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Comparative Jurisprudence (I): What Was It like to Try a Rat?

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# COMPARATIVE JURISPRUDENCE (I): WHAT WAS IT LIKE TO TRY A RAT?

WILLIAM EWALD†

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† Assistant Professor of Law and Philosophy, University of Pennsylvania. This Article, an attempt to rethink the foundations of comparative law, is intended as an introductory and elementary treatment of issues that are to be discussed at greater depth in a forthcoming series of articles under the general heading of "Comparative Jurisprudence." The next articles in the series will deal with, respectively, Alan Watson's theory of legal transplants, the intellectual foundations of German corporate law, and the legal philosophy of Immanuel Kant. The present Article may be regarded as an attempt to explain why these seemingly disparate topics are in fact, from a certain point of view, closely related.

I am grateful collectively to my colleagues at the University of Pennsylvania, and in particular to Jacques deLisle, Colin Diver, Michael Fitts, Robert Gorman, Heidi Hurd, Leo Katz, Fritz Kübler, Howard Lesnick, Bruce Mann, Michael Moore, Eric Posner, Ed Rock, and Michael Wachter. I owe special thanks to Stephen Burbank and Stephen Morse for commenting, not just on one draft, but on several. My sister-in-law, Chase Reynolds Ewald, first called my attention to the animal trials of the Middle Ages. Delf Buchwald provided valuable help with the sections on the *Rechtsstaat* and on German private law. James Whitman, whose way of looking at these matters tallies closely with my own, made some exceptionally incisive and fruitful observations on an earlier draft; I try to acknowledge the specific points of influence as we go along.

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*Alle Begriffe, in denen sich ein ganzer Prozeß semiotisch zusammenfaßt, entziehen sich der Definition; definierbar ist nur das, was keine Geschichte hat.*<sup>1</sup>

The following Article attempts to describe and defend a new approach to the study of foreign law. The core idea is easy to state, although surprisingly difficult to carry out; we shall find that it leads through numerous briar patches before culminating in new and unexpected landscapes. Briefly put, the central claim is this: if comparative law is appropriately combined with legal philosophy the result is a substantially new discipline, "comparative jurisprudence," which is capable of furnishing, not just new knowledge, but a new kind of knowledge about foreign legal systems.

Strange to say, comparative lawyers have neglected to scrutinize the foundations of their discipline or to think with sufficient rigor about the essentially philosophical question: How can we best come to understand law in cultures other than our own? And this neglect has impoverished the entire subject. Indeed, as one leafs through the journals one encounters a malaise that is scarcely to be found in any other branch of the law. Comparative law, as we shall shortly see, is said by its leading scholars to be superficial and unsystematic, dull and prone to error. In part this malaise is the product of disappointed hopes; for if any subject in the legal curriculum promises to bring home the Wealth of the Indies, it is comparative law. The variability of law from culture to culture and from age to age is an epic theme, and should be a bugle call to scholarship. Alan Watson, perhaps the deepest critic of the subject, recalls that the idea of comparative law fascinated him since he began to study law: "My notion was that the study of legal developments in a number of states would, by uncovering patterns and divergences, best reveal societal concerns, and how law responds."<sup>2</sup> But he quickly discovered that the subject was bent on other goals. "Needless to say," he observed, "when, as a beginning student, I read the

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<sup>1</sup> "All concepts in which an entire process is semiotically summed up elude definition; only that which has no history can be defined." FRIEDRICH NIETZSCHE, ZUR GENEALOGIE DER MORAL, pt. II, § 13 (Leipzig, C.G. Naumann 1887). In this Article translation credit for substantial quotations is given in footnote parentheses; shorter quotations have been translated by the author *sub silentio*, as here.

<sup>2</sup> ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 107 (2d ed. 1993).

books available to me, such as H.C. Gutteridge, *Comparative Law*, or Rudolf B. Schlesinger, *Comparative Law*, I found nothing to my purpose. My concerns were not their concerns.”<sup>3</sup>

Perhaps the most serious problem with comparative law has been identified by Arthur von Mehren, who speaks of its “dispersed” and “scattered” quality and of its inability to congeal into a stable academic discipline:

Most subject matters in our curriculum, given focus by the needs of the practicing profession, experience no difficulty in establishing a core of information and theory that is carried forward, developed, and refined by succeeding generations of scholars. Work in comparative law, on the other hand, tends to be scattered and diffuse as to topic, legal system, and purpose. Although much excellent scholarship has been achieved, no shared body of information and theory, no scholarly tradition susceptible of transmission to succeeding generations has emerged. One has the uneasy feeling that comparative-law scholarship is always beginning over again, that comparatists lack a shared foundation on which each can build.<sup>4</sup>

Indeed, to judge from the words of comparative lawyers themselves, it can sometimes seem that the animating spirit of comparative law has been the Muse *Trivia*—the same Goddess who inspires stamp collectors, accountants, and the hoarders of baseball statistics.

I argue below that what von Mehren calls the “dispersed” quality of comparative law, its tendency to heap up random particles of information, is the consequence of certain deep philosophical assumptions about law. Those assumptions were explicit in the minds of the scholars who founded the modern academic discipline at the end of the nineteenth century. For a time these philosophical ideas gave useful guidance to the new subject, supplying it with a powerful methodology appropriate to the problems of the day. But gradually the range of problems has shifted; the assumptions have

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<sup>3</sup> *Id.* (footnote omitted).

<sup>4</sup> Arthur T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624, 624 (1971). He goes on to note:

The basic reasons why comparative-law scholarship is so dispersed are obvious. Unlike most other fields of legal study, comparative law is not self-defining nor is it taught in response to rather specific professional needs. Strictly speaking, there is no subject matter properly denominated comparative law; the term is simply shorthand for the comparative study of two or more legal orders.

*Id.*

been forgotten; and yet the old methodology lingers on. And in this fact, I argue, lie the roots of the present malaise.

If this argument is correct, then a philosophical re-examination of comparative law offers the best hope for a remedy. The issues here are complex, and our investigation will have to proceed on a number of different levels. One level will largely be critical. We shall need to identify the shortcomings in existing comparative law; to examine the intellectual underpinnings of the subject, and attempt to understand the way in which it has been shaped by its tacit philosophical presuppositions. The second level of investigation can then be more constructive. If we can give a precise and explicit statement of the ends to be served by comparative law; if we can tie the subject to other academic disciplines, such as legal philosophy and legal history; if we can identify certain core questions; if we can explain why certain kinds of understanding are more fundamental than others; if we can develop a rigorous methodology; if we can, in short, establish solid foundations for the subject, then perhaps on this groundwork it will be possible to construct a systematic and cumulative body of knowledge.

In this Article I propose to embark on the project of rethinking comparative law. I say "embark" because, as we shall see, the task is too large to be compassed within a single article; but at least it will be possible to show why a prolonged rethinking is necessary and to indicate a direction for future investigations.

The basic idea, which I have already mentioned, is not new. Von Mehren, in fact, years ago suggested that comparative law will become a more rewarding field of study and a more coherent academic discipline, if it is pursued in tandem with legal philosophy.<sup>5</sup> But I do not believe that the significance of his hint has been

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<sup>5</sup> In particular von Mehren says:

[F]or those who believe that comparative-law scholarship would benefit greatly if the field had a core tradition upon which each generation could build, the question remains whether there is any source from which might derive the intellectual discipline and focusing basic to the emergence of a scholarly tradition? Only one possibility seems open: to consider the contribution that comparative study can make to our understanding of the legal order in broader philosophical, historical, and sociological perspectives and to ask what implications our conclusions can have for basic comparative study and research.

*Id.* at 626. Von Mehren is not the first to have proposed an approach that combines comparative law with legal philosophy. The earliest such sustained attempt that I am aware of was by Eduard Gans, a student and collaborator of Hegel's; he wrote a four volume comparative study of *The Law of Inheritance in its World-Historical Development*,

appreciated or that its implications have been adequately explored; certainly its influence on the behavior of most mainstream comparative lawyers has been negligible.

I also concede the oddity of the suggestion, which at first glance appears more likely to increase the problems of comparative law than to diminish them. But it seems to me that the defects of legal philosophy and comparative law are in important ways not parallel but complementary and that each can be used to correct the shortcomings of the other. If philosophy is often blamed for being "all sail and no anchor," for losing itself in theory at the expense of facts, the principal problem with comparative law is that it has immersed itself too deeply in the legal minutiae. It has in consequence become all anchor and no sail: it lacks theoretical direction. So perhaps we can hope for an improvement if we bring the two subjects together.

This is a long article; before we begin, a few remarks about strategy may be in order. The principal task in what follows is to argue that the malaise of comparative law can be traced to a complicated network of philosophical mistakes. It is widely assumed, for instance, that, because comparative law is intended to serve the needs of practicing attorneys, it should be geared toward studying the sorts of thing that concern practicing attorneys; and that, because the sorts of thing that concern practicing attorneys are the authoritative rules of the positive law, it should therefore concern itself with a comparative study of the authoritative rules of the positive law.

On these assumptions most comparative lawyers are agreed; but at this point the theoreticians diverge into two camps, depending on the conception they hold of legal rules. One camp asserts that comparative law should study "rules in books," that is, the black-letter *text*; the other, that it should study "rules in action," that is, the way rules function in their social and economic *context*. The theoretical arguments about comparative law have tended to oscillate between these two poles, text *versus* context; and, at the extremes, each theoretical position has given rise to a characteristic style of comparative scholarship.

Textualism, in its purest form, lies at the root of a familiar kind of comparative study that may be illustrated by the following

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and explicitly argued for an approach to comparative law that would concentrate on the underlying philosophy. EDUARD GANS, *DAS ERBRECHT IN WELTGESCHICHTLICHER ENTWICKLUNG* (Berlin, Maurers 1824-1829) (4 vols.).

example. The largest gathering of comparative legal scholars is the International Congress of Comparative Law, a quadrennial event which most recently was held in Athens. The two opening sessions of the Congress, with panels of twenty and fifteen national reporters respectively, were devoted to the topics "Recent Developments in Extinctive Prescription" and "Current Development Concerning the Form of Bills of Lading."<sup>6</sup> The idea seems to be that working lawyers need information about such specific matters of doctrine, and that the primary business of comparative law is to give it to them.

Contextualism, in contrast, takes a more theoretical approach; but it, too, has produced a somewhat curious literature. It is not difficult to find, even in eminent American law reviews, articles describing, say, Japanese or German banking law, giving impressive lists of data and developing an economic model. But when one looks closely one finds that the information has been culled exclusively from sources published in English; that the author does not, in fact, read the foreign language; and that there has consequently been no effort to comprehend the foreign legal system as it appears from inside.

No doubt such examples represent an extreme case; but they are hardly uncommon, and their very existence raises doubts about underlying assumptions. How could a scholar write about a foreign legal system without first learning the language? How could Bills of Lading seem a significant topic for comparative research? What is being assumed here about the correct way to study a foreign legal system? To be sure, such studies can be conducted well or ill, relative to certain background standards of scholarship. But the question we must face concerns the background standards themselves.

The following Article argues that the debate between textualism and contextualism is itself misconceived; that both approaches are flawed, and that the flaws are to be traced to the seemingly innocuous assumption both camps share in common, namely, that because comparative law is meant to serve the needs of attorneys, it should therefore study legal rules. This assumption rests on a silent philosophical theory about legal reasoning and the nature of law, and in particular overlooks the crucial logical distinction

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<sup>6</sup> These titles are taken from the program of the *Fourteenth International Congress of Comparative Law* (1994) (source on file with the author).

between *rules* and *principles*.<sup>7</sup> As a consequence of its failure to heed this distinction, the silent theory, in both its textualist and contextualist guises, looks on a foreign legal system externally—as a kind of *thing*, an objective social fact that is to be described by an outside observer. Comparative law then becomes a matter of piling up a certain body of factual information, whether about rules or social contexts.

If the argument in this Article is correct, then this external perspective embodies a fundamental logical mistake. Understanding a foreign legal system cannot—in a very strong sense of “cannot”—be obtained solely by heaping up nuggets of information. For understanding is a matter, not just of assembling a stock of data, but of mastering a certain kind of ability—roughly, the ability to think like a foreign lawyer. Logically speaking, these are two very different kinds of enterprises: one is a matter of learning *that*, and the other, of learning *how*.

The contextualists seem to me correct in their assertion that, to understand a foreign legal system, one needs to know more than the bare text of the rules. And the textualists seem to me correct in their assertion that the law must not simply be dissolved into its social and economic background.<sup>8</sup> But both miss the crucial point, which is, that if one is to understand a foreign legal system well enough so that one can communicate with the foreign lawyers, one needs to know how they think—and knowledge about how they think is not to be had simply by describing their rule books and the structure of their society.

If the argument in this Article is correct, then the primary object of study for comparative law should be the *philosophical* principles that lie behind the surface of the rules. This fact establishes a particularly close connection between comparative law and legal philosophy, and it follows that comparative studies grounded in

<sup>7</sup> This distinction has been central to modern jurisprudence since Ronald Dworkin's early writings. See RONALD DWORIN, TAKING RIGHTS SERIOUSLY 14-80 (1977). Further discussion, with extensive references to the literature, can be found in ROBERT ALEXI, THEORIE DER GRUNDRICHTE 71-157 (1985).

<sup>8</sup> The most sophisticated critique of sociological contextualism is found in the writings of Alan Watson which are discussed throughout this Article; in particular, a good introduction to the debate is to be found in his replies to his critics. See generally Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983). I endorse his criticisms of the social contextualists, but not his own retreat into textualism. My discussion of the complicated issues raised by Watson's theory can be found in William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. (forthcoming 1995).

economics or sociology or any other descriptive social science, although they may be helpful, are of subordinate theoretical interest: they do not get to the heart of the matter. The issues presented here are subtle, and it seems best to approach them from several directions. The following essay is therefore divided into three parts.

Much of present-day comparative law is concerned with studying the legal rules of modern industrial mass democracies. The theoretical presuppositions of comparative law do not emerge with particular clarity in such a study because the similarities of the systems are so great that one is tempted, without ever giving the matter much thought, to take many things for granted. Part One therefore seeks to go beyond the normal subject matter for comparative law, and examines the animal trials of the Middle Ages. The hope is that by considering alien legal practices of this sort we will be jolted out of habitual ways of thinking and see more clearly what is involved in studying a foreign legal system.

Part Two is concerned with more mundane matters: the theory and practice of modern comparative law. I discuss the malaise, and argue that, as a consequence of paying inadequate attention to ideas, traditional comparative law has misunderstood the very phenomena it has most sedulously sought to understand. This claim I illustrate with a long example. Comparative lawyers have devoted their greatest energies to understanding the difference between the common-law and the civil-law systems, and in particular to understanding the civil codes of France and Germany. I therefore consider in detail the German civil code; explain how its drafting was influenced by the ideas of Kant and Herder, Savigny and Thibaut, Windscheid and Gierke; and argue that, unless one understands these background ideas, one cannot understand the central issues in present-day German private law.

Part Three then attempts to address the philosophical issues directly, and to trace the malaise of comparative law to a series of mistaken presuppositions about legal reasoning, the nature of rules, and the concept of law. The three parts are deliberately disjointed both in their subject matter and in their degree of philosophical abstraction; but it is important to observe that they are all working to a common end.

It should also be borne in mind that this Article is only the first in a series, and that many issues broached here will have to be discussed more fully at a later time. This is particularly true of the discussion of Kant, whose writings on the philosophy of law have

not yet in English received the attention they deserve. Other topics may seem to be treated here at excessive length. In particular the discussion of nineteenth-century German legal thought is longer than is strictly needed to establish the theses of Part Two. But the ideas of Savigny and his successors laid the foundation, not only for the theory of the civil code, but also for modern comparative law, a subject which scarcely existed before the nineteenth century. That piece of history will form the topic of a later article; but it seemed best to lay the groundwork here.

## PART ONE

### I. THE RATS OF AUTUN

#### i.

In 1522 some rats were placed on trial before the ecclesiastical court in Autun.<sup>9</sup> They were charged with a felony: specifically, the crime of having eaten and wantonly destroyed some barley crops in the jurisdiction. A formal complaint against "some rats of the diocese" was presented to the bishop's vicar, who thereupon cited the culprits to appear on a day certain, and who appointed a local jurist, Barthelemy Chassenée (whose name is sometimes spelled Chassanée, or Chasseneux, or Chasseneuz), to defend them. Chassenée, then forty-two, was known for his learning, but not yet famous; the trial of the rats of Autun was to establish his reputation, and launch a distinguished career in the law.

When his clients failed to appear in court, Chassenée resorted to procedural arguments. His first tactic was to invoke the notion of fair process, and specifically to challenge the original writ for having failed to give the rats due notice. The defendants, he pointed out, were dispersed over a large tract of countryside, and lived in many villages; a single summons was inadequate to notify them all. Moreover, the summons was addressed only to *some* of the rats of the diocese; but technically it should have been addressed to them all.

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<sup>9</sup> The following account of this incident is taken from two sources. See EDWARD P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 18-20* (1906); Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 706-07 (1916).

Chassenée was successful in his argument, and the court ordered a second summons to be read from the pulpit of every local parish church; this second summons now correctly addressed all the local rats, without exception.

But on the appointed day the rats again failed to appear. Chassenée now made a second argument. His clients, he reminded the court, were widely dispersed; they needed to make preparations for a great migration, and those preparations would take time. The court once again conceded the reasonableness of the argument, and granted a further delay in the proceedings. When the rats a third time failed to appear, Chassenée was ready with a third argument. The first two arguments had relied on the idea of procedural fairness; the third treated the rats as a class of persons who were entitled to equal treatment under the law. He addressed the court at length, and successfully demonstrated that, if a person is cited to appear at a place to which he cannot come in safety, he may lawfully refuse to obey the writ. And a journey to court would entail serious perils for his clients. They were notoriously unpopular in the region; and furthermore they were rightly afraid of their natural enemies, the cats. Moreover (he pointed out to the court) the cats could hardly be regarded as neutral in this dispute; for they belonged to the plaintiffs. He accordingly demanded that the plaintiffs be enjoined by the court, under the threat of severe penalties, to restrain their cats, and prevent them from frightening his clients. The court again found this argument compelling; but now the plaintiffs seem to have come to the end of their patience. They demurred to the motion; the court, unable to settle on the correct period within which the rats must appear, adjourned on the question *sine die*, and judgment for the rats was granted by default.

This case, and the ingenuity and learning he displayed in defending his clients, established for Chassenée a formidable reputation as a criminal defense attorney. But he was also to contribute influentially to legal scholarship. So far as I am aware, no complete catalogue of his writings exists. But in 1528 he produced two major works. The first, the *Catalogus gloriae mundi*, was an important Renaissance source book on questions of heraldry and aristocratic rank; it was often reprinted. (The catalogues of major American university libraries show holdings of editions from 1546, 1571, and 1579; but the list is not likely to be complete.) The second was his commentary on the customary laws of Burgundy, the *Commentaria super consuetudinibus Burgundiae*. This work, a minor

classic of legal literature,<sup>10</sup> was a standard work of reference for French lawyers of the Renaissance. (American libraries hold editions from 1543, 1582, 1616, 1647, 1698, and even 1747; again, the list is probably incomplete.)

Chassenée is said during the 1520s, while he was engaged in his scholarly pursuits, to have continued his practitioner's interest in animals, and to have worked on several cases involving their criminal prosecution.<sup>11</sup> The court records do not appear to have survived; but in 1531 Chassenée himself published a book whose full title is *Consilium primum, quod tractatus jure dici potest, propter multiplicem et reconditam doctrinam, ubi luculenter et accurate tractatur questio illa: De excommunicatione animalium insectorum*—which roughly translates as, *A Treatise on the Excommunication of Insects*. This work, like his other writings, seems to have filled a legal need, for it was reprinted at least twice: in 1581 and again in 1588.<sup>12</sup> This treatise discusses the full range of issues that can have been expected to arise during a trial of “insect animals”: the jurisdiction of the lay and ecclesiastical courts, the proper form of the complaint, the issues of notice and of adequate representation by counsel, the procedures to be followed at trial, and the passing and execution of sentences. He cites a remarkable range of obscure and forgotten authors, as well, of course, as various relevant anathemas in the Old and New Testaments—God's cursing of the serpent in the Garden of Eden; the law in Exodus that an ox which gores a man or a woman to death is to be stoned, and its flesh not to be eaten; Jesus's malediction of the barren fig tree of Bethany; the story of the Gadarene swine. He also cites Virgil, Ovid, Cicero, Aristotle, Gregory the Great, the *Institutes* of Justinian, Moses, various patristic theologians, and Pico della Mirandola: the list could easily be extended. He reports numerous examples of successful anathemas pronounced by medieval saints against sparrows, slugs, leeches, eels, and even an orchard. He considers whether animals are to be considered as clergy or as laity. (He concludes that, in general, animals should be presumed to be laity, but that the presumption can be rebutted.) He tries more generally to delimit the exact boundaries separating the jurisdiction of the lay and the ecclesiastical courts; and he draws a careful distinction between punitive prosecutions of animals, and

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<sup>10</sup> See HELMUT COING, *EUROPÄISCHES PRIVATRECHT* 514 (1985).

<sup>11</sup> See EVANS, *supra* note 9, at 21.

<sup>12</sup> The following account of the contents of Chassenée's book is taken from Evans. See *id.* at 21-33.

prosecutions that are merely intended to deter future harmful conduct.

Chassenée's fame as an attorney and a scholar continued to grow. No doubt his commentary on the customs of Burgundy contributed more to his legal eminence than did his treatise on the excommunication of insects; but the two works display the same erudition and the same tone of learned seriousness. One might be tempted to suspect Chassenée and his colleagues of an elaborate joke—gargantuan, one might say, in the manner of Rabelais—except that the joke seems to go too far. Chassenée was involved in too many such cases, and his treatise is too laboriously researched, for such an explanation to be credible. He was, after all, an eminent jurist, with many demands upon his time, and in any case the destruction of their barley fields can hardly have seemed a matter for jest to the farmers of Autun.

Chassenée seems to have treated cases involving animals and cases involving humans with equal seriousness, and fortunately we have an instance which leaves no doubt. Near the end of his life, in 1540, Chassenée, whose star had continued to rise, and who was now President of the *Parlement de Provence*, presided over an inquiry into the justice of an order for the extirpation of heresy.<sup>13</sup> Specifically, it was proposed to extirpate some local Waldenses in the villages of Cabrières and Merindol. One of the members of the tribunal, Renaud d'Alleins, suggested that it would be unjust to exterminate the unfortunate heretics without first granting them a hearing, and permitting an advocate to speak on their behalf. After all, had not the President himself insisted upon such a right for the rats of Autun? Did not even animals have the right to assistance of counsel? There can be no doubt of the seriousness with which heresy was regarded: this would not have been an opportune time to remind the President of a joke. Chassenée was persuaded by the arguments of d'Alleins, and obtained from the king a decree that the accused Waldenses should be heard. (This outcome was by no means legally predestined; in fact, Chassenée died in 1541, and the Waldenses were thereupon exterminated, apparently without obtaining their hearing.)

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<sup>13</sup> The following account of this episode is taken from Evans. See *id.* at 19-20.

## ii.

It should not be assumed that the courts of Renaissance, when hearing a criminal prosecution against animals, were invariably inclined to decide for the human plaintiffs: not even when the defendants were vermin. In 1545 some wine growers in a village in the district of St. Julien instituted legal proceedings against a species of snout-beetle that infests vineyards.<sup>14</sup> Advocates were duly appointed for the insects. But this first case never came to trial. After consultations with counsel for both sides, the court issued a proclamation, dated 8 May 1546, which observed that God had ordained that the earth should bring forth herbs and fruits, not only for the sustenance of rational human beings, but also for the preservation and support of his lesser creatures, the insects; it would be more fitting for the humans to implore the mercy of heaven, and to seek pardon for their sins, than to proceed rashly against the beetles. The proclamation prescribed prayer, contrition, and the saying of High Mass three times in the vineyards. The insects are reported to have thereupon disappeared from the village.

Forty-one years later, however, in April of 1587, the infestation returned; and this time the animals were actually brought to trial. The court proceedings fill twenty-nine folia, which are preserved in the archives of St. Julien. The legal maneuverings and the arguments about the legal status of animals continued into the summer. In June a compromise was proposed by the advocate for the plaintiffs. A piece of ground, distant from the vineyards, precisely described in its location and dimensions, and well-supplied with plants and herbs, was to be reserved for the use of the beetles in perpetuity. The plaintiffs would retain easements to use the springs on the land, and to cross it without doing detriment to the animals' means of subsistence; they also retained the right to shelter there in time of war, and the right to work the mines of ocher—again, so long as in so doing they did not interfere with the pasture of the animals. (Both parties, it should be observed, agreed that the insects had a legal right to life, and to an adequate share of the earth's bounty: this issue was not in dispute.)<sup>15</sup>

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<sup>14</sup> The following account of the case of the beetles of St. Julien comes from Evans and Hyde. *See id.* at 37-49; Hyde, *supra* note 9, at 705-06.

<sup>15</sup> A similar issue arose in a trial of some grasshoppers in 1565 in the town of Arles in Provence. The counsel for the defense argued that, because the grasshoppers were, in the original sense of the word, *creatures*, they were justified in eating what they needed to sustain life. The counsel for the plaintiffs cited the cursing of

The attorneys for the insects did not accept this offer. They argued that the land was in fact barren; moreover, that the mining rights, if exercised by the plaintiffs, would be detrimental to the pasturage of the defendants. The court proceedings continued for many months more. The final outcome of the case is uncertain, the last pages of the court records having subsequently been eaten by some bugs or rats.<sup>16</sup>

How frequent were such trials? From the ninth century to the nineteenth, in Western Europe, there are over two hundred well-recorded cases of trials of animals, with the majority falling in the fifteenth, sixteenth, and seventeenth centuries.<sup>17</sup> However, trial records for the medieval period are notoriously spotty, and the actual number must have been much larger. In Elizabethan England such trials were evidently common enough so that Shakespeare could allude to them and expect his audience to understand what he was talking about:

Thy currish spirit

Governed a wolf, who, hanged for human slaughter,  
Even from the gallows did his fell soul fleet,  
And whilst thou layest in thy unhallowed dam,  
Infused itself in thee; for thy desires  
Are wolfish, bloody, starved, and ravenous.<sup>18</sup>

The animals known to have been placed on trial during this period include: asses, beetles, bloodsuckers, bulls, caterpillars, chickens, cockchafers, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, pigeons, pigs, rats, serpents, sheep, slugs, snails, termites, weevils, wolves, worms, and miscellaneous vermin.<sup>19</sup>

Within this list it is important, as a legal matter, to distinguish wild animals from domestic. As a general rule, the wild animals came within the jurisdiction of the ecclesiastical courts (unless there had been shedding of blood, which could raise complex legal

the serpent in the Garden of Eden. In this case, the grasshoppers were condemned, and told to quit the region on pain of anathema. See Hyde, *supra* note 9, at 707.

<sup>16</sup> See EVANS, *supra* note 9, at 49.

<sup>17</sup> See Hyde, *supra* note 9, at 709.

<sup>18</sup> WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

<sup>19</sup> This list is taken from Evans. See EVANS, *supra* note 9, at 265-85 (Appendix F). Evans there lists some two-hundred cases, with dates, locations, and species of the defendants. In view of their reputation as witches' familiars, it is perhaps surprising that cats do not appear on the list.

issues),<sup>20</sup> whereas domestic animals came within the jurisdiction of the ordinary criminal courts.<sup>21</sup> The cases I have discussed so far have been cases of vermin, and the primary purpose of the trial was to rid the region of infestation by the threat of anathema or excommunication. In the lay courts, in contrast, the purpose, as a rule, was to punish the animal for its criminal acts: not deterrence, but retribution.<sup>22</sup>

An example is the decision of the Law Faculty of Leipzig condemning a milk cow to death for killing a pregnant woman, one Catharina Fritzchen, on 20 July 1621.<sup>23</sup> (German law faculties in the seventeenth century and after, under the institution known as *Aktenversendung*, would often be asked to render judgment in difficult cases.)<sup>24</sup> The cow, condemned as a “monstrous animal” (“*als abscheulich thier*”), was ordered to be transported to a remote, desolate spot, and there executed and buried.<sup>25</sup>

Among criminal cases of this sort, there are many instances of pigs being condemned to death for infanticide.<sup>26</sup> A typical specimen is the trial of a sow and her six pigs at Savigny-sur-Étang in 1457; they were charged with murdering and partly devouring an infant.<sup>27</sup> She was found guilty and, like Shakespeare’s wolf, was sentenced to death by hanging. Nearly a month later her six pigs were brought to trial. Because of their youth, because their mother

<sup>20</sup> See *id.* at 31-32.

<sup>21</sup> See *id.* at 2-3 (crediting the legal historian Karl von Amira with drawing a sharp distinction between animal trials (*Thierprocesse*) and animal punishment (*Thierstrafen*), the former being designed to expel vermin, and the latter to punish animals that were in the service of human beings); Hyde, *supra* note 9, at 703-04.

<sup>22</sup> I note in passing a curious fact. In medieval villages rabid dogs must have been a common public menace, and must frequently have been put to death. But in the animal trials of which I have read descriptions, dogs are conspicuous by their relative absence. Perhaps dogs were merely regarded as ill, whereas infanticidal pigs were regarded as having a wicked character. The issue here is obviously important, and raises the question of how the Middle Ages distinguished among crime and madness and disease; but I am not aware that this particular problem of the relative absence of dog trials has been investigated.

<sup>23</sup> The decision of the Leipzig Law Faculty is given in Evans. See EVANS, *supra* note 9, at 313 (Appendix S).

<sup>24</sup> For a discussion of *Aktenversendung*, see *infra* text accompanying note 235.

<sup>25</sup> See EVANS, *supra* note 9, at 313 (Appendix S).

<sup>26</sup> The useful appendices in Evans give many representative samples, in the original languages, of the judicial sentences of condemnation. Eight are of infanticidal pigs. See *id.*

<sup>27</sup> The following example of the sow of Savigny comes from Evans. See *id.* at 298-303.

had set a bad example, and because the evidence was not sufficient to convict, they were acquitted of the crime.

In cases of bestiality the animal was regularly put to death with the man. It is reported by Cotton Mather that in New Haven, Connecticut, on 6 June 1662, a man named Potter, aged sixty, was hanged with a cow, two heifers, three sheep, and two sows.<sup>28</sup>

Animals condemned to death were executed in various ways. Some were burnt at the stake; others merely singed and then strangled before the body was burned. Frequently the animal was buried alive. A dog in Austria was placed in prison for a year; at the end of the seventeenth century a he-goat in Russia was banished to Siberia.<sup>29</sup> Pigs convicted of murder were frequently imprisoned before being executed; they were held in the same prison, and under substantially the same conditions, as human criminals.<sup>30</sup>

### iii.

These are the phenomena I should like to understand. They perplex and disturb me on a number of different levels. They seem to bespeak a different attitude, on the part of our not-very-remote ancestors, to such matters as: crime, guilt, pain, the person, animals, suffering, truth, death, responsibility, trials, justice, and law. What were they up to, these punishers of animals? What was the point?—I am not sure; and the longer I dwell on the question, the more uneasy and uncertain I become. The issues here are subtle; perhaps we will do best to approach them in stages.

