjects that, from a legal standpoint, are in need of interpretation.⁹⁹ This connects to the fact that the legal tradition is essentially a “narrative,” that the law is a man-made symbolic order, made of language. Although they are universally valid, the rules and norms that are expressed in such narratives are not abstract and empty but specify a great deal of particular content. They express the particular substantial values and goals of the community.¹⁰⁰ It is exactly because the information that narrative carries can be thought of as “thick” and “substantially rational” that narrative imbued with substantial values is especially apposite for the development of historical consciousness.

As Kelley writes in *The Human Measure*, “The substance or dress of Nomos [...] is verbal discourse.”¹⁰¹ In other words, the law is built out of “stories,” and no observer can fail to notice that indeed “legal interpretation is steeped in stories.” Legal rules, norms and values are embedded in authoritative narratives, and through stories the law creates a meaningful normative world; a symbolic order that makes sense of our individual and collective experiences and that subjects as members of the community can and should identify with.¹⁰² By means of the authoritative narratives of the

⁹⁸ Gerth & Wright Mills (eds.), *From Max Weber*, pp. 220, 298, 299; cp. Whimster & Lash, *Max Weber, Rationality and Modernity*, p. 30, 40, 41, 45, 305; cp. Zijderfeld, *The Institutional Imperative*, pp. 22, 36, 159, 160, 201.

⁹⁹ “In every society [...] law grows by “interpretation” when applied to new problems and conditions, whence again the centrality of hermeneutics in following the career of Nomos. “Kelley, *The Human Measure*, p. 10; cp. Gadamer, *Truth and Method*, pp. 269, 281, 282.

¹⁰⁰ Zijderfeld, *The Institutional Imperative*, pp. 152-154; Kolb, *The Critique of Pure Modernity*, pp. 15, 29.

¹⁰¹ Kelley, *The Human Measure*, pp. x-xiii, 1-13; “The law is not merely ongoing; it has a history. It tells a story.” Berman, *Law and Revolution*, p. 9.

¹⁰² “If they function well, institutions constitute what the ancient Greeks called a *nomos* that is, a meaningful infrastructure which provides people with a proper place in the world. If that order, for whatever reason, collapses, we face the terror of *anomie*. *Anomie* is not lawlessness or normlessness but the reign of senseless, illegitimate, and inhuman laws and

legal tradition, the lawyer makes sense of the legal claims and facts that he or she is presented with; they provide both a meaningful *and* normative horizon by means of which one finds meaning in events and actions. This horizon makes legal interpretation and sound judgment possible.¹⁰³

It can be argued that the past can best be understood in terms of traditions. It is important to understand the present in concert with the past precisely because common cultural identity is essentially the product of a shared history, of, to put it rather dramatically, a common historical “fate” or “destiny.” Because this tradition is the historical carrier of the collective meanings and norms of the community, it has a specific authority in the group, and as such, deserves the loyalty and respect of its members. One might even, think of traditions in the community as being “sacred.”

In his book *Law's Empire*, Ronald Dworkin also takes a similarly idealistic stance. He might feel uneasy with the previous description of legal officials as carriers of substantial rationality and endowed with traditional authority. However, Dworkin does argue that we need the (counterfactual) *idea* of a political community expressed in the law to explain the fact that officials or authorities are experienced as having special responsibilities towards the individual members of the community.¹⁰⁴ Let me explore this by again using Hobbes as a stepping stone. The realistic view can never explain our feeling that such officials or authorities should not only keep the subjects in collective awe but should also aspire to serve our common meaningful and normative world. The basic (political) morality of the community, as it is expressed and historically developed in law, is often thought of as a criterion by means of which the authorities can be judged and criticized.

Dworkin argues that we generally feel that authorities have special responsibilities toward members of the community and that the idea that these officials represent a moral community seems to explain and justify this feeling. As we saw before, one of the problems with this is that there is

norms. It is above all, a state of general meaninglessness which deprives people of the possibility to orient and position themselves in the world, in society and in history, in a way that provides their lives with stability and direction.” Zijderveld, *The Institutional Imperative*, pp. 83, 96.

¹⁰³ Luban, *Legal Modernism*, pp. 14-16, 34; Gaakeer, *Hope Springs Eternal*, pp. 39, 40.

¹⁰⁴ Dworkin, *Law's Empire*, pp. 173-175.

always the danger of seeing such a community in religious or metaphysical terms. But how else can we then explain the special responsibility of the officials to the community? As Dworkin says, “The community should be seen as a distinct moral agent because the social and intellectual practices that treat community in this way should be protected.”¹⁰⁵ Thus seeing the community as a “distinct moral agent” does not, according to Dworkin, amount to a metaphysical vision; it might be better thought of as an ideal that legal professionals should aspire to. Legal professionals should act as the guardians of this ideal community and should aspire to let the law, as the expression of this moral agent, “speak through them.” By thus protecting the independent authority and autonomy of the law, they protect the specific community that the law makes possible. This aspiration makes the legal institutional order and its practices highly valuable, and as such, they are worthy of respect. If we give up this aspiration we seem to be left with fear alone.

Since dynamic and fleeting modern societies¹⁰⁶ can give rise to a large degree of pluralism and concomitant moral and ethical controversy, legality, and the community that it makes possible, can become an ever more important means for coordinating behavior and for settling social and political conflicts. As long as the law remains a set of uncontroversial and authoritative norms and principles, society can for the most part be normatively divided and variable. Thus the authority of law plays an important mediating and integrating role in dynamic and pluralist modern societies. However, as the role of law can be expected to become *more* important in modern societies, the authority (and autonomy) of the law needs to be ever more carefully guarded. The loss of legal authority could amount to the loss of an important last source of shared communal meanings and norms in otherwise already relatively unstable modern societies.

¹⁰⁵ Dworkin, *Law's Empire*, pp. 187, 188; “The result is that in the administration of justice civil society is explicitly posited as a whole within the life and action of its members.” Kolb, *The Critique of Pure Modernity*, p. 107; cp. Hegel, *Philosophy of Right*, § 229; Taylor, *Hegel*, p. 439.

¹⁰⁶ Cp. Friedman, *The Republic of Choice*, p. 200; Berman, M., *All that is Solid melts into Air*, The Experience of Modernity, Penguin Books London 1988; Giddens, *The Consequences of Modernity*.

Anthony Kronman realizes that in modern pluralistic societies there is less and less communality for the law to work with. Nevertheless he presents us with an exemplary lawyer that commits to the good of the community: the “lawyer-statesman.” The promise of this professional is that he aspires to excel in what Kronman calls “political deliberation,” which is always guided by the “preservation or improvement of some collective enterprise.”¹⁰⁷ In whatever setting it occurs, “political deliberation always aims at the good of a community.” Moreover, political deliberation and negotiation center on the question of, not what the parties’ interests and values *are*, but what those interests and values *ought to be*, considering the fact that political decisions are aimed at the good of the community.¹⁰⁸ The ideal of political fraternity aims at establishing emotional bonds among the members of the community and helps to counteract the destructive forces that “threaten our fragile human works.” The wise political judgment is the one that can inspire conflicting parties to this good of political fraternity. This is an important good because it makes possible respect and concern for all sorts of different interests and also a willingness to reconsider one’s own values and interests. Thus, “the law is a public calling which entails a duty to serve the good of the community, and not just one’s own good or that of one’s client.”¹⁰⁹

Both one’s own values and interests and those of others are seen in the light of the important value of the preservation or improvement of the collective enterprise of the political community. The enterprise can only be served by the ideal of political fraternity for this keeps our minds and hearts open to common meanings and values that can bind us in our modern pluralist societies, if only occasionally and temporarily. The idealist, contrary to the realist, refuses to give up on the hope of shaping the political order into a political community.¹¹⁰

¹⁰⁷ “For when a community is divided by a contest among incommensurable values important enough to place its identity in doubt, it is in the preservation of political fraternity that the public good largely consists.” Kronman, *The Lost Lawyer*, p. 99.

¹⁰⁸ Kronman, *The Lost Lawyer*, pp. 88, 91.

¹⁰⁹ Kronman, A.T., ‘The Law as Profession’, in: Rhode, D.L. (ed.), *Ethics in Practice*, Lawyer’s roles, responsibilities and regulation, Oxford University Press Oxford UK 2000, p. 31; cp. Parsons, ‘A Sociologist Looks at the Legal Profession’, in: *Essays in Sociological Theory*, p. 384.

¹¹⁰ Cp. White, *Acts of Hope*; Gaakeer, *Hope Springs Eternal*.

Hermeneutics and judgment

Authoritative settlement of conflict requires that both the directly involved and more remotely interested parties experience the legal verdict of the law as both legitimate and definite. The legal professional is supposed to end, or help to end an argument or conflict, and he should leave no space for further escalation. If the professional can persuade the conflicting parties to recognize the common good by means of his judgment and decision, this is the best chance he or she has for a successful solution. To find this common good in particular cases, the good that can bind the conflicting parties, the professional will require cultivated judgment and “practical wisdom.” The mechanical application of formal legal knowledge to individual cases will never do because finding the common good requires the capacity to construct the common meanings and values that the law – and the moral community that it makes possible – consists of in the particular case. It requires coming up with solutions that promote order and community.

Generally, members of a community are brought up with basic shared understandings that bind their community.¹¹¹ This also applies to the officials who are made responsible for the settlement of conflicts in society: the legal professionals. Normally these shared values can remain unconscious as individuals orient their behavior and actions towards them in a “natural” way. They just know how to behave and act within this community, and they most certainly also know how to judge the behavior and actions of others based on these shared understandings.¹¹²

A naturalist or “physicalist” scientific approach seems not to be very fruitful if we try to construct a theory about the meaningful normative order that constitutes the community. But “the brute problem of incorporating meaning into a physicalist’s universe lies heavily across the landscape,” as

¹¹¹ Cp. Berger & Luckmann, *The Social Construction of Reality*, pp. 129-163.

¹¹² Members in the community generally cannot make this knowledge completely explicit in the sense of knowing *that*; this is the difference between practical and scientific knowledge. Cp. Geertz, C., *Local Knowledge*, Basic Books New York second edition 1985; cp. Fish, S., *Doing What Comes Naturally*, Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies, Duke University Press Reprint edition 1990.

Simon Blackburn writes.¹¹³ Both meaning and values are thought of as too subjective to be suitable objects of objective knowledge. From the perspective of modern science, the meaningful normative order that we need to recognize is both subjective and thoroughly relative to a community or tradition of shared beliefs. This means that only *within* such a community can we experience the shared understandings and values that belong to it. From the “outsider” perspective of modern science, the qualities of objectivity and universality are unattainable for these meanings and values.¹¹⁴ The scientific approach will tend to try to explain the cultural realm by “reducing” or “translating” it into something else, something that is a suitable object of scientific research.¹¹⁵ In the process, both the semantic and the normative aspects will be destroyed.

However, legal professionals have to keep a close eye on the developments in the shared understandings of the community in order to guard the authority of the law. If the subjects are to recognize themselves in the law, the legal officials need to show sensitivity for meaningful social order, for the shared meanings and values in the community. What we seem to need, then, is a non-naturalist scientific method that does justice to the specific semantic and normative nature of cultural phenomena. That is why Ronald Dworkin does not refer to lawyers as scientists but as “philosophers.” According to Dworkin, “Lawyers are always philosophers” since they are working within a realm that does not allow for scientific knowledge but only for the analysis and exegesis of authoritative meanings and norms. This practice always involves theorizing about the legitimacy of the law and about how the law as a whole fits the most basic arrangements of the political community.¹¹⁶

From the present perspective, the methods of “analytic philosophy” do not seem to be very helpful for the legal professional because they take a rather

¹¹³ Blackburn, S., *Spreading the Word*, Groundings in the Philosophy of Language, Oxford University Press Oxford UK 1984, p. 281.

¹¹⁴ Unger, *Knowledge and Politics*, pp. 112-114.

¹¹⁵ “So we very often find these social changes explained in terms of the desire for greater wealth, or power, or the means to survival or control over others. Though these things can be woven into moral ideals, they need not be, and so explanation in terms of them is considered sufficiently “hard” and “scientific.”” Taylor, *The Ethics of Authenticity*, p. 20.

¹¹⁶ Dworkin, *Law's Empire*, p. 380.

“detached” or “disengaged” stance toward meaningful normative order. Analytic philosophy generally tends toward a Kantian attitude and searches for a rather high level of abstraction. Thus, there is a danger of abstracting away from the rich and complex (both concrete and particular) shared understandings that we are interested in here.¹¹⁷ Moreover, the analytical method also consistently works from the distinction between facts and norms, and this also leads to a fundamental distortion of the phenomena the legal professional is interested in. Compare Alfred Ayer in his famous *Language, Truth and Logic*: “The function of the relevant ethical word is purely ‘emotive.’ It is used to express feelings about certain objects, but not to make any assertion about them.”¹¹⁸ Meanings are analyzed as “concepts” and the normative is, just as in the scientific approach, a subjective matter.

The basic point here is that the analytical philosopher keeps a relatively disengaged view; he tries to keep a critical distance and not take a completely internal view.¹¹⁹ The analyzing mind does not completely “open up” to the normative force of the meanings that he investigates. He does not let himself be “formed” by it, because he remains at a critical – one might say Kantian – distance. But the authority cannot always afford such a distanced view. He needs to bridge the gap between the critical detached philosopher and the meaningful normative order. And because he needs a method that does justice to the rich semantic and normative aspects of social reality, he needs to make the distinction between facts and values relative.. Such a method starts from our experience or perception of the world as both a rich, meaningful and

¹¹⁷ Cp. Cohen, *The Dialogue of Reason*, An Analysis of Analytical Philosophy, Clarendon Press Oxford 1986, p. 11; Putnam, *Reason, Truth and History*, p. 110.

¹¹⁸ Ayer, A., *Language, Truth and Logic*, Penguin books London 1990, p. 110; “If the question of fact and value is a forced choice question for reflective people, one particular answer to that question, the answer that fact and value are totally disjoint realms, that the dichotomy ‘statement of fact or value judgment’ is an absolute one, has assumed the status of a cultural institution. [...] The view that there is no fact to the matter as to whether or not things are good or bad or better or worse, etc., has, in a sense, become institutionalized.” Putnam, *Reason, Truth and History*, pp. 127, 128.

¹¹⁹ For instance, H.L.A. Hart as a legal philosopher (and according to his preface “descriptive sociologist”) can be said to take, in his *Concept of Law*, a “moderately internal” view. Hart, H.L.A., *The Concept of Law*, Oxford University Press Oxford UK 1960, pp. v, 86-89, 99; Martin, M., *The Legal Philosophy of H.L.A. Hart*, A Critical Appraisal, Temple University Press Philadelphia 1987, pp. 20-25.

indiscriminately evaluative world, and that allows us to view moral reactions as more than subjective or “emotive” gut reactions.¹²⁰ Exploring from such a committed internal or “hermeneutical” perspective, we find that humans are irresistibly given to accord certain things moral significance. According to Charles Taylor, this means we are irresistibly given to experience such meanings and norms as “objective.”¹²¹

It seems that we cannot but fundamentally distort our experience of our social world when we make a distinction between facts that we can objectively describe and values that are merely subjective and emotive. A complete understanding of this shared meaningful normative reality is only possible if one really “opens” oneself to it and does not abstract away or “disengage” from it in analytical or scientific reasoning. By contrast, we have to *engage*, to be prepared to let ourselves be formed by it such that it enriches our horizon, our perspective on things. And we must be prepared to investigate critically the prejudices that make it impossible for the meanings and values to enrich us; prejudices that close us off from these meanings and values.¹²²

To take seriously the idea that legal authorities have special responsibilities with regard to the community that the law makes possible seems to demand a sincere commitment or engagement with the law as a “nomos.” This requires a committed and engaged approach to our collective social reality and to the sources of the law and to legal history and tradition. Social reality, and its legal sources, history and tradition, only yield its rich content when one submits to its authority over us.¹²³ This is not submission to authority in the sense of a blind obedience to commands. The authority is ultimately based on “an act of acknowledgement.” It is based on the acknowledgment that there might be superior knowledge available in some source (persons or texts) and on the fact that one trusts the better insight of others. But, like Goethe said, such authority must be earned.¹²⁴ The

¹²⁰ Unger, *Knowledge and Politics*, pp. 107, 109, 110; Unger, *Law in modern society*, p. 76; cp. Rorty, R., *Philosophy and the Mirror of Nature*, Princeton University Press Princeton NJ 1979, pp. 363-365.

¹²¹ Taylor, *The Sources of the Self*, pp. 7, 8, 346.

¹²² Gadamer, *Truth and Method*, p. 269.

¹²³ Gadamer, *Truth and Method*, p. 279.

¹²⁴ Quoted in Berman, *Law and Revolution*, p. 6.

knowledge that such authorities make available can always be discovered to be true (or false), and it is therefore always ultimately the *content* and not the source that legitimizes the authority.¹²⁵

As argued before, the legal tradition can be seen as the product of a long-standing collective effort of legal professionals to find (or construct) the moral community that binds individual members. The law as a living tradition or history can be seen as “an argument extended through time in which certain fundamental agreements are defined and redefined.”¹²⁶ The law can thus be seen as the legally developed “core” of our common meaningful and normative world, diligently researched and elaborated upon by generations of committed lawyers and legal scientists. By the collective effort of the legal community, law has been made into an important source for shared understandings of the community and as such it deserves to be an authoritative text for both individual members and legal professionals. The law can be seen as the product of the continual confrontation of a specifically legal “depository” of rules, principles, concepts, procedures and institutions with the particulars of a wide range of conflicts in society. The collective experience of this confrontation of the universal with the particular through time, in which the tradition is constantly adapted to new problems in an orderly and piecemeal way, is deposited into a tradition and thus handed down to us.

“We are always situated within traditions,” Hans Georg Gadamer argues in his *Truth and Method*. Ronald Dworkin echoes these words when he says, “Interpreters think within a tradition from which they cannot wholly escape.”¹²⁷ Gadamer argues that every judgment we make derives from the “prejudices” or the “foreknowledge” that we receive in our socialization within a community, through our education and experiences. The legal professional thus works from the prejudices instilled in the study of and experience with the law, and as well, the shared understandings embodied in the law’s traditions. The legal tradition and its sources are authorities that

¹²⁵ Gadamer, *Truth and Method*, p. 280.

¹²⁶ Kelley, *The Human Measure*, p. 281.

¹²⁷ Gadamer, *Truth and Method*, p. 282; Dworkin, *Law’s Empire*, pp. 61, 62.

have been handed down to us, and such authority must have power over us.¹²⁸
Compare Anthony Kronman:

“Every activity has a past. Every activity therefore has a history, which can be studied and written down in books. I am sure that even pinmaking has been studied by historians. But the law has a special relation to the past. The law’s past is not merely something that can be observed from the outside; it also possesses value and prestige within the law itself. [...] To enter the legal profession is therefore to come into an activity with self-conscious historical depth, to feel that one is entering an activity that has been long under way, and whose fulfillment requires collaboration among many generations. It is to know that one belongs to a tradition.”¹²⁹

According to Gadamer the justification of such a tradition, although it in large measure determines our institutions and attitudes, is beyond rational grounding.¹³⁰ Nor can we, in the modern world, find any other metaphysical foundation for it. It used to be thought that we needed such a metaphysical grounding to account for the special significance that the tradition has for us. For example, there have been impressive efforts to ground the development of the legal tradition in some metaphysics of history, like Vico, Hegel and Marx. But now philosophy or science is generally thought to be incapable of providing us with such a warrant.¹³¹

The absence of such a warrant should not seduce us into ignoring what traditions can teach us. If we refuse traditional authority, and take a too distanced and disengaged view, we close our consciousness to tradition’s

¹²⁸ Gadamer, *Truth and Method*, p. 281; Burke famously argues for the procedure of relying on prevailing habit, established norms, institutions and procedures rather than on rational argument. Hence Burke’s defense of what he calls “prejudice.” “Prejudice is of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue, and does not leave the man hesitating in the moment of decision, skeptical, puzzled and unresolved. Prejudice renders a man’s virtue his habit, and not a series of unconnected acts.” Quoted in MacIntyre, A., *A Short History of Ethics*, A History of Moral Philosophy from the Homeric Age to the Twentieth Century, Routledge London 1989, pp. 228, 229.

¹²⁹ Kronman, ‘The Law as Profession’, in: Rhode, (ed.), *Ethics in Practice*, p. 31.

¹³⁰ Gadamer, *Truth and Method*, p. 281.

¹³¹ Taylor, *The Sources of the Self*, p. 346; Unger, *Knowledge and Politics*, p. 115; Kronman, *The Lost Lawyer*, p. 61.

meaningful and valuable contents. In the words of Kronman, you need to *care* for the law and its meanings/values to become a good lawyer. You need to be an *amateur* in the literal sense of the word, and aspire to become a “connoisseur.”¹³² We can rely on an amateur to always be critical of something he really cares for: he would never allow insufficiencies and shortcomings to damage it. Moreover, such an “amateur” cares for the law as a source of meanings and values that are goods in of themselves, “ultimate goods,” and most certainly *not* as a means to some outside goal (or worse, personal material gain). This might explain why we generally fear that amateurs will lose their love for the activity when they start to earn a living from their expertise, which thus becomes “professionalized.” The long-standing discussions on professionalized sports and the traditional Olympic dream serve as a good illustration.

True amateurs, though, will never take a cynical or even completely distanced and reserved view of the law because that would mean they stop caring for it. Only when one cares for a certain activity, and if one opens oneself up to the meanings and values that constitute it, can that activity reveal its wealth to the fullest extent. The same goes for the practices of the law. One needs to become an “amateur of the law,” and study it diligently and with commitment – accepting the authoritative standards of evaluation internal to this practice and submitting to the established guidelines – to really *understand* it.¹³³

In settling conflicts, professionals therefore consciously focus on the question of how, in a particular case, the law can structure the interactions in such a way that community can be realized. In a conflict, this means bridging the gap between the universal and the particular, between the law and individual parties with their own private goals and interests. In other words, it means giving substance to abstract or formal rules and principles. Bridging this gap requires what we might call “good judgment” or “prudence,” and we generally do this by searching for a good “fit.”¹³⁴ Good judgment is what someone who has a cultivated and broad vision of things is capable of. Any

¹³² Kronman, *The Lost Lawyer*, p. 108; cp. Frankfurt, H.G., *The Reasons of Love*, Princeton University Press Princeton NJ 2004.

¹³³ Kronman, *The Lost Lawyer*, p. 140.

¹³⁴ Dworkin, *Law's Empire*, p. 230; Ricœur, P., *The Just*, Chicago University Press Chicago 1995, p. 113; cp. Unger, *Knowledge and Politics*, pp. 97, 148.

wise person who can unite quarrelling members of the community in a bond of mutual respect and sympathy can be thought of as having a special gift of practical wisdom. This gift cannot be made into a science because it requires a form of practical wisdom that is not reducible to rules or methods. One is better to think of it as an “art.”¹³⁵

As such, in the classical world, good judgment or practical “worldly” wisdom was thought to be the harmonious realization of human powers that required the “edification” of the whole person.¹³⁶ Cultivated judgment could be expected of someone with character, refined taste, broad knowledge and experience and training in rational and logical reasoning and deliberation. A practically wise person deserves the loyalty and respect of community members for his judgment and is of great worth to the community. Others will look to such a person for leadership on account of his deliberative power, a power that is a matter of disposition and character rather than of mere calculation or simple skill. Such a person deserves to be seen as an authority for he or she can truly act and judge on behalf of the community and, to quote Kronman again, “guard it against the forces of disorder that threaten our fragile human works”¹³⁷ – especially those shared understandings, elaborated into law, that makes a mere “heap” of people into a genuine community.

The ethics of legal authority

The law grants legal professionals – judges, notaries, advocates, and state attorneys – certain competences and immunities such that they are able to act as the guardians of legality and the community that it makes possible.¹³⁸ It has been a central topic in this chapter that the community expects legal officials

¹³⁵ Kelley, *The Human Measure*, pp. 13, 280; Kronman, *The Lost Lawyer*, p. 224; And the constraint will come “from a background of densely shared custom and culture.” cp.

Unger, *What Should Legal Analysis Become?*, p. 62.

¹³⁶ This can be associated with the German ideal of *Bildung*. Gadamer, *Truth and Method*, pp. 9-19; cp. Rorty, *Philosophy and the Mirror of Nature*, pp. 357-372; “We are born barbarians and only raise ourselves above the beast by culture. Culture therefore makes the person; the greater a person the more culture. Thanks to this, Greece could call the rest of the world barbarians. Ignorance is very raw – nothing contributes so much to culture as knowledge. But even knowledge is coarse if without elegance. Not alone must our intelligence be elegant, but also our desires.” Gracián, *The Art of Worldly Wisdom*, p. 36.

¹³⁷ Kronman, *The Lost Lawyer*, pp. 15, 167.

¹³⁸ Nisbet, *The Sociological Tradition*, pp. 125, 130.

to be committed and loyal to the legal community they represent. Because the nature of professional judgment is complex and context-dependent, and because solutions cannot be spelled out in advance, we entrust greater autonomy to legal professionals than people ordinarily have in their jobs. The professional serves as a prototype of a high-trust and relatively unregulated (non-bureaucratic) occupation.¹³⁹ In return, like Dworkin argues, legal officials are generally thought to have special responsibilities towards the community. We might add that, in the political field, authority and overt cynicism about the binding meanings and values of the community do not readily combine. According to Bourdieu, “The group only fully accepts those who publicly show that they recognize the group. The sanctions of political scandal will inevitably befall the spokesperson who is disloyal, who does not really give the group what the group’s recognition is worth to him.”¹⁴⁰

Above I discussed the fragility of authority. Authority figures often represent a huge collective power and the authority is only trusted with this power when he is (seen as) employing this power to further the common good. Legal professionals should therefore prove themselves “worthy” of their special power, status and privilege, because only this makes them trustworthy or reliable in the eyes of those who subject themselves to their authority. Moreover, some of the specific competences and immunities (or privileges) are explicitly granted to make it possible for these professionals to really commit themselves to the law in a way that we do not normally expect from ordinary job-holders.

We want legal professionals to be dignified, disinterested and independent in their judgments and actions. To begin with there should be no social or economic need for professionals to put their personal monetary interests ahead of their loyalty to the law. The independent institutional position of these professionals makes it possible to honorably and virtuously serve the law without being obliged to continually attend to personal and private interests.¹⁴¹ If with Bourdieu we think of “autonomy” as a liberation from all external constraints, it is in the first instance the economic, social and

¹³⁹ Fukuyama, *Trust*, p. 223.

¹⁴⁰ Bourdieu, *Practical Reason*, p. 142.

¹⁴¹ Parsons, ‘The Professions and Social Structure’, in: *Essays in Sociological Theory*, pp. 35, 42; Nonet & Selznick, *Law & Society in Transition*, p. 57.

institutional independence of the professional legal functionaries that makes “autonomous law” possible. This means at least that legal professionals should carefully cultivate an aura of disinterestedness. In the paradoxical words of Bourdieu, they have an “interest in disinterestedness.”¹⁴²

Anthony Kronman tries to guard the moral aspect by describing it as a “higher order interest” that makes the transcendence of private and particular interests possible.¹⁴³ The ethos of disinterestedness makes it possible for the participants in the proceedings to see the professionals as fulfilling a higher vocation, as letting the common good be their guiding voice. We can now understand why these professionals generally distinguish themselves meticulously from the utilitarian ethos of the commercial classes in modern society. Legal professionals try not to be motivated in their actions by particular and private economic concerns, and they resist both the “commodification” of their output and the description of legal practices in the jargon of business administration.¹⁴⁴ We can also understand why the ethos of legal professionals can never be but incompletely democratic: it is next to impossible for the lawyer to accept that the rightness of a legal judgment can be the object of subsequent democratic discussion and authorization by some arbitrary democratic majority.¹⁴⁵ Compare Nonet and Selznick:

“In interpreting and applying the law, jurists are to be objective spokesmen for historically established principles, passive dispensers of a received, impersonal

¹⁴² Bourdieu, P., *The Field of Cultural Production*, Essays in Art and Literature, Polity Press Cambridge UK 1993, pp. 112, 113; cp. Bourdieu, *Practical Reason*, pp. 75, 143; Bourdieu, P. *The State Nobility*, Stanford University Press Stanford Ca 1996, p. 382; Bourdieu, P., ‘The Force of Law’: Toward a Sociology of the Juridical Field, *The Hastings Law Journal* vol. 38 July 1987.

¹⁴³ Kronman, *The Lost Lawyer*, pp. 32, 54, 101, 374.

¹⁴⁴ “Lawyers [...] lobbied for friendly regulation and the like, not because they believed in a corporatist state, but in defense (they claimed) of the public good; they spoke as little as possible of self-interest, and when they did, they defined it in individualistic terms. Excessive or unfair competition were evils because (among other things) they threatened the independence of the practitioner, reducing a profession to a mere business and a free worker to a serf.” Friedman, *The Republic of Choice*, pp. 76, 77; cp. Posner, *Overcoming Law*, p. 56.

¹⁴⁵ Brint, *In an Age of Experts*, pp. 8, 16, 124; Kronman, *The Lost Lawyer*, p. 155.

justice. They have a claim to the last word because their judgments are thought to obey an external will and not their own.”¹⁴⁶

External will is the “will of the law,” not public opinion or the will of some contingent majority. This claim to fundamental “rightness” in legal matters means that there is a certain legal truth about the matter that can be found by means of hermeneutical exegesis of the relevant legal materials and by means of good judgment.¹⁴⁷ Rightness in legal matters is not the product, nor the object, of subsequent democratic wheeling and dealing. Ideally, the law is “above” politics and its democratic procedures and decision-making, as well as “above” economic motives and calculation. One might even very well argue that it is the law that makes orderly and constructive democratic argument and decision-making possible in the first place. The law and its institutions are part of the “social and cultural walls” that keep the interaction in civil society within bounds. At the same time, the law also keeps in check those democratic majorities that can avail themselves (through legislative and executive means) of the huge power of the modern state.¹⁴⁸

Legal professionals should guard the law and the common good that they represent against all sorts of partial and particularistic interests, and this demands personal professional disinterestedness and independence. This disinterestedness and independence makes a credible and convincing loyalty and commitment to the law possible. Legal professionals should obey – or even *be* – the voice of the law.¹⁴⁹ In the following I will argue that, ideally, the commitment of the lawyer concerns his whole personality and that the distinction between private and public is highly relative from this perspective. The public role and the ethos that it requires should become his “second nature.”¹⁵⁰ The legal professional identifies strongly with his role, with the law and the public good, if necessary with the sacrifice of his own private

¹⁴⁶ Nonet & Selznick, *Law & Society in Transition*, p. 57.

¹⁴⁷ Cp. Kennedy, *A Critique of Adjudication*, p. 364.

¹⁴⁸ Nisbet, *Twilight of Authority*, pp. 44, 66; Kennedy, *A Critique of Adjudication*, pp. 5, 27, 56, 57.

¹⁴⁹ Cp. Bourdieu, P., *Distinction, A Social Critique of the Judgment of Taste*, Routledge London 1984, pp. 23, 24.

¹⁵⁰ Cp. Berger & Luckmann, *The Social Construction of Reality*, pp. 138-163.

interests. In the traditional view this requires the building of character and a perfectionist virtue-ethics.

We can start by contrasting Jane Jacobs's idea of the "commercial ethos" of the merchant classes with the "guardian ethos." The latter can be associated with the political realm and Jacobs characterizes it as respect for hierarchy and tradition, high regard for honour, obedience, loyalty, discipline and commitment.¹⁵¹ The legal professional is entrusted with special powers and competences that give him considerable security, income and status in society. But in return the legal professional "gives himself" to the law.¹⁵²

The ideal of self-sacrifice is intimately connected to the ideas of "noblesse oblige" and professional "honor." *Noblesse oblige* means that it is part of the definition of the good lawyer to be disinterested and devoted to the common good. When the professional ethos has become his second nature he cannot be otherwise; it is "stronger than him."¹⁵³ Ideally, an authority figure should invest his professional "honor," which can hardly be distinguished from his personal honor, in serving the community and subordinating his personal particular interests. The idea of honor has an important function here. In the words of Bourdieu, "The ethic of honor bears down on each agent with the weight of all the other agents."¹⁵⁴ The authority should regard the honor that will be granted by his peers, his "confrères," as his greatest price, and his reward is therefore "spiritual," or at least "immaterial." The material fees or compensation that he *does* receive should be experienced as benefiting the community as a whole. The idea of honor and noblesse oblige also connect to the idea of professional pride, which also helps to arm the professional against powers in politics or civil society who try to bend the law their way.

¹⁵¹ Jacobs, J., *Systems of Survival*, A Dialogue on the Moral Foundations of Commerce and Politics Vintage Books New York 1994, p. 24, 215; Durkheim sees "the spirit of discipline" as the fundamental element of morality. Durkheim, *Moral Education*, p. 31.

¹⁵² Cp. Berger & Luckmann, *The Social Construction of Reality*, p. 145; Kennedy, *A Critique of Adjudication*, pp. 3, 4.

¹⁵³ Lenski, *Power and Privilege*, p. 29; Brint, *In an Age of Experts*, p. 8.

¹⁵⁴ Bourdieu, *The Logic of Practice*, p. 110; An honor code implies a strong concern with the opinions of the peers and it is rigid in subordinating personal choice or interest to the demands of norms shared in the peer group. Honor requires men to conduct themselves in patterned ways and they are not to accept personal insults meekly. Indeed, "codes of honor have a distinct aristocratic flavor." Friedman, *The Republic of Choice*, p. 41.

“Pride is the crown of all virtues,” Aristotle argued, and according to Roberto Unger the core of the virtue of “pride” is the refusal to acknowledge your dependence upon other people’s opinion of you and the wilful assertion of the worth of your project against all constraint and adversity.¹⁵⁵ When a person is thought to be virtuous in the sense of unfalteringly keeping his eye on the good, we grant him the (professional) pride of doing so. The sociologist Peter Berger provides another important aspect: the professional qualities and virtues enjoined by honour “provide the link between self and community.”¹⁵⁶ The ideal lawyer, that is to say his “superior essence,” identifies strongly with the good of the community as a whole, and the good lawyer invests both his personal honour and professional pride in this commitment. Because he wants to live up to this essence, this lawyer would experience it as shameful if he is exposed as an opportunist and a “fraud.” Because authority is both fragile and fleeting in modern societies, he will try to live up to his essence and failing to do so would mean losing face in the community. Thus honour and pride are highly social dispositions and require a public.¹⁵⁷ Like Berger states, these dispositions link the lawyers both to the community of lawyers and to the larger community that the law makes possible.

Generally people feel that communal values are not for sale, and this might explain why the “selling out” of basic values by one of the community members is a threat to the group as a whole.¹⁵⁸ As the law is supposed to be the expression of the shared understandings binding the community, loss of professional honor is loss of face within the larger community. This goes *a fortiori* within the legal community. Since it is professional honour and pride

¹⁵⁵ Aristotle, *The Nicomachean Ethics*, Oxford University Press Oxford UK 1980, p. 91; cp. Unger, R.M., *Passion, An Essay of Personality*, The Free Press New York 1984, pp. 199-202.

¹⁵⁶ Berger, P., ‘On the obsolescence of the concept of honor’, in: Hauerwas, S., & MacIntyre, A., *Revisions, Changing Perspectives in Moral Philosophy*, University of Notre Dame Press Notre Dame Indiana 1983, p. 174; Berger, Berger & Kellner, *The Homeless Mind*, pp. 83-96.

¹⁵⁷ Cp. Elster, J., *Alchemies of the Mind, Rationality and the Emotions*, Cambridge University Press Cambridge UK 1999, pp. 203-207.

¹⁵⁸ “There is no private ownership of values. That would contradict their communal origin.” Aubert, *The Hidden Society*, p. 90.

that binds the community of professionals, loss of honour is loss of face in this community as well. Thus, the authority should take seriously the professional virtues that are highly regarded as means to a worthy and valuable professional life. The community will generally praise and reward any citizen who lives a virtuous life, but it will especially praise authority figures who make these virtues their “second nature.” In order to deserve the trust of those who submit to their authority, these figures will have to aspire to an exemplary and “perfectionist” ethos, that is to say, realizing the ideal of the “superior essence” – or the ideal standard of professional “excellence” – of being a lawyer.

But legal professionals are constantly at risk of succumbing to pressures from outside forces. As I stated before, they are at the forefront in the pacification of society and as such constantly confronted with power-play and violence whether of a physical or of a more symbolic nature. Moreover, to do their work well, professionals often are required to have “guilty knowledge” – knowledge of illegalities, or the immorality of those they are confronted with in their practice. These requirements further encourage the emphasis in professional culture on trust, discretion, judgment and character.¹⁵⁹ To function well under such circumstances requires what one might call a “mild state of mobilization”¹⁶⁰ on the part of the professionals involved. This is perhaps most obvious in the case of the police, but it applies throughout the legal world. Accordingly, like armies these institutions are hierarchically organized and share other characteristics as well. For example, legal professionals are thought to be “officers of the court” who reside in “palaces of justice” wearing uniforms and interacting in a highly formal and ritualistic way. The hierarchy is functional to make it possible for the law to speak with *one* united voice, and generally to make it act (at least in they eyes of the public) authoritatively as a consistent and impersonal whole. To this effect, also, all sorts of symbolism, rituals and procedures are invoked.

Legal professionals are not in the business of the exercise of naked power but of *authority*, which is, in the end, nothing more than a set of legitimating “ideas” added to power. These ideas are to be made concrete and manifest by means of symbols, uniforms, rituals, etc., and thus the powers that the parties

¹⁵⁹ Brint, *In an Age of Experts*, p. 27.

¹⁶⁰ Cp. Taylor, *Hegel*, p. 458.

are confronted with become to be seen as “authorized.” The authority of the law (the value of legality) is the means to order, and as such, the roles, formalities and rituals that symbolize this authority command the respect and loyalty of all court officers and all parties involved in legal procedures, as well. Through this respect they show respect for the law. Importantly, all these “forms” that make it possible for the officials to interact in a highly formal and ritualistic way function as powerful constraints upon passions that can be evoked in the conflict at hand.¹⁶¹ The whole ritual is performed to set it apart from other practices and activities, and to make sure that everyone is well aware that only certain arguments and certain behavior will be acceptable and valid in this context. The relations between all the participants in the legal procedure need to be formalized to some degree to make the ongoing discussion fair and the final decision authoritative and definite.

“Conventions are rules for behavior at a distance from the immediate desires of the self,” argues Richard Sennett in his book *The Fall of Public Man*.¹⁶² Through the conventions, forms and rituals a “new reality” is created, a reality in which the hierarchy and exercise of authority is made visible and in which the roles that the different participants play can “transform” the persons who are forced to behave formally and ritualistically or who are thus addressed.¹⁶³ Considering the fact that the parties are involved in a (possibly) highly destructive conflict with one another, conventions and formalized rituals are necessary to make everyone behave and argue with a certain distance from their anger and frustration. In this possibly explosive confrontation the parties involved “can be sociable only when they have some protection from each other; without barriers, boundaries, without the mutual distance which is the essence of impersonality, people are destructive.”¹⁶⁴

¹⁶¹ Nisbet, *Twilight of Authority*, pp. 31-32.

¹⁶² Sennett, *The Fall of Public Man*, p. 266.

¹⁶³ Bourdieu, *Logic and Symbolic Power*, pp. 119, 122, 123, 126, 168, 170, 192; Berger & Luckmann, *The Social Construction of Reality*, pp. 138-163; cp. Hacking, *The Social Construction of What?*, p. 58.

¹⁶⁴ Sennett, *The Fall of Public Man*, p. 311; The refined “taste” for conventions, formalities and rituals of the legal professional can even be said to be a typically aristocratic virtue. The ceremonial trappings, the discipline of legal reasoning with its requirements of orderliness and precision can be thought of as aristocratic (and rather anti-democratic) virtues and sentiments. Kronman, *The Lost Lawyer*, p. 155.

To conclude, what these forms make possible is “distance.” The officials distance themselves from the parties involved in a conflict such that they can judge them impersonally and objectively. There can be no doubt that the relationships within the legal proceedings are *not* relations between equals. The officials represent the law, and the law is “above” society with its individual members and collectivities. The law certainly is above the litigants and parties involved as it has an authority they should obey.¹⁶⁵ Indeed, the law appears above the parties in both a figurative and a literal sense. Of course, from the perspective of the litigants the judge represents a huge collective power. In the person of the judge, “a superior power appears before the litigants, one which transcends the confrontation of private worldviews.”¹⁶⁶ To make this concrete the judge is also literally placed on a dais to represent the fact that he or she is above the particular concerns and interests in society and is the guardian of the law and the community.

Because authority is fragile, the professional should distance him or herself from the particular perspectives of the parties involved and be prepared to let the law prevail. This also goes for the attorney at law. Talcott Parsons writes that the advocate represents the law rather than the client and this means that he should resist the powers that he is under to make sure that the client gets what he wants.¹⁶⁷ Only if the law commands admiration and respect can it be expected to fulfill its function in modern societies. Those who do *not* conform should duly fear the law and its functionaries. State agents, such as the police, can be authorized by the law to (re-) create a lawful situation, if necessary by means of physical force. It is exactly because the law should arouse both respect and fear in the public that we can explain why an almost “military” dedication to the “higher cause” is demanded from legal professionals. After all, how are they supposed to be consistent and credible combatants for law and order if they do not admire and respect (and fear) the law themselves?

¹⁶⁵ This fact, in principle, invokes in the officials an “aristocratic sense of distance.” Kronman, *Max Weber, Jurists: Profiles in Legal Theory*, Edward Arnold London 1983, pp. 44, 46.

¹⁶⁶ Bourdieu, ‘The Force of Law, Toward a Sociology of the Juridical Field,’ p. 831.

¹⁶⁷ Parsons, ‘A Sociologist Looks at the Legal Profession’, in: *Essays in Sociological Theory*, p. 384; Kronman, *The Lost Lawyer*, pp. 71, 72, 145.

We might say, then, that what is patriotism for the citizen of the nation state is love of the law as represented by the legal professional. Of course, there is an “interest in the disinterested” dedication to the common good, but with Kronman we can say that this is an interest of a special sort. It is “a higher order interest we take in our ideals, the aspirational norms we think should guide our more immediate preferences even when they do not.”¹⁶⁸ We can now truly say that the law is a “calling.”¹⁶⁹ From this dedication to an external voice – the vocation or calling – in this case the voice of the law, the recommended professional virtues logically follow. What is needed in the first place is independence and personal disinterestedness. Secondly, what is needed is character to resist all temptation to abuse the professional powers for personal gain at the expense of the community. Both establish the feeling that legal professionals can be trusted with their power. Thirdly, and I explored this in a previous paragraph, what is needed is cultivated or good judgment, which means that the lawyer knows where the good in a particular case lies and how he should act to realize it. These qualities are exactly those that are prized in a traditional professional culture: “a public outlook influenced by noblesse oblige, an emphasis on character and trust, and an insistence on cultivated judgment.” What arises here is akin to an “aristocratic ethos.”¹⁷⁰ Lawyers who find their inspiration in this ideal are the kind of professionals that de Tocqueville hoped would save modern societies from the powers that are unleashed in modern democratic politics.

¹⁶⁸ Kronman, *The Lost Lawyer*, p. 54.

¹⁶⁹ Kronman, *The Lost Lawyer*, pp. 54, 32, 101, 374.

¹⁷⁰ And, indeed, Steven Brint argues that there are deep roots of these traditional ideals of professionalism in the older aristocratic culture. Brint, *In an Age of Experts*, pp. 8, 27, 28, 30; Gertrude Himmelfarb quotes Taine describing this ethos: “A real “gentleman” is a truly noble man, a man worthy to command, a disinterested man of integrity, capable of exposing, even sacrificing himself for those he leads; not only a man of honor, but a conscientious man, in whom generous instincts have been confirmed by right thinking and who, acting rightly by nature, acts even more rightly from good principles.” And she adds: “The gentleman was typically identified by his moral virtues: integrity, honesty, generosity, courage, graciousness, politeness, consideration for others.” Himmelfarb, G., *The Demoralization of Society, From Victorian Virtues to Modern Values*, Vintage Books New York 1994, pp. 45, 46.

3.

Freedom's Formalism

Human beings not only value living in a community of kindred spirits, they also value their individual freedom. Indeed, we live in a modern culture where “rationality,” “freedom” and “human dignity” form an important part of our moral world, and legal institutions and practices have to take these values seriously in order to safeguard their legitimacy. People realize that there are reasonable limits to their individual freedom, but they demand that these limits are as clear and distinct as possible. The demand for respect for individual freedom translates into a demand for fairness, transparency and objectivity in their treatment by legal authorities. “The real consequence of the Enlightenment is [...] the subjection of all authority to reason,”¹ Gadamer writes and, indeed, it can be argued that one Enlightenment ideal is the thorough “rationalization” of the law. In Weber’s terms the authority of the law takes on a “rational-legal” character, and we witness a tendency towards abstraction and generalization.² As a result not only the law, but also legal practices, become more impersonal, formal and abstract. In other words, we witness a tendency toward the “empty universal.”³

¹ Gadamer, *Truth and Method*, p. 278.

² “Government today is formal, bureaucratic, and legalistic; it is rational and instrumental, at least compared to most historical forms of government. It is committed to rules, to legal processes; it rejects the personalism of its predecessors. Fundamentally it rests on universal norms, rather than on the grace and favor of particular holders of power. It outlaws the arbitrary, the ad hoc.” Friedman, *The Republic of Choice*, p. 212; Nisbet, *The Sociological Tradition*, pp. 42, 43.

³ “For Aristotle as well as for Plato, things owed their identity to a universal form that included all particular determinations. The Enlightenment concept of the universal, to the

Liberal culture

Individual freedom requires emancipation from the “chains” of the community and from the grip of all sorts of authorities. In the introduction I argued that the “Enlightenment” could be thought as the self-conscious pursuit of this good by means of reason and modern science. Indeed, Immanuel Kant argues that Enlightenment is “the emergence of man from a state of self-incurred immaturity.” There is no need for man to let others do the thinking *for* him; human beings should dare to think for themselves and thus dare to be free. To quote Kant in full:

“Enlightenment is man’s emergence from his self-incurred immaturity. Immaturity is the inability to use one’s own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have the courage to use your own understanding.”⁴

Beside the fact that rational human beings can think for themselves, Kant also pointed to another important aspect of the fundamental freedom of human beings. The individual actually *should* be free because he or she can behave ethically or morally only if there is a choice to avoid evil and do the moral thing. Only someone with the freedom to act can be held responsible for his or her deeds. Moreover, Kant thought that we could safely trust the individual with this freedom because human beings are “rational,” or at least reasonable beings, and by means of their rationality they can know good from bad, and

contrary, was a rational a priori void of any particular content, a category of thought imposed upon the real, rather than expressive of it. Its formalist character shows a surprising similarity with the universal names that, in nominalist philosophy, the mind imposes upon reality in order to gain purchase on a chaotic multiplicity. [...] Social factors also presented a powerful incentive for stressing the primacy of universal concepts and values over particular differences.” Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 3.

⁴ Kant, ‘An Answer to the Question: ‘What is Enlightenment?’ in: *Political Writings*, p. 54; cp. Foucault, M., ‘What is Enlightenment?’ in: *The Foucault Reader*, pp. 32- 50.

act accordingly.⁵ For Kant the *dignity* of individual human beings lay in their freedom, and in their respect for other people's values and beliefs. Here the central notion is “human dignity.”⁶ The individual human being deserves to be free and equal, and his or her specific interests, desires and projects are therefore worthy of respect. Against the communitarian concern with community and the authority of its shared understandings, Kant embraces the “principle of individualism” and argues for the authority of (formal) reason. Immanuel Kant, along with other modern liberal political philosophers, thus provided us with the “normative” project of the Enlightenment.

In his famous essay *On Liberty*, John Stuart Mill also embraced individualism: “Over himself, over his own body and mind, the individual is sovereign.” But he provided us with a different yet also very influential justification. Mill regarded the free development of individuality as essential to human *flourishing*, generally, and even as an element of all that is designated by the terms civilization and culture. He argued that human powers are exercised and developed only in making a *choice* in particular circumstances. Choice is vital; it makes it possible to develop oneself, to build a life suited uniquely to oneself, to realize the self in free action and exploration. Mill therefore regarded freedom of choice as essential to human development. Moreover, people are all different and “to give a fair play to the nature of each, it is essential that different people should be allowed to lead different lives.”⁷

Mill sings the praises of “originality.” Individuals who dare to be different make it possible for others to identify with and learn from their example, and perhaps even distinguish themselves from each other, as well. He even

⁵ Kant belongs to the tradition of thinkers who believed in a “reason-based morality.”

Unger, *Knowledge and Politics*, pp. 49, 50; cp. Kronman, *Max Weber*, p. 21.

⁶ “If rational control is a matter of mind dominating a disenchanted world of matter, then the sense of the superiority of the good life, and the inspiration to attain it, must come from the agent’s sense of his own dignity as a rational being. I believe that this modern theme of dignity of the human person, which has such a considerable place in modern ethical and political thought [...] will become an explicitly central theme with Kant.” Taylor, *Sources of the Self*, p. 152; Taylor, *The Ethics of Authenticity*, p. 46.

⁷ Mill, J.S., ‘On Liberty’ in: *On Liberty and other writings*, Cambridge University Press Cambridge UK 1989, p. 64; cp. Friedman, *The Republic of Choice*, p. 2; Dale, *In Pursuit of a Scientific Culture*, p. 44.

explicitly connects the achievements of European civilization and culture to the age-old “pluralism” in this corner of the world. In Europe, a great diversity of individuals and cultures have followed different paths, and many have led to something valuable. Thus, within a certain legally defined zone, the individual self is free to cultivate whatever talents or feelings he or she wishes. The other side of the coin is, however, that one is not free to impose one’s values and norms on others through the collective power of the community:

“But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared to what he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing this that can be possessed by any one else.”⁸

This means that, although the community is bound together by a collective respect for the sovereignty of the state and the authority of the law, the modern citizen now demands something in return. He demands respect from the state and from the law for his dignity as a free person and thereby for his personal beliefs, values and interests. Within a community, this demand amounts to a demand for “fairness” in the sense that the individual’s social status and his personal beliefs, values and interests are disregarded and that he receives equal and fair treatment by authorities. The citizen does not demand fair treatment only by the state and its laws,⁹ but it does start there. Only if the state and the law guarantee and protect certain fundamental rights and freedoms can the citizen truly realize his potential and pursue his idea of the

⁸ Mill, J.S., ‘On Liberty’ in: *On Liberty and other writings*, p. 76.

⁹ “The first, in brief, is the citizen’s expectation of fair treatment, everywhere and in every circumstance. Justice here is not merely a matter of courtroom procedures. Justice is, or ought to be, available in all settings: in hospitals and prisons, in schools, on the job, in apartment buildings, on the streets, within the family. It is a pervasive expectation of fairness.” Friedman, *Total Justice*, p. 43.

good life. Consequently, only if the state and the law treat citizens fairly are they prepared to subject themselves to the ultimate authority of the state and its laws. The relation between citizens and the state is thus seen in “contractual” terms.

Thomas Hobbes was one of the first liberal philosophers who saw the modern state as a product of a contract between citizens and the sovereign. He argued that it was in their enlightened self-interest to relinquish their rights and submit to one central authority charged with keeping the peace and settling conflicts rather than take the law into their own hands. What Hobbes argued that everybody should do has, in fact, been largely realized in the modern sovereign state: “The kind of absoluteness in the state that Hobbes demanded as the sole alternative to the state of nature is, and has been since at least the French Revolution, a fact.”¹⁰ As well, since early modernity, Western societies have also become more open and free. We can relate this to the gradual development and spreading of the liberal and constitutional state, which guarantees its citizens certain fundamental rights and protection against the arbitrary employment of power by the state itself.¹¹

Freedom and modernity

This changing moral landscape has consequences for the law and for legal professionalism. However, before going into this I want like to delve a bit further into the changes we associate with “modernity.” It seems naïve to explain these changes from a purely *normative* standpoint because it is not likely that institutional orders come into being simply because they are just. Only a better look at the developments in modern societies from a sociological point of view can provide us with a framework to understand what made the spread and growth of freedom in modern societies possible.

Modern society is experienced by its members as very dynamic and relatively unstable. According to Robert Nisbet, this mutability has, since the

¹⁰ Nisbet, *Twilight of Authority*, p. 63.

¹¹ Liberalism starts from “the precedence of the individual over the state: hence it demands that what it regards as the basic political freedoms of the individual be protected from the state. What these are, is discerned by various routes – for example natural-rights theory, such as Locke’s ‘life, liberty, and property’ or the American Declaration of Independence’s ‘life, liberty, and the pursuit of happiness’. These rights are held to be self-evident. They are also inalienable.” Finer, *The History of Government*, p. 1569.

end of the nineteenth century, been one of the major concerns to preoccupy the founding fathers of sociology. They have all sought explanations for the socio-economic turmoil in modern societies, its resulting fragmentation of traditional communities, and the destruction of the meaningful and normative “fabric” (or culture) of the community. For instance, Emile Durkheim argues that the modern industrial order, and the accompanying ever more intricate division of labor that it entails, is constantly changing. The tumultuous character of modern social life is explained by the impulse towards this complex division of labor. This division that meets modern economic needs by exploiting nature makes industrial production possible.¹² But the modern industrial order has a highly destructive aspect: “What is characteristic of our development is that it has successfully destroyed all the established social contexts; one after another they have been banished either by the slow usury of time or by violent revolution, and in such fashion that nothing has been developed to replace them.”¹³

Another founding father of modern sociology, Karl Marx, also pointed to a destructive power at work in modern societies: capitalism. Capitalism is also an engine that keeps society in constant motion. It does so by constantly generating new consumers goods, new methods of production or transportation, new markets, and new forms of industrial organization. Hence, modern capitalism is a process of continual “creative destruction.” As the technological frontier moves outward, markets expand and new forms of organization emerge. In the process older forms of solidarity are ruthlessly crushed underfoot.¹⁴

Max Weber was a little less pessimistic about modern society. He paired the Marxist analysis of capitalism as a major engine of change and insecurity with the idea that this force seems to be qualified by a continual “rationalization”¹⁵ of social and institutional ordering. Weber thus points to

¹² Giddens, *The Consequences of Modernity*, pp. 11,12; cp. Nisbet, *The Sociological Tradition*, p. 21.

¹³ Durkheim, E., *Suicide*, Étude de Sociologie, Félix Alcan Paris 1897, p. 446; quoted in: Barber, *Strong Democracy*, p. 97.

¹⁴ Schumpeter, J., *Capitalism, Socialism and Democracy*, Georg Allen & Unwin London 1976, pp. 83, 162; Fukuyama, *Trust*, pp. 312, 313.

¹⁵ “For Weber, the transition to modernity takes place largely through increasing rationalization. Rationality denotes following a rule as opposed to acting on impulse or at

what he calls “rational” or “rationalized capitalism” as the major driving force for change. The end result will not be the destruction of capitalism itself, which was prophesied by Marx, but the gradual extension of (state) bureaucracies to cope with the complexities and incongruities of modern social life. These bureaucracies themselves will become an effective and autonomous force in society, and Weber is justly famous for his visionary analysis of the dynamics of the modern “bureaucratic state.”¹⁶

According to Weber, rational capitalism will lead to a growing “pluralism” in modern society. While pre-modern communities were bound together by shared meanings and values, modern societies will see “many old gods ascend from their graves; they are disenchanted and hence take the form of impersonal forces. They strive to gain power over our lives and again they resume their eternal struggle with one another.”¹⁷ Weber argued that the forces of rational capitalism lead to a gradual but irreversible “disenchantment” of the socio-political order, which amounts to a destruction of our sense of the cosmos as a meaningful and normative order, a destruction of the collective horizon towards which people previously oriented their lives. In the modern experience, we do not share a meaningful common perspective on things anymore, nor do we share a substantial moral framework. All shared values in society are thus experienced as precarious and contingent; that is what we mean by “pluralism.”¹⁸ We already saw how Mill praised such pluralism as a source for culture and civilization. The other side of the coin is, of course, that this confrontation amongst value systems might leave them all relative and contingent. This results in uncertainty and insecurity.

Moreover, we seem to have moved from an eternal *static* cosmic order (in which change was slow, incidental and largely deceptive as time was experienced as cyclic in which everything was the “eternal return of the same”) to an experience of time that is like a “runaway train” in which

random. Rationality means consistency in linking our thoughts or statements, creating the logical order of premise to conclusion. It also means consistency in linking our actions, creating the efficient order of means to end.” Kolb, *The Critique of Pure Modernity*, p. 10.

¹⁶ Collins, *Weberian Sociological Theory*, pp. 19-44.

¹⁷ Weber, ‘Science as a Vocation,’ in: Gerth & Wright Mills (eds.), *From Max Weber*, p. 149.

¹⁸ Cp. Taylor, *Sources of the Self*, p. 17; Unger, *Law in modern society*, pp. 66-76; Unger, *Knowledge and Politics*, p. 103.

everything is changing all the time and in fundamental ways, sometimes virtually overnight. The experience of modernity is therefore, for most people, as much a threat as it is a constant promise. “The beauty it offered held a terror within.”¹⁹ But, the promise of the Enlightenment was *freedom*, and there must be a connection between the forces at work in modern societies and the promise of freedom. Partly *because* the socio-economic forces destroyed collective horizons (and the accordingly preordained social stations with their concomitant meanings and norms), could individuals disengage from authority and individually pursue alternative life projects. Moreover, the increasing mobility in modern societies and the growing economic independence of ever larger parts of the populace made it much easier to “escape” suffocating socio-political orders. In short, it became easier to simply move away from family and local authorities.

A common trait in the sociology of modernity is that the modern world is seen as fundamentally one of “movement,” both literally in geographical terms, and figuratively, in terms of social mobility.²⁰ But as people become more mobile and as modern life has, to a large extent, become “urban” life, we can, with Alexis de Tocqueville in his *Democracy in America*, characterize modern society as a “society of strangers.” This is, of course, but a relative notion. But it seems an adequate metaphor to describe the contrast between the many generations that have lived in closely-knit rural communities before the coming of the modern age.²¹ In the more abstract (or figurative) sense of mobility, modern societies are characterized by the fact that its much easier for people to move up the social ladder (and down the ladder as well). In previous societies one might speak of the “rule of status” since the (power) relations at that time were predetermined by fixed and definite positions and roles, which also determined the personal honor of individuals. These relations and positions were in many instances even

¹⁹ Watson, *The Modern Mind*, p. 72; cp. Gould, S. J., *Time’s Cycle, Time’s Arrow, Myth and Metaphor in the Discovery of Geological Time*, Harvard University Press Cambridge Mass. 1987.

²⁰ Dahrendorf, R., *The Modern Social Conflict, An Essay in the Politics of Liberty*, University of California Press Berkeley Ca 1988, p. 21; Taylor, *The Ethics of Authenticity*, p. 59; Friedman, *The Republic of Choice*, p. 48.

²¹ De Tocqueville, *Democracy in America*, vol. II p.336; Friedman, *Total Justice*, p. 90; Friedman, *The Republic of Choice*, pp. 56, 70, 75; Aubert, *The Hidden Society*, pp. 66, 67.

thought to be of “divine” origin and deeply ingrained in the whole natural and cosmic order.²² How much more secure can social positions and roles become?

In modern societies, however, social positions and roles become “fluid and negotiable,” as famously described by Henry Sumner Maine in the nineteenth century as a movement from “status to contract.”²³ Of course, it is hard to resist seeing a connection between geographical and social mobility. A society of relatively mobile individuals, a society of strangers, will lead to more fleeting and indefinite social relationships. Mobility and city dwelling “involve much more impersonal and casual contact, in place of the more intense, face to face relations in earlier times.”²⁴ Indeed, the social status of individuals is both less evident and less significant in a heady commercial world than in a rustic, but “rusty” rural environment. In a commercial world, others are potential business partners on a contractual and temporal basis, while the feudal rural world created life-long dependencies that seemed to command life-long commitments and loyalties. To assume such life-long loyalties and dependencies in a “society of strangers” seems much less obvious.

Liberalism and the abstract self

According to Friedrich von Hayek the essence of modern liberal political philosophy is “the denial of all privilege,” and surely it cannot be a coincidence that modern mobile societies give birth to such a new political ideology. In commercially thriving communities, the rising commercial classes are bound to question the justification for the privileges of the ruling

²² Von Hayek, F.A., *The Road to Serfdom*, The University of Chicago Press Chicago Ill. 1994, p. 87; Taylor, *The Ethics of Authenticity*, p. 46; Friedman, *The Republic of Choice*, p. 42.

²³ Maine, H.S., *Ancient Law*, Smith Gloucester Ma, 1970; cp. Dahrendorf, *The Modern Social Conflict*, p. 21.

²⁴ Taylor, *The Ethics of Authenticity*, p. 59; “Urbanisation, which brings together groups with different traditions and weakens the reciprocal controls (and even before urbanization, the generalization of monetary exchanges and the introduction of wage labor), results in the collapse of collectively maintained and therefore entirely real fiction of the religion of honor. For example, trust was replaced by credit.” Cp. Bourdieu, *The Logic of Practice*, p. 110.

classes and will eventually demand equal recognition from the state powers. Thus, if “privilege” is understood in its proper and original meaning of the state granting and protecting rights that are not available on equal terms to everyone, then “the essence of the liberal position is the denial of all privilege.”²⁵ From this new ideology, all privilege derived from a predetermined station and status within the community now becomes the object of effective moral criticism.

But if rights and privileges should not be granted to particular individuals with particular qualities, roles and positions in society, how should they be distributed? It is exactly the experience of living in a society of strangers that seems to suggest an answer to this question. It can be argued that the liberal answer involves a more *abstract* way of looking at people and their political community than communitarians generally favour. If we subtract all particularity from the particular individual, we are left with the abstract “person,” and on this level of abstraction all individuals are exactly the same. Granting privileges demands treating different individuals differently, while granting equal rights to all “persons” means treating everybody as equal. Interestingly, it is this kind of abstract “persons” that John Rawls posits when he designed the famous “original position” in which the basic structure for a just society is deliberated. These persons are abstract – or “unencumbered” – in the sense that they have no specific qualities and do not yet know what their particular talents and interests in society are going to be. The idea of the veil of ignorance is invoked, and “the purpose of these conditions is to represent equality between human beings as moral persons.”²⁶ This is a basic premise of liberal political theory.

One might say that as relationships become more impersonal in a society of strangers, the other is actually *experienced* as much more of an abstract person. And accordingly, it becomes thinkable to treat others more impersonally as “persons” in this abstract sense. Without the new “implicit emphasis upon the universal qualities of men and [the] theoretical exclusion of all personal or parochial attributes, a great deal of the history of modern freedom and democracy would not have been possible.”²⁷ Although the idea

²⁵ Von Hayek, *The Road to Serfdom*, p. xxxvi.

²⁶ Rawls, *A Theory of Justice*, p. 19.

²⁷ Nisbet, *The Sociological Tradition*, p. 146.

of such an abstract self as a bearer of rights was already well established in Roman law, in modern society this juridical concept becomes both a social reality and a pivotal notion in liberal political theory.

We thus see the emergence of the idea of an abstract self that is thought of as “above” or “behind” particular roles and positions in society.²⁸ Gradually this abstract self is thought of in opposition to the “masks” one wears in public life, masks that come with a role or a position but which are thought of as “masking” some real self behind it. Public life is more and more experienced as a “theater,” as an unreal world of “roles” and “poses” where one is forced to be someone or something one is not really.²⁹ This leads to an upgrading of the private life and a downgrading of public life. Moreover, the distinction becomes ever more radical.

After the idea of a real self behind such masks is established, it could subsequently give rise to the idea of “originality” and “authenticity” that should find expression and realization in the *private* life of individuals. We already saw how essential to human flourishing Mill regarded the development of individuality free from the fetters of the community, and that is a totally new perspective. The public self becomes more and more abstract – the equal and free citizen – and the self goes on a private quest for authenticity, which amounts to a “road inward.”³⁰ In the words of Charles Taylor: “This notion of an inner voice or impulse, the idea that we find the truth within us, and in particular in our feelings – these were the justifying concepts of the Romantic rebellion in its various forms.” Taylor points to the important moral implications of this highly influential new idea of a fuller individuation:

“This is the idea which grows in the late eighteenth century that each individual is different and original, and that this originality determines how he or she ought to live. Just the notion of individual difference is, of course, not new. Nothing is more evident, or more banal. What is new is the idea that this really makes a difference to how we’re called to live. The differences are not just unimportant variations within

²⁸ Berger, ‘On the Obsolescence of the Concept of Honor’ in: Hauerwas & MacIntyre, *Revisions*, p. 176; Berger, Berger, & Kellner, *The Homeless Mind*, pp. 83-96; cp. Unger, *What Should Legal Analysis Become?*, pp. 21, 128.

²⁹ Cp. Sennett, *The Fall of Public Man*.

³⁰ Zijderveld, *The Abstract Society*, p. 63.

the same basic human nature; or else moral differences between good and bad individuals. Rather they entail that each one of us has an original path which we ought to tread; they lay the obligation on each of us to live up to our originality.”³¹

In modern liberal philosophy, it is the abstract self that is thought to deserve equal recognition in public life and that this self should be buttressed with political rights and freedoms. The connection between developing and realizing the original or authentic self in private life and protecting individual rights seems clear. Liberal political philosophy provides us with the arguments and justifications.

The critique of practical reason

Marx and Lenin in their *Communist Manifesto* stated that the fleeting modern world is a world in which “all that is solid melts into air.”³² In one sense this means that, as modern individuals see more of the world, they are likely to see the social and political arrangements of their own society as more relative and contingent. More generally and dramatically, however, this means that the stable and harmonious cosmic order of the pre-modern world starts to shake on its foundations. In the previous chapter I discussed how, as this cosmic order was of Divine origin, the whole of the natural *and* social order was also a normative order. The order was not only how it happened to be but also how it was ordained to be by God, and as such, the political and social order was worthy of respect and awe. Moreover, in the pre-modern cosmology, the whole order was also one of Divine Truth, Beauty and Goodness.

We should also not underestimate the role that modern science played in shattering this cosmic order, and the success of modern science had huge consequences for the way man saw its place in both the cosmos and in modern society. Science gradually came to see the natural order as determined by blind and mechanical forces that allowed for a purely formal, mathematical description. The mechanical laws of nature that were discovered in modern science make God look much more like an ordinary “engineer” – or even, in the phrasing of Richard Dawkins, a “blind watchmaker”³³ – rather than the

³¹ Taylor, *Sources of the Self*, pp. 368, 369, 375.

³² Marx, K., & Engels, F., *The Communist Manifesto*, Penguin Books New York 1998, p. 54; cp. Berman, *All that is Solid Melts into Air*.

³³ Dawkins, R., *The Blind Watchmaker*, Penguin London 1988.

Grand Designer of a beautiful and normative order. In the process, modern science made the word “law” forever ambivalent between the old normative meaning and the new merely descriptive meaning.³⁴

The word “law” in the pre-modern sense inspired awe and respect exactly because of the fact that such a law was thought to be of divine origin. As such the Law inspired an experience of truth, beauty and goodness in people. In a modern world, however, not many will confess to such an experience. In its modern usage the word “law” refers to blind, meaningless forces in nature in one language game, and it refers to the prescriptions of the highest law-giving institution of the state in another. Scientific and legal language games have drifted fundamentally apart and in both senses the magic is gone. Thus the new scientific cosmology makes implausible the idea of the whole cosmos and society as an integral harmonious normative order. Natural laws and political or ethical laws were shown to be of a fundamentally different kind. Moreover, according to David Hume, although the natural world is a world determined by natural laws these laws will not tell us anything about what we should do.

In other words, the *is* of the natural world was to be strictly severed from the *ought* of human action, or to put it differently again, the scientific knowledge of the facts (of nature for instance) will never teach us anything about our ethical and political duties.³⁵ Why should the natural world determined by merely blind and mechanical laws teach us anything about how we should furnish our social and cultural world? In line with this questioning, it was Immanuel Kant who made a fundamental distinction that is still very much part of modern consciousness. Kant distinguished between scientific or “theoretical” knowledge and moral or “practical” knowledge, and we have generally come to think of this distinction as insurmountable, and it has become generally “institutionalized” in the modern world.³⁶ Kant thought of

³⁴ Cp. Unger, *Law in modern society*, pp. 66-86.

³⁵ G.E. Moore coined the term “naturalistic fallacy” for this category mistake but the basic idea is generally attributed to David Hume. Moore, G.E., *Principia Ethica*, Cambridge University Press Cambridge UK 1993, p. 15; cp. Taylor, *Sources of the Self*, p. 53.

³⁶ “Reason’s cognition can be referred to the object of that cognition in two ways: either in order merely to determine the object and its concept (which must be supplied from elsewhere), or in order to make it actual as well. The first is reason’s theoretical, the second its practical cognition. In both the pure part, i.e. the part in which reason determines

man as inhabiting two distinct “realms” – the realm of nature, which is completely deterministic, and the realm of human freedom in which man is himself lawgiver.³⁷

Kant recognized the revolutionary consequences of this thought. We can think of the distinction Kant made as congruent with the distinction between nature, on the one hand, and culture or society, on the other. Culture or society can now be experienced as a realm of human freedom. It is the world that modern man constructs or creates himself and, furthermore, that man is now himself responsible for. In the modern world, human societies cannot be justified by merely being there, by merely being fact. Societies are in need of an independent and external justification, which can only be the product of “practical reason.” Practical reason will discover or construct a rational normative vision of a just social world against which actual political arrangements can be critically evaluated. The Enlightenment project is thus the rationalization of society by means of the critical powers of human reason. Rationalization makes it possible for man to emancipate himself from a state of self-imposed tutelage.

John Rawls’s project is a recent offshoot of the Kantian tree. The abstract “persons” in an original position devise a “theory of justice” that can serve as a critical point of reference for present societies and institutions. Some basic structure is devised that all rational human beings can accept as doing justice to both their “moral intuitions” and interests, albeit described in a rather

its object entirely a priori, must be set forth all by itself beforehand, no matter how much or little it may contain.” Kant, I., *Critique of Pure Reason*, Hackett Publishing Company, Inc., Indianapolis Cambridge 1996, p. B ix, x (16, 17); cp. Körner, S., *Kant*, Penguin Books Harmondsworth 1955, p. 129; “If the question of fact and value is a forced choice question for reflective people, one particular answer to that question, the answer that fact and value are totally disjoint realms, that the dichotomy ‘statement of fact or value judgment’ is an absolute one, has assumed the status of a cultural institution. [...] The view that there is no fact to the matter as to whether or not things are good or bad or better or worse, etc., has, in a sense, become institutionalized.” Putnam, *Reason, Truth and History*, pp. 127, 128.

³⁷ However, notoriously, the relationship between these two realms remains rather mysterious. Cp. Unger, *Knowledge and Politics*, p. 43; Unger, *Law in modern society*, p. 38.

abstract way. A society that conforms to this ideal can expect the willing cooperation of all citizens.³⁸

Freedom and the universal

Obviously here lies a crucial break with the position that I described in the previous chapter. The “art of authority” seems to imply that the legal professional takes the institutional order as factual *and* normative. This order is both a meaningful and normative order because the shared understandings of which it is constituted make the group into a community bound by the authority that can personify and guard it. A basic and important premise that I discussed is that this order, its traditions and shared meanings and norms are seen as beyond rational grounding.³⁹ From this perspective formal reason – and especially the emphasis on the reasoning individual – is often regarded with a suspicious eye because it is apt to disregard the cumulative wisdom embodied within tradition. And since there is a strong tendency to abstraction and universality, the concrete and particular remain unexamined.⁴⁰ By contrast, Immanuel Kant, and many of his followers, invested much hope in human reason for a better, more just, future.

Another important modern distinction amplifies the contrast with the paradigm that I sketched in the previous chapter. As stated, the modern society of strangers seems to have been the background for the emerging idea of an abstract person as a bearer of equal rights behind the particular roles and positions in society. This abstract person – the “unencumbered” or “disengaged” or “punctual” or “neutral” self – became the “subject,” in both senses, of modern (liberal) political philosophy.⁴¹ Schematizing heavily, one might say that there is a tendency to think of the unencumbered subject as comprised of “reason,” on the one hand, and “desire,” on the other. “Desire” seems to be the central motivating drive towards action, but in Kant’s vision it

³⁸ Rawls, *A Theory of Justice*, p. 15.

³⁹ Gadamer, *Truth and Method*, p. 281.

⁴⁰ Nisbet, *The Sociological Tradition*, pp. 42, 43; Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*, p. 3.

⁴¹ Sandel, *Democracy’s Discontent*, p. 12, 13; Gutting, G., *Pragmatic Liberalism and the Critique of Modernity*, Cambridge University Press Cambridge UK 1999, p. 48; Taylor, *Sources of the Self*, p. 49; cp. Rorty, R., *Philosophy and the Mirror of Nature*, Princeton University Press Princeton NJ 1979.

can and should be “governed” by (practical) reason. Kant was inspired here by Rousseau who famously stated that “to be governed by appetite alone is slavery, while obedience to a law one prescribes for oneself is freedom.”⁴² Reason and the law and duties that reason identifies are thus primary. By subordinating desire to reason Kant has initiated a rich philosophical tradition, which might with Roberto Unger be characterized as a “morality of reason.” The alternative position, however, is to see reason, with David Hume, as merely the “slave of the passions,”⁴³ and thus reverse the hierarchy between desire and reason. In this vision reason is purely “instrumental,” and the satisfaction of desire, or reaching the desired result, is primary. Thus Hume is one of the intellectual fathers of the modern “morality of desire” and these two traditions have gone fundamentally astray.

According to Roberto Unger “the morality of desire” defines the good as the satisfaction of desire, the reaching of goals towards which our appetites and aversions incline us. In a morality of reason, on the other hand, *reason* establishes the standards of right conduct.⁴⁴ In the next chapter I will identify the modern *democratic* culture as more fundamentally premised on a morality of desire. In this chapter, however, I will focus on this morality of reason and the formalist political and legal order that it seems to entail. But how did Kant think that reason can “govern” the desiring part of human beings? Or to rephrase it the question: how can human appetites and aversions be “disciplined” or “canalized” by reason?

Recall the emergence of the abstract person – the free and equal citizen as the bearer of rights – as the abstraction from all particular and concrete aspects of the individual. In his investigations into practical reason Kant makes a comparable move. If we abstract from all particular desires we reach the idea of “pure will” and, although the particular desires and ends may differ extensively among different people, they are all equal in possessing such a will. Put differently, people can identify with each other because everyone possesses an abstract will independently of what they actually

⁴² Rousseau, *The Social Contract*, p. 65; cp. Guyer (ed.), *The Cambridge Companion to Kant*, p. 314.

⁴³ Hume, D., *A Treatise Upon Human Nature*, Oxford University Press Oxford UK 2000; cp. Solomon, R.C. *Not Passion's Slave*, Emotions and Choice, Oxford University Press Oxford UK 2003, p. 92.

⁴⁴ Unger, *Knowledge and Politics*, pp. 49, 50.

desire. As such, they are all equal. Reason will recognize that it is irrational to give one such will priority over another. Respecting one's own "will" implies respecting all other "wills," and thus it is thought to be irrational to will something that is not compatible with anyone else's will. From this a morality of duty is derived.⁴⁵

What is performed here is the standard philosophical strategy of distinguishing between "form" (will) and "substance" (particular desires and ends).⁴⁶ At the same time it is also the disentanglement of the "universal" (will) and the "particular" (particular desires and ends). Respecting one's own will means respect for all other wills, and one shows this respect by abstaining from actions that are incompatible with other wills. But how can I know whether it will be incompatible? I can know this by "universalizing" the particular action I have planned and need to evaluate. Can I consistently will this particular action to be performed by all other individuals? Can I consistently universalize this particular action and think of it as prescribed by a universally valid law? If not, the desire to act this way should be resisted, and I should reconsider the desires and ends that informed it.

⁴⁵ Cp. Körner, *Kant*, pp. 130-136, 147-151.

⁴⁶ Since Plato western philosophy has tended to think of "form" as always and everywhere the same (universal) whereas "substance" is temporal and local (particular). In the classical metaphysics of Plato en Aristotle the concrete and particular still "participates" in the abstract and universal "form" – "idea" or "essence." Moreover, Plato en Aristotle did not distinguish between a factual and a normative realm and thus the forms are both factual and normative in a perfectionist sense. However, in the Kantian scheme reason become thoroughly "empty" and the substance is thereby totally contingent, subjective and arbitrary. Charles Taylor: "We could say that rationality is no longer defined substantially, in terms of the order of being, but rather procedurally, in terms of the standards by which we construct orders in science and life. For Plato, to be rational we have to be right about the order of things. For Descartes rationality means thinking according to certain canons. The judgment now turns on properties of the activity of thinking rather than on the substantive beliefs which emerge from it." Taylor, *Sources of the Self*, p. 156; "What is distinctive about the modern situation is that the universal rules have become quite formal and do not specify any content to the particular case, but only some restrictions imposed by the formal process for entering into the general interaction. In such a society the universal rules specify no particular content and the individuals are told to seek their own good [...]. The separation of universal from particular has become institutionalized." Kolb, *The Critique of Pure Modernity*, p. 15; cp. Unger, *Knowledge and Politics*, pp. 44, 45, 137-144.

In other words, if we think of “rationality” as both “thinking in universal terms” and “thinking consistently,” we should make sure that the maxim underlying any proposed action be such that we can *universalize* it without *contradiction*. We cannot as rational wills consciously undertake this action if we cannot do this. A will operating on this principle would be free from any grounding of determination in nature and hence be truly free. A moral subject is thus autonomous in a radical sense. He obeys the dictates of his own will. Reason, as rational will, is now the only criterion.⁴⁷ One might also say (in slightly less abstract terms) that it is just not “fair” to act on my impulses if my actions are incompatible with the freedom of others. Importantly, we can now see how reason and freedom are related. In the words of Roberto Unger, “The morality of reason could not be devoted to the promotion of any substantive end except the end of freedom.” This means that I should voluntarily curtail my own freedom in the name of freedom and that “there are certain rules I must accept in order to be able to move beyond the assertion of naked desire to the practice of judging right or wrong.”⁴⁸

Let us return to the project of John Rawls. In his *Theory of Justice* he argues that it is rational for individuals deliberating the basic structure of a just society behind a veil of ignorance (which makes them ignorant about their talents and their place in the future society) to accept a constitution protecting basic freedom rights and assuring them careers that are open to all. He even argued that they would agree on a “difference principle” that justifies a specific redistribution of goods as a requirement of distributive justice. To distinguish Rawls from Kant I should mention, however, that, leaving it a bit ambiguous in his *Theory*, Rawls later argued that, contrary to Kant, he did not think of such rationality as “metaphysical” but merely informing a “political” argument for insulating a basic structure of rights from daily political controversy and decision making.⁴⁹

What is important is that within this tradition from Kant to Rawls the individual – to be more precise, the individual endowed with the faculty of reason – is seen as “autonomous.” No one needs paternal or moral guidance

⁴⁷ Taylor, *Hegel*, p. 369.

⁴⁸ Unger, *Knowledge and Politics*, p. 50.

⁴⁹ Cp. Rawls, *A Theory of Justice*; Rawls, J., ‘Justice as Fairness: Political Not Metaphysical’, in: *Collected Papers*, Harvard University Press Cambridge Mass. 1999, pp. 388-414; Rawls, J., *Political Liberalism*, Columbia University Press New York 1993.

because every individual has the capacity for action in accordance with the conception of universal laws and thus the capacity to reason her way out of moral or ethical dilemmas and do the right thing. The modern individual can be left to her own devices and be trusted to be an ethical person, if only she is granted the freedom to prove her worthiness. Moreover, it is exactly the capacity for rational self-determination that gives the human being his particular “dignity,” (*Würde*). Everything else may have a “price,” but only human beings have “dignity”⁵⁰ and, importantly, as all rational human beings have this capacity, they all have equal dignity.⁵¹

To summarize, human society and the political order are human creations and as such not a divine or sacred order that defies rationalizing or modernizing. Furthermore, a just socio-political order should grant individuals the freedom to exercise their faculty of moral judgment, and this points to liberal political arrangements because “the liberal state respects persons as persons, and secures their equal right to live the lives they choose.”⁵² We can now fully see the revolutionary potential of Kant’s ideas: “Man’s emancipation from his self-imposed tutelage” requires the evaluation and rationalization (or “modernization”) of the political arrangements of the political community by means of the critical powers of human reason. Indeed, the publication of Rawls’s *Theory* gave rise to a new impulse to devise such rationalizing plans for our modern states, which were heavily debated throughout the past decades.⁵³

From honor to dignity

The emancipating modern citizen demands freedom from the older hierarchical paternalistic or “patriarchal” political arrangements, and only the liberal constitutional state seems to be able to fully honor the dignity of individual citizens. And modern societies have *in fact* seen a collapse of social hierarchies, replacing the idea of “honor” associated with certain

⁵⁰ “In the kingdom of ends everything has either a price or a “dignity.” What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.” Kant, I., *Groundwork of the Metaphysics of Morals*, Cambridge University Press Cambridge UK 1998, p. 42.

⁵¹ Kronman, *The Lost Lawyer*, pp. 140, 141; Taylor, *Sources of the Self*, p. 83.

⁵² Sandel, *Democracy’s Discontent*, p. 13.

⁵³ Cp. Pogge, T., *Realizing Rawls*, Cornell University Press Ithaca NY 1989.

institutional roles and specific social positions in society with the idea of dignity granted equally to persons as persons, which is independent of institutional roles.⁵⁴ The ideas of honor and dignity point to a completely different cultural world:

“In a world of honor the individual is the social symbols emblazoned on his escutcheon. The true self of the knight is revealed as he rides out to do battle in the full regalia of his role; by comparison, the naked man in bed with a woman represents a lesser reality of the self. In a world of dignity, in the modern sense, the social symbolism governing the interaction is a disguise. The escutcheons hide the true self. It is precisely the naked man, and even more specifically the naked man expressing his sexuality, who represents himself more truthfully.”⁵⁵

In the world of honor man discovers his true identity only in his public role or, more exactly, the individual identifies strongly with some social ideal of his role such that he tries to realize it to perfection. In the world of honor, this is the only road to true “being,” to turn away from the role is to turn away from himself. Moreover, the loss of honor is a loss of being that leaves man naked and vulnerable. By contrast, in a world of dignity the perfection of the self does not lie in pre-established social roles without, but in the discovery and perfection of the unique authentic self within: “In a world of dignity, the individual can only discover his true identity by emancipating himself from his socially imposed roles – the latter only masks, entangling him in illusion, “alienation,” and “bad faith.”⁵⁶

“Honor demands preferences and distinctions,” Montesquieu wrote and indeed honor is something that one has relative to social status and to institutional and social roles and is as such always unequally distributed.⁵⁷ In Bourdieu’s phrase, the rise of the distinguished class to Being has, as an inevitable counterpart, “the slide of the complementary class into Nothingness or the lowest Being.”⁵⁸ Human dignity, however, is associated with mere

⁵⁴ Unger, *Knowledge and Politics*, pp. 65, 66.

⁵⁵ Berger, Berger & Kellner, *The Homeless Mind*, pp. 90-91.

⁵⁶ Ibidem.

⁵⁷ Montesquieu, C., *The Spirit of the Laws*, Cambridge University Press Cambridge UK 1989, pp. 257, 258.

⁵⁸ Bourdieu, *Language & Symbolic Power*, p. 126.

personhood and is thus a thoroughly egalitarian notion.⁵⁹ One might say that as opposed to the earlier demand to respect Nature as God's creation and to concomitantly respect the superiors in society that ruled by God's authority, the Enlightened individual demands equal respect for his or her reasons and interests. We already saw that this amounts to a demand for freedom.

"Honor is a mere "escutcheon" behind it is the face of modern man alone," Peter Berger writes.⁶⁰ As a result of this "unmasking," modern societies have witnessed the emergence of "a culture of personality" emphasizing the "real idiosyncratic" self. The ruling idea of this modern culture of personality is to be "the author of one's own life."⁶¹ We might also refer to this modern culture as "a culture of authenticity" in which the person is called upon to find his or her own way of being. The freedom that is demanded by the modern individual is used to emancipate him- or herself from socially contingent roles and positions, and from all sorts of external demands, to find one's true authentic being and to find a particular voice to express and further develop this unique and authentic self. Importantly, this modern culture leans towards an ahistorical consciousness that also stands in stark contrast with the world of honor:

"It follows that the two worlds have a different relation to history. It is through the performance of institutional roles that the individual participates in history, not only the history of the particular institution but that of his society as a whole. It is precisely for this reason that modern consciousness, in its conception of the self, tends toward a curious ahistoricity. In a world of honor, identity is firmly linked to

⁵⁹ Taylor, *The Ethics of Authenticity*, pp. 46, 49, 50; Unger, *Knowledge and Politics*, p. 66.

⁶⁰ Berger, 'On the Obsolescence of the Concept of Honor' in: Hauerwas & MacIntyre, *Revisions*, p. 175; Berger, Berger & Kellner, *The Homeless Mind*, pp. 83-96; cp. Sennett, R., *The Fall of Public Man*.

⁶¹ Friedman, *The Republic of Choice*, pp. 135, 44; "the nineteenth century had strikingly little respect for people who were "[...] individuals" [...] the unattached, marginal person was the object of fear and disgust. [...] In some ways, the modern individualist is the exact opposite of the nineteenth century individual. At the very least, the free spirit, the social deviant, suffers less social and legal ostracism today than his nineteenth century counterpart. The "individual" now might be someone who does not "conform"; someone who builds his own life, he own personality; who makes the most of his own uniqueness. [...] Today the emphasis is on maximizing one's potential." Friedman, *Total Justice*, p. 103; cp. Taylor, *The Ethics of Authenticity*.

the past through the reiterated performance of prototypical acts. In a world of dignity, history is the succession of mystifications from which the individual must free himself to attain authenticity.”⁶²

The political community should grant all individuals the freedom to explore their own unique being, to find their own values and define their own interests and, in general, to be the authors of their own lives. It seems inevitable that modern societies founded on this moral premise will become “pluralist” and I already mentioned Weber referring to this development as one in which “many old gods ascend from their graves.” The concomitant modern experience, however, is one of a fundamental precariousness and contingency of all shared values in society.⁶³ How can any idea of a “community” of values or ends be grafted onto such a pluralist world?

Karl Popper’s answer in his book *The Open Society and its Enemies* is rather blunt and pessimistic. Modern open society does not provide for a common life, and this is the price we have to pay for human freedom. Furthermore, Popper refers to modern societies as “abstract societies,” meaning a society in which men practically never meet face to face such that the group can hardly be thought of as a concrete and real group of men, or a system of such real groups. “Such a fictitious society might be called a ‘completely abstract or depersonalized society.’”⁶⁴ In such a society loyalty to some community becomes more than ever a matter of “choice,” and the sharing of values within such a community will therefore be just a precarious and possibly temporal “alliance of ends.”⁶⁵ Since common or universal humanity (the “personhood”) of modern individuals is just an empty abstraction, and the particular ends and values are part and product of an individual quest for authenticity, it is unlikely that modern individuals will identify with communal ends and values, except occasionally and strategically.

Moreover, the modern world has generally come to see particular ends and values as radically “subjective,” and values are understood as subjectivity

⁶² Berger, Berger, & Kellner, *The Homeless Mind*, pp. 90-91.

⁶³ Unger, *Knowledge and Politics*, p. 103; Taylor, *Sources of the Self*, p. 19.

⁶⁴ Popper, K., *The Open Society and its Enemies*, Routledge London 1995, pp. 174, 175; cp. Friedman, *The Republic of Choice*, pp. 19, 20.

⁶⁵ Unger, *Knowledge and Politics*, pp. 102, 103.

projected onto a factual world, which is neutral.⁶⁶ As stated before, the theoretical realm is the realm of the “objective.” This is the realm that is determined by the universal laws of nature. Particular desire, values and ends are part of the realm of human freedom and thus thought to be “subjective” in the sense that they are only “determined by choice,” and in this picture of things it is only choice that confers worth.⁶⁷ Obviously, authority will have to change its nature, and authorities will have a much harder time keeping the flock together. Under such circumstances it seems that the community is no longer bound by a substantial morality but only a *formal* morality, a common respect for citizen freedom, that keeps the political order together. Such a “formal community” can only be established by a common respect for rational law.

Human dignity and formal law

In the previous chapter, we investigated an important step on the way to a modern legal order, namely that the state powers grant the legal institutions autonomy in the settlement of legal conflict in society. Under normal circumstances the state powers even promise to consider themselves bound by law. This movement naturally seems to lead to the replacement of the “Rule of Status” idea by the idea of the “Rule of Law and not of Men.”⁶⁸ But from a Kantian position, the factual historical developments are contingent. For Kant the crucial point is not a matter of socio-economic facts; the point is moral. Modern Enlightened citizens have seized the freedom that, as rational beings, they deserved from the start. The modern liberal state, and the modern legal order that makes it possible, is not merely a means to secure legitimacy for state rule, but an important *moral* achievement.

⁶⁶ Taylor, *Sources of the Self*, p. 53; cp. MacIntyre, *After Virtue*.

⁶⁷ Unger, *Knowledge and Politics*, p. 76; Taylor, *The Ethics of Authenticity*, p. 37.

⁶⁸ Nonet & Selznick, *Law & Society in Transition*, pp. 53-54; Von Hayek, *The Road to Serfdom*, p. 87; “The rule of law exists when power-holders remain bound by general rules, even if these are rules established by the power-holders themselves. For them to be bound means, in part, that the rules must be interpreted, applied, and enforced in ways that can be publicly understood. The reasons for decision must not turn on case-by-case judgments of strategic interests bearing no general and reasonable relation to the rules. [...] When the rule of law prevails people enjoy security of a regime of rights” Unger, *What Should Legal Analysis Become?*, p. 64.

Although human beings are social beings, modern individuals are particularly freedom loving beings as well. Some conclude that the liberal constitution of the liberal democratic state is the only one doing justice to “human nature.” In particular, Francis Fukuyama in his *The End of History and the Last Man* explains the inevitable success of the modern liberal democratic state by arguing from the demand for freedom and equal recognition.⁶⁹ But without taking recourse to such a rather grand idea, the general (although relative) success of the liberal constitutional state even in non-Western countries deserves attention and the idea that within the modern world individual freedom has *in fact* grown seems to be very well defensible.

In the past decades, the longing for freedom and equal respect is amplified by the desire for authenticity in the Western world. The Good Life is no longer something that is prescribed by some outside source or authority. Every individual has to find it for him- or herself, mainly by means of self-exploration and the ensuing self-knowledge. There is no ready-made format for how to live a worthy and meaningful life (like religions usually provide), rather everyone has to search and find her own authentic way of “being.” Every individual is thought to be unique in a rather radical sense, and nowadays the task of the modern individual is to find and realize his or her own unique destination in life.⁷⁰ This search should not be impeded by moralism or paternalism, because these stifle the development of the unique authentic self. We should not be forced into conformism or confronted with pre-established identities and social roles. That would severely hurt our individuality and therefore it would be, in the contemporary jargon, “politically incorrect.”

Of course, our individual freedom must, in a modern society, be compatible with the freedom of others and therefore we need “rules” and individual “rights” to clearly delineate our freedom.⁷¹ Kant stated that genuine freedom is only possible with the acceptance of “the law.” Only the acceptance of the validity and authority of the universal law makes it possible for us to act morally (and legally) and yet remain free. However, for Kant this

⁶⁹ Fukuyama, F., *The End of History and the Last Man*, Hamish Hamilton London 1992.

⁷⁰ Cp. Trilling, L., *Sincerity and Authenticity*, Harvard University Press Cambridge Mass. 1972; Taylor, *The Ethics of Authenticity*.

⁷¹ Nonet & Selznick, *Law and Society in Transition*, pp. 61-63, 71.

law cannot be just any law that is imposed on us from the outside, like the law that is decreed by God or Nature. We cannot know God's will, and the laws that rule in nature do not seem to have any normative power for human beings in their social and cultural world. We can now, with regard to "man-made laws" (or positive law), ask a rather embarrassing question: *quo warranto*? What legitimizes the authority of man-made law? Or, on what authority does the law count as valid and binding? In other words, if law is only man-made, and in that sense arbitrary, why should we subject ourselves to it?⁷²

The problem is that if neither God nor Nature can provide us with valid norms, it becomes hard to see who or what can authoritatively end or decide disputes on the question of the validity of the law that makes a claim of authority on us. What makes an orderly society possible under such circumstances? This is the fundamental question of modern political or legal philosophy and several elegant and influential answers have been given.

Hobbes's basic question was indeed: how can society persist given that each of its members pursues his or her own private goals?⁷³ In the previous chapter we already mentioned Hobbes's realistic and rather prosaic answer. The authority of the law is grounded in the authority of the state that is grounded in the rationality of subjecting to such an authority because the war of all against all would make life "nasty, brutish and short." In his scheme, human beings have a natural right to "life," and this legitimizes the voluntary and reasonable subjection of individual citizens, who cannot protect this right by themselves, to the state. In turn, this natural right legitimizes the state as the authority to proclaim the man-made laws that make an ordered and peaceful society possible.⁷⁴ Hobbes offers a highly influential (both secular and liberal) theory of the modern state as the only and absolute authority that can protect its citizens against each other.

A later influential liberal philosopher, John Locke, devised a much stronger position of the individual citizen against the authority of the state. Locke argued that property and liberty are not merely man-made

⁷² Nonet & Selznick, *Law and Society in Transition*, p. 55.

⁷³ Cp. Parsons, *The Social System*, p. 71.

⁷⁴ According to Hobbes human beings have an equal natural right of "self-preservation" which is both a dictate of reason and a law of nature. Therefore this right is inalienable. Hobbes, *Leviathan*, pp. 91-93; cp. Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, pp. 320, 321.

constructions made possible and protected by the state authority but that there exists a natural right to “Life, Liberty and Estate” that should be deemed “sacred” by the political authority. This means that there are important “natural” limits to what the state can declare as law. Locke can be thought of as the first to devise not just “constitutional” or “pre-political” but *natural* limits to the power of the state authority.⁷⁵ Both Hobbes and Locke, however, derived the fundamental authority of the law from “rights to life” or “rights to life, liberty and estate” from Nature thus committing the “naturalistic fallacy.” Kant proceeded more rigorously and, contrary to Hobbes and Locke, tried to consistently work from the distinction between facts and norms.⁷⁶

In his exploration of practical reason, Kant started within the normative realm – the realm of validity (instead of facticity) – and explored the “transcendental structure” of normative or practical judgments. Such judgments are the answers to the basic question: What should I do? In other words, he explored what ultimately made such judgments possible. Kant thought that he had found the law that “constitutes” or “founds” the moral or normative realm to which human beings should subject themselves. This law should function as a touchstone for moral action, and as such it works as a criterion that makes the distinction between valid and invalid moral judgments possible, and thereby, of course, between moral and immoral actions. In short, this law makes it possible to *know* whether we act morally or not, although this kind of knowledge is of a different nature than knowledge in the natural realm. It is practical not theoretical knowledge.

Kant provided an incredibly influential idea by directing our attention to the “formal structure” of laws instead of their content or substance. In the “form” or “structure” of the law, we can discover the secret of the law’s authority. Regardless of its actual content, the law derives its authority from its form, and its form is “universal validity.” Laws are laws because they have the form of universal validity and applicability. The sentence “the law is

⁷⁵ Locke, J., *Two Treatises on Government*, Cambridge University Press Cambridge UK 1998, pp. 350, 351, 363; Hampsher-Monk, *A History of Modern Political Thought*, pp. 81-83, 93, 102.

⁷⁶ It can, however, be argued that also Kant founded his practical reason on “nature,” in this case on human *rational* nature and his transcendental subject can be thought of as metaphysics. Sartre, J.P., ‘Existentialism and Humanism’ in: Marino, G., *Basic Writings of Existentialism*, Modern Library New York 2004, pp. 344, 345.

universal” is true in both of the realms we explore here, the factual realm and the normative. It is an analytical truth, or a tautology; try to deny this and you will end up with all sorts of paradoxes and contradictions. Moreover, the statement “the law is universal” is an analytical truth that *any rational being* can acknowledge to be true. Such a being can also acknowledge the significance of this truth because it offers everyone the possibility to rationally discover whether some action is “lawful” or not by abstracting from the content and analyzing merely its form. All one needs to do is to see whether the action conforms to the law in the sense that it can claim universal validity. To do so, one needs to ask whether one acts in accordance with a maxim that one can consistently will to be a universal law.⁷⁷

Only rational beings are able to freely conform their action to the law, and therefore only rational beings are able to act morally. Human beings are therefore thought to be able to act freely in this normative realm, which does leave such elbowroom as opposed to acting in the causally determined natural world. Contrary to animals who are not gifted with the faculty of reason and who therefore cannot enter the normative realm, human beings are free to let reason guide their actions and, conversely, they can be held *responsible* for their actions if they did not act morally in spite of their freedom and ability to do so. Human beings can *know* the moral law that should be their moral guide. Moreover, they have a “duty” to act from a basic respect for this formal moral law.⁷⁸ If they fail to conform and fail in their duty to respect the law, we can confront them with the law, and by authority of this law, by the authority of reason, we can judge them to be immoral.

Now we come to an important Kantian notion. Only the human being who lets reason guide his actions is “autonomous” or truly free in the sense of self-

⁷⁷ “The moral law itself, Kant holds, can only be the form of lawfulness itself, because nothing else is left once all content has been rejected. The moral law can therefore be stated as follows: A perfectly rational will acts only through maxims which it could also will to be a universal law. When this appears to us in the form of the categorical imperative, it says: Act only according to that maxim through which you can at the same time will that it should become a universal law.” Guyer (ed.), *The Cambridge Companion to Kant*, p. 320; cp. Unger, *Knowledge and Politics*, pp. 51, 85.

⁷⁸ Kant, *Critique of Practical Reason*, p. 82 (106).

rule.⁷⁹ As a rational being, he or she *imposes the law on him- or herself* because any rational being recognizes his duty to do so. But as long as he lets reason be his guide in moral matters, he does not need to subject himself to any law that is imposed on him from any outside power. He does not need any guidance from others or need others to be moralistic with him, nor does he accept any paternalism as long as he acts in conformity with the moral law. Thus the rational being can remain in the realm of freedom and (partially) disengage from the realm of necessity.

After the notion of autonomy, we need to introduce one last notion to complete the Kantian picture. Because human beings are capable of autonomous moral action, rational human beings are *worthy* of their freedom. They truly deserve to be free, and it is part of human dignity to be granted this freedom to judge moral matters for themselves. This is what human dignity amounts to – being able to choose autonomously and to determine one’s own fate in life.⁸⁰ People can be trusted with this freedom. So we need to make individual freedom possible by making sure that constitutional liberal state institutions protect individual rights to freedom. The legal order should protect the individual freedom that makes it possible for citizens to act truly morally and in accordance with their own conception of the good.

According to Kant, the difference between the legal and the moral is that the first only demands outward or behavioral conformity with the law, while the second demands, from the internal point of view, actual acceptance and subjection to the moral law. Thus law in the legal sense, codifies the outer limits of individual freedom into a set of legal rights and obligations, preferably stated in clear and distinct, *universally valid* rules. In legal

⁷⁹ Kant, *Critique of Practical Reason*, p. 33 (48); cp. Kronman, *The Lost Lawyer*, pp. 38, 39.

⁸⁰ “It now follows on its own that in the order of purposes the human being (and with him every rational being) is a *purpose in itself*, i.e., he can never be used merely as a means by anyone (not even by God) without being in this at the same time a purpose himself, and that therefore the *humanity* in our person must be *holy* to ourselves. For he is the *subject of the moral law* and hence of that which is holy in itself [and] on account of which and in agreement with which alone anything can indeed be called holy at all. For, this moral law is based on the autonomy of his will, as a free will which, according to its universal laws, must necessarily be able at the same time to *agree* with that to which it is *subject* itself.” Kant, *Critique of Practical Reason*, pp. 131, 132 (167); cp. Taylor, *Sources of the Self*, p. 152.

procedures the only thing that is tested is whether the behavior of the individual parties involved conformed to this law: “In the domain of the law it does not matter why I do what I do, so long as I abstain from violating the rights of others.”⁸¹ Legal institutions should not mingle in the moral question of whether the intentions or motivations of the parties were actually moral. If we translate this to the attitude that legal officials should take with regard to the subjects involved in a lawsuit, officials should try to be nonjudgmental. Particularly in an effort to uphold a distinction between the legal and the moral realms, the legal professionals are not to judge the parties on their intentions. Outward conformity to the legal order is all that the law in the legal sense demands, and beyond this, the citizens are free.

Obviously, honoring the law and desiring to follow the universally valid (legal) rules in the (legal) order are connected to “the desire to recognize the rights and liberties of others and to share fairly in the benefits and burdens of social cooperation.”⁸² However, this implies that we should follow the rules both impartially and consistently and also that we should treat similar cases similarly. These are aspects of what we can call *formal* justice, and they are closely linked to the ideal of the rule of law, which in turn is closely related to liberty. A legal order consists of a system of universal rules addressed to rational persons for the purpose of regulating their conduct and providing a framework for social cooperation. When these rules are universal and formally just, they establish a basis for legitimate expectations within the social order. The rules constitute grounds upon which persons can rely on each another and rightly object when their expectations are thwarted.

⁸¹ “[Kant] there divides morality into two domains, one of law or right (*Recht*), and one of virtue. The domain of law, which extends to civil law, arises from maxims that are vetoed because they cannot even be thought coherently when universalized. The rejection of such maxims turns out to provide a counterpart to the recognition of the strict rights of others. We may not interfere with their legitimate projects, may not take their property, and so on. The domain of virtue involves maxims that can be thought but not willed as universal laws. Most of what morality requires as action rather than abstention is a requirement of virtue.” Guyer (ed.), *The Cambridge Companion to Kant*, p. 323.

⁸² Rawls, *A Theory of Justice*, p. 60.

Crucially, “when these claims are unsure, so are the boundaries of men’s liberties.”⁸³

Political liberalism

The whole exercise thus ends up in stating the priority of the right over the good.⁸⁴ Reason can only provide us with a *formal* law, and we need an institutional legal structure that grants us our freedom rights, and subsequently protects them, such that we are able to act both genuinely morally and in accordance with one’s own conception of the good life. This means that reason cannot provide us with a “substantial morality” or a “perfectionist ethics.” Or, in other words, it cannot teach us anything about what constitutes a good life. What such a life consists of is something that each individual should find out for himself or herself, and it is exactly the demands of freedom and human dignity that prohibit any authority (the moral philosopher, the politician, or the lawyer for that matter) from saying anything on this point. That would inadvertently amount to paternalism or moralism and thereby subvert freedom.⁸⁵

For Kant all this was the outcome of a metaphysical inquiry, the product of the critical analysis of the transcendental structure of moral judgments. In other words, it is the product of the critical analysis of practical reason: *eine Kritik der Praktischen Vernunft*. We can safely write Practical Reason with capitals, as it is thought of as the universal and eternal structure of judgment in the normative realm. An important conclusion for Kant was that moral judgments could receive an *objectively* true answer. The answer can transcend the relativity of the here and now. That is to say, the moral law is universally

⁸³ Rawls, *A Theory of Justice*, p. 235; “Thus there is a link between “individualism” and the cycle of expectations that lies behind the demand for total justice.” Friedman, *Total Justice*, p. 106.

⁸⁴ Kant, *Critique of Practical Reason*, p. 63 (84); Kant, ‘On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’’ in: Kant, *Political Writings*, pp. 80-87; cp. Rawls, *A Theory of Justice*, p. 31.

⁸⁵ “The fact that many people fear that if they concede any sort of moral objectivity out loud then they will find some government shoving its notion of moral objectivity down their throats is without question one of the reasons why so many people subscribe to a moral subjectivism to which they give no real assent.” Putnam, *Reason, Truth and History*, p. 149.

and eternally true as it is a demand of Reason. The statement “This answer is rationally valid here and now” can be transcended and transformed into the statement “this is Rationally valid” because it can be thought of as universally and eternally valid.

Another rephrasing can change the statement from a claim to universal and eternal (or absolute) validity in the normative realm to a statement referring to objectivity in the factual realm: “This is Rational.” Now we can refer to the Rationality and Morality of a certain action as objectively true. Why should I do this or that, or better still, why should I obey this law? Because it *is* Rational! Now consider the words of John Rawls when he argues for the principles of justice the first of which means to grant every person an equal right to the most extensive liberty compatible with a similar liberty for others:⁸⁶

“Thus acting autonomously is acting from principles that we would consent to as free and equal rational beings, and that we are to understand in this way. Also these principles are objective. They are the principles that we would want everyone (including ourselves) to follow were we to take up together the appropriate *general point of view*. The original position defines this perspective, and its conditions also embody those of objectivity: its stipulations express the restrictions on arguments that force us to consider the choice of principles *unencumbered* by the singularities of the circumstances in which we find ourselves. The veil of ignorance prevents us from shaping our moral view to accord with our own particular attachments and interests. We do not look at the social order from our situation but take up a point of view that everyone can adopt on equal footing.”⁸⁷

Under the circumstances of the original position and behind a veil of ignorance, reason provides us with a “general point of view” (the “universal perspective” one might say) that “everyone can adopt on equal footing.” Under such circumstances, we would all agree on the priority of the right over the good and agree to grant everyone equal liberty rights. Now consider the following words of Immanuel Kant:

⁸⁶ Rawls, *A Theory of Justice*, p. 60.

⁸⁷ Rawls, *A Theory of Justice*, p. 516.

“Reason provides a concept which we express by the words *political right*. And this concept has binding force for human beings who coexist in a state of antagonism produced by their natural freedom, so that it has an objective, practical reality, irrespective of the good or ill it may produce (for these can only be known by experience). Thus it is based *on a priori* principles, for experience cannot provide knowledge of what is right, and there is a theory of political right to which practice must conform before it can be valid.”⁸⁸

Thus both Kant and Rawls see the basic political rights of the citizens in the liberal state as objective because they are founded on or derived from reason. Thus these rights acquire a metaphysical *allure*. As such they need no further legitimation as they are firmly grounded in something supra human – in Rationality. It is Rationality that claims to be the ultimate authority, and now Rationality provides us with the ultimate argument that puts an end to all discussion of moral and legal rights and obligations. This argument appeals to the rational nature of all rational beings and purports that if the answer is rational, a rational being should conform to its demands because otherwise he or she does not live up to his or her rational nature. If someone fails to live up to this nature, he or she falls back into the realm of necessity and squanders his or her freedom. Any such person can be forced back to recognition of the demands of rationality by means of moral criticism or even legal enforcement or punishment.

However, Rawls does not need such a metaphysical idea of Rationality.⁸⁹ Much of the features of modern law, legal practices and institutions can be understood by reference to a thoroughly *human* and contingent drive to “the universal” or “the abstract,” and to the consistent reasoning of such universal and abstract terms. These are properties of rationality, to be sure, but they

⁸⁸ Kant, ‘On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’ in: Kant, *Political Writings*, p. 86; cp. Ernest Weinberg: “Kant understood right as the juridical manifestation of self-determining agency. The fundamental feature of this agency is the agent’s capacity to abstract from – and thus not be determined by – the particular circumstances of his or her situation. Inasmuch as this capacity is a defining feature of self-determining agency, all self-determining agents are equal with respect to it.” Weinberg, *The Idea of Private Law*, pp. 81, 82.

⁸⁹ Cp. Rawls, J., ‘Justice as Fairness: Political Not Metaphysical’, in: Rawls, *Collected Papers*, pp. 388-414; Rawls, *Political Liberalism*; Rawls, J., *Justice as Fairness, A Restatement*, Harvard University Press Cambridge Mass. 2001.

need not be thought of as grounded in a metaphysical order, or transcending our phenomenal world. They can also be thought of as merely “a way of looking” at fellow human beings and our social world. In such an abstract modern society, this conceptual edifice could be the result of a simple truism. Modern citizens do not accept it when they are treated “unreasonably.” Such a citizen feels that he or she is not respected, or taken seriously, as a reasonable human being when he or she is confronted with unreasonable judgments and interference with his/her freedom by whatever authorities.

To be sure, this has serious consequences for legal practices and institutions in modern societies. It means that the law should be “rationalized” such that it can provide us with clear and distinct answers to legal questions such that the involved parties can be dealt with in a way that respects their dignity as reasonable human beings. Only under a regime of “rational law” or “formal law” can we know what to expect from the law and the officials that administrate it.⁹⁰ The important conclusion is that in such a project of rationalizing the law and legal judgment, *formal reason* is deemed to be the ultimate authority.⁹¹ This need not be the metaphysical Rationality that Kant thought he had discovered but at least rationality in the sense that the political contingencies and the moral disagreements of the here and now are transcended in a way that all rational citizens can identify with a certain rational decision under certain circumstances.

Law as a glasshouse

Let us explore what kind of legal order can be legitimized by such an exercise of taking rationality as the ultimate authority in the political community. First of all, it will take individual freedom and human dignity as basic notions and subsequently construct a “deontological” moral and political universe that can serve as a home to this free and dignified individual. The state and its laws

⁹⁰ Cp. Nonet, & Selznick, *Law & Society in Transition*, pp. 60-70.

⁹¹ “Formal reason is the cognitive complement to instrumental rationality. It is the kind of thought that does not directly depend on the choice of ends, and therefore need not run into the embarrassment the need for such choice creates. It is the realm of pure knowledge in which theory means contemplation even though it may be put to practical use. Formal reason produces understanding through the perception of what is universal in a set of particulars rather than through the choice of means or the advancements of ends.” Unger, *Knowledge and Politics*, pp. 153, 154; cp. Cohen, *The Dialogue of Reason*.

only have a relative authority: they must stand the test of reason. Surely, this endangers the effectiveness of these institutions, and we can safely say that “rational-legal authority” will not give the power holders in the state nor the legal institutional role occupants much room for manoeuvring. Especially in times of crisis or instability, the logic of freedom that I just depicted in its rudimentary form seems to substantially (or one might think dangerously) limit the elbowroom for authority that I described in the previous chapter. But let me give a picture of a rational legal order that can satisfy the demand for rational legal reasoning and decision-making.

Previously I introduced Kant’s notion of “pure will” as the universal abstract substrate of all particular desires. This will is furthermore supposed to submit to universal law to make genuine freedom possible. Now, to have such a will seems to imply that this will has an entitlement of respect for its objectives and projects. This in turn implies the acceptance of a system of rules to distribute and enforce such entitlements.⁹² To put it in less abstract terms, individual citizens in modern societies demand the right to equal respect and concern for their individual goals and projects. This amounts to the demand for concrete legal rights, “rights incised in stone,” as it were, and the very term “right” implies law. Moreover, it requires law with a strong *formal* element, in the sense of precision, objectivity and enforceability.⁹³ Only then do modern citizens have the feeling that they are ruled by law and not by men. In these three steps – from the will to rights to formal law – the massive and seemingly unbridled legalization, or the “law explosion,” of modern societies seems to be readily explainable.⁹⁴

⁹² Unger, *Knowledge and Politics*, pp. 51, 71; “To protect people from the harm that can come from modern society and its tools – on which they are totally dependent – some new, more powerful method of control is needed. This means intervention by some strong outside force, a force that can control harm at its source. In short, what is needed is the generalized third party, the state. Or to put it still another way, what is needed is law. If custom is the name given to norms that govern face-to-face relationships, then law is the name for formal, authoritative norms that come from the state and govern the relationships among strangers. It stands in contrast both to the informal norms of traditional society and the despotic or charismatic norms of absolutist states.” Friedman, *Total Justice*, p. 41.

⁹³ Friedman, *The Republic of Choice*, p. 10; cp. Kant, ‘On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice.’” in: Kant, *Political Writings*, p. 77.

⁹⁴ Friedman, *The Republic of Choice*, pp. 10, 11; Von Hayek, *The Road to Serfdom*, p. 87; cp. Friedman, *Total Justice*.

Not many will contest the thesis that to make an orderly society possible, individuals need to be constrained in the pursuit of their objectives to the extent that such pursuits inhibit or damage the pursuits of others. It is a demand of reason that individuals need to delimit and coordinate the freedom of action, and this requires a system of legal rules. The specific demand for universal “rights” can be explained by the fact that they have a peculiar phenomenal quality: rights seem to be mediators between the realm of pure value (which is subjective) and the factual (which is objective).⁹⁵ This means that rights discourse seems to bridge the gap between the subjective and the objective –between norms and facts – and this, importantly, seems to make objective and calculable reasoning possible. The “factoid” character of rights allows the citizen to make his claims as claims to reason, rather than a matter of mere “desire” or preference. (Such a claim can become a legal claim when the written laws affirm such rights as *legal* rights.)

Before I considered formal reasoning as thinking consistently in universal terms and this is exactly what rights make possible and values do not. Reasoning in terms of rights lifts reasoning to an objective and universal level, making it possible to disregard the particular and the subjective. Thinking in terms of rights almost automatically leads to the demand of making these rights as concrete and particular as possible in the law. The demand for rights will thus lead to a demand for law with a “strong formal element in the sense of precision, objectivity, and enforceability.”⁹⁶ It requires that rights and duties be circumscribed in terms of the well-defined, visible, factual characteristics of people’s activities, and it is preferably the law that is a consistent system of universal “rules,” as rules are precise, objective and applicable to facts without much ado.⁹⁷

This is so because rules are applicable in an all-or-nothing fashion: “If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.” Thus we can think of rules as norms with

⁹⁵ Kennedy, *A Critique of Adjudication*, p. 305; cp. Kant, ‘On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’” in: Kant, *Political Writings*, p. 86.

⁹⁶ Friedman, *The Republic of Choice*, pp. 10, 11.

⁹⁷ Aubert, *The Hidden Society*, p. 66, 67; Unger, *Knowledge and Politics*, pp. 50, 51.

determinate scope and application.⁹⁸ This means that rules seem to demarcate clearly and distinctly my legal obligations at the same time that they just as clearly demarcate the realm of my freedom; accordingly, the scope and limit of official authority is also demarcated.⁹⁹ Naturally, the citizens need to know exactly what the rules are that he or she must conform to. Only certain rules are thought to be so important that state power will be used against me if I do not voluntarily conform. Since only the violation of *legal* rules will provoke such a reaction, I will need some criterion to distinguish legal rules from other rules, (social rules, for instance, or rules of games and of etiquette). Hart's "rule of recognition" is devised to do just this. The simplest form of remedy for the uncertainty is the introduction of such a rule of recognition.¹⁰⁰

In most modern liberal states the rule of recognition will take the form of a *formal* criterion. Again we are not asked to look at the particular substance of the rule under investigation, but only at a certain formal quality – the formal criterion being the fact that, generally, in modern liberal democracies, the rule was established by means of the right procedures by the right institutions. The source of the law will have to be the right authority, which is in most cases the established law-giving power or institution in the state. The legal rules that are proclaimed by such an authority should also be *universal in scope*. This is a requirement of the Kantian argument that was presented before: the law should limit everybody in his or her freedom to exactly the same extent. This again is a formal requirement necessitated by the fact that the law should not favor particular goals and ends at the expense of other values and ends, which would amount to favoring or privileging one group over others in society.

⁹⁸ Dworkin, *Taking Rights Seriously*, p. 24; Nonet & Selznick, *Law & Society in Transition*, p. 60.

⁹⁹ "The rule-centered character has a very practical basis: 1.) Rules are a potent sources for legitimating power. They fix with precision the scope and limit of official authority, thus offering seemingly clear tests of accountability. 2.) When judges are perceived as constrained by rules, the apparent range of their discretion is narrowed. [...] The outcome, however unintended, a rights-centered jurisprudence." Nonet & Selznick, *Law and Society in Transition*, pp. 61-63, 71.

¹⁰⁰ Hart, *The Concept of Law*, p. 92; cp. Nonet & Selznick, *Law & Society in Transition*, p. 12.

As stated before, in this perspective, any grounding of the law on some strong or substantial notion of the common good will lead to the imposition of values upon people, and this would mean denying all individuals equal concern and respect.¹⁰¹ If the law *would* distinguish between certain ends and goals there is, in modern society, a risk that this will endanger the legitimacy of the law because the law would be seen as taking certain subjects – those subjects whose objectives conform to those of the law – more seriously than others. This means that the law should be stated in general and impersonal terms and should be neutral with regard to all goals and objectives of individual citizens in society. Furthermore, when it also exists *prior* to the events to which it is applied, this suggests an objective impartiality, which makes modern law rationally acceptable.¹⁰²

Thus we may conclude that the matching vision of law in a culture of “plural equality” with a strong equal rights consciousness is highly “formalist.” It is formalist in the sense that it treats persons as abstract and equal “selves” with an equal right to respect and concern. It is also formalist in the sense that it radically separates law from morality and politics by focusing on rules with a particular origin, which are universal in scope. To repeat, to make any substantive moral, ethical or political vision the fundament of the law (like is done in the natural law tradition) would discriminate against those who choose a different moral, ethical or political vision to guide their lives. Furthermore, these formal rights are to be “clear and distinct,” to use the Cartesian phrase, because the modern citizen demands that he *know* exactly what his or her rights and obligations are. Only formal and sharply focused rules will satisfy this strong demand for legality:

“The formal element, moreover, contributes to the legitimacy of rules and institutions. Form and procedure seem to be the key elements in legitimation of modern law. And legitimacy is presumed to be indispensable to the success of authority – a vital substance without which authority is dead, inert, a statue of stone.”¹⁰³

¹⁰¹ Von Hayek, *The Road to Serfdom*, p. 85; Taylor, *The Ethics of Authenticity*, p. 51.