To begin with, I am not satisfied by the explanations, whether medieval or modern, that have been produced for these trials. (Observe that the issue here is the trial, that is the criminal prosecution of the animal by the same formal legal procedures employed for humans: what needs to be explained is not why one would put down a dangerous cow, but why one would first bring the matter to the Law Faculty of Leipzig.)

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<sup>28</sup> See Hyde, *supra* note 9, at 711. To this case can be added the case of Thomas Granger, who was executed in Plymouth in 1642. Granger was a sixteen- or seventeen-year-old servant who confessed to carnal relations with a mare, a cow, two goats, several sheep, two calves, and a turkey. Pursuant to Leviticus 20:15, each of the animals was killed before Granger, who was then himself executed. See 2 RECORDS OF THE COLONY OF PLYMOUTH IN NEW ENGLAND 44 (Nathaniel B. Shurtleff & David Pulsifer eds., Boston, 1855-1861) (12 vols.). I owe this reference to Bruce Mann.

<sup>29</sup> The foregoing examples come from Hyde. See Hyde *supra* note 9, at 709-12.

<sup>30</sup> See EVANS, *supra* note 9, at 142-43 (giving several examples).

One explanation of animal punishment was given by the great canon lawyer Gratian in the twelfth century.<sup>31</sup> He held that animals are punished, not because of their guilt (*culpa*), but so that the hateful act might be forgotten.<sup>32</sup> Another explanation from the sixteenth century takes an opposite approach: animals are punished to inspire in humans horror of the deed, and to keep its memory alive.<sup>33</sup> But neither explanation is satisfactory. The explanation of Gratian raises the question why the animals are to be put on trial and given a gruesome and memorable death rather than simply got rid of and forgotten as quickly as possible. The other explanation raises the question why the particular animal that did the deed is to be punished: if the purpose is to inspire horror in humans, why not kill the animal that will suffer most memorably? And why, indeed, kill just one? Would not a general slaughter be better remembered?

At bottom the problem with both explanations is the same. They sever the nexus between guilt and punishment; Gratian explicitly, and the other approach implicitly. They both assert that (i) injuries caused by animals have nothing to do with *culpa*, but rather are to be counted among "things that happen"; and, (ii) the purpose of animal punishment is to produce certain psychological effects in humans. But now it becomes difficult to understand why the same reasoning cannot be extended to inanimate objects. Why does one not place on trial the murderous axe, or execute an animal to make vivid to oneself the horror of an avalanche? We have arrived at a *reductio ad absurdum* for these two lines of justification; or so it would appear.

Another explanation is given by Leibniz in his *Theodicée*.<sup>34</sup> He says that one would be justified in imposing capital punishment on beasts if in so doing one could deter other beasts from evil. (He notes that in Africa lions were crucified to drive away other lions; that wolves were hanged in Germany for the same reason; and that peasants nail birds of prey to the doors of their houses.) Leibniz

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<sup>31</sup> See Hyde, *supra* note 9, at 718.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> GOTTFRIED WILHELM LEIBNIZ, *ESSAIS DE THEODICÉE SUR LA BONTÉ DE DIEU, LA LIBERTÉ DE L'HOMME, ET L'ORIGINE DU MAL* (Amsterdam, I. Troyel 1710). There is no standard pagination for this work; the passage discussed in the text that follows occurs in §§ 69-70 in the first of the three *Essais*. In the standard edition of Leibniz's works, it is found at 6 GOTTFRIED WILHELM LEIBNIZ, *DIE PHILOSOPHISCHEN SCHRIFTEN VON GOTTFRIED WILHELM LEIBNIZ* 110 (Hildesheim, Olms Verlas 1960-61) (C.I. Gerhardt ed., 1885).

himself phrases his explanation in the subjunctive mood, and appears sceptical about the deterrent value of capital punishment for animals; but in any case this explanation and his examples would explain only why one kills the beast and displays its body—not the principal issue, which is why one first puts it through the ritual of a formal criminal trial.

Another view of animals was given by an eighteenth-century Jesuit, Guillaume-Hyacinthe Bougeant, in his *Amusement philosophique sur le langage des bestes* of 1739;<sup>35</sup> this work was translated into English in the same year. Bougeant does not directly discuss the animal trials; he was troubled instead by the following problem.<sup>36</sup> As Christianity spreads to pagan regions, and as infants are baptized at birth, the supply of humans available for habitation by devils will constantly diminish. But devils are immortal; where then are they to dwell? Bougeant answers that the majority of devils are incarnate in the brutes of all kinds. This conclusion he supports by another argument. *Pace* Descartes, animals are not automata, but exhibit thought, knowledge, and feeling; yet they do not have immortal souls, and are not, *qua* animals, destined either for Heaven or for Hell. But if they are neither persons nor automata, then they must be some third thing; and the only remaining possibility is that they are devils. For this reason, he says, the Christian church has never taken the animals under its protection, or urged kindness towards them. On the contrary, animals have been provided to us by a benevolent God for our use and entertainment. The suffering they endure is part of God's punishment of devils; and when a dog is beaten, or a pig slaughtered, it is the embodied demon that actually suffers. "If it be said that these poor creatures, which we have learned to love and so fondly cherish, are foreordained to eternal torments," he says,

I can only adore the decrees of God, but do not hold myself responsible for the terrible sentence; I leave the execution of the dread decision to the sovereign judge and continue to live with my little devils, as I live pleasantly with a multitude of persons, of whom, according to the teachings of our holy religion, the great majority will be damned.<sup>37</sup>

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<sup>35</sup> GUILLAUME-HYACINTHE BOUGEANT, *AMUSEMENT PHILOSOPHIQUE SUR LE LANGAGE DES BÊTES* (Paris, Chez Gisse 1739).

<sup>36</sup> The following discussion of Bougeant's views is found in Evans. See EVANS, *supra* note 9, at 66-67, 80-83.

<sup>37</sup> *Id.* at 83.

Bougeant's views, however, are not medieval: they date from the eighteenth century, more than two centuries after the trial at Autun. His theory that animals exhibit rational thought flew in the face of the received scholastic wisdom; and his theory that animals are in fact demons seems to have been regarded by the Church as highly questionable, if not actually heretical.<sup>38</sup> His arguments are not internally consistent, and in any case do not suffice to explain why, if one *knows* that an infanticidal pig is a devil condemned to suffer at human hands, one would ever put it through the formal ceremony of a criminal trial.

Some even later writers have seen the purpose of these trials, not in their deterrent effect on other animals, but in their deterrent effect on human beings.<sup>39</sup> But this is a modern explanation; I do not believe it is to be found in the writings of thinkers like Chassenée. Nor does it seem to provide a particularly strong argument for animal trials. Punishing a killer sow seems unlikely to deter a human from infanticide; and when we consider rats or grasshoppers the analogy seems to break down entirely.

Other modern writers have tried to explain these trials by appealing to a theory of *personification*. They assert that in the Middle Ages domestic animals were regarded as members of the household, and were under certain circumstances even permitted to appear in court as witnesses; from these facts it is inferred that animals were regarded as rational beings, capable of acting as responsible agents.<sup>40</sup> These authors conclude that the purpose of the animal trials and of the subsequent punishment was not so much deterrence as retribution: animals, like humans, are to be held responsible for their actions. But this explanation, too, is problematic. Perhaps it has some limited plausibility for higher mammals, like pigs or dogs; but it hardly seems to work for rats or grasshoppers.

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<sup>38</sup> The title page of the English translation of his book describes it as "Written originally in French by Father Bougeant, a famous Jesuit; now confined at La Flèche on account of this work." GUILLAUME-HYACINTHE BOUGEANT, A PHILOSOPHICAL AMUSEMENT UPON THE LANGUAGE OF BEASTS AND BIRDS (1739). I have only seen a card catalogue entry for this translation, which lists the date of the French original as 1737; I have not yet been able to establish the details about the imprisonment at La Flèche. In particular I do not know whether Bougeant was accused of heresy, and, if so, for which of his arguments.

<sup>39</sup> See Hyde, *supra* note 9, at 718 (citing references to the literature).

<sup>40</sup> *Id.* at 725-26 (citing references).

Chassenée, to be sure, thought that the rats of Autun were entitled to notice of their case, and entitled to a hearing. Perhaps—the evidence seems to me ambiguous—he believed that, in some sense, the rats were rational creatures; perhaps, despite his erudition, he shared in a widespread superstition of the common people. But the theologians of the Middle Ages clearly deny to animals the status of rational agents, and Chassenée, at any rate in his more scholarly moods, seems to follow their analysis. Thomas Aquinas, for example, argued that only rational creatures could be the subject of a curse; if God curses an animal (or a place or a thing) the curse must be regarded, not as a curse of the animal *per se*, but as an indirect way of cursing a rational agent.<sup>41</sup> How, then, asks Thomas, are human curses of animals to be justified? If we regard animals merely as irrational brutes, then the curse would be *odiosum et vanum et per consequens illicitum*. And if we regard the animals as the instruments of God's will, then the human curse would be blasphemous. But a third possibility remains. If the animals are regarded, not as the agents of God, but of Satan, then they may properly be cursed and excommunicated and punished with death: for this is an indirect way of cursing the Devil. (This argument is thus crucially different from the argument of Bougeant, who regarded animals as themselves devils.) Chassenée (who, as I say, may not be entirely consistent in his beliefs on this point) seems to accept this scholastic analysis, and declares in his treatise on the excommunication of insects that the anathema of the Church is not pronounced against the animals in their own person, but through them against Satan.

We have, then, two theories that seek to explain the animal trials in terms of indirect punishment: the theory that animals are punished to intimidate humans, and the theory that they are punished to intimidate Satan. Both theories deny *culpa* to the animal; both sever the connection between guilt and punishment; both use the suffering of the animal to produce a psychological reaction in the true evildoer. Once again, we seem to be back at our earlier *reductio ad absurdum*. It is not clear why the animal punished and the animal who participated in the crime should be the same; nor why the same reasoning should not apply to inanimate objects. Aquinas and Chassenée propose to prosecute

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<sup>41</sup> The arguments of Aquinas and of Chassenée are summarized, with references, by Hyde. *See id.* at 716-17.

criminally and punish creatures whom they know not to have free will—the guiltless instruments of Satan. But this theory is, if anything, even less comprehensible than the trials it is supposed to explain: we seem to have arrived at the outer limits of intelligibility. For, in its essence, the suggestion of the great philosopher and the erudite lawyer is, it seems, that we should punish, not the cutthroat, but the knife.

## iv.

But perhaps we have missed something. Perhaps this outcome would not strike the medievals as a *reductio ad absurdum*, but simply as a further implication of the theory. (It is not a *logical* mistake.) And if we look in Blackstone, in the chapter dealing with the revenues of the Crown, we find, mixed in with the discussion of rents, profits, ecclesiastical revenues, wine-licenses, shipwrecks, mines, treasure-trove, confiscated property, and escheats of land, a passage in which Blackstone discusses the remnants of the institution known as *deodand*—etymologically, things “given to God.”<sup>42</sup> Under this law any personal chattel which was found by a jury of twelve to have immediately caused the death of any reasonable creature was forfeit to the king; the proceeds were to be applied to pious uses and distributed in alms by the high almoner.

Blackstone reports some curious distinctions. (1) No deodand is due if an infant fall from a cart or a horse, so long as the cart or horse is not in motion; but if an adult fall and is killed, the thing is forfeit. (2) If a horse or an ox of its own motion kill an infant or an adult, or if a cart run them over, the thing shall be a deodand. (3) “Where a thing, not in motion, is the occasion of a man’s death, that part only which is the immediate cause is forfeited; as if a man be climbing up a wheel, and is killed by falling from it, the wheel alone is a deodand: but, wherever the thing is in motion, not only that part which immediately gives the wound, (as the wheel, which

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<sup>42</sup> All the following references to Blackstone’s discussion of deodands are found in Book I, Chapter 8 of his *Commentaries*. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 290-92 (Oxford, Clarendon Press 1765-1769) (4 vols.) (footnotes omitted).

The law of deodands has its origins in the most distant past of English law; the most common medieval deodands were horses, oxen, boats, carts, mill-wheels, and cauldrons. See 2 FREDERICK POLLOCK & FREDERICK W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 473 (1923). Pollock and Maitland observe that “many horses and boats bore the guilt which should have been ascribed to beer.” 2 *id.* at 474 n.4.

runs over his body) but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited." (4) No deodands are due for accidents on the high sea, which is not in the jurisdiction of the common law; but if a man fall from a boat in fresh water and is drowned, the ship and its cargo are deodands.

Blackstone has evident difficulty explaining these rules. Point (4) is a simple matter of jurisdiction, and need not detain us. Point (1) he explains in religious terms. The institution of deodand, he conjectures, was originally intended to expiate the souls of the dead, and to pay for masses for those who had died suddenly and in sin. But the child seems, he says, to have been regarded as incapable of actual sin, and therefore to need no propitiatory masses for its soul. (He rejects the explanation of Sir Matthew Hale, that the infant in case (1) receives no deodand because it is unable to take care of itself, pointing out that this fact explains nothing: Hale, too, had evidently struggled to find reason behind these rules.) Points (2) and (3) he explains by "this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." But the explanation appears to make him uncomfortable. Negligence seems to have played no part in the jury's determination that something was forfeit as a deodand; and Blackstone himself observes that "[i]t matters not whether the owner were concerned in the killing or not; for if a man kills another with my sword, the sword is forfeited as an accursed thing." Indeed, he prefaces his entire discussion of deodands with the remark that this species of forfeiture "arises from the misfortune rather than the crime of the owner."

The entire discussion, measured by Blackstone's usual standard, is remarkably incoherent; he struggles, but is unable to make rational sense of the existing rules. Much as Chassenée might have done, he cites without commentary the Mosaic law about stoning an ox that has killed a human; and he points out that the ancient Athenians would banish from the precincts of the city any object that had caused a man's death by falling on him.<sup>43</sup> But the

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<sup>43</sup> According to Pollock and Maitland, who quote Bracton on the point, in older English law the bane, that is the object that caused the death, was itself regarded as the evil-doer. They quote Bracton as saying, "If a man by misadventure is crushed or drowned, let hue and cry at once be raised; but in such a case there is no need to make pursuit from field to field and vill to vill; for the malefactor has been caught, to wit, the bane." 2 POLLOCK & MAITLAND, *supra* note 42, at 473. In this early time, as they point out, the criminal law worked in effect with a theory of strict liability, and

underlying reasons seem to leave him baffled. He says that the institution of deodand appears to have had its origin in "the blind days of popery," and to reflect the "humane superstition of the founders of the English law."<sup>44</sup> But, he continues, in the present day deodands are for the most part granted out as a royal franchise to the lords of manors, "to the perversion of their original design"; the clear implication is that the institution has outlived its time, and although it did not immediately disappear from English law, it was in fact finally abolished, during the reign of Queen Victoria, in 1846.<sup>45</sup>

## v.

Armed with this information about deodands, let us return to the animal trials. The problem, recall, was to make sense of the things Aquinas and Chassenée say about the punishment of animals. We seemed to have arrived at the absurd conclusion that their theory would justify the punishment of inanimate objects; but perhaps to them the conclusion was after all not so absurd.

What light do deodands shed on the original problem? The answer, I think, is some but not very much. In the first place the geographical distribution of the two institutions is not quite right. Deodands seem to have been a creation of English common law, whereas most animal trials took place on the Continent.<sup>46</sup> It is not clear as an historical matter exactly how the institution of deodand arose, or what the primary intellectual sources were: even whether they were pagan or Christian. The Athenians, as Blackstone knew, would put on trial at the Prytaneum three classes of objects: (i) unknown murderers, (ii) animals, and (iii) inanimate objects (stones, beams, pieces of iron) that had caused the death of a man by falling on him. These facts are recorded by Aristotle; Pericles and the famous sophist Protagoras are said to have spent a whole day debat-

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its attitude was, "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." 2 *id.* at 474 (quoting Chief Judge Brian "in words that might well be the motto for the early history of the criminal law").

<sup>44</sup> Pollock and Maitland, in contrast, remark that "[t]he deodand may warn us that in ancient criminal law there was a sacral element which Christianity could not wholly suppress." 2 *id.*

<sup>45</sup> 2 *id.* at 473 n.3.

<sup>46</sup> Deodands appear to have spread eastward to Germany from France, with significant modifications on the way. See Hyde, *supra* note 9, at 730. Hyde also mentions some French cases involving the excommunication of glaciers. See *id.* at 726.

ing the guilt of an inanimate object. Plato not only mentions such legal proceedings, but evidently approves of them, and in Book IX of the *Laws* makes provision for their inclusion among the statutes of his ideal commonwealth.<sup>47</sup>

But we must beware of drawing too quick analogies between the Athenians, the English, and the French. The purpose of the Athenian practice is perhaps in the end as obscure as the medieval animal trials; but it seems to have been intended to remove an impurity from the community. The original purpose of deodands (if Blackstone's conjecture is correct) was in contrast to provide prayers for the soul of the deceased. And the animal trials seem to have had yet other springs and levers. The connection in Chassenée's mind between animal trials and the cursing of inanimate objects is difficult to fathom. As we saw, he cites two such curses: Jesus's cursing of the barren fig tree of Bethany, and a medieval saint's cursing of a fruit orchard. But Chassenée, like many a lawyer before and since, made a practice of citing whatever precedent lay ready to hand; and these two precedents on inspection seem to have little to do with the institution of deodands, and to shed little light on the trials of animals. The cursing of the fig-tree was understood allegorically in the Middle Ages as a cursing, not of the tree *per se*, but of the Jews, whose rituals had brought forth legal foliage but not the fruit of righteousness. And the fruit orchard was cursed, not for any crime it had committed, but because its fruits were keeping the young people of the village from the saint's sermons; once attendance improved, the fruits again began to grow.

It would be an interesting historical exercise to trace these two quite different curses back to their roots, noting the similarities and divergences: one inquiry would involve a study of curses in the ancient world in general, and in ancient Judaism in particular; the other would involve a study of northern European magic and sorcery. In Chassenée's mind the two seem to have blended. But that is not the present point. For neither of these two curses of inanimate objects seems in the relevant respects analogous to the medieval trials of animals. The crucial differences—what sets those trials apart from deodand and from Greek purification rituals—is the element of punishment. The animal trials of course may have been intended (like the Greek rituals) to eradicate a religious taint, and

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<sup>47</sup> References to the Athenian practices are furnished by Hyde. See *id.* at 696-702.

they may also have been intended (like deodands) to give comfort to the soul of the victim. None of this do I deny (although the exact relationship to the Hebrew, Greek, Christian, and northern European rituals seems to me mysterious). But they seem to have had another purpose as well: to condemn and to punish the animals.

## vi.

That at least part of the purpose of these trials was punitive can scarcely be in doubt. And it is this element, the punitive element, that I still do not understand. I said before that often the convicted animals were burned at the stake, or buried alive. Sometimes the treatment was even more inhumane, and the animal was tortured before execution. A single example will here suffice for many. In 1386 a murderous sow of Falaises that had torn the face and arms of a child was sentenced first to be mangled and maimed in her head and forelegs; the sow was then dressed in human clothes and slowly hanged in the public square by the town executioner.<sup>48</sup>

At this point it is tempting to fall back on the explanation offered by Blackstone, and blame the whole business on the ignorance and the brutality of the medieval world. But this line of reasoning is no less problematic than the others. Chassenée was not in any obvious sense a cruel man (think of his attitude to the Waldenses) and he had read more widely and thought more deeply about the moral standing of animals than has almost any modern attorney. In his thought (and still more in the thought of Thomas Aquinas) the questions about animals are subordinated to a complex moral theology that we may wish to reject as mistaken, but cannot dismiss as primitive.

As for the accusation that these trials were inhumane, it is important to remind ourselves that, after all, the rats of Autun won their case. So too did the snout-beetles of St. Julien. A field was reserved for their use; both parties agreed that even the least of God's creatures has a legal right to live. This attitude contrasts markedly with the modern attitude. One distinguished modern naturalist estimates that, at the present day, as a result of human activity, species of all kinds, but mostly insects, are disappearing at a rate of 27,000 per year—roughly three entire species each hour.<sup>49</sup>

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<sup>48</sup> See EVANS, *supra* note 9, at 16, 140, 287 (Appendix G).

<sup>49</sup> See generally EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

We are horrified by the brutality of the animal trials; but it does not take much imagination to see that Chassenée would be equally horrified by our wanton extermination, without trial, of God's creation.

True, he saw animals as creatures who, like humans, could be brought to trial for their deeds and cruelly punished; but from some points of view this must be seen as a sign of moral respect. Where we see in a rat or a pig either useless vermin or a reservoir of animal protein, he saw fellow creatures who enjoyed certain basic rights that can be vindicated at law. Indeed, the entire modern vocabulary of praise and condemnation seems oddly out of place here. We speak of these trials as brutal, and praise the modern world for being more humane; but *brutal*, in the original sense of the word, is precisely what Chassenée was not. This shift in vocabulary is an important clue. What seems to have happened—what we call being more humane—appears to reflect not so much a greater underlying kindness, or a greater respect for the moral personality of animals, as a greater indifference and a shift in metaphysics. We no longer think of animals as creatures, that is, as created things. We have attained a greater emotional distance from them; we draw a sharper distinction between the animals and ourselves, and are more inclined to view them as automata, as parts of the material world. And when we do accord them some degree of moral respect, there has been an important change in the standard we apply: the higher animals are not to be mistreated, not because they are the handiwork of God, but because they are like us.

At least as a first approximation we can say that Chassenée would have used a different vocabulary than we do: he would have carved up the world differently. He would have divided it, perhaps, into godly and ungodly things. Godly humans and animals appear on one side of his ledger; ungodly humans and animals on the other. This is quite different from the division (which seems to have got its start in the Renaissance) between the brutal and the humane, with all animals falling in one category, and most humans in the other.

A warning may now be in season. I do not wish to suggest that this is the only important difference between ourselves and Chassenée, and the last point about the Renaissance explains why the contrast I have just mentioned can only be a first approximation. The path that leads from Chassenée and the animal trials to ourselves and modern penal science is twisted and at many places hard to follow; perhaps some of the complexity can be brought out

by the following observation. It is a common superstition about the Middle Ages that their sensibilities would have been shocked by the discovery of their biological kinship with the animals; but as we have just seen, Chassenée saw humans and animals as being alike God's creatures. He would have acknowledged a kinship, although he did not suppose it to be a biological kinship. It was the humanist philosophers of the Renaissance who first began to talk, in a new way, about the nobility of being human, and to speak of humans as uniquely created in the image and likeness of God.<sup>50</sup> The older view (which of course in Chassenée's day still jostled with the newer one) had counselled humility, resignation, and the insignificance of all things merely human; the newer saw humanity as participating in aspects of the divine. It was the Humanists of the Renaissance and their successors whose sensibilities would have been shocked to learn of their kinship with the apes: the older thinkers would have been surprised, to be sure, but would likely have seen in this kinship only one more deserved chastisement for a fallen human species.

It is important to notice that this difference between the Middle Ages and the Renaissance is not just a matter of new scientific theories, but also involves the discovery of the possibility of new emotional responses to the world—and the loss of some old possibilities. I spoke just now about “sensibilities.” The word is important, and should remind us that the differences between ourselves and Chassenée exist, not just at the level of cognition, but also in the very constitution of our moral sentiments. To put the point another way: what separates us from Chassenée—what makes the animal trials both so elusive and so revealing—is not just a shift in a single concept, but in an entire frame of reference. We set out to study these strange legal proceedings of our ancestors; and at every turn we have been brought face-to-face with alien sensibilities, alien metaphysics. And by “metaphysics” here I mean metaphysics in its most full-blooded sense—the subject that addresses such questions as: What is a person? What is an animal? What is the essence of freedom? What is justice? How is reality constituted, and to what ends? To understand Chassenée, it seems, we need to recapture lost images, a forgotten range of experience: an entire way of thinking and feeling about the world.

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<sup>50</sup> The *locus classicus* for these matters is CHARLES TRINKAUS, *IN OUR IMAGE AND LIKENESS: HUMANITY AND DIVINITY IN ITALIAN HUMANIST THOUGHT* (1970).

## vii.

So far I have been writing as though the principal task were to understand the animal trials; but this last line of inquiry raises an uneasy question, namely, how well we understand our own legal rituals. We started out to understand Chassenée, and we unexpectedly bumped into the fact that Chassenée might find our treatment of animals as callous and repellent as we find his. It is natural to wonder how deep the disagreement here lies, and whether we have any firmer grasp on our own practices than we do on his. So let us try another tack and consider how we would justify to a sceptical Chassenée some peculiarities of our modern attitude to punishment. The treatment of animals raises issues that are perhaps too difficult for a first example; so let us start with an easier and more central case—the physical mutilation and torture, as punishment, of human prisoners.<sup>51</sup>

I begin by observing that I, like most of the people I know, have a strong, almost physical repugnance against the sort of physical mutilation that occurred in the West until a couple of centuries ago (more recently for American slaves)—cropping a felon's nose, or amputating the hand of a thief. The repugnance has the feel of something basic, something primitive—not in the sense of being uncomplicated, but in the sense of being automatic: a learned reflex, if not actually an inborn instinct.

The problem comes when we try to go behind this reflex and supply it with reasons—when we try to explain it to Chassenée, who evidently had other reflexes. True, an amputation cannot be undone; but neither can a year in prison. Both are serious blights upon an entire human life. And indeed, from the point of view of the *prisoner* the loss of a hand might well be rationally preferable to a decade spent in a modern American prison. Yet we do not offer prisoners the choice.

Perhaps the reason has less to do with our solicitude for the prisoner than our solicitude for the aesthetic sensibilities of the

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<sup>51</sup> It should be stressed that I consider only the case of torture as a punishment; in particular, I do not consider the case of torture as a means of preventing a catastrophe—of forcing the terrorist who has planted a nuclear bomb in the heart of Paris to disclose its location. Those complex issues are discussed in Michael Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280 (1989). Most people would countenance torture in the second case; almost nobody in the first. Yet (as one sees in the last scene of *Othello*) torture as punishment was commonly accepted four centuries ago, and for present purposes it is this case that raises the difficult issues.

surrounding society. A thief locked away is a thief you can forget; but a thief without a nose triggers all the familiar emotion-drenched reactions against human mutilation. But this argument too is unsatisfactory. First, it does not apply to all mutilations, but only to those that are publicly visible. (It would not apply, say, to rapists.) Second, the vividness of the reminder is an argument that cuts two ways: so long as we are merely considering the impact of the spectacle on third parties, it is not clear that the deterrent value does not outweigh the feelings of squeamish discomfort. Third, and most importantly, the argument reasons in a circle. The original question was how rationally to justify our reflexive responses; the proposed answer says nothing more than that we do not mutilate because mutilation produces the reflexive response.

Broadly speaking there exist two familiar ways of justifying a prohibition on physical mutilation: the consequentialist, and the deontological. The consequentialist arguments all seem to me in the finish to beg the question in this way. The issues are complex, but roughly the problem is this. On any plausible consequentialist measure the harm both to the prisoner and to society of some large degree of imprisonment (say, fifty years in maximum security) will outweigh the harm of some slight degree of mutilation (the painless amputation of your little toe). If we nevertheless cling to an absolute prohibition on mutilation, the underlying reasoning cannot without great difficulty be consequentialist. To put the point another way: from the point of view of the convicted criminal it is surely better to be maimed than executed; but even the most ardent proponents of capital punishment shrink from the re-introduction of maiming. So in some respects mutilation is regarded as worse than death; the problem is to say why. Consequentialist calculations of expected pleasures and pains, I conclude, are unlikely to be what underlies the prohibition or the intense psychological reflex.

If we press the question we must therefore enter the realm of deontology, and at this point something curious seems to happen. Why do we not physically maim our prisoners? The standard answers fall back on some such phrase as: (i) respect for the integrity of the human body; (ii) a desire that punishment be made humane; (iii) respect for human dignity; or (iv) respect for the sanctity of the person. This language is a staple of all the various international resolutions on human rights, and of the literature of such organizations as Amnesty International.<sup>52</sup> This language is

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<sup>52</sup> The United Nations Universal Declaration of Human Rights of 1948 may be

both puzzling and revealing. The first two phrases either beg the question or are equivalent to one of the last two; and I have already commented on the oddity of the word "humane." The third phrase—human dignity—appeals to a moral and religious ideal whose origins in the modern world can be dated fairly precisely, to the time of the Italian Renaissance.<sup>53</sup> Pico della Mirandola's *Oration on the Dignity of Man*, delivered in 1486, may be taken as the classic statement of the view that God had created Adam "so that with freedom of choice and with honor, as though the maker and molder of thyself, thou mayest fashion thyself in whatever shape thou shalt prefer."<sup>54</sup> Pico continues:

O supreme generosity of God the Father, O highest and most marvelous felicity of man! To him it is granted to have whatever he chooses, to be whatever he wills. Beasts as soon as they are born (so says Lucilius) bring with them from their mother's womb all they will ever possess. Spiritual beings, either from the beginning or soon thereafter, become what they are to be for ever and ever. On man when he came into life the Father conferred the seeds of all kinds and the germs of every way of life.<sup>55</sup>

These are not the tones of the Middle Ages, whose attitude is better represented by the title of Innocent III's thirteenth-century tract *On the Misery of Man*.<sup>56</sup> The fourth phrase—sanctity of life, sanctity of

taken as a typical specimen. It opens with the words, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world"; and then decrees that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *United Nations Universal Declaration of Human Rights of 1948*, Preamble and Article 5. Similar language invoking human dignity is to be found in Preambles to the American Declaration of the Rights and Duties of Man (1948); the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963); the United Nations International Covenant on Economic, Social and Cultural Rights (1966); the United Nations International Covenant on Civil and Political Rights (1966); the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1969); the American Convention on Human Rights (1969); the United Nations Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1975).

<sup>53</sup> Again, the standard source for these matters is TRINKAUS, *supra* note 50.

<sup>54</sup> Giovanni Pico Della Mirandola, *Oration on the Dignity of Man*, in *THE RENAISSANCE PHILOSOPHY OF MAN* 225 (Ernst Cassirer et al. eds. & Elizabeth Forbes trans., 1971) (quoting the fourth paragraph of the *Oration*) [hereinafter *RENAISSANCE PHILOSOPHY*].

<sup>55</sup> *Id.*

<sup>56</sup> For a discussion of the historical background to, and the significance of, Pico's *Oration*, see Paul Oskar Kristeller, *Introduction to RENAISSANCE PHILOSOPHY*, *supra* note 54, at 215-22.

the person—manifestly goes back further yet, and has religious roots that extend well beyond the Renaissance.

It is curious that we moderns should fall back on this particular vocabulary. For no age has given higher place to the ideals of the sacred or of human dignity than did the Middle Ages and the Renaissance; and yet both inflicted punishments that today we regard as barbarous. This fact raises for us a double problem. (α) We must show that the ideal of human dignity can still be defended after its original religious underpinnings have dropped away; and, (β) we must then show, *contra* Chassenée, that mutilation violates human dignity.