¹⁰² Lenski, *Power and Privilege*, p. 50, 51.

¹⁰³ Friedman, *The Republic of Choice*, pp. 10, 11; Bourdieu, ‘The Force of Law’, p. 817.

With this strongly formalist vision of legality we have given substance, or better, form, to the ideal of the “rule of law and not of man.” The rule of law means that government in all its actions is bound by legal rules fixed and announced beforehand – rules which make it possible to predict the behaviour of those with whom we must collaborate and to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.¹⁰⁴ Thus, reliance on rules reflects an effort to stem the tides of personal justice and to render power impersonal through law.¹⁰⁵

However, the rule of law does not only promise us legality in the sense of both neutrality and certainty, it also offers us the hope of “equality.” The vision of the law as treating everybody as an abstract legal subject – a bearer of rights – and depending on clear and distinct impersonal rules might have contributed significantly to the almost constant increase of freedom and equality in modern societies because the ideal of impersonal rules introduces into the social order a permanent source of subversion of all forms of hierarchical community.¹⁰⁶ In fact, the ideal of impersonal rules seems to be an effective antidote to all forms of inequality and oppression by whatever “authorities” exist in society, and this also partly explains the success of thinking in terms of individual rights and impersonal universal rules. Moreover, rights and the legal rules embodying them have multiplied. Without exception modern societies have witnessed a thorough and almost uncontrollable “legalization,” the proliferation of legal rules and procedural formalities.¹⁰⁷

¹⁰⁴ Von Hayek, *The Road to Serfdom*, pp. 80-89.

¹⁰⁵ Posner, *The Problems of Jurisprudence*, pp. 48, 319; Unger, *Knowledge and Politics*, pp. 243, 268.

¹⁰⁶ Unger, *Knowledge and Politics*, p. 170; “For it is the generality of law that establishes the formal equality of the citizens and thereby shields them from the arbitrary tutelage of government. Administration must be separated from legislation to ensure generality; adjudication must be distinguished from administration to safeguard uniformity. These two contrasts represent the core of the rule of law ideal.” Unger, *Law in modern society*, p. 54.

¹⁰⁷ Marshall, T.H., ‘Citizenship and Social Class’ in: Marshall, T.H., *Citizenship and Social Class and Other Essays*, Pluto Press London 1992, p. 45; Nonet & Selznick, *Law & Society in Transition*, p. 108.

In a society characterized by the increasing importance of formal and large-scale organization – that is to say in modern industrial, capitalist and urban societies – there is a growing demand for defining situations and responses to situations in terms of highly visible and easily recognizable criteria. We already identified a demand for the law to be impersonal and formal and this implies that rights and duties for almost *all* thinkable social relationships have to be circumscribed in terms of well-defined rules. In modern societies the general trend has been toward assigning rights and duties on the basis of visible, measurable characteristics, a development which has taken the form of a general increase in legal or semi-legal regulations of social situations.¹⁰⁸ Indeed, according to Lawrence Friedman, “The shrinking zone of authority is remarkably similar to the shrinking zone of immunity to law.” Almost no corner of modern society – including even the cradle of “fraternity,” the family – is left untouched by the authority of the law as it tries to protect all individuals from arbitrary interference by whatever other “authorities.”¹⁰⁹

The other side of the coin is that the law might become a “total presence,”¹¹⁰ and many think it stifles economic initiative and human sociability. It should be clear, though, that as long as we value individual dignity and formal equality like we do, as long as we loathe oppression of the individual by “arbitrary” external authorities, and as long as we demand objective positive law to help us orient our behavior and secure our freedom, all kinds of proposals for “de-legalization” will encounter severe difficulties. We seem to end up with the image of the law as, in the words of Ronald Dworkin, “a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges.”¹¹¹ This set of rules is seen as a system that covers the whole of society like a huge “glasshouse,” ordering and regulating every aspect of it by means of a “clear and distinct” (glassy) system of sharp rules that clearly delimits our rights and legal obligations. Thus, the legal order is an abstract and formal *Rechtsstaat* that can assume any substantial content that the lawgiver wants it to have as long as it is “formalized” in

¹⁰⁸ Aubert, *The Hidden Society*, pp. 66, 67.

¹⁰⁹ Friedman, *The Republic of Choice*, pp. 10, 17; Friedman, *Total Justice*, p. 148.

¹¹⁰ Friedman, *Total Justice*, p. 42.

¹¹¹ Dworkin, *Taking Rights Seriously*, p. 15.

general or *universal* and sharp rules that fit the overall system of rules and legal rights derived from it.¹¹² In other words, the law is experienced as a large glasshouse of norms that “covers” or “domes” our civil society and political institutions to keep them within bounds and to guard and guarantee the individual’s freedom against arbitrary external interference.

To complete the picture we need to briefly mention some other qualities of this glasshouse of the law. Adjudication in this doming legal order, the application of the rules to concrete cases, must be strictly distinguished from “administration” to safeguard uniformity of adjudication.¹¹³ Individual judges should not try to think as administrators and aim at particular (political or social) results with their reasoning. In the second place, the adjudication must also be strictly distinguished from “legislation” to safeguard the independence and autonomy of the judges, because the intrusion of particular political values and ends will destroy the formal qualities of the glasshouse. As we have seen, granting equal concern and respect requires the strict separation of the law from both politics and morality. In interpreting and applying the law, jurists are thought to be objective spokesmen for the law, “passive dispensers of a received, impersonal justice.”¹¹⁴

In the previous chapter we learned to understand the law in terms of the respect that individuals owe to the shared understandings of the community and to its expression in the law. Here we tried to understand the law in terms of the individual’s demand for formal respect from the law *in return* for his loyalty to the community. The law is still thought to be “above” politics, but is such in a new sense. The glasshouse might be thought of as the formal normative structure that makes political strife and controversy possible in the first place. It is possible only in so far as the glasshouse itself stays clear of “politicization” or “moralization,” which would thoroughly obfuscate our doming glasshouse, and thus would compromise our freedom.

¹¹² Cp. Weinrib, ‘Legal Formalism: on the immanent rationality of law’, p. 1011; cp. Ward, *Introduction to Critical Legal Theory*, pp. 41, 42; Weinrib, *The idea of Private Law*, p. 25.

¹¹³ Unger, *Law in modern society*, p. 54.

¹¹⁴ Nonet & Selznick, *Law & Society in Transition*, p. 57.

Rationalizing the law

In the present paradigm, both the modern state and a legal order are regarded as necessary because, first, the freedom of the individual has to be limited by the law to make the freedom of all possible and, second, the state has to be the power that enforces and executes the law if people fail to comply voluntarily. However, the individual citizens only trust the state authority with this power if certain basic rights are guaranteed and protected by an independent judicial power. Legal rights will have to be complemented by legal obligations, of course. These legal obligations limit the individual's freedom, and therefore they should be codified as much as possible in clear and distinct legal rules. It should be possible to know exactly what the legal obligations in the political community are. The limit of these obligations is where the realm of freedom starts, and this limit should be as sharp as possible. To attain a maximum of legal certainty, and to guard and respect the individual autonomy of the citizens, the law needs to be constantly and thoroughly "rationalized."

Previously I described "rationality" or "formal reason" as thinking in universal terms and thinking consistently. Thus "universality" is the road to objectivity. In Unger's words, "The simplest way to define the point of rationalizing legal analysis is to say that it represents a way to think clearly and connectedly about the law." The road to such "clear and distinct" thinking is "to climb up the ladder of abstraction, generalization, and system."¹¹⁵ Importantly, in contrast to the hermeneutical attitude that was propagated in the previous chapter, formal rationality should again be thought of as "disengaged" reason. Analytical or formal reason adopts a critical distance towards its object of knowledge and scrutinizes it for inconsistencies and for arbitrary particulars and substance in order to find the "universal form." In other words, one looks for the "deeper" formal structure, the inherent system of axioms that subsequently makes inferential reasoning possible.¹¹⁶ Thus legal reasoning should be thought of as thinking consistently in *universal legal terms*, and legal science will have an important role in making this

¹¹⁵ Unger, *What Should Legal Analysis Become?*, p. 59; Unger, R.M., *The Critical Legal Studies Movement*, Harvard University Press Cambridge Mass. 1983, pp. 13, 14.

¹¹⁶ "The Cartesian option is to see rationality, or the power of thought, as a capacity we have to construct orders which meet the standards demanded by knowledge, or understanding, or certainty. [...] Clarity and distinctness require that we step outside ourselves and take a disengaged view." Taylor, *Sources of the Self*, pp. 143-158, 410, 411.

possible because “science is a way of finding the common principles that transcend particular situations, of extrapolating from things we know to things we do not know, a way of seeing the novel as another arrangement of the familiar.”¹¹⁷ This means that we should “discern in law an inchoate and developing rational scheme in order to recognize its legitimacy and to read its meaning.”¹¹⁸

But what are the universal legal terms? In essence, we will see the same procedure in legal science as we have seen in the previous sections. The idea is to “empty out” the legal tradition and materials of all particularity and substance and ideally end up with a consistent system of universal rules that clearly demarcates the legal rights and obligations of the citizens. Such a system needs to be a *consistent* and *coherent* system because only such a system can offer unambiguous and clear answers as to what is legally due. It has to be a system of *rules* because rules stated in the “if/then” formula can unambiguously state the rights and obligations on the one hand and the legal consequences or sanctions on the other such that a maximum of certainty is reached. Thus rules can be norms with a determinate scope of application.¹¹⁹ The systematic reasoning from rights formulated in rules that is made possible by rationalizing legal science is an antidote to arbitrariness in legal reasoning and, according to Unger,

“[...] enables people to stay secure in their entitlements while restraining power under law. Within broad limits people can understand what the law means and how it will be enforced. Citizens can participate in the same process of justification that the judges themselves must use. More importantly, the character of the reasons for decision given in rationalizing legal argument enjoys a power of significant generalization and selection.”¹²⁰

¹¹⁷ Collins, *Conflict Sociology*, p. 2.

¹¹⁸ Unger, *What Should Legal Analysis Become?*, p. 55.

¹¹⁹ We can even say that rules are the “cutting edge of social control” in contrast with values because “control is easier to institute when reliance is placed on specific rules than more general precepts.” Nonet & Selznick, *Law & Society in Transition*, pp. 60, 63; cp. Dworkin, *Taking Rights Seriously*, p. 24.

¹²⁰ Unger, *What Should Legal Analysis Become?*, p. 63.

But the project of rationalizing the law requires making some fundamental distinctions – distinctions we explicitly refused to make in the chapter on authority in the previous chapter.¹²¹ To start with, we should honor the famous Humean distinction between “relations between facts” and “relations between ideas.”¹²² The autonomy and objectivity of the law are secured by confining legal analysis to the “conceptual level,” staying at a respectable distance from facts and particulars. Legal doctrine or legal analysis is thus thought to be an exclusively conceptual practice that starts from institutionally defined materials and aims at rationalizing it into a coherent system.¹²³

But we need to add another important distinction. We might say that the construction of the law as a consistent rational system is an exercise in, what one might call (with Max Weber), “formal rationality,” which can be opposed to “substantive rationality” and, obviously, this distinction also capitalizes on the philosophical form/substance dichotomy that we encountered before.¹²⁴ From a legal point of view, the problem with substantive rationality is that it aims at particular just results but, again, reaching just results in particular cases would make the reasoning dependent on the facts about the world. Because these facts and circumstances are always variable, such purposive or substantive reasoning is inherently particularistic and unstable.¹²⁵ Thus Von Hayek in *The Road to Serfdom* thinks of formal legal rules as instrumental only in the sense that they are expected to be useful in a very general sense to as yet unknown individuals, and for as yet unknown purposes. To his mind, formal rules do not aim at the wants and needs of particular people, rather they aim at helping people to predict the behaviour of those with whom they must

¹²¹ Indeed, one might argue that the analytical mind typically proceeds by making distinctions, reducing complexity by analyzing back into elementary parts. Unger, *Knowledge and Politics*, pp. 46-49, 121.

¹²² Hume, D., *An Inquiry concerning Human Understanding*, Open Court Chicago Ill. 1988, p. 71; This distinction was a last “dogma of empiricism.” Cp. Quine, W.V.O., ‘Two Dogma’s of Empiricism’ in: *From a Logical Point of View*, Harvard University Press Cambridge Mass. 1953; Unger, *What Should Legal Analysis Become?*, p. 122.

¹²³ Posner, *The Problems of Jurisprudence*, pp. 39, 40; Unger, *The Critical Legal Studies Movement*, p. 2.

¹²⁴ Cp. Brint, *In an Age of Experts*, p. 144; Unger, *Knowledge and Politics*, pp. 153, 154.

¹²⁵ Lash, S.M., *Another Modernity, A Different Rationality*, Blackwell Publishers Oxford UK 1999, p. 372; Unger, *Law in modern society*, p. 86; Unger, *Knowledge and Politics*, p. 97; Posner, *The Problems of Jurisprudence*, pp. 40, 41.

interact and collaborate. Von Hayek advises the law to stay at the formal or conceptual level, the level of relations between ideas:

“In fact, that we do *not* know their concrete effect, that we do *not* know what particular ends these rules will further, or which particular people they will assist, that they are merely given the *form* most likely to on the whole to benefit all the people affected by them, is the most important criterion of formal rules. [...] This consideration is in fact the rationale of the great liberal principle of the Rule of Law.”¹²⁶

Yet, there is, however, a third important distinction that we should consider. We need to take seriously the distinction between facts and norms, the “is/ought distinction,” also initially made famous by David Hume. In the previous sections we saw how the breakdown of the cosmic order made this distinction necessary. One cannot say norms “exist” in the same way as facts do. Facts can be said to exist in reality, of norms we can only say that they are *valid* under certain circumstances. This “logical” or “analytical” difference justifies the strict separation between facts and norms in scientific discourse. Science generally focuses on the facts, but it seems clear that the law belongs to the normative realm. In the previous chapter we saw that from the perspective of authority there is a tendency to make relative the separation between norms and facts. Particular shared meanings are experienced as having a normative aspect in a particular community, and it is on behalf of this community that the legal professional speaks with authority. Conversely, norms are only expressible in factual meaningful utterances, and this also seems to make the distinction relative. In fact, in the present paradigm we also tend to focus on the meanings, but only after a last important distinction has been made. We need to separate the domain of the law strictly from the domains of morality, on the one hand, and the political realm on the other.¹²⁷ This is important because, in a legal community, we want the subjects to keep their *legal* obligations, but we do not want to further treat them in a moralistic or paternalistic way.

¹²⁶ Von Hayek, *The Road to Serfdom*, pp. 81, 83 (emphasis added.) Cp. Kennedy, *A Critique of Adjudication*, p. 359.

¹²⁷ Cp. Nonet & Selznick, *Law & Society in Transition*, pp. 57-60.

To summarize, legal issues should be distinguished from the factual realm, on the one hand, and from the other normative realms – politics and morality – on the other.¹²⁸ If we would focus on the facts, legal science would be reconfigured as legal sociology, and if we do not make a distinction between political and moral controversies, on the one hand, and particular legal issues on the other, we will never come to a distinct legal science that aims at finding the universal structure of the law. We might say that such a legal science searches for “universality through immunity to normative and empirical controversy.”¹²⁹

We delimit a specific autonomous legal domain that is rationalized into a system of clear and distinct rules. The “rationalizing project” aims at thinking consistently and in universal terms about the law. To achieve this we need to rationalize the law into a system of rules that “abstracts away” as much as possible from specific concrete and particular aspects of particular circumstances and persons such that this system can be unambiguously, and, most importantly, *universally* applied to legal conflicts. Surely, reason or rationality is “a machine for analysis and combination,”¹³⁰ and this is exactly what both the lawyer and the legal scientist will have to do. The legal professional has to work with legal materials (statutes, precedents, treaties, and customs) that have authority in the community as reasons or justifications

¹²⁸ We can think of an alternative reaction and I will extensively explore the resulting position in the next chapter. We might also *reduce* the moral world to the natural (or factual) one instead of radically separating the two. This is one of the distinctive differences between the paradigm I am exploring here and the idea of law as technology, which will be the subject of the next chapter. Unger, *Law in modern society*, p. 38.

¹²⁹ An influential direction in legal theory is “the project of producing an analytic representation of law that can disengage itself from both normative controversies about what the content of law should be and causal-empirical controversies about the causes and consequences of different rules and doctrines. [...] the central idea of an analytic description of law disentangled from ideology and sociology.” Unger, *What Should Legal Analysis Become?*, pp. 122, 123.

¹³⁰ Unger, *Knowledge and Politics*, pp. 74, 75; “With Kant the modern individual is explicitly discussed in purely formal terms. Our cognitive and volitional lives are analyzed into a process that works for unification, consistency, and universality. What content they receive is a contingent matter; the process itself can be known only in purely formal terms. [...] In Kant’s opinion it was exactly the formal purity of his system that made it scientific and necessary knowledge.” Kolb, *The Critique of Pure Modernity*, p. 17.

for legal actions. These materials can only successfully regulate modern societies if they are consistently and coherently applied in legal practices. Proceeding by means of “analysis” and “combination” analytical (and critical) inquiries aim at finding the underlying coherence and unity in the apparently chaotic mishmash of legal materials that the lawyer has to work with and apply to particular cases. “Thus analysis and combination” or “thinking consistently in universal terms” is the road to consistent and predictable legal practices.¹³¹

We see how there is a strong dependence on reason as a means to coherence and consistency. This leads easily to both a “legal positivist” and “legal formalist” conception of law. The legal positivist works from and with the certainty that the law consists only of particular legislative or other official commands. In other words, legal rules are only those that are chosen by the sovereign to be legal rules, as opposed to social or moral rules.¹³² I already mentioned the rule of recognition that makes it possible to know exactly know what is and what is not a source of such legal rules. The legal formalist works from the premise that these commands can, in all cases, yield demonstrably correct results. In its simplest form, it reasons from the premise that by an automatic or mechanical process we can deduce correct answers to our legal questions from the given laws.¹³³ The legal professional can stay on the conceptual or formal level and proceed by means of analysis of the meaning of the relevant legal texts and materials only.

Legal formalism and legal positivism can go together very well. To put it succinctly, the exclusive *forms* of consistent and correct legal reasoning (formalism) are exclusively *given* in the authoritative sources of law (positivism). A specific division of labor in the legal professional world makes objectivity and certainty possible in legal practices: it is legal science that searches for a coherent interpretation of legal materials as a whole, such that professionals in legal practices can more easily find the correct answers in particular legal cases. But how does the rationalizing of the law work?

¹³¹ The road to such practice is sometimes called “rational reconstruction.” Cp. Lucy, *Understanding and Explaining Adjudication*, pp. 3, 108, 110.

¹³² Unger, *Knowledge and Politics*, p. 70.

¹³³ Posner, *The Problems of Jurisprudence*, pp. 40, 41; Unger, *Knowledge and Politics*, p. 92.

Legal science advances through a constant “flattening out” of particularity.¹³⁴ Starting from particular cases and problems and the particular rules and principles that offered a satisfying and authoritative settlement of particular conflicts, the legal scientist abstracts away from the particulars and tries to formulate more general rules that can cover more particular cases (and thus treat alike cases alike).¹³⁵ Thus constant “rationalizing” of the legal materials refers to the constant reasoning away from the particular, the concrete, the timely and the local toward the universal and the abstract, and thus towards the “transcendence” of time and place, or in the words of the sociologist Ralph Dahrendorf, “individual problems are generalized, formalized, [and] turned into impersonal cases in a filing system”.¹³⁶

The reasoning away from the particular, the concrete, the temporal and the local amounts to “the emptying out of symbols of specific content” and the emptied-out symbols can in this way become the standard “forms” of legal reasoning. One might say that what is aimed at in this legal science is “the absorption of ever-increasing spheres of human activity and fancy into a predictable, calculable, organizing stream of categorizations and rational actions.”¹³⁷ The law should thus be an organised and systematic whole of such “categorizations” and “actions” that on an abstract and impersonal level prescribe what the state demands from its citizens.

To give an example of this method of formalism, let us take a look at the concept of the so-called “legal subject.” The “legal person” is constructed out of individual lives as an abstract and formal universal, and then treated as if it

¹³⁴ Cp. Parsons, ‘The Professions and Social Structure’, in: *Essays in Sociological Theory*, pp. 41, 42.

¹³⁵ Compare the “Langdellism” that Kronman describes: “[...] what Langdell actually sought to do was reorganize the common law in the spirit of geometry [...] a science of this sort could be established by rearranging the common law from within.” Kronman, *The Lost Lawyer*, p. 181.

¹³⁶ Dahrendorf, *The Modern Social Conflict*, p. 132; According to Parsons we can think of the legal science as a “universalistic applied science” because the standards and criteria that are used are independent of the particular social relationship and of particular persons: who states a proposition is as such irrelevant to the question of scientific value. This is what makes it a science; an applied science but a science notwithstanding. Parsons, ‘The Professions and Social Structure’, in: *Essays in Sociological Theory*, pp. 41, 42.

¹³⁷ Lash, *Another Modernity, A Different Rationality*, p. 105; cp. Brint, *In an Age of Experts*, p. 144.

were a real and independent being. It is particularly (and ideally even exclusively) with this abstract legal person, who is the subject of legal rights and duties, that the jurist is concerned. The particular individual “behind” this abstraction, the man or woman who uses his or her legal entitlements to promote particular interests, should be completely left out of the picture. “The law,” according to Jean-Jacques Rousseau, “considers all subjects collectively and all actions in the abstract,”¹³⁸ and we can now see what he means.

The legal scientist should work with such abstracting generalizations of the self and abstain from getting involved in the evaluation of concrete values and interests. In the present paradigm the particular interests, experiences, or circumstances are viewed as a contingent substance of the forms, or as concrete examples of abstract propositions. They are, furthermore, to be left to the exclusive assessment of the particular individuals themselves. The abstract legal persons are granted rights and one of the advantages of thinking in terms of “rights” is exactly that one can define a right independent from particular interests that it might serve. In the previous paragraph I already discussed how the “factoid” character of rights allows for an objective legal discourse without the need to meddle in questions of a moral or political nature.¹³⁹ What remains are the *forms* of the law – or *pure law*¹⁴⁰ or the ideas or concepts of law – and these have to be applied in concrete conflicts.

Rationalizing legal science makes objectivity in legal practices possible. A perfectly rational law even makes what one might call “mechanical jurisprudence” thinkable. If judges can easily find an apposite rule, they may seem not much more than legal analysts or legal technicians acting out preordained procedures and routines.¹⁴¹ No particular *judgment* is necessary; no practical wisdom or “*prudentia*” is required. The law can be found in, or is given in the legal sources, preferably in systematic and accessible statutes, and can simply be mechanically applied in particular cases.

¹³⁸ Rousseau, *The Social Contract*, p. 82.

¹³⁹ Von Hayek, *The Road to Serfdom*, pp. 80-96; Unger, *Knowledge and Politics*, pp. 74, 35; Kennedy, *A Critique of Adjudication*, pp. 308, 309, 334.

¹⁴⁰ Unger, *What Should Legal Analysis Become?*, pp. 59, 74; cp. Dworkin, *Law's Empire*, p. 400.

¹⁴¹ Nonet & Selznick, *Law & Society in Transition*, pp. 60, 61; Kennedy, *A Critique of Adjudication*, p. 359.

Previously we identified a constant pull toward legal formalism in modern societies. The rights that people demand should be firm and enforceable. This means that people want rights to have a “formal reality.”¹⁴² This is impossible if they depend on the discretion or goodwill of some official or functionary. Complete discretion is considered to be radically inconsistent with the concept of right. From the present perspective, rights are formally recognized in a codified law as a coherent system of rules, and no interpretation or judgment is required. Ideally, the facts are data fed into a system of categories that produce the answer, and at each step definitions do all the work. Thus the “deductive mode” moves from the abstract (or general and universal) to the concrete (or particular), and this excludes the judge’s personal interests and values. Any neutral observer endowed with reason and a good set of eyes will be able to determine whether the legal professionals have unpacked the meaning of the rule and applied it correctly or whether they have forced their moral or political preferences on the parties involved.¹⁴³

An important selling point of this method is that the forms of legal reasoning attain an “ahistorical” quality. Temporal abstraction leads to an experience of forms as things without a specific history. Importantly, in a sense, the forms of the law seem to *resist* being interpreted as contingent products of history. This is so because formalism is a “synchronic” and not a “diachronic” method. What is searched for in the scientific program of formalism is horizontal (local) rather than vertical (temporal) consistency of the system of rules.¹⁴⁴ Another important aspect of the universalizing attitude is that it makes the law seem totally independent from all sorts of (political or socio-economical) power relations in society or the political community. The very generality and impersonality of formally rational law presupposes a vision of law as transcending social, economical or political interests. Thus, the universalizing attitude makes it possible to guard the autonomy and

¹⁴² Friedman, *The Republic of Choice*, p. 10; “Modern rights [...] are pushy, expansive and bold. They are less liable to forfeiture which is another way of expressing the fact that they are more general and less liable to run afoul of old immunities and unreviewable discretions.” Friedman, *Total Justice*, p. 120.

¹⁴³ Kennedy, *A Critique of Adjudication*, pp. 98, 102.

¹⁴⁴ Cp. Dworkin, *Law’s Empire*, p. 227; Berger, ‘On the Obsolescence of the Concept of Honor’ in: Hauerwas, & MacIntyre, *Revisions*, p. 177.

objectivity of legal practices.¹⁴⁵ We end up with a practice of “reasoned elaboration.” This practice concerns itself with universality of understanding and of application from a “need to leave the law, after a decision, in an organized state, “one allowing judges, other officials, lawyers, and ordinary people alike to understand and to obey the law, and every extended part of it, as a reasonable plan rather than as a formless collection of accidents and deals.”¹⁴⁶

However, it will be hard to rationalize the legal materials of any legal order into a coherent system of rules without crossing the dividing line into the political and moral sphere. Most likely, the legal scientist needs a philosophical apparatus of basic moral or political concepts to lift the whole system to a higher degree of order and cohesion, concepts and ideas that make it possible to see the law as a “reasonable plan” as they “formalize” the formless collection of particulars and accidents that we encounter in the legal materials. Generally, the basic idea is that formal law, in an effort to become pure form, needs to be systemized with the help of some conception of “formal morality.” Thus the law will be redesigned and reconstructed to reach towards a rational plan, and the traditionalist, with his distaste for abstraction, will lose ground. “Rationalizing legal analysis and its supporting theories represent extended areas of law and legal doctrine as moving toward the conceptual order of comprehensive prescriptive theories”¹⁴⁷

After all that has been said it will come as no surprise that mainstream liberal moral philosophy, and especially the towering figure of Immanuel Kant and those inspired by him, will probably be of great help here.¹⁴⁸ Indeed, it is clear that it is not an arbitrary morality that is proposed as the starting point for rationalizing and systematizing the legal order. It is the *liberal* morality of formal and equal rights as the requirement of the basic morality of

¹⁴⁵ Lash, ‘Modernity or Modernism? Weber and Contemporary Social Theory’, in: Lash & Whimster (eds), *Max Weber, Rationality and Modernity*, p. 374; cp. Bourdieu, *Language and Symbolic Power*, pp. 141, 142; Bourdieu, ‘The Force of Law’, p. 817.

¹⁴⁶ Unger, *What Should Legal Analysis Become?*, p. 65.

¹⁴⁷ Unger, *What Should Legal Analysis Become?*, pp. 67, 68, 72.

¹⁴⁸ “Corrective justice and Kantian right are as immanent in the legal discourse as principles of syntax and logic in discourse generally.” Weinrib, *The Idea of Private Law*, p. 146: Cp. Dworkin, *Taking Rights Seriously*.

individual human dignity that fits well with the modern liberal culture in the modern Western world I described in the opening paragraphs of this chapter – a morality that works from the idea of human dignity and political equality.¹⁴⁹ The sort of (political) morality that can be put under the heading of “fairness” has been especially highly influential.¹⁵⁰ This explains why concepts like individual “rights,” “corrective justice,” “procedural justice,” or “justice as fairness” will be invoked to re-conceptualize many of the basic notions of the law.

Modern expert professionalism

The respect that is due to the citizen’s freedom implies that legal professionals should distance themselves from the values and interests of the parties in the conflict. That is to say, these values and interests should be taken as *givens* and should not in any way be evaluated or assessed. On the whole, the role of the professional attains an increasingly *formal* quality and becomes more limited and strict. In other words, the legal professional will behave in a more rational and impersonal way. He strictly limits his or her responsibilities to matters of formal law, which is the expertise that legitimizes the lawyer’s role and competencies. Such a formalist lawyer does not consider it to be the task of the lawyer to *judge* persons but merely to test their behavior against the formal demands of the law.

This means, and we investigated this “universalizing” or “abstracting attitude” in the previous section, that legal concepts and rules must be made devoid of any particular and concrete meaning; they have to be, in other words, “emptied” of *particular* references and meaning. Thus, professionals are particularly interested in matters of meaning,¹⁵¹ but they do so in a disengaged and an analytical way. Professionals should become “experts committed to a method of reasoned elaboration,” and such professionals should forestall becoming personally “involved” or “engaged” in the

¹⁴⁹ Cp. Dworkin, *Taking Rights Seriously*, p. 198.

¹⁵⁰ “Notions of fairness have the property that evaluations relying on them are not based exclusively – and sometimes are not dependent at all – on how legal policies affect individual’s well-being.” Cp. Kaplow & Shavell, *Fairness versus Welfare*, p. 39.

¹⁵¹ Nonet & Selznick, *Law & Society in Transition*, p. 61.

particulars of the conflicts.¹⁵² In other words, we see here a “disengaged” (or “unencumbered,” “punctual” or “neutral”) professional at work, the type of relatively “estranged” subject that might be seen as a typical product of the modern world. Needless to say, we find a strong contrast here with the explicit engagement with order and community displayed by the ideal lawyer in the previous chapter.

The formalist does not experience any particular loyalty to a larger whole, no concern for the community nor any intrinsic substantial good of the law. We see a serious contrast with the traditional commitment here, which requires placing oneself above society, and distinguishing oneself strongly from it in an effort to serve the binding meanings and values of the community. However, as described in the previous chapter, such a professional attitude and engagement easily leads to a rather aristocratic and paternalistic attitude. The formalist certainly is not prone to elitism and paternalism.¹⁵³

In modern society, where individuals demand equal respect for their interests and goals in return for their “subjection” to the law, the moral side of the traditional professional could seem “overly genteel, unnecessarily intrusive, and inclined to purism.”¹⁵⁴ In modern egalitarian liberal culture, the in-egalitarian logic of authority will be challenged, and (as they do from all authorities) individuals will demand equal respect and concern from legal professionals.¹⁵⁵ Moreover, according to Brint, “The idea of occupationally

¹⁵² “If we can quarantine the political branches and leave the case-by-case development of law in the hands of experts committed to a method of reasoned elaboration, we can expect the law over time to “work itself pure.”” Unger, *What Should Legal Analysis Become?*, p. 74; Dworkin, *Law’s Empire*, p. 400.

¹⁵³ But we should also note that the present “disengaged professional” is generally not concerned with results of legal decisions and actions. He is particularly not concerned with effectiveness and “efficiency.” Lucy, *Understanding and Explaining Adjudication*, pp. 108, 110.

¹⁵⁴ Brint, *In an Age of Experts*, p. 8.

¹⁵⁵ “Legally as well as politically, society is no longer pictured as the traditional pyramid with a moral and economic elite at the peak. Morally and socially, society is a plateau, a mesa; with standing room for all at the top.” Friedman, *The Republic of Choice*, p. 159; One might refer here to the idea of the ‘egalitarian plateau’: “On Dworkin’s view, every plausible political theory has the same ultimate value, which is equality [...] the idea of treating people ‘as equals.’ [...] A theory is egalitarian in this sense if it accepts that the

defined contributions to the public good seemed increasingly dubious to a skeptical generation,”¹⁵⁶ and this can be explained by the fact that modern society can hardly be expected to generate common values and goals. The idea of legal professionals as self-evidently contributing to the public good of order and community will now constantly be critically considered and assessed.

We saw how modern, rights-conscious individuals will demand transparency from professionals, as they want to be able to see whether they are unduly patronized or moralized at by those who exercise authority over them and thereby have power over them. This implies that such individuals demand a formal evaluation of their actions by means of the relevant legal rules and the abstention from judgment of his or her moral stature. This formal evaluation can remain impersonal, objective and transparent; the “personal” and the “subjective” can stay out of the picture and thereby remain safe from damaging involvement. Under such circumstances the idea of professional honor or professional pride, which was the basis of the distinction between legal professionals and “commoners” in civil society, is also bound to crumble. In the legal world, like in the rest of modern society, professional honor will be experienced as a mere “escutcheon,” a kind of “mask” hiding the “real face” of the professional.¹⁵⁷ The real face, that is to say the person with his or her interests, values and taste, should, however, remain out of sight because these idiosyncrasies should not be seen as determining the outcome of the legal proceedings.

This implies that the individual demands that the modern legal professional comes down from his “elevated position” and give him due respect by relating to him in a businesslike, professional and neutral manner. What is demanded is a “calculable impersonality of relations of authority”,¹⁵⁸

interests of each member of the community matter, and matter equally. Put another way, egalitarian theories require that the government treat its citizens with equal consideration; each citizen is entitled to equal concern and respect.” Kymlicka, *Contemporary Political Philosophy*, pp. 4, 5; Dworkin, *Taking Rights Seriously*, pp. 179- 183.

¹⁵⁶ Brint, *In an Age of Experts*, p. 9.

¹⁵⁷ Berger, ‘On the Obsolescence of the Concept of Honor’ in: Hauerwas & MacIntyre, *Revisions*, p. 175; Berger, Berger, & Kellner, *The Homeless Mind*, pp. 83-96; cp. Sennett, *The Fall of Public Man*.

¹⁵⁸ Dahrendorf, *The Modern Social Conflict*, p. 131.

which means that the personal – being the moral and the political – should be evaded and the relationship should be neutral and premised on mutual respect. In the words of Steven Brint, such modern legal professionals are nothing more, and nothing less, than “agents of formal knowledge” forgoing judgment.¹⁵⁹ They settle conflicts with the use of this formal knowledge and make no further claims to wisdom or to a pretentious legal professional ethics that emphasizes character, trust and judgment. Moreover, the commoners experience the professional pride of jurists, which works as a binding element within the legal community, as aloof and unassailable.

Roberto Unger describes pride as the denial of vulnerability, as the denial of the dependence on other people for self-respect and success, which produces a “hardening of the self.” In the extreme, the proud self might even be described as a kind of “citadel” with all the constraints on experience that such a closure implies.¹⁶⁰ In contrast to the traditional professional, the formalist professional does *not* identify completely with his or her professional – or public – role in society. The formalist attitude allows for a certain distance between the professional role and the personal commitments that are preserved for private life. Moreover, the professional and the personal – or the public and the private – are to be strictly severed; the latter should not influence the former. Self-esteem and personal pride are not wholly derived from the public professional role but rather derived from and relegated to the personal and private life.

This does not mean that formalist professionals do not consider themselves as playing an important role in modern societies. By consistent formalistic practice with regard to the legal rights and duties of the citizens that are involved in conflicts with each other or with the state, these rights and duties become *real*. The protection of weak parties in society against the mighty state and powerful (repeating) players like large corporations and organizations requires a principled dedication by the professionals to such rights and duties. To repeat, freedom and the modern culture of authenticity require “rights incised in stone,”¹⁶¹ and the formalist legal professional can offer just this. Rights and duties now become clear and distinct, and the legal

¹⁵⁹ Brint, *In an Age of Experts*, p. 37, 10.

¹⁶⁰ Unger, *Passion*, pp. 199-202.

¹⁶¹ Friedman, *The Republic of Choice*, p. 10.

professional can give them teeth in his impersonal and formalist dedication to the law as a system of rules. This formal professional is the guardian of the “formal community” that the modern liberal state, or *Rechtsstaat*, aspires to be.

Another important point is that a consistent formalistic attitude also makes formal equality more than just an ideal. The famous blindfolded figure of justice can only really be blind if legal professionals treat everyone and all cases alike on purely formal grounds. The formalist treats everyone as an abstract legal subject with abstract rights and duties regardless of their personal qualities or status. Everyone also goes through exactly the same legal procedure, and everyone’s actions (or inactions) are tested against the same clear and distinct legal norms.¹⁶² We can think of such equality as a major achievement of the modern liberal state. In the words of Friedrich von Hayek in *The Road to Serfdom*, “It is the Rule of Law, in the sense of the rule of formal law, the absence of legal privileges of particular people designated by authority, which safeguards that equality before the law which is the opposite of arbitrary government.”¹⁶³

Thus, in the ideal case, from the liberal formalist perspective that I investigated here, modern legal professionals should be “mechanical agents of formal knowledge” and as transparent, calculable and verifiable as possible. One might say that this requirement would make them a paradigm case of the “heartless and spiritless experts” that, according to Weber’s prediction, would more and more administrate the rational-legal institutional structures of modern life.¹⁶⁴ And indeed, striving for universality makes law on the whole

¹⁶² Cp. Luhmann, N., *Legitimation durch Verfahren*, Luchterhand Neuwied am Rhein 1969.

¹⁶³ Von Hayek, *The Road to Serfdom*, p. 87.

¹⁶⁴ “[...] the iron cage [in which] specialists without spirit, sensualists without heart, [are] caught in the delusion that [they] have achieved a level of development never before attained by mankind.” Weber, M., *The Protestant Ethic and the Spirit of Capitalism*, Scribner’s and Sons New York 1948, p. 182; cp. Eliaeson, *Max Weber’s Methodologies*, p. 11; Brint, *In an Age of Experts*, p. 144; “Rational-legal authority [...] cannot help but place an emphasis on equality that is lacking in the traditional order. All are equal under the rules governing them specifically. The emphasis is on the rules rather than on persons or on mores. The organization is supreme and, by its nature, strives toward increasing rationalization of itself through reduction of the influence played by kinship, friendship, or the various other factors, including money, that so strongly influence the traditional

rather cold and bloodless, and it can be argued that it cannot completely replace traditional authority in the expressive, emotional sense that was explored in the previous chapter. Authority is a kind of bonding, and the law is now merely the product of reason, which inspired a tendency to universality but which has no appeal to the emotions and cannot provide us with a sense of belonging and community. This formal law is merely a form, a framework.¹⁶⁵

Such a law is a nightmare for Anthony Kronman who thinks that the growing disengaged formalism in the legal professions is a major cause of the crisis of morale in the modern legal community. But he also realizes that the product of the modern liberal egalitarian culture has found expression in the Kantian domination of our moral and political order. The conception of self-rule or autonomy that Kant has made famous has, in our contemporary culture, become almost a dogma of belief, and this leaves the virtues of excellence, leadership, judgment, wisdom and character as rather suspect. Kronman in today's egalitarian culture speaks of them as "embarrassed virtues."¹⁶⁶

Interestingly, already in the eighteenth century, Montesquieu prophesied the coming of this "heartless, spiritless" legal professional. In his famous quotation on judges being only the "mouthpiece" of the law, he calls them "inanimate beings" who have no authority but to strictly apply the exact wording of the law and who can "moderate neither its force nor its rigor."¹⁶⁷ Since the eighteenth century, it seems that the whole public sphere in modern societies is rationalized and impersonalized (one might even speak of a "demoralization of society"),¹⁶⁸ and it was only a matter of time before legal professionals would follow suit. Like Kronman argues, it leads to "demoralized legal professionals." Kronman mainly argues from a

system. Function, authority, hierarchy, and obedience all exist here, as they do in the traditional order, but they are conceived to flow strictly from the application of organizational reason." Nisbet, *The Sociological Tradition*, p. 143.

¹⁶⁵ Friedman, *The Republic of Choice*, pp. 112, 113.

¹⁶⁶ "Kant's conception of self-rule has become, in our contemporary culture, almost a dogma of belief." Kronman, *The Lost Lawyer*, pp. 2, 46-50.

¹⁶⁷ Montesquieu, *The Spirit of the Laws*, p. 163.

¹⁶⁸ Cp. Himmelfarb, *The Demoralization of Society*.

philosophical point of view, but he does claim a sociological basis for his argument, as well.¹⁶⁹

The sociologist Steven Brint supports Kronman's thesis. In the past decades, Brint noticed a movement from the traditional "social trustee professional" (which is characterized by an emphasis on character, trust and judgment) towards formalism. The modern professional is generally seen as merely an "expert professional" whose role and competencies are legitimated only by the formal knowledge that he or she brings to certain (social, medical, or legal) problems. According to Brint, for the modern expert professional, such knowledge requires no additional moral vaulting.¹⁷⁰

However, this trend *does* have an important moral dimension that has been the basic premise in the present chapter. The respect that the modern individual (who tries to emancipate himself from arbitrary interference by external authorities) demands from the law for his personal interests and values seems to demand the "demoralization" or even "dehumanization" of the law's administrators. Under such demands, administrators then change into experts of formal reason who just do their jobs while reserving their passions and commitments for their private lives,¹⁷¹ and they treat all legal subjects as abstract public selves deserving of equal respect, which implies neutral, impersonal and transparent treatment by the law.

¹⁶⁹ Kronman, *The Lost Lawyer*, p. 6.

¹⁷⁰ Brint, *In an Age of Experts*, pp. 10, 204.

¹⁷¹ "The distinction between strangers and insiders never wholly disappears under liberalism. It persists [...] above all, as a contrast between the public world of work and the private life of family and friendship." Unger, *Law in modern society*, p. 144.

4.

Power to the People

“Power to the people,” Jeremy Bentham is reported to have said, and indeed in modern liberal democracies the legitimacy of the legal order is ideally derived from the “will of the people.”¹ However, Bentham’s slogan also seems to point to a specific democratic and technological *culture* that has developed in modern societies. In such a culture, we find a repeated and explicit reference to the *will* – or the actual needs and desires – of the people as a basis for legal legitimacy, coupled with an extensive use of socio-economic knowledge to reach the desired results by means of the law.

In the previous chapter, the Enlightenment was analyzed in normative terms and tied to the emancipation of the individual. I explored the idea that freedom-loving individuals should respect certain prescriptions of reason. Reason prescribes certain boundaries to the exercise of their free will. In general, what they should respect are certain precepts of “fairness.” The democratic and technological culture discussed in this chapter is fundamentally different, even fundamentally at odds with it, because it leads to a conception of the law as a powerful instrument of public policy. The fundamental difference is that the law is seen as an instrument at the disposal of the people’s will. The actual desires of the people become the focus of attention.² The Enlightenment is also a naturalistic scientific project, and

¹ Quoted in Kelley, *The Human Measure*, p. 226.

² “[...] the goal which utilitarians seek to [...] promote – happiness, or welfare, or well-being – is something that we all pursue in our lives, and in the lives of those we love.

during the past two centuries we can see an ever-increasing influence of *technology* on modern culture. In short, the big promise of technology is that it gives us *power* over both our natural and social environments.³ Indeed, modern man can see that all around him, technology has fulfilled this promise to a very large degree.

Technological culture

“All that is solid melts into air,”⁴ and this certainly seems a fitting comment on the institutional structure in modern liberal democracies. Indeed many people experience the institutional structure of the modern state – and of modern civil society – as perpetually “under construction.” With regard to the legal institutional structure, especially when we look at the growing and constantly changing corpus of legal norms and policies that take on a legal form, this seems to be a truism. But, more generally, we can say the same of all organizations, practices and socio-economic institutions in our modern societies, which are constantly re-evaluated and if necessary redesigned. To a large degree, the eagerness of the moderns to continually reconstruct their common legal and socio-economic world can be explained by the fact that modern culture is largely a “scientific” or “technological culture.” Since the Scientific Revolution, man has learned to master the forces of nature and has used this knowledge for his own purposes. Concomitantly, we have gradually come to think of the institutions and practices in our societies as merely instrumental to human needs and desires. Moreover, such social institutions and practices are thought of as at least as changeable and improvable as our natural environment. We not only mastered nature, we also to a large degree “mastered” our social world as well.

In the past two centuries even the most basic institutional, political and social structures that seemed to inhibit modern man in his aim to control his basic life conditions were challenged. Sometimes this resulted in a revolutionary break with the traditions and “truths” (or “prejudices”) that

Utilitarians just demand that the pursuit of human welfare or utility [...] be done impartially, for everyone in society.” Kymlicka, *Contemporary Political Philosophy*, pp. 10, 11; cp. Bourdieu, ‘The Force of Law’, pp. 814-817.

³ Cp. Kolb, *The Critique of Pure Modernity*, p. 2.

⁴ Marx & Engels, *The Communist Manifesto*, p. 54; cp. Berman, M., *All that is Solid Melts into Air*.

supported the challenged structures and institutions. Indeed, tradition and historical background count surprisingly little in a technological culture; what counts is how we can make things better for the future.⁵ Within a modern technological culture there is a strong incentive to investigate how scientific knowledge can make life better or easier than it is. From this perspective, age old traditions or well-established practices and institutions never have any “intrinsic” worth; they are evaluated against the needs and desires of the present generation and cast aside when they do not live up to expectations. Moreover, high respect for the authority of traditions and institutions inhibits the quest for truth. Authority and modern science are uneasy bedfellows.⁶

Since the birth of modern science in early modernity, it has had tremendous success in describing and explaining our natural environment. In the first instance, this success was made possible by the “radical” or “methodical doubt” that made a relatively anti-authoritarian, anti-dogmatic and open attitude towards natural phenomena possible.⁷ Such systematic doubt can spur on empirical and experimental inquiry, and indeed modernity saw the birth of an explicitly “empiricist” and “experimentalist” attitude in modern scientists. Such scientists, in principle, accept only truths that are verified by means of testable empirical and experimental inquiries.⁸ During the sixteenth and seventeenth century, the new scientific method was perfected, and the nineteenth century witnessed a thorough

⁵ Cp. Snow, *The Two Cultures*, p. 44; Gould, *The Hedgehog, the Fox, and the Magister's Pox*, p. 92.

⁶ “The hierarchical structure of a legal system and the desire for stability [...] impede the search for truth. [...] Systems of thought that emphasize hierarchy, tradition, authority, and precedent disvalue the kind of critical inquiry that tests the truths that such systems accept are not robust.” Posner, *The Problems of Jurisprudence*, pp. 82, 91; cp. Posner, ‘Pragmatic Adjudication’ in: Dickstein, *The Revival of Pragmatism*, p. 238.

⁷ It was, of course, especially the modern rationalist philosopher René Descartes who made this attitude into a systematic method of scientific and philosophical inquiry. Cp. Descartes, R., *Meditations on First Philosophy*, in: *The Philosophical Works of Descartes*, Cambridge University Press Cambridge UK 1984, pp. 12 etc.; cp. Williams, B., *Descartes, The Project of Pure Enquiry*, Penguin Books Harmondsworth UK 1990, pp. 32 etc.

⁸ Cp. Oldroyd, D., *The Arch of Knowledge, An Introductory Study of the History of the Philosophy and Methodology of Science*, Methuen New York and London 1986, pp. 48-100.

professionalization of scientific inquiry. From then on, (state) universities formed the institutional background for scientists. Thus institutionalizing and professionalizing scientific research led a spectacular growth in the knowledge of the natural world for the benefit of all.

Since the late nineteenth century, the human and social sciences also have become more professional and emancipated from the moral and dogmatic traditions that had dominated its agenda.⁹ The traditional “moral sciences” thus became the distinct disciplines of history, economy, psychology and sociology. As a result of the efforts of such modern social scientists, modern man has gained important scientific knowledge of modern social, economic and political systems and human behavior. Nowadays we understand much better than older generations did, how our social world is collectively “created” and how all sorts of socio-economic and political phenomena can be described, understood and, to some extent even explained, in causal terms. Of course, the social and political sciences are not as unambiguously successful as the “real” or “hard sciences,” because of the relative irregularity and unpredictability of human behavior. But this does not mean that there is reason to underestimate the knowledge that is acquired in these disciplines.

From this type of scientific knowledge, it is a small but highly significant step to “technology.” Knowledge becomes technology the moment it is used to influence and manipulate our natural or social environment. In other words, science becomes technology when the new scientific representations of nature (or of social systems) are no longer primarily interpreted or understood, but instead lived, experienced and, most importantly, *used*. In short, technology is about the *use* of knowledge.¹⁰ We can say that, as in technology, modern science becomes a means to control and manipulate nature; it becomes a means to power. Therefore, modern science, which aims at understanding nature, is almost equivalent to technology, which aims at controlling it. “Yet, in all scientific fields, however the work originated, one motive becomes implicit in the other,” C.P. Snow argues in his famous “Two Cultures” essay.¹¹ When he subsequently argues that the proper administration of

⁹ Cp. Collins, R., *Four Sociological Traditions*, Oxford University Press New York Oxford 1994, pp. 20-46.

¹⁰ Lash, *Another Modernity, A Different Rationality*, p. 92; cp. Unger, *Knowledge and Politics*, p. 45.

¹¹ Snow, *The Two Cultures*, p. 67.

science would help solve the overriding problems of both the rich and poor countries in the world, he gives us a standard exposition of the ideals of the Enlightenment.¹²

The motive for explaining natural phenomena and the motive for controlling them seem to be intimately connected in popular consciousness. This explains why in the popular mind the distinction between “pure science” and technology generally seems to have a ring of arbitrariness. The average citizen cannot really identify with science as “an art for art’s sake.” In fact, generally “theories of great beauty but little power leave him cold.”¹³ Surely, to a large extent, the scientific knowledge that has grown since early modernity has in one way or the other become technology. Especially since the nineteenth century, modern imagination has become more and more fascinated, not so much with the wonders of science, but with the awesome power of science as technology. Modern technology even counts as one of the great successes of modern man.¹⁴

Technology – whether in the form of modern medicine, modern transportation or the means of communication, to name but a few – has changed almost every aspect of human life. It has changed not only our natural environment but also our social world. Compare Lawrence Friedman:

“In modern times science and technology have totally transformed society; they have altered every element of the social equation, and the rate of change from this source is steadily increasing. Technology must get major credit or blame for the revolution in the way we live today.”¹⁵

The modern social world changed just as much as the natural world, maybe even more. Not only was the knowledge that was the product of modern

¹² Snow, *The Two Cultures*, pp. 41-51.

¹³ Posner, *Overcoming Law*, p. 7; Thus in a modern democracy, where the popular mind and will is supposed to rule supreme, there will invariably be a tendency to equate science with technology, which means that science perpetually has to prove itself *useful* to be worth funding, for instance. The same goes for scientific legal research.

¹⁴ Randall Collins: “technology may have always had more influence over science than the other way around.” Collins, *Weberian Sociological Theory*, p. 114; cp. Dale, *In Pursuit of a Scientific Culture*, Science.

¹⁵ Friedman, *The Republic of Choice*, p. 6; cp. Watson, *The Modern Mind*, p. 4.

scientific research put to use in all sorts of technologies, there was bound to develop a human or social science that aimed at describing, explaining and thereby mastering the causal forces in society in the same manner as we have learned to master the forces of nature.¹⁶ And indeed, modern psychology, sociology and economics have opened our eyes to the hidden laws of human (socio-economic) behavior. This had important consequences because in many cases social reality proved to be wholly different from what it looked like from the traditional or “ideological” perspectives of older generations. Many traditional institutional structures and many of the traditional social “scientific” categories (that were thought to be “natural” and therefore universal and necessary) proved to be highly arbitrary and contingent. Moreover, many of the constraints or “laws” in our social world lay elsewhere than generally expected.¹⁷

Most importantly, there was not much in the “nature of things” that intrinsically legitimated or justified existing social, political and economic structures and institutions. Many aspects of the social and political order proved to be far from natural or necessary and instead merely man-made artifices. Hence they could be thought of as changeable and malleable. Increasingly, much of the existing socio-economic reality seemed “up for grabs.” Accordingly, Roberto Unger writes, “The manipulative posture towards the world takes the form of a denial of the immutability of nature and of society. It is the tendency to regard and to treat both the phenomena of nature and the arrangements of society as if they were in their entirety proper objects of human will.”¹⁸

Furthermore, the modern social sciences have subsequently provided us with the knowledge and means to “master” and reconstruct these structures

¹⁶ Von Hayek, *The Road to Serfdom*, p. 225.

¹⁷ “Sociology’s misfortune is that it discovers the arbitrary and the contingent where we like to see necessity, or nature [...] and that it discovers necessity, social constraints, where we would like to see choice and free will.” Bourdieu, *In Other Words*, p. 14.

¹⁸ Unger, *Knowledge and Politics*, p. 152; Thus welfare economics takes the well-being of individuals as the only norm and generally assumes that “individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them.” Kaplow & Shavell, *Fairness versus Welfare*, p. 23.

and categories, or they seem at least very promisingly able to do so.¹⁹ Such knowledge is used in our present societies to shape the social world in accordance with human needs and desires. We can rightfully use the term “technology” when sociologists, political scientists and economists use their knowledge of social, political or economic systems to control and steer (or, pejoratively, “manipulate”) our social world. Such technologies feed on the huge prestige science has in modern culture. Moreover, there seems to be a strong link between technology and modern (rational) capitalism and industrialism. In the previous chapter I already described these forces in modern societies. Modern technology made modern capitalism and industrialism possible and, conversely, capitalism and industrialism have been driving forces for the advances of science and technology. Many of the social and economic changes in modern society can be related to these forces.²⁰

The growing wealth of the capitalist and industrialist countries over the past centuries has released many people from the economic insecurity that had previously imprisoned them within the pre-determined social and political bounds of the pre-modern world. This is a major factor because with wealth came both independence and mobility, which also led to a loosening of familial and community bonds. Thus, to many these developments meant freedom from such loyalties and dependencies.²¹ Indeed, we cannot be free when we are weak. Therefore the development of socio-economic technology is “the development of our power to push back the constraints of scarcity, disease, weakness, and ignorance. It is the empowerment of humanity to act upon the world.”²² All in all, the rise of modern technology and the wealth-generating powers of modern capitalist industrialism have liberated many from the “chains of nature.”

Surely, the bourgeois middle classes were the first to profit from this liberation. But, since the late nineteenth century in most western nations, the general rise in income altered the economic distance between the classes, and this was amplified by a system of taxation that compressed the scale. On the one hand, the modern welfare state made some *redistribution* of wealth

¹⁹ Brint, *In an Age of Experts*, p. 40.

²⁰ Giddens, *The Consequences of Modernity*, pp. 11, 12.

²¹ Friedman, *The Republic of Choice*, pp. 57, 58; cp. Posner, *The Problems of Jurisprudence*, p. 129.

²² Unger, R.M., *Democracy Realized*, Verso New York 1998, pp. 5, 7.

possible because governments in such states have, in recent times, taken on a responsibility in the distribution of social and economic advantages.²³ The desire for such redistribution (which seemed just to democratic majorities and was also made possible by a work force more organized and powerful than any in history) was at the root of the modern welfare state.²⁴ On the other hand, though, the mass production for a home market and industry's coinciding growing interest in the needs and tastes of the common people gradually enabled the lower classes to enjoy material civilization. This strengthened their chances of controlling their own fate. All these gains have fueled a growing general belief that, in the words of Friedrich von Hayek, "our only chance of building a decent world is that we can continue to improve the general level of wealth."²⁵

However, there is a serious downside to the technological culture we inhabit. The combination of technology and capitalism leads not only to power and creativity but also to destruction.²⁶ Previously I mentioned that, just like in modern science (as in modernist art), tradition and authority count for little in modern technological culture. Not only the dynamics of modern (rational) capitalism, per se, but also the general growth of wealth and economic security greatly contributes to the breaking down of traditional hierarchies and other forms of authority. Moreover, technological change continually threatens the communal cultural basis of society that makes cooperation, community and authority possible. In the terms used in the second chapter, the meaningful normative order of the community and its traditions, institutions and practices are always under critical scrutiny and therefore seem constantly "under construction." As Francis Fukuyama says:

"The same innovation that increases productivity or launches a new industry undermines an existing community or makes an entire way of life obsolete. Societies caught on the escalator of technological progress find themselves

²³ Unger, *Knowledge and Politics*, pp. 175, 176; Unger, *Law in modern society*, p. 193; cp. Friedman, *Total Justice*, p. 68.

²⁴ Finer, *The History of Government*, pp. 94, 1481.

²⁵ Von Hayek, *The Road to Serfdom*, p. 230; cp. Marshall, 'Citizenship and Social Class', in: *Citizen and Social Class and Other Essays*, p. 28.

²⁶ Schumpeter, *Capitalism, Socialism and Democracy*, pp. 83, 162; Fukuyama, *Trust*, pp. 312, 313.

constantly having to play catch-up as social rules evolve to meet changed economic conditions.”²⁷

The major traditions, institutions and authorities in modern society – important cultural constructions that make trust, community and collective action possible – can easily lose their power to command respect and allegiance. One of the major problems of the modern societies seems to be that “the institutional fabric, whose basic function has always been to provide meaning and stability for the individual, has become incohesive, fragmented and thus progressively deprived of plausibility.”²⁸ In other words, when older solidarities, institutional structures, hierarchies and authorities stand in the way of realizing the will of modern man (economic progress, for instance), this modern man is quick to break them down, to replace them with more functional and efficient (or “rational”) arrangements.

A rapidly evolving modern world can hardly maintain a sense of eternal stability and certainty. Many will attest to the experience that the rate of change is at times so high that it is hard for the imagination to keep up. Indeed, the belief in “changelessness” will be fundamentally undermined. The net effect of this perpetual changing and rationalizing of the institutional arrangement is that institutions and practices will be experienced as highly relative and instable. One might even say that modern man must therefore learn to “yearn for change, to delight in mobility.” The present circumstances seem to require a specific professional attitude. This can be connected with the explicitly modern professional ideals of mobility, flexibility, creativity and pragmatism. Modern managers are surely expected to live up to these ideals, and we might expect that legal professionals will have to follow suit.²⁹

²⁷ Fukuyama, F., *The Great Disruption*, Human Nature and the Reconstitution of Social Order, The Free Press New York 1999, p. 282.

²⁸ Berger, ‘On the Obsolescence of the Concept of Honor’ in: Hauerwas & MacIntyre, *Revisions*, p. 39; cp. Nisbet, *Twilight of Authority*, pp. 10, 11.

²⁹ Berman, *All That is Solid Melts into Air*, p. 96; Friedman, *The Republic of Choice*, pp. 6, 53; cp. Sennett, R., *The Corrosion of Character*, The Personal Consequences of Work in the New Capitalism, W.W. Norton & Company New York London 1998.