The closest thing to a successful attempt along these lines that I am aware of is the theory of Immanuel Kant, who makes a valiant attempt to ground a system of morality in the abstract concept of rational agency.<sup>57</sup> He sets an absolute value, “beyond any price,” on human dignity;<sup>58</sup> and, like the Renaissance, he draws a sharp contrast between rational agents and animals.<sup>59</sup> This is not the place to enter into the details; but two features of his attempt should be noticed. First, even if Kant’s argument strikes us as entirely plausible, it is not clear that it will have the same effect on Chassenée. Kant, of course, presents his conclusions as a derivation from pure reason; but the abstract arguments seem at some level less powerful than the psychological reflex. Indeed, part of the strength of Kant’s argument is the way it holds together and makes sense of our native sensibilities: if instead it concluded with a triumphant vindication of torture, mutilation, and slavery, we would be inclined to suspect an error somewhere in the chain of inference. *Mutatis mutandis* for Chassenée. He evidently does not share our reflexes, and there is no reason to suppose that somebody whose sensibilities have not been conditioned by the historical growth of Western culture from the Renaissance onwards can be compelled, solely on abstract considerations about the concept of rational agency, to adopt our particular set of moral reflexes.<sup>60</sup> Second,

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<sup>57</sup> Similar remarks to those made below about Kant seem to me to apply, *mutatis mutandis*, to deontological theories that are based on the concept of individual rights, which in turn are grounded in the idea of a social contract.

<sup>58</sup> The concept occurs throughout Kant’s writings on ethics and politics; the best-known discussion comes in Section II of IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 435-41 (Riga, J.F. Hartknoch 1785).

<sup>59</sup> See IMMANUEL KANT, THE METAPHYSICS OF MORALS 230, 238 (Mary Gregor trans., 1991).

<sup>60</sup> I leave aside the question whether, in fact, this is what Kant’s argument was

even within the Kantian theory—that is, even if we accept everything he says about autonomy and equality and the absolute value of human dignity—there is still a problem with showing point ( $\beta$ ), that is that physical mutilation violates human dignity. Chassenée could retort that his conception no less than Kant's rests on ideas of dignity and the sanctity of the person; but that the modern era has drawn the wrong inferences. The value of dignity is served by taking the criminal seriously as a moral agent: to treat him with dignity is to regard him as a rational being, and, through the inflicting of sudden agony, to communicate to him the full wrongness of his deed. The modern conception, far from respecting human dignity, locks criminals in a cage away from sight, like dangerous beasts.

The present task is not to say whether this argument of Chassenée's is right or wrong, but to note the depth and pervasiveness of the set of problems we have almost inadvertently backed into. Chassenée shudders at heresy, and makes light of mutilation; we make light of heresy, and shudder at mutilation. When pressed to explain, we find ourselves falling back on an intuitive appeal to the sanctity and dignity of the person, but without the metaphysical and religious underpinnings that Chassenée might have invoked. Plainly we have come a long way from our original concern with the trials of animals: what now seems to be at issue is not just our understanding of the animal trials, but the precariousness of our own moral judgments.

viii.

These reflections can produce in us a kind of mental cramp, an uncertainty about where to turn next. So let us temporarily set aside questions of understanding and justification, and ask instead how the modern point of view historically arose. What steps led from Chassenée to ourselves?

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intended to do. It seems to me an error in Kant's interpretation to view him as attempting to *deduce* from pure reason a system of ethics; perhaps it is more accurate to see his project, not as an attempt to refute the moral sceptic, but as an exploration of the contours of practical reason. If so, then Kant is closer to the standpoint of modern analytical philosophy than he sometimes appears. The issues here are difficult, and impinge on the vexed question of the nature of a transcendental argument; but these problems belong rather to Kant scholarship and need not detain us here.

Manifestly a large change took place in legal thought in the eighteenth century. Early in the century London pickpockets were still punished by hanging; by the end, the project of criminal codification and of penal reform, led by Jeremy Bentham and Cesare Beccaria, was well under way. Punishment was to be made humane and proportional to the crime: it was to be made rational, scientific. If we open to any page of Bentham and compare it to any page of Chassenée we can see at once the change that has taken place. Where Chassenée cites the old *auctoritates*, Bentham appeals to observed facts, logic, quantities of pleasure and pain, precise measurements, rational design. We might conjecture that the rise of the scientific world view is the chief point of separation between Chassenée and ourselves.

I do not dispute that the changes that have occurred in the theory and practice of punishment are tied to changes in the empirical sciences. But here it is important to ask, What is the nature of the tie? Is it just an accidental link, or is there some deep, underlying affinity between modern science and modern punishment? Even if we conclude the link is merely accidental, this information will be useful in allowing us to understand something important about the differences between Chassenée and ourselves; but if the link turns out to be based on objective *reasons*, then we have the additional prospect of being able to explain to him, without begging the question, why our conception of punishment is superior.

Bentham would certainly have presented himself as marching in step with Science, Progress, and Reason; and he also rejected physical mutilation. But the question is whether there is any essential connection between these two positions. Perhaps the fact that the people who rejected mutilation were the same as the people who upheld Science has no deeper significance than the fact that we call certain political positions "left" and "right" rather than "top" and "bottom" or "blue" and "green." Bentham's own sentiments were opposed to the deliberate infliction of severe pain; but as I indicated earlier, these sentiments are hard to derive by scrupulous logic from his brand of hedonistic consequentialism.<sup>61</sup> Are we to

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<sup>61</sup> This is not the place for a detailed examination of the development of Bentham's views on punishment. In some of his earliest writings he was concerned with establishing an association of ideas between crime and punishment, and suggested various ways in which punishment might be made analogous to the crime. So, for example, the same implement might be used in the punishment as was used

say that an increase in scientific knowledge must necessarily bring with it an increase in general benevolence? This seems implausible, and certainly it is easy enough to imagine a certain sort of scientific temperament that would sweep aside all talk of human freedom and human dignity as so much medieval superstition, to be replaced by a rationally-based theory of punishment that would employ, where necessary, mutilation and torture.

What of Bentham himself? What reasons impelled him to reject the inhumane punishments—the maimings and the tortures—of the Middle Ages? Perhaps an answer to this biographical question will shed some light on the larger issues.

As I have already argued, Bentham's utilitarianism does not seem to me to provide an ironclad logical argument. But an anecdote may be illuminating. Bentham seems to have had an almost morbidly sensitive disposition, and from his earliest childhood to have been troubled by dreams of the Devil. When he was an undergraduate at The Queen's College, Oxford, he was given a room in the back quadrangle overlooking the cemetery of St. Edmund Hall; his fear of ghosts was so great that, from his meager funds, he paid another undergraduate to change rooms. It was at this time that he began to apply himself assiduously to the study of logic.<sup>62</sup> So perhaps this is the answer to the question about

to commit the crime; or the same injury might be inflicted upon the criminal; or the part of the criminal's body that was used to commit the crime might be subjected to punishment; or the counterfeit of a coin might have an image of the coin imprinted on his face. See 1 THE WORKS OF JEREMY BENTHAM 407-11 (J. Bowring ed., London, Simpkin, Marshall & Co. 1838) [hereinafter WORKS OF BENTHAM].

In chapters 13 to 15 of his influential mature work, the *Principles of Morals and Legislation*, Bentham discusses species of punishment in abstract terms; his principal concern is to introduce proportionality between the punishment and the crime. But he gives a number of considerations that the legislator ought to take into account in designing a schedule of punishment. Mutilation, whipping, branding, and capital punishment, he points out, cannot be remedied if the innocence of the prisoner is later established. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 184 (J. Burns & H.L.A. Hart eds., 1970) [hereinafter BENTHAM, MORALS AND LEGISLATION]. He also points out that punishments should not offend public sensibilities, and that punishments for different crimes should be commensurable. But these considerations are to be balanced against such matters as the effectiveness of punishment and its "characteristicalness," that is its similarity to the crime. Bentham appears as a general matter to favor imprisonment; but he does not lay down an absolute prohibition against mutilation or capital punishment, and indeed, as we observed earlier, such a prohibition would be difficult to square with his general utilitarian stance. For a discussion of the difficulties with Bentham's theory of punishment, see H.L.A. Hart, *Introduction* to BENTHAM, MORALS AND LEGISLATION, *supra*, at lx-lxvi.

<sup>62</sup> These facts, part of the lore of the College, are reported by the editor of

Bentham. Perhaps science and logic offered him a more comforting world, a world free of the fear of ghosts and devils; perhaps Bentham's personal Enlightenment was at bottom itself a kind of animal trial, a medieval exorcism carried out by other means. And perhaps we have stumbled across an answer to the larger problem as well. Perhaps this sort of incremental, evolutionary, irrational change, occurring at the level, not of abstract reason, but of the moral sentiments, repeated many thousands of times, accounts for the distance between Chassenée and ourselves. A philosopher of genius, frightened of the dark, develops a naturalistic moral theory, free of ghosts, and persuades his contemporaries to accept it; the older view gradually recedes, and is forgotten. These evolutionary changes, even taken as an ensemble, do not themselves of course constitute an *argument* for the truth of our moral conceptions, any more than the evolution of the poodle constitutes an argument against its ancestor the wolf. But they do offer, if not an argument, at least some kind of explanation. They explain two things: how we could have gotten from Chassenée to ourselves, and why Chassenée's world is now so difficult to access.

It will no doubt be objected that these facts constitute not reasons, but causes, and that in mentioning Bentham's morbid psychology I am committing the "genetic fallacy," that is, the fallacy of confusing the truth of a theory with its psychological origins. The objection is right to label the things I have mentioned causes; but it is as causes, and not as reasons, that I offer them. I do so as a *pis aller*; I would prefer reasons. But the problem is, all the reasons I can think of seem to have run out; and still I would like an explanation. What is left but to grope for causes?

#### ix.

These reflections can leave us with an uneasy feeling that, not only do we not understand the animal trials of the Middle Ages, but we do not even understand our own legal practices. This is a possible philosophical position; and here Nietzsche has some apposite things to say:

As for the other element in punishment, the fluid element, its "sense," in a very late condition of culture (for example, in modern Europe) the concept of "punishment" does not at all

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Bentham's works, who discussed them with Bentham before publishing. See 10 WORKS OF BENTHAM, *supra* note 61, at 21, 39.

display any more a *single* sense, but rather an entire synthesis of "senses." The previous history of punishment in general, the history of its use for the most varied ends, crystallizes in a sort of unity which is difficult to untangle, difficult to analyze, and (as one must emphasize) is utterly *indefinable*. Today it is impossible to say exactly *why* punishment occurs: All concepts in which an entire process is semiotically condensed elude definition; only that which has no history can be defined.<sup>63</sup>

But notice that our earlier train of thought seems to have landed us in a place one would hardly have thought exists: in a scepticism even more extreme than that of Nietzsche. For Nietzsche thought only that *modern* punishment is indefinable; but not so for punishment in earlier stages of culture. (To paraphrase: in the past there were *reasons*; today we can give only historical *causes*.) But we have looked at the explanations of the animal trials provided by Blackstone and Leibniz, Gratian and Aquinas; and none seems to make sense.

Here is a possible nightmare. If we could gather together in a single room all the great thinkers who have written about animal trials—Moses, Plato, Gratian, Aquinas, Leibniz, Blackstone—and ask them to explain themselves, what would they say? What would they say to the others? What would they think to themselves? Perhaps—the possibility is not far-fetched—they would have nothing at all to say. Perhaps they would find the infliction of punishment as mysterious as we do. Maybe all that is going on here is a kind of horrible legal inertia, where rules are blindly copied from one system to another: we do these things because they are the things we do. Perhaps even Chassenée, for all his deep learning on the subject, never really understood the animal trials—nobody knows what they were for, and nobody has ever known. At any rate, Nietzsche's suggestion that our ancestors knew the secret of punishment seems overly optimistic. The ancient Romans punished parricides by casting them into the sea, enclosed in a sack, accompanied by a cock, a viper, a dog, and a monkey.<sup>64</sup> Can it be possible that they understood punishment any better than we?

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<sup>63</sup> The original is given in *supra* text accompanying note 1.

<sup>64</sup> See 2 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 718 (Modern Library Edition 1993) (1776).

## x.

These, then, are the sources of my unease. We started with what looked like a mere caprice, an inquiry into the curious case of the rats of Autun. And we have come, by an entirely natural sequence of steps, to philosophical issues of extraordinary depth and complexity. I do not here wish to endorse any particular solution, but merely to point out the problem: we went on a lark to open an ancient tomb, and the mummies seem to have come alive.

Other kinds of philosophical problems, of course, can produce a similar sense of epistemic vertigo. David Hume famously argued that even his belief in the external world is not to be established by reason: it depends rather on habit and feeling. "After the most accurate and exact of my reasonings," he writes, "I can give no reason why I should assent to it; and feel nothing but a *strong* propensity to consider objects *strongly* in that view, under which they appear to me."<sup>65</sup> Perhaps the same is true here. Perhaps what separates Bentham from Chassenée is merely habit and feeling, causes but not reasons: the Middle Ages had one set of sensibilities, and the Enlightenment another; that is all.

Hume also famously pointed out a reassuring side of his doctrine, namely, that his sceptical doubts vanished as soon as he left his study. Maybe this solution will also work for us. Abstruse reasoning, he says, is less powerful than sentiment:

When we leave our closet, and engage in the common affairs of life, its conclusions seem to vanish, like the phantoms of the night on the appearance of the morning; and 'tis difficult for us to retain even that conviction, which we had attain'd with difficulty.<sup>66</sup>

"Most fortunately it happens," he says, "that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose."<sup>67</sup> We cannot help believing in the external world as we do; and in the end philosophy "expects a victory more from the returns of a serious, good-humour'd disposition, than from the force of reason and conviction."<sup>68</sup>

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<sup>65</sup> DAVID HUME, A TREATISE OF HUMAN NATURE, bk. I, pt. IV, § vii (London, John Noon 1739).

<sup>66</sup> *Id.* bk. III, pt. I, § i.

<sup>67</sup> *Id.* bk. I, pt. IV, § vii.

<sup>68</sup> *Id.*

But this Humean solution is not, I think, available to us. For our problem is not, in the end, a philosopher's problem like the problem of the existence of the external world. It is a problem about our capacity to make sense of real, historical people; it comes with us when we leave our study. Hume, in treating the problem of the external world, can fall back on nature and habit precisely because the habits he appeals to are universal in the species. But what does a "good-humour'd disposition" have to say about the animal trials? To put the point another way: what is in question here is not just our reason, but our sentiments as well. The scepticism we encounter seems to have no bottom.

The issues raised by these meditations on the animal trials indeed appear to lie at the center of our modern attitude to the world. It seems to me utterly basic—moral bedrock—that somebody who deliberately tortures a pig must be insane or evil or both; certainly I would prefer to spend a week in the company of the lunatic who believes that the world does not exist. Both are mad, but the torturer has the additional demerit of being both threatening and nauseating. But our course of reasoning calls this modern attitude into question. Chassenée was plainly neither mad nor cruel; yet he wrote a deeply learned text that discusses, *inter alia*, the judicial torture of animals. We appear to have reached the limits, not just of rational intelligibility, but of emotional intelligibility as well.

## xi.

These sceptical conclusions are plainly intolerable; they may be the beginning of wisdom, but let us hope they are not its end. If we are to "dispel the clouds" of scepticism, where must we turn for assistance?

One line of argument to which I have already alluded comes from within modern analytical philosophy and would short-circuit the entire problem. The argument ultimately has its roots in Kant's distinction between *questions of fact* and *questions of reason*. The argument goes like this. What I need in order to still my doubts is *reasons*; but in looking at Chassenée and Bentham and the rest I have inadvertently strayed into the realm of historical *causes*. What I must do is clearly separate these two things: I must, on the one hand, *qua* philosopher, develop an abstract moral theory that will justify my beliefs and rationally explain why the torture of animals is wrong; and, on the other, *qua* historian, develop an empirical

theory of moral pathology that will explain why Chassenée and others have gone so badly astray. These are both important projects, but logically quite distinct; and only confusion can result from mingling the two.

In developing a moral theory (the argument continues) my only option is to work from within my own conceptual scheme. There is no transcendental standpoint. I must take my moral beliefs and my emotional reflexes as I find them, and attempt to bring them into harmony with each other. Here is how John Rawls describes the method of “reflective equilibrium”:

There are questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust. We think that we have examined these things with care and have reached what we believe is an impartial judgment not likely to be distorted by an excessive attention to our own interests. These convictions are provisional fixed points which we presume any conception of justice must fit.<sup>69</sup>

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<sup>69</sup> JOHN RAWLS, A THEORY OF JUSTICE, 19-20 (1971) [hereinafter RAWLS, THEORY OF JUSTICE]. In treating Rawls’s method of reflective equilibrium as characteristic of much recent analytical philosophy I do not mean to imply that all analytical philosophers adhere to his method in all its details; indeed, Rawls himself employs several distinct senses of “reflective equilibrium,” and his use of the term has undergone subtle modifications since it was first introduced. For his most recent discussion of these matters, see John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 142-50 (1995). It should also be observed that in his recent publications Rawls assigns a specific technical meaning to the terms “reasonable” and “rational”; that meaning is not in question here. I hope the general features of the style of moral philosophy I am discussing will be clear from the text.

I should like explicitly to observe that I have no disagreement with the philosophical project of developing a political conception of justice for a modern, constitutional, democratic regime, nor against the idea that such a political conception must be grounded in an overlapping consensus. Rawls’s project in *Political Liberalism* is (roughly) to find political principles that citizens of a modern, pluralist democracy can agree upon while remaining divided on issues of religion, philosophy, and morality. See generally JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. I am interested in a different problem: (roughly) how far we can make sense of the legal practices of cultures not our own. As a logical matter the two enterprises seem to me entirely compatible; but for reasons I give in the text the ideas of reflective equilibrium and of overlapping consensus cannot play the same central role in comparative law that they do in the theory of political liberalism. It seems to me an empirical question how far an overlapping consensus is in practice possible: if ethnic or religious conflict reaches deep into a society, or if two mutually hostile societies (religions, world views) glower at each other across an international border, then the sort of issue I am concerned with becomes relevant to the project of political liberalism; but even then, I believe, the two projects are complementary rather than incompatible.

We try to arrange these provisional fixed points into a coherent scheme of justice whose “justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.”<sup>70</sup> Some of the initial fixed points may shift in the process: they are not necessary truths. The resulting theory “is a theory of the moral sentiments (to recall an eighteenth century title) setting out the principles governing our moral powers, or, more specifically, our sense of justice.”<sup>71</sup>

I have no argument against this way of doing moral philosophy, and indeed for many purposes it seems to me the only possible way to proceed. My point is a different one, namely that for *present* purposes this style of philosophy, if taken in a certain way, seems unlikely to solve, or even to address, the problems raised by the rats of Autun.

The difficulties arise when moral philosophy makes itself relative to the inherited scheme of moral sentiments; for it is hard to see how making an orderly arrangement of our own moral sentiments can solve the original problem. Chassenée evidently has one set of moral sentiments, and we another; but there is no reason to suppose that, if we were both to construct our respective maximally coherent theories of our moral sentiments, those theories would agree even at the most basic level. The difficulty, indeed, is that the most basic moral sentiments we possess—the provisional fixed points from which we start—are precisely *not* things we have closely examined. We do not need to. They are, as I observed before, almost a physical reflex, part of our moral bedrock. We see some children light a cat on fire, and we see that that is wrong: it is hard to think of any mere *reasons* that reach deeper.

To put the point another way, the example of the animal trials brings out a latent tension between the following two propositions:

- (1) The task of moral philosophy is to construct a moral theory, that is, a maximally-coherent set of moral judgments that function as reasons.
- (2) The theory can appeal to no transcendental standpoint: it is to be grounded in certain basic moral sentiments that we happen, as an empirical matter, to have.

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<sup>70</sup> RAWLS, THEORY OF JUSTICE, *supra* note 69, at 21.

<sup>71</sup> *Id.* at 51.

The problem is that what in (1) are treated as reasons turn out in (2) to be brute empirical facts; and it is then hard to see how they can have any grip on Chassenée.

If (1) and (2) are *all* that moral philosophy has to offer, then we seem to have reached an impasse. We can, of course, continue to give reasons why we do not torture animals. But those reasons, it is important to observe, are not now grounded in any a priori, transcendental *Vernunft* of a metaphysical and Kantian sort. They are relative to our own conceptual scheme, and ultimately seem to rest upon nothing more than the brute fact that we have inherited a particular set of reflexes. In other words, the reasons we arrive at are to be understood as reasons *for us*: they make no claim to constitute reasons for a medieval Samurai or a Homeric warrior.

These facts are directly relevant to the issue of historical causation with which we began. The original suggestion, recall, was that we should consign such matters as Bentham's nocturnal fears to the realm of history—the realm of mere causes—and instead develop a reasoned, philosophical theory of morality. We can now see that what underpins this suggestion is the rejection of a transcendental starting point. A subtle but natural train of thought can lead from that premise to the conclusion that the study of empirical historical causes is irrelevant to moral philosophy. The argument—call it the “immanence argument”—goes like this. We are constrained to take our considered moral sentiments as we find them: they are the only possible starting point for moral philosophy. Our task as philosophers is then to explore, from inside our inherited conceptual scheme, the contours of our shared, modern, Western sense of justice. This investigation will furnish us with a body of reasons; but those reasons are *immanent* reasons: the only sort of reasons that exist. We have no need (and in fact it would be an error) to base our philosophical investigations on history or on the study of the moral practices of other communities; indeed, to do so would be, in a subtle way, to try to go beneath the bedrock, to try to adopt a standpoint outside of our own conceptual scheme.

I do not know to what extent this immanence argument has consciously influenced analytical philosophers; it is rarely stated explicitly, but lurks in the background. However, it is entirely consistent with the unhistorical way analytical philosophers have practiced moral philosophy. They have explored the moral sensibilities of a twentieth-century Western industrial democracy in just the way the immanence argument would recommend, testing them against each other and against ever more imaginative thought

experiments. The literature that has resulted ("Do Robots Have Rights?") is technically very sophisticated, and often employs the tools and the mathematical vocabulary of game theory or decision-theory or welfare economics. But it is important to observe that, despite the denial of a transcendental starting point, these techniques of analytical moral philosophy can only be described as being, from a methodological point of view, a priori: we are not, perhaps, as distant from Kant as one might at first suppose.

This a priori style contrasts markedly with the historicist style of moral philosophy pioneered by Kant's student Johann Gottfried Herder, and later developed, in very divergent ways, by such thinkers as Hegel and Marx and Nietzsche. In analytical philosophy there has been little attempt to probe the historical origins of our moral sentiments, or (what comes to the same thing) to subject them to empirical scrutiny.

So far, however, so good. I have no objection to casuistry, and no allergy to mathematics. But not so when the a priori style of analysis claims to be the unique way to pursue the problems of moral philosophy, and in particular when it suggests we need never look to historical causation.

The difficulties occur when we come to a phenomenon like the medieval animal trials. We seem, on the analytical approach, to end in a blank irrationalism, with one world view uncomprehendingly staring into the eyes of another. We have reached the bedrock of our moral sentiments; and if the immanence argument is correct, then nothing more can be said. But the suggestion of Herder and Nietzsche and their historicist *confrères* is that, even if reasons have run out, we can still look to historical causes: that something of philosophical importance is to be learned from attempting to go behind our moral sentiments, and to trace the genealogy of our moral ideas. (It is one of the many oddities raised by the trial of the rats of Autun that, at this point in the argument, Nietzsche could seem to represent an antidote to the irrationalism of analytical philosophy.)

The question we must therefore ask is whether the suggested way of short-circuiting our earlier worries—concrete historical causes in this basket, abstract philosophical reasons in that one—is philosophically tenable; and this comes down to the question of the tenability of the immanence argument.

Let us agree with the prevailing wisdom that moral philosophy is immanent and that its task is to explore the contours of our inherited conceptual scheme. It does not follow from this premise

that our *methods* may only be mathematical and a priori. History can be immanent, too; in fact, rather more easily than game theory. For our conceptual scheme is conspicuously a product of cultural evolution, and one way to explore it is to examine the way it emerged over time. Of course, if you believe (and if you do, it can only be on a priori grounds) that the task of moral philosophy is simply to examine abstract reasons, then an inquiry into the genealogy of morals will not belong to philosophy. But this is to beg the question. I see no reason, a priori or empirical, not to adopt a more generous conception of the task of philosophy: philosophy exists not just to examine abstract reasons, but to help us understand our situation. And for that purpose we should be free to employ any tool that lies ready to hand, whether it come from mathematical economics or from history. As for the invention of illuminating thought experiments, history is evidently much better at the job than we are. The trial of the rats of Autun seems to me at least as fruitful a topic as the make-believe examples of robots and imaginatively jailed prisoners: it raises equally difficult theoretical issues, and penetrates more deeply into our way of thinking about the world.

When once we start to approach moral philosophy in this way, the sharp distinctions of the a priori analytic approach can come to seem problematic and arbitrary. Take first the suggestion that the task of moral philosophy is to construct a coherent theory of our inherited moral sentiments. Once one starts to think of this problem historically, it is natural to wonder about the precise force of the "we." Closeness in moral sensibility does not correlate perfectly with chronological closeness or geographic closeness: in many ways, Aristotle is closer to us than are Cotton Mather or the Boston Strangler. I do not mean to deny that, as a practical matter, a philosopher might attempt to construct a public conception of justice to be employed by the citizens of a particular society. But here the relevant community can be taken as given; the task is then to devise a set of principles that will command widespread acceptance. My point is a different one: that, as a philosophical matter, if the community is not given in advance, there seems to exist no criterion that does not beg the question for determining whose sentiments count, and who is to fall within the scope of our moral community. There seems no good reason to limit it to people who are presently alive (and ample reason not so to limit it). But then the original strategy for short-circuiting our sceptical doubts is in trouble. The suggestion, recall, was that we should develop a theory

of *our* community's moral sentiments, and exclude the rat triers; but I can see no principled way to draw the line.

Similarly for the distinction between *reasons* and *causes*. As we probe into the origins of our moral sentiments it can at times be difficult to tell which is which. Reasons seem to be able to metamorphose into causes, and causes into reasons. Take an example. Hobbes wrote his *Leviathan* in the wake of the Thirty Years' War in Germany. He had lived in Holland for a spell, and knew from refugees the consequences of anarchy. Undoubtedly this experience left its mark on the theory of sovereignty in the *Leviathan*—on the argument that sovereignty must be undivided, on pain of civil war. But are we dealing here with reasons or with causes? If Hobbes's fear of civil war is a reason for his arguments in political theory, then why is not the same true for Bentham's fear of ghosts? And what of the impact of, say, Plato on subsequent political theory? He held a number of views (on slavery, on women, on the transmigration of souls) which he puts forward as reasons for his political beliefs, but which we now regard as mistaken. Is the influence on the present of what were once regarded as reasons to be counted as merely a cause of our present ideas, or as belonging to the realm of reasons? To ask these questions is to see their futility, and to despair of being able to disentangle either reasons from causes, or ourselves from the medieval triers of animals. Nor, I think, should this conclusion disturb us. It should be evident that the search for a cause can help bring to light reasons of which we were not earlier aware; and so long as the explanation sheds light, who cares what we call it? Bentham's fear of ghosts seems to us less significant than Hobbes's fear of civil war, not, perhaps, because one is a cause and the other a reason, but because the first fear explains far less than the second.

Should we go further and deny, not only that reasons and causes can be disentangled, but that there is any sharp and ultimate metaphysical difference between the two? The question is difficult, and fortunately we need not attempt to answer it here. I wish only to establish a case for thinking that moral philosophy may have something to gain from looking to what are often classified as mere historical causes; nothing I have said depends on the more general metaphysical claim.

The foregoing abstract argument about the unhistorical analytical approach to moral philosophy can also be looked at historically. Very roughly, at the end of the eighteenth century,

Immanuel Kant, in the *Critique of Pure Reason*,<sup>72</sup> attacked the idea that truth consists in a correspondence to a transcendental, mind-independent reality; the details of his argument are immensely complex, but in essence he argued that truth is a kind of coherence of reasoned judgments with each other. Kant himself continued to accept the idea of a universal and unchanging reason; but it was natural for his student Herder to take the next step and make reason and morality relative to the particular coherencies endorsed by the national culture and the age. Once one has made reason immanent in this way, the question then arises of whether in some way reason and history can be brought back together. Precisely this problem was faced by philosophers of such different temper as Hegel, Nietzsche, and C.S. Peirce, all of whom attempted to steer a middle course between pre-Kantian transcendental realism and a thoroughgoing historical relativism: between saying on the one hand that moral truths are truths of reason, true in the same way for all times, places, and persons; and, on the other, that morality is simply the reflection of whatever the community happens to believe. The analytical approach I discussed earlier can be viewed as an attempt to step around this particular problem: the idea is to work entirely within the moral beliefs of a particular time and culture, and to explore those beliefs from inside. As I said earlier, I have no argument against this way of proceeding, so long as it is not taken to exhaust the entire subject of moral philosophy. But the animal trials of the Middle Ages seem to me to raise again, from the inside, the old metaphysical question of the relationship between reason and history; and the problems here, I have argued, cannot be solved simply by exploring more deeply the structure of our own moral beliefs. We confront in those trials the question of the limits of moral intelligibility, the question of how far we can hope to understand the world view of Chassenée both intellectually and emotionally; and if the foregoing argument is correct we need to enlist in our service not just the methods of abstract philosophy, but of history as well. The subtlety here is that the particular method we develop for addressing these problems will itself be dependent on how we answer the larger and more abstract philosophical questions about reason and history; specifically, on the answer to the philosophical questions depends the answer to how far it is possible to combine into a single view the abstract, analytical

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<sup>72</sup> IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (Riga, J.F. Hartknoch 1781).

approach that hearkens back to Kant and that seeks reasons, and the concrete, historicist approach that hearkens back to Herder, and that seeks empirical causes.

These are indeed deep and difficult issues that our reflections on the rats of Autun have led us into. At this point we might encounter a different version of the short-circuiting argument. It might be objected that the questions I have raised are questions for the philosopher's study. They summon forth no pressing moral issues. Chassenée has been dead for centuries; his views on trial procedures for insects are no longer of practical significance. We may, if we choose, amuse ourselves by trying to understand the follies of the past; but each age starts afresh, and the issues that weigh upon us today are best confronted directly: not by studying rat trials, but by the best moral arguments we can muster.

I do not deny the importance of abstract moral arguments. But the point of considering the rat trials is precisely to learn something about the limits of moral intelligibility, and therefore about the limits of abstract moral argument. And the problems here are not just a theoretical puzzle about understanding the distant past. Even if we leave to one side—it is a large omission—all those present-day cultures that are non-Western and non-secular, it is an obvious fiction to speak of our shared moral sensibilities, or to speak as though those sensibilities could be disconnected from their historical origins. One need not look far to find disputes whose roots lie in the sensibilities that have survived to us from the past, and even in the sensibilities that are in evidence in the animal trials of the Middle Ages. Over the centuries the legal systems of the West have given different answers to the question of metaphysics, What is a person? It has been debated how far the concept should be extended to women, to non-Greeks, to animals, to slaves; and although few people today would propose that the legal system extend its protection to grasshoppers or snout-beetles, the same cannot be said for human embryos.