From transcendentalism to immanence

Since modern capitalist, industrialist and rationalist societies are in constant turmoil and our social world constantly changes, this rationalizing by means of instrumental reason never seems to come to a halt. In modern societies change, and the uncertainty and disorientation that it causes, seems to be here to stay. Let us explore the consequences for modern culture in (speculative) philosophical terms. We might argue then that modern societies in the Western world gradually seem to evolve from a “transcendental culture” to an “immanent culture,” largely as a result of the fact that in the transition from pure science to technology the transcendental status of knowledge (of both its subjects and its objects) is lost. This point is well illustrated by Friedrich Nietzsche’s famous metaphor of the “Death of God” in *The Gay Science*. I will argue that this cultural transition from transcendence to immanence will have strong repercussions for the legal culture in modern societies.³⁰

In socio-political terms a transcendental culture knows itself bound by a collective focus on an otherworldly – or “transcendental” – Good (or God), which is structurally separated from the present actual world. In more theological terms, transcendence may be described as the distinction between God and the world. By contrast, a technological culture will gradually lead to secularization and immanence.³¹ A transcendental culture is bound to dedicate its major intellectual efforts to unveiling and interpreting the Good, which is thought to exist in some ideal or transcendental realm and which has some independent existence. Unveiling the Good might be necessary in an effort to realize it as far as possible in the here and now of the material or profane world. The Judeo-Christian culture that preceded the present modern world in Europe evidently presented such a transcendental culture.³² Moreover,

³⁰ “What Weber called ‘disenchantment,’ the dissipation of our sense of the cosmos as a meaningful order, has allegedly destroyed the horizons in which people previously lived their spiritual lives. Nietzsche used the term in his celebrated “God is dead” passage: “How could we drink up the sea? Who gave us the sponge to wipe away a whole horizon?”” Taylor, *Sources of the Self*, p. 17.

³¹ Posner, R.A., *Law, Pragmatism and Democracy*, Harvard University Press Cambridge Mass. 2003, p. 9; Unger, *Knowledge and Politics*, p. 157-164.; Unger, *Law in modern society*, pp. 76-86.

³² We owe, for instance, much of the idea of “transcendental” human rights to this transcendental culture that made such an idea plausible: “The natural right doctrine made

Nietzsche argued that the Platonic unity of “the Good, the Beautiful and the True” is equivalent to “the Way, the Light and the Truth” for Christendom. For both philosophies, the realms of being, truth and value are transcendental and fundamentally united; for Nietzsche Platonism and Christendom are essentially the same.³³

However, it can be argued that the Judeo-Christian culture did already lay the groundwork for the modern culture of immanence by de-sanctifying the actual present world.³⁴ The transcendental Judeo-Christian theology itself superseded previous “immanent theologies” that sanctified the actual natural and social world. In an immanent theology, there is no split between the profane and the divine, and thus the particular world around us is sacrosanct and not up for human manipulation. Judeo-Christianity, however, removed the sacred to another world and made the first step towards secularizing the actual world. One might say that the profane became (in Platonic terms) a “lesser reflection” or “imperfect version” of the divine order and could be thought due for improvement by means of human intervention and good deeds. By focusing on God’s will and divine inspiration, mortals could, or at least should, make the profane world a better place.

But secularization did not stop short here. Secularization of the profane prepared the way for a subsequent secularization of the transcendental, and thereby it prepared its demise. From the early Enlightenment on, the transcendental (or God) becomes more and more removed from the world as we scientifically know it, and eventually the transcendental completely disappears from the scientific worldview.³⁵ In a modern “culture of immanence,” the world no longer contains, represents or even faintly reflects the divine, and therefore the particular forms it takes at any given time need not command reverence. From then on, “the features of nature and of society are prized as means to the satisfaction of ends, or as ends in themselves if

room for the transcendent element in European civilization through its emphasis on the existence of universal entitlements and rules superior to state power.” Unger, *Law in modern society*, p. 85.

³³ Allison, *Reading the New Nietzsche*, pp. 91, 99, 186.

³⁴ Unger, *Knowledge and Politics*, pp. 159, 160, 179-181; Unger, *Law in modern society*, pp. 76-86.

³⁵ Cp. Taylor, *The Sources of the Self*, p. 332.

their perpetuation is an object of desire. But they are never worthy by virtue of their existence alone, Being implies no sanctity.”³⁶

The modern scientific methods of methodical doubt and experimental reasoning did not unveil a dazzling transcendental reality of Truth, Beauty and Goodness – a reality that, according to Plato, could be unveiled by philosophical reason. Nor did modern experimental science find in nature God as a fountain of Meaning and Love. Nature was discovered to be nothing more than a kind of “machine” causally determined by blind laws devoid of any meaning or purpose whatsoever. Consequently, the new science thoroughly “de-moralized” or “de-humanized” nature. Nature was increasingly seen as mere substance ready for technological manipulation by human beings. Nature was, in a famous metaphor that originates with Max Weber, thoroughly *entzaubert*. The world was “disenchanted” and “demystified;” the magic was gone.³⁷

This also seems to be what Nietzsche referred to with his famous “Death of God” thesis.³⁸ Secularization and technological culture have redirected the focus of man from a universal transcendental order towards particular objectives and activities in the here and now of the profane world. Modern man thereby lost his collective orientation toward Good, Truth and Beauty. From this moment on, nothing more prosaic than human “will” is the source of good, truth and beauty; the capitals are gone. To summarize, the

³⁶ Unger, *Knowledge and Politics*, p. 159.

³⁷ “[...] this intellectualist rationalization, created by science and by scientifically oriented technology [...] means that principally there are no mysterious incalculable forces that come to play, but rather that one can, in principle, master all things by calculation. This means that the world is disenchanted.” Weber, ‘Science as a Vocation,’ in: Gerth & Wright Mills (eds.) *From Max Weber*, p. 139; Human nature and civilization are also disenchanted. Compare Peter Allen Dale: “In Freud’s revolutionary reworking of this perennial positivist dilemma, not only is the instinctual duality stripped from its civilized disguise – altruism becomes eros; egoism becomes aggression and desire for death – but also civilization itself becomes, in his wonderful metaphor, a mere “lullaby” about heaven sung to us all [...] in our cradles, an elaborate placebo devised by humankind to hide from itself the irremediable discontent built into, alloyed with, its very nature.” Dale, *In Pursuit of a Scientific Culture*, pp. 271, 221-225.

³⁸ Nietzsche, F., *Die Fröhliche Wissenschaft*, Wilhelm Goldmann Verlag München 1959, pp. 150 etc, pp. 166 etc.; Allison, *Reading the New Nietzsche*, pp. 90-99; cp. Himmelfarb, *The Demoralization of Society*, p. 10.

conception of nature and society as possible and proper objects of unlimited manipulation becomes available when the world is regarded as completely devoid of intrinsic worth or beauty, rather than as the embodiment, representation or reflection of the sacred.³⁹ This is exactly what happened when both the theology of immanence and of transcendence were superseded by a modern secular culture of immanence.

Technological culture and democracy

The ideal of modern mass democracy also seems to feed on this technological culture that fuels the constant changes that we experience in our daily lives. And conversely, modern technology gets strong impulses from the fact that to serve the desires of democratic majorities, there is a great need of socio-economic knowledge. Let us define “democracy” provisionally as a state where political decisions are taken by and with consent of the people, or with the active participation of at least the majority of the people. The word literally refers to the idea of “rule by the people,” and this seems to imply at least some form of political equality among the people in their political influence.⁴⁰ But democracy can only be a coherent idea when people generally feel that they actually (collectively) have the power to “make a change” and to influence their social environment. Indeed, modern socio-economic technology makes this power to at least some degree a fact.⁴¹ By contrast, democracy can have no meaning to people who feel that our social world is completely determined by forces beyond human power. What should we democratically decide if the whole order is of Godly origin and therefore both intrinsically Necessary and Good? All one can do is try to interpret the

³⁹ Lash, *Another Modernity, A Different Rationality*, p. 92; cp. Taylor, *Hegel*, p. 401.

⁴⁰ Finer, *The History of Government*, p. 1568; Held, *Models of Democracy*, p. 1; cp. Posner, *Law, Pragmatism and Democracy*, pp. 131-150; Barber, *Strong Democracy*.

⁴¹ “Technology has made the world over, and in so doing has vastly reduced certain kinds of uncertainty; it has also opened the door to a vastly greater level of demands on government. Slowly people have come to expect more out of government, out of law, out of life. The mechanisms may be obscure, but one key factor is the sense that there are ways to control over many of man’s ancient contingencies. Technology is crucial in generating this sense of control. Science and machines can conquer disease, life the curse of early death, protect against disaster, solve the problems of the world. And from physical control the mind moves, in time, to social, collective control.” Friedman, *Total Justice*, pp. 51, 70.

world such that Divine will is unveiled; the will of the people, in itself, has no normative force whatsoever.⁴²

However, if the natural and social order is emptied of all normative significance and if modern man subsequently gains power over both nature and the collective social environment, what man should do with this power becomes a serious point of discussion. If the power is at hand and there is no transcendental source of values and goals to be found beyond this world, the will of the citizens becomes an important (maybe even the only) source of legitimacy for rulings and policies. All this leads to a fundamental argument for democracy as rule based on the consent of the people and “democracy has become the fundamental standard of political legitimacy in the current era.”⁴³

With a “community of goals” or a “community of values,” we do not seem to be confronted with a particular problem. When all the members of the community structurally share certain goals and values, it seems obvious what values and goals should be served by modern technological knowledge. The idea of the *volonté générale*, which should inform the rulings and policies of the state authorities, can be said to function as both a secular and formal substitute for a natural or religious community of values and goals. In an immanent modern culture where the actual will of the people is the only source of legitimating decisions and policies, we can only act collectively when *we all actually want the same thing*: “the idea of the general will [...] is the other great discovery of the Enlightenment ethical theory. Man shapes his society according to right reason by founding it fully on the general will. For the rational is the universal, that which holds all men and is binding on all men.”⁴⁴

Many today think of this notion of the “general will” as rather romantic and obscure.⁴⁵ In modern, “pluralistic,” mass democracies, this notion of the “general will” cannot be less vague and senseless than the notion of transcendental or natural rights. Moreover, despite Rousseau’s optimism, the notion of a general will of the body politic has often (not only by totalitarian regimes) been abused to, to use Rousseau’s own ambiguous phrase, “force

⁴² Cp. Allison, *Reading the New Nietzsche*, p. 95.

⁴³ Held, *Models of Democracy*, pp. xi, 1.

⁴⁴ Taylor, *Hegel*, p. 402.

⁴⁵ Cp. Dworkin, *Taking Rights Seriously*, p. x; Kelley, *The Human Measure*, p. 226.

individual citizens to be free”⁴⁶ by making them conform to the particular will of the ruling elites; thus making a mockery of freedom. Thus many deem the notion of a general will that can be known *a priori* without consulting the people highly dangerous and equally all the variants and offshoots of this concept like “public interest” or “public good.”

In modern, pluralistic societies we can thus safely start from the premise that such a general will is both a chimera and undesirable. Modern societies consist of several incommensurable moral universes and they have, despite many efforts to nation building, even lost the pretence of a common culture.⁴⁷ Moreover, any sharing of values that might provide us with common ground is thought to be but a precarious and contingent alliance of ends that merely reveals the subjective preferences of the allies. The important consequence of this is that power holders in the political community will have no self-evident, *a priori* or “natural” legitimacy for their policies as they would in a community of goals and values. In other words, a pluralist society will not easily become a political community with one ultimate and stable basis in “rationality” or a “general will.”

We should add the (originally Marxist) insight that in many cases, imputed shared values or interests reflect not much more than the prejudices and interests of the dominant groups within society. We can think of such a “common good” as the product of “universalisation projects” of intellectual and political elites, making an effort to present particular interests as a general will. From a critical perspective such “common ends” and “shared values” will typically be looked upon with suspicion as we have learned to suspect they hide serious group repression.⁴⁸

⁴⁶ Rousseau, *The Social Contract*, p. 64.

⁴⁷ Posner, *The Problems of Jurisprudence*, p. 129; cp. Nonet & Selznick, *Law & Society in Transition*, p. 103; Barber, *Strong Democracy*, p. 62.

⁴⁸ Kennedy, *A Critique of Adjudication*, pp. 41-44, 308, 309; Unger, *Knowledge and Politics*, pp. 102, 103, 69; “The universal is the object of universal recognition and the sacrifice of selfish (especially economic) interests is universally recognized as legitimate. (In the effort to rise from the singular and selfish point of view of the individual to the point of view of the group, collective judgment cannot but perceive, and approve, an expression of recognition of the value of the group and of the group itself as the fount of all value, and thus a passage from “is” to “ought”.) This means that all social universes tend to offer, to varying agrees, material and symbolic profits of universalization.” Bourdieu,

Democracy is the only cure for the modern predicament. When rulers need legitimacy for their rulings and policies, it will have to be constantly created and recreated, somehow, from the “bottom up.” The legitimacy is to be found in the consent or the will of the people, or at least the majority. But we can argue for this point from a different direction as well. In a technological or immanent culture, modern citizens will think of the state and its legal order in “functional” terms. As in modern pluralist societies where the individual choices of the citizenry seem to be the only arbiter of good, the idea arises that the modern state and its laws (just like other authority structures) are legitimate only insofar as the state has the power to “facilitate, channel, and realize individual choices.”⁴⁹

This neatly hooks up with the idea of modern democracy. The lawgiver needs legitimacy for his decisions and policies to be effective, and this can only be provided by those affected by such decisions and policies: the “people.” Here we see an important source of the idea of popular sovereignty.⁵⁰ In a democracy, what the people actually want becomes crucial because only this will legitimates the effectuation of legal rules and policies. As such, democratic procedures and institutions seem to complement the free market in giving voice (and power) to the particular wills and desires of the citizens. However, this implies that, like anything else in the modern technological immanent culture, democracy is not an end in itself but essentially a “means,” a utilitarian device for safeguarding internal peace and facilitating the individual freedom to pursue one’s individual ends.⁵¹

To many, this view is too cynical, and it is argued that modern liberal democracies cannot survive if the citizens do not orient their behaviour to “democratic virtues,” actions that have *intrinsic* worth in the sense that they are good in themselves, or to actions that can be seen as serving some sense of the common good – the community’s well-being. Democratic citizenship

Practical Reason, p. 59, 60; cp. Eagleton, T., *Ideology*, An introduction, Verso New York 1991, pp. 56-58.

⁴⁹ Friedman, *The Republic of Choice*, p. 39; “our public institutions can be thought of [...] as being neutral, value free, procedural institutions for brokering and facilitating the choices of pure individuals.” Kolb, *The Critique of Pure Modernity*, p. 4.

⁵⁰ Finer, *The History of Government*, pp. 1475 –1478.

⁵¹ Posner, *Law, Pragmatism and Democracy*, pp. 165, 166, 178; Von Hayek, *The Road to Serfdom*, p. 78.

implies such virtues, it is argued, because otherwise liberal democracies reduced to “interest-brokerage” will eventually go under in conflict and distrust.⁵² Nevertheless, in modern pluralist and immanent culture, values cannot be self-evident or self-justifying; they will not easily be experienced as having intrinsic worth – a worth that cannot be reduced to something else. Values are generally thought to serve some, often hidden, *extrinsic* purpose.⁵³ We might even say that modern man, with regard to values as in everything else, is inclined to a “technological stance.”

The modern spirit generally seems to have difficulty with any human activity of “intrinsic worth,” a worth or value that cannot be immediately translated into some extrinsic goal or use. Human activity done for its own sake and without ulterior purpose – science for science’s sake, art for art’s sake or politics for politics’ sake – becomes suspect: every activity must derive its justification from a concrete (or even material) interest, from a concrete socio-economic purpose.

In the second chapter we saw how fraternal ethics, which focused on the idea of “virtue” instead of values, makes a common bond or community possible, which provides the individual with a secure and meaningful social environment. Indeed, the idea of virtue carries a sense of gravity and authority that the idea of (subjective) value does not. However, making a distinction between virtuous democratic action and self-interested action seems invariably to have the effect of making certain citizens, the virtuous, more worthy of democratic influence than those who seem to just use the democratic institutions and procedures to further their own particular interests. But when individual will is the only arbiter of good, no individual citizen can claim his or her will to be more worthy than any other, and a “hierarchy of worthiness” seems to be fundamentally at odds with this democratic premise. The idea of “virtue” seems to lead to perfectionism, elitism and moralism. By contrast, the idea of “value”, seen as something subjective that needs to be respected as deriving from the individual will, can lay claim to moral equality and neutrality.⁵⁴

⁵² Barber, *Strong Democracy*, pp. 93-97, 143-148; cp. Sandel, *Democracy’s Discontent*.

⁵³ Himmelfarb, *The Demoralization of Society*, pp. 10, 11.

⁵⁴ Himmelfarb, *The Demoralization of Society*, pp. 11, 12.

The fact that democracy as a political system became evermore dominant during modernity goes hand in hand with modern technological culture: if we have the power to make a change, we all deserve a say, and when we cannot reach universal agreement or consensus, the majority rules – whatever the contents and goals of its rulings.⁵⁵ But we also need to be able to protect minorities and individuals against such majorities. In the previous chapter, we explored a solution to this problem: we grant to individual citizens constitutional rights that protect them from arbitrary interference from the body politic. However, under the present circumstances, people can hardly experience these individual rights and the *Rechtsstaat* that protects them as having “intrinsic worth” either.

Thus such rights become relative to the will of the (qualified) majorities, and they are under constant scrutiny for whether they actually serve the goal they are expected to serve, or whether they “arbitrarily” or “uselessly” stand in the way of the majorities imposing their will on society. The moment we start seeing the rule of law as functional or merely instrumental in the protection of the interests of individual citizens against arbitrary powers, we already start making the idea of individual rights relative to some external goal or purpose, preferably stated in concrete material terms. The moment we fail to see how, in a particular case, the invocation of rights can serve any purpose, we are inclined to make relative, or even ignore, the established right and make some other purpose override it.⁵⁶

⁵⁵ “Increase in knowledge (or what is thought of as knowledge) in medicine, engineering, and economics means an increase in the capacity of human beings to control “natural” forces collectively. Knowledge really is power; but power for whom? For individuals, certainly; but only up to a point. For one thing, no individual can command the knowledge needed to gain power over the natural (and unnatural) world. Knowledge is a collective good, and its power is collective power, that is, power for the state. In an age of science, the state could accomplish more, could control more, than ever before; certainly more than isolated individuals or even groups of individuals could. Hence a lot more was expected from collective action.” Friedman, *Total Justice*, p. 70.

⁵⁶ There is the risk that especially the rights of the weak and the unpopular members in society for the goals and benefits of majorities, the problem is that some people will then be treated as means to other people’s ends. There is a danger of repression in a purposive legal order. Cp. Kymlicka, *Contemporary Political Philosophy*, pp. 35- 47; cp. Nonet & Selznick, *Law & Society in Transition*, p. 117.

Democracy and social technology

We discussed the fundamental problem with the legitimacy of the rules and policies generated by the state in modern secular societies. The liberal democratic institutions are thought to remedy this, to some extent at least. But we cannot expect everyone to be convinced of the good of the rulings and policies that are generated by these institutions. Many citizens will nevertheless conform to these rules and policies because, although they might be able to really identify with the values and goals that are served by the rulings, the formal democratic legitimacy is enough for them. But even of such true democrats, the compliance is bound to be rather unprincipled and at times half-hearted. Moreover, in modern pluralistic societies many will *not* experience democratic legitimacy as a sufficient reason to comply. With regard to such subjects, there is no alternative but to force minorities and individuals into conformity. With regard to the half-hearted ones, the state should show them that it seriously enforces the law against those who violate it, thus giving them an extra reason to stay within bounds.

But how can state powers be effectively applied to force minorities or individuals into compliance when the product of democratic institutions is no more than the *formal* legitimacy of the rules? Those with a strong interest not to comply, or those with values that are at odds with such rules, might not be particularly impressed with the argument that it is undemocratic not to comply. The strategy of influencing behavior by means of legitimation is in many cases the most efficient means, but surely the legitimacy of rulings and policies in democracies is often rather thin. In pluralist democracies, legitimation strategies will never convince every single citizen in the political community, and there seems to be but one important instrument left with which to force individual citizens into the desired conformity with the rulings of the majority in modern mass democracies. We typically do so, to put it prosaically, by means of “sticks and carrots.”⁵⁷ “Know a person’s mainspring of motive and you have as it were the key to his will,” wrote the Spanish Jesuit scholar Balthasar Gracián in the seventeenth century:

⁵⁷ Unger, *Law in modern society*, p. 26; Barber, *Strong Democracy*, p. 13; “The American system is therefore open to the charge that it is chaotic, inefficient, and produces annoying, harmful disincentives.” Friedman, *The Republic of Choice*, p. 191.

“Have resort to primary motives, which are not always the highest but more often the lowest part of his nature, because there are more dispositions badly organized than well. First guess a person’s ruling passion, appeal to it with words, set it in motion by temptation, and you will always checkmate his freedom of will.”⁵⁸

We can try to convince people to do the right thing and make them conform by an appeal to the “rational will.” By convincing them, we give them a reason to respect the law and see it is as right, necessary and useful. But this is an idealistic stance, in the sense that we try to affect people on the level of ideas, justifications and purposes. Gracián, however, is a realist in his advice to appeal to the “lowest part of his nature,” directly affecting the will or the passions, reasoning from the Humean premise that reason is only a slave to the passions, and often we are well-advised to affect the will directly, not indirectly, through the faculty of reason. With regard to compliance with the law, we should also not be too naïve and idealistic. Thus, Richard Posner argues that “ [...] compliance with law is more a matter of incentives than of deference or respect.”⁵⁹ And this is well complemented with Friedrich von Hayek’s remark that “men are not likely to give their best for long periods unless their own interests are directly involved.”⁶⁰ Like anything in nature, human nature also has a degree of manipulability; human behavior is, at least to some degree, controllable. Some may call this nihilistic and cynical, but others prefer the word “realistic.”⁶¹

We can manipulate and coordinate human behavior effectively and efficiently by manipulating the *price* of behavior. Raising the price of socially undesirable behavior will make individuals avoid it and, conversely, lowering the price of desirable social actions, and thus reformulating public goods in terms of private advantage, will encourage people to do the right thing.⁶² In

⁵⁸ Gracián, *The Art of Worldly Wisdom*, pp. 12, 13.

⁵⁹ Posner, *The Problems of Jurisprudence*, p. 234.

⁶⁰ Von Hayek, *The Road to Serfdom*, p. 138; cp. Bourdieu, *The Logic of Practice*, p. 108; “Political morality does not fall from heaven, and is not innate to human nature. [...] It would be a question of establishing social universes where, as in the Machiavellian ideal republic, agents had an *interest* in virtue, disinterestedness, and devotion to public service and the common good.” Bourdieu, *Practical Reason*, p. 144 (emphasis added).

⁶¹ Barber, *Strong Democracy*, p. 13; cp. Posner, *Law, Pragmatism and Democracy*, p. 9.

⁶² Barber, *Strong Democracy*, pp. 13, 23; cp. Kennedy, *A Critique of Adjudication*, p. 59.

such a view, “rules are treated by the individual as one more factor to be taken into account in his calculus of efficiencies,” according to Roberto Unger:

“This means that he will comply with the rules only to the extent that his own goals are better served by compliance than by disobedience. Consequently, the sanction becomes the crucial part of the rule. The fear of the sanction operates to internalize the requirements of social order in the individual’s reasoning about the most effective means to attain personal ends.”⁶³

This is where modern social technologies come into the picture. Knowledge of the socio-economic laws of modern society makes it possible to coerce parts of the citizenry into conformity. If we want to make certain changes in our social world, if we want to reach certain effects by means of policies, we need to know how the social world “works,” and how it will react to certain rulings and policies. This knowledge can be used to make them as effective as possible. But these rulings and policies should not only be effective, they also should be efficient. The goals and desires in society are, in principle boundless, but the means and resources to reach such goals are always scarce. A meta-norm will naturally suggest itself under such circumstances: “efficiency.”⁶⁴

This is seriously at odds with the “art of authority,” which prescribed respect for the meaningful normative order that constitutes the community as an ultimate good. Therefore politics is not particularly about getting all of what you want, or even as much as possible of what you want. As there is always the need to *curtail* such particular individual desires and make room for the Good of the community as a motivating factor, traditional authorities are not even likely to take the particular desires of individual subjects *too* seriously.⁶⁵ We should remember that authority is a fragile symbolic phenomenon that, when stripped of its specific symbols and rhetoric, loses its “symbolic efficacy,” its power to command and this implies that authority does not bear

⁶³ Unger, *Law in Modern Society*, p. 26; Unger, *Knowledge and Politics*, p. 73.

⁶⁴ Efficiency in the use of resources is often called Pareto-optimality or Pareto-efficiency. Cp. Lipsey, R.G., Steiner, P.O. & Purvis, D.D., *Economics*, Harper & Row Publishers London 1987, pp. 246-252.

⁶⁵ Cp. Taylor, *The Sources of the Self*, p. 332.

too much prosaic or “realistic” instrumental reasoning. From the traditional perspective both authority and community are “intrinsic goods” that deserve respect regardless of the contingent desires and goals of the individual members.⁶⁶

The formalist perspective is also hard to reconcile with the present picture of things. Like discussed in the previous chapter, modern freedom-loving citizens expect the state authorities (and any other authority for that matter) to respect their individual human dignity and freedom rights. Like Immanuel Kant argued, this is not a demand that is grounded in concrete or particular desires, but a demand that is grounded in the formal or abstract “will” which has dignity and demands individual autonomy. The democrat, by contrast, does not particularly seek legal or *formal* respect for freedom; he seeks respect for the substance, or the particular content, of his will. To the democrat the particular desires and goals should count in the democratic decision-making process as equal to those of others in society. The fact that we can very well imagine a liberal state that is by no means a democracy can illustrate this.⁶⁷ The liberal state is about the reasonableness of the social contract and the individual freedom rights that it grants its citizens. In a democracy, the will of the people rules supreme, whether it is “reasonable” or not. The democrat demands that the power holders recognize and realize the actual substance of the preferences and desires of (the majority of) the people. Here the fears and desires of the citizens, not reason, dominate the political sphere.

The morality of desire and the modern social sciences

The human sciences were for a long time referred to as the “moral sciences,” but the idea that some science can discover the intrinsic good of human being, some intrinsic morality that can be derived from being human, gradually got lost. The only candidate that we are left with to provide us with values and goals is our subjective individual will – or desire. Subsequently, we come to

⁶⁶ Cp. Unger, *Law in Modern Society*, pp. 26- 37; “Highly censured and euphemized discourses and practices which are produced by reference to ‘pure’, purely ‘internal’ ends are always predisposed to perform additional, external functions. They do so the more effectively the less aware they are of doing so.” Bourdieu, *The Field of Cultural Production*, p. 96.

⁶⁷ Cp. Finer, *The History of Government*, pp. 1568-1572.

think of reason as thoroughly instrumental to this will, and instrumental reason begins to dominate our way of looking at the world. “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them,” David Hume famously argued.⁶⁸ Science and reason are morally inert, they can only help us to effectively and efficiently reach the goals and ends of the subjective will. Thus reason remains in the neutral realm of means: it is of a purely instrumental nature.⁶⁹

The modern technological immanent culture seems to force us into a “morality of desire,” a morality that prioritizes the good over the right. Compare Roberto Unger: “The morality of desire defines the good as the satisfaction of desire, the reaching of goals to which our appetites and aversions incline us.” The good can, however, only be thought of as a *subjective* good, a good that every individual has to discover for himself or herself: “Reason can’t adjudicate moral disputes.”⁷⁰ The contingent desires individuals have are the only material out of which moral standards can be made, and therefore all moral thinking must begin with an understanding of the passions to which men are subject as “desiring animals.”⁷¹ This seems to be exactly what is done when in modern social sciences human behavior on a general (and to some degree reductive) level is analyzed in functional or instrumental terms.

In such science, reason is seen as merely instrumental for the actor or agent in their effort to reach certain goals.⁷² These goals are not established a

⁶⁸ Hume, *Treatise on Human Nature*, book II part III section III.

⁶⁹ Unger, *Knowledge and Politics*, p. 153; Richard Posner also does not invest much trust in reason (or jurisprudence) finding ends for the law: “Like most philosophy, all that most jurisprudence can do is to arm one against philosophical arguments. It is therapeutic, but not curative.” Posner, *Overcoming Law*, p. 80.

⁷⁰ Unger, *Knowledge and Politics*, pp. 49, 50, 51, 299; Taylor, *The Ethics of Authenticity*, p. 18; “In this century there has been a strong trend toward accepting science as the only rational authority but rejecting both the rational status of ethics and the need for a philosophical foundation for scientific rationality.” Gutting, *Pragmatic Liberalism and the Critique of Modernity*, p 3.

⁷¹ Unger, *Knowledge and Politics*, p. 51.

⁷² “Rational Choice theory begins with a single, ideally rational individual. [...] He has three components: fully ordered preferences, complete information, and a perfect internal computer. He acts rationally in as much as he chooses the action, which he correctly calculates to be the most instrumental in satisfying his preferences. [...] Rational action is

priori by such sciences (like in the “moral sciences”). They are the *a posteriori* product of empirical research, or of democratic decision making, and then taken as givens. That is to say, the social scientist typically will not claim any expertise in evaluating such goals and preferences. In other words, in such social science the individual is constructed as an “actor” or “agent” endowed with certain (socially or individually determined) preferences, on the one hand, and on the other hand, with instrumental reason to reach his goals within the constraining limits of institutional, social or economic conditions. In such a kind of anthropology, “reason” is nothing but “reckoning.”⁷³ Indeed, Hume argued that there are only two kinds of scientific truths. On the one hand, there are those that are the product of mathematical reasoning, and on the other, those that are empirically verifiable scientific statements. The rest is dubious metaphysics.⁷⁴

Obviously, such a scientific cast of mind does not leave much room for philosophical investigation of some transcendental Common Good. Nor can it, importantly, with a straight face entertain a notion like “natural” or “transcendental” (or otherwise pre-social or pre-political) “rights.” The idea of natural rights cannot be much more than, in Jeremy Bentham’s famous phrase, “nonsense on stilts.”⁷⁵ The idea of Natural Rights or the Common

thus instrumentally rational action. [...] Rational agents can have any (consistent) preferences, and are rational if and only if their choices maximise their expected utility accordingly. There is no further question of the rationality of their ends.” Hollis, *The Philosophy of Social Science*, pp. 117, 118.

⁷³ From this perspective, although they were written over three hundred and fifty years ago, the following words by Thomas Hobbes sound utterly modern: “Reason is the pace, increase of science is the way and the benefit of mankind is the end. And on the contrary, metaphors, and senseless and ambiguous words, are like *ignes fatui*, and reasoning upon them, is wandering amongst innumerable absurdities; and their end, contention, and sedition, or contempt.” Hobbes, *Leviathan*, pp. 32, 36.

⁷⁴ “When we run over libraries, persuaded of these principles, what havoc must we make? If we take in our hands any volume; of divinity or school metaphysics, for instance, let us ask, Does it contain any abstract reasoning concerning quantity or number? No. Does it contain any experimental reasoning concerning matters of fact and existence? No. Commit it then to the flames: for it can contain nothing but sophistry and illusion.” Hume, *An Inquiry concerning Human Understanding*, p. 195.

⁷⁵ The famous “nonsense on stilts” quotation allegedly comes from ‘Anarchical Fallacies.’ Cp. Bentham, J., *Rights, Representation, and Reform*, Nonsense upon Stilts and Other Writings on the French Revolution (The Collected Works of Jeremy Bentham), Oxford

Good is a product of the dubious metaphysics that was denounced by Hume as “scholastic philosophy” and cannot be reached by means of logical reasoning or empirical experimental science. There can be no logical or empirical truth because the Common Good and inalienable Human Rights are part of the normative domain, not of the natural. We should commit such nonsense on stilts to the flames, as Hume would say.

The modern social sciences that are the heirs to this “naturalism” do not generally invoke moral or ethical ideals that motivate and explain human action but tend to refer to “harder” or more “down-to-earth” explanations, and thus the moral sciences developed into modern naturalist sciences during the past two centuries. Only non-moral or amoral motivations, like the desire for greater *wealth* or *power* will be sufficiently “hard” to count as seriously scientific, and such wealth or power might subsequently refer to control over means to survival or to control over others in the community. It is exactly because such explanations can be seen as morally neutral – they were explicitly designed to be morally neutral – that they have scientific standing.⁷⁶

We can illustrate this point well with Richard Posner’s description of legal analysis, which can be deemed scientific according to such modern standards. According to Posner such an analysis should “lead discussion away from issues semantic and metaphysical toward issues factual and empirical.” This means that although “Aristotle’s physics treats objects in nature much as if they were animate beings, with goals; today we are more likely to treat animate beings on the model of objects.”⁷⁷ If we could define “the common good” in objective and empirical terms (that subsumption of ethics into the natural sciences inevitably requires), “then empirical enquiry can determine which behaviours may best achieve the stated goals, and whether (and how) societies have established their ethical rules to reach those ends.”⁷⁸ Here,

University Press 2002; “It is the nature of the Enlightenment as Hegel saw not to accept any such authority. Everything must be thought out from the ground up by human reason and decided according to reason by human will. [...] There are not even entrenched individual rights, matters taken outside the sphere of government, as there are with Locke.” Taylor, *Hegel*, pp. 404, 405.

⁷⁶ Taylor, *The Ethics of Authenticity*, pp. 19, 20

⁷⁷ Posner, *The Problems of Jurisprudence*, pp. 387, 167.

⁷⁸ Gould, *The Hedgehog, the Fox, and the Magister’s Pox*, p. 244.

preferably, we impute such goals like a desire for greater wealth and/or power.

An important advantage of such empirical and “demoralized concepts” is that they offer the opportunity, just like in physics, to translate qualitative, vague (metaphysical) concepts into empirical and quantitative ones. Reference to such relatively physical “things,” such as the wealth- or power-maximizing behavior, makes it possible to actively observe and even measure such behavior.⁷⁹ With the help of statistics in the analysis of the found empirical data, one can discover regularities in the social reality. The beauty of such regularities in our social reality is, of course, that they can be described or represented in a formal system of abstract rules: a theory. When we have established the laws of our social world, we can subsequently try to predict and even influence human behavior.⁸⁰

Thus, for instance, the modern science of economics (which, interestingly, was until the late nineteenth century called “political economy”) makes all sorts of actions commensurable by abstracting away from all the qualitative differences between human desires and motivations – they are all thought to be contingent and equally worthy – and “reckons” in quantitative terms about how such actions relate to the desire to maximize wealth or “welfare” or “utility.”⁸¹ Inescapably science consists in reducing complexity, and this reduction of economic science is widely regarded as a very successful one.

The desire to maximize welfare or utility is a kind of meta-desire that can even provide us with a *norm* – a kind of meta-norm – that any sane person should and generally will attest to. At least this is a central assumption in

⁷⁹ “One of the most conspicuous aspects of the rise of technology (assisted by industry and the sciences) is [...] that the inorganic supersedes the organic and a cultural superstructure emerges in which the “big three” of modern society (technology, industry and science) rule. In this world of the inorganic, experiment and continuous abstraction seem to dominate. Modern man has substituted inorganic for organic material, and inorganic energy for organic power. A *nature artificielle* has spread out over the world. [...] Organic life will probably always remain a puzzling problem to man, but the inorganic is relatively easily accessible and can be manipulated. Hence, man tries to replace the organic by the inorganic as much as possible.” Zijderveld, *The Abstract Society*, p. 84.

⁸⁰ Popper, K., *The Poverty of Historicism*, Routledge & Kegan Paul London 1961, p. 25; Hollis, *The Philosophy of Social Science*, pp. 42, 64.

⁸¹ Posner, *The Problems of Jurisprudence*, pp. 356-362, 374-387.

utilitarian moral theory.⁸² Because welfare or utility are fairly empirical notions this means that we can easily switch from the normative realm to the world of facts or matter. Thus, when we make relative the distinction between fact and value and subsequently reduce the moral world to the natural one, we might find common ground: “We can meet the harsh facts of the flesh, on the level where all of us are, or should be, one.”⁸³

If people do not attest to, or accept the validity of this norm of maximizing welfare, and give other (typically less self-interested) motivations to justify and explain their actions, economists might argue that, however people describe their own actions, it is *empirically* sound to impute that they generally act in accordance with this meta-norm. In addition, we can also depart from the premise that human beings always have a particular interest in minimizing the costs of satisfying their desires, and thus focus on the comparative costliness of the different lines of action. As said before, from such a perspective *all* lines of action are commensurable because they are translated into expenditures of a single universal good called *wealth* (or welfare).⁸⁴ We can now begin to appreciate why Richard Posner calls economics “the instrumental science par excellence.”⁸⁵

In socio-economic policy analysis, the social scientist will start from a “realistic” view of human beings as economic or rational actors and cut to the chase. If we translate (or reduce) human desires, values and interests to the material conditions that need to be fulfilled to pursue these individual

⁸² Cp. Kymlicka, *Contemporary Political Philosophy*, p. 10; cp. Dale, *The Pursuit of a Scientific Culture*, p. 175.

⁸³ Snow, *The Two Cultures*, p. 77; “The traditional view of a continuity between the natural and the moral order was overthrown and replaced [...] by the reduction of the moral world to the natural one.” Unger, *Law in Modern Society*, p. 38.

⁸⁴ “Very frequently these common ends will not be ultimate ends to the individuals but means which different persons can use for different purposes. In fact, people are most likely to agree on common action where the common end is not an ultimate end to them but a means capable of serving a great variety of purposes.” Von Hayek, *The Road to Serfdom*, p. 67.

⁸⁵ “The basic assumption of economics that guides the version of economic analysis of law [...] is that people are rational maximizers of their satisfactions – all people (except for small children and the profoundly retarded) in all their activities (except under influence of psychosis or similarly deranged through drug or alcohol abuse) that involve choice.” Posner, *The Problems of Jurisprudence*, p. 353; Posner, *Overcoming Law*, p. 15.

projects, we see here that all human beings, although thoroughly divided on values, actually do have one common interest. Regardless of what the goals and desires are, the *means* that make it possible to satisfy individual desires and interests should be maximized, and we can safely and conveniently talk of such means in terms of “money.” Compare Pierre Bourdieu:

“The discovery of labor presupposes the constitution of the common ground of production, that is, the disenchanting of a natural world reduced to its economic dimension alone. Ceasing to be the tribute paid to a necessary order, activity can be directed towards an exclusively economic goal, the one that money, henceforward the measure of all things, starkly designates.”⁸⁶

Now measured by this yardstick, most activities that were justified as having an intrinsic worth that cannot be measured in material effect, are likely to be dismissed as “metaphysical” or as merely “symbolic” and as such lacking any reference in the real world. In the words of Bourdieu: “Measured by the yardstick of monetary profit, the most sacred activities find themselves constituted negatively as symbolic, that is, in a sense the word sometimes receives, as lacking concrete, material effect, in a word, gratuitous, that is disinterested but also useless.”⁸⁷

The disenchanting effect of such a perspective is clear, and it has great *critical* potential against all sorts of domination by political authority figures or other powerful institutions in society by means of such “vain metaphysics” and “empty symbolism.” This also goes for the legal practices and institutions in modern societies. The law is full of symbolism and dubious metaphysical concepts, which can be “unmasked” from a social scientific perspective as mainly hiding from sight the interests of the legal professionals to immunize their judgments from scientific or public scrutiny.⁸⁸

⁸⁶ Bourdieu, *The Logic of Practice*, p. 117; cp. Walzer, *Spheres of Justice*, pp. 21, 22.

⁸⁷ Bourdieu, *The Logic of Practice*, p. 117, 118.

⁸⁸ Posner, *Overcoming Law*, pp. 33-80; Posner, *The Problematics of Moral and Legal Theory*, pp. 185-206; “Claims to high ethical standards and collegial regulation were reinterpreted by some scholars as “myths” aimed at protecting the privileges of professionals.” Brint, *In an Age of Experts*, p. 40; cp. Collins, R., *The Credential Society*, An Historical Sociology of Education and Stratification, Academic Press New York 1979, pp. 147-159.

The serious downside, however, also seems clear. There are symbolic aspects to politics that cannot be completely dispensed with. The symbolisms and rhetoric of political and legal authority, for instance – at least that seems to be the conclusion we should draw from the investigation in the second chapter. Any functional analysis in realistic or empirical terms will transform the experience of authority beyond recognition. Paradoxically, such an analysis makes it symbolically ineffective. Furthermore, the individual rights that are granted by liberal democracies to protect minorities or individuals against democratic majorities may at a first glance seem “factoid,” but closer scrutiny reveals that they are also merely of a symbolic nature; in other words, they can be thought of as being “social constructions,” as well.⁸⁹ Again the question arises whether we can both take legal rights seriously as well as analyze them in instrumental terms. Here also, instrumental analysis might threaten symbolic effectiveness.

Pragmatism

Any social science that tries to describe and explain phenomena in the social world (those connected to the free market in modern societies, for instance) has to make use of a conceptual apparatus that can only be interpreted as a kind of “formalism.” The danger of dogmatism with regard to this formal theory is just as apparent here as it is in the juridical formalism that was explored in the previous chapter. However, this formalism is thought to be thoroughly instrumental and should not be thought of as having any intrinsic worth, or having any pre-political or pre-social normative foundation whatsoever. We should think of these theories as the product of empirical research in the modern social sciences, theories that are readily adjusted and revised whenever social reality proves to be different from what the theory predicts. Thus, according to Richard Posner we should think of economics, for instance, as “a formalism erected on a realist base.”⁹⁰ The formal theories and premises of this science are under constant scrutiny and revision as it constantly tries to adapt theory to an ever-changing and whimsical empirical reality.

⁸⁹ Cp. Hacking, *The Social Construction of What?*

⁹⁰ Posner, *The Problems of Jurisprudence*, p. 387; cp. Kennedy, *A Critique of Adjudication*, pp. 116, 309.

To make this easier, we are well advised not to take the distinction between facts and values too seriously. We should not be too principled to refuse to re-conceptualize individual “values” as merely the desire for something or other; subsequently we can translate them into matters of interests.⁹¹ The normative is thus translated into something that has a more concrete ring, something that is also sufficiently factual as to be scientifically researchable. Now it is possible to employ the experimental or empirical scientific method of enquiry to determine the most effective and efficient solutions to social conflicts.⁹²

What probably characterizes pragmatism most is a general distrust of a dogmatic attitude with regard to (philosophical) distinctions.⁹³ Thus the distinction between fact and reason, or between empirical reality and the conceptual scheme by means of which this reality is ordered and explained, is thought to be thoroughly relative.⁹⁴ Remember that the traditional view of continuity between the natural and the moral order was in the third chapter replaced by a strict division between the natural and the moral order. This distinction is now overthrown and replaced “by the reduction of the moral world to the natural one.”⁹⁵ Now the old opposition between the order of facts and the order of ideas can be superseded such that scientific research into those realms does not require different methods of enquiry. Particularly, there is no need for a distinctive method for the realm of ideas – the philosophical method of interpretation of symbols or the analysis of concepts.

⁹¹ “For the moralist of desire there is just a tenuous and elusive line between descriptive psychology and ethics. For him, the contingent desires individuals have are the only material out of which moral standards can be made. [...] Only by repudiating the distinction between fact and value, could we go from the mere description of these communal values to their use as standards of evaluation.” Unger, *Knowledge and Politics*, pp. 51, 102, 103; cp. Kaplow & Shavell, *Fairness versus Welfare*, pp. 11, 12, 21.

⁹² Posner, *The Problems of Jurisprudence*, p. 387; Posner, *Law, Pragmatism and Democracy*, p. 9.

⁹³ Kolb, *The Critique of Pure Modernity*, pp. 17, 18.

⁹⁴ Quine, W.V.O., ‘Two Dogma’s of Empiricism’ in: *From a Logical Point of View*; “Fact and theory are not opposed, science, including good social science, unites them. [...] Modern economics can furnish the indispensable theoretical framework that law so badly needs.” Posner, *Overcoming Law*, p. 19. Cp. Luban, *Legal Modernism*, pp. 139, 140.

⁹⁵ Unger, *Law in modern society*, p. 38; cp. Bourdieu, *The Logic of Practice*, p. 108.

Moreover, according to Quine, “meanings, those very models of mental entities, end up as grist for the behaviorist mill.”⁹⁶ The interpretation of symbols and the analysis of concepts can be thought of as unscientific because symbols and meanings are identified as merely mental having no real and determinate existence whatsoever. We must “think things and not words,”⁹⁷ and from the pragmatic premises we can do exactly this. We can investigate our social reality all over the board by constructing causal explanations of facts arrived by means of experimental inquiry.⁹⁸ This results in a pragmatic scientific attitude, which does not take seriously any claim to “pure” or “transcendental” knowledge, knowledge which can be arrived at by means of reason, interpretation or conceptual analysis alone.

What, according to William James, the American philosopher of pragmatism, takes the place of rationalist speculation is an orientation towards “concreteness and adequacy, towards facts, toward action, and toward power.”⁹⁹ This pragmatic emphasis on concreteness dispels all (philosophical) speculation on vague moral values or metaphysics. It also emphasizes behavioral and measurable facts which can be investigated by means of empiricist and experimentalist methods of inquiry and dispels the reification of meanings, particularly of legal concepts; in this sense pragmatism is particularly anti-Platonic and anti-rationalistic.

Importantly, pragmatism is thoroughly technological in spirit because, as William James argued, it is oriented both towards action and towards power. It is not even particularly interested in founding or finding Truth. When knowledge is a successful guide for action and is a powerful instrument to reach our goals, then that is all the certainty the pragmatist needs, however temporary and relative such certainty is. For the pragmatist, knowledge (or reason) is simply a “tool,” an instrument that is wholly at the service of

⁹⁶ Quine, W.V.O., ‘Ontological Relativity’ in: *Ontological Relativity and Other Essays*, Columbia University Press New York 1969, p. 26, 27.

⁹⁷ The expression is famously attributed to Oliver Wendell Holmes but is also reported to originate in the work of Francis Bacon.

⁹⁸ Unger, *Knowledge and Politics*, pp. 113, 114, 116.

⁹⁹ James, W., *Pragmatism and the Meaning of Truth*, Harvard University Press Cambridge Mass. 1975, p. 31; Posner, *Law, Pragmatism and Democracy*, p. 24; Posner, *Overcoming Law*, p. 5.

human goals and purposes. All philosophical speculation on what explains the power and adequacy of our knowledge is thought to be vain.¹⁰⁰

From “dissensus” to the democratic art of compromise

We seem to be stuck with empty instrumental reason waiting for the will to give it the input it needs to reckon the most effective and efficient course of action. We are left with the rather prosaic experience of pursuing one’s ends and seeing other persons merely as “aids” or as “obstacles” to the achievements of those ends. Moreover, it seems most realistic and scientifically sound to define man as a subject of certain desires taken as givens for (moral) reasoning. Desires cannot themselves be judged at the bar of reason, and this relates to the fact, which was mentioned before, that in the modern world the subjective individual will rules supreme.¹⁰¹ In a democracy this is not merely a factual or empirical statement but also a *normative* statement. Decisions and policies that express the will of the people, or at least that of a democratically victorious majority, have the greatest legitimacy in a democratic state; this will of the majority *should* rule. In addition, modern social science as technology offers the means to make policies and decisions as effective and efficient as possible in regulating and influencing the society.

In the ideal case, what the people want can be realized both effectively and efficiently by means of modern socio-economic policy science. This, however, depends on the goals that these majorities set themselves. But there is an important condition that seems to expose both the strength and the weakness of modern social scientific technology. The goals that modern man and democratic majorities set themselves should be as *concrete* or *material* as possible because otherwise there is no possibility of knowing and predicting how the policy will influence or affect social reality. There is no chance of ever empirically monitoring whether the policy has been a success or not. Goals described in merely symbolic or worse in metaphysical terms – like most *moral* ideals or aspirations that cannot be translated into some material goal – will not pass such a test for concreteness.

There is, however, also another reason to prefer concrete and material goals to vague moral ideals. Within the context of democratic deliberations

¹⁰⁰ Cp. Rorty, *Philosophy and the Mirror of Nature*.

¹⁰¹ Unger, *Law in modern society*, p. 85; cp. Taylor, *Hegel*, p. 367.

and negotiations, it is harder to compromise with regard to moral convictions than with regard to concrete goals formulated in material terms. The problem is that people generally behave much more principled and uncompromisingly when some conflict is experienced as one concerning values – a “dissensus” – than when it is seen as merely a conflict of interests. Especially when these interests can be translated into a conflict over *means* in material terms (money), a compromise seems to be always within reach. By contrast, values are experienced as that which should not be easily compromised because they are often of a communal origin. In other words, individuals often do not feel that they can freely dispose of values. In addition, it seems hard to see how conflicting parties can meet halfway when the values that caused the conflict are incommensurable (like they typically are).¹⁰²

The looking away from moral convictions and the focus on concrete material interests can easily become a cardinal democratic “virtue” in modern complex and pluralistic societies. Such a democratic attitude encourages compromise, encourages the buying off of all sorts of interest groups, and thus social peace is maintained by generally bracketing ideological differences. The crucial point being again that, to repeat, “interests, unlike ideas can be compromised.”¹⁰³ This suggests a pragmatic way out of political controversy concerning ends. Compare Richard Posner:

“First, efforts are made to instrumentalize political reasoning to the extent possible so that intractable issues of ends are transformed into issues of means. Second, the responsibility for the extensive instrumental reasoning now required of government is handed over to technical experts – instrumental reasoning is what technical expertise is good for.”¹⁰⁴

Although we live in pluralistic modern societies and might disagree substantially on values if we translate those into concrete goals and interests, we do not even generally disagree on *ends* in modern societies. Posner: “There happens to be a substantial consensus in our society concerning ends, the disagreement is over means and it will lessen as more of us learn more

¹⁰² Aubert, *The Hidden Society*, pp. 86-90; Posner, *The Problematics of Moral and Legal Theory*, pp. 62, 63.

¹⁰³ Posner, *Law, Pragmatism and Democracy*, p. 166, 173.

¹⁰⁴ Posner, *Law, Pragmatism and Democracy*, p. 205.

about how economic systems work.”¹⁰⁵ To be sure, in the first instance this is a rather surprising statement considering the fact that he generally agrees to the fact that we moderns live in pluralistic societies in which we are fundamentally divided on questions of the good or the good life. However, Posner might make two steps that explain this contention.

First we translate vague abstract moral values into concrete goals in material terms and then, secondly, we recognize that we *do* have a kind of meta-goal or meta-interest in common: we all have a meta-interest in economizing on the means. Considering the fact that means are always scarce, we might recognize in the need for “efficiency” both an abstract and a no-nonsense interest that can provide us with a meta-norm.¹⁰⁶ Moreover, this is not just a normative statement. It can well be argued that it represents also a factual or descriptive statement. Economists might argue that on an aggregate level people actually generally act in accordance with this overall end. This means that if we want to understand human behavior we need to know how economic systems work that are both the “product” and the “producer” of such behavior.

This becomes even more important if we want to *influence* or *change* such behavior. I argued that in a democracy there is great interest in influencing individual behavior because it should be made possible for democratic majorities to “create” the society that they prefer. However, I have also argued that the moment we start to use our knowledge of social and economic systems to manipulate human behavior, such knowledge becomes a “social technology.” We have also already established how we can *realistically* and effectively affect human behavior by changing or manipulating the *price* of behavior. Raising the price of socially undesirable behavior will make individuals avoid it and, conversely lowering the price of desirable social actions will encourage people to reformulate public goods in terms of private

¹⁰⁵ Posner, *The Problems of Jurisprudence*, p. 387; “It is true that the conflicting values in any political debate can be made commensurable merely by viewing them from a sufficiently distant point of view.” Kronman, *The Lost Lawyer*, p. 57.

¹⁰⁶ “Efficiency is also a concept that captures aggregate effects on individuals well-being, and invocations of efficiency should thus be understood to entail a concern for individual’s well-being, rather than obedience to some technical or accounting notion.” Kaplow & Shavell, *Fairness versus Welfare*, p. 37.

advantage. Indeed, in recent decades we have witnessed the modern corporate welfare state yielding to an emphasis on such public policy.¹⁰⁷

But we have also witnessed attempts to force back the reliance on public policy by state- or semi-state agents in favor of reliance on the competitive forces in the free market; a strategy that is deemed in many cases more effective and efficient. Largely instigated by financial pressures, modern states have relegated more and more public tasks and policies to the rationalization of expertise in a more market-oriented direction.¹⁰⁸ The case for the liberalism of the free market is, however, often not of a principled kind. The arguments are of a much more pragmatic nature, in the sense that liberalism generally creates the conditions that makes economic prosperity possible. The case for free-market liberalism is therefore thoroughly instrumental as is the case for any other institution or practice in a technological culture. The case for free-market competition can be complemented by principled arguments for the value of freedom, as they are, for instance, by Von Hayek in his *The Road to Serfdom*, but need not be.¹⁰⁹

Posner gives some pragmatic reasons for justifying free-market liberalism. For instance, he argues that such liberalism fosters the exchanges of information necessary to scientific and technological progress. He also argues that such liberalism generally maximizes productive output and that it effectively and efficiently encourages and rewards competence. In addition, there is a democratic aspect to free-market liberalism as it prevents excessive centralisation of decision-making. Last but not least it defuses political and sectarian strife because it weakens competitive loyalties within the political community (like to family or clan). Indeed, such a justification of free-market liberalism by means of such favourable *results*, to be sure, is thoroughly pragmatic.¹¹⁰

And so is the case for democracy. Democracy is not seen as a value or goal in itself – as nothing has intrinsic value or is an ultimate goal in pragmatic reasoning – but essentially as a *means* to satisfy particular desires. In this perspective politics in general is not much more than “the

¹⁰⁷ Unger, *Law in modern society*, p. 194; Barber, *Strong Democracy*, pp. 13, 23.

¹⁰⁸ Cp. Brint, *In an Age of Experts*, p. 124.

¹⁰⁹ Cp. Friedman, M., *Capitalism and Freedom*, The University of Chicago Press Chicago 1982.

¹¹⁰ Posner, *Overcoming Law*, p. 25.

chambermaid of private interests” because no other interests exist. Democracy has legitimacy as long as it is a means to satisfy such private interests and leads to the desired results. This means that we can even think of democratic politics in terms of the free market, like Schumpeter famously does in his *Capitalism, Socialism and Democracy*.¹¹¹ Schumpeter thinks of democracy as a means to the peaceful maximization of the satisfaction of individuals, “a utilitarian device for safeguarding internal peace and individual freedom.”¹¹² Nothing much intrinsic in the concept of democracy or in the idea of free market liberalism justifies the institutions that they inspire; only the specific interests and desires that they serve do so.

If private interests and subjective desires rule supreme, the combination of such pragmatic liberalism and modern economic thinking leads to a preference of free market mechanisms for coordination of human interaction in contrast to the explicit use of state power. Respect for individual wills implies abstaining from manipulating as much as possible and only a free market economy gives the people what they want, instead of what political majorities think they ought to want. No taste whatsoever is illegitimate or improper so long as it can make a market, and the market makes it possible for every individual to maximize the satisfaction of his or her own tastes, preferences and desires. Thus the free market takes the actual will of people seriously, and we should not allow for any paternalistic or moralistic intervention.¹¹³

A free market is also fairer and more egalitarian than any political judgment on what we should want or could ever be. Impersonal and not political forces determine the free market and demands can, in principle, incite a supply without any political intervention. Also, the market does not discriminate. Personal characteristics or qualities do not count for much. Moreover, by letting market forces determine demand and supply, the resolution of conflict is ceded to the private realm where people represent only themselves and resolve their differences voluntarily. To conclude, one can even go to the extreme of this argument by claiming, with Friedrich von

¹¹¹ Schumpeter, *Capitalism, Socialism and Democracy*, p. 26; Barber, *Strong Democracy*, p. 118; cp. Brint, *In an Age of Experts*, p. 144.

¹¹² Von Hayek, *The Road to Serfdom*, p. 78; Posner, *Overcoming Law*, p. 25; Posner, *Law, Pragmatism and Democracy*, pp. 188-203.

¹¹³ Friedman, *Capitalism and Freedom*, p. 15; Friedman, *The Republic of Choice*, p. 44.

Hayek, that “[...] the free market is the only mechanism that has ever been discovered for achieving participatory democracy.”¹¹⁴

Law as technology

This seems to leave us with a private sphere dominated by the mechanisms of the free market, on the one hand, and a public sphere where instrumental legal rules legitimated by democratic majorities seek to complement or correct ruling socio-economic forces, on the other. Such rules can only be successful if they sufficiently ally with these forces, and this means that they need to be empirically well informed. The law radically changes in character. In the classical picture of things, power worked top-down and was concentrated in the State, which in an important sense “transcended” society. In the words of Scott Lash: “Power was lodged in a *transcendent* juridico-discursive instance, for instance in a transcendental state.” However, “in the Modern,” Lash goes on to say, “sovereignty is lodged in the social itself, and power circulates immanently ‘in the capillaries of society’; the state is no longer above us but among us.”¹¹⁵ But, under such circumstances, not only the state loses its transcendental features. In the modern immanent culture, the law is also no longer “above” us but “among” us. Surely, this must have important consequences for the law and legal professionals.

We should connect this to another important (and perhaps rather demeaning) feature of modern law that we arrived at in the previous paragraphs. Modern law is seen as completely derived from the human will. There is no pre-social or pre-political order where we might find legal rights or obligations. Jean Jacques Rousseau already referred to this when he said that the social order “serves as a basis for all other rights. And as it is not a natural right, it must be founded on covenants.” When the cosmic order goes to pieces, the socio-political and normative order loses its metaphysical (transcendental) allure and is now up for grabs. Argues Rousseau, “The laws are but the registers of what we ourselves desire,” and “A people, since it is

¹¹⁴ Von Hayek, *The Road to Serfdom*, p. xi; Barber, *Strong Democracy*, p. 107; Friedman, *The Republic of Choice*, p. 44.

¹¹⁵ Lash, ‘Modernism and Sociological Thought,’ in: Lash & Whimster (eds.), *Max Weber, Rationality and Modernity*, p. 362; “The state is not an abstract entity, divorced from concrete social forces and institutions. It is part of society. The state feeds on the wants of its citizens.” Friedman, *Total Justice*, p. 68.

subject to laws, ought to be the author of them. The right of laying down the rules of society belongs only to those who form society.”¹¹⁶

Obviously it is by now a widely shared idea that the law is a pivotal instrument by means of which democratic people rule themselves.¹¹⁷ It is man alone who can decide what his social world should look like, and we have also established that modern man is apt to look at this world in instrumental terms. Thus socio-economic reality is thought to be open to functional analysis, negotiation and renegotiation; if necessary it is even open for *perpetual* renegotiation as social needs, interests and technologies constantly change. This goes for every aspect of our social contract including the most basic human rights and duties.¹¹⁸

In modern pluralistic societies the law is mainly the systematized and coercive embodiment of the desires and preferences of the majority in a democracy, and we can expect the law to change when these desires and preferences change.¹¹⁹ And, to be sure, this is why in modern democracies the law seems to be perpetually “under construction.” But maybe there are important reasons or incentives for legal professionals to conceal, or to at least “euphemize,” the fact that the law is merely the contingent instrument serving the will of democratic majorities. In the formalistic paradigm that I described in the previous chapter, the law is thought of as a systematic and consistent whole of rights and obligations, which in the end is largely legitimated by the respect for individual dignity and equality that the modern

¹¹⁶ Rousseau, *The Social Contract*, pp. 50, 81-83.