Now, it may be asserted that all issues of this sort can be resolved by a priori reasoning from our shared moral sensibilities. But the historical evidence for this assertion seems to me weak, and I am aware of no a priori argument that would establish the point. Under the circumstances it seems reasonable to take illumination wherever we can find it: in abstract philosophy if possible, but also in history. The issues here of the limits of intelligibility and of the genealogy of our moral sentiments—of where our disagreements come from, and of how they are to be understood—are not a mere

historical caprice, but reach deep into the practical problems of the present; I see no way to fence them off. There are two issues here: first, we may hope that, by asking ourselves in the abstract how it is possible to come to understand Chassenée we will also learn something about how to understand the disputes of the present; second, we may hope that by actually studying the animal trials of the Middle Ages we will at the same time learn something about the contours and origins of our own moral thought. Whether one calls this historical knowledge a knowledge of reasons, or a knowledge of causes seems to me immaterial: the important question is how much light it sheds, and how far we are assisted to understand, not Chassenée, but ourselves.

## xii.

Our argument has taken us in a large circle. We started by trying to make sense of the trial of the rats of Autun. But when we looked at the explanations of Chassenée and Leibniz, Blackstone and Aquinas, the reasons they offered seemed to melt. We next wondered whether our own situation is any more secure, and we turned to history for an answer. We squirm at the thought of mutilating a prisoner; Chassenée did not. Chassenée squirms at the thought of heresy; we do not. We explain our squirming by saying we believe in human dignity, the sacredness of the person. But Chassenée, who believed in the sacredness even of insects, is much closer to the metaphysics that gave this notion its original force; he indeed saw heresy precisely as a threat to the sacred—this is why he was willing to punish it so savagely—and yet our arguments about torture and mutilation seem to be unable to find a grip on him. How, then, as a matter of reason, are we to explain how our own legal practices could have developed out of the practices of Chassenée? This question engendered a feeling of epistemic cramp. We looked to history for help, as a succedaneum; but it only made our symptoms worse. Perhaps, we thought, nothing underpins the differences except blind historical causation—phenomena ultimately no more rational than Bentham’s fear of ghosts. We next turned to analytical philosophy, which seemed to offer a way of short-circuiting the entire problem. But, by degrees, we have been led to the conclusion that the problem is not, in fact, an illusion, and that the “high priori road” of analytical philosophy is unlikely to carry us to our goal: to understand ourselves, we need to know how to understand Chassenée, and to understand Chassenée we need

empirical history, not just immanent reasons. And so we have come round to our original problem, but in a different and more urgent key: How are we to make sense of the trial of the rats of Autun?

xiii.

In the course of these meditations we have obtained a sense of the sprawling difficulty of the issues. It is natural now to try to cut them down to reasonable proportions. Perhaps if we start by trying to solve an easy case, we shall in time be able to make progress on the more difficult.

History and philosophy have led us into deep waters. We found ourselves overwhelmed; we were left with a sense of vertigo, with mental cramp, not knowing how to go forward. The abstractness and the sheer breadth of the issues is in part to blame; and law here perhaps can provide an antidote. The legal rules of a society are public and highly visible: its moral philosophy writ large. So perhaps it will be easier to see what is going on. Moreover, law is a concrete and practical discipline. Working attorneys must, as a matter of practical necessity, sometimes deal with the laws of another society; and the problems they must solve can be expected to bear at least a family resemblance to the more theoretical problems we encountered earlier. Perhaps if we consider, in the concrete, how an American lawyer makes sense of a French *avocat* or an English solicitor we shall obtain some hints about the trial of the rats of Autun.

An entire academic discipline has been devoted to just this problem: the discipline of comparative law. It has been in existence for about a century, and has generated a large and learned literature, in numerous languages, discussing how best to study law in a foreign legal system. I have searched in this literature for hints and clues, always asking: What are the prospects that this theory will assist us to understand the animal trials of the Middle Ages?—Many theories have been proposed; but they can be sorted into four main groups. None seems to offer much help. We shall see the details later; for now a brief indication of the reasons will suffice.

(1) Some scholars say you should seek understanding in the *black-letter rules* of the substantive law. But the rules in the animal trials seem to be clear enough: rats, if they wantonly destroy a farmer's crops, are guilty of a felony, and are to be punished, provided they have been convicted after a fair trial.

(2) Others say you should look to the *legal process*. But I know—or I think I do—how the animal trials worked. Not well enough, perhaps, to try such a case myself; but well enough to be able to follow the proceedings, and to say if somebody made a significant mistake. I know that insects were entitled to the appointment of counsel for their defense; that domestic animals were tried in lay courts, and wild animals in ecclesiastical ones; that the procedures used were influenced by a mixture of Roman law and canon law. But information of this sort seems rather to state my problem than to solve it.

(3) Yet other scholars have urged that comparative law is best conceived as the study of *legal transplants*—of how black-letter rules have been transported from one system to another. But this approach to the subject only postpones my problem. For if I do not understand the rules for deodand in seventeenth-century Germany, it does me no good to be told that those rules were borrowed from England *via* sixteenth-century France.

(4) We might conjecture that the problem with these first three classes of theories is that they cast their net too narrowly. They look just to the legal system itself; but perhaps we should look to a wider context. The final group of scholars does just this. They assert that the legal system is a mirror of the economic relations, or the power relations, or the social relations in the surrounding culture; they treat law principally as a sociological phenomenon. So, for example, law will be viewed as a mechanism of dispute resolution, or as a means for organizing the economy, or as a way of establishing social order. But these “functionalist” explanations, applied to the animal trials, seem to miss the point. In the first place, as we have observed, animal trials are to be found in a wide variety of societies, from Periclean Athens to Elizabethan England, and indeed well beyond Europe. But I have been unable to discover any significant tie between the institution of animal trials and the background social or political or economic structures.<sup>73</sup>

Second, and more importantly, these trials seem to have served no recognizable economic purpose. It is, of course, economically obvious why one would kill a dangerous pig or try to rid one's barley fields of rats. But the issue is the economic or social function of the *trial*. And I can see no way of explaining these trials in

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<sup>73</sup> This general point about the irrelevance of social background to legal institutions has been forcefully made by Alan Watson in dozens of books and articles. My discussion and endorsement of his argument is to be found in Ewald, *supra* note 8.

functionalist terms without either begging the question, or saying something manifestly false. Shall we say the trials were a mechanism of dispute resolution—between humans and grasshoppers? Or that the sociological function of the trials was to restore calm to a troubled community? Or that judges were implicitly trying to maximize wealth? But these explanations seem to me to shed darkness rather than light. To say that a social practice serves a particular end has explanatory force only if, and only to the extent that, the end can be specified independently of the practice; but plainly *anything* can be explained by saying its social function is to satisfy the ends that are to be satisfied by the observance of the social practice. Such an explanation is like the explanation that opium puts you to sleep because it possesses “the dormative virtue.” The problem is not so much that such explanations are false, or that they are empty (often they are both) as that they can, in certain circumstances, and in subtle ways, engender a dangerous illusion of understanding. One thinks one understands the animal trials, and never notices that the central issue has been left untouched. *Of course* the trials were intended to restore calm to a troubled community. But that is not the source of my bewilderment, and this is not the kind of explanation I seek. I want to know precisely how putting a pig on trial for murder could accomplish such marvelous social effects, and to understand why Chassenée saw these matters in one way, whereas we see them in quite another.

## xiv.

The problem with all these explanations is thus not so much their width or narrowness as the kind of fact they take to be central. Recall the original problem, and the source of our epistemic disquiet. Chassenée and his contemporaries were solicitous of insects and rats, but willing to torture a pig for its crimes; we are unwilling to torture pigs, but mostly indifferent to insects and rats. Not only these particular things have changed, but a great deal else besides. Scientific knowledge has changed, metaphysics has changed, the moral sentiments have changed: the entire frame of reference is different.

But the theories of the comparative lawyers, both broad and narrow, say nothing about Chassenée’s frame of reference, nothing about his moral sentiments. Like the functionalist and behaviorist explanations in philosophy of mind with which these theories have

a great deal in common, the point of view is remorselessly external.<sup>74</sup> All the talk of rules and processes, structures and functions, might just as well apply to a community of robots. (So we need not study the rules?—I assert no such thing.) What is missing is the element of subjective, conscious experience: an account, however tentative, of what it was like to be Chassenée. We get only the husk, and never penetrate to the kernel. To put the point another way, these theories think of law as a set of more-or-less abstract social relations. But the difficulty in understanding the animal trials is not a difficulty in understanding social relations. It is a difficulty in making some extremely alien behavior intelligible to ourselves: of understanding how Chassenée and his contemporaries think.

We must, it seems, for this purpose conceive of law as a cognitive phenomenon, seeing in it not just a set of rules or a mechanism for the resolution of disputes, but a style of thought, a deliberate attempt, by people in their waking hours, to interpret and organize the social world: not an abstract structure, but a conscious, ratiocinative activity. So viewed, law becomes part of a larger framework of cognition, and it both shapes and reflects the metaphysics and the sensibilities of the age. It is important at this stage to try to formulate the task of comparative law precisely, and to try to see exactly what a solution to its central problems will entail.

We have already agreed that to recapture Chassenée's frame of reference we need to know more than just the legal *rules*; but what else do we need? Certainly also the underlying *principles*, that is, the characteristic underlying pattern of justifications and reasons that he would give for the surface rules. If our task were simply to understand a modern Western legal system we might be able to stop here; but with Chassenée there seem to be at least two further steps

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<sup>74</sup> These points about philosophy of mind are made in Thomas Nagel's celebrated chapter on chiropterous phenomenology. See THOMAS NAGEL, *MORTAL QUESTIONS* 165-80 (1979). Nagel's arguments bear more than a nominal relationship to the present inquiry; in particular, their influence on the remainder of this introduction will be clear to anybody who has read his chapter.

The existence of a significant relationship between comparative law and the philosophy of mind is not as surprising as it may at first appear; for if (as I do) one thinks of law primarily as a style of thought, then general considerations about philosophy of mind come immediately into play. The issues here run extremely deep, and are hardly new: a full discussion would take us—indeed, in due time and in a later article will take us—into a discussion of nineteenth-century idealism as applied to the social world, and in particular to a consideration of such works as GEORG W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., Oxford 1977) (1807).

we need to take. We need to recover the wider pattern of *beliefs* that underlies the legal principles—his beliefs about pain, animals, the person, responsibility, law—broadly speaking, his metaphysics. (In dealing with a modern French *avocat* we can probably take these things for granted; but for philosophical purposes it is well to remind ourselves that we are doing so. Hence the utility of Chassenée as an example.)

So far we have asked three questions of the foreign legal system: What are the rules? How are they justified? What did Chassenée believe? But as we also saw, not all the barriers to an understanding of Chassenée occur at the level of belief, and there is a further problem of making intelligible to ourselves his feelings, his moral sentiments: without such an understanding, indeed, we will probably not be able to make rational sense of his beliefs.

We need, in other words, to find our way into his cosmos, to excavate the pattern of beliefs and sentiments that was characteristic of his age. We need to imagine what it would be like to shudder at heresy, and to regard torture as a normal punishment; to believe the old metaphysics, and to participate, with full seriousness, in a legal proceeding like the trial of the rats of Autun. What would one have to believe, and how would it feel?—All this assumes that there was some range of conscious experience that Chassenée underwent as he thought about his arguments and addressed them to the court: something it was like to *be* Chassenée, something the experience was like *for him*. And my suggestion is that it is ultimately that range of experience we must recapture if we are to make sense of the animal trials. Hence my way of formulating the central question for this series of articles: *What was it like to try a rat?* This question, in contrast to the questions comparative law has dealt with hitherto, seems to put the emphasis in the right place, namely, on the character of the conscious experience; if we can answer it, then we can claim to understand the animal trials of the Middle Ages, and we can claim to know how to go about trying to understand a foreign legal system. The question has a second advantage. It reminds us that the task of comparative law is to render a certain range of legal proceedings intelligible to ourselves, or, to put the matter in a different way, to enable us to *communicate*; and plainly we cannot intelligently communicate with Chassenée—cannot intelligently discuss the animal trials with him, cannot understand what he is trying to do—if all we know is the external husk of rules and courtroom procedures.

Of course, to formulate a question is not to be able to answer it, and the present question immediately raises a second question of equal difficulty: How are we to find out what it was like to try a rat? Herder had a revealing expression for this process: *sich einfühlen*. (He is said by some to have coined it.) The standard English translation—"to empathize"—does not capture the sense of the original. It is a reflexive verb; literally, "to feel oneself into." But so far this is only a label, a promissory note for a method; it is not the method itself.

How are we to feel ourselves into Chassenée's cosmos? How are we to recover the vanished frame of reference? From what has so far been said it might be imagined that my answer is: learn everything. Learn Chassenée's beliefs, learn his sentiments, study the rules, study the trial procedures. The more you know about Chassenée, the more, indeed, you know; and you cannot understand him fully until you understand everything about him and about his age.

But this answer would collapse my thesis into triviality, and provide no guidance about how to proceed. It would also, as a practical matter, make an answer to my central question impossible. In fact (as will emerge more clearly below) my thesis is quite different. Much of the sheer factual information that comparative lawyers have so sedulously heaped up—information about the rules for contract formation, or about the rules for service of process, or about the comparative lengths of statutes of limitation—seems to me beside the point. This kind of information sheds no light on the central question of comparative law; if it sheds light anywhere else, I should be grateful to receive a postcard from so distant a location. The same goes for much (not all) sheer empirical economic or sociological data about the legal system. Exactly which data are useful and which not is a difficult question that will have to occupy us at a much later stage. For now we need only observe that our task is to prospect for nuggets of conscious experience, and that we must be prepared to discard large quantities of iron pyrite.

So far everything I have said is at the level of a first hunch. I started from the animal trials of the Middle Ages, and since then have been following a train of thought wherever it happened to lead; the discussion has been loose and intuitive. I hope, however, to have established a prima facie case for investigating further the following claims. That the task of understanding the evolution of law gives rise to deep intellectual problems; that our legal concepts are saturated with the philosophies of the past; that comparative law stands in need of reform; that history is part of philosophical

understanding; that something is to be hoped from pursuing legal history and philosophy and comparative law in conjunction.

I should like eventually to be able to answer the central question; I suspect the way to do so is to try to recapture Chassenée's metaphysics and his moral sensibilities. But for the time being that ambition must remain a distant point on the horizon. We shall need to do a considerable amount of exploring and clearing away of brush first; and before this series of articles is finished we shall find we have been led into some strange and neglected corners of the legal world. The grand problems we have glimpsed from afar are after all not a mirage. But it will be best to begin with humbler things. Our reflections have given us reason to think that comparative law, for much of its history, has travelled in a systematically mistaken direction: our first task must be to examine it carefully, and point it in the direction of our distant goal. For you can know the trial procedures, know the rules, know the way the rules were transplanted, know the economic statistics—know all these facts, and still have *no idea* what it was like to try a rat.

## PART TWO

### II. COMPARATIVE JURISPRUDENCE

The foregoing inquiry has yielded for us several important conclusions about the study of foreign legal systems: that, at any rate in the case of Chassenée, understanding foreign lawyers is not just a matter of understanding foreign rules or foreign economics; that comparative law and legal philosophy are interconnected; and that communication and understanding are not as straightforward as they seem. Our task in what follows is to apply these insights to the topic of comparative law, and to see how far they apply to the study of modern legal systems. The first step must be to try to sketch, in broad outline, the principal features of an approach that will embody our insights, and to explain how it differs from the traditional practice of comparative law.

#### A. *Remarks on Strategy*

Let me now, in abstract terms, sketch the main features of the position I should like to defend. I begin with two terminological points.

First, it should be noticed that legal history raises many of the same theoretical issues as the study of foreign law. Both are species of comparison; the chief difference is that in one case the foreign systems are separated from us by geography, while in the other they are separated by time. For present purposes it does not matter whether the comparisons drawn are explicit (as when, say, the legal systems of France and Japan are juxtaposed and contrasted) or implicit (as when, say, some aspect of medieval French law is described, the implicit comparison here being to our own system). I shall use the term "comparative law" loosely to refer to all such investigations.

Secondly, it will often prove necessary to refer generically to those participants in a foreign legal system who are in some way professionally engaged in the development or administration of law. I shall use the term "jurist" in a similarly loose sense to encompass, not just legal scholars, but also attorneys, judges, legislators, academicians, administrators, and the like.

Observe now that there are several distinct ways in which the study of foreign law can give rise to philosophical questions. First, and most obviously, philosophy is interested in the results of the study. This sort of interest is at least as old as Aristotle, who famously commences his discussion of political justice in the *Nicomachean Ethics* with the observation that "fire burns both here and in Persia, but the rules of justice keep shifting before our eyes."<sup>75</sup> The task for the philosopher is to say what is to be made of this fact; the hope is that by studying how law and justice vary from society to society one can more effectively draw philosophical conclusions about law in general. Call this sort of philosophical interest an interest in the "yield" of comparative law. The questions posed above by Alan Watson are an example of questions of yield.

Secondly, philosophy is interested in certain questions about the enterprise of comparative law itself. How should one study law in foreign society? What techniques should one use? To what extent is the inquiry afflicted by cultural relativism? How far is it possible to understand law in a radically alien society? The questions in this second category involve most obviously the problem of method, that is, the task of saying how the comparative lawyer should proceed; but there is also here a further range of philosophical questions

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<sup>75</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, reprinted in *ARISTOTELIS OPERA* 1134b (Berlin, G. Reimer, Prussian Academy ed. 1831-1870) (5 vols.) (translation by author).

about, for example, the ends and the scope of the comparative inquiry; so the category is somewhat wider than methodology alone. Call this complex nest of philosophical questions questions of "design."

These two sets of questions might appear to exhaust the alternatives, with questions of design covering the procedural aspects of the enterprise, and questions of yield, the substance. But it is important to observe that questions of design are, as it were, second-order questions, and that there exists a logical gap between questions of design and questions of yield. Even though the central question of design—How should we pursue comparative law?—is a philosophical question, there is no necessity that the answer contain any reference to philosophy; that is, we need not conclude that the fieldwork of comparative law is best pursued by philosophical means. (A philosopher interested in the design and yield of quantum-mechanical research need not advise physicists to adopt metaphysical speculation as their principal tool of inquiry.) So as a logical matter the issue remains open, and it follows that there exists a third way in which philosophy can potentially be involved with comparative law, namely, in the first-order conduct of the subject itself, as it is performed in the field. Call this the level of "execution." As a rough approximation, questions of yield, design, and execution can be thought of as questions that arise after, before, and during the comparative inquiry.

These distinctions between yield, design, and execution are still somewhat primitive, and should not bear too much theoretical weight, but they will suffice for a brief, preliminary sketch of what a philosophical rethinking of comparative law will entail.

The most conspicuously pressing questions that must be addressed are the questions of design. These questions can be approached in two stages. First, it will be necessary to diagnose the source of the malaise; second, to propose a solution, that is, to describe a new approach to the subject. Each of these two stages will involve us in a special set of difficulties. The diagnosis must in large part be historical and exegetical, and will require a careful probing of the origins of the subject and of the presuppositions that have shaped its development. And any proposed solution, before it can be made with confidence, will require an examination of thorny issues in what John Stuart Mill termed the "logic of the

moral sciences.”<sup>76</sup> One must here face intricate questions about the objectivity of values, the explanation of human behavior, the theory of radical translation, the philosophy of history, the nature of social explanation; even, perhaps, about logic and the philosophy of science.<sup>77</sup> Both of these inquiries—the historical and the philosophical—must, I believe, be pursued at a far greater depth than has hitherto been customary in comparative law: only then can a rethinking of the subject be said to have begun in earnest.

It is important to observe that, besides these issues of design, issues of yield and issues of execution also pose special difficulties. Take, first, the issues of yield. In general, what we seek from the yield of an enterprise like comparative law can vary depending on our reasons for pursuing the subject. So, to take an obvious contrast, a working attorney will in general want the yield to be of practical use, while a philosopher will want it to be of theoretical interest. The lawyer may be interested in questions about the foreign rules for the creation of secured transactions; the philosopher, in the foreign concept of sovereignty. It follows that, at least in principle, comparative law might divide into two or more tracks, with one track yielding information for lawyers, and another for philosophers.<sup>78</sup> In such a case it might prove necessary to design each track separately: for we clearly cannot presuppose that the same method will work for both goals. Call these two possibilities “single-track” and “multiple-track” approaches to the subject.

The central claims I should like to make about comparative law can now be put in the form of two interrelated propositions. First, comparative law is inherently a single-track activity. That is, if your goal is to understand a foreign legal system—let us say, to understand it well enough so that you can communicate effectively with foreign lawyers—then there is, in essence, only one way to proceed. It makes no difference if your motive for the study is anthropological, or historical, or legal, or philosophical, or anything else: given the goal of understanding the foreign legal system, you must go

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<sup>76</sup> JOHN STUART MILL, *A SYSTEM OF LOGIC* 519 (New York, Harper & Bros. 1864) (1843).

<sup>77</sup> That these issues are deeply interconnected has been evident at least since the days of Mill and Comte. See, e.g., AUGUSTE COMTE, *COURS DE PHILOSOPHIE POSITIVE* (Paris, Bachelier 1830-1842) (6 vols.); AUGUSTE COMTE, *SYSTEME DE POLITIQUE POSITIVE* (Paris, L. Mathias 1851-1854) (4 vols.); MILL, *supra* note 76, at 519-93.

<sup>78</sup> This division need have nothing to do with the distinction between theory and practice, as perhaps the bifurcation between macroeconomic and microeconomic theory makes clear.

about your business in the same way. Differences of emphasis there will of course be, but not a fundamental difference of method.

This is an important and nonobvious point, and of course it demands an argument. But for the present an analogy may help to make clear the nature of the claim. A multiple-track approach to comparative law, I think is as misconceived as a multiple-track approach to learning a foreign language. It is like approaching the study of French with the attitude that, because you are a hard-headed botanist, you wish to learn only the vocabulary of botany and to prune away everything else. But it should be clear that in this way not only would you end with an impoverished knowledge of French, but you would end with an impoverished knowledge of French—even for the purposes of botany. Linguistic capacity is not in this way relative to subject matter, and there is no radical cleavage between the study of French for botanists and the study of French for everyone else. A parallel logical mistake seems to have been committed by the traditional approach to comparative law. The subject has been developed with an eye towards what are imagined to be the needs of practicing attorneys; everything else, including the theory of law, has been ruthlessly pruned away. Is it any surprise that the subject is believed to be impoverished or that it has failed to congeal into a coherent academic discipline?

My second claim is that, at the stage of execution, comparative law is an essentially philosophical enterprise. I mean this claim to be taken in a strong sense—not just that philosophy is an indispensable tool for the study of foreign law, but that it has a certain priority over other disciplines. In making this claim I do not assert that other approaches to comparative law—say, via economics or sociology or anthropology—are without value. But their value is, I believe, strictly ancillary, and in the study of foreign law these disciplines are best viewed as handmaidens to philosophy.

This thesis, too, stands in need of argument, but the underlying reasoning (which I have already hinted at in the discussion of the rats of Autun) can be put somewhat dogmatically as follows: When we study a foreign legal system, the principal thing to grasp is not the external aspects—say, the sociological statistics about judges or the economic functioning of the rules or even the details of the black-letter doctrines—but rather what might be called the “cognitive structure” of the legal system. Recall that our goal is to be able to communicate with the foreign jurists; and communication requires not just that we observe their external behavior, but that we come to understand their style of thought and the reasons for which they

act: that we regard them as conscious agents. We must therefore seek to embed the black-letter rules within a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions. The hope is that, in this way, we will come to understand the legal system from within and be able to think about it as a foreigner thinks. External studies—economics, sociology, and the rest—provide the background for this cognitive inquiry and are indispensable to it; but it is a serious logical blunder to think that they can take its place.

At this stage a word of warning is in order. When I say that comparative law is an essentially philosophical enterprise, I do not wish to claim that its central concern should be to study questions of philosophy. “Everything,” says Bishop Butler, “is what it is, and not another thing”<sup>79</sup>—and law is not philosophy. The goal is to understand the foreign legal system; to do so one must uncover the reasons and justifications that underlie the legal rules; and this task requires philosophy. But it should be evident here that philosophy is the vehicle of the enterprise, and only incidentally its object. If the word “jurisprudence” is understood to denote the style of thought of foreign jurists—their characteristic pattern of reasoning within and about the law—then the approach I advocate might be dubbed “comparative jurisprudence.”<sup>80</sup> “Comparative legal philosophy” is a different enterprise altogether.

This conception of comparative law rests, as it must, on a philosophical view about what law is. That view needs to be spelled out in detail; but for the present it can be said that, for the purposes of comparative law, law is best viewed not as a collection of rules, nor

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<sup>79</sup> JOSEPH BUTLER, FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL § 39 (London, Botham 1726).

<sup>80</sup> The term “comparative jurisprudence” is old and has had many senses. It is first to be found, I believe, in the writings of John Austin. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED *passim* (Noonday Press 1954) (1832); it was in use in the middle of the nineteenth century to designate roughly what today is known as “comparative law”—the study of the positive laws of differing legal systems. By 1869, when Sir Henry Maine was appointed first Professor of Historical and Comparative Jurisprudence at Oxford, the term, in part as a consequence of his work, had taken on a more historical and philosophical coloring, and is to be so understood when it is encountered in the works of, say, Frederic William Maitland or Sir Frederick Pollock. Pollock’s farewell lecture at the University of Oxford, delivered in 1903, was entitled “The History of Comparative Jurisprudence”; he traces the idea, not only to historians like Maine, but also to Montesquieu and Vico. See FREDERICK POLLOCK, ESSAYS IN THE LAW 1-30 (1922). As we shall see, Kant, Herder, and Hegel should be added to the list, see *infra* parts IV.A-C, as should Eduard Gans. The term has since fallen out of use, so I feel entitled to appropriate it to my own purposes.

as a device for maximizing the wealth of the society, nor as the commands of the sovereign, nor as a reflection of timeless truths about the universe, but as a kind of conscious mental activity, and above all as the record of the attempts, by jurists, in light of their conception of law, to arrive at the correct answers to legal questions.

This activity is in two ways a deliberative enterprise. First, one has the private effort by individual jurists to think through the legal problem and grope their way to a solution. Secondly, one has the presentation of the solution to the public, its official justification, and its incorporation into the objective legal order. I do not wish to consider here how far these two sorts of reasonings must overlap or can diverge. The point is rather that both activities involve conscious thought and that they take place within "the logical space of reasons." It is especially to be stressed that the second sort of reasoning typically occurs in full view of the public and is, as it were, proclaimed from the housetops. To the extent that these deliberative activities involve thought about the state or the family or promise-keeping or punishment or individual responsibility, and to the extent that they are concerned with answering questions about what ought to be done, they can be regarded, in a very broad sense of the term, as a kind of applied moral philosophy.

The central task of comparative law, I think, is to interpret and make sense of the world's variety of such applied moral philosophies. Indeed, the analogy to philosophy goes deeper yet and carries with it the following implication: in studying Kant or Aristotle what one wants to know is not so much "the bottom line"—whether the external world really exists or whether virtue is really always a mean between two extremes. The deeper question is how these thinkers reached their conclusions—the route they travelled, the problems they encountered on the way, and what insight we can derive from retracing their footsteps. Similarly what matters here—in a sense, what gives meaning to the legal enterprise across cultures and over time—is not so much the black-letter solutions as the cognitive struggle itself and the effort by jurists, over time, to deepen their understanding of law and what it requires.<sup>81</sup>

Comparative law, in other words, rests upon the existence of a plurality of perspectives, and it values those perspectives in their own right rather than as windows on the truth. In saying this, have

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<sup>81</sup> I owe the stimulus for this paragraph to a conversation with James Whitman.

I pledged myself to relativism? I do not think so. The conception of law I am urging merely acknowledges the fact—it is an objective fact—that opinions about law vary, from the ancients to the moderns and from here to Persia. This much, I think, is obviously true. It is also true (although perhaps not quite so obvious) that some opinions are objectively more significant than others, and it is once again both obvious and true that the significance of an opinion is not identical with its truth. What follows from this plentiful supply of truths? A significant conclusion: in comparative law we seek to discover the truth about the most significant opinions of foreign jurists, let the truth of those opinions be what it may. But plainly nothing I have said compels me to assert that any of the opinions under study is true, let alone (which would be incoherent) that all are.

A converse point holds for something I said earlier, namely, that the conception of law I have just sketched is the right conception for the purposes of comparative law. Here I do mean to adopt a form of relativism, at least provisionally. It should be evident from the discussion so far that the study of foreign law requires us to engage in a complex blending of perspectives: we are to stand, as it were, outside a number of different legal systems and from that vantage point, without endorsing the beliefs of the foreigners, to try to discover how law looks from within. It is not clear, however, that this blended perspective can be coherently turned around and applied to ourselves; not, at any rate, while we are ourselves acting as jurists with beliefs that we must necessarily endorse. We are not entitled to assume without argument that the perspective of the agent can be entirely reconciled with the perspective of an external observer; and at the end of our investigations we may find that we are left with two distinct conceptions of law, neither of which can be reduced to the other and neither of which can be reduced to some conception more fundamental. In such a case we would have to develop what Thomas Nagel calls “double vision,” and learn to live with at least two mutually irreducible perspectives.<sup>82</sup> There

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<sup>82</sup> See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 86-89 (1986). Particularly in chapter VII of this work, Nagel discusses numerous cases where the view of an objective observer—“the view from nowhere”—cannot be either abandoned or smoothly combined with the subjective view of an agent. I am inclined to believe that a similar set of problems arises in the study of foreign law, but shall not argue the point here. It should be observed that the issues are closely related to Ronald Dworkin’s distinction between internal and external scepticism. See RONALD DWORIN, *LAW’S EMPIRE* 78-86 (1986).

would then be no single answer, even in principle, to the question, "What is law?" Plainly we cannot rule out such a possibility in advance; so here the course of wisdom is to acknowledge the possibility, to remain agnostic about it, and to work with a conception of law that makes no claim to serve any purposes beyond those of comparative law.

If we now retrace our steps we can put these points in another way. I remarked earlier that my two central claims—that comparative law is a single-track enterprise and that it necessarily employs philosophy at the stage of execution—are related. We can now see that they are in fact two aspects of a deeper, underlying philosophical conception of law. In studying comparative law we seek to understand a foreign legal system; in particular we seek to understand it well enough so that we can effectively communicate. To satisfy this ambition we must view the foreign jurists as conscious beings engaged in an essentially cognitive enterprise. Because law is essentially cognitive and because it is concerned with substantive values and with determining what ought to be done, we must, as it were, view it within the space of public reasons, as the applied moral philosophy of the foreign legal system; and therefore we must employ philosophical concepts at the stage of execution. And because law is essentially cognitive there exists no other way to obtain the sought-after understanding; therefore, comparative law is a single-track enterprise.

Thus, the core of my position is a philosophical conception of what law is. No doubt this conception is open to challenge and I shall have to defend it at the appropriate time. But this is not a ground for complaint. For any theory of comparative law will, in the end, have to stake itself upon some conception of law. The problem with the traditional approaches is that they have done so in silence and indeed without troubling to give the matter much thought. In consequence the conceptions of law on which they rest—to the extent that coherent conceptions can here be discerned at all—are, I think, unable to withstand philosophical scrutiny.