¹¹⁷ “[...] the law is defined instrumentally, at least in part, as a tool, and artifact, which the constituent parts of society can manipulate deliberately and openly for personal or social ends. Law is, therefore, open to the public and its representatives; it is, ultimately, their instrument. [...] Some of the magic of immutable rightness still clings to modern law, in pockets and corners, very markedly in charters of basic right, but the rest of the codex, the main body of laws, is frankly and prosaically instrumental.” Friedman, *The Republic of Choice*, p. 22.

¹¹⁸ “Each advance in science and technology seemed to increase the possibility of control – over nature, over the conditions of life. But control always required regulation, rules, implementation; control was, and had to be, vested in law, legal process, and the state.” Friedman, L.M., *Total Justice*, Russell Sage Foundation New York 1985, p. 42; cp. Nonet & Selznick, *Law & Society in Transition*, p. 92, 93; Posner, *Law, Pragmatism and Democracy*, p. 9.

¹¹⁹ Berman, *Law and Revolution*, p. 38; Posner, *The Problems of Jurisprudence*, p. 16.

state owes its citizens. Reason thus gives modern rational law an *autonomous* legitimacy and authority in modern society.

Posner argues that during the past decades, the alliance of jurisprudence and moral philosophy emphasizing “fairness” in many variants can be seen as a conservative response to the functionalism and scientism that started to penetrate the law.¹²⁰ But, interestingly, the constant democratic tinkering with the law has had an important side effect. Change necessarily undermines belief in changelessness – belief in a relatively timeless, sacred order of being. One might say that constant legal change reveals the thoroughly political, human and instrumental aspects of the law. Maybe some of the magic of immutable rightness still clings to modern law, markedly in the charters of basic and constitutional rights, but nowadays the main body of law is experienced as prosaically instrumental.¹²¹

When the belief in the law as a timeless and sacred set of norms is lost – in Weberian terms, when the law is completely disenchanting – it has lost its transcendental qualities and the law enters the modern culture of immanence. The law is a social technology and as such a means to master and regulate social behavior.¹²² The law is not an ultimate goal in itself, or seen as having intrinsic worth or value. The law is instrumental to *external* goals, any objective that the democratic majorities want it to serve. We thus witness “the complete secularization of law as a set of rules whose making and application were wholly at the mercy of judgments about how to achieve desired political objectives.”¹²³ This also means that legal institutions and practices can be changed at will, for instance when the existing institutions do not serve democratically legitimated goals or purposes.

¹²⁰ “Throughout Western society a traditional professionalism that emphasized guild-like restrictions and the cultivation of professional mystique is being challenged by a new, more functional, more empirical and scientific, in a word more rational (in a Weberian sense) professionalism foreseen long ago by Holmes. Moral theory is a methodologically conservative response to the challenge.” Posner, *The Problematics of Moral and Legal Theory*, p. xi.

¹²¹ Friedman, *The Republic of Choice*, pp. 22, 53; Unger, *Law in modern society*, pp. 26, 27.

¹²² Berman, *Law and Revolution*, p. 39.

¹²³ Unger, *Law in modern society*, p. 85.

Now remember Judge Holmes's claim that it would be wholesome for legal professionals to learn to "think things and not words." Jurists should not only acquire a taste for investigating our social reality, but they should also be more pragmatic, that is to say less dogmatic with regard to the legal institutions and practices in our modern societies.¹²⁴ A pragmatist does not take seriously any claim to "pure" or "transcendental" knowledge, which can be arrived at by means of reason or conceptual analysis. Note how William James characterizes pragmatism as an orientation towards:

"[...] concreteness and adequacy, towards facts, toward action, and toward power and that means the empiricist temper regnant, and the rationalist temper sincerely given up. It means the open air and possibilities of nature, as against dogma, artificiality and the pretence of finality in truth."¹²⁵

Following Holmes, Richard Posner argues that this is exactly what the legal world needs. The "internal and dogmatic" perspective focusing on the analysis and interpretation of "meaning" has proven inadequate for the complex and unstable modern social world; legal professionals should gain some distance, and thereby perspective, on their own practice and conceptual toolbox. From such distance, we recognize that the formalist lawyer has a rather "weak sense of fact," according to Posner, and "what is needed is inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of change."¹²⁶ Posner:

"What is missing from law are penetrating and rigorous theories, counterintuitive hypotheses that are falsifiable but not falsified (and so are at least tentatively supported), precise instrumentation, an exact vocabulary, a clear separation of positive and normative inquiry, quantification of data, credible controlled experiments, rigorous statistical inference, useful technological by-products, dramatic interventions with measurable consequences, and above all and subsuming

¹²⁴ Cp. Unger, *Knowledge and Politics*, pp. 113, 114, 116.

¹²⁵ James, *Pragmatism and the Meaning of Truth*, p. 31; Posner, *Law, Pragmatism and Democracy*, p. 24; Posner, *Overcoming Law*, p. 5.

¹²⁶ Posner, *The Problems of Jurisprudence*, pp. 218, 219, 442, 465.

most of the previous points, objectively testable – and continually retested – hypotheses. In law there is a shadow of scientific reasoning, but no edifice.”¹²⁷

If we think of the scientific attitude in modest and pragmatic terms as nothing more than “an attitude of respect for fact,” we may set “before the lawyer, judge, and law professor an eminently attainable as well as highly worthwhile ideal.”¹²⁸ But why does this, at present, seem so necessary for the legal world?

The law and its institutions are the instruments by means of which the people rule themselves, and therefore the legitimacy of its rule becomes relative to the (contingent) fact of whether the goals that it is set to serve are actually realized or not. It will be hard to make citizens conform to rules and policies that are flagrantly ineffective in reaching the goals they were designed to serve. In other words, the application of the legal rules can be legitimate only if it *actually*, or *in fact*, serves the democratically legitimated goals and purposes. This means that the law and both the legal practices and legal science lose their autonomy with regard both to politics and the social sciences because, on the one hand, the goals and purposes are to be politically defined. The law cannot autonomously define any goal or purpose. On the other hand, only social and economic experts can provide the law with the means to design truly effective and efficient rules and policies, “The responsibility for the extensive instrumental reasoning now required of government is handed over to technical experts – instrumental reasoning is what technical expertise is good for.”¹²⁹

When the law is to be effective in reaching democratically established goals, we may rightfully doubt whether legal professionals are able to put right the major juridical problems without recourse to the social sciences. Such sciences have much prestige in modern societies exactly because they are (more or less) effective social technologies based on scientific knowledge. But the moment legal professionals take recourse in such knowledge and experience, they compromise the autonomy of legal practices.¹³⁰ Indeed, legal

¹²⁷ Posner, *The Problems of Jurisprudence*, p. 69.

¹²⁸ Posner, *The Problems of Jurisprudence*, p. 70.

¹²⁹ Posner, *Law, Pragmatism and Democracy*, p. 205.

¹³⁰ Posner, R.A., *The Decline of Law as a Autonomous Discipline*, Harvard Law Review vol. 100 1990, p. 769, 772; Bourdieu, ‘The Force of Law,’ p. 818; “The problem with law

professionals are not very well equipped to make the legal system into an effective and efficient instrument of social policy. The education of lawyers is often highly formalistic, and law students are taught to think of the legal system as a relatively consistent and autonomous whole comprised of concepts, rules and principles.

Effective and efficient law, however, does not require puzzling with concepts and the exploration of the “relations of ideas,” but rather, in David Hume’s words, “experimental reasoning concerning matter of fact and existence.”¹³¹ To be successful in penetrating and manipulating our complex social reality one needs to proceed scientifically. This requires a naturalistic ontology and an empiricist and experimentalist method of inquiry. One should refocus from the *normative* and conceptual legal dimension toward the *factual* social reality that the law tries to affect. Formalistic professionals are going to lose ground to those professionals who can claim expertise here.¹³² As the law and its institutions will lose their autonomy, they will become more and more dependent on the expertise of, for instance, psychologists and psychiatrists whom we have actually seen enter the courtrooms in the past decades. Further optimization will require the expertise of sociologists and economists.¹³³

The pragmatic dissolution

The refocus from the normative to the factual will be made easier if the distinctions that were introduced in the previous chapter are “dissolved,” or, at least, made relative again. In the first place the distinctions between “relations between ideas” – the “conceptual scheme” or “theory” – and “relations between matters of fact” – empirical truths. For a pragmatist, this sharp distinction is not philosophically defensible anymore. Pragmatism

(with ethics too) as a system of reasoning is that in a pluralistic society it lacks cogent techniques for resolving disagreement.” Posner, *Overcoming Law*, p. 36.

¹³¹ Hume, *An Enquiry concerning Human Understanding*, pp. 71, 195.

¹³² Cp. Posner, ‘The Decline of Law as an Autonomous Discipline 1962-1987’ pp. 761-781.

¹³³ “What is particularly noteworthy about the sociology of law taken as a whole is its empirical cast and its refusal to take for granted that legal doctrines track legal practices. These are perspectives sorely lacking both in conventional legal analysis and in highfalutin constitutional and jurisprudential theorizing. Sociology is refreshingly down to earth.” Posner, *The Problematics of Moral and Legal Theory*, p. 215

builds on the (Wittgensteinian) realization that the “relations between ideas,” in the case of legal science the conceptual structure of the legal system, cannot have any independent meaning abstracted from actual or factual contexts. In other words, studying legal concepts in abstraction from actual conflicts in particular circumstances is a relatively meaningless effort. There is no conceptual scheme that can be consistently separated or abstracted from such circumstances and contexts. Posner: “Fact and theory are not opposed, science, including good social science, unites them.” Only when we have done so can “modern economics [...] furnish the indispensable theoretical framework that law so badly needs.”¹³⁴

The pragmatist legal professional and scientist will try to dissolve the distinction between facts and norms. There is just an elusive line between our factual desires and ethics because the contingent desires individuals have are the only material out of which moral standards can be made. Thus, “only by repudiating the distinction between fact and value, could we go from the mere description of these communal values to their use as standards of evaluation.”¹³⁵ If the distinctions between a conceptual and normative scheme, on the one hand, and the factual context and circumstances, on the other, are not taken seriously, the factual and the conceptual/normative start to intermingle.¹³⁶ The two worlds, the factual and the conceptual/normative, which was thought of as “transcendental” to the first, melt into one. The distinction that promised a distinct realm of normative or conceptual investigation or analysis now withers away. Legal norms or concepts gain their specific meaning in light of the facts, and vice versa. There is only *one* reality in which both facts and norms are *immanent*.¹³⁷

Now that the transcendental is brought back to the here and now of our factual world; for Posner the scientific project is to thoroughly and rigorously

¹³⁴ Quine, W.V.O., ‘Two Dogma’s of Empiricism’ in: *From a Logical Point of View*; Rorty, *Philosophy and the Mirror of Nature*; Posner, *Overcoming Law*, p. 19.

¹³⁵ Unger, *Knowledge and Politics*, pp. 51, 102, 103.

¹³⁶ Cp. Davidson, D., ‘On the very Idea of a Conceptual Scheme’ in: Davidson, D., *Inquiries into Truth and Interpretation*, Clarendon Press Oxford 1974; cp. Quine, W.O., ‘On the Very Idea of a Third Dogma’ in: *Theories and Things*, Belknap Press Cambridge Mass. London 1981, pp. 38-43.

¹³⁷ Cp. Taekema, S., *The Concept of Ideals in Legal Theory*, Schoordijk Instituut Tilburg 2000, 25-35, 87-106.

“naturalize” our normative reality. In other words, the normative should be largely reduced to the factual and translated into scientifically (or empirically) respectable terms. The traditional view of a sharp distinction between the natural and the conceptual and moral order will thereby be overthrown and replaced “by the reduction of the moral world to the natural one.”¹³⁸ The law can then be researched as any other phenomenon as “a matter of fact,” which, like anything else, is the object of “experimental reasoning.” The whole idea of a distinct legal order can be unmasked as an “ideology” in the bad sense of the word, ideology that merely serves as a strategy to keep socio-economic knowledge claims that compete with formal legal expertise at a distance and to avoid the “messy encounter with empirical reality.”

Autonomous “meanings” are no longer scientifically respectable notions, and the hermeneutical and analytical methods by means of which these were investigated will generally have to be replaced by *real* scientific methods: empiricist and experimentalist reasoning. The notoriously vague and indeterminate “intentionalist” discourse will have to make way for a stringent behaviorism and naturalism.¹³⁹ What people think they mean or intend is of no importance; all that matters is what they actually *do*. Only what they do, as opposed to the vague concepts and ideology, by means of which they try to justify their actions, can in fact be empirically registered, described or measured by means of the statistical and empirical social scientific methods of inquiry.

Behavior can subsequently be explained by means of social and economic laws that these sciences have identified. From measuring collected data, we can proceed to causal explanations by means of constructing the laws of human interaction, and finally from this knowledge we can, at least roughly, predict what will happen. The moment we use this knowledge to manipulate social reality it becomes technology. Only a thoroughly scientific (a

¹³⁸ Unger, *Law in Modern Society*, p. 38; cp. Luban, D., ‘What’s Pragmatic about Legal Pragmatism?’ in: Dickstein (ed.), *The Revival of Pragmatism*.

¹³⁹ Posner, *The Problems of Jurisprudence*, p. 223; naturalistic science is science that is modelled on the natural sciences and which postulates this its methods as a single logic of explanation for all sciences. Cp. Hollis, *The philosophy of social science*, pp. 8, 11.

thoroughly “naturalized”) legal system can serve as an effective and efficient instrument of social control and social engineering.¹⁴⁰

The law is nothing more poetic or elevated than a means to realize certain goals by means of *force*. Descriptions that refer to vague moral concepts such as justice, human dignity, rights, or fairness, are eschewed as being metaphysical and insufficiently scientific. “The ultimate ratio of law is indeed force,” Posner argues, and this can be related to the fact that in modern pluralist societies as the scale increases, the extent of agreement on the order of ends decreases, and the necessity to rely on force and compulsion grows.¹⁴¹ Indeed, “power” (closely related to physical force) is also a relatively material and non-moral ground for legal obligations, and as such sufficiently hard to count as scientific.

“Law is dissolved into physical force, also an abstract entity but one that has a more solid ring and, more important can be interpreted in behavioral terms.” Factual human behavior and the exercise of power can be brute facts of experience, and such facts can be known without much interpretation.¹⁴² The “naturalization of the law” implies a focus on the actual, on particulars and on the facts. To be effective as an instrument of social engineering, the legal professional will have to be conscious of the *effects* of legal practice. This means that legal professionals and scientists will have to focus on the *facts*, on the *actuality* of our social world and make sure that the law makes the right impact on it. The law is conceptualized as the exercise of power, or

¹⁴⁰ Posner advocates a “naturalized jurisprudence,” that is, a jurisprudence that eschews armchair conceptual analysis in favor of continuity with a posteriori inquiry in the empirical sciences. “Pragmatic reasoning is empiricist, and so theories that seek to guide empirical enquiry are welcomed in pragmatic adjudication.” Posner, *Law, Pragmatism, and Democracy*, p. 77.

¹⁴¹ “Power –closely related to physical force as it is [...] is an attractive concept to someone who wants a material, nonmoral ground for legal obligations. [...] To be blunt, the *ultima ratio* of law is indeed force – precisely what is excluded by even the most latitudinarian definitions of rationality. Rationality is “*simply* a method of being open en curious, and of relying on persuasion rather than force.” Law is not characteristically “open and curious,” and relies on force as well as persuasion.” Posner, *The Problems of Jurisprudence*, pp. 19, 83, 120; Luban, *Legal Modernism*, pp. 130, 132.

¹⁴² Cp. Hollis, *The Philosophy of social science*, p. 44.

better, as a powerful instrument in the service of human needs. In short, it is conceptualized as a technology.¹⁴³

There is bound to be a new focus on its *efficiency* as well. In the modern technological culture and in modern democracies there is no end to the goals and desires that are articulated by the electorates and their representatives. However, every goal or policy has a “price.” Although there seems to be no end to human needs and desires, the means are always scarce, and we should try to calculate the costs and benefits such that we can make a good estimate of whether the means are used economically. In a technological culture, efficiency is easily seen as an intrinsic good because we need to get the maximum of results with the minimum of resources and costs. Often it is presented as an ultimate norm that under the circumstance of scarcity everyone should submit because it can unite otherwise highly divided individuals in modern pluralistic societies. Such a normative approach tends toward consequentialism and utilitarianism, but surely a consistent pragmatist will refuse to become too dogmatic in his normative theories.¹⁴⁴

“We can meet the harsh facts of the flesh, on the level where all of us are, or should be, one,” C.P. Snow argued.¹⁴⁵ We should divert the discussion from semantic and metaphysical issues toward those that are adequately factual and empirical.¹⁴⁶ The focus should therefore be on *concrete* social needs and interests, on the one hand, and on the *factual* outcomes, on the other. Richard Posner argues that from a social scientific perspective lawyers are generally rather naïve about how law actually affects the behavior of citizens in society. The idea that law affects behaviour not only directly, by creating rewards and sanctions, but also to a large extent indirectly, by altering attitudes, and through them behaviour, is an article of faith for most legal professionals. Especially judges and law professors seem to cling strongly to the idea that the law has a strong connection to custom and moral

¹⁴³ Posner, *The Problems of Jurisprudence*, pp. 18, 19, 26, 28, 29, 223.

¹⁴⁴ Posner, ‘Pragmatist Adjudication’, in: Dickstein (ed.), *The Revival of Pragmatism*, pp. 235-253; Posner, *Overcoming Law*, p. 4; Posner, *Law, Pragmatism and Democracy*, pp. 59, 337.

¹⁴⁵ Snow, *The Two Cultures*, p. 77.

¹⁴⁶ Posner, *The Problems of Jurisprudence*, p. 123, 387; “empirical sciences treat the subject matter as a one-dimensional thing that does not need to be set against the background of intentions or values.” Unger, *Knowledge and Politics*, p. 113.

consciousness or that it is experienced as reasonable. This then explains the general compliance. Posner however argues that, from a social scientific perspective, one can at least doubt the self-evidence of these theses. Posner argues that there is no evidence that these consequences exist, but this fact seems to have obviously failed to shake the profession's faith in the affects of the strategy by means of such legitimation.¹⁴⁷

A more realistic and scientifically respectable theory of why people comply with the law would analyze the matter in terms of *incentives* instead of in terms of “legitimacy” of the law or “respect” for the law. In a genuinely scientific analysis, one should defer such normative and moral terms in research into the compliance with law.¹⁴⁸ Oliver Wendell Holmes argued that moral terms in the law should be “bathed in cynical acid” to strip them of their moral connotations. We should abstain from all such “nebulous” and “ideological” motivating entities and realize that morality is not a very trustworthy or realistic motivating factor for human action. To put it in the words of Friedrich von Hayek, “Men are not likely to give their best for long periods unless their own interests are directly involved.”¹⁴⁹

For the law to effectively and efficiently regulate behavior the law should, as Gracián advised us, try to affect the “primary motives, which are not always the highest but more often the lowest part of his nature.” We should manipulate human fears and desires such that the fear of sanction enters the intelligent calculation. Previously, we have already argued that all such deliberation about means is, in essence, a kind of counting of how to attain personal ends.¹⁵⁰ Appeal to the level of will and desires with a sufficiently stiff punishment will make it the self-interests of all to obey the law because compliance outweighs the advantages that might be gained from disobedience. We simply change the price of conduct; the social sciences, especially economics, can help us to do this effectively and efficiently.¹⁵¹

¹⁴⁷ Posner, *The Problems of Jurisprudence*, p. 214; Friedman, *The Republic of Choice*, p. 113.

¹⁴⁸ Posner, *The Problems of Jurisprudence*, p. 234.

¹⁴⁹ Von Hayek, *The Road to Serfdom*, p. 138; Luban, ‘What’s Pragmatic about Legal Pragmatism?’ in: Dickstein (ed.), *The Revival of Pragmatism*, p. 289.

¹⁵⁰ Unger, *Law in modern society*, p. 26; cp. Kronman, *The Lost Lawyer*, p. 55.

¹⁵¹ Unger, *Knowledge and Politics*, p. 73; cp. Kennedy, *A Critique of Adjudication*, p. 59.

In the monitoring of factual outcomes (the factual effects of a certain legal regulation in society) rests an important opportunity to render the legal claims more *objective*. Outcomes can be scientifically predicted, described and explained in relatively exact and universal terms, and as such social science can provide us with a common ground for subsequent political evaluation. If we succeed in formulating clear and concrete goals for the law to serve we have a clear and concrete standard by means of which we can evaluate and criticize the law. This also opens the way to changes if necessary. At the same time, “they can control administrative discretion and thus mitigate the risk of institutional surrender.”¹⁵² But again we should not be too dogmatic about such standards and not make too much of this objectivity, because “all such purposive judgments are inherently particularistic and unstable: the most effective means to any given end varies from situation to situation and the purposes themselves are likely to be complex and shifting.”¹⁵³ This means that we need to “introduce openness and flexibility into legal judgment.”¹⁵⁴

Thus the objectivity and the certainty that we wish to derive from such objectivity is always relative to time and place. The objectivity is also always relative to policy objectives (which are relative to contingent desires) and particular circumstances. This means that the certainty aspired to is forever out of reach and therefore, according to Nonet and Selznick,

“The quest for purpose is a risky venture for legal institutions. In the large business enterprise the heritage of the past is readily perceived as a hindrance to rationality. In principle, the organization is free to demystify its rules and alter its procedures. But some institutions, notably religious and legal, have depended heavily on ritual and precedent to sustain identity or uphold legitimacy. For them the road to

¹⁵² Nonet & Selznick, *Law & Society in Transition*, p. 77; “means end judgments seem to be among the few assurances of impersonality in the exercise of power.” Unger, *Knowledge and Politics*, p. 268.

¹⁵³ Unger, *Law in Modern Society*, p. 86; “The language of formal equality is a language of rights as abstract opportunities to enjoy certain advantages rather than a language of the concrete and actual experience of social life.” Unger, *Knowledge and Politics*, p. 74; “the American people want two things from judges; they want particular results [...] and they want judges who find law rather than make law. These things are incompatible.” Posner, *Overcoming Law*, p. 79; cp. Posner, ‘Pragmatic Adjudication’, in: Dickstein (ed.), *The Revival of Pragmatism*, p. 238.

¹⁵⁴ Nonet & Selznick, *Law & Society in Transition*, p. 80.

responsiveness is necessarily perilous; it cannot be contemplated with easy optimism.”¹⁵⁵

This accounts for the fact why legal professionals are risk averse and are inclined to opt for a rather conservative stance. The constant critical evaluation of the legal institutions, practices and decisions threatens to make “all that is solid melt into air.” Thus there is a tendency to adopt a “low risk perspective” being wary of overly encouraging the constant questioning of received authority. In arguing for a more purposive and open legal order, the advocates of responsive law opt for a relatively “high risk” alternative,¹⁵⁶ but Posner argues that there is simply no choice. Modern citizens demand transparency and are due to evaluate the law on its effectiveness and efficiency. All lawyers can do to meet this demand is at least try to both be clear about the policy objectives and strengthen our respect for fact, because there is ample opportunity for improvement.

We are encouraged to think of the law as a specific product of the state to meet specific socio-economic demands. This might be a radical way of looking at the law, but in his *Problems of Jurisprudence*, Posner bluntly argues that the modern state is merely the *supplier* in the market of legal services, and the law generally is a means to maximize welfare. To put it differently, the legal system is one of the public services that each state offers to its residents and to the people and firms who do business with them.¹⁵⁷ To many lawyers such reasoning is obviously a bridge too far, but it does seem to be a consistent argument the moment we start to think of the law in instrumental and down-to-earth terms.

To summarize: now that the old meta-law has broken down, it has been replaced by a legal pragmatism that is invoked to justify legal rules and decisions. The law is becoming more fragmented, more subjective, geared to expedience and less to morality, concerned more with immediate consequences and less with consistency and continuity.¹⁵⁸ However, it also means that legal institutions become, at the same time, more accessible *and* more vulnerable., Because the focus is results-oriented and the forms or

¹⁵⁵ Nonet & Selznick, *Law & Society in Transition*, pp. 77, 78.

¹⁵⁶ Nonet & Selznick, *Law & Society in Transition*, pp. 5-8, 77, 78.

¹⁵⁷ Posner, *The Problems of Jurisprudence*, pp. 26, 121.

¹⁵⁸ Berman, *Law and Revolution*, pp. 38, 39.

formalities are not regarded as worthy for their own sake, respect for procedural forms weakens, and the validity of legal rules becomes problematic. The downside is that this seems to mean that officials and citizens can more readily do as they please, because the law threatens to lose its capacity to restrain officials and command obedience.¹⁵⁹ We are left with only one means to restrain and control: scientific objectivity.

Legal professionals as social engineers

Legal professional ideology will be thoroughly “disenchanted” as well. The appeal to “disinterestedness” and ethical perfectionism are likely to be unmasked as a means to hide their actual interests from the public.¹⁶⁰ It seems more honest and straightforward to see them as providers on the market of legal services and, unmasked like this, the “guild-like” privileges that legal professionals are granted will be thought of as unjust: “Even in a non-democratic polity, public opinion counts for something, and usually a lot. Privilege is resented, and may also have ominous political consequences.”¹⁶¹ Posner argues that legal professional ideology will not survive modernity. This argument starts with the idea that the modern pluralistic world seems to leave us with the idea of “values,” which replaced the classical (and Judeo-Christian idea) of “virtues.”

Traditionally the idea of virtue is connected to a perfectionist idea of what it means to be a human being. The virtues are what make one into the most perfect human being one can be. Often this is connected to the premise that humans are not good and sociable by nature; they need to be perfected by reason, culture or religion. “We are born barbarians and only raise ourselves above the beast by culture,” Balthasar Gracián wrote, and this implies that humanity is a *goal* and not a fact. The virtues – politeness, fidelity, prudence,

¹⁵⁹ Nonet, & Selznick, *Law & Society in Transition*, pp. 74, 117.

¹⁶⁰ “When belief in a profession’s knowledge claims is not justified by the profession’s actual knowledge, we have a case of “professional mystique.” [...] Sociologists are sceptical about professions as well as academic disciplines. They insist that what is “professed” may mask the pursuit of self-interest.” Posner, *The Problematics of Moral and Legal Theory*, pp. 188, 189, xiii; Brint, *In an Age of Experts*, pp. 204, 10.

¹⁶¹ Cp. Posner, *Overcoming Law*, pp. 39, 40, 45.

temperance, courage, justice, generosity etc. – are the road towards true humanity; it is the achievement of the virtuous.¹⁶²

Virtues were, in many cultures and societies, thought to be relative to the status and role in the institutional hierarchies of the community.¹⁶³ In the mind of Aristotle for instance, the virtues of the laborer were thought to be different from those of the housewife or the notables in society. Thus, the specific role and position of legal professionals also seem to prescribe a specific set of professional virtues, “prudence” and “justice” being important among them. We can think of the legal professional as rightfully proud when he or she lives up to the particular ethical standards that the profession sets for these role occupants. We might say that the traditional “status group” of legal professionals within society was to a large degree formed by means of these standards, and the concomitant professional pride – connected to the idea of *noblesse oblige* – was what made the professionals into a particular community.

But in modern pluralistic societies, there is no collective focus on some binding common good, and this leaves the institutionally embedded hierarchies and status groups that were bound by the idea of *noblesse oblige* without any social function. The citizens can only see “choice” as the arbiter of the good, and thus the idea of subjective “values” replaces the idea of objective “virtues.”¹⁶⁴ Importantly, this idea of subjective values bears on the idea that values are merely conventional, that they have their root in customs and conventions that are both contingent and arbitrary. Such customs and conventions are not more than human “social constructions” and at bottom merely a matter of taste or preferences. Moreover, this view works on the assumption that values generally have a purely instrumental, utilitarian purpose.¹⁶⁵ But since values are incommensurable, we should cut to the chase

¹⁶² Gracián, *The Art of Worldly Wisdom*, p. 36; cp. Comte-Sponville, A., *Petit Traité des Grandes Vertus*, Presses Universitaire de France Paris 1995, p. 11.

¹⁶³ Kolb, *The Critique of Pure Modernity*, pp. 15, 29; MacIntyre, *After Virtue*, p. 123.

¹⁶⁴ Himmelfarb, *The Demoralization of Society*, p. 10; cp. Kelman, M., *A Guide to Critical Legal Studies*, Harvard University Press Cambridge Mass. 1987, p. 4.

¹⁶⁵ Himmelfarb, *The Demoralization of Society*, p. 11; “Institutions are no longer believed to be god-given or natural. The idea that they have been socially constructed and are handled by human beings according to their needs and interests has become widely spread in contemporary society.” Zijderfeld, *The Institutional Imperative*, p. 124.

and directly focus on these instrumental utilitarian purposes. Moreover, we should translate values into concrete interests such that we can reach a compromise.

In a fraternal ethics, “virtue is its own reward.”¹⁶⁶ Those who put the good of the community ahead of their individual interests will be regarded as both trustworthy and virtuous. We can, however, with Max Weber, contrast such a fraternal ethics with the ethics of the free market. The ethos of the market is deeply antagonistic to such high-minded perfectionist aspirations because on the marketplace the “exchange value” of goods is what ultimately matters, and there is no place for something like intrinsic value. Such exchange value is thoroughly relative and contingent: What something is worth depends on the circumstances. Moreover, personal qualities or “character” is of no relevance at all in the free exchange of goods in the free market. There is no need to perfect oneself with regard to some ideal of humanity or community; the interaction can remain much more businesslike and impersonal than would be acceptable from a fraternal-ethical standpoint.

Weber stated that the market is “an abomination to every system of fraternal ethics.”¹⁶⁷ This seems to be a very significant observation for the community of legal professionals that traditionally at least aspire for a collegial brotherhood, and also legitimate their status and position with their contribution to the larger community that the law makes possible. Importantly, because there is no regard for personal qualities or for “honor,” markets are also antagonistic to the idea of “status groups.”¹⁶⁸ Indeed, Steven Brint argues that the status and prestige of professionals in general is now thought of in “standard-of-living terms rather than of an occupation’s contribution to community well-being.”¹⁶⁹ Occupational status and prestige are more loosely connected to the ideals of character, judgment and *noblesse oblige*. They are now more prosaically connected to income, and this is

¹⁶⁶ “Just as virtue is its own reward, so vice is its own punishment.” Gracián, *The Art of Worldly Wisdom*, p. 37.

¹⁶⁷ Weber, M., *Economy and Society*, An Outline of Interpretative Sociology, University of California Press Berkeley 1978, p. 637; cp. Swedberg, R., *Max Weber and the Idea of Economic Sociology*, Princeton University Press Princeton NJ 1998, p. 43.

¹⁶⁸ Weber, *Economy and Society*, An p. 936; cp. Swedberg, *Max Weber and the Idea of Economic Sociology*, pp. 43, 51.

¹⁶⁹ Brint, *In an Age of Experts*, p. 41.

obviously much more in congruence with the ethos of the market. The loyalty to fellows weakened as professionals and the knowledge they represent were more and more seen in terms of “exchange value” rather than in terms of moral ideals.¹⁷⁰

Pragmatic legal professionalism: law as the balancing of interests

The focus should be turned away from the past and present forms of the law towards the future and the social reality that the law seeks to affect and regulate. The professional should become conscious of the particular effects legal practices bring about and should try to optimize these. To this effect professionals should be more knowledgeable of the social scientific expertise that can help them be more effective and efficient in their efforts. But, the social world is rather erratic and often proves recalcitrant to our technological manipulation. Purposive judgments are “inherently particularistic and unstable,” which means that the most effective means to any given end varies from situation to situation, and the purposes themselves are likely to be complex and shifting.¹⁷¹

That socio-economic expertise cannot always in advance provide professionals with perfect guidance in lawmaking is partly explained by the fact that social scientific expertise is generally and necessarily based on abstractions from the micro levels and works with generalizations that only work relatively well on the macro-scale of social aggregates. Moreover, it always concerns knowledge based on historical data that are extrapolated into the future often with heavy use of *ceteris paribus* assumptions. The social world, however, is apt to surprise social scientists and prove their expectations wrong. This means that, however optimized the legal system is, in general, after it has been perfected by socio-legal and legal economic analysis and restructuring, it cannot always yield optimal solutions for the settlement of conflicts *in particular cases*.

¹⁷⁰ “Traditionally, professional autonomy has been strengthened by many partial barriers against the influence of markets and private sector employers on the practices of professionals. [...] By contrast, the recent age of expertise has been an age of relatively unrestrained consumer markets and corporate power.” Brint, *In an Age of Experts*, p. 17.

¹⁷¹ Unger, *Law in Modern Society*, p. 86; Unger, *Knowledge and Politics*, p. 74; Posner, *Overcoming Law*, p. 79.

The legal professional works on this micro level and discovers that he cannot always derive the most effective and efficient solution to a social conflict from the legal system. Because dogmatic formalism makes it impossible to learn from the particulars of conflicts, a new attitude is demanded of the legal professional. A formalistic attitude will result in staying too close to the legal forms and formalities; it explicitly feeds on the desire of legal professionals to abstract away from all those (factual and purposive) aspects of legal conflicts on which they cannot claim any particular knowledge or expertise. “They want to do well what they do well, even if they could make a greater social contribution by performing a more important task, such as rendering social justice, less well.”¹⁷²

A formalistic focus on legal rights, rules and procedures tends to narrow the range of legally relevant facts such that there is a danger of losing contact with social reality all together. The danger is that formalism attenuates the sense of purpose and leads to a “disposition to rely on authority at the detriment of problem solving.”¹⁷³ Indeed, in the words of Roberto Unger, “the language of formal equality is a language of rights as abstract opportunities to enjoy certain advantages rather than a language of the concrete and actual experience of social life.”¹⁷⁴ But if we want particular problems to be effectively and efficiently solved we have no choice but to immerse more deeply in the “messy” particulars of a case. These particulars, however, are only available in a language of the concrete and actual experience of social life, and if we want to put ourselves at the service of the particular needs and desires of the citizenry, we should refocus from the formal to the actual, from the abstract to the particular, and constantly try to learn and improve the system by flexibly and creatively developing the law. This introduces “openness and flexibility into legal judgment.”¹⁷⁵

This amounts to a *pragmatic* attitude with regard to the law and its institutions and practices. We should not try to find objectivity and security in the formal legal system but in the facts of the case. But, according to Richard Posner, “systems of thought that emphasize hierarchy, tradition, authority,

¹⁷² Posner, *Overcoming Law*, p. 73; Unger, *Knowledge and Politics*, p. 74.

¹⁷³ Nonet & Selznick, *Law & Society in Transition*, pp. 64, 65.

¹⁷⁴ Unger, *Knowledge and Politics*, p. 74.

¹⁷⁵ Nonet & Selznick, *Law & Society in Transition*, p. 80.

and precedent disvalue the kind of critical enquiry that tests belief and advances knowledge, and as a result the truths that such systems accept are not robust.”¹⁷⁶ We should not depend rigidly on the authority of the system but rigorously test our beliefs against reality in a more experimentalist and empiricist spirit.¹⁷⁷

“Freed from formalism and ritual, legal inquiry can be more systematic and more empirical. This evolution offers the promise of a more effective law.”¹⁷⁸ The important conclusion we reach here is that if the law is completely instrumental to human needs and desires, it becomes difficult to distinguish legal analysis from policy analysis, on the one hand, and to distinguish legal decision-making from other forms of systematic decision-making from, for instance, managers or public administrators, on the other. To determine legal rights and wrongs, we will need to take account of the multiple ends both the law and legal decisions might serve. Moreover, it requires taking account of the situational constraints that make it hard to reach those purposes, and it requires resourcefulness in coming up with practical alternatives if necessary.¹⁷⁹ The pragmatic professional should therefore always keep a stern eye on those multiple ends, situational constraints and practical alternatives; in short, it requires a focus on the facts in combination with the policy goals that the law is supposed to serve.

Conflict settlement requires a new attitude. Generally, there always seems to be a strong tendency for all parties involved to see a legal conflict in moral or normative terms. The parties invoke certain values and principles, translated into legal norms, and these come to a head-on collision. The judge is called

¹⁷⁶ Posner, *The Problems of Jurisprudence*, pp. 82, 464.

¹⁷⁷ We should bracket the word “truth” here because theories are in the end not really about the Truth but about reaching our objectives. It is a basic pragmatist maxim that scientific truth is, like anything else, a tool, an instrument which has no intrinsic value. Therefore, “the pragmatist’s real interest is not in truth at all but in belief justified by social need.” Posner, *The Problems of Jurisprudence*, pp. 82, 464.

¹⁷⁸ Nonet & Selznick, *Law & Society in Transition*, p. 83; “Being anti-metaphysical and anti-dogmatic, the pragmatist views scientific theories as tools for helping human beings to explain and predict and, through explanation, prediction, and technology, to understand and control our physical and social environment.” Posner, *Overcoming Law*, pp. 7, 8.

¹⁷⁹ Nonet & Selznick, *Law & Society in Transition*, pp. 82, 83, 89; Unger, *Knowledge and Politics*, p. 194.

upon to decide who was right and who was wrong. The fundamental problem, however, is that all this *normative* discourse in many cases does not allow for an effective and efficient solution or compromise. Values, principles and legal rules or norms are not apt for compromise because they are closely tied to the social or individual identity of the parties and therefore not “for sale.” Although they are thought of as subjective, they are generally not experienced as up for compromise because this is experienced as a personal defeat. This is why they often evoke strong emotions and are defended with rhetoric that does not refer to any objective facts or interests. But not only are values and norms experienced as communal property or tied to the authentic identity, very often they are also rather vague and abstract. These qualities make them even less suitable for a compromise.¹⁸⁰

In modern pluralist societies it is therefore a good strategy not to moralize or formalize the conflict but to “naturalize” it. This requires the translation or “reduction” of the conflict between values and norms – what can be called a “dissensus” – into a conflict of *interests*. Interests are more individual and concrete than values. The conflict of interest

“[...] is a type of social interaction in which it seems that solutions are reached by discouraging the actors from getting morally involved in a major aspect of the interaction, the condition being that the interests are not diametrically opposed. The gain of one party is not wholly a loss to the other.”¹⁸¹

Importantly, interests (in contrast to strong values or principles) can often rather easily be translated, and subsequently measured, in financial terms. In

¹⁸⁰ “A profound conflict of values will tend to keep the antagonists apart.” Aubert, *The Hidden Society*, pp. 89-91; “Interests, unlike ideas, can be compromised. This is done all the time in markets.” Posner, *Law, Pragmatism and Democracy*, p. 166; “The opposition between the ‘sacrilegious cunning’ to be expected in market transactions and the good faith appropriate to transactions among kinsmen and friends [...] mainly served to keep the calculating dispositions favoured by the market out of the universe of relations of reciprocity.” Bourdieu, *The Logic of Practice*, p. 123; “Thus, groups [...] particularly favor real of fictitious tribute to the ideal of disinterestedness, the subordination of the I to the us, or the sacrificing of individual interest to the general interest, which defines precisely the passage to the ethical order.” Bourdieu, *Practical Reason*, p. 142.

¹⁸¹ Aubert, *The Hidden Society*, p. 87; cp. Posner, *The Problematics of Moral and Legal Theory*, p. 206.

legal conflicts, we can translate the whole dissensus in terms of the objective and measurable interests of the parties involved. When this is done, we can start to devise a compromise that takes the interests of all parties involved and of the community at large as all equally worthy and justified. In dealing with social strife and conflict in modern mass democracies, this is generally such an important and successful strategy that we might declare it to be a distinct political “art.”

The “ethos of the market” is the panacea for the legal conflict that threatens to escalate into a frontal collision, leading to much more damage (in socio-economic terms) than necessary. According to Posner the relations between actors on the market are “deliciously superficial,” and this is what we should try to achieve in the settlement of social conflict as well. And indeed, “shared superficiality keeps people together by avoiding difficult, divisive, personal questions.”¹⁸² We should try to keep a cool head and proceed in a businesslike manner. Once we have translated the conflict from a dissensus into a conflict of interests we can think of the settlement in terms of weighing or balancing interests.

Ideally, the parties involved do all the deliberation that is required with regard to their own individual interests, and the legal professionals should abstain from entering such deliberations. The professionals should take the outcome of such deliberations as given and just balance all the interests involved to reach a reasonable compromise.¹⁸³ All they should do is facilitate and try to realise the wishes and desires of those involved as far as possible. We saw how modern man has come to think of almost everything as serving some extrinsic human purpose or interest.¹⁸⁴ Thus, preferably, it is by means of the explication of purposes or interests that the judge should motivate his decision.

But there is one important interest that the legal professional, and especially the judge should always take into account in his deliberations. There should always be consideration for the fact that there is a great public

¹⁸² Posner, *Law, Pragmatism and Democracy*, p. 31; cp. Sennett, *The Corrosion of Character*, pp. 98-117, 108; cp. Friedman, *Capitalism and Freedom*, pp. 109-110.

¹⁸³ Cp. Kronman, *The Lost Lawyer*, p. 128.

¹⁸⁴ This has even resulted in a general unwillingness to submit to any legal decision or rule the rationale of which man does not understand. Von Hayek, *The Road to Serfdom*, pp. 222, 223.

or socio-economic interest in legal certainty, such that only strong countervailing interests can justify compromising this interest. But, in the present pragmatic paradigm, this legal certainty is only one interest among many others. Thus, what the judge should do is “a matter of balancing rule of law virtues against equitable and discretionary case-specific considerations”¹⁸⁵ More specifically, according to Richard Posner the judge

“[...] has to make a policy choice, and the choice is dictated by the results of surveying and evaluating the consequences of alternative choices: consequences for the rule of law, for the parties, for the economy, for public order, for civilization, for the future – in short for society.”¹⁸⁶

The judge or any other legal decision maker should be sensitive to the complexity of the modern world. In some cases the public interest in legal certainty that requires rigidly affirming and applying the pre-established legal rules and standards overrides more case specific interests of parties. In other cases the judge may find that formalism will seriously risk his legitimacy as a problem solver. The judge should then also be well aware of what the consequences of his or her decision will be for the parties in particular and for society in general. The knowledge and intuition of the judge that make it possible for the judge to foresee and evaluate the consequences of his rulings can be educated by immersion in the facts. Surely, we are not interested in the facts per se (like we are not interested in the Truth) but only in effective action. To be effective we will find the findings of the social sciences helpful. Posner: “The proper methods of inquiry are therefore those that facilitate pragmatic decision making – the methods of social science and common sense.”¹⁸⁷

Such an approach that is practical and instrumental is therefore future-oriented or forward-looking; the pragmatist values continuity with the past only in so far as such continuity can help us cope with the problems of the present and of the future. If not, the pragmatist will not be so risk averse that

¹⁸⁵ Posner, *The Problems of Jurisprudence*, p. 26; cp. Kennedy, *A Critique of Adjudication*, pp. 99, 100, 135.

¹⁸⁶ Posner, *The Problems of Jurisprudence*, pp. 133, 143, 26; Unger, *Law in Modern Society*, p. 85; Nonet & Selznick, *Law & Society in Transition*, pp. 82, 83.

¹⁸⁷ Posner, *The Problematics of Moral and Legal Theory*, p. viii.

he will ignore the undesirable consequence for the sake of legal certainty or the vague rule of law values. Thus, this is a progressive or “can do” attitude. It advises the lawyer to take the widest possible view on legal conflicts, to “naturalize” it when possible and to keep an eye on both systemic and case specific consequences. But pragmatism is not bound to an absolute *norm* of consequentialism.¹⁸⁸ If there is one thing that characterizes the pragmatist, apart from his disdain for arbitrary distinctions, it is that he or she does not deal in absolutes. This is also the most democratic way the legal professional can proceed, if one thinks of democracy as a means to consensus in a pluralistic and divided society. If we think of the essence of democracy consensus as the search for “reasonable balances,”¹⁸⁹ we can see how legal professionals can contribute to a peaceful society where all interests are balanced with due care to the interests of others and the community at large.

¹⁸⁸ Posner, *Overcoming Law*, p. 4; Posner, *Law, Pragmatism and Democracy*, pp. 59, 337.

¹⁸⁹ Dahrendorf, *The Modern Social Conflict*, p. 116.

5.

Critical Commitments

After exploring two specific aspects of the Enlightenment there is, however, still another aspect that might inspire modern legal professionals. Immanuel Kant is the first to have pointed to this specific aspect of modern consciousness, and it has often been repeated, in many different contexts, ever since. In his essay ‘What is Enlightenment?’ Kant argues that for the first time in history man becomes aware of the fact that he is a *historical* being and starts to see the social and institutional world around him as the product of a particular history. Moreover, now that he gains this distance from his particular day and age, modern man can critically investigate the social world that he has inherited and ask for the *justification* of the traditions, institutions and practices that he finds himself enmeshed in. Kant sees the age of Enlightenment not so much an achieved state, but as a process or project: “If it is asked whether we at present live in an enlightened age, the answer is: No, but we live in an age of enlightenment.”¹ Modernity can be characterized as an epoch in which the critical distance from our own social world is an inalienable and irrepressible possibility.

With Dupré and Luban, I propose to think of this modern critical attitude as a defining characteristic of “modernism” in particular.² Compare David Luban: “Modernist culture arises from an intensification of the Enlightenment demand that we cast off the claims of dogmatic authority; politically, it arises

¹ Kant, ‘An Answer to the Question: ‘What is Enlightenment?’ in: *Political Writings*, p. 58; cp. Foucault, ‘What is Enlightenment?’ in: Rabinow (ed.), *The Foucault Reader*, pp. 32- 50.

² Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture*.

from our drastic loss of confidence in the ability of public institutions to cast light on human affairs.”³ The critical distance does not only regard the traditional or “pre-modern” institutions and practices of our present world, it also critically scrutinizes and evaluates the modern naturalist and rationalist culture that has emerged.⁴

Anti-naturalism

In the last chapter, we investigated a way to “demoralize” or “depoliticize” both legal science and legal practice by “naturalizing” the legal order. This is a means to achieve more objectivity and effectiveness in both legal science and legal practices. The attitude propagated by Richard Posner would supposedly lead to a strengthened professionalism because jurists become relatively amoral experts in “social engineering” who can then dispense with all the vague and pretentious rhetoric referring to vocations and moral or political commitments. Moreover, Posner argued that this rhetoric merely functions to disguise the actual particular interests jurists have in protecting their privileges and monopolies.

The discipline of economics “is a means for making morality, whatever morality one has, into a science,”⁵ and indeed, especially economics is thought to provide us with the chance of cutting short all moral and political confusion in legal practices and legal science. Re-conceptualizing the law as an instrument of effectively and efficiently realizing predetermined socio-economic goals would exempt professionals from moral and political deliberation and, this is another important and related “selling point,” such professionals would have little or no use for the idea of authority.⁶ If we consider the rhetoric and symbolism of authority investigated in the second chapter, we understand why this was considered to be an important gain. As

³ Luban, *Legal Modernism*, pp. 11, 51-92.

⁴ “Nietzsche, Heidegger, Foucault and Derrida [...] engage in a rebellion against Kant, even as they exploit the intellectual resources that Kant gave them.” Megill, *Prophets of Extremity*, p. 4; cp. Kolb, *The Critique of Pure Modernity*, pp. 18, 19.

⁵ Kronman, *The Lost Lawyer*, p. 237.

⁶ “[...] today there are conservative judges and professors of a law and economics persuasion who have reconfigured the debate by adopting a highly deductive form of policy argument from the premise of wealth maximization and who have little or no use for authority.” Kennedy, *A Critique of Adjudication*, p. 111.

noted before, modern science and the paraphernalia of authority do not go well together.⁷

Economic reasoning offers a way to successfully deal with pluralism in modern societies. This is because the economic system can be imagined as directed *not* to any substantive goal but to consistent and efficient dealing with the multitude of individual goals that are its inputs. Especially the free market and the associated ideas of a minimum of external interference (by the state, for instance) is supposed to be such an institution. The economic system takes the individual desires “as they come” and the economist as a social engineer has no goal other than the facilitation and protection of these individual purposes. “Of course, the market and the state do present restraints to the individuals entering, but those restraints are thought to come from natural facts (such as scarcities), from purposes of other individuals not from some substantive values embedded in the system as such.”⁸ The system is neutral in itself. Importantly, and this distinguishes this paradigm from the formalist perspective, the desire or “taste” for formal equality or for fairness is considered as on equal footing with all other desires that the system (and the social engineers who make use of it) can try to facilitate.⁹

Thus efforts are made to instrumentalize political reasoning to the extent that intractable issues of ends are transformed into issues of means. Such an attitude even advises us to subject ourselves to one meta-norm that can, on an abstract level, unite us all in modern pluralist societies. The essence of this meta-norm is actually the general utilitarian insight that whatever we disagree on, we will always agree that we should maximize the means to the satisfaction of our desires. In abstract terms this norm is met if we collectively maximize our welfare.¹⁰ “We can meet the harsh facts of the flesh;” this is exactly the kind of objective that we looked for in our modern pluralist societies, because it offers us a possibility for objectivity in our decision

⁷ Posner, *The Problems of Jurisprudence*, pp. 82, 91.

⁸ Kolb, *The Critique of Pure Modernity*, pp. 15, 16.

⁹ Kaplow & Shavell, *Fairness versus Welfare*, pp. 431-436.

¹⁰ “Policy arguers present it as different from pure politics, or ideology, because it appeals to universal rather than particular interests. Consequentialist argument appeals to a notion of “social welfare” or “efficiency” or “economic growth.” Kennedy, *A Critique of Adjudication*, pp. 109-111.

making.¹¹ The objectivity becomes possible because the focus is now exclusively on the *effects* of legal practices and actions on the general well-being of individuals in society. Such effects can, when we thoroughly naturalize the goals and means (by translating everything in terms of money), be empirically investigated. So here the claim to objectivity can be supported by the fact that positive or empirically-informed data are used.

The second step will be to assess these effects in order to determine their socio-economic desirability. This implies a normative analysis of these effects and welfare economics (which can be loosely associated with utilitarianism) or efficiency analyses can provide us with a framework for doing so.¹² Here the claim to objectivity can be supported by the fact that the calculations that are performed are formally sound. What economics therefore brings to normative evaluation is not only mathematical rigor.¹³ Efficiency claims are both universal and “factoid” and thus we seem to have been rescued from the confusions of the normative realm and can stay firmly within the realm of facts. An efficiency claim is *universal* because, whatever we disagree on, we will always agree that we should maximize the means to the satisfaction of our desires. Such a claim is *factoid* because of its pertinent claim to objectivity as it is both empirically based and technically highly sophisticated. Thus it helps us formulate objectively determinable questions, questions of fact or of logic, and avoid “subjective questions” about things like fairness and justice, which have no objectively determinable answers.¹⁴

From this perspective, the law becomes essentially the use of power to reach whatever goals the political community sets itself. What goals these should be is merely a matter of contingent tastes and preferences. Many

¹¹ Snow, *The Two Cultures*, p. 77; Rorty, R., *Objectivity, Relativism and Truth*, Philosophical Papers Volume 1, Cambridge University Press Cambridge UK 1991, p. 22.

¹² “I am guided mainly by the kind of vague utilitarianism, or “soft core” classical liberalism, that one associates with John Stuart Mill.” Posner, *The Problematics of Moral and Legal Theory*, p. xii; Kaplow & Shavell, *Fairness versus Welfare*, pp. 15-17.

¹³ Kronman, *The Lost Lawyer*, p. 237.

¹⁴ “An efficiency claim has many of the same mediating properties as a rights claim: it is a value judgment that is universal (who can be opposed to making everyone better off according to their own understanding of better-offness?) and factoid (efficiency arguments are nothing if not technical and they are supposedly empirically based).” Kennedy, *A Critique of Adjudication*, pp. 309, 111.

lawyers may experience the amoral professional attitude that Richard Posner advocates as rather “nihilist” with regard to the law as a discipline, or at least uncomfortably “realist.” Indeed, Posner literally states that “force” and nothing more poetic is the essence of law.¹⁵ Naturalized law becomes merely a matter of “incentives” and of calculation. Legal rules are thought of as something that the individual citizen considers to be, in Unger’s words,

“[...] just one more factor to be taken into account in his calculus of efficiencies. This means that he will comply with the rules only to the extent that his own goals are better served by compliance than by disobedience. Consequently, the *sanction* becomes the crucial part of the rule. The fear of the sanction operates to internalize the requirements of social order in the individual’s reasoning about the most effective means to attain personal ends.”¹⁶

Such an individual treats promises and contracts, for instance, not as creating special moral ties to one person, but as simply adding new factors into the calculation of overall utility. This seems to be at odds with our basic intuitions or experience because generally we feel that we should repay loans regardless of whether this maximizes our utility.¹⁷ This suggests that considerations of fairness are not just “one more factor to be taken into account in the calculus of efficiencies.” To the contrary, considerations of fairness should be basic and should justify a principled attitude and the abstention from individual calculative behavior.

Obviously, making the law into an effective and efficient system requires expert knowledge about our complex modern societies, knowledge we can only acquire by scientific training and research. That is why Richard Posner argues that the responsibility for the extensive instrumental reasoning now required of government is handed over to technical experts – “instrumental reasoning is what technical expertise is good for.”¹⁸ Essentially, he argues for

¹⁵ Posner, *The Problems of Jurisprudence*, pp. 83, 120; “[...] modern conservative law and economics theorists [...] from the liberal point of view [...] combines nihilism about adjudication with formalism about economics.” Kennedy, *A Critique of Adjudication*, p. 116.

¹⁶ Unger, *Law in modern society*, p. 26.

¹⁷ Kymlicka, *Contemporary Political Philosophy*, p. 23.

¹⁸ Posner, *Law, Pragmatism and Democracy*, p. 205.

legal professionals who operate as “experts armed with scientific method” that constitute a “neutral bar” that make it possible to dispense with the uncertainty that characterizes modern social, political and legal conflicts.¹⁹

Notwithstanding the goods that are served by such an attitude, there are several reasons for a critical evaluation. For one thing, in this technological culture, we become highly dependent on abstract scientific knowledge, claimed by experts, and “people recognize, as they must, that in some areas of life they face decisions they are simply not competent to make, or nowhere near *as* competent as experts. This is because the complex, interwoven structures of society, the sheer amount of scientific and technical knowledge, and the secrecy on which some social actors cloak their actions.”²⁰ However, discussion will often be short-circuited by means of technical and esoteric claims about all sorts of (unassailable) empirical “facts” and calculations. Thus people “alienate their powers” to such experts armed with the scientific method, and they hardly realize this. Moreover, often both the normative premises and the naturalist method of such a science are lost from sight. The result is a strengthening of the discourse such that it becomes hard to imagine alternative solutions.

But this claim to neutrality and objectivity can be fundamentally critiqued. Duncan Kennedy argues that the re-conceptualization of law as a neutral and objective policy science will never succeed completely: “Policy is potentially a Trojan horse for ideology.”²¹ The gist of this argument is that “the dictates of efficiency would get you nowhere, for its dictates are utterly indeterminable and manipulable.” This is not merely because lawmakers will never succeed in retraining the discretion of those who apply the rules because of the referential vagueness of the legal terms that are used. It is also because the legal system as a whole is committed to contradictory norms and goals.²² The choice for welfare maximization is not without alternatives and therefore can hardly be seen as a politically neutral choice.²³ On a

¹⁹ Sandel, *Democracy's Discontent*, p. 209.

²⁰ Friedman, *The Republic of Choice*, p. 78.

²¹ Kennedy, *A Critique of Adjudication*, p. 111.

²² Kelman, *A Guide to Critical Legal Studies*, pp. 12, 13.

²³ “the commitment to value subjectivity is openly perilous [...] utilitarians believe that we are *morally bound* to seek to maximize utility, not simply that we might *desire* to do so.” Kelman, *A Guide to Critical Legal Studies*, p. 65.

fundamental level we might just as well have chosen to maximize “rights” or “fairness” and different parts of the legal system can easily be analyzed in such terms. In other words, if we choose to talk about legal and social problems and its solutions in policy terms, we, in one sense, refer to a social good like utility, but in another, to social goods like rights, or even fairness. Sometimes we opt for utility and, at other times, for rights or fairness as a solution to such social problems.

Parallel to the discussions in the legal realm, the arguments for rights, fairness, justice, or for welfare regularly collide in the political arena. It is a political choice to make the maximization of welfare primary and make the desire for rights or fairness as just one of the factors to be taken into account in the calculation of welfare. We might just as well decide to make the fairness of the basic structure fundamental, as the structure within which the maximization of welfare can have its way.²⁴ The initial choice for the basic norms and goals does make a crucial difference. This also means that the policy debates within legal science and practices will also, although they are often differently phrased, somehow relate to equivalent political debates.²⁵ If the legal professionals are to choose between the suggested policies, there seems to be no objective way to decide the matter. Thus we see a blurring “of the line between adjudication and legislation.”²⁶

Balancing the different policies does not seem to be a promising way out of this dilemma. Of course, there are rational ways to balance policies and thereby we might save the objectivity of the decision-making process and refrain from outright political or moral reasoning. According to Kennedy, the problem is that balancing “is a weak form of rationality.” No doubt “the process seems obviously open to conscious and unconscious ideological manipulation, at least by comparison to the paradigm of deduction.” Moreover, Kennedy argues:

²⁴ Rawls, *A Theory of Justice*; Rawls, *Political Liberalism*; Kennedy, *A Critique of Adjudication*, p. 148.

²⁵ “[...] the social values – rights, morality, utility – to which policy argument appeals are the very stuff of the universalization projects of ideological intelligentsias.” Kennedy, *A Critique of Adjudication*, p. 148.

²⁶ Kennedy, *A Critique of Adjudication*, p. 149; cp. Nonet & Selznick, *Law & Society in Transition*, pp. 7, 73-86.

“Indeed, the imagery of balancing, or gravitational force, has an ambiguous meaning. Contradicting its scientific overtone is the suggestion that the question involved is one of degree, of line drawing. There is a general cultural understanding that the resolution of such questions cannot be “objective” or “necessary” or “independent of the observer or decision maker” in the way that resolution of conceptual or factual questions can be.”²⁷

But there may be another road to neutrality and objectivity. Instead of probing for objectivity in the rationality of the balancing process, one might point to the objectivity of the *results* or *consequences*. Such results can be experienced as objective by referring to the empirical grounding scientifically well-researched policies can claim. In other words, the resolution of the problem of balancing can become an objective process by focusing on the factual consequences that the policy will establish. The fundamental problem here, though, is that policy arguments cannot reach the objectivity that one might wish for because, as Roberto Unger states, “purposive judgments are inherently particularistic and unstable: the most effective means to any end varies from situation to situation.”²⁸ Exactly because they aim at factual results, policy arguments are always vulnerable on factual grounds. Referring to facts is thus both an important gain and a risky strategy.²⁹ The professional can never really and completely know in advance what the precise objective consequences of his or her policy decision will be. How is the professional to objectively balance the consequences of policy decisions in a social world that is inherently particularistic and unstable?

Consequentialist reasoning is always dependent on contingent and unpredictable facts “out there” in the social world. This means that the reasoning itself is also to a certain degree unstable and indeterminate. Considering the fleeting nature of our social world – especially in a capitalist

²⁷ Kennedy, *A Critique of Adjudication*, p. 148.

²⁸ Unger, *Law in modern society*, p. 86; Von Hayek, *The Road to Serfdom*, pp. 80, 82.

²⁹ “For some purposes it is useful to distinguish between technical norms and overtly moral norms, the stability of which rests on different footings. If an agency bans a food chemical, a manufacturer can attack the rule by proving that the chemical is actually harmless. [...] It is important to recognize this dependence and to be aware that in this sense, then, there are no purely technical rules. Technical they may be, but never purely.” Friedman, *The Republic of Choice*, p. 71.

society where “all that is solid melts into air” – pragmatic legal reasoning might lead to a somewhat more objective regarding of the consequences of adjudication. The question is whether the price we pay for the security of rights and the overall demand of fairness of adjudication is worth it. Moreover, it is a slippery slope from regarding the law in purely instrumental terms to completely disregard the importance of individual rights and equal and fair treatment. This amounts to the risk of regression to a “repressive” or “authoritarian” legal order against which the morality of desire that we investigated has, in contrast to the morality of reason, no principled answer.³⁰ Instead, one might choose to defend the autonomy of the legal system, and legal determinacy in the sense of both universality and predictability.³¹ Such a system depends on social norms and (formal) moral ideas that are far less vulnerable on factual grounds than technical reasoning in referring to consequences.³²

In chapter four, we saw how the pragmatist takes the actual existing desires and preferences as fundamental and has no independent criterion by means of which these desires can be judged. Certainly, the idea of the rule of law and the basic liberal democratic structure of our political community are not independent criteria because they are seen just as much as instruments to contingent goals as any other arrangement would be. In other words, there are no *non-instrumental* limitations on the choice of means that makes it impossible to secure well-defined entitlements for individuals and groups.³³ Roberto Unger reaches the important conclusion that, on a fundamental level, instrumental rules are incompatible with a stable social and political order.³⁴

³⁰ Unger, *Knowledge and Politics*, p. 70; Nonet & Selznick, *Law & Society in Transition*, p. 117.

³¹ Cp. Lucy, *Understanding and Explaining Adjudication*, pp. 364, 375.

³² Friedman, *The Republic of Choice*, p. 71.

³³ “The lack of content of reason in the vision of the Enlightenment can be seen first if we probe its basic system of valuation, utilitarianism. The principle of utility assesses the value of things extrinsically, by how they serve the ends of man. But where does this process stop? [...] Utilitarian thought can step over the brink in which man becomes means and not end.” Taylor, *Hegel*, p. 402; cp. Kolb, *The Critique of Pure Modernity*, pp. 32- 34.

³⁴ Unger, *Law in modern society*, p. 28.

Richard Posner realizes that there is an irreducible political element in legal practices and acknowledges the political and cultural nature of authority, in general, and legal authority, in particular.³⁵ This means that it is both utopian and undesirable to completely and thoroughly “demoralize” or “naturalize” legal practices and legal science. However, the influence of “naturalization” in our modern societies is large. We can describe the modern world, which I described as an “immanent culture,” as to a large extent the product of the success of the modern natural sciences and the technology that it makes possible. There are, however, reasons to be worried and critical about the modern tendency to naturalize all human conduct and interaction and seeing every (social) problem as basically requiring a technological solution.

First there is the anthropology that this perspective seems to imply. As Posner reminds us: “Aristotle’s physics treats objects in nature much as if they were animate beings, with goals; today we are more likely to treat animate beings on the model of objects.”³⁶ Largely inspired by a longing for objectivity, persons and all their actions are seen as part of the order of nature – and not as part of some independent Kantian realm of freedom. Thus socio-economic positivism opts for “the logic of nature.” This means that we also tend to see human actions as causally determined and, indeed, the naturalist or positivist social sciences tend to conceive of individual choice as essentially an illusion.³⁷ The consequence is that human beings are seen as at the mercy of, on the one hand, their sense impressions and desires and, on the other, their calculations of how to maximize utility. Subsequently, in the free exchanges of the market, an “invisible hand” coordinates the “mechanics” of the interaction such that the utility of the whole is maximized.

In today’s modern world, there is consensus on the fact that this is wholesome and that such maximizing behavior in free markets should even be stimulated. However, many become worried if we start to think of our *public*

³⁵ Posner, *The Problems of Jurisprudence*, p. 26; Posner, *The Problematics of Moral and Legal Theory*, pp. 205, 211, 215; cp. Aubert, *The Hidden Society*, pp. 59, 60.

³⁶ Posner, *The Problems of Jurisprudence*, pp. 387, 167; cp. Taylor, C., ‘Self-interpreting animals,’ in: *Human Agency and Language*, Philosophical Papers I Cambridge University Press Cambridge 1985.

³⁷ Friedman, *The Republic of Choice*, p. 45; cp. Bourdieu, *In Other Words*, p. 14.

realm in such terms.³⁸ An “invasion of economic man”³⁹ into the public sphere is alarming for those who feel that we should develop our *social* human nature in a constant effort to create human communities. Moreover, there is the fundamental experience that the logic of nature structurally closes off non-objectivist ways of looking at human beings and their interaction. Many feel attracted to a critical diagnosis of modern culture exactly because they feel the need to resist this positivist anthropology: “The preservation of our sense of human specialness has in many quarters come to reside on a resistance to closure.”⁴⁰ This also inspires in many a resistance to the positivist presuppositions of socio-economic policy science.

We can refer to, what might be called, a “Hegelian” strand of critique here. His critique of modern positivist culture, and especially the naturalization of the public realm, is still an important point of departure for many today. Ideally, Hegel’s state is a moral community that “encloses” or “contains” civil society, which both limits and gives direction to action in the private realm. However, modern civil society – the private socio-economic realm – threatens to “overflow” onto the state – the public realm – such that the public morality that binds the community now threatens to “melt into air.” The businesslike and instrumental interactions of actors trying to maximize utility seem to be structurally at cross-purposes with the ideal of a (moral or political) community. If human tastes, preferences or desires are central, the state or the community that it encompasses is reduced to a tool in the satisfaction of these preferences. The state cannot, under such circumstances, be a greater whole that offers individual members an experience of shared identity and belonging. The problem is, in the end, that a state so atomized and instrumental might lose the allegiance of its members because it is incapable of communal moral action and threatens to become a “plaything” of the arbitrary will of factions and contingent majorities that rule in a modern democracy.⁴¹

³⁸ Unger, *Knowledge and Politics*, p. 59; cp. Foucault, ‘What is Enlightenment?’ in: Rabinow (ed.) *The Foucault Reader*, p. 36.

³⁹ Cp. Baert, P., *Social Theory in the Twentieth Century*, New York University Press New York 1998, pp. 153-171.

⁴⁰ Dale, *In Pursuit of a Scientific Culture*, p. 10; cp. Derrida, J. *Margins of Philosophy*, Chicago University Press Chicago Ill. 1982, pp. 11, 20.

⁴¹ Taylor, *Hegel*, p. 451.

We can complement this with Habermas' famous critique of the modern liberal state. The problem with the consequentialist position is that the legitimacy of the decisions that it informs depends on the promise of results actually being fulfilled. "Customer satisfaction" is a fragile foundation for legitimacy especially in modern complex, globalizing economies. In *Legitimation Crisis*, Jürgen Habermas argues that the claim that politics (and the law) is a purely instrumental affair has the effect of grounding the stability and legitimacy of the state in its capacity to maintain a high level of technological success. Under such circumstances the legitimacy of the state and its institutions is made relative largely to the delivery of a sustained rate of economic growth or welfare. The danger is that, especially in times of economic recession, such states will be unable to call on any wider or more traditional loyalties on the part of their citizens, with the result that (economic) difficulties will readily and dangerously mutate into a crisis of legitimacy.⁴² This amounts to a plea for an independent (critical) morality that dominates in the public sphere, which remains autonomous with regard to the socio-economic or "private" realm.⁴³

To *not* see the public realm as an independent moral realm, to consider it to be just as much at the mercy of instrumental economic action, would thus structurally endanger the stability of the state, or, indeed, any tradition or institution that gather individuals in some larger whole or community. To repeat, under such circumstances no stable social order can exist because there are no non-instrumental limitations on the choice of means. "Anything might in principle be used as a means to any end,"⁴⁴ which means that there is no possibility for a public morality (whether formal or substantive) that structures and limits the desires that dominate in civil society and the political community at large.

Thus, when people interact in the public sphere, the instrumentalist and naturalizing attitude can be considered harmful because it leaves the actors with no choice but to see their interactions as a head-on collision of particular

⁴² Habermas, J., *Legitimation Crisis*, Beacon Press Boston 1975; cp. Skinner, Q., (ed.) *The Return of Grand Theory in the Human Sciences*, Cambridge University Press Cambridge UK 1985, p. 8.

⁴³ Cp. Habermas, *The Theory of Communicative Action*; Walzer, *Spheres of Justice*.

⁴⁴ Unger, *Law in modern society*, p. 28; Taylor, *Hegel*, p. 402; cp. Kolb, *The Critique of Pure Modernity*, pp. 32- 34

and individual interests. Such negotiations will generally concern means and not ends, because ends are reckoned to be subjectively “given” and incommensurable. The only rational action for actors in such a modern civil society is to make sure that they get as much as possible out of the necessary compromise and maximize their utility. Moreover, these compromises are actually to a large degree predetermined by social forces that are beyond the control of the individual. Thomas Nagel argues that we end up with a description of human agency and human sociability that seems rather “debilitating.” When we view human action from an objective or external standpoint, some of its most important features seem to completely vanish:

“Actions seem no longer assignable to individual agents as sources, but become instead components of the flux of events in the world of which the agent is a part. The easiest way to produce this effect is to think of the possibility that all actions are causally determined, but it is not the only way. The essential source of the problem is a view of persons and their actions as part of the order of nature, causally determined or not. That conception, if pressed, leads to the feeling that we are not agents at all, that we are helpless and not responsible for what we do. Against this judgment the inner view of the agent rebels. The question is whether it can stand up to the debilitating effects of a naturalistic view.”⁴⁵

Indeed, the emerging picture of both human action and agency does not seem very elevating: “The romantic spontaneity and courage are gone, the vision is materialistic and depressing,” as William James writes. We end up with a “materialistic universe, in which only the tough-minded find themselves congenially at home.”⁴⁶

There is another point of departure for critical investigation of the naturalistic culture that we are presently discussing. This critical perspective starts with Friedrich Nietzsche. In *The Genealogy of Morals*, he describes modern man

⁴⁵ Nagel, T., *The View from Nowhere*, Oxford University Press Oxford 1986, p. 110.

⁴⁶ James, *Pragmatism*, p. 15; Nor is the picture of politics very attractive. Benjamin Barber argues that we end up with the idea of politics as “zoo-keeping.” Barber, *Strong Democracy*, p. 3.

as a “calculable being,”⁴⁷ and, to be sure, the moment social scientists or economists have identified the causal determinants of human economic behavior and thus discovered the laws governing free markets, this knowledge can be used to *manipulate* human behavior. However good the intentions and important the ends that it serves, socio-economic technology or policy science remains basically the manipulation of human beings.⁴⁸ It does so by influencing the actual desires or the will of human beings and the calculations individuals make in trying to maximize their utility. When we conceive of human beings as calculating we also make them calculable. Here we are introduced to the conception of human beings as being “tricked” and “manipulated” into conformity and predictability.⁴⁹

In Nietzsche’s vision of the calculable, and thereby, “normalized” individual, we can also see the germ of Michel Foucault’s critical diagnosis of modern society. By means of the modern human sciences, which Foucault analyzes by means of the concept of “knowledge/power,” the whole of human society and human behavior threatens to come under human control. In Foucault’s view, “modernity” is fundamentally about creating political order, which is largely achieved by means of rationality or rationalization and by

⁴⁷ “The task of breeding an animal entitled to make promises involves, as we have already seen, the preparatory task of rendering man up to a certain point regular, uniform, equal among equals, calculable. The tremendous achievement which I referred to in *Daybreak* as “the custom character of morals,” that labour man accomplished upon himself over a vast period of time, receives its meaning and justification here – even despite the brutality, tyranny, and stupidity associated with the process. With the help of custom and the social straight-jacket, man was, in fact, made calculable.” Nietzsche, F., *Genealogy of Morals*, in: Rundell, J., & Mennell, S., *Classical Readings in Culture and Civilization*, Routledge London New York 1998, p. 96.

⁴⁸ “Politics is less a matter of preaching or indoctrination than technical management and manipulation, form rather than content; once more, it is as though the machine runs itself, without needing to take a detour through the conscious mind.” Eagleton, *Ideology*, p. 38; “People like to feel that they are masters of destiny. And they may be right: possibly people in the West are masters of destiny and can exercise choices to an extent past generations would have found unthinkable. It may be equally true that they are manipulated and preformed to an extent they never imagine.” Friedman, *The Republic of Choice*, pp. 130, 131.

⁴⁹ “the commitment to value subjectivity is openly perilous [...] utilitarians believe that we are *morally bound* to seek to maximize utility, not simply that we might *desire* to do so.” Kelman, *A Guide to Critical Legal Studies*, p. 65.

“discipline and punishment.”⁵⁰ At the endpoint of the logic of naturalism and modern technology, we see the nightmare vision of Foucault’s “carceral society.” In *Discipline and Punish*, he depicts modern life as dominated by all sorts of experts, described as “the judges of normality.” These experts are everywhere, and “each individual may find himself, his subjects [...] his body, his gestures, his behavior, his aptitudes, his achievements exposed and subjected to the pitiless discipline, the minute, detailed prescriptions of these invisible powers.” This is because, according to Foucault, the moderns “have gradually shifted from the rule of law to an obsession with the creation of a normal and healthy population.”⁵¹

Importantly, this vision can only be the product of a *critical* and *external* perspective on modern society. The naturalistic point of view that dominates modern society is in itself incapable of analyzing the kind of culture that it produces because the meanings and norms (or “ideology”) that culture consists of are beyond the reach of naturalist analysis. From the naturalistic perspective we can hardly see, let alone evaluate or criticize, the cultural and political implications of this perspective. The naturalist perspective has important consequences or effects that remain concealed. Compare Bourdieu:

“The brutally materialist reduction which described values as collectively misrecognized, and so recognized interests, and which points out, with Max Weber, that the official rule determines practice only when there is more to be gained by obeying the rule than by disobeying it, always has a salutary effect of demystification. But it must not lead one to forget that the official definition of reality is part of the full definition of social reality and that this imaginary anthropology has very real effects.”⁵²

We lose sight of the subtle kinds of manipulation and domination particularly in the symbolic (or ideological) realm because of the relentless reduction to “the material.”⁵³ The real and damaging effect is that, when we see ourselves

⁵⁰ Cp. Foucault, ‘What is Enlightenment?’ in: Rabinow (ed.), *The Foucault Reader*, p. 36.

⁵¹ Foucault, M., *Discipline and Punish*, Vintage Books New York 1979, p. 304; cp. Friedman, *The Republic of Choice*, pp. 44, 45; Skinner (ed.), *The Return of Grand Theory in the Human Sciences*, p. 73.

⁵² Bourdieu, *The Logic of Practice*, p. 108.

⁵³ Cp. Bourdieu, *Language and Symbolic Power*.

(and each other) in such terms, the theory might “realize itself” or make itself true. This seems to be a fundamental Nietzschean insight that has great critical potential for modern immanent societies.

This is probably part of the reason why Weber was, compared to Hegel and Marx, rather pessimistic about the future of modern society. Hegel envisioned an “end of history” in which the substantive values embodied by the liberal state would provide a counterpoint and limit the otherwise uncontrollable forces that always threaten to dissolve civil society. Famously, Marx envisioned the dialectical overcoming of modern civil society in a communistic utopia. Weber, by contrast, argued that there is no hope for redemption or for overcoming the dialectic. He believed that objectivism and reductionism of the naturalist project leads to utilitarianism and materialism, *tout court*.⁵⁴

Anti-naturalist formalism

Making the law relative to contingent and volatile desires in modern democracy thus structurally endangers the ideal of fairness and even the ideal of the rule of law itself. To be fair and stable, legal rules, procedures and principles should be primary and independent criteria by means of which we *evaluate* our individual needs and desires. The utilitarian argues from a morality of desire and thus reverses the argument. Our actual desires provide the criterion by means of which we should evaluate the law. Thus needs and desires are primary, and a “taste for fairness” is merely one of the wishes that we should maximize among others. Moreover, whether we should do this is merely an empirical matter. That is to say, it depends on the contingent fact of whether people actually have this wish or taste. If not, fairness will not enter the calculations that we make to maximize well-being in society.⁵⁵

“We will usually assume that individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them,”⁵⁶ state Kaplow and Shavell in *Fairness versus Welfare*. This is exactly where formalism and naturalism part ways. The formalist would say that what people actually want

⁵⁴ Eliaeson, *Max Weber's Methodologies*, p. 11.

⁵⁵ Cp. Kaplow & Shavell, *Fairness versus Welfare*, pp. 21, 23.

⁵⁶ *Ibidem*.

is not to be the criterion by means of which legal institutions and decisions should be judged. To repeat, the formalist states that we need an independent, prior idea of legality, justice, or reasonableness or fairness to *judge* those desires and wishes.

The naturalist consequentialist position can accommodate desires for intangibles such as aesthetic fulfilment, altruism, or other valuables aside from their individual's levels of material comfort. Also, a taste for fairness can be included. However, such an approach explicitly excludes the use of notions of fairness for reasons that are not reducible to concerns about an individual's well-being. According to Kaplow and Shavell we should exclude notions of fairness as prior and "independent evaluative principles – principles employed to assess the desirability of legal rules without regard to the effects of the rules on individual's well-being."⁵⁷ The problem with such a prior and independent notion is that we cannot establish such evaluative principles empirically. Only a moral philosopher will be able to establish such principles with the help of reason, in whatever conception of it.

When we consider the problem of racism or discrimination on the basis of racial or ethnic characteristics, we see the shortcomings of this perspective. In an effort to avoid vague metaphysical notions (like "natural rights"), naturalists have the tendency to reduce race discrimination to a matter of individual tastes. Compare the economist Milton Friedman:

"It is hard to see that discrimination can have any meaning other than a "taste" of others that one does not share. We do not regard it as "discrimination – or at least not in the same invidious sense – if an individual is willing to pay a higher price to listen to one singer than to another, although we do if he is willing to pay a higher price to have services rendered to him by a person of one color than by a person of another. The difference between the two cases is that in the one case we share the taste as in the other we do not. [...] But in a society of free discussion the appropriate recourse is for me to seek to persuade them that their tastes are bad and that they should change their views and their behavior, not to use coercive power to enforce my tastes and my attitudes on others."⁵⁸

⁵⁷ Kaplow & Shavell, *Fairness versus Welfare*, pp. 5, 6.

⁵⁸ Friedman, *Capitalism and Freedom*, pp. 108-111.

Indeed, to use coercive power, the power of the state, to enforce particular tastes and attitudes on others is an infraction of their individual freedom. But in the naturalist and utilitarian scheme, there is no guarantee that the tastes in a society might not change such that the overall utility will be maximized by systematically discriminating against some group within society. The formalist argues that discriminating preferences and tastes should not count *a priori*. Such tastes are illegitimate even when vast majorities in society express them. “A taste for prejudice is not the same as other tastes because it restricts and injures individuals – it prevents them from exercising their own options.”⁵⁹ Thus we need an independent criterion to determine which tastes do count and which tastes should be excluded as at least unreasonable and generally unjust or *unfair*.

This point is urgent, indeed, because citizens in modern society generally seem to have developed a “taste” for fairness. Lawrence Friedman identifies “a general expectation of justice,” which is largely comprised of the “the citizen’s expectation of fair treatment, everywhere and in every circumstance. [...] It is a pervasive expectation of fairness.”⁶⁰ The point is that if we take this expectation of fairness seriously, the principles of justice that correspond to this expectation of fair treatment should be thought of as *primary* and not as merely one desire among others that should be incorporated into the calculation of overall utility. But this reasoning has serious consequences for the legal system in modern states. Especially state officials and legal professionals have to be sensitive to this demand because they are generally accountable to the citizens.⁶¹

We cannot see legal rules, rights, principles or procedures as merely another alternative policy. To be primary implies that fairness should not be thought of as a policy at all, it should not be thought of in instrumental terms: It is a goal or a good in itself. Such expectations of fairness as an ultimate good do not bear instrumental reasoning. Moreover, fairness is now an independent criterion by means of which we evaluate ends, needs and desires. What people actually desire does not equal what they should (reasonably)

⁵⁹ Friedman, *The Republic of Choice*, p. 86; “there may be unfair preferences which should not count.” Kymlicka, *Contemporary Political Philosophy*, pp. 26.

⁶⁰ Friedman, *Total Justice*, p. 43.

⁶¹ Dworkin, *Law’s Empire*, p. 173.

desire, considering the fact that they should respect certain demands of fairness, especially when they are representing the state as government or legal officials.

The postulate of the priority of rationality or reason comes to the fore. We saw how it is reasonable to postulate a principled distinction between *is* and *ought*. The ‘ought’ should be established with the help of reasonable criteria – provided by fairness – and not be dependent on any contingent preferences or needs.⁶² This also implies that certain things must be done and others avoided whether one likes or desires the consequences or not. People now demand that they

“[...] live under rules or procedures that command their allegiance because of a rightness or goodness irreducible to individual desires or to a calculus of means and ends. [...] Without such constraints on the scope of instrumental judgments, it would be impossible for individuals to treat one another as moral persons – as beings capable of distinguishing what they want from what they ought to do. Only by asking the latter question can they overthrow the tyranny of blind desire and establish a social order that will not be at the mercy of private interest.”⁶³

If the law becomes thoroughly relative to contingent preferences and needs, it will lose both its autonomy and thereby legitimacy in modern society.⁶⁴ According to Roberto Unger, “The security of rights, so important to the ideal of legality, would fall hostage to context-specific calculations of effect” and would thereby become fundamentally unstable.⁶⁵ This also informs the contrast between non-consequentialism and consequentialism, and we may

⁶² Cp. Weinberg, *The Idea of Private Law*.

⁶³ Unger, *Law in modern society*, pp. 28, 29; “Any political society based on some strong notion of the common good will of itself by this very fact endorse the lives of some people (those who support its notion of the common good) over other (those who seek other forms of good) and thereby deny equal recognition. Something like this [...] is the fundamental premise of a liberalism of neutrality, which has many supporters today.” Taylor, *The Ethics of Authenticity*, p. 51; Unger, *Knowledge and Politics*, p. 70.

⁶⁴ Nonet & Selznick, *Law & Society in Transition*, p. 77.

⁶⁵ Unger, *Law in modern society*, pp. 27-29, 86; Unger, *The Critical Legal Studies Movement*, p. 3.

conclude that we have reached a fundamentally anti-naturalist and anti-consequentialist position.⁶⁶

The lure of the universal

Both objectivity and fairness of legal institutions and practices can be realized in a modern legal system when we rationalize the law into a coherent system of written or codified legal rules, prefixed fair procedures, individual rights and legal principles. In addition, a list of basic (constitutional) rights and principles can be established which is acceptable (because fair and reasonable) to all.⁶⁷ Importantly, when the law is viewed in non-instrumental or non-consequentialist terms a rationalized legal system can assume a “factoid” appearance and it is specifically the air of universality of the system that facilitates the subjection of the citizens to the law. This is important, because needs and desires are not just subjective and individual but “individuating, that is, we are distinguished from one another by our wants while reason and perceptions are universal.”⁶⁸ Universal reason provides us with the road to transcend subjectivity and particular needs and desires. Rationalization of the law is first a project of “universalization.” This universalization is, in turn, a “strategy of legitimation” because it assumes an air of objectivity and thereby the air of *necessity*.

Universalization is a very successful strategy of legitimation indeed, and no modern legal order can afford to neglect it. But we should also remain critical of this strategy because the experience of necessity that it induces easily lures us into the belief that both reason and rational law are somehow grounded in a transcendental realm. Thus we subject ourselves to something that we have ourselves created and subsequently placed in some metaphysical realm; again we effectively and completely “alienate our powers.”⁶⁹ In the

⁶⁶ “If we must express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.” Weinrib, *The Idea of Private Law*, p. 5; Kaplow & Shavell, *Fairness versus Welfare*, pp. 45- 47.

⁶⁷ Bourdieu, ‘The Force of Law’ p. 845; Parsons, ‘The Professions and Social Structure’, in: *Essays in Sociological Theory*, pp. 41, 42; Friedman, *Total Justice*, pp. 80-93.

⁶⁸ Kelman, *A Guide to Critical Legal Studies*, p. 64; “Means and form, as objects of reason, are public; ends and substance, as concerns of desire, are private.” Unger, *Knowledge and Politics*, p. 45.

⁶⁹ Kennedy, *A Critique of Adjudication*, pp. 18-20.

present section, I critically investigate how the law attains such an air of objectivity and necessity, which implies a critical exploration of the “alliance” between reason and modern law.

Consider the following example. When, in his famous essay *The Two Cultures*, C.P. Snow speaks of the *Second Law of Thermodynamics* he becomes rather lyrical and describes this law “as one of the greatest depth and generality: it has its own sombre beauty: like all the major scientific laws, it evokes reverence.”⁷⁰ Interestingly, the factual generality of this natural law seems to inspire in Snow both an *aesthetic* and a *normative* experience, as Snow thinks of universal law as both beautiful and reverence evoking. To put it in slightly stronger terms, the generality of the law seems to force him into submission. Snow experiences reverence, and he feels compelled to follow its prescriptions.

The point of this example is that the experience of the law’s generality seems to subtly blend with the experience of the law’s *validity*. Factual generality or universality almost indiscriminately and imperceptibly transforms into legitimacy, and thus we seem to gently slide from facts to norms through the experience of universality. We easily slide from norms to facts as well: universal norms or rules attain a “factoid” quality.⁷¹ We might say that generality “mediates” between the factual and the normative. Universally valid legal rules can acquire a factoid appearance, although legal rules are man-made and obviously reside on the normative side of the fact/norm divide.⁷² This explains why “universalization” is “the universal strategy of legitimation.” Marx and Engels mention this, for instance, in *The German Ideology* when they state that in giving some ideas and interests an

⁷⁰ Snow, *The Two Cultures*, p. 72; cp. Gould, *The Hedgehog, the Fox, and the Magister’s Pox*, p. 89.

⁷¹ “Rules do not depend on ongoing dialogue to gain a dimension or content; they can be understood since they refer to “objects” in the exterior domain of reason, even by someone who shares no sense of community with his fellows.” Kelman, *A Guide to Critical Legal Studies*, p. 62.

⁷² Interestingly the natural law idea, the set of principles that combine description with prescription and apply universally to all societies, was a major source of the concept of explanatory scientific laws. Cp. Unger, *Law in modern society*, p. 75; cp. Bourdieu, *The Logic of Practice*, pp. 37-40; Bourdieu, ‘The Force of Law’ pp. 820, 841-850.

ideal form, “it will give its ideas the form of universality, and represent them as the only rational, universally valid ones.”⁷³

In the terminology of Pierre Bourdieu: “The reference to the rule’s universality represents increased symbolic power associated with its being put into form, into an official formula, into a general rule.”⁷⁴ The mere generality and universality (and thereby the experience of objectivity and necessity) contributes to the “symbolic effectiveness” of the law. We can influence individual behavior, not by the use of direct force or by means of instilling fear or by manipulating their calculations of utility, but by means of “legitimation.” People will comply or conform voluntarily: no physical force or manipulation of the will is necessary.⁷⁵ They might even often prize and obey such a system of rules, although their self-interest or personal advantage would be served with disobedience.⁷⁶ Bourdieu argues that modern law has become a “nomological science,” which employs the means of formalization and systematization by means of which legal norms are removed from the contingency and particularity of concrete cases. This formalization gives such norms the “seal of universality,” which is “the quintessential carrier of symbolic effectiveness” and thus “introduces into social relations a clarity and predictability.”⁷⁷ The “rationalization” of the law is a route to objectivity and thereby a means to both “depoliticize” and “demoralize” both legal science and practices.⁷⁸

For the Rule of Law to be “symbolically effective,” it is more important that there *is* a universal rule applied without exceptions than what this rule is exactly. This is so because the (symbolic) effectiveness of the Rule of Law depends on its being experienced as universally valid.⁷⁹ However, the

⁷³ Marx & Engels, *The German Ideology*, in: Collins, *Four Sociological Traditions*, p. 16.

⁷⁴ Bourdieu, *Practical Reason*, p. 143.

⁷⁵ Bourdieu, *Language and Symbolic Power*, pp. 119, 125, 126; Bourdieu, *Practical Reason*, pp. 142, 143; Kennedy, *A Critique of Adjudication*, pp. 59, 236-240; Friedman, *Total Justice*, p. 30.

⁷⁶ Unger, *Law in modern society*, p. 28.

⁷⁷ Bourdieu, ‘The Force of Law’, pp. 845, 846; Bourdieu, *Language and Symbolic Power*, p. 131.

⁷⁸ Lenski, *Power and Privilege*, p. 53.

⁷⁹ Von Hayek, *The Road to Serfdom*, p. 88; Bourdieu, ‘The Force of Law’, p. 825, 841-850.

symbolic effectiveness of the law paradoxically depends on denying symbolic effectiveness.⁸⁰ What should remain concealed is that this effect is aimed at compelling obedience. To repeat, written or codified legal rules, prefixed procedures, rights and even principles have a “factoid” appearance only when they are viewed in non-instrumental terms. The Rule of Law is effective only when it denies that it tries to effectuate anything. We can illustrate this by quoting Friedrich von Hayek in his *Road to Serfdom* on legal rules:

“In fact, that we do *not* know their concrete effect, that we do *not* know what particular ends these rules will further, or which particular people they will assist, that they are merely given the *form* most likely to on the whole to benefit all the people affected by them, is the most important criterion of formal rules. [...] This consideration is in fact the rationale of the great liberal principle of the Rule of Law.”⁸¹

The respect that is paid by the subjects to universal rule, of course, makes regularity and “regularization” possible and, to be sure, it is always easy and comfortable to act in accordance with clear and distinct rules. But when we connect the strategy of universalization with the regularization of human agency, we could also re-describe the universalization effect as the “normalization effect.” And indeed, according to Bourdieu the law, an *intrinsically* powerful discourse (although it is of course coupled with the physical means to impose compliance on others) can be seen as a “quintessential instrument of normalization.”⁸²

But there is more to this phenomenon. There is deep “intuition” that acting in accordance with general and universal rules is the essence of ethical action. This might be explained by the experience that acting in accordance with such rules seems to imply a subordination of the individual to the group,

⁸⁰ “Highly censured and euphemized discourses and practices which are produced by reference to ‘pure’, purely ‘internal’ ends are always predisposed to perform additional, external functions. They do so the more effectively the less aware they are of doing so.” Bourdieu, *The Field of Cultural Production*, p. 96.

⁸¹ Von Hayek, *The Road to Serfdom*, p. 83 (emphasis added).

⁸² Bourdieu, ‘The Force of Law’, pp. 845, 846; cp. Foucault, ‘What is Enlightenment?’ in: Rabinow (ed.), *The Foucault Reader*, p. 36; Brint, *In an Age of Experts*, p. 114.

which defines the passage to an ethical order.⁸³ That explains why the submission to a fair and coherent system of universal rules is generally legitimated by ethical or moral philosophical (and not pragmatic or consequentialist) arguments. (Indeed, in Chapter Three we saw that these are particularly Kantian arguments.) The experience is that in the end the legal system must be founded in some morality because “ultimately all norms are moral norms,” however formal and procedural they may be in a modern liberal-democratic order.⁸⁴

Anti-formalism

Talcott Parsons argued that professionals should generally commit to the “universal perspective” because only then can they show respect for our individual freedom.⁸⁵ Indeed, it is exactly this promise to technical neutrality that makes it attractive for the professional to “identify with reason,” and we can now see that they are the kind of agents that have, in the words of Pierre Bourdieu, a vested (and concealed) *interest* in the universal.⁸⁶ However, the strong push towards the universal in the law has its drawbacks. One drawback is that the legal order and practices become highly abstract and technical: abstract formulas and procedures become the essence of modern law. Moreover, if we combine the demand for objectivity (or universality) with the “pervasive expectation of justice” in modern societies, we see both a growing abstractness and a proliferation of legal rights and entitlements. This effectively means more law and a massive “legalization” of society. Friedman even speaks of a “due process revolution.”⁸⁷

It will also mean that this law will be of a more abstract and technical nature, administrated by experts, armed with primarily analytical skills and formal legal knowledge, trying to be non-judgmental and aiming for objectivity and neutrality. Such formalist legal experts will merely follow the

⁸³ Bourdieu, *The Logic of Practice*, pp. 108, 109; Bourdieu, *Practical Reason*, pp. 142, 143; cp. Kaplow & Shavell, *Fairness versus Welfare*, pp. 63-69.

⁸⁴ Friedman, *The Republic of Choice*, p. 71.

⁸⁵ Parsons, ‘The Professions and Social Structure’, in: *Essays in Sociological Theory*, pp. 41, 42; According to Unger in liberal society the legal order is “a bureaucracy in the wings” devoted to the “universal.” Unger, *Law in modern society*, pp. 167, 184.

⁸⁶ Bourdieu, *The Logic of Practice*, p. 33.

⁸⁷ Friedman, *Total Justice*, pp. 80-93.

procedures and apply the legal rules in concrete cases. There is something “bureaucratic” about this attitude. In his book *Critical Legal Studies*, Mark Kelman gives us a succinct (and rather dismissive) description of such a professional:

“Rules are associated with distancing and role-playing; the bureaucrat need not listen as long as he gives you your due. No one can demand anything but compliance with preset rules; conversation and explanation of one’s conduct are avoided, for it is easily ascertained whether one has done all he must. One can shut up those who ask for explanation of one’s conduct – a rule’s a rule, don’t complain to me. Ongoing attempts to reassert the coherence and comprehensiveness of doctrine, of whatever web of legal rules purports to describe social relations, are part of a collective effort to pacify and reassure us that we have been delivered from existential tragedy.”⁸⁸

The claim to objectivity and neutrality can be criticized on a very fundamental level. There is no overall way to escape ideology or politics: a legal system, however formally consistent and complete, cannot always and completely determine the outcome of a concrete legal conflict. There are many reasons why the law is often indeterminate in ways that cannot be overcome and therefore why the promise of objectivity and neutrality cannot be completely fulfilled.⁸⁹

In *Explaining and Understanding Adjudication*, William Lucy confronts “orthodox” legal theorists who feel that legal practices can, to a large extent, be predictable and impersonal with “heretics” who do not. Orthodox writers like H.L.A. Hart and Ronald Dworkin defend impersonality and predictability.⁹⁰ By contrast, heretics argue that the formalist pretensions are nothing more than a strategy to mask the substantial elbowroom or “discretion” that legal professionals have in legal judgment. The experience of objectivity and neutrality is not in general the product of intrinsic qualities (e.g. the meaning) of the legal rules. Often, it is determined by something external to the system of the law, something that stays implicit but might easily be manipulated. If so, discretion can be used to force a (generally

⁸⁸ Kelman, *A Guide to Critical Legal Studies*, p. 63.

⁸⁹ Cp. Unger, *What Should Legal Analysis Become?*, pp. 120-122.

⁹⁰ Lucy, *Understanding and Explaining Adjudication*, pp. 2.

conservative and liberal) political morality on society, in general, and on the parties involved, in particular.⁹¹

To show how the legal system is indeterminate, critics might start by identifying internal contradictions *within* the system.⁹² Surely, if the system is not consistent or coherent, it cannot completely determine the outcome of concrete legal conflicts, even in easy cases where the right legal answer seems to be readily and unambiguously deducible from the legal system. If internal contradictions can be found, the conclusion would even be that “there are, in short, no easy cases.”⁹³

Another criticism might be based on the fact that formalism is pertinently non-consequentialist. Non-consequentialism seems to make the rules, rights and principles of the legal system structurally indeterminate because “they are under-inclusive as to purpose or they are over-inclusive as to purpose, or both.”⁹⁴ For instance, drawing the line for majority at eighteen, which gives someone the right to vote, is under-inclusive because it will always exclude young people who are perfectly able to make up their mind and use their right to vote responsibly. At the same time, there are also always people who are above the age who are immature and incapable of such responsible choice. There will always be cases in which one feels compelled to identify the particular *purpose* of a particular rule. When the purpose is found, it will be useful in evaluating the particular consequences of the application of the rule in a particular concrete case, and this will destabilize the system. As stated several times before, purposive judgments are inherently particularistic and unstable.⁹⁵ We can *always* ask why in one case one decides to follow the rules and ignore purposes and consequences, while in another we ignore the rule and reason according to purposes and consequences instead.

⁹¹ Kennedy, *A Critique of Adjudication*, pp. 47, 133-156; Kelman, *A Guide to Critical Legal Studies*, p. 4.

⁹² “According to the Critics, every legal doctrine is coupled with a counter doctrine that underwrites its exceptions.” Luban, *Legal Modernism*, p. 41; cp. Kennedy, D., ‘Form and Substance in Private Law Adjudication’, *Harvard Law Review* vol. 89 1976, pp. 1685-1778; Unger, *What Should Legal Analysis Become?*, pp. 127, 128.

⁹³ Kelman, *A Guide to Critical Legal Studies*, p. 4.

⁹⁴ Kelman, *A Guide to Critical Legal Studies*, p. 40.

⁹⁵ Unger, *Law in modern society*, p. 86; cp. Von Hayek, *The Road to Serfdom*, pp. 80, 82.

A third focal point is the problem that universal and abstract rules, rights and principles often (or always) require extensive *interpretation* when they are to be applied in particular and concrete circumstances. If reasoning in a policy style, we might solve this problem by trying to match the identified purposes with the measurable or foreseeable consequences of the application of a rule and thus reach a certain measure of predictability and impersonality. The formalist, however, has only analytical or hermeneutical means at his or her disposal and has to determine what a rule *means* in the particular circumstances of the particular case.⁹⁶ A first problem is that legal systems generally have gaps. Sometimes there just is no general legal rule available in the particular case before us. We might try to fill the gap by extrapolating from other rules that govern comparable cases, by reasoning analogically, that is.

We might also, more generally, try to reason from systematic or “formal” qualities of the law to fill the gap. However, it is clear that it will not be easy to ascertain determinacy and objectivity in such “hard cases.” The opposite also happens: Rules overlap in the sense that they govern the same cases but prescribe different or even contradictory solutions.⁹⁷ What rule should we apply in such a case? In addition, interpretation will be made difficult by the fact that legal wordings will often be ambiguous and vague. Even the explicit legal rules, which might be thought of as being far more determinate in their meaning than particular rights, can take on an indeterminate meaning in particular circumstances. This seriously weakens a claim to predictability and impersonality.

⁹⁶ “A formal view of justice requires, to be coherent, a belief in the possibility of formalistic legal reasoning. And it is likely to be most persuasive in the realm of exchanges among individuals rather than in that of government distribution, which involves choices among conflicting interests. Thus, it tends to distinguish sharply between an impersonal justice of reciprocity that dispenses with distributive premises and an arbitrary justice of distribution whose pronouncements are never impartial and general enough to have anything more than the appearance of law. [...] Language is no longer credited with the fixity of categories and the transparent representation of the world that would make formalism plausible in legal reasoning or in ideas about justice.” Unger, *Law in modern society*, pp. 195, 196.

⁹⁷ Kelman, *A Guide to Critical Legal Studies*, pp. 45- 51.

Ludwig Wittgenstein famously raised a last problem I will briefly discuss: No rule can determine the scope of its own application. For instance, when we want to apply the rule “close the door at five,” we have to make several judgments about whether certain particulars in our empirical reality correspond to concepts such as “close,” “door” and “five.” The basis for these judgments cannot be found by means of logical or hermeneutical analysis of the meaning of these concepts. The moment we agree that language is not a “mirror of nature,” there are also no “objective” tests of correspondence outside the text or the rule. There are solutions to this problem because in practice we generally succeed in applying the rule without any problem. Such solutions typically refer to “practical reason” or to the consensus of an “interpretative community” – Wittgenstein himself spoke of “life forms.”⁹⁸ Duncan Kennedy replies that

“[...] whatever method one chooses as a solution to the “application problem,” that is, however one grounds rule application, that method will not have the demonstrable or objective quality that would be necessary to guarantee that the decision maker’s ideology played no role in the choice of an outcome.”⁹⁹

A last promising road to objectivity and impersonality would be finding a “background normative theory” that helps us to interpret rules, rights and principles in concrete circumstances. Preferably the theory is found to be already informing the major part of the system in the sense of being “immanent” or “inherent” or “intrinsic” to the legal system.¹⁰⁰ This theory would help fill the gaps and decide on the right way to repair overlaps and contradictions. Modern legal theory often works from the idea of an intrinsic order expressible by a background normative theory and it also seems to be presupposed by professionals in the legal practices. The legal order is treated as a repository of some particular set of intelligible purposes, policies,

⁹⁸ “this was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule.” Wittgenstein, L., *Philosophical Investigations*, Blackwell Oxford 1967 § 201; cp. Kripke, S.A., *Wittgenstein on Rules and Private Language*, An Elementary Exposition, Harvard University Press Cambridge Mass. 1982.

⁹⁹ Kennedy, *A Critique of Adjudication*, pp. 31, 32, 161; Lucy, *Understanding and Explaining Adjudication*, p. 143; Kelman, *A Guide to Critical Legal Studies*, pp. 4, 46-7.

¹⁰⁰ Cp. Weinrib, *The Idea of Private Law*, pp. 16, 18-21.

principles or some particular morality that can be distinguished from ordinary daily legislative politics.¹⁰¹

Both the consequentialist theorist and the formalist theorists work from background normative theories that give coherence to the legal corpus and practice and which strengthens its universal appeal and applicability. Preferably, such a background theory fits the existing corpus of legal materials like a glove. It might therefore even be conceived of as “grounding” the legal system and practice.¹⁰² The coincidence of the coherent theory and – an at least extended part of – the body of law gives a clue to the fact that this is, in fact, the “essence” or moral “foundation” of the system. Thus Richard Posner claimed, in his earlier work, that American private law is basically informed by economic efficiency. By contrast, Ronald Dworkin argued that the idea of law as integrity helps us to work the law pure.¹⁰³

According to Roberto Unger what is looked for is a “canonical form of social life and personality” that supports (or at least should support) the legal system and practices. An entire field of law, or the law as a whole, will be presented as the expression of this underlying form such that, in cases of confusion and incoherence, we can find a solution in the theoretical construction of this canonical form. Surely, the forms and theories that are referred to in modern legal science have become more and more abstract, but, according to Unger, the basic idea has remained the same since pre-modern times. There is a “meta-scheme” or “basic structure” that informs, or at least should inform, legal theory and practice. Modern legal science has only changed the demands for the rationality (or at least reasonableness) of this

¹⁰¹ Unger, *The Critical Legal Studies Movement*, p. 9; Unger, *What Should Legal Analysis Become?*, p. 72.

¹⁰² “Fit or coherence rule making is distinct from the method of developing the definitions of the words in legal rules as an aid to applying them, because it is focused on the choice among different rules proposed to resolve a gap, conflict, or ambiguity in the legal system seen as an ensemble of rules. It is clear that the judge is making law. He does so by treating the whole corpus of rules (rather than the words of a particular rule) as the product of an implicit rational plan, and asks which of the rules proposed best furthers that plan. If he employs the method of coherence, he will make law that is no influenced by his personal convictions, simply because he will follow the rational plan even when he doesn’t agree with it.” Kennedy, *A Critique of Adjudication*, p. 33.

¹⁰³ Cp. Posner, R.A., *Economic Analysis of the Law*, Little Brown Boston 1972; Dworkin, *Law’s Empire*, p. 400.

basic structure. What has motivated this search “has been the fear that, carried to the extreme, the critique of objectivism and formalism would leave nothing standing.”¹⁰⁴

However, as Unger extensively argues, “no extended body of law in fact coincides with such a meta-scheme, just as no broad range of historical experience coincides with the implications of one of the evolutionary views that claim to provide a science of history.” This implies that “it is always possible to find in actual legal materials radically inconsistent clues about the range of application of each of the models and indeed about the identity of the models themselves.”¹⁰⁵ We can generalize this argument by referring to discussions in modern philosophy. Philosophy in both its modern and pre-modern guises has also been largely pre-occupied with finding a universal and eternal “canonical form” or “grid” that underlies the empirical, or at least visible, reality that we scientifically investigate. Critical philosophers as diverse as Nietzsche, Heidegger, Wittgenstein, Foucault and Derrida seriously undermined this search. In the end there is no such canonical grid of concepts in terms of which the world is best divided and classified.

Anti-philosophy

We should, in the words of Pierre Bourdieu, be very wary of “the dangerous old conceptual fiction” of the “pure” disinterested and neutral subject that by means of “pure reason” can reach *intrinsic* qualities or “forms” or “knowledge in itself.” There is no pure subject that has access to things in themselves or to their intrinsic aesthetic, moral or metaphysical qualities. A “view from nowhere” or a “God’s eye point of view” that might see the world as it is in itself is unavailable to us mortals.¹⁰⁶ This Nietzschean insight implies that “there is only a perspective seeing, only a perspective “knowing,” and the more affects we allow to speak about one thing, the more eyes, different eyes, we use to observe one thing, the more complete will our

¹⁰⁴ Unger, *The Critical Legal Studies Movement*, pp. 12-14; “The thesis of radical indeterminacy turns out to be in large part a metaphor for something else: a planned campaign of social and cultural criticism.” Unger, *What Should Legal Analysis Become?*, p. 121.

¹⁰⁵ Unger, *The Critical Legal Studies Movement*, pp. 9-11; Unger, *What Should Legal Analysis Become?*, pp. 109-111.

¹⁰⁶ Cp. Putnam, *Reason, Truth and History*, p. 50; Nagel, *The View from Nowhere*.

“concept” of this thing, of our “objectivity,” be.”¹⁰⁷ Importantly, this idea structurally undermines and completely discredits the orthodox idea that the task of moral, political or legal philosophy is to analyze *the* formal language of morals, or *the* formal vocabulary of politics. The same goes for the analysis of *the* concept or *the* intrinsic formal structure of law or legal reason. Michel Foucault also extensively argued that there is simply no such changeless grid of concepts and meanings awaiting neutral analysis.¹⁰⁸

In addition to the fact that we will never reach absolutely true knowledge, thinkers like Nietzsche and Heidegger argue that the schematic, abstract and “reductionist” concepts of modern technological rationality radically rob reality of its multiplicity and human experience of its richness and vitality. They argue that reality far transcends the abstract formal structure that we impose on it.¹⁰⁹ We should be aware of this reductionism and never be tempted to mistake the conceptual apparatus for the real world that it pretends to describe. Moreover, the use of “objective knowledge” is never innocent. Concepts are not timeless entities with fixed meanings, but should instead be thought of as, according to Heidegger, “weapons,” or, according to Wittgenstein, as “tools.” The understanding of such concepts is always, in part, a matter of seeing who is wielding them and for what purposes: “The whole structure of human knowledge, then, is in doubt, except as the indicator of a purely human reality, as the reflection of purely human preoccupations.”¹¹⁰

The moment we accept that there is no perspective-free knowing, we easily make the next step that consists in denying “disinterested knowing.” Michel Foucault here uses the concept of “knowledge/power” to emphasize the strong entanglement of claims to objective knowledge with a claim to power or legitimate domination.¹¹¹ Bourdieu makes similar claims when he says that “all objectivist knowledge contains a claim to legitimate domination.”¹¹² The implication of the attack upon formalism by the critical

¹⁰⁷ Bourdieu, *Distinction*, p. 28.

¹⁰⁸ Skinner (ed.) *The Return of Grand Theory in the Human Sciences*, p. 13.

¹⁰⁹ Megill, *Prophets of Extremity*, pp. 49, 94.

¹¹⁰ *Ibidem*; Unger, *Law in modern society*, pp. 195, 196.

¹¹¹ Cp. Foucault, ‘Truth and Power’ in: Rabinow (ed.), *The Foucault Reader*, pp. 51-75; cp. Nonet & Selznick, *Law & Society in Transition*, pp. 4, 5.

¹¹² Bourdieu, *The Logic of Practice*, p. 28.

legal scholars is that there is no hope that the law can be grounded in some explicitly “legal reason” – the canonical “vocabulary” or “language of law” – that can be successfully and credibly contrasted to ideology, moral or political philosophy or to legislative politics. According to Unger the point of the critical project “is to demonstrate that a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies.”¹¹³

The critique of legal formalism

Rationalization projects in the law will amount to rationalization of the established political order, which is thereby effectively “consecrated.” Indeed, Roberto Unger calls this project a “daring but implausible sanctification of the actual.”¹¹⁴ Especially those who cannot identify with the established legal order – and with the political order that it sanctifies – and who feel that severe injustices are perpetuated and legitimated by the formalist and objectivist legal discourse try to expose the internal contradictions and indeterminacy of the system to “desecrate” “demystify” or “disenchant” mainstream legal practice and science. Kennedy justifies such a “de-legitimation” by referring to a deep longing for “justice and liveliness,” while the mainstream legal practice and science seems rather “dead and wrong.” Legal formalism makes it seem as if the present social world and the legal institutions and practices that support and sustain it are necessary and permanent. The belief system that gives the impression of being necessary and objective falsely makes it appear as if the longing for justice and liveliness is out of reach, “falsely making it appear that they can’t be realized or that they have already been realized.” We should try to “break open” these belief structures by showing them to be inconsistent with our longing for liveliness and justice. Kennedy:

¹¹³ Unger, *The Critical Legal Studies Movement*, pp. 9-11.

¹¹⁴ Unger, *The Critical Legal Studies Movement*, pp. 7, 9; Bourdieu, ‘The Force of Law’, p. 838; Bourdieu, *The Logic of Practice*, p. 132; “the doctrines of protected constitutional interests and of legitimate ends of state action were the chief devices for defining the intrinsic legal-institutional structure of the scheme of ordered liberty. They could not be made coherent in form and precise in implication without freezing into place, in a way that the real politics of the republic would never tolerate, a particular set of deals between the national government and organized groups.”

“There is a false appearance of determinacy in the social world, and the false determinacy hides a true determination by human agency. In other words, people “alienate their powers. [...] Also that belief systems constitute all of us in ways inconsistent with our own longings and impede our efforts to realize justice and liveliness by. [...] I suggest that it would be in some sense “better” to determine our fates without alienating our powers.”¹¹⁵

According to Unger we should therefore lend

“[...] extraordinary interest to the exceptions, the countervailing solutions, the residues and “mistakes,” of every legal order. For these are signs of past or rejected solutions, of subordinated interests, and roads not taken, form material which the hidden, contrary side of the divided consciousness can work. Each of them becomes a possible starting point for more general alternatives in law. Thus, from having been intellectual and political embarrassments, they become intellectual and political opportunities.”¹¹⁶

But Kennedy argues that we should not just investigate the “contradictions,” the “mistakes” and the “embarrassments” of the existing legal order, rather we should continually create or *provoke* them. We are explicitly urged not to submit to the existing “necessities” in our social world and produce “representations” or “artefacts” that will be inconsistent with the ruling ideologies such that they are robbed of their self-evidence and “naturalness.” This is not an easy task because these ideologies deeply determine the perspective on things.¹¹⁷ The strategy is to continually demonstrate how also the law, like human knowledge generally, is a purely human reality, “the reflection of purely human preoccupations.”¹¹⁸ This implies that all claims to objectivity and necessity can be exposed as false.¹¹⁹ Hopefully, this makes room for alternative visions of social and political order.

However, if one makes everything relative to human preoccupations and denounces claims to objectivity the charge of all destructive “relativism” or

¹¹⁵ Kennedy, *A Critique of Adjudication*, pp. 15-19.

¹¹⁶ Unger, *What Should Legal Analysis Become?*, pp. 127, 128.

¹¹⁷ Kennedy, *A Critique of Adjudication*, pp. 15-19.

¹¹⁸ Megill, *Prophets of Extremity*, p. 49.

¹¹⁹ Cp. Unger, R.M., *False Necessity*, Anti-necessitarian social theory in the service of radical democracy, Verso New York 2004 (1987).

even devastating “nihilism” is close at hand. And what about Kennedy’s representation of the law and legal practices? Is there no claim to inherent objectivity in his representation? Kennedy acknowledges that it is not a representation in the sense of a “mirror image” of legal practice and science “out there in reality.” The object of his investigation “transcends” or “surpasses” the representation “and indeed my understanding, no matter what method(s) I adopt, and that’s fine with me,” he says.¹²⁰ But we nevertheless should not take the critique of epistemology to mean that (now that objectivity in any absolute sense can never be guaranteed by some “right method”) we should fall into the other extreme of absolute relativity. Kennedy thinks that the critique of epistemology has not totally invalidated the methods he uses to come to an understanding of his subject and to falsify the arguments and theories that he reached with them. After the devastating critique of modern epistemology, however, objectivity might just receive a new, less pretentious, meaning.

Objectivity now merely refers to “a representation that hasn’t been falsified (yet)” without denying that personal moral and political commitments influence the representation. On the other hand, the subject under investigation does not allow for just any representation. However much we would like something to be otherwise – because it would better match or serve his political and moral purposes – “reality” cannot bend in just any direction.¹²¹ Kennedy opts for “eclecticism,” which can be characterized as using whatever methods available – whether they be “hard” methods aspiring for causal explanation or “soft” methods trying for interpretative understanding – to communicate a representation of the subject that the audience can recognize as “true” and that the audience experiences as a “revelation.” In Kennedy’s words:

“To my mind, none of this “undermines objectivity,” The object quality of that which is represented is accessible to the audience, and the representation works only to the extent that the audience can hold it and the object and the author in mind together without experiencing the representation as falsified or inert. The artifact is effective not because it is constructed following procedures that guarantee that it represents objectively) though much of it may be empirical or deductive), but

¹²⁰ Kennedy, *A Critique of Adjudication*, p. 15.

¹²¹ Kennedy, *A Critique of Adjudication*, pp. 14-18.

because by juxtaposing the representation, the author, and the object the audience experiences a “revelation.”¹²²

Formal law and the abstract society

The critical, rather irreverent attitude with regard to the formalist and objectivist “push towards the universal” is partly motivated by the kind of society that it produces, sustains and legitimates. One can argue that the formalist abstract nature of the legal system “mirrors” the formalist abstract nature of modern society. Anton Zijderveld relates modern abstract rationality and knowledge to the gradual evolution and growth of the modern “abstract society,” which is a true “society of strangers.” Zijderveld: “Abstract formalism has generally superseded all substance – a process that is remarkably in tune with the main tenets of abstract society. [...] a world in which substance is superseded by forms, material by methods, essence by functions, reality by abstractions.”¹²³

A critical perspective on such an “abstract society” can be brought in line with the cultural criticism that I broadly classified as “Hegelian.” We identified an inner tension between the formal rationality of formalism and the instrumental rationality of consequentialist reasoning, but this Hegelian critique is generally directed at modern society as the product of *both* formal and instrumental rationality – the rationality of the autonomous individual who has to make choices as to what goals he should pursue, how he should (efficiently) pursue them and what boundaries free citizens of a liberal democracy should set themselves in order not to impede or even damage other free citizens in their pursuits. Indeed, law in modern liberal democratic states centers on individuals rather than on groups. More specifically, it focuses on what individuals have in common: the capacity for rationality, which makes it possible to appreciate the necessity to limit individual freedom by means of a universal legal system.

Subsequently, law “tends toward generality, toward universalism – that is, toward a single general code of conduct applicable to everyone within the jurisdiction.”¹²⁴ Such a formal universal law leaves room for a variety of

¹²² Kennedy, *A Critique of Adjudication*, p. 18.

¹²³ Zijderveld, *The Abstract Society*, pp. 83, 85.

¹²⁴ Friedman, *The Republic of Choice*, p. 152; cp. Luban, *Lawyers and Justice*, p. 30.

individual goals and values, and it is blind with regard to communal, cultural or ethnic differences, because it treats individuals as both equal and abstract subjects. This can be regarded as an important achievement of modern law because everybody can expect equal treatment; the law does not differentiate between classes, cultures or ethnic groups, which is a characteristic of pre-modern law. Thus universal formal law is one factor in “the trend to suppress ethnicity and multiplicity in the nineteenth century.”¹²⁵ But the net effect, however paradoxically, is that legal uniformity plays a role in processes of “homogenization”:

“The development of modern society, partly under the impulse of general will theory and Enlightenment modes of thought generally, has been towards a greater and greater homogenization, and in this respect a modern Western society would be unrecognizable to a man of early nineteenth century Europe.”¹²⁶

Analytical or formal rationality “distinguishes” and “separates” but does not seem able to see “things in their inner dialectical connections,” according to Hegel. The analytical dissection of everything into separate individual objects leads to a “splintered” vision of reality that is beyond repair. Politically, the problem is that the ensuing vision of men as radically separated, rational individuals pursuing their chosen individual goals and goods loses sight of the community in which the necessary contexts for these pursuits are set. Hegel criticizes the Enlightenment project because the rationality it employs (also for rationalizing the legal and political order) is fatally partial and inadequate. We saw how this rationality desacralizes all sorts of (traditional) authorities and communal meanings and values. The important gain is that the individual can emancipate from the firm grip of arbitrary authority, but there is also a serious loss. We end up with a view of the world as merely “a heap of objects, open to human scrutiny and use.”¹²⁷ Moreover, the shared meaningful and

¹²⁵ *Ibidem*.

¹²⁶ Taylor, *Hegel*, p. 407, 408; Kolb, *The Critique of Pure Modernity*, p. 36; cp. Foucault, ‘Discipline and Punish’, in: Rabinow (ed.), *The Foucault Reader*, pp. 206-213.