So much for a brief sketch of the principal theoretical claims. It should now be observed that, if these claims are true, they carry with them two important and surprising corollaries. First, if comparative law is a single-track activity, then it will yield useful results for legal practice if, and only if, it also yields useful results for legal theory. But if, as Alan Watson has argued—and I see no reason to doubt his conclusion—comparative law has not yielded useful results for theory, it follows that its record for practice

should, if we inspect it closely, turn out to have been equally bleak. It would then follow that comparative law as presently pursued does not adequately serve either theory or practice; and this conclusion would explain much of the malaise. Second, if my analysis is correct then the malaise has its source, not in any superficial lapse on the part of comparative lawyers, but in the fact that the subject rests on a fundamentally mistaken conception of law and on a fundamentally mistaken conception of how to go about the task of understanding a foreign legal system. The problems here have a taproot that reaches deep into philosophy; if this is so, then what the existing subject needs is not surface tinkering, but a radical change of method. And we may hope that the result is an enterprise that will be capable of furnishing, not just new knowledge, but a new kind of knowledge about foreign law.

These remarks on my general strategy have been very abstract; the bulk of the details remains to be filled in. Most likely some of the claims as I have phrased them above are overstated; certainly they will require both refinement and a careful philosophical defense. But in their present form they will perhaps serve to explain what I propose to do in this Article and what I propose to leave undone.

I shall postpone for another occasion several important tasks, namely:

- (1) I shall not here argue for the thesis that comparative law is a single-track activity;
- (2) nor for the thesis that philosophy plays the essential role at the stage of execution;
- (3) nor for the underlying conception of law I sketched earlier.

It will be observed that I shall here be defending neither of my two principal theses, nor the conception of law on which they rest. Moreover:

- (4) I shall not inquire into the historical origin of comparative law or attempt to trace the aetiology of its malaise;
- (5) nor shall I discuss the complicated nest of philosophical questions of design or say anything about "the logic of the moral sciences";
- (6) nor shall I attempt to assess the extent of my agreement or disagreement with the arguments that have been made by other critics of traditional comparative law.

These are all important tasks; indeed they are the central tasks for any fundamental reform of the subject. But here I wish to do

something different. I wish so far as possible to set aside philosophical abstractions, to stay close to the soil, and to make a concrete, illustrative argument that comparative law stands in need of the kind of reform I have indicated.

In particular I wish to concentrate on the two surprising corollaries I mentioned earlier: the prediction that comparative law, on inspection, will turn out not to meet the needs of legal practice and that this failing can be traced to deep-lying misconceptions. The argument I shall make is this: traditional comparative law in America has concentrated its efforts on understanding the civil law systems of continental Europe and especially on understanding the systems of France and Germany. In particular it has sought to understand the legal rules contained in the French and German civil codes—roughly speaking, the substantive private law of contract, tort, and property. I shall concentrate on the specific case of the German civil code and argue that even here, in the central core, the traditional approach has failed to deliver an adequate understanding of its subject.<sup>83</sup> The important thing to observe is that the failure, in essence, can be attributed to a failure of method; if this conclusion is correct, then the same failures are probably to be found elsewhere and we can conclude that the traditional approach stands in need of a thorough overhaul.

If the argument below is correct, two important and related conclusions follow. First, want of care in laying the foundations can throw an entire subject off kilter. In particular we shall see that many of the methodological failings of comparative law can be traced to the various tacit and unreflective answers comparative lawyers have given to the philosophical question—“What is law?”—and to their ignoring of the important philosophical distinction between rules and principles.<sup>84</sup> The result has been a century of confusion in the foundations of the subject.

Second, much of traditional comparative law has been driven by a desire to make the subject useful to practicing lawyers. The

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<sup>83</sup> I concentrate my attention on the civil code, not because I believe that is the aspect inherently most worthy of study, but because it is the aspect that has in fact been most intensively studied by traditional comparative law. For the same reason, incidentally, I concentrate my attention exclusively on European legal systems. In doing so I do not mean to slight other systems; but it seems best to concentrate on the case that is best known, and to hope that, if a suitable methodology can be devised for studying European law, it will then be possible to extend it to other areas as well.

<sup>84</sup> See DWORKIN, *supra* note 7, at 14-80.

subject has in consequence jettisoned philosophy, and given ever more narrowly doctrinal answers to the question, "What is law?" But the subject has not in the process become more useful to practitioners; and much of the malaise is due to this fact. The jettisoning of philosophy has had two harmful consequences. It has drained comparative law of much of its inherent scholarly interest, leaving behind only the dry skeleton of the law. And, paradoxically, it has made comparative law less useful, not more. We shall find that, by moving in the opposite direction and taking a more philosophical approach based on a richer and more defensible conception of law, we will end with a subject that not only conveys a deeper theoretical understanding, but also has greater utility in practice. Or so, at any rate, I shall attempt to argue.

### B. *The Boundaries of Comparative Jurisprudence*

If the foregoing argument is correct, then the approach to be developed in this Article will be a departure, not only from the method, but also from the subject matter, and perhaps even from the goals, of traditional comparative law. We shall be compelled to explore the territory that lies between comparative law and legal philosophy. This interstitial region has not been closely investigated; and in the investigations that follow I shall be attempting to discover the lay of the land, as well as to stake out particular claims within it.

I do not wish to criticize others for not having accomplished what they never attempted; and it is therefore a good question whether the new approach should be viewed as the same enterprise pursued in a different way, or as a different enterprise altogether: whether I am proposing fundamental reforms to something that already exists, or simply abandoning it and changing the subject.

We need not attempt to answer this question now. But for the sake of expository clarity, I suggest that, at least provisionally, we treat the new approach as constituting a new and independent field of inquiry. After the two enterprises have been sufficiently examined we can compare them and ask how they are related. There are then three possibilities. Either (1) they are distinct subjects, each with something to contribute to legal scholarship, and should continue on parallel tracks; or, (2) they are distinct subjects, but one should displace the other; or, (3) they are at bottom just different ways of doing the same thing, and should therefore merge. I shall argue in the course of this Article that the two subjects are

in fact distinct; so the choice is between (1) and (2). I shall also argue that the older subject (as von Mehren already observed) has largely failed to live up to its promise, even if we judge it in its own terms; it is this failure, I think, that explains the inability of comparative law to form itself into an academic discipline. The argument is closely related to my earlier claim that the existing methods of comparative law are in principle unable to tell us what we wish to know about the trial of the rats of Autun; and we shall find that the same conclusion holds for less exotic studies as well. The genuine insights that comparative law has secured in the past can all, it seems to me, be absorbed without residue into the new subject; so if the argument to be unfolded below is correct, (2) provides the most accurate description of the relation between the two subjects.

We need some terminology to distinguish between the old subject, the new subject, and the activity that embraces both. I shall use "comparative law" as the generic expression for all forms of inquiry into foreign law. "Traditional comparative law" is comparative law as it has been pursued hitherto; although when the context leaves no room for ambiguity I shall speak simply of "comparative law." The new subject I shall dub "comparative jurisprudence."

### 1. Criteria for a New Subject

To treat comparative jurisprudence as a distinct and independent subject has a further advantage, namely, that it imposes some stringent requirements on our investigations. For any claim, however tentative, to have discovered a new field of inquiry raises an immediate objection. As a general matter, if *X* is a well-established subject, and *Y* is a well-established subject, the application of *X* to *Y* may turn out to be a new subject; but this cannot happen very often, on pain of infinite regress. Broadly speaking, two sorts of things can go awry. First, the new field may collapse into one of the old ones. That is, the application of *X* to *Y* may result in something that, on inspection, turns out to be just a branch of *X* or of *Y*. Second, *X* and *Y* may belong to such different species that their overlap is sterile. So, for example, the result of applying algebraic number theory to constitutional law is likely to be meager: a few paragraphs would exhaust the subject, and leave nothing for future scholarly endeavor.

But there is a third possibility. The application of  $X$  to  $Y$  may turn out to be both fruitful and distinct from  $X$  and from  $Y$ . In such a case we have a genuinely new field. And sometimes this third possibility does occur. The application of economic theory to law has been one of the most bountiful innovations of modern legal thought, and has yielded insights that could have been gleaned in no other way: its subject matter is extensive enough, and its methods of inquiry are distinctive enough, so that it is commonly considered a field of research in its own right.

So if my proposal is to succeed I must show that comparative jurisprudence is more like law and economics than like the algebraic number theory of the Constitution. In particular I must show:

- (1) that comparative jurisprudence is distinct both from legal philosophy and from traditional comparative law; and,
- (2) that it is not sterile.

This second requirement should be viewed as an abbreviation for the following two pairs of sub-requirements. I must establish that comparative jurisprudence: (a) is rich enough, both in its techniques and its subject matter, so that it will not quickly be exhausted; and (b) promises to deliver important insights, both for the theory and for the practice of law. (This last requirement is especially important, since if comparative jurisprudence has no practical legal payoff its interest, even for legal theory, will be slight.)

Most of the Article will be devoted to satisfying these requirements. It is not possible to separate them entirely, and the argument will only be complete after we have seen a certain amount of illustrative detail. The task on which we are about to embark will be complicated; so I begin by considering, in a preliminary way, the relationship of comparative jurisprudence to legal philosophy, and then proceed to the more complicated issue of its relationship to comparative law.

## 2. Distinguishing Comparative Jurisprudence from the Philosophy of Law

I must show two things: ( $\alpha$ ) that comparative jurisprudence raises important questions for legal philosophy; and ( $\beta$ ) that it does not collapse into the latter subject.

Point ( $\alpha$ ) need not detain us long. Recall that philosophy can take an interest in questions of design and in questions of yield. I have already argued in the discussion of the trial of the rats of

Autun that the central question of design—How should we attempt to understand a foreign lawyer like Chassenée—raises deep questions about the limits of moral intelligibility of foreign cultures, and about the relationship between reason and history. I also argued that the yield of comparative law—the specific, empirical information it supplies to us about the historical causes of our own moral beliefs (or the moral beliefs of others) is itself directly relevant to moral philosophy. To these two arguments can be added a third, which is more directly occupied with the philosophy of law *stricto sensu*.

Legal philosophies can be arranged along a spectrum according to their conception of the universality of law. At one end of the spectrum are the most extreme exponents of Natural Law—thinkers for whom the deepest principles of law are a set of timeless, necessary, universally valid truths, sewn, as it were, into the very fabric of the cosmos, and binding on all persons, at all times, everywhere. At the opposite end are the most extreme representatives of legal positivism, for whom laws are merely a contingent human creation—the commands, say, of a particular human sovereign, backed up by particular threats, binding only on those persons to whom the commands are addressed, and variable at the whim of the sovereign.

The important point to notice is that each of these extreme theories—and a fortiori all the more subtly nuanced theories in between—needs to address the theoretical issue posed by the existence of foreign law. The Natural Lawyer needs to explain the perceived *diversity* of the world's legal practices. For if laws are timeless and necessary and universal truths, then one encounters an obvious dilemma: *either* a law like the Rule Against Perpetuities, contrary to appearances, is not truly law, *or else* it is sewn into the fabric of the cosmos, where most of the world's jurists have failed to spot it. In either case, something needs to be explained. The legal positivist, on the other hand, needs to explain the perceived *uniformity* in the world's legal practices. All societies have rules for preserving order, for punishing thieves, for resolving certain kinds of dispute. But if law is *just* a collection of wholly arbitrary orders backed by threats, then what explains these important points of transcultural uniformity? Law, in short, as it appears across human societies, exhibits (as Aristotle already observed) a mixture of uniformity and diversity, of necessary and contingent elements; and any sophisticated legal theory will have to give a plausible account of both.

For each of the extreme ends of the spectrum there exists, therefore, an advantage to be expected from the study of foreign law. There also exists a correlative danger if one chooses to remain in ignorance. For the Natural Lawyer the danger is that you will elevate the local rules of your own time and place into universal truths for all humanity; indeed, as is well known, the great systems of Natural Law of the seventeenth and eighteenth centuries were largely rearrangements of the rules of Justinian's *Digest*.<sup>85</sup> For the legal positivist the danger is that you will lose sight of the continuities in law, and end in an extreme form of empirical relativism, unable to make sense of any culture but your own.

These arguments establish point ( $\alpha$ ), and show that, from the point of view of philosophy, comparative jurisprudence is not sterile. Let us now consider point ( $\beta$ ), that is, whether comparative jurisprudence collapses into legal philosophy.

The first thing to notice is a terminological issue. In English the word "jurisprudence" is commonly used as a synonym for "the philosophy of law." If I were to follow this usage, then comparative jurisprudence would be by definition equivalent to comparative legal philosophy. But comparative legal philosophy—the activity, say, of comparing a German philosopher like Kant to an English philosopher like Bentham—is, *qua* comparison of philosophers, no different in kind from the activity of comparing Kant to Kelsen or Bentham to Hobbes. If the latter activity is a branch of legal philosophy, then so is the former; hence comparative legal philosophy collapses into legal philosophy. So to keep comparative jurisprudence from collapsing into legal philosophy, I must explicitly depart from standard usage, and give the word "jurisprudence" a different and more narrowly focused signification.<sup>86</sup>

The details will have to be filled in later; but for now jurisprudence can be defined as the study of the central features of a given, national legal system—that is, of its leading institutions and of the ideas that animate them. So jurisprudence is always strictly speaking the jurisprudence of some particular country. The subject studies such legal institutions as: judges, civil codes, constitutions, legislatures, corporations, precedents, crimes, administrators,

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<sup>85</sup> This point is made by Alan Watson. See ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 83-98 (1981).

<sup>86</sup> The word "jurisprudence" and its cognates in the other European languages is of course extremely variable; the sense in which I use it is closer to Italian *giurisprudenza* than to English *jurisprudence*.

attorneys, statutes, prosecutors, trusts; it studies both the institutions themselves, and their theoretical underpinnings.

Legal philosophy, on the other hand, is a branch of philosophy rather than of law, and is concerned with issues that transcend the positive law of any particular legal system. Again, the details will have to wait; but it follows from this provisional definition that legal philosophy, so defined, is logically distinct from jurisprudence.

As will emerge in a later article in this series, I have numerous reasons for drawing the distinction in this way, and for insisting that the two enterprises not be confused.<sup>87</sup> But for the time being I shall rely on the following two arguments. The first is an argument from the *practical* purposes of comparative jurisprudence, namely, that separating jurisprudence from philosophy keeps the emphasis of the new subject where it ought to be if it is to have a significant legal payoff. I wish, that is, to distinguish between the philosophical activity of setting up the new field, and the legal benefits to be derived from the practice of comparative jurisprudence itself; and the choice of terminology helps to mark the difference. Second, as I noted above, comparative legal philosophy collapses into a branch of legal philosophy. But comparative *jurisprudence* does not similarly collapse into jurisprudence: for, as a logical matter, jurisprudence is always the jurisprudence of a particular legal system. There is an important distinction to be drawn between comparing two jurists who belong to the same system, and comparing either two jurists from different systems, or two different systems *tout court*: the differences between the national legal systems are relevant to the work of jurists in ways that they are not when our task is to compare the abstract speculations of philosophers. Hence the need for a terminology to distinguish the two enterprises.

This distinction between jurisprudence and philosophy must be borne in mind in the discussion that follows or serious confusion will result. In particular, when I urge comparative jurisprudence as

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<sup>87</sup> Briefly the other arguments are: (i) an argument from *logical* priority, or from the *theoretical* purposes of comparative jurisprudence, namely, that it is supposed to furnish a certain kind of information to legal philosophy, and can only do so if (so far as possible) it is pursued without presupposing the truth of any particular philosophical theory; (ii) an argument from *methodology*, namely, that comparative jurisprudence raises certain complex issues (known in the philosophy of mind as issues of *intentionality*) that should be treated separately from the discussion of the laws of any particular legal system; and (iii) an argument from *relativism*, namely, that if we do not distinguish between the (relativistic) approach taken within comparative jurisprudence and the (non-relativistic) philosophical theory that motivates it, we shall be led into well-known paradoxes.

a technique for studying foreign law, I should not be understood as saying that the best way to learn about French bankruptcy legislation is to steep yourself in Sartre and Descartes, or in Montesquieu and Rousseau. My claim is a different one: in order to understand the French legal system it is necessary to understand its intellectual underpinnings; and for that purpose one must understand the works of the great French jurists. To the extent that they were influenced by the philosophers, the philosophers become relevant to the inquiry; but the primary emphasis remains on the jurists. The goal of comparative jurisprudence, in other words, is to study the intellectual foundations of foreign law: not to turn comparative law into a division of legal philosophy.

The foregoing argument suffices, at least as a preliminary matter, to establish point ( $\beta$ ). We have thus successfully shown that comparative jurisprudence is a new subject vis-à-vis legal philosophy.

We must now turn to the more difficult task of drawing the boundary between comparative jurisprudence and traditional comparative law. In particular I must show two things: (i) that comparative jurisprudence is distinct from traditional comparative law; and (ii) that the new field has something important to contribute. The establishment of these two points will absorb most of the remainder of this Article. Point (i), in particular, raises some delicate issues. The distinction between comparative jurisprudence and legal philosophy rests, as we saw, on a clean and easily stated logical distinction between two kinds of subject matter. But the distinction between comparative jurisprudence and comparative law is more subtle, and is to some extent a matter of degree. It rests in the first instance on a distinction of method; but, as we shall see, this distinction also leads to a derivative distinction between subject matters, and between the sorts of things the two subjects study.

Very roughly the argument is this. Traditional comparative law suffers from a malaise; it is in principle unable to furnish the sort of information that one needs in order to make sense of a phenomenon like the trial of the rats of Autun. We accordingly need to specify the goals of comparative law more precisely, and then to build a method that will take us to those goals. The new subject (if such it is) will thus be distinguished from the old both by its goal and its method and (as we shall see) its subject matter; if we do our job correctly, it will not suffer from the old malaise.

But as a first step we need to secure a better understanding of traditional comparative law—of its methods and ambitions and mal-

aise; and then to explain why it is reasonable to think that the best hope for a cure lies in a closer relationship to legal philosophy.

### III. THE PRESENT STATE OF COMPARATIVE LAW

#### A. *The Malaise*

The suggestion that comparative law and legal philosophy should be more closely knit is apt to strike some readers as perverse. For the two subjects already have one conspicuous point in common: practicing lawyers are distrustful of both. Other subjects—contracts, say, or civil procedure—have an obvious utility to the American corporate attorney. They wear their justifications on their sleeves. But the theoretical relationship between law and morality? Or the French law of automobile insurance? Who (to put it politely) cares?

Philosophers, who are seldom concerned with practicality, simply ignore the criticisms; taking their cue from Plato, they may mutter something about a βαναυσία—a mere “mechanic art”—and continue unruffled with their higher calling. Not so the comparative lawyers. They want their subject to be useful and not to have to blush for its name. Hence the existence of a large literature, not just in comparative law, but about it—defending it, selling it, debating its use and its parameters, and, above all, explaining to law students why they should be interested in the subject. The leading American casebook commences with a 200-page *apologia*, organized around the theme of “Foreign Law in Our Courts.”<sup>88</sup> Comparative law, it is said, will enable you to understand and work with foreign legal materials.<sup>89</sup> It will give you a fresh perspective on your own legal system—new insights and a quiver full of powerful techniques.<sup>90</sup> It may, indeed, even enable you to glimpse the “deep-

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<sup>88</sup> RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES-TEXT-MATERIALS* 43-228 (5th ed. 1988). Schlesinger gives references to others who have written on the utility of comparative law in the courts.

In Germany it has become difficult to use this once-commonplace justification for studying comparative law. A scholar with a firm sense of precision counted the cases, and observed that, over a period of 50 years, the German Supreme Court (the *Reichsgericht* (RG) and then the *Bundesgerichtshof* (BGH)) mentioned comparative legal matters in only 31 decisions. See B. Aubin, *Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung*, 34 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 458 (1970).

<sup>89</sup> For this justification of the subject, see George Winterton, *Comparative Law Teaching*, 23 *AM. J. COMP. L.* 69 (1975) (citing copious further references).

<sup>90</sup> See, e.g., SCHLESINGER ET AL., *supra* note 88, at 39-43. See generally *id.* at 1-43.

structure" of law.<sup>91</sup> Roscoe Pound is frequently quoted: when "we are . . . thinking of the further development of our own law . . . the methods of the jurists must [*must!*] have a basis in comparison."<sup>92</sup>

Some scholars observe that the subject might come in handy when you advise your client about the legal consequences of an international business transaction.<sup>93</sup> Others add that comparative law will be useful if you happen to be called upon to draft a statute<sup>94</sup> or to interpret a treaty.<sup>95</sup> (Why, in these cases, you would not summon the assistance of foreign counsel appears to be a mystery.) Still other scholars—especially, for some reason, in France—take a more idealistic line. They say, for example, that comparative law improves understanding among nations,<sup>96</sup> helps with the problems of global under-development,<sup>97</sup> can contribute to the development of World Law,<sup>98</sup> clarifies values,<sup>99</sup> protects the noosphere,<sup>100</sup> and advances the cause of peace and justice.<sup>101</sup>

<sup>91</sup> BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 103 (Tony Weir trans., 1990); D.L. Perrott, *Has Law a Deep Structure?—The Origin of Fundamental Duties*, in *FUNDAMENTAL DUTIES* 1 (D. Lasok et al. eds., 1980).

<sup>92</sup> André Tunc, *Foreward* to ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* at vii (2d ed. 1977) (quoting Roscoe Pound's foreword to the first edition of this text).

<sup>93</sup> See, e.g., Arthur H. Dean, *The Role of International Law in a Metropolitan Practice*, 103 U. PA. L. REV. 886 (1955) (locating and describing the place of international law in a law firm's practice); John Wolff, *The Utility of Foreign Law to the Practicing Lawyer*, 27 A.B.A. J. 253 (1941) (arguing that knowledge of foreign legal principles will help lawyers win cases).

<sup>94</sup> See George A. Zaphiriou, *Use of Comparative Law by the Legislator*, 30 AM. J. COMP. L. 71 (Supp. 1982); see also Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 199-200 (1977) (noting the transferability of legal norms from one system to another).

<sup>95</sup> For an extensive discussion of the literature, see 2 LÉONTIN-JEAN CONSTANTINESCO, *RECHTSVERGLEICHUNG* 380-412 (1972). Two helpful older pieces are Wilhelm F. Bayer, *Auslegung und Ergänzung international vereinheitlichter Normen durch staatliche Gerichte*, 20 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 603 (1955), and F.A. Mann, *The Interpretation of Uniform Statutes*, 62 L. Q. REV. 278 (1946).

<sup>96</sup> See André Tunc, *La contribution possible des études juridiques comparatives à une meilleure compréhension entre nations*, 16 R.I.D.C. 47 (1964).

<sup>97</sup> See J. Lambert, *La contribution du droit comparé à l'étude des problèmes de sous-développement*, in 2 *PROBLÈMES CONTEMPORAINS DE DROIT COMPARÉ* 177, 177 (1962) [hereinafter *PROBLÈMES CONTEMPORAINS*].

<sup>98</sup> See Georges S. Maridakis, *Droit mondial, droit comparé*, in 2 *PROBLÈMES CONTEMPORAINS*, *supra* note 97, at 193.

<sup>99</sup> See Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. L. 24 (1952) (remarking that "people are increasingly demanding values that transcend the boundaries of nation-states").

<sup>100</sup> See André Tunc, *Le juriste et la noosphère—la fonction possible des études compara-*

One gets the sense that, for these scholars, teaching American law students about French bankruptcy legislation would be an effective way to promote peace in the Balkans.

These scholarly apologetics, voiced by the most eminent authorities in comparative law, are intended to meet the objections of sceptics from outside the field; but they reflect a more fundamental malaise that arises from within. There is widespread uncertainty about the purpose of comparative law, and a lack of confidence about the direction the subject should follow. The malaise is visible in the writings of the leaders of the subject, both in Europe and America. Alan Watson devotes a chapter of his *Legal Transplants* to a survey of the perils of comparative law;<sup>102</sup> he comments on its superficiality, its lack of system, and its propensity for error.<sup>103</sup> One scholar writes that the subject is preoccupied with "irrelevant problems," that it uses "scientifically false concepts," and that it is founded upon "valueless" philosophical doctrines; he observes that the practitioners of comparative law are in danger of becoming known as the "great masters of the trivial."<sup>104</sup> A distinguished authority in England declares that "in a sense, a comparative lawyer

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*tives dans le monde contemporain*, in 2 PROBLÈMES CONTEMPORAINS, *supra* note 97, at 489.

<sup>101</sup> See André Tunc, *Comparative Law, Peace, and Justice*, in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 80 (1961) [hereinafter YNTEMA]. There are similar sentiments in R.H. Graveson, *L'influence du droit comparé sur le rapprochement des peuples*, 10 R.I.D.C. 501 (1958).

<sup>102</sup> See WATSON, *supra* note 2, at 10-16.

<sup>103</sup> See *id.*

<sup>104</sup> These comments come from Jaro Mayda, who writes that:

These four seem to me the most important among the negative features of contemporary comparative law: 1) the wide use of imprecise, scientifically false concepts; 2) reliance on philosophical doctrines which are valueless for operational purposes on the empirical-scientific level; 3) as a consequence—and outside of purely positive research in several fields of multinational interest (commercial law, conflicts, maritime law, intellectual property, etc.)—a preoccupation with irrelevant problems; 4) as a result of the absence of empirical-scientific methodology, comparative law has been (with some important exceptions) marked by a descriptive attitude; too dogmatic and historical orientation; an accent on the "what" rather than the "how", or even less the "why"; a tendency toward analysis without synthesis, toward dichotomy rather than integrative comparison.

Jaro Mayda, *Some Critical Reflections on Contemporary Comparative Law*, in RECHTSVERGLEICHUNG 361, 370 (Konrad Zweigert & Hans-Jürgen Puttfarken eds., 1978) (footnotes omitted). He goes on to argue that, unless the subject reforms itself in a fundamental way, the comparative law community "is in danger of being known in the intellectual history of the 20th century (if we as a group manage to get a footnote) as the 'great masters of the trivial.'" *Id.* at 380.

is bound to be superficial; he would soon lose himself in the sands of scholarship."<sup>105</sup> He proposes a curious remedy. He suggests that comparative lawyers limit themselves to the study of what he calls "lawyers' law"—those aspects of the law that, he says, are of no interest to anybody besides lawyers.<sup>106</sup> He gives an example of the sort of thing comparative lawyers should principally be concerned to study, namely, the Rule Against Perpetuities.<sup>107</sup> Another writes of his disappointment at the "great but unfulfilled expectations" of comparative law,<sup>108</sup> and of its tendency to indulge in "meaningless generalisations."<sup>109</sup> He notes that in Britain law students have chosen to "vote with their feet."<sup>110</sup> A German scholar observes

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<sup>105</sup> Frederick H. Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16 (1949) (Inaugural Lecture delivered at the University of Oxford, Feb. 2, 1949).

<sup>106</sup> *Id.* at 18-20.

<sup>107</sup> Thus Lawson writes:

Private law is doubtless the most promising field of comparison; and here I would plead for an extension of comparative work to the law of property, even to the parts where English law seems most insular, the treatment of future interests. For instance, other countries, too, have their rules against perpetuities, which are worth studying in comparison with our own.

*Id.* at 20.

It has been pointed out to me by James Whitman that, if one looks at the problem of future interests historically, there are indeed interesting differences between the various European countries, those differences being tied to the differing ways in which those countries abandoned feudalism, and to the speed of the change. But this does not seem to be the sort of investigation Lawson had in mind.

<sup>108</sup> The complaint is a common one in the literature. "My own feelings about my subject were and are of great but unfulfilled expectations. Comparative law is, I believe, still searching for an audience even where it has found a place of sorts in the university curriculum." Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990) (footnote omitted).

<sup>109</sup> *Id.* at 20. Markesinis further notes:

This breed of comparatists has also been comprised of predominantly conventional or doctrinal lawyers who have underestimated the value of interdisciplinary or empirical research and ignored the practice of the courts. Overall, this type of comparatist scholarship strikes me as being replete of often meaningless generalisations while also being heavily biased towards the law of obligations.

*Id.* (footnote omitted).

<sup>110</sup> *Id.* at 21 ("If the professors cannot realise that the traditional approach to comparative law no longer appeals to today's students, their audiences do and they vote with their feet . . .") (footnote omitted)). In a footnote Markesinis remarked:

A conference of comparatists recently held in Paris attempted to underplay or justify what is, on the whole: (a) a low research output in this area and (b) meager student numbers following established courses in comparative law. As the French report shows, even where this endeavour is undertaken with the consummate elegance and style that characterises Professor Mouly's work, the dull reality cannot be concealed from the trained eye.

that the subject enjoys only a "stepmotherly existence" in the German universities;<sup>111</sup> similar concerns have been expressed by André Tunc in France.<sup>112</sup>

Such a litany of complaints, coming from the leading practitioners of the subject, is, so far as I am aware, unique to comparative law. Our task must now be to uncover the cause of this malaise, and attempt to find a cure.

## B. *The Traditional Approaches to Comparative Law*

### 1. Casebooks and Pedagogy

It may be helpful to begin with a relatively concrete example. I propose to consider how comparative law is taught in American law schools, and specifically to consider the merits and the shortcomings of the dominant casebook approach. I shall afterwards extend the criticisms to comparative legal scholarship more generally. But because the primary audience for comparative law is in the universities rather than in the world of practice, pedagogical questions have here an importance and a primacy that they lack in other disciplines; so it is natural to begin with the casebooks that have done so much to shape the field.

Here, two works stand out as the flagships: Rudolf Schlesinger's *Comparative Law*, which first appeared in 1950,<sup>113</sup> and Arthur von Mehren's *The Civil Law System*, which first appeared in 1957.<sup>114</sup> It would be hard to overstate the contribution these two books have made to comparative legal education in America. They are pioneering studies, scrupulously edited and brimming with useful information; indeed, they virtually created the modern subject, and

*Id.* at 21 n.107. The papers reflecting the conference to which Markesinis refers were published in volume 40 of the *Revue Internationale de Droit Comparé* in 1988.

<sup>111</sup> Fritz Sturm, *Geschichte, Methode und Ziel der Rechtsvergleichung*, 1975 JURISTISCHE RUNDSCHAU 231, 235 (translation by author) ("nur ein stiefmütterliches Dasein"—the phrase is not a familiar one to me, but the sense seems clear). Sturm also observes that in 1973, in the Federal Republic of Germany, courses in comparative law were offered in only six universities. *See id.*

<sup>112</sup> *See* André Tunc, *L'enseignement du droit comparé: Présentation*, 40 R.I.D.C. 703 (1988). For further similar remarks on the teaching of comparative law in France, see also Denis Tallon, *Les perspectives de l'enseignement universitaire du droit comparé*, in Festschrift für Imre Zajtay: Mélanges en l'honneur d'Imre Zajtay 479, 479 (Ronald H. Graveson et al. eds., 1982).

<sup>113</sup> *See* SCHLESINGER ET AL., *supra* note 88.

<sup>114</sup> *See* ARTHUR T. VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* (1957).

before Schlesinger's work appeared comparative law scarcely existed in American law schools.<sup>115</sup>

Let me ease into my discussion by describing my own experience as a consumer of comparative law. I traveled to Göttingen in early 1985 to commence two years of research in legal philosophy. I knew that I would be spending much of my time with doctrinally-minded legal scholars, and consequently that I would need to know the rudiments of German law. Fortunately, I thought, this would not be a problem. After all, I had studied comparative law at Harvard; and my transcript (which I still believed) declared I had learned the subject.