¹²⁷ Taylor, *Hegel*, p. 401; “More and more aspects of human life can come to be treated as commodities to be exchanged. Nothing is sacred. [...] The freedom of civil society because of its separation from all content, threatened to trivialize life and convert all human relations into commodity relations.” Kolb, *The Critique of Pure Modernity*, p. 33.

normative order is “desecrated” or “disenchanted” because meanings and values are not “objective” in any formal rationalist or empirical sense. They are merely “subjective” and therefore arbitrary projections upon a reality that is “in itself” devoid of meaning and purpose. Nothing is sacred and everything is up for “commodification.” “More and more aspects of human life can come to be treated as commodities to be exchanged.”¹²⁸

Moreover, there are no substantial values, thick institutions or traditions that will limit both the pursuit for individual welfare and the proliferation of needs and desires. “The emptiness of his freedom and his domination by impulse are among the roots of the endless drive for *more* which infects every aspect of civil society.”¹²⁹ The notion of individual freedom is thought of in a *negative* way as freedom from external impediments and constraints in the satisfaction of an individual’s particular needs and desires.¹³⁰ Enlightenment (analytical or instrumental) rationality cannot autonomously limit such needs and desires, and therefore all the limits (such as those set by the legal order) will be experienced as *external* constraints. The demands of the political or legal order on the individual will also be experienced as impediments and constraints from the outside, arbitrarily limiting freedom.¹³¹

Although individuals, if they are reasonable, will see such restrictions and limitations on their will as necessary, they will be experienced as a necessary evil because freedom is the fundamental good. Instead, Hegel argues that some set of limits the community imposes on the freedom of individual citizens should be experienced as meaningful and valuable; they should be internalized as such. But the limits the liberal state and modern society set are formal and abstract; the modern individual does not really identify with such

¹²⁸ “There are no substantial values or traditions limiting what kinds or quantities can be taken up into civil society’s circulation of needs and goods.” Kolb, *The Critique of Pure Modernity*, pp. 32, 33.

¹²⁹ Kolb, *The Critique of Pure Modernity*, pp. 35, 36.

¹³⁰ Cp. Berlin, I., *Liberty*, Oxford University Press Oxford UK 2002, pp. 30-54.

¹³¹ “Kant’s political theory [...] takes its start from men as individuals seeking particular goals, and the demands of morality and rationality, i.e., universality, only enter as restrictions and limitations (Beschränkungen) imposed on these individuals from the outside. Rationality is not immanent, but an external, formal universality which demands only that the negative freedom of all individuals be made compatible.” Taylor, *Hegel*, p. 372.

an “empty” social order. The price of the formalization and universalization of the law is that modern law does not provide particular meanings and concrete norms that the members of the community can recognize themselves in. It is next to impossible to identify with abstract legal rules, procedures and principles, just like it is hard to experience the abstract “society of strangers” as a community in which one feels congenially at home.

This can be related to the fact that, according to Max Weber, in modern society authority takes on a “rational-legal” character. Authority in modern society is rather formal, bureaucratic, legalistic, rational and instrumental. Charismatic and traditional authority are, by contrast, of a more personal nature because they rest, respectively, on the particular charisma of a leader and on the prestige of traditions and institutions in the community that is reflected in those who represent them. Legal-rational authority rejects such personalism characteristic of the “pre-modern” types of authority and is, instead, committed to rules and to legal processes. Fundamentally, it rests on universal norms.¹³²

However, compared to charismatic or traditional authority, such a rational-legal order is, on the whole, rather “cold and bloodless.” We should even doubt whether we can speak of authority at all. If we think of authority as a kind of bonding, as a link of legitimacy between someone who commands and someone who obeys, it is difficult to see here what the bonding actually consists of. The law has become “a form, a framework: a mode of organizing and translating authority, which has become diffuse and multiplex.”¹³³ The authority of modern law is thus highly abstract and cerebral and does not have a firm grip on the emotions and the imagination of the community members.

Moreover, the Enlightened “radical notion of freedom being purely formal and therefore vacuous cannot generate a new substantive vision of the polity.”¹³⁴ A civil society that is regulated with the help of such formal universal rules, will lead to a form of social and political interaction that is “unusually bare.” Modern societies tend to what Anton Zijderveld calls “thin

¹³² Friedman, *The Republic of Choice*, p. 212; Nisbet, *The Sociological Tradition*, p. 143.

¹³³ Friedman, *The Republic of Choice*, pp. 112, 113.

¹³⁴ Taylor, *Hegel*, p. 372; “The separation of universal form from particular has become institutionalized.” Kolb, *The Critique of Pure Modernity*, p. 15.

institutions.” Institutions are rationalized according to their functions and “ruled and measured by efficiency and effectiveness. Therefore, it is easy to view them as “alienating strictures that impose abstract forms of authority and control.”¹³⁵ The structures of mutual recognition and interaction in modern society are relatively empty and formal, and there is no pressure to care for, or identify with, the community as a meaningful and normative whole because the modern state that comprises it is also a formal or functional entity devoid of any substantive content. Modern citizens acknowledge the formal requirements of procedural and formal justice in their dealings with one another but the larger community becomes an empty abstraction.¹³⁶

Karl Popper refers to such modern societies as “abstract societies,” societies in which men practically never meet face-to-face. “Such a fictitious society might be called a completely abstract or depersonalized society,”¹³⁷ and as such, the group can hardly be thought of as a community or even a concrete and real group of men in any meaning of the word. Surely we can relate this to Tocqueville’s characterization of modern society as a “society of strangers.”¹³⁸ An abstract society like this is increasingly unable to provide the citizens with a communal identity. A society in which face-to-face relations are to a large extent replaced by relations between official functionaries and anonymous role occupants, who practice these roles without really identifying with them, cannot provide man with a concrete experience of meaning in his life. Modern man, according to Zijderfeld “is largely estranged from nature and endures his society as something that confronts him. He does not “live society,” he faces it.” Moreover, he does not identify with the roles that he plays in this society largely because “the modern individual is compelled to change roles like the jackets of his wardrobe. A distance grows between himself and his roles, and he experiences a loss of meaning and reality, which usually is called “alienation.”¹³⁹

The characteristic mode of organization in which such a functionary works is bureaucracy, an organizational form that requires a “bureaucratic

¹³⁵ Zijderfeld, *The Institutional Imperative*, pp. 15, 17.

¹³⁶ Kolb, *The Critique of Pure Modernity*, pp. 25, 26, 28.

¹³⁷ Popper, *The Open Society and its Enemies*, pp. 174, 175.

¹³⁸ De Tocqueville, *Democracy in America*, p. 336; Friedman, *Total Justice*, p. 90; Friedman, *The Republic of Choice*, pp. 56, 70, 75; Aubert, *The Hidden Society*, pp. 66, 67.

¹³⁹ Zijderfeld, *The Abstract Society*, pp. 53, 74, 78.

attitude.” This attitude consists, in a strictly functional and detached way, of dealing with things, and these rational agents can only be effective and efficient if they are “sufficiently dehumanized to be factors in the realization of calculable goals.” This attitude starts to structurally influence modern consciousness, and human beings generally become agents of formal knowledge who Weber characterizes as “experts with spirit and sensualists without heart.”¹⁴⁰ Indeed, Zijderveld sees them as specialized experts and dehumanized functionaries: “A man without qualities consists of qualities without man.”¹⁴¹

Authenticity, homogenization and alienation

In modern society there is room for the exploration and realization of “authenticity,” of finding one’s own particular lifestyle and values. The quest for freedom and authenticity was a major motivating force in “desecrating” and dismantling the traditional social institutions and stratifications to the point that uniform castes, estates or classes, which gave pre-modern society a strict structure, are almost absent. The increase in differentiation and the leveling of class differences seems, however, not to lead to more diversity and pluralism but to a powerful “homogenization.” The abstract order in which all are free and equal seems to result in a society of a rather uniform and predominantly consumptive style of life.¹⁴² One might argue that exactly because such an abstract and leveled society does not have the power to form the identity of the individual coherently, modern media and commerce becomes more powerful because it is now the sole producer and supplier of standards, norms and values that the individual as a free consumer can pick and choose from. These meanings and norms were formerly part of a social structure but they now, in the words of Zijderveld, “float around like pieces of common property.” We might add that the mass media tries for the greatest satisfaction of the desires of the greatest number, and therefore they generally focus on the average consumer and supply the images and products that have the greatest appeal. The result: “cultural uniformity has spread out over

¹⁴⁰ Weber, *The Protestant Ethic and the Spirit of Capitalism*, p. 182; cp. Eliaeson, *Max Weber’s Methodologies*, p. 11; Brint, *In an Age of Experts*, p. 144.

¹⁴¹ Zijderveld, *The Abstract Society*, pp. 87, 88, 80.

¹⁴² Zijderveld, *The Abstract Society*, p. 79.

industrial society which is coached and stimulated by the mass media that offer fads, fashions, norms and values by the thousands merely for the sake of consumption.”¹⁴³

The matching attitude or mentality also invades the public sphere – the political sphere where shared meanings, norms and institutions constitute our collective identity, and which deserves a special loyalty and respect. While Hegel’s state was a moral community enfolding and limiting modern civil society, now the larger community is thought to be invaded by calculating individuals maximizing their utility. Moreover, the borders of the modern nation states are not natural borders for the modern mass media and capitalist commerce either, and this means that “a worldwide civil society may be the direction in which we are headed today.”¹⁴⁴ Given the trends towards formalization, homogenization and commodification that this seems to promise, we might be less than enthusiastic about these trends in “globalization.”¹⁴⁵

The formal and neutral state (and formal and neutral legal procedures and laws) matches the modern society of strangers. The political and legal theory backing it officially banishes myth and fable and aspires to be a radically rational or rationalized community. But this theory has not provided a basis for men’s identification with a larger community or nation-state. If there is no basis for identification, there is a good chance that citizens even feel rather *alienated* from the state and its laws. Certainly, the modern state as the product of reason and self-interest does not generate very warm feelings of belonging or special loyalty in the citizenry. Individuals sharing nothing but formal reason and an interest in law and order, do not share very much. We can analyze this alienation with the help of another classic theme in modern sociology: the danger of “anomie.” Anomie is “essentially the absence of a meaningful order, a *nomos* in which one can feel at home and in which one can develop one’s identity and character, one’s capabilities and talents.” According to Zijderveld, this state of meaninglessness and the experience of

¹⁴³ Zijderveld, *The Abstract Society*, pp. 87, 88, 80.

¹⁴⁴ Kolb, *The Critique of Pure Modernity*, p. 117.

¹⁴⁵ Cp. Hardt, M. & Negri, A., *Empire*, Harvard University Press Cambridge Mass. 2001; Klein, N., *No Logo, No Space, No Choice, No Jobs*, Flamingo London 2000.

anomie definitely occur in abstract, over-bureaucratized and strongly controlled modern societies.¹⁴⁶

Alienation can be a characteristic experience in modern societies when individuals cannot identify with the meaningful order and institutions of the larger community. Such alienated citizens feel they cannot develop their identity, character, capabilities and talents in any satisfying way. If practices and institutions are rather impersonal and formal – “cold and bloodless” – the experience of alienation comes close to the experience of anomie because who can really identify with abstract, over-bureaucratized and formalized institutions like the modern state and its legal institutions?¹⁴⁷ Modern societies tend to what Zijderfeld calls “thin institutions.” Such thin institutions are easily experienced as “alienating strictures that impose abstract forms of authority and control” that even inspire people to protest and rebel. There is always the possibility, according to Zijderfeld, that the abstract society “triggers the spirit of protest.”¹⁴⁸ It is this spirit of protest that seems to inspire the critical attitude with regard to the modern formalist law as well.

But we should not overstate this point. Society can never in fact become purely abstract. “A pure civil society is an idealization like a frictionless plane; it does not exist as described. It exists with a larger community, as “economic man” always has.”¹⁴⁹ This means that there is always a set of substantive meanings and values that people *do* identify with and that do motivate action, which are not constantly scrutinized as to their rationality and efficiency. Indeed, it can be argued that modern societies have actually functioned with a large part of their traditional outlook intact. The fact that modern nations like Great Britain and the Netherlands consider themselves bound by a Queen shows that “myth and fable” are still very much alive in modern political reality. Even a republic with a highly individualized population like the United States makes ample use of myths to create a feeling

¹⁴⁶ Zijderfeld, *The Institutional Imperative*, p. 199.

¹⁴⁷ “When, for example, the an institution like the university modernizes to the extent that functional rationality supersedes substantial rationality, so that efficiency and effectiveness, not intellectual integrity and truth are its ultimate values [...] a pervasive sense of alienation will gradually affect the faculty, the students and the administration.” Zijderfeld, *The Institutional Imperative*, p. 201.

¹⁴⁸ Zijderfeld, *The Institutional Imperative*, pp. 15, 17.

¹⁴⁹ Kolb, *The Critique of Pure Modernity*, p. 105.

of a common culture and destiny. The Presidency and its rich symbolism is an important source for pride and identification, and so are the myths of the frontier, the myth of the perpetual new beginning, and the myth of the boundless future that is open to self-creation. Surely these are hardly compatible with the findings of modern (social) science and reason.¹⁵⁰

For Hegel the state and its laws should be the embodiment of a community with which individual citizens can identify and that has to be lived as an “organic whole.” This whole is more than the aggregation of its individual elements because it is the locus of a larger life transcending petty citizen interests and individually defined goods.

“According to Hegel, the state must constitute a common life in which all find their identity, otherwise the citizenry can only experience government and the legal order as external impediments to their freedom which means that “government can only survive as a despotism over individuals crushing private wills under the yoke of a law with which no-one identifies.”¹⁵¹

Surely, the tendency to abstraction and formalism does not seem very promising to most. It can be argued that both modern formalist law and the litigation explosion are the product of a general “estrangement” exactly because what people share in a modern social world has become highly abstract. According to Lawrence Friedman the (real or apparent) decline of authority is a crucial factor: “Authority itself has changed. There is a loss of loyalty, commitment and trust. This then is another reflex of the dependence on strangers.”¹⁵² He argues that a pervasive expectation of formal and procedural justice in most modern Western societies has been accompanied by a formalization of both the law and the social relationships that it regulates. As the lawgiver and legal institutions have, to a high degree, met the demand for both fairness and objectivity in the legal practices, we witness a process of “legalization” of practically all social relationships. Nowadays no area of life is completely beyond the influence of law and even traditional zones of immunity such as the family have been extensively legalized. Friedman argues that “the scope of law has expanded; it has become a gigantic, total

¹⁵⁰ Taylor, *Hegel*, p. 411.

¹⁵¹ Taylor, *Hegel*, pp. 411, 439, 444.

¹⁵² Friedman, *Total Justice*, p. 89.

presence.” Thus the decline of authority goes hand-in-hand with a boundless “legalization” of society. Moreover, not only will there be ever more law in such societies, we can also expect a rise in the use of legal proceedings to solve social and political problems. We can expect an explosive growth of litigation. Friedman: “The emotional distance strips away inhibitions against using formal law, just face-to-face relationships tend, on the whole to create this kind of inhibition.”¹⁵³

The public world should be spared from such “legalization,” and an ensuing litigation explosion should be avoided. In the public or political realm, we need the vocabulary of justice to be more flexible, shared, substantial and argumentative than a system of formal law can ever provide.¹⁵⁴ However, in such a society the (artificial) boundaries between private law and the public sector or public realm tend to melt away. In the modern world, legal formalist thinking invades the whole public order because, according to Lawrence Friedman, “modern legal culture insists on a single, unified domain of fairness and legality and demands a single standard of justice. To satisfy this demand, every institution has to fall into line.”¹⁵⁵

Lawrence Friedman points to some structural social and political problems. The demand for law ever increases, and this means that the legal institutions will easily be overburdened. Those seeking legal remedies will be confronted with delay, but, as the saying goes, justice delayed is justice denied and thus the growing demand for law and legal adjudication of conflicts is bound to challenge the legitimacy of the legal order. Surely there are boundaries to what a community can afford to spend on its legal institutions to meet the seemingly boundless demand for justice within the citizenry. In addition, there is the continual and structural impairment of governmental administrative tasks and duties. As the government is more and more restricted in its powers and competences to rule, and if citizens are granted all sorts of rights and procedures, it becomes hard to reach goals in an effective and efficient way. If citizens can get a judge to check, obstruct or

¹⁵³ Friedman, *Total Justice*, pp. 89-81.

¹⁵⁴ “The vocabulary of self-creation is necessarily private, unshared, unsuited for argument. The vocabulary of justice is necessarily public and shared, a medium for argumentative exchange.” Rorty, *Contingency, irony and solidarity*, p. xiv.

¹⁵⁵ Friedman, *Total Justice*, pp. 22, 42, 43, 91.

even reverse public actions that they do not approve of, government action will be at least delayed, at worst, made impossible.

But, maybe most importantly, one may point to the damage to the (moral) fabric of society. The pervasive demand and supply for fairness might generally undermine the trust between citizens; it might also undermine the morality and creativity in dealing with conflict. Trust and social creativity are important lubricants in social interaction and this means that these trends cannot fail to have an effect on the quality of life in such a modern society.¹⁵⁶ Modern formal law is the product of a decrease in trust and moral consensus in the community to the extent that we can hardly talk of a community at all. On the other hand, modern formal law and its “bureaucratic functionaries” tend to strengthen and hasten the trend towards the abstract society that does not seem appealing.

Grades of commitment

If we acknowledge that the tendency towards de-moralization and de-politicization of the state and the legal order has a serious downside, we seem to be back to Durkheim’s conclusion that a state of order or peace ultimately remains a moral task.¹⁵⁷ Richard Posner, the champion of scientism, admits this much when he says that “the entanglement of law with morality, politics, tradition, and rhetoric may well be permanent and the path to complete professionalization therefore permanently blocked.”¹⁵⁸ But does this mean that we have come full circle and that we are back in the community of shared understandings of the second chapter? The legal professional should realize that there is an irreducible political and moral dimension to legal professionalism, and this makes it important to a self-conscious and self-critical professional attitude. Legal professionals should scrutinize their

¹⁵⁶ Friedman, *Total Justice*, p. 16; “Today, having abandoned the promise of social engineering, virtually all serious observers understand that liberal political and economic institutions depend on a healthy and dynamic civil society for their vitality. [...] A thriving civil society depends on a people’s habits, customs, and ethics – attributes that can be shaped only indirectly through conscious political action and must otherwise be nourished through increased awareness and respect for culture.” Fukuyama, *Trust*, pp. 4, 5.

¹⁵⁷ Durkheim, *Professional Ethics and Civic Morals*, p. 11, 12; “everything in society is politics, mere politics” Unger, *False Necessity*, p. 1.

¹⁵⁸ Posner, *The Problematics of Moral and Legal Theory*, p. 211.

loyalties, their commitments or their “engagement.” This engagement can range from a self-conscious and consistent conservative stance to a radical revolutionary one.

The (ideal-typical) conservative attitude derives from the feeling that we should be careful with the disenchantment of the present institutional, social and political order. Such an order is thought to be a precarious historical achievement, which deserves our loyalty and commitment. Conservatives often emphasize the importance of the present institutional order in *civilizing* the individual - in making human beings, who are in their natural or uncivilized state selfish and aggressive, into social beings. In such a model peace and consensus is important, as it is the fragile product of such civilizing traditions and institutions.¹⁵⁹ The emphasis is on guarding the established order and the – particular, local and historically evolved – shared understandings of the community. Conservatives generally point to the fact that our strongest sentiments, memories, and loyalties are always focused upon “particular persons, particular inherited languages, particular places, particular social groups, particular rituals and religions.”¹⁶⁰ This *particular* meaningful normative order is a “nomos” derived from reason, morals and history that deserves our respect and that should be protected against arbitrary powers.¹⁶¹ This serves as the starting point for an investigation into “grades of commitment” of the legal professional.

Some will not feel at home with a conservative political commitment. Such views often come to the fore when an established political order is threatened and accompanied by the pessimistic idea that the present can be seen as largely “degenerated” from a golden past. But in many cases this is

¹⁵⁹ “Conservatives have traditionally been distrustful of man’s nature and have emphasized the need for restraining social institutions, while radicals have taken a more optimistic view. [...] The second point of controversy between the two older traditions concerns the nature of society. Conservatives have usually emphasized the systematic nature of society, while radicals have viewed society more as a setting within which struggles take place. [...] Third, radicals and conservatives have differed on the question of the degree to which systems of inequality are maintained by coercion. Radicals have emphasized the importance of coercion while conservatives have argued for the importance of consensus.” Lenski, *Power and Privilege*, p. 441.

¹⁶⁰ Hampshire, *Justice is Conflict*, pp. 37, 38.

¹⁶¹ Berman, *Law and Revolution*, p. 556.

informed by an unfair comparison of the best of the past with the average or worst of the present. Maybe it is sometimes more fair to see the present as an evolution from a simpler past, resist “nostalgia” and face the complexity of modern life. Whatever one’s feeling about the past with regard to the present, we might conclude with Richard Posner that the “clock cannot be turned back, especially to a time that only exists in the imagination.”¹⁶² Also David Luban urges us to resist a nostalgic longing for the (imaginary) past and instead, take a critical look at the values and traditions that we inherited from previous generations. Why should we today privilege any of the values of our grandparents when we are committed to undoing the wrongs of the social world that we inherited from them?¹⁶³

Roberto Unger also warns us of the pitfalls of nostalgia. We should, for instance, be highly critical of the image that is often presented to us by nostalgic thinkers of an ancient republican community, where the whole citizenry had an active experience of self-rule, devotion to the public good, and life on the historical stage. Remember that Kronman presented us with the ideal that at least legal officials exhibit these qualities. This image is often presented as the incompatible antithesis to the existing modern liberal democracies where private enjoyment or development of subjectivity and authenticity flourishes at the price of a shrinking public space. Unger argues that this contrast is not only a false opposition, which inhibits our imagination and creativity in social and political theory, but he even qualifies it as a “sham”:

“The opposition between the two forms of government is false, not because it can be easily resolved, but because it is a sham. The picture presented in contrast with the existing democracies, whether or not made to describe any real society of the past, is simply their inverted self-image, the receptacle of everything that seems missing in contemporary social life, and a confession of practical and imaginative failure.”¹⁶⁴

But he offers a different reason for resisting romanticizing some Golden Age of community; such an image stifles reformative imagination and creativity.

¹⁶² Posner, *The Problematics of Moral and Legal Theory*, p. 199.

¹⁶³ Luban, *Legal Modernism*, p. 117.

¹⁶⁴ Unger, *The Critical Legal Studies Movement*, p. 41.

The community seems to be continually under siege, and this generates the feeling that we should hold on to any kind of communality or order that we have left. Unger: “Precisely because the idealized communal republic cannot emerge from present political arrangements as the outcome of any plausible sequence of practical reforms and conceptual adjustments, it confirms the power of the established order in the very act of pretending to deny it.”¹⁶⁵ The image of the community as a “paradise lost” consecrates the present order by making it seem inevitable and necessary because the better (traditional) world is gone for good or forever beyond our reach. There is thus a tendency to sanctify the remaining political order and see it as both precious and without alternative.

We should start with stripping the present of its deceptive appearance of necessity: the social and institutional world is merely the outcome of historical processes that could have easily led to other results as well. The first grade of commitment that I introduce here is seeing the social institutional order is as relative to contingent historical processes.¹⁶⁶ In other words, we should resist any kind of “historicism” that argues that the present is the necessary outcome of necessary and objective historical processes or evolution.¹⁶⁷ Although we realize this, we might take the stance that we are nevertheless stuck with it. We cannot and should not do much about it right now. This means that we take an “ironic” or “pragmatic” (both terms were suggested by Richard Rorty) attitude with regard to the social-political institutional order. Irony is the experience that the present social and institutional order is “highly contingent, the product of social history and forces, and yet something that we cannot, in our present lives, avoid treating as part of the universe in which we interact with other people, the material world, and ourselves.”¹⁶⁸ This attitude is still rather cautious and conservative, and some will not feel comfortable with this kind of commitment.

¹⁶⁵ Ibidem.

¹⁶⁶ Hacking, *The Social Construction of What?*, p. 19; Unger, *What Should Legal Analysis Become?*, pp. 123-129.

¹⁶⁷ Cp. Popper, *The Poverty of Historicism*, p. 3; Unger, *Law in modern society*, pp. 12-13; Unger, *What Should Legal Analysis Become?*, pp. 126-128.

¹⁶⁸ Rorty, *Contingency, irony and solidarity*, pp. 74, 75; Hacking, *The Social Construction of What?*, pp. 19, 20.

If we substitute the “harmony model” of society for a “conflict model,” it becomes harder to sustain the ironic stance. Generally it is thought that the harmony model favors a conservative view with regard to the existing re- or constraining social and institutional order.¹⁶⁹ However, sociological models that emphasize conflict rather than hard-won harmony and functionality do not conceptualize society as a harmonious whole. Society is rather seen as an “arena” where individuals and groups compete for scarce resources such as goods and honor. The behavior of individuals is, in the words of Randall Collins, “explained in terms of their self-interests in a material world of threat and violence. Social order is seen as being founded on organized coercion. There is an ideological realm of belief (religion, law), and an underlying world of struggles over power; ideas and morals are not prior to interaction but are socially created to serve the interests of parties to the conflict.”¹⁷⁰

We might contrast here the “low-risk” view of law and order of the skeptical conservative with a “high-risk” view of the progressive radical.¹⁷¹ The conservative emphasizes the indispensable contribution of (legal) institutional stability in modern societies and worries about the fragility and precariousness of the existing systems of authority. He tends to feel that only where there is respect for the established order and constituted authority do people experience the security that is a prerequisite for genuine freedom. The authority and stability of the legal order is based on a fundamental consensus. The low-risk view warns us of taking this hard-won stability and consensus for granted. By contrast, the conflict model sees the established harmony as merely the product of coercion. Moreover, if you take a more optimistic view of human nature, one might be less reluctant to make relative the importance of traditions and institutions. If one judges the current outcome of the past struggles and conflicts as unjust, one might be prepared to risk the anarchic or anomic consequences of criticizing, reforming or even destroying the present social world.¹⁷² This matches with a high-risk view of law and order that, in the words of Nonet & Selznick:

¹⁶⁹ Cp. Baert, *Social Theory in the Twentieth Century*, p. 59 Lenski, *Power and Privilege*, p. 441.

¹⁷⁰ Collins, *Conflict Sociology*, pp. 56-61; Lenski, *Power and Privilege*, pp. 16, 17.

¹⁷¹ Nonet & Selznick, *Law & Society in Transition*, pp. 6, 7, 77, 78.

¹⁷² “Conservatives have traditionally been distrustful of man’s nature and have emphasized the need for restraining social institutions, while radicals have taken a more optimistic

“[...] emphasizes the potential resilience and openness of institutions. It is more careless of authority, more accepting of challenge and disarray. This approach resists the equation of “law” and “order”; it is sensitive to the fact that law characteristically upholds a specific *kind* of order in the form of received moral codes, systems of status, and patterns of power. The very concept of “order” is perceived as problematic, subject to historically changing expectations, compatible with controversy and expressive behavior. In this perspective law is valued as a resource for criticism and an instrument for change, and there is a tacit faith that the system of authority can better preserve itself, and be better, if it is open to reconstruction in the light of how those who are governed perceive their rights and reassess their moral commitments.”¹⁷³

When we see society as an arena where groups and individuals try to advance their interests over others leading to overt conflict or domination, we might also find it hard to see legal traditions as “springs of value.” The institutional world is simply the product of previous victories of previous victorious rulers who contingently won the struggle for power. In the words of Walter Benjamin, the institutions, traditions and values that are thought to be the product and foundation of some social consensus and that are handed to us from previous generations are simply “spoils of victory” whose origin we “cannot contemplate without horror.”¹⁷⁴ Unger:

“Institutions become a second order fate, but only after having been shaped and stabilized by a surprising history of fighting and compromise, of halting insight and armed illusion. People forget the sufferings and sorrows of this war, and re-imagine them as culture.”¹⁷⁵

The moment we feel we cannot identify with this order and even feel estranged, alienated or excluded from the present political order, we are

view. [...] Radicals have emphasized the importance of coercion while conservatives have argued for the importance of consensus.” Lenski, *Power and Privilege*, p. 441.

¹⁷³ Nonet & Selznick, *Law & Society in Transition*, p. 6.

¹⁷⁴ Benjamin, W., ‘Theses on the Philosophy of History’ in: Arendt, H., (ed.), *Illuminations*, Schocken Books New York 1969, pp. 254-256; cp. Luban, *Legal Modernism*, p. 40.

¹⁷⁵ Unger, *What Should Legal Analysis Become?*, p. 127.

forced to an “external” view. Under such circumstances, an “estranged outsider” finds it hard to experience the authority of the law and of government, and we might not be talking of some small minorities or scattered individuals. Unger again: “There is an important sense in which the average citizen of a rich industrial democracy – not just the member of ‘discrete and insular minorities’ – feels himself to be an angry outsider, angry at his rulers or his bosses or both and powerless to change the constraints upon his situation. Students of popular consciousness and political culture have observed that the belief that the state and big business are run as a racket to the benefit of predatory elites is widespread.”¹⁷⁶

Such an estranged outsider who sees the law as the arbitrary and unjust result of previous power struggles will find it hard to uncritically submit and identify with this political and legal community. Importantly, taking such an external and critical perspective will be a de-legitimizing first step. When we see the law as a contingent social construction and explain it in terms of specific interests instead of understanding it in terms of intrinsic qualities and founded in a genuine consensus, we are well under way to weakening the force of the ideologies that support it.¹⁷⁷ A third grade of commitment might then arise from the feeling that the current legal institutional order is bad as it is, and does not deserve our uncritical support and commitment. The existing institutional order is judged to be unsatisfactory, and we might decide that a reformation is in order. This is the next grade of commitment that we might take with regard to the institutional order: we might then take on a “reformist” attitude.¹⁷⁸

But surely, we need an idea of the direction that such reforms should take. If we want to repair the injustices that the present system (re-) produces, there probably is a conception of substantive justice with regard to which the present legal system and practice is found wanting. If we want the reform to lead to a consistent system, such a general idea should inform the reformation; we need a “critical morality” or “a critical definition of the social world” to give us a sense of direction.¹⁷⁹ An important conception of justice

¹⁷⁶ Unger, *What Should Legal Analysis Become?*, pp. 81, 82.

¹⁷⁷ Hacking, *The Social Construction of What?*, pp. 93, 94.

¹⁷⁸ Hacking, *The Social Construction of What?*, p. 20.

¹⁷⁹ Bourdieu, *The Field of Cultural Production*, p. 44.

might be provided by a profound experience of *inequality* in modern liberal capitalistic societies (or even in the world at large). Socio-economic inequalities are often justified as inevitable or even necessary by-products of freedom, economic growth and welfare. The present legal institutional structure can be seen as both sustaining and legitimizing the resulting inequality and domination. Surely, this view has roots in a Marxist diagnosis of the modern world.

Another critical perspective can be provided by the Hegelian critique. Modern abstract societies are supported by abstract legal systems informed by a liberal procedural or “formalist” conception of justice. This is the kind of social or legal order that real people of flesh and blood longing for a real full-blooded community sharing substantial values or goals cannot readily identify with. What we might try to strive for is both a substantially moral and rational order that makes both a real freedom *and* real community possible.¹⁸⁰ Those who feel estranged from the present social world might aspire to a combination of both more equality and community, and this aspiration does seem to feed on a deep human need in modern societies. For many in modern societies, justice does not only mean fair treatment by other people (and especially by the government and its legal officials) but “it also means getting a fair shake out of life.” Such substantial conception of justice leads to the idea that people should have equal starting positions in their individual lives and that they should at least be compensated if they are left with less than others for reasons that are beyond their power to influence.¹⁸¹

This is mainly a socio-economic aspiration, but it might already require a greater redistribution of scarce resources than most liberal democracies presently realize.¹⁸² More of a socio-cultural (symbolic or ideological) nature is, however, the critical dismantling of the *perceptions* of the individuals in society, because many of the inequalities, and the domination that it makes possible, cannot be repaired merely by means of economic policies. For instance, activists in the struggles of the so-called “politics of identity” are motivated by the experience that the “projecting of an inferior or demeaning image on another can actually distort and oppress.” Thus to be denied equal

¹⁸⁰ Cp. Luban, *Legal Modernism*, p. 14.

¹⁸¹ Friedman, *Total Justice*, p. 43.

¹⁸² Kennedy, *A Critique of Adjudication*, p. 279.

recognition can be a severe form of oppression, and this oppression can only be fought at an ideological level.¹⁸³ Of course, a social definition (like being Dutch) is just as much beyond the individual's power to change as a biological definition (like being a woman). In addition, there is always a dangerous tendency to naturalize or "biologize" traits that are actually merely of a social nature, which makes them even more irreproachable. We should, moreover, not forget that the biological definitions also always have an irreducible social aspect (like that of being a woman). Both biological and social definitions in fact strongly influence the chances and choices of such individuals or members of certain groups. In recent decades many who feel oppressed in such a way have demanded, not just equality before the law in the sense of equal formal rights, but legitimacy or recognition.

The battle for recognition is often described as "symbolic," but, if one does not take a naturalist or formalist stance, to qualify something as such is not a disqualification.¹⁸⁴ To the contrary, the moment one realizes how oppressive our collective symbolic or ideological world can be, and how real and concrete the consequences for certain individuals and groups are – Bourdieu uses the term "symbolic violence"¹⁸⁵ – we realize that we might need to develop a critical stance with regard to these perceptions. This form of oppression and domination is not easily detected nor combated by means of the naturalist or formalist methods and instruments. As we are dealing with the ideological sphere, this seems to require both critical and "soft" methods that focus on language and meaning such as "semiotics" or "deconstruction."¹⁸⁶

Duncan Kennedy describes the goals of his leftist project as "to change the existing system of social hierarchy, including its class, racial, and gender

¹⁸³ Taylor, *The Ethics of Authenticity*, pp. 49, 50; Lenski, *Power and Privilege*, pp. 401, 402.

¹⁸⁴ "The battle is often described as "symbolic." In the first place symbolic tools have instrumental uses. In the second place, human beings want dignity as well as bread; honor alongside cash." Friedman, *Total Justice*, pp. 110, 140, 143.

¹⁸⁵ Cp. Bourdieu, *Language and Symbolic Power*, pp. 50, 51, 209-213.

¹⁸⁶ Cp. Kennedy, D., 'A Semiotics of Legal Argument', *Syracuse Law Review* vol. 42 1991; Derrida, J., 'Force of Law: The "Mystical Foundation of Authority",' in: Cornell, D., Rosenfeld, M. & Carlson, D.G., *Deconstruction and the Possibility of Justice*, Routledge London 1992.

dimensions, in the direction of greater equality and greater participation in public and private government.”¹⁸⁷ Given these goals, we can understand why Kennedy does not want to feel limited to using scientific methods that are considered to yield hard or objective results. Such methods explicitly abstract away from what he thinks is both interesting and urgent about our social world: “The more “hard” (capable of being counted, highly verifiable and replicable, intersubjectively “valid”), the more “narrow” (partial, fragmentary, meaningless)” Kennedy states. To combat the existing hierarchies and domination, we should not abstract away from this symbolic oppression but engage it on the level of ideology. The things that interest Kennedy are “broad,” like justice and liveliness, “so they can be grasped in their totality only be means that are “soft” (contestable, subjective, vague.)” Kennedy:

“I think the way to respond to this dilemma is by using the hard/narrow methods of representation strategically, in the interest of making the soft/broad methods plausible, and in order to poke threatening holes in what seem to me false as well as legitimating and deadening representations of others. We don’t believe only statistics, and we don’t believe only prose that sings totality. Why not use both?”¹⁸⁸

We saw that the opposition might take the form of a conservative argument for the necessity or the inevitability of the present institutional and social arrangements. This means that before actual reforms can take place, it will be necessary to confront such claims to necessity. What will be argued for is the contingency (historicity) of the present arrangements, and then the legitimacy of these arrangements will be critically questioned. Thus, the past two paragraphs can be thought of as efforts to de-legitimize the efforts to make fairness or efficiency the leading “necessary” or “inherent” conceptions of justice. But these conceptions also have critical power against each other and against other competing conceptions. This makes it possible to criticize and make relative claims to objectivity and necessity.

In such an effort to de-legitimation, one might try to “unmask” the existing institutions by showing that they serve some other hidden function

¹⁸⁷ Kennedy, *A Critique of Adjudication*, p. 6.

¹⁸⁸ Kennedy, *A Critique of Adjudication*, pp. 17, 18; “we need narrative as well as causal explanations to make sense of political and legal experience.” Luban, *Legal Modernism*, p. 14.

than they officially seem to do.¹⁸⁹ “Conservatives insist that might is employed only as the handmaiden of right, to restrain and rebuke those who put self-interest above the common good, while radicals maintain that the state employs might to suppress right, in defense of selfish interests.”¹⁹⁰ There is always the possibility that a dominant group or class has used the law to further their particular interests by making the coordinated efforts of the society and its legal institutions as a whole serve their particular goals. It is very well possible that elites or other powerful groups in society succeed in masquerading their particular interests as universal interests: Gerhard Lenski even argues that it is relatively easy to transform force in authority, or might into right. When an elite gains power, it is in a position to influence the legal institutions and rewrite the law, and this gives the elite the opportunity to reformulate their special interests in terms of general and impersonal (universal) terms, thus giving them the allure of necessity and objectivity. But laws can always be written in such a way that they favor some particular part of society more than other segments. “In short, laws may be written in such a way that they protect the interests of the elite while being couched in very general, universalistic terms.”¹⁹¹

Also the freedom that the modern liberal state promises might be judged to be illusory to a large extent, and people generally are not conscious of this fact: “People never see the axioms and postulates of their own society; these are too close up to be visible. Free choice and its values are among these axioms. The limits of free choice are even more invisible.”¹⁹² The reformist might decide to “unmask” the rhetoric of freedom that informs the current emphasis on formalism by making the arbitrary limits of freedom in the present institutional arrangement visible. There is thus a false appearance of determinacy about the axioms and postulates of the social world, which hides

¹⁸⁹ Hacking, *The Social Construction of What?*, pp. 20, 6; cp. Mannheim, K., *Essays on the Sociology of Knowledge*, Routledge and Kegan Paul London 1952.

¹⁹⁰ Lenski, *Power and Privilege*, pp. 50, 51; “The problem is to show that the so-called deeper element really is common and not just another particular interest masquerading as universal.” Kolb, D., *The Critique of Pure Modernity*, p. 114.

¹⁹¹ Lenski, *Power and Privilege*, pp. 41, 50-53.

¹⁹² For instance: “What is not presented by the media – or by society in general – cannot be chosen; the consumer never even knows these possibilities exist.” Friedman, *The Republic of Choice, Law*, p. 132.

a true determination by arbitrary powerful elites. This means that people “alienate their powers.” Kennedy suggests “that it would be in some sense better to determine our fates without alienating our powers”¹⁹³

Surely, in such a project “positivism,” in whatever form, is a kind of generic enemy. Positivist approaches generally proceed from “givens,” from something that is regarded as objective and inevitable – as “present.” The modernist view that combats this positivist project seems to defend the freedom that we threaten to alienate (maybe without our realizing it). This last freedom is, it seems, “the freedom not to believe in or be determined by our own mental constructions.”¹⁹⁴ Justice and morality are not given with some social structure or political order; they are the product of a constant effort. According to Pierre Bourdieu, because a political morality “does not fall from heaven, and is not innate to human nature,” we need a critical definition of the social world, or a sociology, that will free us by “freeing us from the illusion of freedom, or even more exactly, from the misplaced belief in illusory freedoms. Freedom is not something given: it is conquered – collectively.”¹⁹⁵ The conquering of freedom starts with unmasking the illusions of the present order by a critique of the presented necessities.¹⁹⁶ The critical visions of sociologists like Marx and Weber are instrumental in this defense. But many also feel that philosophers like Nietzsche, Heidegger, Foucault and Derrida provide weapons to fight “the Enlightenment pretension to construct a science of society modeled on natural science.”¹⁹⁷

An important source for “the unmasking turn of mind” is the sociology of knowledge of Karl Mannheim. This strategy of unmasking does not entail

¹⁹³ Kennedy, *A Critique of Adjudication*, pp. 18, 19; cp. Unger, *False Necessity*.

¹⁹⁴ Dale, *In Pursuit of a Scientific Culture*, p. 10; cp. Foucault, ‘What is Enlightenment?’ in: Rabinow (ed.), *The Foucault Reader*, p. 36.

¹⁹⁵ Bourdieu, *Practical Reason*, p. 144; Bourdieu, *The Logic of Practice*, p. 15.

¹⁹⁶ Cp. Unger, *False Necessity*; Unger, *Knowledge and Politics*, p. 129; “in social evolution nothing is inevitable but thinking makes it so.” Von Hayek, *The Road to Serfdom*, p. 54.

¹⁹⁷ Megill, *Prophets of Extremity*, p. 4; “the empiricist and positivist citadels of English speaking social philosophy have been threatened and undermined by successive waves of hermeneuticists, structuralists, post-empiricists, deconstructionists and other invading hordes. [...] Among these general transformations, perhaps the most significant has been the widespread reaction against the assumption that the natural sciences offer an adequate or even a relevant model for the practice of the social disciplines.” Cp. Skinner (ed.), *The Return of Grand Theory in the Human Sciences*, p. 6.

facing the opposition by trying to refute ideas and arguing for other better ones, but by trying to undermine or de-legitimate them. One does so if one succeeds in exposing a hidden function that the ideas or arguments serve. If some conception, idea, policy or regulation is shown to serve the interests of some (dominant) group in society while the pretension is to serve universal justice, this unmasking will strip this conception of “a false appeal to authority.” The moment one sees the “extra-theoretical function” of an idea, it will lose its “practical effectiveness.” Unmasking an idea does not so much involve the “disintegration” of an idea but stripping it of a false appeal to authority. We might call this “unmasking constructionism,” and it can be readily combined with the reformist attitude with regard to the institutional order.¹⁹⁸

The premise is that when we become aware of the axioms and postulates of our own institutional world and society, we can subsequently “transcend” these axioms, postulates and institutions. This requires that we actually can break through the formative contexts of our practical or conceptual world.¹⁹⁹ Compare Roberto Unger:

“Our practices of discourse can be changed, sometimes deliberately but always slowly. The reason why it is hard for us to change our practices is that, to a large extent, we are the sum of practices of discourse and action. The reason why we can change our practices nevertheless is that they never exhaustively define us: we enjoy a residue of productive and creative capacity that they fail to use up or tame. The goals we pursue through them are never our only possible aims. [...] Underlying this fact is a persistent feature of our relation to the institutional and discursive contexts in which we act: there is always more in us than there is in them, more powers of insight, desire, and association than they are capable to countenance or to prevent. Consequently, people have a two-sided consciousness in even the most entrenched and all-inclusive society and culture. They never surrender completely to the routines and pieties that seem to have mastered them. They secretly entertain a mental reservation. If the established order suffers a trauma,

¹⁹⁸ Hacking, *The Social Construction of What?*, pp. 20, 6; cp. Mannheim, *Essays on the Sociology of Knowledge*.

¹⁹⁹ Unger, *Passion*, pp. 8, 23-36; Unger, *Knowledge & Politics*, pp. 223-231; Luban, *Legal Modernism*, p. 55.

they may suddenly cast aside what they seemed, so completely, to have embraced.”²⁰⁰

To change our practices and fight the injustices and conquer our freedom, we not only need a critical definition of the present world but to unmask the legitimating ideology that sustains it. We need compelling alternative visions to inspire and move people to action. Influential thinkers like Nietzsche, Heidegger, Foucault and Derrida might provide transcendent and compelling cultural visions that radically break from previous thought.²⁰¹ Such “transcendence” might be referred to as a typical modernist goal both in art and in politics²⁰² and, indeed, Kennedy describes his project as “modernist” because it tries to achieve “transcendent aesthetic/emotional/intellectual experiences at the margins of or the interstices of a disrupted rational grid.” But how does one generate such disrupting transcendent experiences? Kennedy:

“The practical activity [...] centers on the artifact, something made or performed (could be high art, could be the most mundane object, could be the deconstruction of a text, could be the orchestration of dinner). [...] Making and appreciating artifacts are two paths toward transcendent experience, but they regularly upset the theory of experience. The analytics, which in modernism are always ex post, [...] emphasize the omnipresence of repressed or denied “primal forces” or “dangerous supplements” and the plasticity of formal media that presuppose that they are not plastic.”²⁰³

We might associate this with a typically Romantic aspiration. Among the Romantics, the route to metaphysical transcendence is “characteristically by

²⁰⁰ Unger, *What Should Legal Analysis Become?*, pp. 63, 127.

²⁰¹ Megill, *Prophets of Extremity*, p. 1.

²⁰² “Art in our century has displayed a modernist tendency toward constant revolution and the invention of new forms. It has been important to break the former rules and create new modes of art. [...] Yet it refuses what in many other areas of life is a typically modern desire for unity and system, for *the pure form*.” Kolb, *The Critique of Pure Modernity*, pp. 18, 19; Luban, *Legal Modernism*, pp. 51-54; Unger, *Passion*, p. 33; Kolb, *The Critique of Pure Modernity*, pp. 18, 19.

²⁰³ Kennedy, *A Critique of Adjudication*, pp. 7, 8, 346.

way of aesthetic creation.”²⁰⁴ If we feel estranged from modern society as an order that is able to manipulate people as “a totality of the anonymous” and from the “abstract society of strangers” that partly results from the abstract and empty liberal conceptions of rationality, justice as fairness, this might provoke criticism and protest. This abstract anonymity evokes a Romanticist counterforce, which is also very much part of the experience of being modern, that seeks to realize values and conceptions of justice that seem generally neglected or even consciously oppressed in liberal-democratic modern societies.²⁰⁵

The Romantic modernist tries to “open up” or “break open” the axioms, postulates or formative contexts that seem “closed” in the general dominant discourse and that determine us. The modernist tries to disrupt this experience of “closure” to reveal as yet unthinkable and unsuspected new possibilities. One might even say, as Kennedy does, that the modernist critique becomes a goal in itself. Kennedy describes it as a “project of originality, of innovation for its own sake, the “cult” of innovation.”²⁰⁶ But surely by now the reformist attitude seems far too cautious and ineffective. The more one feels estranged with regard to the legal order and the society that it legitimizes and sustains, the less one can expect a patient, piecemeal reforming attitude. This estrangement will motivate a “rebellious attitude” with regard to the legal system. When we feel we should radically and thoroughly transform it, we reach a new grade of commitment. The rebel is at a greater distance from the established order and feels pragmatic, piecemeal tinkering and reformism to be inadequate.²⁰⁷

²⁰⁴ Dale, *In Pursuit of a Scientific Culture*, p. 5; According to Megill, “the dominant philosophy of the later twentieth century has become “aestheticism,” by which he means the “tendency to see ‘art’ or ‘language’ or ‘discourse’ or ‘text’ as constituting the primary realm of human experience.” Dale, *In Pursuit of a Scientific Culture*, p. 282; cp. Megill, *Prophets of Extremity*; However, Posner classifies Kennedy as a (although rather defeatist) “pragmatist.” Posner, *The Problematics of Moral and Legal Theory*, p. 270.

²⁰⁵ “this abstract anonymity has caused the re-emergence of romanticism, with Heidegger’s existentialism as a late fruit of this romantic turn.” Zijderfeld, *The Institutional Imperative*, p. 50.

²⁰⁶ Kennedy, *A Critique of Adjudication*, p. 349.

²⁰⁷ Hacking, *The Social Construction of What?*, pp. 20, 6; What is required according to Roberto Unger is “total criticism” and “revolutionary reform” not partial and piecemeal reformism. Cp. Unger, *Knowledge and Politics*, pp. 1-7; Unger, *False Necessity*, pp. 64,

The “loss of faith” in the existing system and its normative claims is now complete. There is no especial faith in the rationalizing and universalizing claims and aspirations of modern law; a totally objective and rational legal science and practice is not possible. But Kennedy argues that the absolute opposite – that rationality and objectivity are totally *impossible* – is just as hard to prove. Kennedy has lost faith in this project as well: “I’m not sure that it’s impossible to show – maybe someone can show – that objectivity, rationality, the subject, and representation are all impossible. I just don’t think anyone has shown it so far, but I could be wrong. I’ve lost faith in the enterprise of trying to show it.”²⁰⁸ The proof that rationality and objectivity are impossible would require metaphysical arguments and an epistemology that are just as unavailable as the arguments to the opposite.²⁰⁹ We should wield a less pretentious conception of objectivity. “There is no other available meaning for objectivity than “a representation that hasn’t been falsified (yet),” which is not to deny that personal, moral and political commitments influence this representation. In Kennedy’s view, this justifies methodological eclecticism.²¹⁰

However, Kennedy also tells us that there is no guarantee whatsoever that the loss of faith automatically means that the alienated powers are recovered from “those owners of the technical discourses used to pursue their conscious or unconscious political projects through the manipulation of the supposedly objective and rational “sciences” of understanding society” – in one word, from the legal experts. Of course, there is also no guarantee that the ordinary or mobilized and re-possessed citizens would decide for a freer, more egalitarian or communitarian society. Moreover, the loss of faith also means that there is no more belief in the project of the “reconstruction” of society because this will only lead to more new reifications, necessities, to new claims to rightness based on more theoretical claims and visions. Although

65; But compare Kennedy: “No critique is truly global [...] structuring and critiquing are interminable activities.” Kennedy, *A Critique of Adjudication*, pp. 33, 275-277.

²⁰⁸ Kennedy, *A Critique of Adjudication*, pp. 8, 286, 350.

²⁰⁹ Kennedy, *A Critique of Adjudication*, pp. 1, 86, 89, 92, 276, 277; “Clearly, developing an indeterminacy argument that functions at the metaphysical level is a daunting and complicated task, but that has not cowed many heretics.”; Lucy, *Understanding and Explaining Adjudication*, pp. 194, 199, 200.

²¹⁰ Kennedy, *A Critique of Adjudication*, pp. 15, 16.

losing faith in theory does not mean giving up doing theory, it “means giving up the expectation of rightness in the doing.”²¹¹ Many will immediately see that there is a deep tension between Kennedy’s political program and the intellectual underpinnings that structurally undermine all claims to rightness. Surely they undermine political aims as well: “If the struggle for a more communitarian and egalitarian society is not, either implicitly or explicitly, ultimately a claim to rightness, then what can it be?”²¹²

But we might derive from Unger an “intrinsic” good in the modernist project; we might see a certain ethics in the critical rebellious attitude. If we embrace the idea that no institutional order or social vision can ever fully exhaust the types of human association and connection, we need to continually scrutinize and criticize the established meanings and institutions. The modernists have “the belief that the individual can expect no progress from the revision of his contexts. He can assert his independence only by a perpetual war against the fact of contextuality, a war that he cannot hope to win but that he must continue to wage.”²¹³ Kennedy also describes this unwinnable “war” as a goal in itself, and refers to it as a “cult of innovation.”²¹⁴

Thus we have entered the world of the rebel and left that of the reformist. But an activist who moves beyond the world of ideas and argument and who tries to change the world by means of all sorts of action might be called a “revolutionary.”²¹⁵ The revolutionary (whether he has a clear view of a more just post-revolutionary world or not) tries to subvert the established order by trying to cause a “crisis.” According to Walter Benjamin the history of the oppressed teaches us that the “state of emergency” is the rule, and not the exception. We should be aware of this and realize that there are circumstances

²¹¹ Kennedy, *A Critique of Adjudication*, p. 361.

²¹² Lucy, *Understanding and Explaining Adjudication*, p. 9.

²¹³ Unger, *Passion*, p. 36; “we are an infinite within a finite. The finite, in this instance, is the open series of social worlds – the formative institutional and imaginative contexts – that we construct and inhabit. The infinite is personality. It is also an inchoate, open-ended fund of the forms of practical collaboration or passionate attachment that may bind people together. Central to the whole argument of *Politics* is the notion that no one context can be our permanent home: the place where we can institute all the varieties of practical or passionate connection that we have reason to want.” Unger, *False Necessity*, p. 12; cp. Unger, *Law in modern society*, p. 101.

²¹⁴ Kennedy, *A Critique of Adjudication*, p. 349.

²¹⁵ Hacking, *The Social Construction of What?*, p. 20.

– Benjamin specifically had the fascism of his time in mind – in which it is our task to actively bring about such a state of emergency.²¹⁶ The revolutionary is trying to cause a crisis such that all the taken-for-granted (or “reified”) truths, perceptions and values in the community will be thoroughly disrupted. They will come to life and start moving again. Bourdieu argues that the most durable effect of the crisis is “the symbolic revolution as profound transformation of styles of thought and life, and, more particularly, of the whole symbolic dimension of everyday existence.”²¹⁷ If one is dissatisfied with the present “symbolic dimension of everyday existence” such a transformation might seem promising.

Bourdieu points especially to the “cultural producers” – writers, artists, public intellectuals – to critically scrutinize and even subvert the established order: “The cultural producers are able to use the power conferred on them, especially in periods of crisis, by their capacity to put forward a critical definition of the social world, to mobilize the potential strength of the dominated classes and subvert the order prevailing in the field of power.”²¹⁸ What is needed is a critical definition of the social world in a crisis that sets all established perceptions and definitions afloat. But this is not enough. The revolutionary will try to provoke a crisis. For the revolutionary, therefore, the ultimate political problem is not of Truth or even Justice in the abstract. The ultimate political problem is one of “action.”

But, as Bourdieu tells us, “In the case of the social world, speaking with authority is as good as doing” and surely, legal professionals are authoritative speakers with regard to the law. As “legal discourse is a creative speech which brings into existence that which it utters,” legal speech has real effects

²¹⁶ Benjamin, W., ‘Theses on the Philosophy of History’ in: *Illuminations*, p. 257.

²¹⁷ Bourdieu, *Homo Academicus*, p. 193; “Revolution [...] must have a profoundly dislocating effect upon the traditions or rules by which men normally live. [...] The rationalization of government [...] is prevented from evolving further to a more complete, even totalitarian, mode of bureaucratic rationalization [...] only because of the continued force of moral and aesthetic values which men will somehow continue to see as limits on pure rationality.” Nisbet, *The Sociological Tradition*, pp. 143, 145; “people [...] never surrender completely to the routines and pieties that seem to have mastered them. They secretly entertain a mental reservation. If the established order suffers a trauma, they any suddenly cast aside what they seemed, so completely, to have embraced.” Unger, *What Should Legal Analysis Become?*, p. 127; cp. Sennett, *The Fall of Public Man*, pp. 183-194.

²¹⁸ Bourdieu, *The Field of Cultural Production*, p. 44.

in the social world and is “as good as doing.” Much legal speech is even “the limit aimed at by all performative utterances” because such action brings into being what it declares there to be and thereby affects and often changes our socio-political environment.²¹⁹ A lawyer must therefore realize the impact of his choices, for the way in which he uses his language is also normative. We should therefore continually critically reflect on our commitments, intentions and actions.

²¹⁹ Bourdieu, *In Other Words*, Essays, p. 53; Bourdieu, *Language and Symbolic Power*, p. 42.

6.

Conclusion: The Legal Junction

If we critically scrutinize our commitments, the present presentation of the modern “legal junction” might serve as a signpost. We might even come to the conclusion that in our daily practice we are not consistent, that we vary our priorities with the specific problems and situations that we are confronted with. Such inconsistency is problematic if one dogmatically strives for integrity. Especially if integrity is thought of as an aspiration to moral perfection, as the ideal of being in perfect harmony with the larger community, inconsistency will be experienced as an indication that something must be wrong. There is something fundamentally suspicious about identifying with one project one moment and changing one’s commitments in the next. Only one genuine commitment can be “authentic,” and actions that are not in accordance with that commitment are merely “pragmatic” or “strategic” and sometimes even outright “opportunistic.” Surely, such qualifications are considered to be disqualifying.

However, we can think of this need for integrity as variant of the kind of “foundationalism” that has been rejected by philosophers who have left behind the preoccupations of both modern philosophy and modernism. This aspiration seems to imply that there is some sort of “essence” of right action that is valid at all times and places which might be found in the nature of things, or which might be found “inside” oneself if one thinks of this essence as a unified authentic “subject” to which one should remain true. Only if such an essence informs our actions are we a person of integrity or an “integral whole.”¹ But antifoundationalism implies that there is no deeper

¹ Cp. Kronman, A.T., *The Lost Lawyer*, pp. 80-87.

metaphysical foundation for human practices. Nor can we find deep inside ourselves some grounding “subject” as an integral whole or as authentic; this subject is a product of our imagination and not some metaphysical entity. “Anti-foundationalism” and the “Death of the Subject” are thus marks of a move beyond modern philosophy and modernism: “post-modernism.”²

Religious authority and community is generally justified by reference to some immanent or transcendent truth that the believer should conform to. In chapter two, we came across the temptation to metaphysically ground both legal authority and the (legal) community. In the first place, it seems attractive to ground the legitimacy of the law and its practices in some conception of “natural law,” which supposes that some basic set of legal norms and principles are intrinsic to the fabric of the universe. If we “historicize” this natural law idea, we might arrive at the conception of a Legal Tradition as a historically evolving Grand Narrative – the product of the collective experience and wisdom of jurists, with its own distinct logic and necessity. We added the idea that Tradition is the product of the subtle art of legal reasoning and prudence. But reference to “nature” or “historical logic” is certainly a metaphysical claim, and the postmodernist urges us to stay clear of such pretentious and even oppressive discourse. Moreover, “all too often this language of artistic and practical prudence has been made to immunize legal thought against social criticism.”³

But if we cannot ground authority in some substantial and stable metaphysics, we seem to be left with guarding the authority of the law by making sure that the people in society who are subject to the law can identify with it. Indeed, “the more that law conforms to prevailing moral opinions, including the moral opinions of relevant subcultures such as the commercial community, the easier it is for lay people to understand and comply with law.”⁴ Especially in modern democracies where authority of learning, individual distinction and taste are weakened, men come to “distrust all authority that does not seem to arise from public opinion.”⁵ The repudiation of traditional forms and dogmas in order to make room for policies that

² Best S., & Kellner D., *Postmodern Theory*, Critical Interrogations, Macmillan Press London 1991, pp. 4, 5.

³ Unger, *What Should Legal Analysis Become?*, p. 62.

⁴ Posner, *The Problematics of Moral and Legal Theory*, pp. 208, 209.

⁵ Nisbet, *The Sociological Tradition*, p. 124.

further freedom and welfare reinforces public opinion. De Tocqueville looked upon this development with anxiety because it seems to make each man's common sense the guide to all difficulties and mysteries, which has a "sterilizing effect on intellectual distinctions."⁶

Indeed, public opinion and common sense seem rather flimsy and volatile as grounds for legal decisions. Moreover, it is hard to know how the vast majority really thinks about all sorts of complicated moral and technical issues that legal professionals are confronted with. Still, somehow modern legal professionals, at the risk of losing authority in society, have to keep in touch with and be responsive to public opinion. Modern legal professionals therefore walk the thin line between intellectual conservatism and cautious conformism with shifting moral opinions.

Moral consensus and public opinion in society might not only be unstable, but public opinion might also be rather repugnant to the sensitive mind. For instance, Arnold Gehlen pointed to a growing "primitivization" of modern consciousness. Modern man often demands a simplicity and plasticity that the law, with its technical sophistication and subtle distinctions, often cannot offer. Moreover, this demand for simplicity often lines up with a demand for emotional satisfaction that is illustrated by modern man's tendency to express himself in slogans. "It is represented by the mass media which continuously bombard us with their slogans and nervous shocks promising us the newest, the latest, the best and the deepest."⁷

Modern mass media also play a role in another trend in modern society. Partly because of the influence of the mass media, "authority has been reshaped in the image of the celebrity."⁸ The media have broken the monopoly of face-to-face influences and role models, and today people identify with and model themselves on media celebrities. Even the authorities of the traditional institutions – like Royalty and the Papacy – have to fall in line with this celebrity culture, and this has important consequences. Celebrity status implies constant exposure to the public and keeping a close connection with public opinion. "Celebrity culture embraces primarily heroes of popular culture; secondarily, political leaders. It has expanded, however, to take in all

⁶ Nisbet, *The Sociological Tradition*, p. 129.

⁷ Zijderveld, *The Abstract Society*, p. 87.

⁸ Friedman, *The Republic of Choice*, p. 117.

the elites, including the modern businessman.”⁹ Indeed, it has expanded to advocates, public attorneys and even to judges.

Public opinion can be a Pandora’s box. Unger observes that many citizens of modern democracies feel themselves to be “angry outsiders” with regard to the establishment: “The belief that the state and big business are run as a racket to the benefit of predatory elites is widespread.”¹⁰ Charismatic politicians or activists can mobilize this discontent, and the mass media will provide them with the necessary exposure. Advocates or public attorneys, if not judges, will learn how to manipulate this new reality when legal practices are confronted with this discontent. The more traditionally minded legal professionals might find modern mass culture, with its “hypes” and its constant emotional appeals, rather demeaning, and they will find it hard to conform to its “logic.” However, public opinion, images, slogans, sound bites and all sorts of hyped products and trends, constitute much of our common world today, and modern legal professionals will have to learn how to manage modern media exposure and prudently audit their public image, however unpleasant this may be.

Although rational-legal authority is neither very emotionally satisfying nor always even very convincing in modern culture, it does function as an indispensable counterweight to the flimsy and volatile nature of public opinion and to democratic power play. Legal procedures, codified legal rules and legal principles help to transform conflicts such that certain important goods are included in the deliberation. One primary good is that all parties involved are heard with respect and consideration.¹¹ Secondly, the outcome of legal conflict resolution is at least to some degree predictable, and to this effect, it is more important that there are fixed general rules and procedures than what these rules actually prescribe. Moreover, the procedures also make it possible to establish the facts in a conflict, facts that easily escape those carried away by emotions and indignation. Science can help to keep a cool head and falsify or expose all sorts of myths and fables that are presented as factual truths.

⁹ Friedman, *The Republic of Choice*, p. 124.

¹⁰ Unger, *What Should Legal Analysis Become?*, pp. 81, 82.

¹¹ Hampshire, *Justice is Conflict*, pp. xi, 11.

The good of individual emancipation is served with the development of a system of rational, fair and formal rules and procedures. Modern legal science and formalistic legal practices fall in line with a general trend in modern societies to abstraction and generalization – in short, an increasing “intellectualization.” This is “the tendency to think and speak in terms of highly abstract models and formalistic categories.”¹² In chapter three, I investigated the idea of a legal science that rationalizes the law by purging it of all particular and contingent content and arrives at the universal forms. Essentially, this is a process of “de-situating” legal questions, “that is, divorcing them from the compromising association of their cultural contexts.”¹³ Thus we abstract away from legal subjects and their contexts all particular qualities – particulars that should not be included, as the law should treat all parties as free and equal.

“Means and form, as objects of reason, are public; ends and substance, as concerns of desire, are private,” Unger writes. When desiring “men are private beings because they can never offer other more than a partial justification for their goals in the public language of thought.”¹⁴ This inspires the formalist project of rationalizing and formalizing the law so that legal reason provides a shared and objective public discourse in a deeply divided modern society. Formal legal knowledge facilitates reasoning from a shared vocabulary that narrows the differences between individuals on the level of their particular goals and desires.

However, the push toward universality that informs this project should not be taken too seriously. The forms, fairness and rationality of the law should not be presented as a metaphysical foundation for legal institutions and practices either. Postmodern anti-foundationalism urges us to regard formal/technical law talk as a discourse like any other. Universalization or rationalization is not a method that provides us with privileged access to some transcendental legal reality. Moreover, there is always the danger that this formal knowledge is elevated above the cultural contexts from which they were abstracted away. In addition this elevation also threatens to elevate the

¹² Zijderfeld, *The Abstract Society*, p. 87.

¹³ Toulmin, *Return to Reason*, p. 78.

¹⁴ Unger, *Knowledge and Politics*, p. 45.

“haves” of this knowledge above the “have-nots,” who are often radically excluded from the intricate technicalities of modern law.¹⁵

In addition, the idea of the “legal subject” as the result of abstracting away from all particular subjects should be critically scrutinized. This subject is merely a construction. However, it is a construction with unfortunate or even immoral consequences because it has normative power. Human beings are always “situated” in linguistic and social contexts that are *not* unequivocal. Thus, like these contexts, humans are “socially and linguistically decentred and fragmented.”¹⁶ The least we should do is resist the temptation to see the abstract subject as “transcendental.” Any scientific formal conception of human beings is an abstraction that both denies and represses human existence as underdetermined, indeterminate and inexhaustible. Scientific formalist conceptions are alienating and de-humanizing. For Roberto Unger this culminates in a plea for casuistic analogical reasoning, without the mystifications that traditionally accompanied this art:

“Analogical reasoning and knowledge of people are constant companions: the interpretation of self-experience and the interpretation of other people’s experience provide each other with the analogies that rescue us, if only a little bit, from both solipsism and self-obscurity. The suppression of analogical judgment in legal thought would, if it could be accomplished, result in a radical dehumanization of the law: one method for people, and another for rules. We should rid ourselves of both the superstition of conceptual imperialism and the counter-superstition of legal art. Practices are practices. They serve multiple, half-articulate purposes, as they also shape the aims we can pursue and the possibilities we can entertain. They lack permanent essences.”¹⁷

But this lack of permanent essences (of practices, of subjects, of the law) can be acknowledged without radically changing the daily legal practices. Professionals might take an “ironic” stance with regard to the ideals of rationality, objectivity and fairness and justify them with reference to political

¹⁵ Cp. Toulmin, *Return to Reason*, p. 100.

¹⁶ Best & Kellner, *Postmodern Theory*, pp. 4, 5; cp. Carty, A. (ed.), *Post-Modern Law, Enlightenment, Revolution and the Death of Man*, Edinburgh University Press Edinburgh 1990.

¹⁷ Unger, *What Should Legal Analysis Become?*, p. 62.

goods rather than to metaphysics.¹⁸ The ironist realizes that nothing has an intrinsic nature or a real essence: “So she thinks that the occurrence of a term like “just” or “scientific” or “rational” in the final vocabulary of the day is no reason to think that Socratic inquiry into the essence of justice or science or rationality will take one much beyond the language games of one’s time.”¹⁹ So long as the ironist feels that the language games can be justified with reference to important political goods, she self-consciously plays along.

Surely, such an ironic commitment is not a very solid base and, as there is no “intrinsic” good to be served with the formalist attitude, the ironist might too easily succumb to instrumental or pragmatic reasoning. We saw how instrumentalist purposive reasoning necessarily refers to particular and contingent circumstances and thus endangers the ideals of equality, legal certainty and “objectivity” (in a non-metaphysical sense). Moreover, with regard to the effectiveness and efficiency of legal decisions and actions, professionals are at the mercy of (social) scientists, whose claims will be hard to assess from the legal angle.

However, the most important problem is that we may expect an unwillingness to submit to any rule of which the subjects do not understand the ulterior purpose or the use.²⁰ Legal rules and procedures cannot be goods in themselves, and thus do not provide us with an independent criterion. They are constantly evaluated by means of a criterion that comes from the *outside*: Does this rule or procedure serve any purpose here? Whether it serves its purpose depends on the particular and contingent circumstances. The danger is that professionals are constantly forced to discuss the conflict on terms that are, ideally, external to the legal formalities. The practices and the institutions will be made thoroughly and irremediably relative. This problem cannot be resolved, but legal professionals will have to realize that the risk of this quest for purpose may be a “naturalization” of the law.

The modern world is strongly influenced by the positivist’s idea that the “scientific method” exhausts rationality itself. Importantly, the forms of “verification” allowed by modern science have been institutionalized by modern society: “What can be ‘verified’ in the positivist sense can be verified

¹⁸ Cp. Rawls, *Political Liberalism*.

¹⁹ Rorty, *Contingency, irony and solidarity*, pp. 74, 75.

²⁰ Cp. Von Hayek, *The Road to Serfdom*, pp. 177, 178.

to be correct [...] or to be probably correct, or to be highly successful science, as the case may be; and the public recognition of the correctness, of the ‘highly successful scientific theory’ status, exemplifies, celebrates, and reinforces images of knowledge and norms of reasonableness maintained by our culture.”²¹

This goes *a fortiori* for those scientific claims regarding the good of material or economic progress, “liberating us from drudgery and incapacity and giving arms and wings to our desires.”²² But here again abstract and formalist reasoning are both a blessing and a curse. “Professionals who are committed to particular disciplines, technical or economic, too easily assume that economic and technical issues can be abstracted from the situation in which they are put to use, and so can be defined in purely disciplinary terms.”²³ Again this implies a narrowing of the perspective that can have unfortunate consequences. To begin with, such reasoning (or calculations) promise neutrality and objectivity, and this promise cannot be completely fulfilled. Maximizing welfare is political choice and depends not only on “doing one’s sums right” but “doing the right sums,” which does imply taking notice of the relevant social, historical, and cultural contexts of human needs and desires – “in other words, doing calculations that are directly relevant to the practical situation in question.”²⁴

The reference to epistemological foundations with regard to the scientific theories is tempting here as well. There is a tendency in the socio-economic sciences to think of the data as “facts” found by means of empirical research. The scientific theories in which these facts are recorded are representations, which, if they are true, correspond to empirical reality. Such a theory grounds truth in a metaphysical reality that we do not have any scientific access to. As I argue in this book, such foundationalism can be avoided by taking a pragmatist stance. “For the pragmatist true sentences are not true because they correspond to reality, and so there is no need to worry what sort of reality, if any, a given sentence corresponds to – no need to worry about what “makes” it true.” But, importantly, this pragmatism stays close to the positivist notion

²¹ Putnam, *Reason, Truth and History*, p. 106.

²² Unger, *What Should Legal Analysis Become?*, p. 6.

²³ Toulmin, *Return to Reason*, p. 61.

²⁴ Toulmin, *Return to Reason*, p. 66.

that knowledge is power, a tool for coping with reality. “He drops the notion of truth as correspondence with reality altogether, and says that modern science does not enable us to cope because it corresponds, it just plain enables us to cope.”²⁵

We thus arrive at a pragmatic positivism that is well aware of the shortcomings of de-situated abstract reasoning. But there is yet another point. The instrumentalist attitude, just like the legal formalist, reaches “objectivity” (again in a non-metaphysical sense) by focusing on means instead of goals. Only “means and form, as objects of reason, are public.”²⁶ Modern policy science, which exclusively focuses on means, will not provide us with a very firm basis for men’s identification with the community. Because this is so, in modern society people tend to find substitutes in all sorts of ideology, “myths and fables” that, from the perspective of the scientific experts, is mostly counterproductive and “irrational.”²⁷ However, both legal formalism and scientism are at the root of this; “irrationalism” is their dialectical shadow.

The constant resurgence of such myths and fables might also be connected to the fact that in modern society and in its institutions and associations, individuals participate only in partial, distanced and formal roles. “Individuals expose only a limited portion of their humanity to their fellows in each of the narrow strips of life on which they meet.”²⁸ Modern society makes it possible for people to share certain purposes or interests, but makes it very hard to shape the various groups into a full-blooded community, since this requires seeing the individual members as complete persons instead as merely jobholders or formal role-occupants. The interaction may be rational and efficient when it concerns the allocation of scarce means and resources; it is in shared narratives and moral universes that human beings feel fully human. Compare Charles Taylor:

“One of the great objections against Enlightenment disengagement was that it created barriers and divisions: between humans and nature; and perhaps even more grievously, within humans themselves; and then also, as a further consequence, between human and human. This last seems to follow both because of the atomist

²⁵ Dale, *In Pursuit of a Scientific Culture*, pp. 158, 159.

²⁶ Unger, *Knowledge and Politics*, p. 45.

²⁷ Taylor, *Hegel*, p. 411.

²⁸ Unger, *Law in modern society*, p. 168.

affinities of naturalism and because the purely instrumental stance to things allows for no deeper unity in society than that of sharing certain common interests.”²⁹

Disciplinary emphasis on the technicalities of the human sciences imposes a set of “professional blinders that direct their attention to certain narrowly defined considerations, and often prevent them from looking at their work in a broad human perspective.”³⁰ But if both the formalist and the pragmatist legal experts succeed in resisting the inclination to define their own field with its specialized theories and methods, as the final reality, they might become both more modest and more sensitive to the complexity of what transcends his world and knowledge.³¹ This is particularly difficult for the pragmatist because she is very much oriented towards concrete and deliberate action as she constantly sees room for improvement and progress. Indeed, many of these ideals could be realized if to achieve them were the sole aim of humanity. Regrettably, there are an infinite number of good things of which we cannot hope to achieve more than a few within our lifetime. Von Hayek:

“That these things cannot be all done at the same time, that any one of them can be achieved only at the sacrifice of others, can be seen only by taking account of factors which fall outside any specialism, which can be appreciated only by a painful intellectual effort – the more painful as it forces us to see against a wider background the objects to which most of our labors are directed and to balance them against others which lie outside our immediate interest and for which, for that reason, we care less.”³²

Modern science and philosophy have introduced several distinctions and dichotomies that have been institutionalized in modern society. To establish man’s moral independence and technological power, the Enlightenment project works from man’s separation from nature, society, and the “other” generally. The result is the alienation of the individual – the subject – from objectified nature, from an oppressive community, and from other human beings. It created barriers and divisions among human beings, but also

²⁹ Taylor, *Sources of the Self*, p. 383.

³⁰ Toulmin, *Return to Reason*, p. 140.

³¹ Zijderfeld, *The Abstract Society*, pp. 83, 84; Toulmin, *Return to Reason*, p. 140

³² Von Hayek, *The Road to Serfdom*, p. 60.

“within humans themselves” – like the division between reason, which is objective, and desire, which is subjective. Modern man therefore moves “in two worlds only precariously bound together.”³³ Moreover, the modern world leaves much to be desired. Consider these words of David Kolb:

“Our world of universal imposition carries out fully the understanding of the being of things in terms of presence that has been with the West since the Greeks. Our world fulfills the Platonic desire for the essential being of things to be open and steadily present, but we have no transcendent dimension or any goal for *eros*. We have Hegelian mutual connection and transparency, but without dialectical tension and depth. It is achieved will to power but without Nietzsche’s contention and shifting perspective. This world would be familiar to Comte: open facts ready for recording and manipulation but without Comte’s religion of humanity.”³⁴

In response to these barriers and divisions, and the lack of goals, tension, depth, contention, shifting perspectives and humanism in the modern world, nineteenth-century intellectual history was, according to Peter Allen Dale, in essence a search for “an adequate replacement for the lost Christian totality” with “Romanticism” as its most significant offshoot. The Romantic Movement proceeded from a critique of Enlightenment values and the “wasteland” that the French revolution left behind. This movement “was bent on remaking Christianity for the modern world, secularizing it as a metaphysical idea of social and individual wholeness, in which all the great enlightenment antinomies, mind and nature, infinite and finite, self and other, might be reconciled anew.”³⁵

This quest remains alive in a “critical counter-culture” that rejects the conventional morality of the Enlightenment and in “aesthetic modernism” emerging in “avant-garde modernist movements and bohemian subcultures, which rebelled against the alienating aspects of industrialization and rationalization, while seeking to transform culture and to find creative self-realization in art.”³⁶ Especially modern art was thought to have a “dislocating” or even “transformative” quality that disrupted the one-

³³ Unger, *Knowledge and Politics*, p. 45.

³⁴ Kolb, *The Critique of Pure Modernity*, p. 148.

³⁵ Dale, *In Pursuit of a Scientific Culture*, p. 5.

³⁶ Best & Kellner, *Postmodern Theory*, pp. 2, 3.

dimensional and objectifying perspective of modern man such that new ways of seeing and experiencing become possible. This, in turn, fed the hope that cultural change might advance social change. In chapter five, I explored the form this critical counter-culture takes in the legal world.

Romanticism and aesthetic modernism often took on a metaphysical guise. For instance, Nietzsche's metaphysics of the "will to power" and his call for "aesthetic self-realization" fit this ideal well. Also Heidegger explicitly engaged in a metaphysical quest, trying to deconstruct the modern technological perspective, which is the result of a "forgetting of being," and restoring a perspective that overcomes the separation of subject to object thus once again opening up to the richness, multiplicity and diversity of being. Heidegger's existentialism can be seen as a reaction to modern abstract bourgeois society.³⁷

But here, too, we are urged to radically resist the metaphysical seduction because it cannot be other than a longing for foundations that we just do not have any access to. Moreover, modernist aestheticism "is open to the postmodern critique [because] it glorifies the author."³⁸ The idea of some author's intention or genius as a unified and autonomous source of meaning is philosophically incoherent. There is no such clear-cut and heroic "subject" determining the meaning of the artifact, heroically undermining and transforming the social conventions and "revaluating all values." Postmodernists argue against the dogmatic moralism, the stifling seriousness and elitism of modernism and plead for pluralism, irony and the bridging of the gap between artists and audience, critics and the laity.³⁹

However, we need to save some of the modernist seriousness and commitment. According to Roberto Unger the modernist quest can proceed without a longing for some metaphysical "terminal station" and even without the belief that we can expect any real progress with the revision of his social and cultural contexts. The full potentiality of human beings is always limited by these contexts, and Unger therefore calls for a constant fight for a critical independence to keep our minds open for something else. Therefore the modernist fights his "perpetual war against the fact of contextuality, a war

³⁷ Cp. Zijderfeld, *The Institutional Imperative*, p. 50.

³⁸ Kennedy, *A Critique of Adjudication*, p. 347.

³⁹ Best & Kellner, *Postmodern Theory*, pp. 10-14.

that he cannot hope to win but that he must continue to wage.”⁴⁰ To this effect we need a critical distance, and we should constantly put “our ideals and self-understandings through the skeptic’s flame, risking nihilism for the sake of insight.”⁴¹

According to Lawrence Friedman, legal practices are always the expression of “moral hegemony” in a society, and without a doubt, these practices carry the “imprimatur of state and society.” Law, he argues, “has the sole franchise on official norms. It holds the monopoly of legitimate violence, and it expresses what was intended to be a monopoly of legitimacy itself.” The legal professional self-consciously acknowledges that the legal system cannot help to “enforce prevailing moral standards.”⁴² Moreover, to protect its fragile authority and not risk alienating the public, the law should not distance itself too much from the prevailing moral standards. The promise of modern legal professionalism still includes guarding the authority of the law by keeping it in close interaction with mainstream morality. But, surely, the good that is served is an ambivalent good; it needs to be carefully balanced with other goods – goods that are, however, just as ambivalent.

The law’s entwinement with politics and the prevailing morality is a reason why, measured against Richard Posner’s standards of professionalism, the law’s professionalization “has not proceeded far at all.”⁴³ The effectiveness and efficiency of legal practices and institutions still leave much to be desired. The demand to be responsive to the desires within the political community and to be effective in the realization of the goals that it sets itself, can only be ignored at the risk of losing legitimacy. But here again this good cannot claim priority at all costs because it is, again, an ambivalent good. To mitigate its dangerous side effects, we need to commit to other goods the law serves. One set of such goods can be ordered under the citizen’s demand for equal respect, objectivity, transparency and fairness from both the government and legal officials in the modern liberal state. But here again the good of liberal respect and the formalist ideal of the rule of law is an

⁴⁰ Unger, *Passion*, p. 36.

⁴¹ Unger, *Passion*, p. ix.

⁴² Friedman, *The Republic of Choice*, p. 71.

⁴³ Posner, *The Problematics of Moral and Legal Theory*, p. 203.

ambivalent good, and under certain circumstances, we need to be prepared to take a critical stance, or even distance from this demand also.

Legal practices are therefore the permanent stage of fundamental political and moral conflict and strife: “What was withdrawn from the main staging ground of politics and culture, reappears, however, under the disguise of technical expertise, in the practice and discourse of the professions.”⁴⁴ As Weber writes: “Our civilization destines us to realize more clearly these struggles again, after our eyes have been blinded for a thousand years – blinded by the allegedly or presumably exclusive orientation towards the grandiose moral fervor of Christian ethics.”⁴⁵ The existentialist conclusion that we reach is that these choices and decisions cannot be unequivocally dictated by some kind of logic; legal practices are the stage for inevitably ungrounded choices. “This is the source of Weber’s doctrine of the difference between “facts” and “values,” of the inevitable choice that one always makes when one decides what to do.”⁴⁶

Indeed, legal practices are the stage for the most fundamental ideological conflicts of the conflicting themes of traditionalism and modernism or those between – “on the one hand, the values of community, moral authority, hierarchy, and the sacred and, on the other hand, individualism, equality, moral release, and rationalist techniques of organization and power.”⁴⁷ What emerges is a jurist who tries to be a loyal and trustworthy “insider” and a critical and innovative “outsider” at the same time. “There emerges the characteristic figure of the modern jurist who wants – and needs – to combine the cachet of theoretical refinement, the modernist posture of seeing through everything, with the reliability of the technician whose results remain close to the mainstream of professional and social consensus.”⁴⁸

One might call this a cynical posture, as Unger does, but one might also appreciate this legal professional for not being too dogmatic and too self-important, for not trying to single-mindedly impose on the community one particular good as the result of his need for integrity or authenticity.

⁴⁴ Unger, *What Should Legal Analysis Become?*, pp. 113.

⁴⁵ Weber, ‘Science as a Vocation,’ in: Gerth & Wright Mills (eds.), *From Max Weber*, p. 149.

⁴⁶ Collins, *Max Weber*, p. 36 (emphasis added).

⁴⁷ Nisbet, *The Sociological Tradition*, p. ix.

⁴⁸ Unger, *The Critical Legal Studies Movement*, p. 10.

Postmodern authority, ironic formalism, pragmatic positivism and anti-foundationalist modernism, each cannot claim exclusivity. Indeed, they should not do so for the goods that are served in the modern world are structurally ambivalent, and this amplifies the modern or postmodern appreciation of “pluralism” as something that we should not try to overcome but as a good in itself. In other words, in an open society, diversity has become part of our ideal world, and even the tragic tension that we necessarily experience between our ideals – as the fulfillment of some ideals always excludes the fulfillment of others – has become valuable as it constantly reminds us of our human limitations and imperfection.

We end up with a “legal junction” and conclude that we cannot reduce the junction to a one-way road to salvation by resolving the fundamental tensions in modern law. But this is not a plea for “anything goes” relativism. Such relativism seems to be merely the mirror-image of the dogmatic demand for absolute (metaphysical) guarantees. There is no need to conclude that any wild opinion is as good as any other. There is still room for objectivity with regard to both morality and facts resulting from rational argument or empirical research.⁴⁹ This is not to suggest that abandoning the quest for metaphysical guarantees is but a minor feat; indeed, by doing so, the world does take on a new appearance. At the same time this is not a radically new world, especially not for modern legal professionals who as “connoisseurs of chaos” specialize in making decisions under conditions of uncertainty.

⁴⁹ Cp. Putnam, *Reason, Truth and History*, pp. 126, 148.

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Arie-Jan Kwak

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Nederlandse samenvatting

De moderne jurist wordt in de dagelijkse praktijk geconfronteerd met een verwarrend geheel van verwachtingen en verplichtingen. Sterker nog, vaak lijken de eisen die aan juridische professionaliteit worden gesteld innerlijk tegenstrijdig. In dit proefschrift wil ik deze ervaring van tegenstrijdigheid onderzoeken. Als we er van uitgaan dat professionalisme (ten opzichte van amateurisme) een bepaalde belofte inhoudt dan is de vraag: wat is de specifieke belofte van de moderne juridische professional? Het antwoord dat in deze studie wordt gepresenteerd is een complex antwoord. Deze complexiteit ontstaat omdat in de huidige praktijk de volgende vier beloftes te onderscheiden zijn:

De jurist bewaakt het gezag van het recht en zijn representanten.

De jurist realiseert transparantie en rechtszekerheid.

De jurist is effectief en efficiënt.

De jurist heeft een open, kritische, en innovatieve houding, en durft initiatief te nemen om tot grotere (maatschappelijke) rechtvaardigheid te komen.

Deze eisen laten zich goed begrijpen vanuit vier verschillende waardeoriëntaties die in onze samenleving toonaangevend zijn. In hoofdstuk 1 onderzoek in op een inleidende wijze deze oriëntaties: gemeenschap, vrijheid, technologie en cultuur- of maatschappijkritiek. Deze waardeoriëntaties staan binnen een moderne pluriforme cultuur op gespannen voet met elkaar en dit spiegelt zich in de theorie én de praktijk van het recht. Als we elk van de vier eisen absoluut nemen dan levert dat een specifieke consistente opvatting van juridische professionaliteit op. Als we die vier ideaaltypische juristen vervolgens met elkaar confronteren, kunnen we de spanningen op het spoor komen die het moderne recht kenmerken.

In de inleiding en het eerste hoofdstuk leg ik mijn methode nader uit. De constructie van een ideaaltypische jurist vanuit één van de bovengenoemde waarden vereist het *begrijpen* (in de zin van *Verstehen*) van een bepaalde professionele houding, van bepaalde kennisclaims en van de instituties die door deze waarde geïnformeerd zijn. Zolang deze houding, kennis en instituties als waardevol worden beschouwd in de gemeenschap, houdt de daarbij horende opvatting van professionaliteit zijn specifieke

aantrekkingskracht. Met andere woorden, de achterliggende waarden *rechtvaardigen* de professionele houding, de kennisclaims en de instituties waarmee deze waarde gerealiseerd kan worden.

De conclusie zal zijn dat de moderne juridische professional vier verschillende waardeoriëntaties dient die niet altijd even goed met elkaar te verenigen zijn. Sterker nog, de vier waarden zijn structureel ambivalent en we blijven dus achter met een “juridisch knooppunt.” De dilemma’s laten zich echter niet *a priori* op theoretisch niveau oplossen, ik probeer de knoop alleen te ontwarren om zo de professionele dilemma’s van de moderne jurist beter begrijpen.

De kunst van gezag

Het gezag van het recht laat zich verbinden met de waarde van gemeenschap. Vooral het verlangen naar een gemeenschap van gedeelde waarden, gebruiken en betekenissen biedt een sterke legitimatie voor juridisch handelen. Een professioneel engagement met autoriteit en gemeenschap leidt tot een meer traditionele opvatting van juridische professionaliteit. De juridische traditie laat zich dan begrijpen als een door generaties juristen tot recht gevormde geheel van waarden, gebruiken en gedeelde betekenissen in de gemeenschap. In hoofdstuk 2 construeer ik vanuit dit idee een traditioneel type van juridische professionaliteit.

De juridische traditie laat zich niet geheel in abstracte of formele termen beschrijven, noch laat het zich begrijpen middels een afstandelijke kritisch-analytische houding. Integendeel, de jurist wordt geacht zich te laten vormen door de traditie en zich te committeren aan de instituties en gebruiken van het recht. Een goede jurist wordt binnen de beroepsgroep ingewijd in de juridische praktijken en gebruiken die hij wordt geacht op een onafhankelijke en onpartijdige wijze te dienen. De jurist moet zich aan de juridische traditie ‘geven’ en hier past een hermeneutische houding, waarbij hij zich persoonlijk identificeert met het recht als geheel van juridische normen en waarden die gemeenschap mogelijk maken.

De waarden van het recht maken “substantiële rationaliteit” mogelijk: in concrete geschillen wordt een rechtvaardige oplossing gevonden. De vertaalslag van de waarden van de gemeenschap naar het concrete geval vereist het begrijpen en kunnen uitleggen van het recht (hermeneutiek) en praktische wijsheid. Deze moet worden gevormd door een intensieve

juridische training en door ervaring. Juridische praktische wijsheid laat zich het best begrijpen als een “kunst”: de kunst van het verenigen van individuele leden van de gemeenschap in gedeelde waarden of een gedeeld belang in een specifieke situatie. Een dergelijk juist juridisch oordeel kan de leden van de gemeenschap werkelijk verzoenen: de individuele belangen die hen verdeeld hield worden overwonnen en de partijen weten weer wat hen werkelijk bindt als leden van de gemeenschap.

Dit type jurist bewaakt zo de gemeenschap in situaties waar conflict dreigt te escaleren en de eenheid wordt bedreigd. Dit idee van de jurist als een loyale en onafhankelijke bewaker van de gemeenschap draagt bij aan het gezag van de jurist en aan het wekken van een betrouwbare indruk in de gemeenschap. Dit gezag is echter kwetsbaar en lijkt zelfs een kwestie te zijn van alles of niets. Óf de gezagsdrager is daadwerkelijk de vertegenwoordiger van de gemeenschap en de verdediger van haar waarden en belangen, óf de gezagsdrager is een ‘bedrieger’ die de collectieve macht die hij vertegenwoordigt gebruikt om deelbelangen, of zijn eigenbelang te dienen. Ongefundeerde roddel en achterklap kunnen al een dermate reputatieschade opleveren dat de autoriteit niet meer kan functioneren en dit verklaart waarom er speciale instituties bestaan die de juridische autoriteiten moeten beschermen tegen dergelijke aantasting van het gezag. Deze instituties – de levenslange aanstelling van de rechter, het procesmonopolie en de vaste declaratie van de advocaat bijvoorbeeld – maken het mogelijk dat de jurist onafhankelijk en belangeloos kan opereren.

Deze traditionele jurist zal zijn handelen rechtvaardigen door te verwijzen naar het algemene belang, of naar de waarden die gemeenschap mogelijk maken en beschouwd het nastreven van het individuele eigenbelang in de maatschappij of op de vrije markt als bedreigend voor de gemeenschap (omdat het kan leiden tot conflict en onverzoenlijkheid). De jurist zal zich dus ook, middels een betrekkelijk aristocratische houding, *distingeren* van de moderne maatschappij waar deelbelangen of zelfs individueel eigenbelang het handelen bepalen. Hij moet bovendien institutioneel worden afgeschermd van het oordeel van de leden in de maatschappij omdat juridische kennis en juridisch handelen niet goed te beoordelen zijn voor de leek. Omdat zijn gezag kwetsbaar is, is het wenselijk dat de jurist alleen door gelijken wordt beoordeeld. Als er klachten zijn over het functioneren van juridische

professionals zal hij door een tribunaal van *peers* worden beoordeeld en eventueel gewaarschuwd of gestraft.

De juridische professional verbindt in het ideale geval zijn persoonlijke eer aan het feit dat hij de gemeenschap als geheel dient en ervaart dus ook geen scherp onderscheid tussen zijn private persoon en zijn publieke persoon als ambtsdrager. Deze jurist zal zijn persoonlijke private belang structureel ondergeschikt maken aan het publieke belang. Dat is een kwestie van *noblesse oblige* voor hem, want hij is zich zijn publieke verantwoordelijkheid voortdurend bewust. Deze professional is dus ook trots op zijn beroep, op de beroepsgroep waar hij toe behoort, en op de belangrijke rol die deze speelt in de gemeenschap. Hij spiegelt zich aan de meest voorbeeldige, succesvolle leden van de beroepsgroep en probeert zo te voldoen aan de standaarden van professionele perfectie die in de groep leven. Dit levert ook een hiërarchische professionele (sub-) cultuur op die versterkt wordt door de institutionele hiërarchie. Deze hiërarchie mondt uit in één hoogste rechtsprekende instantie die het mogelijk maakt dat het recht met één mond spreekt.

Deze traditionele opvatting laat zich vervolgens contrasteren met twee moderne opvattingen van professionaliteit die respectievelijk kunnen worden begrepen vanuit de moderne waarden van individuele autonomie en van de effectiviteit van de overheid in het realiseren van de doelen die de democratische gemeenschap zichzelf stelt.

Vrijheid en formalisme

In de moderne politieke cultuur wordt algemeen aanvaard dat de waarde van individuele vrijheid en ontplooiing bescherming verdient. Als we deze waarde centraal stellen zien we dat de opvattingen over recht en de daarmee samenhangende opvattingen over juridische professionaliteit veranderen want vanuit de eis van bescherming van het individu rijst een veel formalistischer en proceduralistischer beeld op van recht en juridische professionaliteit dan het traditionele beeld te zien gaf. In hoofdstuk 3 wordt dit perspectief nader onderzocht.

De veranderingen in het recht gaan gepaard aan ontwikkelingen die de moderne maatschappijen typisch doormaken. Twee belangrijke kenmerken van moderne samenlevingen zijn, ten eerste, voortdurende sociaal-culturele verandering en, ten tweede, geografische en sociale mobiliteit. Deze dynamiek in moderne maatschappijen kan worden gezien als het gevolg van

industrialisatie en van (rationeel-) kapitalisme. Het gevolg van alle beweging is een ‘maatschappij van vreemdelingen,’ individuen die minder intensief met elkaar in contact komen, waardoor ze ook abstracter voor elkaar blijven.

Deze individuen onttrekken zich ook gemakkelijker aan de autoriteiten en aan de gemeenschappelijke waarden, gebruiken en betekenissen van de gemeenschap. Hierdoor wordt een groter pluralisme mogelijk en er kan zelfs een cultuur ontstaan waarin juist het vinden en ontwikkelen van je unieke of ‘authentieke’ zelf een belangrijke waarde wordt. Ieder kritiekloos conformisme aan voorbepaalde waarden en rollen wordt verdacht en gezien als valse schijn. De vraag is echter hoe in deze pluralistische “maatschappij van vreemdelingen” nog een (juridische) orde kan worden gerealiseerd?

Dat kan door de mensen aan te spreken op hun redelijkheid. Individuele vrijheid en orde gaan samen als individuen zich realiseren dat voor een vreedzame en succesvolle samenleving duidelijke regels en procedures nodig zijn waar iedereen zich aan houdt. De ervaring van de “maatschappij van vreemden” suggereert het beginpunt van deze nieuwe redelijke orde: ieder subject is gelijk in een abstracte zin. Dit abstracte (rechts-) subject wordt gezien als autonoom en verantwoordelijk voor zijn handelen juist omdat hij vrij en gelijk is. Omdat een systeem van juridische regels en procedures een gemeenschap mogelijk maakt, is het redelijk zich aan deze regels en procedures te houden want deze maken uiteindelijk ook vrijheid mogelijk. De juridische regels reguleren een publiek domein en de individu die zich hieraan conformeert en binnen de regels blijft, is verder vrij in het bepalen van zijn eigen normen, waarden en doelen.

Om paternalisme en moralisme door autoriteiten (door de overheid, maar ook door juridische professionals) te voorkomen moet de lijn tussen publieke juridische gebondenheid en private individuele vrijheid zo scherp mogelijk zijn. Het recht moet daartoe tot een systeem van heldere en duidelijke procedures, regels en sancties worden gemaakt en hier ligt een taak voor de moderne rechtswetenschap. Het rechtssubject mag niet meer afhankelijk zijn van het onnavolgbare en oncontroleerbare oordeel van de jurist, maar moet de juridische waarheid direct uit de wet of andere rechtsbronnen kunnen leren kennen. In het ideale geval is rechtsspraak nu een mechanische toepassing van vooraf kenbare juridische regels en procedures. Dit is om verschillende redenen een onbereikbaar ideaal, maar het gelijke respect dat de iedere vrije

individu verdient vereist dat de jurist naar voorspelbaarheid, transparantie en naar een gelijke behandeling streeft.

Omdat juristen nu een meer afstandelijke kritisch-analytische houding innemen zien we een heel andere juridische cultuur ontstaan. De traditie wordt niet hermeneutisch maar kritisch op haar formele redelijkheid onderzocht. Juridische instituties and procedures worden zodanig ‘gerationaliseerd’ dat er een abstract formeel systeem van regels kan worden geformuleerd dat zich ondubbelzinnig laat codificeren en toepassen. Gezocht wordt naar universaliteit, transparantie en communiceerbaarheid. Er is niet langer een streven naar “substantiële rationaliteit” maar naar “formele rationaliteit”. De moderne jurist wordt gezien als niet meer dan een expert op het gebied van het formele, positieve recht. Het vergt geen *Bildung* of historisch bewustzijn, of andere bijzondere talenten of eigenschappen om een dergelijke expert te worden. Bepaalde analytische vaardigheden en formele kennis van het formele, gepositieerde recht is nu voldoende.

Een sterke onderlinge solidariteit tussen de juristen is ook niet meer nodig. De gemeenschap van juristen wordt ook een “maatschappij van vreemdelingen” en de interactie in de opleiding en in de dagelijkse praktijk wordt minder intensief. De onderlinge verhoudingen worden hier ook geformaliseerd en de uiterste consequentie is dat hier formele regels (gedragscodes) worden opgesteld om de juristen voor te schrijven hoe ze zich in bepaalde situaties moeten gedragen. Deze regels beschermen ook de jurist tegen aantasting van hun formele gezag. Ze zullen elkaar alleen corrigeren als het handelen duidelijk in strijd is met deze codes en het liefst deze correctie over laten aan een centrale autoriteit.

Niet langer wordt geprobeerd om partijen met een beroep op de gemeenschapszin te verzoenen. Juristen zullen niet moraliseren met betrekking tot gemeenschappelijke waarden en normen, maar proberen de partijen louter aan te spreken op hun redelijkheid. Het beschrijven van conflictbeslechting als een esoterische “kunst” is elitair en verhult een onderliggend paternalisme en moralisme. De jurist als ‘expert professional’ pretendeert echter geen bijzondere kennis te hebben van de waarden en betekenissen die de gemeenschap binden. Deze juridische expert claimt alleen kennis van de formele regels en procedures en hoe die moeten worden toegepast en de gemeenschap die deze jurist bewaakt is niet meer dan een formele gemeenschap: een rechtsstaat als “een glazen huis.”

Deze expert brengt een scherpe scheiding aan tussen zijn publieke persoon (een persoon met een formele rol in de gemeenschap) en zijn ‘echte’ authentieke zelf die hij bewaart voor zijn privé-leven. Er hoeft geen persoonlijk engagement te zijn in de publieke rol; sterker nog, dat engagement zal door partijen als moralistisch of vooringenomen worden gezien. De partijen in het geding willen dat hun persoonlijke waarden en belangen voorop staan en op een transparante wijze worden getoetst aan het bestaande stelsel van juridische normen.

De juridische expert kan, als hij formeel juist handelt, een indruk van onafhankelijkheid en onpartijdigheid wekken. Het gezag van het recht zit niet in het welgevormde oordeelsvermogen en het karakter van de door de traditie en het beroep gevormde jurist, maar in het recht als een formeel consistent systeem van regels en procedures want een hieruit afgeleid juridisch oordeel wordt aanvaard als neutraal en onpersoonlijk. De jurist is onafhankelijk en onpartijdig omdat hij niet meer is dan een ‘spreekbuis’ van de algemeen geldende en in algemene termen geformuleerde wet. Bovendien is het juridische regelsysteem voor iedereen gelijk en maakt maatschappelijke status of rol ook niet meer uit. De universaliteit van een dergelijk oordeel benadert dat van de universaliteit van de rede. De standaarden van professionele juist handelen worden daarmee zuiver formele standaarden en de institutionele hiërarchie wordt een zuiver formele hiërarchie die alleen door de rede wordt voorgeschreven. De hiërarchie is wel nog steeds nodig om fouten te corrigeren en het recht met één mond te laten spreken.

In het ideale geval hoeft deze jurist niet in het bijzonder van de maatschappij te worden afgeschermd omdat zijn handelen transparant en redelijk is. Ieder persoon die beschikt over voldoende analytische vaardigheden en kennis van het recht kan het juridische handelen narekenen en/of voorspellen. Juridisch juist redeneren laat zich gemakkelijk onderscheiden van juridisch onjuist redeneren en de fouten zullen in de procedures worden gevonden en gecorrigeerd. De indruk dat juridische professionals onderling het hand boven het hoofd houden zal verder maatschappelijk onaanvaardbaar zijn en alleen teveel fouten zal het “legaal-rationele gezag” van de jurist aantasten.

Alle macht aan het volk

De moderne wereld is niet alleen een wereld van een grote geografische en sociale mobiliteit, ze is ook een wereld waarin technologie een bijzonder grote rol speelt. Moderne technologie en mobiliteit zijn natuurlijk zelfs sterk met elkaar verbonden. De moderne wetenschap heeft de moderne mens niet alleen een enorme kennis opgeleverd over onze natuurlijke én sociale omgeving, maar ons ook de middelen gegeven om deze omgeving te beïnvloeden: technologie. In het vierde hoofdstuk wordt onderzocht wat dit voor de politieke cultuur en het recht betekent.

Nu de moderne mens grote technologische macht heeft, rijst de vraag wat hij met deze macht moeten doen. Iedere moderne gemeenschap moet maatschappelijke doelen formuleren en in een pluralistische moderne samenleving zijn deze niet vanzelfsprekend en vooraf gegeven. Democratie is een oplossing voor dit probleem: de meerderheid beslist. Omdat democratie sterk lijkt te zijn verbonden met de technologische cultuur (als je geen macht hebt over je sociale en natuurlijke omgeving hoef je geen doelen te formuleren en dient de democratie nergens toe) legitimeren democratisch gekozen bestuurders zich ook door middel van het formuleren van gemeenschappelijke doelen en gaat de politieke discussie voor een belangrijke deel over de verdeling van de schaarse middelen waarmee deze kunnen worden gerealiseerd.

Het recht is een heel belangrijk instrument voor het realiseren van veel van dergelijke politieke doelen. Het recht is dan geen doel op zich meer, maar een middel waarmee door de politiek geformuleerde “extrinsieke” doelen moeten worden gerealiseerd. De rechtvaardiging van het recht ligt ook in de democratisch gelegitimeerde doelen en daarmee buiten het recht. Dit biedt echter een nieuwe kans voor de verwetenschappelijking van het recht. In tegenstelling tot allerlei normatieve en “intrinsieke” rechtvaardigingen van het recht, kunnen deze externe doelen worden geformuleerd in concrete, empirisch meetbare termen. We kunnen dan onderzoeken of in de juridische praktijk deze doelen ook daadwerkelijk worden gerealiseerd, of dat het systeem bijsturing behoeft.

Als de doelen worden gerealiseerd kunnen we ook nagaan of dit op een efficiënte wijze gebeurt. Het aantal doelen dat de democratische gemeenschap zich stelt kan in principe oneindig zijn, maar de middelen zijn altijd schaars. Dus is de inzet van schaarse middelen een voortdurend onderwerp van debat

in de democratie en efficiëntie biedt een norm waarmee velen in redelijkheid zullen instemmen. Immers, hoe efficiënter we de middelen inzetten hoe meer doelen we kunnen realiseren. Er is bovendien een vrij brede consensus ontstaan over de vraag hoe we de middelen in de gemeenschap kunnen maximaliseren. Het vrije markt kapitalisme maakt een steeds groeiende welvaart mogelijk die vervolgens het realiseren van allerlei maatschappelijke doelen mogelijk maakt.

Het recht wordt nu gezien als een systeem van regels en procedures dat buiten zichzelf gelegen doelen dient, doelen die zo concreet mogelijk zijn geformuleerd en die juristen op zo efficiënt mogelijke wijze moeten realiseren. Dit vraagt een heel nieuw professioneel ethos. De jurist die het recht als autonoom ziet en die zich zuiver analytisch en formalistisch opstelt, wordt nu beschouwd als bijziend en rigide. De jurist moet oog krijgen voor de maatschappelijke effecten (en effectiviteit) van zijn handelen en veel kostenbewuster worden. De jurist moet op een verantwoorde manier een kosten–baten analyse maken en zich niet verschuilen achter de formele regels en procedures en de vage normatieve doelen die deze zouden dienen.

We kunnen er overigens niet op rekenen dat juristen uit zichzelf doelmatiger en efficiënter zullen worden. Juristen hebben er belang bij om zeer algemene waarden en vage doelen als legitimatie voor hun handelen te noemen. Of deze daadwerkelijk worden gerealiseerd laat zich immers niet controleren en dus kunnen ze daar niet concreet op worden afgerekend. Een realistisch beleid om juristen effectiever en efficiënter te maken richt zich ook niet op de rede of op het overtuigen van de juristen, maar direct op hun concrete belangen. In de rechtsspraak zou zich dit kunnen vertalen in het formuleren van concrete en meetbare productiedoelen. Er zal een informeel of zelfs formeel sanctiestelsel in het leven worden geroepen die de rechters een *incentive* bieden om bepaalde productie quota te halen en efficiënt om te gaan de beperkte (financiële) middelen van de rechtbanken.

Voor advocaten of notarissen kan de vrije markt kan hier een rol spelen. Het herformuleren van juridisch werk als een doodgewone ‘dienst’ als iedere andere, een dienst waar ook gewoon een markt voor kan bestaan, maakt het mogelijk om de vragers op deze markt meer invloed te geven op de professionals. De professionals worden gedwongen zich meer gelegen te laten liggen aan de eis van effectiviteit en efficiëntie door de klanten omdat ze anders van het marktplein zullen worden weggeconcurrerd. De markt maakt

het belang van de aanbieders congruent met die van de vragers en zo worden professionals uit hun ivoren toren gehaald en op het niveau van hun eigen belang om een inkomen te verwerven beïnvloed.

Dit werkt ook andersom. De moderne, pragmatische jurist moet zijn blik gefixeerd houden op de concreet te realiseren maatschappelijke doelen en de kosten in de hand houden. Om de doelen te realiseren moet het recht zich richten op de burgers als rationele behartigers van hun eigenbelang en moeten juristen niet al te naïef en idealistisch zijn over hoe mensen tot het maatschappelijk gewenste handelen kunnen worden gebracht. De jurist zal het effectiefst en efficiëntst zijn als hij door alle ideologische rechtvaardigingen heen prikt en zoveel mogelijk probeert de concrete belangenafwegingen van de burger te beïnvloeden. Dit kan door de preferenties, belangen en de rationele afwegingen van de burgers te manipuleren.

Net als het recht is ook de rede is geen doel op zich maar een instrument voor het realiseren van buiten haar gelegen doelen. Een effectief en efficiënt recht vraagt dus niet een zuiver kritisch-analytische houding van de juridische professionals. Daar waar de formalist zich focust op het conceptuele niveau van het recht, wordt de pragmatist een “social engineer,” of een “case manager” met een scherp oog voor de feiten. Deze jurist heeft een empirische en technologische blik, gaat pragmatisch te werk en laat zich niet (mis-)leiden door allerlei vage waarden en ideologische retoriek. Juridisch oordeelsvermogen en conflictbeslechting wordt nu vooral een kwestie van het afwegen en beïnvloeden van concrete, maatschappelijke doelen en belangen.

De juridische instituties en procedures worden nu ook op hun effectiviteit en efficiency getoetst en middels de instrumentele rede gerationaliseerd. Met name de instituties die de jurist moeten beschermen tegen invloed vanuit de maatschappij worden nu met het nodige wantrouwen bekeken. Deze instituties worden gerechtvaardigd door de behoefte aan onafhankelijke en belangeloze professionals. Maar in het huidige perspectief is belangeloosheid en onafhankelijkheid een fictie (een typisch professionele ideologie) die vooral dient om de belangen van de juridische professional te verhullen.

Niets is meer heilig of onaantastbaar in een technologische democratie en dat betekent dat de instituties die de juridische professionals zo onaantastbaar lijken te maken, kunnen worden hervormd. Als de politieke gemeenschap effectiviteit en efficiency wil, dan is er geen enkele rechtvaardiging te bedenken voor het uitzonderen van de juridische professional. De claim van

praktische wijsheid en inzicht in de basale waarden die de gemeenschap constitueren van de traditionele jurist zal, net als de claim van formeel-juridische expertise als een waarde op zich van de formalist, structureel door het publiek worden gewantrouwd.

Kritisch engagement

Het beschermen van de individuele menselijke waardigheid in een liberale rechtsstaat en het idee van de democratische en maakbare samenleving door middel van wetenschap en technologie zijn twee aspecten van de Verlichting. De formele- of instrumentele rede maakten een structureel kritische houding mogelijk met betrekking tot de maatschappelijke instituties en de cultuur van het *ancien régime*. De kritische houding heeft zich echter uitgebreid naar de moderne cultuur die door de genoemde Verlichtingsidealen zelf is veroorzaakt. De pretenties van de liberale rechtsstaat, vrije markt kapitalisme en de representatieve democratie, die een stempel op het recht en haar instituties drukken, worden aan kritisch onderzoek onderworpen. De Verlichting kan zich dus kritisch tot zichzelf verhouden en dit leidt tot een cultuur waarin een open, kritische en innovatieve houding, en de durf om tot grotere rechtvaardigheid te komen een belangrijke waarde vertegenwoordigen. Hoofdstuk 5 is gewijd aan dit aspect van de moderne cultuur.

De moderne technologische cultuur laat zich fundamenteel bekritisieren omdat het geen recht doet aan moraliteit, aan menselijke waardigheid en omdat het weinig ruimte laat voor gemeenschapszin. De *social engineer* neemt de bestaande preferenties en belangen van de individu als gegeven en probeert deze of te manipuleren of te faciliteren, afhankelijk van zijn professionele rol op dat moment. Of deze preferenties en belangen immoreel of asociaal zijn doet niet ter zake; het is niet democratisch om bepaalde preferenties en belangen als waardiger te beschouwen dan andere. Bovendien moeten de te realiseren doelen in zo concreet mogelijke termen moeten worden geformuleerd en dit leidt tot een massale “reductie” van kwalitatieve aspecten tot materiële, kwantitatieve begrippen. Er is een goede kans dat de doelen in termen van geld en/of macht worden geformuleerd en dit doet uiteindelijk weinig recht aan de rijke normatieve en betekenisvolle sociale werkelijkheid.

De kennis die we hebben van menselijk handelen en menselijke samenlevingen geeft ons macht over die mensen en die samenlevingen. Als we deze kennis gaan gebruiken om menselijk handelen en de samenleving naar onze hand te zetten, en dus een technologische houding innemen ten opzichte van mens en maatschappij, dan betekent dit heel concreet de manipulatie van mensen. We spreken deze individuen niet aan op het niveau van de rede of als verantwoordelijk gemeenschaps-wezen, maar manipuleren zijn behoeften, belangen en preferenties. Zo zijn ook productiequota een manier om het handelen van rechters te beïnvloeden en is marktwerking een manier om advocaten en notarissen te laten doen wat de vragers op de markt willen. We noemen dit niet voor niets de disciplinerende werking van de markt. Al is deze manipulatie democratisch gelegitimeerd, het blijft manipulatie waar we ons kritisch toe kunnen verhouden.

De (analytische of formele) rede biedt hier een antwoord op door te stellen dat juist de bescherming van het individu tegen deze machtsuitoefening de formele rechtsstaat nodig maakt. Het recht biedt een mogelijkheid om het machtsuitoefening over individuen te toetsen aan heldere en duidelijke, vooraf gestelde regels. Een voorwaarde is echter dat deze regels universele gelding hebben en *niet* in instrumentele termen worden geïnterpreteerd. Een instrumentele duiding van deze regels zou de bescherming die ze bieden te veel relatief maken aan de toevallige omstandigheden van het geval. Dit zou leiden tot grote onzekerheid met betrekking tot de rechten en plichten die in de regels zijn vastgelegd.

Maar ook naar het project van de formele rechtsstaat kan kritisch worden gekeken. De formele rechtsstaat wordt mogelijk door de maatschappij van vreemdelingen en laat zich rechtvaardigen als een geheel van praktijken om de waardigheid van de vrije individu te beschermen. Dit roept het beeld op van een “abstracte maatschappij” waarin het enige dat de individuen bindt de formele rede is. De mens is echter een op waarden georiënteerd wezen en zoekt een gemeenschap waarin hij werkelijk substantiële waarden deelt. Maar formalisme en technologische reductionisme vernietigen de gedeelde waarden en de betekeniswereld waaruit een werkelijke gemeenschap bestaat. De burger zal zich als gemeenschapswezen niet alleen vervreemd voelen van het “lege” of formele recht. Hij zal zich ook vervreemd voelen van haar representanten, de formalistische juridische experts, die geen enkele inhoudelijke waarde lijken voor te staan waar de burgers zich mee kunnen

identificeren. Een dergelijke formele gemeenschap is geen werkelijke gemeenschap en het “legaal-rationele gezag” van haar autoriteiten is geen werkelijk gezag.

De onvrede met de huidige sociale en politieke werkelijkheid – de onvrede met de liberale rechtsstaat, het vrije markt kapitalisme en het reductionistische materialisme dat haar kenmerkt – kan, aan de ene kant, leiden tot een verlangen naar een terugkeer naar de traditionele waarden. Dit leidt tot vormen van (neo-) conservatisme waarin een terugkeer naar de cultuur van gemeenschapszin, opoffering, eer en deugd wordt bepleit. De conservatief streeft naar een traditionele waardegemeenschap die mede door het recht wordt mogelijk gemaakt. De onvrede en vervreemding kan echter ook leiden tot een poging door middel van een radicalisering van de kritiek de huidige cultuur te doorbreken. Dit leidt tot een radicalisering van het geloof in een betere samenleving als iets dat nog in de toekomst ligt en waarvoor we (voortdurend) de bestaande politieke en sociale verhoudingen moeten overwinnen: modernisme. In hoofdstuk vijf onderzoek ik de professionele houding die hierbij aansluit.

Je kunt verschillende graden van engagement onderscheiden voor een dergelijk project. Een eerste stap is dat de huidige sociaal-politieke orde wordt gezien als het toevallige product van een toevallige geschiedenis. Er is, met andere woorden, niets noodzakelijk aan de huidige institutionele orde en er zijn veel meer mogelijkheden niet gerealiseerd dan we misschien geneigd zijn te denken. Dit vereist een historisch bewustzijn (en dat is een zwakke kant van de analytische en de instrumentele rede) maar we kunnen desondanks tot de conclusie komen dat het niet wenselijk is om de huidige institutionele orde grondig te hervormen en te proberen onze cultuur te veranderen. We kunnen dan spreken van een “ironische” of “pragmatische houding”: de huidige orde is niet noodzakelijk en laat wellicht veel te wensen over, maar we moeten het er mee doen. Vooral vanuit een harmoniemodel van sociale interactie kun je heel goed tot deze conclusie komen.

Als we echter de huidige verhoudingen zien als een toevallige uitkomst van een voortdurende *machtsstrijd* tussen allerlei groepen en belangen in de gemeenschap, en dus een conflictmodel hanteren, wordt het moeilijker een dergelijke houding vol te houden. Als we de toevallige uitkomst van deze strijd als onrechtvaardig en als het product van dwang ervaren, dan kan dit een sterke motivatie opleveren om je te engageren voor een rechtvaardiger

orde. Een dergelijk engagement laat zich dan als “reformistisch” kenmerken. De hervorming van de sociaal-politieke orde, en het recht dat deze orde bestendigt en legitimeert, begint met het bekritisieren van de verschillende legitimaties van die orde en haar instituties. Alle betrokkenen moeten worden overtuigd van het feit dat deze orde zich niet laat rechtvaardigen en dat ze onze loyaliteit niet verdient. Als iedereen daarvan overtuigd is, staat men misschien open voor alternatieve ordeningen.

Het kan in dit kader nodig zijn om de huidige institutionele orde en de ideologie die haar legitimeert te “ontmaskeren.” Dit betekent dat de ideologie niet als waarde op zich wordt beschouwd maar wordt gezien als een manier om achterliggende belangen van specifieke groepen en/of individuen te verhullen en te beschermen. Een dergelijke ontmaskering is een beproefde methode tot “de-legitimering” van instituties en ideologieën. In een moderne, “modernistische” cultuur is een dergelijke ontmaskering een veelgebruikt wapen waarmee ruimte kan worden gecreëerd voor innovatie, creativiteit en voor hervormingen. De modernistische houding kan zelfs worden omschreven als een “cult van de innovatie.” In een dergelijke cultuur wordt innovatie bijna een doel op zich.

De revolutionair is het meest radicaal geëngageerd. De revolutionair is zijn geloof in de bestaande politieke, sociale en juridische orde volledig verloren en wil door actief handelen een plotselinge en massale bewustwording forceren om een bewustzijnsverandering mogelijk te maken. De revolutionair probeert in de moderne gemeenschap een “crisis” te veroorzaken die leidt tot een algehele “symbolische revolutie”: een diepe transformatie van het bewustzijn van de leden van de gemeenschap. De fascinatie voor het fenomeen van de revolutie in de moderne tijd laat zich verklaren door een diepgeworteld verlangen naar het plotseling doorbreken van alle bestaande verhoudingen, betekenissen en waarden met als doel ruimte te creëren voor iets nieuws. De cult van de innovatie wordt gevoed door een modernistisch verlangen naar iets nieuws, iets spannends dat achter de horizon op ons wacht.

Ongetwijfeld zijn er activistische juristen die dit verlangen ten diepste delen. De meeste zullen echter niet zover gaan omdat ze de risico’s die ermee gepaard gaan veel te groot vinden. Sterker nog, veel juristen zullen het revolutionaire (zowel symbolische als zelfs lichamelijke) geweld niet kunnen rechtvaardigen. De rechtvaardiging ligt meestal in een onvoorspelbare toekomst en we nog maar moeten afwachten of het werkelijk blijvend onze

politieke en sociale orde ten goede komt. De ervaring met revoluties in de geschiedenis stemt ook niet optimistisch.

We blijven achter op een juridisch knooppunt waarin vier waardeoriëntaties, die elk op zich ambivalent zijn, met elkaar op gespannen voet staan. De moderne juridische professional kan geen van deze oriëntaties absoluut nemen in de voortdurend keuzes die hij moet maken in specifieke juridisch conflicten. De hoop is dat de manier waarop in deze studie de knoop is ontward zicht geeft op de spanningen die de moderne jurist in zijn dagelijkse praktijk ervaart en dat de jurist op het juiste moment tot de juiste keuzes komt. Dat blijft de belofte van de moderne professional.

Arie-Jan Kwak, augustus 2005