The course, I think, was fairly typical. It was based on the von Mehren casebook. The professor—not von Mehren, who might have approached the course quite differently—was a visitor from Scandinavia; he seemed slightly puzzled by what he had been asked to teach. He followed the casebook closely, and concentrated his attention on the chapters dealing with substantive private law: specifically on tort liability for automobile accidents and on the rules for the formation of contracts. He always recurred to his favorite “convergence thesis”—that, whatever may have been true in the past, the substantive legal rules of France, Germany, and the United States were today really not so very different at all. The material, as is customary, was arranged in a somewhat formless *pot-au-feu* manner: “selected topics” rather than a comprehensive survey. I came away with a general sense of the “foreignness” of the style of continental judicial opinions, and with a good deal of technical information, but with little sense of how the technicalities were connected together. Like Alan Watson, I was disappointed that the theoretical questions that had initially drawn me to comparative law remained unanswered, and indeed were scarcely touched.<sup>116</sup>

I was lured to the course by the elegant introductory chapter in the von Mehren casebook: a lucid, hundred-page historical survey of the development of the civil law.<sup>117</sup> The introductory chapter covers European history from the Romans to the end of the nineteenth century and treats the intellectual influences that shaped

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<sup>115</sup> For an account of the state of pre-Schlesinger comparative scholarship, see, for example, John R. Stevenson, *Comparative and Foreign Law in American Law Schools*, 50 COLUM. L. REV. 613 (1950).

<sup>116</sup> See WATSON, *supra* note 2, at 107.

<sup>117</sup> See VON MEHREN & GORDLEY, *supra* note 92, at 3-96.

the growth of the law—the contributions of Justinian, of medieval scholastics, of Enlightenment *philosophes*, and of nineteenth-century codifiers.<sup>118</sup> This survey captured my imagination and held out the promise that the succeeding eleven hundred pages would be equally gripping and illuminating.

The next hundred pages continue in the form of a narrative exposition, but the style and the subject matter change abruptly. The topic is the organization of the French and German civil courts.<sup>119</sup> But instead of intellectual influences one gets facts: dates, statutes, and black-letter rules, first for France, then for Germany.<sup>120</sup> There is little effort to explain why the rules are as they are, or to investigate why they take one form in France and another in Germany. What one gets is in effect a recitation of the principal provisions of the various statutes of civil procedure.<sup>121</sup>

After these two expository chapters we come to the proper stuff of a casebook. The emphasis on facts and doctrines continues, but now we begin to lose all sense of organization. The next chapter furnishes an example. It deals with French doctrines concerning the separation of powers.<sup>122</sup> We begin with a paragraph from Montesquieu and a few sentences clipped from the *Declaration of the Rights of Man and of Citizen*.<sup>123</sup> Those snippets tell us that the separation of powers is important; but do not explain why. Next come four cryptic paragraph-length judicial opinions from the time of the Revolution. Then we hop to a slightly longer (but still cryptic) opinion from 1823. Then we hop clear to the text of the 1958 French Constitution, which takes up more than half of the chapter, and is reproduced almost without commentary.<sup>124</sup>

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<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 97-141.

<sup>120</sup> See *id.*

<sup>121</sup> The 40-page discussion of German civil procedure contains some four hundred footnotes, the overwhelming majority of which are to the code of civil procedure. See *id.* at 151-202. Many of the footnotes contain multiple references to provisions of the German code of civil procedure, the *Zivilprozessordnung* ("ZPO"), so that the proportions are more extreme than I have indicated. The approach here should be contrasted with the elegant introduction to American civil procedure (for an Italian audience) by Hazard and Taruffo. See GEOFFREY C. HAZARD & MICHELE TARUFFO, *LA GIUSTIZIA CIVILE NEGLI STATI UNITI* (1993). This book contains scarcely a reference to the Federal Rules of Civil Procedure and instead concentrates on the underlying ideas. I observe in passing that comparative questions of process offer ripe ground for theoretical inquiry. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

<sup>122</sup> See VON MEHREN & GORDLEY, *supra* note 92, at 215-460.

<sup>123</sup> See *id.* at 216.

<sup>124</sup> More precisely, the commentary consists of three sentences which inform us

The spray of facts continues as the next two hundred pages treat selected topics in French constitutional law. We get more cryptic French judicial decisions, interspersed with statutory provisions and extracts from the legislative record.<sup>125</sup> One is overwhelmed by details, and left with no clear overview. Next comes a chapter on French administrative law, and yet more cryptic French judicial decisions.<sup>126</sup> And finally we get some six hundred pages of French and German judicial decisions on selected topics in tort law and contract law; this section accounts for about half of the casebook.

I do not want to dwell on the familiar objections to the typical introductory course in comparative law. There are essentially five of them. Comparative law is said to be:

(a) *Superficial*, because not even the teacher, let alone the students, can master all of the intricacies of two distinct legal systems;

(b) *Unsystematic*, because the number of foreign rules is so vast that the teacher must take a bird's nest approach, picking up random scraps of doctrine here and there;

(c) *Arid*, because the standard approach is a mere heaping up of facts about foreign law, a procedure which is inherently unsatisfying;

(d) *Futile*, because the students will never achieve the proficiency of a continental lawyer, or even learn to do research in foreign legal materials; and, finally,

(e) *Misleading*, because, for all the preceding reasons, both students and teachers will be tempted by their ignorance to draw false analogies between legal systems, thus undermining the value of the "fresh perspectives" on domestic law.

My own criticisms come from a different direction, and concern instead the usefulness of the standard course to future practitioners. In particular I doubt the ability of the case method to provide a deep, practical insight into the workings of the European legal systems. (My criticisms thus have nothing to do with the use of

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(1) that the Constitution was influenced by Charles de Gaulle, and (2) that de Gaulle believed in a strong executive. *See id.* at 228. The inadequacy of this chapter as a treatment of the problem of separation of powers can be seen by consulting almost any work on the history of political philosophy that deals with the issue. What can be accomplished in this area—the insights that can be gained for modern constitutional thought by a careful historical examination of the doctrine of separation of powers—is shown, in a mere 12 pages, by Gordon Wood. *See* GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 150-62 (1969).

<sup>125</sup> *See* VON MEHREN & GORDLEY, *supra* note 92, at 245-491.

<sup>126</sup> *See id.* at 492-554.

casebooks to teach American students about precedent-based domestic law: the issue is rather whether this is the right method for giving them their first glimpse of a system based on a civil code.)

To continue with my story. Armed with my training in the civil law, I entered my first Göttingen seminar. The topic was causation in the law of torts. I prepared carefully, and in the discussion tossed in a reference to one of the cases in the von Mehren casebook. To my pleasure and surprise, my comment caused a small stir: nobody else in the room appeared to have read the case. I smugly repeated the trick a few more times before it dawned on me (it dawned earlier on my hosts) that something was amiss with my education.

A small part of the problem was that I was citing outdated cases from a court and a legal system that no longer existed. (Fully fifty of the seventy-eight German cases in von Mehren's casebook are from the old *Reichsgericht*, which was abolished after the war.<sup>127</sup>) But the greater problem was that I was citing cases at all. It had never been adequately explained to me that in Germany—and still more in France—strictly speaking there is no doctrine of *stare decisis*, and, at least in principle, the lower courts are free to disregard the interpretations of the law laid down by the higher court.<sup>128</sup>

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<sup>127</sup> In von Mehren's defense it should be observed that, as we shall see below, in private-law matters both the present BGH and the old RG interpret the same German Civil Code of 1900; so there has been a certain degree of continuity in this part of the law, despite the upheaval in the structure of the legal system. But this does not alter my central point. For, as we shall also see the postwar German Constitution contains certain provisions (in particular the *Sozialstaat* provision) that have heavily influenced the development of private law, and that mark a substantial departure from the past. See *infra* part V. The developments in private law from 1900 to the present have been tumultuous, and the prewar history is a large part of the story; but (as I shall argue below) the scope of the change and its underlying intellectual reasons cannot be adequately grasped simply by reading judicial opinions.

<sup>128</sup> It is important in comparative law to distinguish two senses of the phrase *stare decisis*. It can have either a horizontal sense (the obligation of a court to follow its own settled precedents), or a vertical sense (the obligation of a court to follow the interpretations of the law laid down by the higher courts of the same jurisdiction). For a general discussion, see RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (1964); and JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 133-41 (2d ed. 1985). David's book has been translated in several editions. See, e.g., RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (3d ed. 1985).

I note in passing that the French are even more extreme than the Germans in their rejection of *stare decisis*, and until recently there was no way for the highest court of appeal—the *Cour de cassation*—to compel lower courts to follow its rulings—even in the very case being litigated! (The practice today has been slightly modified, so that on a second remand after a plenary hearing by the *Cour de cassation* the lower

In practice, of course, the lower courts tend to follow the lead of the higher courts. But the official theory, nevertheless, has important consequences. For because the courts are supposed to be *declaring* the law promulgated by the Legislature rather than to be *making* it, the decisions, even of the highest ordinary courts—the *Bundesgerichtshof* (BGH) in Germany, or *Cour de cassation* in France—are stated as per curiam decisions, without dissents or elaborate discussions, all of which makes them a singularly unhelpful guide for anybody trying to understand the policy debates behind a particular bit of legal doctrine.<sup>129</sup> For all these reasons (and others which I shall come to) continental European law students primarily study, not judicial opinions, but the codes and commentaries.

These are important facts, and essential knowledge for anybody reading European cases. But they are not stressed in the casebooks. I have found in the opening chapters of von Mehren only two casual references to the fact that public dissents are not permitted in the

court must do as it is told: but only in that particular case. Its hands are not tied in the future.) A quotation—admittedly extreme—from one of the most influential French jurists of the nineteenth century will convey something of the flavor of the prevailing attitude:

It is not at all in the decisions emanating from the courts but in the examination of the laws themselves, in meditation on the bases on which they repose and the motives that produced them, in searching examination of their texts and the comparison and reconciliation of their provisions, that one must pursue the science of law. The head that is most filled with the recollection of various decisions must naturally be the most empty of ideas on the great principles of law.

JEAN B.V. PROUDHON, *TRAITÉ DES DROITS D'USUFRUIT D'USAGE, D'HABITATION, ET DE SUPERFICIE* at vi-vii (Brussels, H. Tartlier 1833) (translation by author). Proudhon goes on to say that he only wishes "to protest here against the abusive practice that has been introduced of battling only with blows of citations in debates before the courts." *Id.*

<sup>129</sup> The most conspicuous exception to these rules in the major civil-law countries is the Federal Constitutional Court in Germany. In most matters, the decisions of this court resemble the decisions of the United States Supreme Court. Dissents are permitted; opinions are individually signed, are a definitive statement of the law, and are binding on all actors in the legal system, including the Parliament. (France, by contrast, has no system of judicial review: only an anonymous review of legislation by the political *Conseil constitutionnel*; the review occurs before the legislation is promulgated. It remains to be seen how far the French situation will change as a result of participation in the European Union.) The opinions of the German Constitutional Court are thus a reliable guide to the law, and function much like opinions of the United States Supreme Court; they would in consequence provide suitable material for treatment in an American-style casebook. But neither the casebook by von Mehren nor that by Schlesinger contains even a single opinion from this court.

ordinary French and German courts.<sup>130</sup> But there is no adequately conspicuous warning that judicial opinions do not enjoy the same authority in Europe as they do in America.<sup>131</sup> I mentioned earlier that the French judicial decisions on separation of powers struck me as “cryptic.” Rudolf Schlesinger explains why: “French judicial decisions, and especially the decisions of the Cour de Cassation, are reported in such a way that the reader of the reports is not reliably informed either of the facts of the case or of the reasoning of the Court.”<sup>132</sup>

This remark occurs, not in the Schlesinger casebook, but in his scholarly writings, and is intended to explain why the international team of legal academics in the influential *Cornell Project on the Formation of Contracts* was careful not to place excessive weight on the decisions of the French courts. But what is true for a team of professional comparative scholars is no less true for American law students.

All these things—and many more—were new to me when I arrived in Göttingen; if they were mentioned at all in the classroom when I studied comparative law, they did not stick in my memory or in my notebook. And, the pedagogical shortcomings I have mentioned seem to me to be inherent in the case method itself. The problem is not just, as we have seen, that reading cases is an inefficient way to learn the black-letter rules about automobile accidents, or that cases are an unhelpful guide to the underlying policies. The deeper problem is that the casebook approach is a standing invitation for American law students to make false inferences about the nature of judicial institutions. It was hard not to conclude from the format of a textbook composed principally of judicial opinions that judicial opinions were what we should study;

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<sup>130</sup> See VON MEHREN & GORDLEY, *supra* note 92, at 190, 307.

<sup>131</sup> The principal discussion of these matters is buried in the final thirty-page chapter, where von Mehren returns to exposition, and abandons the case method. *See id.* at 1127-60. Except for the introduction, this chapter seems to me easily the most instructive in the 1200-page book.

It is a striking fact that the two most helpful and illuminating chapters in this casebook are the ones which von Mehren, himself, wrote. I observe that, when von Mehren wrote an introduction to *American law* for foreign law students he abandoned the case method altogether in favor of a straight exposition; the result seems to me far more successful. *See* ARTHUR T. VON MEHREN, *LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW* (1988).

<sup>132</sup> 1 FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 54 (Rudolf B. Schlesinger ed., 1968) [hereinafter FORMATION OF CONTRACTS]. This work was part of *The Cornell Project on the Formation of Contracts*.

we were told little about the theory of adjudication and not warned about the different conception of precedent that prevails on the Continent. Nor could this deficiency have been remedied simply by reading more cases: that would only reinforce the problem.<sup>133</sup>

So far my criticisms have dealt with misunderstandings of continental adjudication. However, the problem goes deeper and affects one's understanding, not just of the judiciary, but of every other institutional actor in the legal system: for the various parts are linked together, and if you misunderstand one, you misunderstand them all. Consider, for example, the civilians' rejection of *stare decisis*. This rejection can usefully be viewed as an implicit answer to the question, "What is law?"—the answer, namely, that (in contrast to the answer of the common law) law is to be found not in judicial opinions but in the statute books. This conception of law has consequences beyond the judicial branch and is itself only a part of a complicated network of reasons for the prevailing attitude towards the major legal institutions.

In France, for example, the rejection of *stare decisis* and the unwillingness to trust judges to declare precedents are bound up with a deep-seated fear of judicial encroachment on the tasks of the legislature and with an extreme hostility to judicial review. That judges are regarded—and paid—as career bureaucrats, with less prestige than their Anglo-American counterparts, further reinforces this notion.<sup>134</sup> These facts in turn have additional ramifications and are connected to the prevailing conception of legislation and of the *Code civil*. The authentic expression of the *vox populi* is to be pronounced, not by the lowly civil servants in the judiciary, but by

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<sup>133</sup> In making these remarks I do not mean to suggest that the facts I have just mentioned cannot be gleaned if one is on the lookout for them and hunts through the casebooks with sufficient diligence. The problem is one of emphasis and of the impression conveyed. The casebooks do not drive home the warning that European cases do not have the same status as American cases, nor do they discuss systematic differences in a systematic fashion. We were simply invited to plunge into the substantive legal details with our presuppositions intact. Surely it is a significant fact—one that says much about the way comparative lawyers conceive of their subject, and one that calls for explanation—that if you seek a comprehensive account in English of the most fundamental structural differences between the legal systems of Europe you must turn, not to the standard instructional texts of comparative law, but to the work of legal historians like John Dawson or Alan Watson. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1986); WATSON, *supra* note 85, at 154-57, 176-78. For an introductory treatment, see the elegant work by MERRYMAN, *supra* note 128.

<sup>134</sup> The classic account of the evolution of the European courts and of the role of judges is DAWSON, *supra* note 133. On the low prestige of continental judges, see MERRYMAN, *supra* note 128, at 101-10.

the elected representatives of the people: anything else is a violation of the separation of powers and a betrayal of French democracy.

This conception of the *code* in turn has implications for legal scholarship. Since the days of the Roman jurists the authoritative expositions of the law in continental countries have, as a rule, been given, not by judges, but by scholars; and still today legal academics on the Continent wield more authority than their Anglo-American counterparts.<sup>135</sup>

But, the chain of reasoning continues, it will not do to allow the jurists to infiltrate their own ideas in place of the commands of legislature. They must cleave strictly to the letter of the code. Hence one arrives at the extremely formalistic—and, to American eyes, bewildering—style of reasoning that prevails among legal academics on the Continent, especially among French lawyers and academics, but also among Germans and Italians. There is a widespread disinclination to speculate about questions of philosophy or public policy—a feeling that such questions are not the province of lawyers but of the legislature.<sup>136</sup>

The foregoing sketch of the linkages between the roles of judges, scholars, lawyers, and legislators is of course only a caricature; the details are complex and vary subtly from country to country. But to say this only strengthens the central point, namely that an explicit and systematic account of the variability in institutional roles—what might be called the “institutional culture”—needs to be the heart of any introduction to the civil legal systems. Notice that this requirement has nothing to do with the demands of legal philosophy; it is an entirely practical requirement, for entirely practical ends. For if one wants to interact with foreign lawyers and to understand why they behave as they do, then the principal task should not be simply to learn some aspects of contract doctrine, but also to learn how judges and lawyers and scholars think of their jobs

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<sup>135</sup> See DAVID & BRIERLEY, *supra* note 128, at 347-49; DAWSON, *supra* note 133, at 432-506; MERRYMAN, *supra* note 128, at 101-10; WATSON, *supra* note 85, at 172.

An example may illustrate the point. The nineteenth-century jurist G.F. Puchta, in an influential passage, listed the three primary sources of law as—in order—the spirit of the people, the acts of the legislature, and the interpretations of legal scholars. See GEORG F. PUCHTA, *LEHRBUCH DER PANDEKTEN* 28 (Leipzig, J.A. Barth 1838). He nowhere mentions the lowly judge. We shall see more on the sources of his ranking below, when we consider the work of Savigny. See *infra* part IV.D.

<sup>136</sup> For a brief account of the historical origins of this attitude, see KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 19-24 (5th ed. 1983).

and how they go about their business; and this is not something that can readily be learned from the study of cases.

So far I have argued that casebooks convey a distorted impression of adjudication and that in consequence they also mask many important large-scale aspects of the foreign legal system. They have another failing as well: they mask many of the underlying historical reasons that explain why the legal systems of Europe have the shape they do. No amount of reading of the decisions of the French courts will tell you why the French distrust of the judiciary is as deeply ingrained in their legal culture as judicial review is in ours;<sup>137</sup> nor will you learn that the high standing of legal academics (and the relatively low standing of judges) has its roots in the old Roman system of adjudication;<sup>138</sup> nor that the rejection of *stare decisis* has a history at least as ancient as Justinian's instruction to his judges, *non exemplis sed legibus iudicandum est*: Do not judge by examples but by the law.<sup>139</sup>

One might reply that these various shortcomings could be corrected by judicious supplementation of the case approach. Indeed, the two standard works contain not just cases but also expository "materials." But the supplementation seems to have been intended rather to incite "liveliness of class sessions"<sup>140</sup> than to provide a comprehensive overview of the European legal systems;

<sup>137</sup> For a discussion of the underlying reasons, see DAWSON, *supra* note 133, at 374-431; I KONRAD ZWEIGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS* 76-99 (2d ed. 1984); Jean Maillet, *The Historical Significance of French Codifications*, 44 TUL. L. REV. 681 (1970).

<sup>138</sup> Once again the best account is provided by legal historians. See DAVID & BRIERLEY, *supra* note 128, at 347-49; DAWSON, *supra* note 133, at 100-24; WATSON, *supra* note 85, at 84; ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 82-85 (1991).

<sup>139</sup> For the history of the influence of this phrase, see DAWSON, *supra* note 133, at 122-24, 132-33, 294-95, 440.

<sup>140</sup> Rudolf Schlesinger addresses this criticism directly in the preface to the latest edition of his casebook:

Some European reviewers of the earlier editions [of Schlesinger's *Comparative Law*] suggested that the format of a "casebook" be given up altogether and that a textbook or treatise would be a more appropriate tool for the teaching of Comparative Law. It may be possible to adduce some arguments in support of this suggestion; but in the opinion of most American law teachers it overshoots the mark. It has been demonstrated by experience, and especially by the comparative experience of those who have taught and studied law on both sides of the Atlantic, that student participation and liveliness of class sessions are best assured by a discussion focused on concrete fact situations.

SCHLESINGER, ET AL., *supra* note 88, at xxiii.

and various reviewers have suggested abandoning the case approach in favor of a more systematic exposition.

## 2. Works of Scholarship

With this suggestion we come to the issue of comparative legal scholarship, and we must now ask whether the existing texts and treatises can be expected to do a better job.

It is necessary to begin by excluding from consideration two classes of comparative legal scholarship. My concern in the present Article is with the mainstream of the subject, and so it is appropriate to exclude works that adopt a nonstandard approach. Some of these works are explicitly offered as departures from the comparative tradition;<sup>141</sup> others depart implicitly but no less profoundly.<sup>142</sup> There is much I agree with in all these works, and much also that calls for discussion; but that task is not for the present.

The second class of writings raises a subtle issue: I shall argue that, despite surface appearances, this class is best not thought of as belonging to comparative law at all. This class raises the following special problem. It is my general thesis that the traditional approach is too narrowly focused on describing the modern-day black-letter rules; it is insufficiently theoretical and insufficiently concerned with legal history. To this thesis one might reply that theoretical studies of foreign law in fact abound.

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<sup>141</sup> For example, for Alan Watson's approach via legal transplants, see WATSON, *supra* note 2; for Saul Levmore's approach via economic theory, see Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986) [hereinafter Levmore, *Tort Law*]; Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEG. STUD. 43 (1987) [hereinafter Levmore, *Good Faith*]. A criticism of existing comparative law is provided by Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988).

<sup>142</sup> See generally DAMAŠKA, *supra* note 121; MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); JAMES R. GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991). The approach of Gordley, with its combination of history and philosophy (he traces the origins of modern contract doctrine back to the scholastic philosophers of the Middle Ages), I find especially congenial to the approach outlined in the present Article. Another work that should be mentioned here is LLOYD L. WEINREB, DENIAL OF JUSTICE (1977). This work attempts to rethink the intellectual foundations of American criminal procedure; although it does not present itself as a work of comparative scholarship, it is deeply informed by a study of the procedures of France. See *id.* at 117-46 (chapter six, entitled "An Alternative Model"). These works, in their different ways, seem to me to show what can be achieved if comparative law fixes its gaze on theory rather than on the black-letter rules.

For the sake of definiteness, let us consider the following recent example: an article by Mark Roe on differences in corporate structure in Germany, Japan, and the United States.<sup>143</sup> Roe poses the following theoretical question. The classical Berle-Means model of the public firm predicts that shareholders will be diversified, and that there will be a divergence of managerial goals from shareholder goals.<sup>144</sup> This economic model provides an accurate description of the structure of large American corporations. If it were the *entire* explanation for that structure, then we should expect nations with similar economies to have corporate structures similar to the American. However, "even a brief comparison" (the brevity is important) of German and Japanese corporate structure is enough to show that the classical economic model cannot be universal.<sup>145</sup> Whence the differences? Roe finds them in law and its underlying politics:

America's politics of financial fragmentation, rooted in federalism, populism, and interest group pressures, pulverized American financial institutions, contributing heavily to the rise of the Berle-Means corporation.<sup>146</sup>

Roe's study is manifestly not a mere description of foreign black-letter doctrines. It raises a fundamental question about the economic theory of the corporation; it points to the importance of understanding the historical influences; it contrasts the American system with the systems of Germany and Japan; and, to my mind at least, it is entirely persuasive in its argument.

Nevertheless I do not believe that this analysis should be counted as a study of Japanese and German corporate law. Nor, I think, was it intended to be. For consider what it leaves out. It makes no claim to present a comprehensive overview of foreign corporate law, nor to consider how foreign lawyers think about their corporate institutions, nor (and this is the crucial point) to do for

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<sup>143</sup> See Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993).

<sup>144</sup> See *id.* at 1929.

<sup>145</sup> See *id.*

<sup>146</sup> *Id.* Roe further considers the extent to which American, Japanese, and German corporate structures are in fact converging, and the extent to which such a convergence should be welcomed. I should stress that the foregoing summary is only a sketch, and does not do justice to Roe's complex and subtle argument.

His discussion of the political and theoretical background to the American corporation is an extension of research contained in two earlier articles, Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991), and Mark J. Roe, *Political and Legal Restraints on Ownership and Control of Public Companies*, 27 J. FIN. ECON. 7 (1990).

foreign law what he has done for American law, namely, to plumb the background in history and politics, law and theory.<sup>147</sup> For all these reasons the analysis, I think, is best viewed, not as a study of foreign corporate law, but as a use of some facts about foreign law to address a fundamental issue in the economic theory of the American corporation.

This conclusion does not mean that Roe's argument has no implications for comparative law. On the contrary, if his argument is correct, then the variability between foreign and American corporate law is in large part to be explained by differences in politics and national history, and it follows that, if comparative lawyers seek a deep understanding of German and Japanese corporate law, then they must explore the historical and intellectual background with the same vigor and depth that Roe has brought to his studies of American law.<sup>148</sup>

For these reasons I propose to restrict the term "comparative law" to studies that aim at a reasonably comprehensive understanding of whatever aspect of the foreign legal system is in question; and which are based on a careful study of the primary sources in the original languages. The use of comparative law for theoretical ends is a different enterprise, and cannot take the place of studies that satisfy these two conditions.

These preliminary observations having been made, and the two classes of scholarly works having been set aside, let us now turn our attention to traditional comparative scholarship. The remarks that follow can be illustrated by reference to five well-known works. For reasons given in the footnotes, each is a landmark of the field. Three are texts: those by René David;<sup>149</sup> by Konrad Zweigert and

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<sup>147</sup> Linguistic barriers seem to have played a role here. Most of the references are to works in English; the acknowledgements thank foreign research assistants who "assembled data, research, and translations of German and Japanese materials." Roe, *supra* note 143, at 1927.

<sup>148</sup> It may perhaps be found somewhat surprising that this conclusion applies to corporate law, *prima facie* the homeland of the "practical" and of the nontheoretical. It seems to me that this implication of Roe's work is exactly right.

<sup>149</sup> See DAVID, *supra* note 128. This work is the leading French treatise of its kind; it has gone through numerous editions and has been translated into English and German. See, e.g., DAVID & BRIERLEY, *supra* note 128; RENÉ DAVID & GÜNTHER GRASMANN, EINFÜHRUNG IN DIE GROßEN RECHTSSYSTEME DER GEGENWART (Günther Grasmann trans., 2d ed. 1966). The work is treated by Jaro Mayda as marking an epoch in the history of comparative law. See Mayda, *supra* note 104, at 367, 370 (referring, in a survey of the principal developments in comparative law in the twentieth century, to "the brilliant contrasting and generalizing of René David, which culminated in the conception of the 'grands systèmes' in the early 1960s").

Hein Kötz;<sup>150</sup> and by Amos and Walton.<sup>151</sup> The remaining two are works of reference: Rudolf Schlesinger's celebrated "Cornell Project" on the Formation of Contracts,<sup>152</sup> and the *International Encyclopedia of Comparative Law*, an enterprise of the Max Planck Institute in Hamburg, which has been in progress for three decades, and which will soon be complete in seventeen volumes.<sup>153</sup> This list, which includes treatises, instructional texts, and works of reference from four countries, is representative of the mainstream of comparative scholarship; so we will do well to ask what attributes they have in common.

Let us start with the Cornell Project. This study (like Schlesinger's casebook) is a pioneering work. The basic idea may

<sup>150</sup> See ZWEIGERT & KÖTZ, *supra* note 137. This work is the standard German treatise on comparative law. Both editions have been elegantly translated into English by Tony Weir, Fellow of Trinity College, Cambridge. His translations were published by Oxford University Press as AN INTRODUCTION TO COMPARATIVE LAW (2d ed. 1987) [hereinafter ZWEIGERT & KÖTZ, INTRODUCTION].

<sup>151</sup> See FREDERICK H. LAWSON ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW (3d ed. 1967). This work is the standard British introductory textbook on French law. The first edition, by Sir M.S. Amos and F.P. Walton, appeared in 1935; it has subsequently gone through three editions under the stewardship of such leading scholars as F.H. Lawson, A.E. Anton, and L. Neville Brown.

<sup>152</sup> See generally FORMATION OF CONTRACTS, *supra* note 132. This study, under the general editorship of Rudolf Schlesinger, was conducted under the auspices of the General Principles of Law Project of the Cornell Law School. The project took nine editors and numerous outside consultants a decade to complete. See *id.* at 2. The work has been extremely influential. Indeed, even before publication the study had generated some 45 published lesser studies by a variety of scholars, not all of whom were direct participants in the project; those publications are listed in the text. See *id.* at 62-65.

The influence and continuing importance of the Cornell methodology continues to be acknowledged even in such recent works of comparative theory. See generally Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991); see also *id.* at 27-30 (discussing the Cornell Project's methodology).

<sup>153</sup> INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (André Tunc ed., 1983). The project, under the general editorial supervision of Konrad Zweigert and Ulrich Drobnig, covers the legal systems of some 150 countries, and draws on the expertise of over 400 comparative legal scholars; it is the only systematic survey of comparative law to have been published on such a scale, and may fairly be taken to represent the current state of the subject. A review typical of many observes: "Monumental in scope, unique in conception, unprecedented in its worldwide cooperation of comparative law specialists and based on tremendous amounts of research, expertise, and technical effort, this unique scholarly enterprise, when completed, might well be known as the 'work of the century' among comparative law scholars." Adolf Sprudz, *The International Encyclopedia of Comparative Law: A Bibliographical Status Report*, 28 AM. J. COMP. L. 93 (1980). Similar sentiments are expressed, for instance, by André Tunc, *Une oeuvre comparative sans précédent: L'encyclopédie internationale de droit comparé*, 26 R.I.D.C. 297, 297 (1974).

be explained as follows.<sup>154</sup> Rather than merely compiling lists of legal rules from various countries, comparative law must actively engage in a process of comparison.<sup>155</sup> This means that one must seek to identify the extent of agreement and disagreement between the rules of one legal system and those of another.<sup>156</sup> By proceeding in a factual, case-oriented manner—by looking at what he calls a “segment of life”<sup>157</sup>—the Project was enabled to “cut right through the conceptual cubicles in which each legal system stores its law of contracts, and made it possible to proceed immediately to the matching of the results reached by the various legal systems.”<sup>158</sup> The principal task of the study was to attempt to identify a “common core” of legal doctrines in the special area of formation of contracts. The justification for this focus is somewhat nebulous. On the one hand, “[c]ommon core research perhaps can be justified in the same terms in which our colleagues in the natural sciences speak of basic research.”<sup>159</sup> On the other hand, “[o]nly the elements common to the various legal systems under consideration can be used in building the organization and terminology of the future teaching tools.”<sup>160</sup>

The idea that comparative research should focus on the “common core” has not found wide acceptance; for clearly the *differences* between legal systems are as deserving of study as the similarities. Nor is it true that the use of comparative law in law reform requires the identification of a “common core”; for, as Alan Watson has so persuasively argued, legal change is often the result of the transplantation of legal rules from one system to another.<sup>161</sup>

This style of scholarship, however, has been widely influential, and is, to a considerable extent, shared with such works as the *Inter-*

<sup>154</sup> Schlesinger discusses his methodology in several places. See 1 FORMATION OF CONTRACTS, *supra* note 132, at 1-65 (introduction); see also Rudolf B. Schlesinger, *The Common Core of Legal Systems—An Emerging Subject of Comparative Study*, in YNTEMA, *supra* note 101, at 65 (1961); Rudolf B. Schlesinger & Pierre Bonassies, *Le fonds commun des systèmes juridiques: Observations sur un nouveau projet et de recherches*, 15 R.I.D.C. 501 (1963).

<sup>155</sup> See 1 FORMATION OF CONTRACTS, *supra* note 132, at 2 (noting that previous projects were limited to “the *compilation* and *juxtaposition* of various solutions found, without proceeding to the further step of *comparison*.”).

<sup>156</sup> See 1 *id.*

<sup>157</sup> Schlesinger, *supra* note 154, at 75.

<sup>158</sup> 1 FORMATION OF CONTRACTS, *supra* note 132, at 57-58.

<sup>159</sup> 1 *id.* at 5.

<sup>160</sup> 1 *id.* at 7.

<sup>161</sup> This thesis runs through virtually all of Watson’s writings. See generally WATSON, *supra* note 2.

*national Encyclopedia*.<sup>162</sup> The general style can be gathered by considering some of the chapter headings in the Cornell Project's *Formation of Contracts*:

- \* Acceptance or Acknowledgement of Receipt of Offer?
- \* Acceptance by Silence
- \* Acceptance by Performance
- \* Is Communication of Acceptance Necessary?
- \* Means of Declaring and Communicating Acceptance
- \* When Acceptance Becomes Effective
- \* Time Limit for Acceptance<sup>163</sup>

Within each chapter one has subheadings for the various countries: Acceptance by Silence for France, Acceptance by Silence for Poland,

<sup>162</sup> This is not entirely a coincidence. Ulrich Drobnig and Herbert-Jürgen Guendisch were granted leaves of absence by the Max Planck Institut für ausländisches und internationales Privatrecht to assist Schlesinger in drafting and revising the Working Paper for the Cornell Project. See 1 FORMATION OF CONTRACTS, *supra* note 132, at 67. Drobnig is the Executive Secretary of the *International Encyclopedia*, and thus in charge of supervising the overall direction of the work; his discussion of methodology can be found in Ulrich Drobnig, *The International Encyclopedia of Comparative Law: Efforts Toward a Worldwide Comparison of Law*, 5 CORNELL INT'L L.J. 113 (1972) [hereinafter Drobnig, *Efforts*].

The importance of the Cornell Project can be seen from the fact that Max Rheinstein devotes a full chapter to a discussion of its methodology in his book. See MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* (2d ed. 1987). He observes that any future comparative scholar will have to study both the Cornell Project's contents and its method, for it "represents a paradigm of modern comparative law." *Id.* at 123.

Rheinstein also devotes a section of this chapter to a comparison of the Cornell Project with the *International Encyclopedia*, observing that the *Encyclopedia*, although influenced by Cornell, places a greater emphasis on the need to view legal rules in a sociological context. It might be said that, whereas the primary focus of the Cornell Project is on rules *per se*, the primary focus of the *Encyclopedia* is on rules as solutions to problems. As Drobnig notes, the *Encyclopedia* needed to avoid two dangers: the underinclusive danger of focusing exclusively on the five "great systems" of law, and the overinclusive danger of listing every legal rule of every nation of the world. Accordingly:

The method of selection and presentation which has been adopted is that of the so-called 'typical solutions.' It is based upon the observation that in fact the legal solutions that have been developed for any given social problem (such as defects of goods sold) are limited in number. The essential task is to find these typical solutions.

Drobnig, *Efforts*, *supra*, at 124. The similarity of this approach to Schlesinger's method of considering "segments of life," *see supra* notes 154, 157, should be evident. For further discussion by Drobnig of the methodology of the *Encyclopedia*, see Ulrich Drobnig, *Methodfragen der Rechtsvergleichung im Lichte der "International Encyclopedia of Comparative Law,"* in I IUS PRIVATUM GENTIUM: FESTSCHRIFT FÜR MAX RHEINSTEIN 221 (E. von Caemmerer ed., 1969).

<sup>163</sup> 1 FORMATION OF CONTRACTS, *supra* note 132, at v.

Acceptance by Silence for India, and so on.<sup>164</sup> And under each of these subheadings one then finds five pages or so devoted to the particular black-letter doctrines regarding Acceptance by Silence in the particular jurisdiction: lists of the relevant provisions of the civil code or references to judicial opinions.

Two things stand out about this scheme. First, the Cornell Project is, in essence, a gathering together and a classification of narrowly defined black-letter *rules*: in Schlesinger's phrase, the aim is to produce a "matching."<sup>165</sup> Second, the scholarly orientation is doggedly practical. There is little attempt, even in the General Reports, to deal with questions of history or with theoretical arguments about the purposes of contract law. (The General Reports briefly summarize, topic by topic, the findings from individual countries.)

The orientation towards the perceived needs of practice is of central importance here. Indeed, the Cornell Project is self-consciously modeled on such great systematizing works as the *Restatement of Contracts*.<sup>166</sup> It can be viewed as a kind of *Parallel Restatement for Much of the Globe of the Law of Formation of Contracts*. Nobody would question the practical utility of the original Restatements. But it seems to me to have been a serious error, and the root of much mischief, to have assumed that the same utility must carry over to the Cornell Project. For there are two significant points of difference between the enterprises.

First, the Restatements are a project *within* an ongoing legal enterprise. Their aim is to *reform* the common-law rules: to reorganize and clarify and simplify. They respond to a widely recognized practical need. It is clear how and by whom they will be used. The Cornell Project, in contrast, is a project that stands outside every legal system whatsoever. It speaks to no clear constituency; it answers no clear need. (Hence, perhaps, the energetic efforts to *find* a need,<sup>167</sup> and the inevitable appeal to "basic science.")

The second point follows from the first. Restatements are intended for professional lawyers, already well-versed in their craft. They are not meant to serve as an introduction to American law. The historical background, the general contours of American legal

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<sup>164</sup> 1 *id.* at xii.

<sup>165</sup> 1 *id.* at 57-58.

<sup>166</sup> See 1 *id.* at 7 (stating that the task performed by the authors of the *Restatement of Contracts* "must now be tackled on a multinational scale").

<sup>167</sup> See 1 *id.* at 5-17.

institutions, the policy debates, the institutional roles, the ability to read background works in the English language—all of this can be taken for granted. But the situation is different when we go abroad. The task of comparative law is not to redescribe the rules of a system we already understand; it is to introduce us to the point of view of a system not our own. And, as I have been arguing, it is a serious mistake to think that these two tasks can be approached in the same way, or to think that the same things can be taken for granted.

So far I have identified two features of traditional comparative scholarship: a focus on substantive black-letter doctrines, and an avoidance of history and theory. It is natural at this juncture to wonder how such an approach can ever have seemed possible. The point perhaps emerges most clearly if we redirect our gaze and consider how one can hope to understand American law without understanding *Marbury* or the Fourteenth Amendment or the New Deal? And how can one understand these things without history or theory? And must not the same conclusion be true for other legal systems?

At this point a third feature of traditional comparative scholarship becomes relevant. It is not evident from the Cornell Project, whose focus is narrow; but it can be clearly seen in the *International Encyclopedia*, whose vast bulk is devoted almost exclusively to the substantive rules of private law.<sup>168</sup> Constitutional law is absent; so too is administrative law; so too is criminal law; so too is most legal theory.<sup>169</sup>

It should be clear that these three features are deeply connected. For if one's *method* is to study the black-letter rules, then it is necessary that the *subject matter* be chosen so as to exclude those aspects of law most tainted by politics and national history;

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<sup>168</sup> Specifically, the seventeen volumes of the *International Encyclopedia* are devoted to: (1) National Reports; (2) The Legal Systems of the World—Their Comparison and Unification; (3) Private International Law; (4) Persons and Family; (5) Succession; (6) Property and Trust; (7) Contracts in General; (8) Specific Contracts; (9) Commercial Transactions and Institutions; (10) Restitution—Unjust Enrichment and *Negotiorum Gestio*; (11) Torts; (12) Law of Transport; (13) Business and Private Organizations; (14) Copyright and Industrial Property; (15) Labor Law; (16) Civil Procedure; and (17) State and Economy (dealing mostly with foreign commerce and investment). INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 153.

<sup>169</sup> In a work of such scope and of so many authors, there are of course exceptions. *See, e.g.*, A.M. Honoré, *in* 11 *id.* at 7-1 to 7-203 (providing a lengthy discussion of causation and remoteness of damage in the law of torts). But the general point still stands.

conversely, if one narrows one's gaze to a sufficiently narrow subject matter, then a description of black-letter rules can seem an adequate methodology. It will be helpful to have a short name for these three features, and I propose to call them the "telephone-book approach" to comparative law; for, in Schlesinger's terminology, their aim is a "matching" of the rules of one system to those of another.<sup>170</sup>

How did the telephone-book approach arise as a scholarly paradigm? This is a complicated question, and ironically it can only be answered if we turn to history and legal theory. I shall return to the issue at the end of the Article; for now a sketch will suffice. Comparative law arose as an academic discipline in Europe in the closing decades of the nineteenth century. At the time, the dominant style of legal thought, both in France and in Germany, was an extreme form of legal positivism. Moreover, all the legal systems of the Continent drew a sharp conceptual distinction between public law and private law; the distinction had its roots in Roman law and was considered virtually axiomatic. Finally, the great European legal project of the age was the drafting of the German civil code. This project—in essence a Restatement of German private law—drew the attention of legal scholars across Europe and provided them with a model for legal reform.<sup>171</sup> The principal task for these continental scholars was a task of legislation; and, as with the Restatements, it could be assumed that the scholars and legislators throughout Europe engaged in the legislative reform of the private law were already well-versed in the rules of Roman law: in other words, comparative studies of the various civil codes could presuppose a great deal of shared cultural background. So, for all these reasons, it was natural that their comparative investigations should have focused on a comparison of black-letter rules of the private law. The roots of the telephone-book approach are to be found in this period, and comparative law has been under its influence ever since. The Cornell Project and the *International*

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<sup>170</sup> See 1 FORMATION OF CONTRACTS, *supra* note 132, at 57-58.

<sup>171</sup> The excitement generated by the drafting of the German civil code is plainly visible in many works of the time. See, e.g., FRANÇOIS GÉNY, *LA TECHNIQUE LÉGISLATIVE DANS LA CODIFICATION CIVILE MODERNE* (Arthur Rousseau ed., 1904) (discussing modern techniques of legislative drafting); FREDERIC W. MAITLAND, *The Making of the German Civil Code*, in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND*, 474, 476 (H.A.L. Fisher ed., 1981) (stating that with the drafting of the civil code, Germany "has striven to make [its] legal system rational, coherent, modern, worthy of [the] country and [the] century").

*Encyclopedia* are (despite some nods in the direction of "functionalism") in the traditional mold. Indeed, the principal purpose of the *Encyclopedia* is explicitly *not* to "serve as a handbook in which practitioners would find the solution to any legal issue arising under the law of some country of the world."<sup>172</sup> Its purpose is to assist lawmakers in the drafting of new private-law legislation;<sup>173</sup> the benefits to the academic community are treated as a significant by-product.<sup>174</sup> The casebooks by Schlesinger, of the Cornell Project, and von Mehren, the editor of one of the volumes on the law of contracts in the *International Encyclopedia*,<sup>175</sup> offer a new

<sup>172</sup> Drobniġ, *Efforts*, *supra* note 162, at 114.

<sup>173</sup> Thus Ulrich Drobniġ says:

The *Encyclopedia* addresses itself primarily to lawmakers, national and international. Many European legislators customarily lay the groundwork for major legislative projects by first undertaking a comparative study. A broad systematic comparative work can offer legislators a multitude of models for the solution of recurring as well as novel problems. The variety of alternatives presented should help the legislators of the more advanced countries to improve their legislation, and assist their judges in the interpretation of existing statutes and the development of case-law. But the *Encyclopedia* is intended to be of particular value for the legislators of developing nations. These men are in the course of reorganizing their social and economic orders, and some of them strive for comprehensive codification

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The *Encyclopedia* will be most useful to lawmakers on the international level. The drafting of international legislation for purposes of unification and harmonization of diverging national laws is an unthinkable act, both legally and politically, without a careful comparative study prior to the actual drafting.

*Id.* at 114-15. The methodological difficulties of drafting an international private-law convention are discussed by John Honnold with regard to the 1980 United Nations Convention on Contracts for the International Sale of Goods. See John A. Honnold, *Uniform Words and Uniform Application: The 1980 Sales Convention and International Juridical Practice*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 115 (Peter Schlechtriem ed., 1987). Honnold observes that successful drafting requires a knowledge of far more than the mere black-letter rules of various jurisdictions, and indeed that "uniformity does not automatically result from agreeing on the same words for international rules." *Id.* at 116. The essential problem—and notice that this is not just a theoretical problem, but a practical problem for the drafters of an international convention—is that local differences of *interpretation* and *application* can significantly alter the way the agreed-upon words are applied by the domestic courts. It is therefore necessary for the drafters to have a deep understanding of the cultural and economic and institutional background as well, and to take additional steps to encourage uniform application. Honnold's article gives numerous examples.

<sup>174</sup> See Honnold, *supra* note 173, at 115.

<sup>175</sup> Indeed, von Mehren's contribution to the *Encyclopedia* forms the backbone for his treatment of contract law in his casebook. See VON MEHREN & GORDLEY, *supra* note 92, at 783 n.1 (noting that "[t]his chapter draws extensively upon . . . [my] work

American wrinkle by using the case approach; but the underlying focus on the black-letter rules remains the same.

We embarked on this discussion of comparative legal scholarship in order to see whether treatises afford a more satisfactory approach to the subject than do casebooks. So let us now reconsider the objections to the casebooks and ask whether treatises can be expected to do better.

The first three objections, recall, were that cases are an inefficient guide to the black-letter of the law; that the "semi-secret"<sup>176</sup> style of continental opinions conceals the underlying legal reasoning; and that the case format offers a standing invitation for American students to misunderstand the role of judicial opinions. How fare the treatises? Clearly they are superior on the first two counts; and the third objection is entirely irrelevant. Schlesinger has in turn accused the treatises of superficiality.<sup>177</sup> His accusation, I think, has some force against the work by David.<sup>178</sup> But the work by Zweigert and Kötz delves more deeply into legal questions, in a more organized fashion, with less scope for misunderstanding, than do the American casebooks, and in half the space.<sup>179</sup>

in progress for Volume 7, *Contracts in General*, of *The International Encyclopedia of Comparative Law*").

<sup>176</sup> The phrase is Schlesinger's. See 1 FORMATION OF CONTRACTS, *supra* note 132, at 54.

<sup>177</sup> See Rudolf B. Schlesinger, *The Role of the "Basic Course" in the Teaching of Foreign and Comparative Law*, 19 AM. J. COMP. L. 616, 622 (1971). Schlesinger further observes:

Descriptive generalizations, however systematically presented and brilliantly expressed, will not always leave an imprint on . . . [the student's] mind . . . . [A] purely abstract-descriptive exposition must remain lifeless and imageless; it will not create much interest and will be difficult to remember . . . .

Only an exposure to original source materials can counteract these dangers, by acquainting the student with the existential reality as well as the analytical outline of foreign legal institutions.

*Id.* at 622.

<sup>178</sup> David's work attempts to survey "the major systems of the world today" in a scant 600 pages, DAVID & BRIERLEY, *supra* note 128; so a certain degree of superficiality is inevitable. American law receives 45 pages; the topics treated in those pages are: History of American Law; Structure of American Law, Federal Law and State Law; Other Structural Differences; Decisions of the Courts; and Statute Law. *Id.* at 397-452. In the treatment of common-law adjudication, the doctrine of stare decisis and questions of legal reasoning are disposed of in six pages. See *id.* at 434-39.

<sup>179</sup> ZWEIFERT & KÖTZ, *supra* note 137.

But what of the remaining objections? I argued that the casebooks do not provide a satisfactory account of the prevailing legal culture, of the interconnected roles of judges and legislators, of lawyers and scholars. Here the existing treatises, including that by Zweigert and Kötz, are open to the same objection. They are still under the influence of the traditional nineteenth-century model of comparison-for-legislative-reform. They focus exclusively on the private law, they ignore questions of institutional role,<sup>180</sup> and they pay insufficient attention to history and philosophy. The fundamental problem, in other words, is not a problem that affects the casebooks alone, and the problem with the existing texts is that *au fond* they still rely on the scholarly ideal developed at the end of the nineteenth century. That ideal was appropriate for the task of designing and comparing civil codes; but as I learned in Göttingen it is inadequate as an introduction to foreign law.

Briefly put, what I most needed to know about the continental legal systems—what caused me the most perplexity in my dealings with European lawyers—was not the black-letter rules themselves, but (1) the way they are conceived by the legal community, and (2) how that community conceives of itself: what I earlier called the “cognitive structure” and the “institutional culture” of the legal system. At bottom, in modern legal systems, the rules are the least interesting things. For my professor’s “convergence thesis” was correct: on the whole, in modern Europe, the same sorts of agreement are now honored as contracts, the same sorts of injury compensated as torts, and the same sorts of misdeed punished as crimes as in America. What I needed to know was something more elusive and fundamental—the prevailing attitude towards the law, the style of legal analysis, what it means for a European to “think like a lawyer.” By these amorphous phrases I mean to include, not just the way lawyers reason about a particular set of facts or interpret a statute, but also such matters as the prevailing attitude towards courts, the legislature, legal scholarship, legal education, legal practice, jurisprudence, the basic constitutional rights, and so on. And I needed not just an exposition of these attitudes and styles—the bare factual information that they exist—but more importantly an explanation of the reasons, both historical and philosophical, that have brought them into existence. In short, I needed to know

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<sup>180</sup> This remark does not apply to the work by David, DAVID & BRIERLEY, *supra* note 128, which, for example, has other shortcomings. For a discussion of those problems, see *supra* note 178.

the facts that are essential to any successful communication: I needed explanations as well as facts; the how and why and whence of the legal system, and not just the black-letter what.

### 3. The Problem of Public Law

One further point should now be noticed about the American casebooks, namely, that they tend to conceal the large differences that exist among the various legal systems on the Continent. (The title of von Mehren's casebook is *The Civil Law System*—as though there were only one.) This blurring of the national boundaries is, I think, in part a consequence of an excessively black-letter approach to comparative law. Indeed, comparative lawyers who talk about "The Civil Law" as a unitary system face a dilemma depending on how they answer the philosophical question, *What is law?* If, on the one hand, they conceive of law as the substantive black-letter rules of tort and contract (as stated in the civil code) then, by the "convergence thesis," it is probably harmless to lump the various continental systems together. But for the very same reason, you might as well lump the civil law with the common law; for at this level of generality the differences between Germany and England are no more (or less) interesting than the differences between California and Idaho. On the other hand, if law is understood more broadly so that it also encompasses a comparative study of legal institutions and of the prevailing styles of legal thought, then one can indeed find systematic differences between the civil law and the common law; but at the same time one finds other systematic differences among the various civilian legal systems themselves. So it would be more accurate to speak, not of *the civil law simpliciter*, but of the civil law *systems*.

There is a subtle issue here, and it is precisely at this point that the traditional approach's restriction to private law becomes most significant. So long as we look only at the rules of tort and contract, it is easy to pit the civil law (as a whole) against the common law (as a whole); for the core affinities that unite these parts of the civil law systems all revolve around the great codifications, in the nineteenth century, of the inherited rules of Roman private law. But as soon as we throw constitutional law into the equation, the interrelationships and the elective affinities become more intricate. The complexity becomes evident if we consider judicial review. Here the German and the American systems tolerate a full-blown review of legislation by the judiciary:

if anything, the Germans travel even farther in this direction than do the Americans.<sup>181</sup> But Britain, like many other common-law systems, is decidedly cool towards the idea; whereas France, Germany's civil-law neighbor, is actively hostile.<sup>182</sup> These differences have nothing to do with the distinction between common law and civil law, but are to be explained by national history; and it is important here to observe that, from a practical point of view, the differences among the various civil-law countries are subtle, and at least as likely to trap and perplex an American-trained lawyer as the more blatant differences between the civil law and the common law.

I take it to be obvious that the principles of constitutional law cannot be adequately explained if we limit our attention, as does the traditional approach, to the study of present-day legal rules. The issues involved are too closely bound up, on the one hand, with national history, and, on the other, with questions of justice and sovereignty and democracy, for such an approach to be satisfactory.

For this reason, if one is to employ the telephone-book approach it is necessary to insist on a sharp cleavage between public law and private. For if the two kinds of law are intertwined then private law as well as public law will be bound up with politics and history and philosophy, and one cannot restrict one's attention to the black-letter rules.

As I mentioned earlier, the European scholars who created comparative law at the end of the nineteenth century would scarcely have regarded this cleavage as controversial. For it was axiomatic in all the systems based on Roman law that the public sphere was to be sharply distinguished from the private; and (as we shall see) the political and economic theory of the age did nothing to undermine this legal distinction. The traditional Roman-law cleavage was incorporated into the methodology of comparative law, woven into the fabric of the subject. And it has become a commonplace among American students of the subject that this old Roman cleavage is still one of the defining marks of the civil-law systems generally.<sup>183</sup>

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<sup>181</sup> See generally ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, VERFASSUNG, DEMOKRATIE* 29-52 (1991) (discussing the historical development of conceptions of the constitution).

<sup>182</sup> See, e.g., MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 150-60 (Paul J. Kollmer & Joanne M. Olsen eds., 1989) (discussing the French resistance to judicial review).

<sup>183</sup> See, e.g., MERRYMAN, *supra* note 128, at 91; SCHLESINGER ET AL., *supra* note 88, at 309; WATSON, *supra* note 85, at 144. Merryman observes that the "main division of law in the civil law tradition is into public law and private law." MERRYMAN, *supra*

I shall make this observation the starting point for the next stage of my argument. Up to now I have been criticizing traditional comparative law for sins of omission: for having neglected constitutional law, institutional culture, and history and philosophy. But now I want to argue something stronger: that traditional comparative law has not even understood the black-letter rules. The principal task in what follows, in other words, is not to fault the traditional approach for having failed to understand the things it never tried to understand, but rather to argue that, as a result of not having tried to understand them, it has failed to understand the things it *has* tried to understand. The logical structure of this criticism is important. The point is not merely that a knowledge of the black-letter rules of French contract law is no more a knowledge of French law than a knowledge of all French words beginning with letters C through G is a knowledge of the French language. The point is rather that such knowledge is not even knowledge of what it purports to be knowledge of, and that you cannot be said to understand either the rules or the words unless you know a great deal more besides.

In particular I shall argue, first, that it is impossible to understand the modern German civil code without also understanding the historical and intellectual background to that code. Second, that an understanding of this historical and intellectual background to private law is inseparable from an understanding of the historical and intellectual background to public law.

If these two claims are correct, they imply a collapse, for German law, of the traditional cleavage between public and private law. They further imply that the traditional approach to comparative law has failed to understand its own central case. And the damage cannot be confined to the understanding of German law. For either the French cleavage has also collapsed, or it has not. If it has, then we are left with the same conclusion as in the German case. If it has not, then we must explain why France went in one direction, and Germany in another. And this is not just a question about rules, but about ideas and the large-scale history of the law.

If this argument is correct, it bolsters my claim that comparative law is in need of a fundamental rethinking, and that the rethinking

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note 128, at 91. He rightly observed that "the mighty cleavage" is still important, although it has been breaking down in the twentieth century, but he does not draw the inference that the methodology of traditional comparative law needs to be changed as a result. *See id.* at 91-100.

must embrace both subject matter and method. The method will have to spend less time “matching” one rule to another, and more trying to understand history, ideas, and institutions; and the subject matter will have to include, not just the substantive rules of tort and contract, but everything that lies behind these rules. And this conclusion further implies that the simple-minded polarity of “common law” *versus* “civil law” will have to be abandoned, leaving us with a subtler and more nuanced view of the relationships between the principal Western legal systems.

These are large claims, and it must again be emphasized that I postpone the detailed theoretical arguments for another occasion. The task here is merely to make the claim plausible. But from what has already been said we should perhaps be able to conjecture that the traditional approach to comparative law, on closer inspection, will fall short, not only for public law, but for private law as well. For it seems a reasonable hunch that, even in the law of corporations or the law of torts, communication with foreign lawyers is not primarily a matter of knowing the rules, but of understanding the underlying principles.

#### IV. THE INTELLECTUAL ORIGINS OF GERMAN LEGAL THOUGHT

##### A. *Introduction*

It is now time to illustrate these general criticisms with a concrete example; but before we turn to the details it will be best to recapitulate what the example is intended to show. I wish to argue that, in order to understand the rules of modern European private law, it is not enough merely to know the black-letter doctrines embodied in the civil code. One must also understand the intellectual background to those doctrines, and grasp the underlying principles that give them their point. Those principles are the product of historical evolution; so my claim is that, if we look to intellectual history, we will obtain a deeper understanding of modern private law than if we simply study the surface phenomena of the rules. That is what the example must show. As a corollary, for reasons I gave earlier, in exploring the example we should cast a sceptical eye on the alleged cleavage between public and private that has been a main prop of the traditional approach to comparative law.

Traditional comparative law has focused its attention on private law as embodied in the civil codes. Codification, indeed, is typically

thought to constitute the great point of division between civil law systems and those of the common law. So that is the example I propose to consider.

This is of course a vast topic; much too vast for a single article. Edward Gibbon was not one to shrink from large tasks, but at the start of his celebrated chapter on the history of Roman law he remarks that "I enter with just diffidence on the subject of civil law, which has exhausted so many learned lives and clothed the walls of such spacious libraries."<sup>184</sup> The same sentiment is valid here, and in what follows I shall be able to offer only a sketch.

It is important, however, to observe that this fact does not so much undermine my central claim in this Article as support it. For I wish to show two things: (1) that the issues I treat are fundamental to an understanding of modern continental private law; and (2) that they have been ignored by traditional comparative scholarship. But my point is only strengthened if we add the additional observation that (3) these issues occupy a vast domain that is now ripe for comparative scrutiny.

To make the discussion that follows more tangible, I propose to focus on a claim made by Alan Watson. He is, as I have indicated, a sharp critic of the traditional approach, but he, too, concentrates his attention almost exclusively on the black-letter rules of the private law, and he, too, makes the distinction between public and private into one of the defining pillars of the civil law, declaring that "[t]he fundamental division in civil law systems is into public law and private."<sup>185</sup> In a strategically placed passage at the end of his study of *The Making of the Civil Law*, he makes the following memorable assertion:

A law student of the age of Justinian, confronted with a modern civil code such as the Austrian *ABGB* and its surrounding statutes, would not be greatly astonished by the substance of the law, though he might well be taken aback by the abstract way in which the rules are set out. Differences in the substance of the law there certainly are, but scarcely what might be termed major developments. The major differences are the insistence on a public ceremony for the creation of a marriage and a formal procedure

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<sup>184</sup> 2 GIBBON, *supra* note 64, at 669.

<sup>185</sup> WATSON, *supra* note 85, at 144. See also his remarks in SCHLESINGER ET AL., *supra* note 88, at 309.

As I remarked earlier, I shall not here discuss Watson's theory of legal transplants, which raises deep and important issues that go far beyond the bounds of this paper. I have commenced on the task elsewhere. See generally Ewald, *supra* note 8.

for the granting of divorce . . . . The biggest surprise for the ancient law student would be the disappearance of a law of slavery in the Austrian code.<sup>186</sup>

To focus the discussion that follows, I suggest we concentrate on Watson's vivid example, for it is a consequence of the view that takes black-letter legal rules to be the principal object of study. With that starting point, it is natural to end with the conclusion that comparative law is primarily a matter of "matching" one rule to another, and that, in fifteen hundred years of European legal history, not very much has happened to the substance of the law.

It will be helpful to give the ancient law student a name; let us call him "Romulus." It will also be more illuminating if we focus our attention, not on the peripheral Austrian *ABGB*, but on the central case of German law. I suggest that in the discussions that follow we keep the following questions at the back of our minds: Would Romulus *really* be so much at home with the German *BGB* as Watson says—or has something been left out? Would you rely on his assistance in selling your house? How well does he understand the activities of modern German lawyers? How effectively can he communicate?—I am not, in fact, willing to grant that the changes in the substantive law are as slight as Watson says. As we shall see, section 242 of the *BGB*<sup>187</sup> is only one of many provisions that would cause Romulus to boggle, but this is a comparatively minor point. For the purposes of comparative law, the important questions are the ones I have just mentioned.

<sup>186</sup> WATSON, *supra* note 85, at 179-80. Watson then adds, *sotto voce*, the following remark:

To some extent this overwhelming influence of Roman law on private law is overlooked, because in other areas Roman law influence is slight, as in commercial law, public law, and social welfare law. Areas of law in which the Romans, especially the Roman jurists, were little interested have expanded.

*Id.* at 180. I have said earlier that I propose to focus on the private law because I wish to show that *even here* the traditional approach is inadequate. But I note in passing that the areas of law Watson leaves to one side embrace most of modern law: constitutional law, civil and criminal procedure, criminal law, bankruptcy law, insurance law, patent and copyright law, administrative law, the whole of commercial law, tax law, international law—both public and private, the law of the European Union, social welfare law, labor law, corporate and antitrust law, mass media law, and transportation law. These are the most active and fertile parts of the modern civil law and cannot be adequately understood if we limit ourselves to studying those aspects of private law that have stood still since the Roman Empire.

<sup>187</sup> BÜRGERLICHES GESETZBUCH [BGB] § 242 (F.R.G.) is discussed *infra* note 433.

Before we embark on the details, two important caveats are in order. First, my task here is to examine the origins of the *BGB*; but, although I shall proceed historically, my interests are not precisely the same as those of a legal historian. My purpose is to describe, in a very brief space, the leading ideas that have shaped German thinking about private law and that continue to shape it today. I am not trying to recreate the intellectual world of nineteenth-century legal scholarship in all its rich detail, nor to explore all the nuances of argument, but to shed light on comparative law and on twentieth-century legal practice. Issues that were of central importance in 1814 or 1848 are here touched on only lightly; and many influential thinkers receive short shrift, or no shrift at all. But to treat a topic as vast as the origins of the civil code requires that we first establish a frame of reference and gain a sense of the intellectual geography. The schematic (and indeed oversimplified) nature of the present account is therefore deliberate and is intended to focus attention on a few core ideas; once the importance of those ideas has been grasped, it should be possible, in a more extended treatment, to fill in the necessary details.<sup>188</sup>

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<sup>188</sup> For the history of German legal thought in the early nineteenth century, far the best study in English (and one of the best in any language) is JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990). Whitman's account provides an exceptionally rich and insightful account of the intellectual developments, and supplies much of the detail that I have omitted here.

It is important to observe that there is a second, more philosophical reason for attempting to give a schematic account of the intellectual sources of the *BGB*. In the earlier discussion of the trial of the rats of Autun I commented on the distinction between *reasons* and *causes*. I argued there that we should not insist on an excessively sharp distinction, and that for many purposes philosophy has a need to study historical causes as well as abstract reasons. The issues here are extremely delicate, and their full discussion will have to await a later article; but it should be clear that the problem we face here is related to the problem of the ultimate compatibility of the approaches of Kant and of Herder. Intuitively the relevance to the present enterprise is this. We do not want to go too far in the direction of emphasizing causes at the expense of reasons; and so the approach I propose to follow here is, in effect, to look to what might be called the "rational causes" of the *BGB*, that is, to treat reasons *as* causes, and to take the principal causes to be themselves reasons. The basic strategy is to look to a cluster of more-or-less philosophical ideas as they evolved in German legal thought over time, as they influenced the practice of law, and as they responded to social and economic change; that structure of ideas, treated as an abstract schematism, can then itself be viewed as a rational cause of the development of the *BGB*.

One further point should perhaps here be mentioned. In an important article, Michael Moore has argued for the importance to legal theory of the metaphysical debate between realism and idealism. Interpretivists, he says, think they can avoid this debate; however, "[m]y aim is to show that metaphysics has been prematurely

Second, I said earlier that I shall focus my attention on the case of Germany; and this fact requires me to proceed with caution. On the one hand, I must concentrate on those features that are particular to the German legal system, but there are also dangers in taking an excessively national focus. Since the nineteenth century there has been a tendency among historians to write the history of law as a purely *national* phenomenon: German historians of the last century would emphasize the uniqueness of German law and German history, and play down the points of similarity with France or England. This tendency existed in other countries as well. During World War I, French and English historians were quite happy to agree that Germany's history had been different—and at times the results have been downright silly.<sup>189</sup> In legal and especially in political history there has been a longstanding tendency, reinforced by World War II, to stress the uniqueness of Germany's development and her divergence from the Western democracies. Differences certainly abound, but it is important not to overstate the case. In what follows I shall, for reasons of space, be forced to concentrate on the national history; but it should be borne in mind that romantic nationalism was a pan-European phenomenon and had its roots in Rousseau, Burke, and the French Revolution; that anti-absolutist German legal reformers looked to the English common law for inspiration;<sup>190</sup> that the great liberal thinker of the

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interred. The metaphysical debate over realism is both meaningful and relevant to practical concerns, in law as elsewhere." Michael S. Moore, *The Interpretive Turn in Legal Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 873 (1989). As should be clear from my earlier discussion of the trial of the rats of Autun, I endorse this conclusion, and indeed would push it beyond the bounds of the debate over realism: as I stressed above, when I speak of metaphysics I mean the term to be taken in its most full-blooded sense. I do not here wish to belabor the point (which must be postponed for a later article dealing in detail with the foundations of Kant's philosophy of law), but attentive readers will notice the extent to which the debate between Kant and Herder turns on just such metaphysical questions.

<sup>189</sup> Even today, in American universities, it is common to hear the proponents of so-called "Continental" philosophy contrast their tradition with the tradition of "Anglo-American" philosophy—overlooking the fact that the most influential thinkers in the Anglo-American tradition are Frege, Wittgenstein, Carnap, Gödel, and the Vienna Circle.

<sup>190</sup> See WHITMAN, *supra* note 188, at 71-75. Whitman is admirably clear on the need to look at German legal history with fresh eyes:

It is this perduring tendency to think of Germany as a battleground between change and the dark forces of reaction, between the dynamic New and the static Old, that one must shake off if one is to understand Savigny and his contemporaries. It makes undeniable dramatic sense to think about the German world in these terms . . . . It makes undeniable dramatic sense,

age was Kant; that Mill's *On Liberty* was explicitly based on the ideas of Wilhelm von Humboldt; that Victoria's Britain, like the Kaiser's Germany, was a parliamentary monarchy; that, in the 1890s, progressive social thinkers in Britain took much of their intellectual inspiration from the German Social Democrats.<sup>191</sup> The tendency to write national histories of law is, I think, closely bound up with the positivism that underlies the traditional, telephone-book approach to comparative law; and if the argument in this Article is correct, precisely one of its consequences should be to undermine the nationalist approach to legal historiography. For on the view I am advocating, law is best seen, not as a heap of rules enacted by a national legislature, but as fundamentally a matter of *ideas*, and ideas have a notorious ability to seep or sweep across national borders. So in a more complete account one would view the German developments as occurring on a European, or indeed a Western, stage—with German legal thinkers importing ideas from France and Britain and America, and with French and British and American thinkers in turn absorbing ideas from their German counterparts.<sup>192</sup> Only in this way will we be able properly to compare one system with another, and to distinguish between those legal legacies that are German or English or French and those that are Common Western.

Let us now turn to the historical origins of the German civil code. I shall start at what seems to me to be the great modern *massif* in European legal thought.

Everybody agrees that an important change took place in legal thinking during roughly the two decades on either side of the French Revolution. On one side of the divide are the natural

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too, to suppose that German history was, in the early nineteenth century, already grinding toward Hitler—that the post-Napoleonic years were years when liberalism, introduced by the French armies into a dreary and static German world, met a pivotal defeat . . .

But a sense of drama can be a grave handicap in understanding history.

*Id.* at 97. These remarks come in the middle of a longer passage devoted to a discussion of the historiography of nineteenth-century Germany. *See id.* at 94-99.

<sup>191</sup> The young Bertrand Russell, for example, travelled to Germany to study the movement for social democracy. *See* BERTRAND RUSSELL, *GERMAN SOCIAL DEMOCRACY* (Simon & Schuster 1965) (1896).

<sup>192</sup> For a recent discussion of these influences, with many further references, see James Herget, *The Great German Influence on American Jurisprudence*, 25 *RECHTSTHEORIE* 43 (1994); *see, e.g.*, James Q. Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 *YALE L.J.* 156 (1987).

lawyers, confidently expounding the law of nature, and more-or-less freely appealing to reason, divine law, and the universal consensus of the civilized world. To say this is not to deny that there are great differences among the legal thinkers on the pre-Revolutionary side of the divide: of course there were. But it can scarcely be disputed that the picture on the other side of the divide—that is, on our side—is very different. Suddenly, starting in the late eighteenth century and increasing steadily in the nineteenth, we have a splintering of ideas, a sudden flowering of new legal theories, and perhaps most strikingly, of new academic disciplines—legal history, legal sociology, legal economics, legal anthropology, and so on. And conspicuous among these new disciplines is comparative law, a subject which had no separate existence before the nineteenth century. These academic disciplines in turn were associated with various kinds of philosophical theories: legal positivism, Hegelianism, the Historical School of law, neo-Thomism, neo-Kantianism, *Begriffsjurisprudenz*, legal realism, and numerous attempts to revive the theory of natural law. Legal thought since the late eighteenth century of course has many points of continuity with what went before; but it has become far more complicated, diverse, and self-conscious, both about its methodology and about the historical, social, and ideological contingencies of existing legal systems.<sup>193</sup>

What were the causes of this fissure in European legal thought? No short answer is possible, but we can get some idea of the intellectual background by considering two seminal thinkers of the late eighteenth century. These two thinkers straddle the great divide, and they have a number of attributes that make them a rewarding object of study for anybody interested in understanding the changes that took place. They lived in the same city on the Baltic; they knew one another; and they addressed each other's arguments. Each was to be influential on the development of nineteenth-century legal thought, although in very different ways. They also disagreed sharply with each other, and by examining their disagreements we can get some sense of what was at stake.

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<sup>193</sup> For historical background on the development of comparative law, see I CONSTANTINESCO, *supra* note 95, at 122-202. The general legal developments during this period are described in FRANZ WIEACKER, GRÜNDER UND BEWAHRER: RECHTSLEHRER DER NEUEREN DEUTSCHEN PRIVATRECHTSGESCHICHTE 348-467 (1959).

## B. Kant

The first of my two thinkers is Immanuel Kant.<sup>194</sup> Kant—at any rate, in the English-speaking world—is not usually remembered as a philosopher of law, either by philosophers or by lawyers: not by philosophers, who have preferred to busy themselves unravelling the intricacies of his contributions to metaphysics and ethics, and not by lawyers, who have been repelled by the abstractness and difficulty of the one book he published on legal philosophy.<sup>195</sup> Indeed, this book—the *Metaphysics of Morals* of 1797—has often been dismissed as the work of a philosopher long past his prime. (Kant was 73 when he gave it its final form.) Certainly it cannot be regarded as one of his greatest accomplishments. However, Kant regularly lectured on law, and wrote about it throughout his life; his manuscript notes on legal philosophy, first published in the 1920s, fill the better part of a fat volume of some 600 pages.<sup>196</sup> When this material is added

<sup>194</sup> Because the following discussion is not intended to be an exhaustive treatment of the subject, but only a brief introductory sketch, I shall confine myself to mentioning the chief secondary works, to which readers seeking further information should turn.

The classic introductory study in English of Kant's moral philosophy is H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (1948); two excellent recent studies are ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* (1989), and HOWARD WILLIAMS, *KANT'S POLITICAL PHILOSOPHY* (1983).

Kant's specifically legal philosophy, in contrast, has not yet received a comprehensive treatment in English; but there is a helpful introduction by Mary Gregor in her translation of the *Metaphysics of Morals*. See Mary Gregor, *Introduction to KANT*, *supra* note 59, at 1-29. The most extensive recent study in German is WOLFGANG KERSTING, *WOHLGEORDNETE FREIHEIT: IMMANUEL KANTS RECHTS- UND STAATSPHILOSOPHIE* (1984). A useful collection of essays and readings is to be found in ZWI BATSCHA, *MATERIALIEN ZU KANTS RECHTSPHILOSOPHIE* (1976). The history of the development of Kant's legal thinking is treated in CHRISTIAN RITTER, *DER RECHTSGEDANKE KANTS NACH DEN FRÜHEN QUELLEN* (1971). Useful recent monographs, which contain an overview of much of the literature (which by now is scarcely surveyable in a single human lifetime) are GERD-WALTER KÜSTERS, *KANTS RECHTSPHILOSOPHIE* (1988) and PETER UNRUH, *DIE HERRSCHAFT DER VERNUNFT: ZUR STAATSPHILOSOPHIE IMMANUEL KANTS* (1993). These last works contain extensive bibliographies and are a useful guide to the many insightful article-length studies. Also well worthy of study is the set of lectures by Italy's leading modern philosopher of law, NORBERTO BOBBIO, *DIRITTO E STATO NEL PENSIERO DI EMANUELE KANT* (1969).

<sup>195</sup> See IMMANUEL KANT, *METAPHYSIK DER SITTEN* (Königsberg, F. Nicolovius 1797). This work should not be confused with his much better known *Grundlegung zur Metaphysik der Sitten* of 1785, which exists in several reliable translations. See KANT, *supra* note 58. It is surprising that the work of 1797 received its first reliable and complete English translation only in 1991. See KANT, *supra* note 59.

<sup>196</sup> This *Nachlass* material was first published by the Prussian Academy in 1934. See KANT'S *GESAMMELTE SCHRIFTEN* (1934) [hereinafter *GESAMMELTE SCHRIFTEN*]. Kant in particular lectured from the first part of GOTTFRIED ACHENWALL, *IURIS*

to his *Metaphysics of Morals* and to his writings on political philosophy, the philosophy of history, and moral philosophy, it becomes much clearer—or, at any rate, *somewhat* clearer—how the entire system is supposed to hold together. But despite the best efforts of the commentators, a large bundle of problems remain. For example, it is not entirely clear whether Kant's legal philosophy is even consistent with his general moral philosophy, let alone (as he claims) derivable from it. The concepts of the state of nature, of civil society, of private law and of public law are at best murky, as is Kant's doctrine of civil disobedience. The relationship between natural law and positive law in his thought is a point of bitter controversy among the commentators, as is the precise relationship of Kant's categorical imperative to what he calls the "fundamental maxims of law."<sup>197</sup> And on top of these problems are the problems of interpreting his often sketchy remarks on private property, contracts, marriage, international law, punishment, and legal responsibility. And finally there is the meta-problem of explaining the history of the interpretations of Kant—a history that Ralf Dreier summed up in the formula: "from Natural Law to Positivism and back again"<sup>198</sup>—with the high point of the positivistic interpretation occurring towards the end of the nineteenth century, and with the natural law interpretation being most in evidence since World War II. How, one would like to ask, could such a widely diverging set of interpretations be possible?

Obviously, it is not possible to go into all of these problems here; a brief sketch of the main points of Kant's legal philosophy will have to suffice.

The Kantian moral philosophy takes it to be a demand of reason that ethics—true ethics—be universally applicable. The moral law must be valid, not just for all greengrocers or all Scandinavians or even all human beings, but for all rational creatures, everywhere, at all times.<sup>199</sup> And for Kant this means that the moral law must be

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NATURALIS (Göttingen, S.V. Bossiegelli 1763); the text of this work of Natural Law scholarship is reproduced by the Prussian Academy together with Kant's marginal commentaries. *Id.* It is thus possible to trace the evolution of his thought from an early stage to the late *Metaphysik der Sitten*. (Achenwall, incidentally, was a professor of law at Göttingen, and is of interest for the history of criminal law.)

<sup>197</sup> KANT, *supra* note 59, at 231.

<sup>198</sup> RALF DREIER, *RECHT, MORAL, IDEOLOGIE: STUDIEN ZUR RECHTSTHEORIE* 287 (1981) (translation by author).

<sup>199</sup> Kant believed that other planets contained intelligent life, which seems to be part of the explanation for his views on ethical universality: he wanted the Martians to obey the moral law as well.

both necessary and *a priori*—that is, independent of and logically (although not historically) prior to all experience.

More specifically, the moral law for Kant must be a command of reason itself. It cannot be based on experience, for then ethics would no longer be *necessary*: it would be just one contingent empirical fact among many, like the fact that human beings walk on two legs—“mere empirical anthropology.” And if ethics *were* contingent in this way, then the door would be open to two opposite but related dangers: on the one hand, ethical scepticism; on the other, ethical dogmatism. Kant saw his ethical theory as a war on two fronts against these two dangers.

It is important to see what was so radical about Kant’s position. The lawyers of the eighteenth century had based their systems of natural law precisely on what Kant regarded as “mere empirical anthropology.” *Nature* stipulated that human beings had certain more-or-less permanent and unchangeable properties that could be known by the light of reason; and that from these properties it was possible to derive at least the basic laws of human association—for instance, to take an example from Grotius, the natural law that it is wrong to intend to kill another human being except in self-defense.<sup>200</sup> The natural law theorists often invoked another theory as well, besides the theory that *nature* is the basis of the legal order; namely, the divine command theory, that is, the theory that *God* stipulated the basic laws by *fiat*, and that these divine commands—for instance, the “Thou shalt not kill” of the Ten Commandments—provide the ultimate grounding of the law. And, as often as not, both *God and Nature* were invoked to provide the ultimate foundations for natural law.<sup>201</sup>

What is radical about Kant’s theory is that it rejects *all* of these theories—not only the theory that law can be founded on nature or anthropology, but also the divine command theory, the self-evident-truths theory, and the God-given-rights theory. At bottom, the reason is the same in all these cases: a mere brute fact, whether a fact of anthropology, or a fact of direct perception, or the fact that some supernatural being has issued an order backed by a threat, is not enough, by itself, to make an action right or wrong. On Kant’s view, if you are justifying an action you are never allowed simply to

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<sup>200</sup> For a general account, see WATSON, *supra* note 85, at 83-98.

<sup>201</sup> A characteristic example of this is the opening of the Declaration of Independence, which, in the space of a single paragraph, appeals to Nature, to God, and to allegedly self-evident truths about human nature.

plead that you were following orders, even if the orders come directly from God.

Kant's argument here is complicated, and leads deep into the heartland of his metaphysics. It is in part based on the fact-value distinction, on the proposition that you can never derive an ought from an is; but this is not the core of his argument. It is also based on an argument about epistemology; specifically, that the concept of the Good is logically prior to the concept of the Divinity. You can never tell that an order comes from God unless you are first able to test it by some independent criterion of morality; for you might, after all, be having an auditory hallucination, or even hearing the voice of the Devil, in the manner of some psychopaths. The only way to tell for sure that you are hearing the authentic voice of God is to test it by its conformity to the moral law. This point comes out most strikingly in a footnote in one of Kant's late writings on anthropology. He says:

For example, consider the sacrifice that Abraham wished to perform, on divine command, by slaughtering and burning his own son (the poor child, knowing nothing of all this, even carried the wood for the fire). Abraham, however, should have replied to this supposedly divine voice as follows: "That I ought not to kill my good son is absolutely certain. But that you who appear to me are in fact God is something of which I am not certain and of which I can never become certain, even if your voice should thunder down from the visible heavens."<sup>202</sup>

Now, the crucial point is that this argument cuts away all of the traditional legal underpinnings. No brute fact or facts can serve as the foundations of law or morality: not nature, not empirical anthropology, not a divine command, not self-evident truths, not human nature, not the moral sense, not happiness, not the Bible, not divine voices. The only foundation for reason is reason itself: anything else is heteronomy, moral servitude, the absence of freedom.

The point about absence of freedom is crucial. This is not the place to enter into a detailed discussion of Kant's metaphysical views; but it is important for what follows to remember that the

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<sup>202</sup> IMMANUEL KANT, DER STREIT DER FAKULTÄTEN 103 (Königsberg, Friedrich Nicolovius 1798) (translation by author). The original pagination is given, which is not reproduced in all editions; the footnote in which this passage appears occurs near the end of the section entitled, "Der Streit der philosophischen Facultät mit der theologischen."

concept of freedom of the will plays the central role in all of his writings on moral philosophy. This is an important point, because Kant's legal philosophy has often been interpreted as a mere logic-chopping formalism without any substantive or motivational content; whereas in fact it is more accurately seen as an ethics of mutual toleration in which each moral agent is free to develop his or her talents to the maximal extent compatible with the freedom of everybody else. (It is one of the many paradoxical aspects of Kant's philosophy that moral agents, if they are to be truly free, must acknowledge that they are under an affirmative moral obligation to develop their natural talents, and to cultivate what Kant calls their "*personality*": in his ethical writings the concepts of freedom, of the development of moral personality, of reverence for the moral law, and of treating other persons always as ends-in-themselves are tightly interwoven.) The emphasis, in other words, is on freedom, not on formalism, a point which tends to get lost from view if Kant's political views are not seen in a broader setting.<sup>203</sup>

Let us now turn to Kant's philosophy of law. This philosophy begins with the supposition that there is only one human reason, the same at all times and places, and consequently only one philosophy. The task of the philosophy of law is to set forth the *metaphysical first principles* of law by bringing them under a system of pure rational concepts. It is crucial for Kant that the exposition be what he calls "scientific," that is, that it set forth the principles in a systematic fashion, and not just as a collection of rules.

In its most general outlines, Kant's system of legal philosophy looks like this: at the top of the hierarchy of political and moral principles stands the famous Categorical Imperative, which, in its basic formulation, says: "Act only on that maxim through which you can at the same time will that it should become a universal law."<sup>204</sup> Kant gave several other formulations of the Categorical Imperative, which he argued were equivalent; the most important and influential for the philosophy of law is the formula of the End in Itself: Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.<sup>205</sup>

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<sup>203</sup> These points are made in RAWLS, *THEORY OF JUSTICE*, *supra* note 69, at 251.

<sup>204</sup> GESAMMELTE SCHRIFTEN, *supra* note 196, at 402.

<sup>205</sup> *See id.* at 427.

The Categorical Imperative has a double use in Kant's late legal philosophy—a *juridical* use and an *ethical* use. The distinction comes down to a distinction between external behavior and internal motivation. The use is juridical when the Categorical Imperative is applied to external actions; that is, when it is used to say whether a particular bit of external behavior, like paying a debt, is legally right or not—regardless of the motive from which it is performed. And the use is ethical when the Categorical Imperative is used to judge the internal motives for an action. These two uses of the Categorical Imperative in turn give rise to two philosophical theories: the theory of law and the theory of virtue. Kant, in pursuit of his ideal of system, formulates a supreme principle for each of these theories. The supreme principle for law is: "Act externally in such a manner that the free exercise of your will can exist together with the freedom of everyone else according to a general law."<sup>206</sup> From here, matters become rapidly more specialized and concrete, and Kant enters into a detailed classification of virtues, rights, and obligations, both moral and legal, before he passes on to the analysis of contracts, property, and the criminal law.

Obviously, a system as rich and complicated as this one is open to many different kinds of objection, and not just on matters of detail. Historically the most influential objections have accused Kant of falling into one or the other of the two traps he said he was trying to avoid: the traps of scepticism and dogmatism. The first sort of objection accuses Kant of being too *lax*—of producing nothing but a sterile formalism that, because it has been entirely removed from the empirical world, is incapable of guiding action in the concrete case. The other sort of objection, in contrast, accuses him of being too *strict*—a moral absolutist who sets up unbending standards that are to be valid at all times, everywhere, without exception.

These criticisms ultimately lead into the deep waters of Kantian metaphysics, but they are also provoked by some of the less metaphysical aspects of his system. In particular, recall that Kant draws a sharp distinction between laws, which regulate external actions, and morality, which is concerned with internal motives and the good will. This distinction is grist to the mill of legal positivists and even legal irrationalists, particularly when Kant goes on to declare that "the real morality of actions, their merit or guilt, even

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<sup>206</sup> *Id.* at 231.

that of our own conduct, always remains entirely hidden from us."<sup>207</sup>

Here we already have the seeds of doctrines that were to sprout wildly at the end of the nineteenth century: on the one hand, factually minded legal positivism and legal formalism; on the other, legal irrationalism and relativism. It may seem strange that these apparently different legal philosophies could look for inspiration to the same Kantian source, but the positivists and the irrationalists were merely emphasizing different sides of the same Kantian cleavage between the moral and the legal. The irrationalists pointed out that the moral aspects of the law are beyond the reach of pure reason, and are subject to time, place, and circumstance; the positivists replied that nevertheless it was possible to have knowledge of the *empirical* aspects of the legal system—of its rules and structure and traditions. Presented in this way, the two doctrines can be seen to be flip sides of the same coin.<sup>208</sup>

But however natural these positivistic and irrationalistic interpretations of Kant may have seemed at the end of the nineteenth century, it is clear in hindsight that they both overlook much of what is distinctive about his philosophical position. To begin with, they forget that Kant's two seemingly distinct subjects, the theory of morality and the theory of law, both have a common root in the theory of the Categorical Imperative; they are distinct versions of the same moral law.

As for the interpretation of Kant as a relativist or a formalist—a mere spinner of concepts with no substantive theory of his own: this interpretation, as I said earlier, forgets that his entire system is constructed around the substantive metaphysical doctrine of freedom and that his doctrine that humanity is always to be treated also as an end in itself, never merely as a means, forced him to condemn many political institutions as unjust—in particular the institutions of African slavery and the oppression of American Indians, both of which he condemned as the behavior of European savages.<sup>209</sup> Kant's political philosophy, in other words, was not aimed at producing a strict logical formalism, but at the attainment of individual liberty. Indeed, in his philosophy of history Kant urged that:

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<sup>207</sup> KANT, *supra* note 72, B580.

<sup>208</sup> For a general discussion on these disparate interpretations of Kant, see DREIER, *supra* note 198, at 286-315.

<sup>209</sup> See KANT, *supra* note 59, §§ 58-60, at 348-49.

The history of the human race, viewed as a whole, may be regarded as the realization of a hidden plan of nature to bring about a political constitution, internally and also externally perfect, as the only state in which all the capacities implanted by her in mankind can be fully developed.<sup>210</sup>

Once again we see the emphasis on liberty and on the free development of the capacities of humanity. Kant's arguments here, as always, are complicated and have deep philosophical roots which I shall refrain from discussing. But the details of his argument show that he was *not* urging that there is one unique correct form of government. Kant is clear that reforms must take place within an historical setting; indeed, he is pessimistic that humanity will ever attain the political ideal. This pessimism is not entirely surprising. It was Kant, after all, who famously declared that from the crooked timber of humanity no straight thing could ever be made.<sup>211</sup>

Nevertheless, his conclusion that there exists some ideal political constitution, however unattainable, makes him vulnerable to the charge of moral absolutism. In fact, this charge was made against him almost exactly two hundred years ago—and made so successfully that it pushed the nineteenth-century interpreters of Kant in the direction of relativism and positivism that I have just discussed. And this brings me to the second of my two thinkers, Johann Gottfried Herder.

### C. Herder

Herder was a student of Kant's in Königsberg between 1762 and 1764. At this time, Kant had not yet formulated his revolutionary philosophical doctrines: he was still an empiricist, and what Herder learned from him in his lectures on ethics, mathematics, logic, and metaphysics was not the "critical philosophy," but empiricism.<sup>212</sup>

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<sup>210</sup> IMMANUEL KANT, *IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBÜRGERLICHER ABSICHT*, prop. 8 (1784).

<sup>211</sup> See *id.* prop. 6.

<sup>212</sup> As with Kant, I am not here attempting to provide a detailed exposition of the thought of a subtle and voluminous philosopher. Those wishing to study Herder in more depth should start with Isaiah Berlin's elegant introduction. See ISAIAH BERLIN, *VICO AND HERDER* (1976).

The standard biography is still RUDOLF HAYM, *HERDER NACH SEINEM LEBEN UND SEINEN WERKEN* (Berlin, R. Gaertner 1880-1885) (2 vols.). Also worthwhile is EUGEN KÜHNEMANN, *HERDER* (3d ed. 1927).

For a discussion of Herder and Kant, see THEODOR LITT, *HERDER UND KANT ALS DEUTER DER GEISTIGEN WELT* (1930); EUGEN KÜHNEMANN, *HERDERS LETZTER KAMPF GEGEN KANT* (1893); Gottfried Martin, *Herder als Schüler Kants. Aufsätze und*

In the 1760s the relations between the two men were warm and even admiring. Herder called Kant his greatest teacher, his intellectual liberator, and Kant described Herder as a “boiling genius” who was certain to accomplish great things once he had “ceased fermenting.”<sup>213</sup> But after Herder left Königsberg in 1764 for his travels in Lithuania, Russia, and France, the two thinkers drifted even further apart. Kant abandoned his earlier empiricist philosophy and began the investigations that were to culminate in the *a priori* discoveries of the *Critique of Pure Reason*; Herder, on the other hand, developed his own concrete and particularistic philosophy of nationality and culture. By the 1780s the intellectual gulf was enormous. Herder was horrified by the *Critique of Pure Reason*; and Kant, for his part, wrote two harsh reviews of the first two parts of Herder’s masterpiece, the *Ideas for a Philosophy of the History of Mankind*. After these two reviews, communication between the two ceased for about a dozen years. But Herder continued to brood on the evils of the Kantian system; and in 1797, urged on by Hamann and Fichte, he published his *Metacritique*, a massive polemical onslaught against the *Critique of Pure Reason*.<sup>214</sup>

In contrast to Kant, who constructed his system like a piece of architecture, paying meticulous attention to the logical structure of his theory, Herder’s philosophy is more like an ant heap or a bird’s nest in its deliberate lack of system. The difference here is not merely stylistic or temperamental, but a matter of world view—as a few quotations from Herder’s writings will perhaps show.

To begin with, where Kant had tried to conceive of morality as the expression of *a priori* laws, Herder was rootedly and emphatically empirical. For instance:

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*Kolleghefte aus Herders Studienzeit*, 41 KANTSTUDIEN 324 (1936).

In English there are two brief and useful introductory studies. See A. GILLIES, *HERDER* (1945); F. MCEACHRAN, *THE LIFE AND PHILOSOPHY OF JOHANN GOTTFRIED HERDER* (1939). For more substantial works, see F.M. BARNARD, *HERDER’S SOCIAL AND POLITICAL THOUGHT* (1965); ROBERT T. CLARK, JR., *HERDER: HIS LIFE AND THOUGHT* (1955).

Little has been written on the subject of Herder and the law. The only reference I have seen is V. EHRENBURG, *HERDERS BEDEUTUNG FÜR DIE RECHTSWISSENSCHAFT* (1903), which is described, see GILLIES, *supra*, at 143, as a *Festrede* held in Göttingen; I have not been able to locate a copy.

<sup>213</sup> ROBERT R. ERGANG, *HERDER AND THE FOUNDATIONS OF GERMAN NATIONALISM* 58 (1931) [hereinafter ERGANG, *HERDER*]. See generally ROBERT R. ERGANG, *THE EMERGENCE OF THE NATIONAL STATE* (1971).

<sup>214</sup> For a discussion of Herder’s relationship with Kant, see CLARK, *supra* note 212, at 384-412.

Human nature, even at its best, is not an independent deity: it has to learn everything, develop through progress, keep on advancing through gradual struggle. Naturally it will develop for the most part, or only, in those directions which give it cause for virtue, for struggle, or for progress. Each form of human perfection, then, is, in a sense, national and time-bound and, considered most specifically, individual. Nothing develops, without being occasioned by time, climate, necessity, by world events or the accidents of fate . . . . [This] will be all the more startling to anybody carrying within himself an idealized shadow-image of virtue according to the manual of his century, one so filled with philosophy that he expects to find the whole universe in a grain of sand.<sup>215</sup>

This quotation illustrates another important point, namely, that for Herder the point of departure, the fundamental unit of moral philosophy, is not the human species (as in Hume), nor the family (as in Rousseau), nor the biological individual (as in Locke) and least of all the disembodied, non-empirical, noumenal self of Kant. It is instead the *nation*, or more exactly, the *culture*—a community considered as an organic, living, historically determined cultural and linguistic—but not necessarily political—whole. For Herder, the nation has two sorts of value, an internal and an external: internally it provides the individual with his way of looking at the world, his moral values, his aesthetic sense, his goals, his standards of happiness and rationality, and, inseparably from all of these, with his language. And externally it contributes, with other nations, to the unfolding of all the multitudinous varieties of *Humanity*. Herder often talks of human history as a grand pageant, a drama in which each nation has a unique role to play; for instance:

He has not considered—this omniscient philosopher—that there can be a great, divine plan for the whole human race which a single creature cannot survey, since it is not he, philosopher or monarch of the eighteenth century though he be, who matters in the last resort. Whilst each actor has only one rôle in each scene, one sphere in which to strive for happiness, each scene forms part of a whole, a whole unknown and invisible to the individual, self-centered actor, but evident to the spectator from his vantage point

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<sup>215</sup> FREDERICK M. BARNARD, J.G. HERDER ON SOCIAL AND POLITICAL CULTURE 184 (1969) [hereinafter SOCIAL AND POLITICAL CULTURE]. The translation is from Herder's work, *Yet Another Philosophy of History*, published in 1774.

and through his ability to see the sequence of the total performance.<sup>216</sup>

In contrast to Kant, who had stressed the generality of the moral law and its applicability to all rational creatures, Herder stresses the particularity and the variability of human values—that they are culture-bound, plural, and incommensurable:

[H]ow can one survey an ocean of entire peoples, times, and countries, comprehend them in one glance, one sentiment, or one word, a weak, incomplete silhouette of a word? A whole *tableau vivant* of manners, customs, necessities, particularities of earth and heaven must be added to it, or precede it; you must enter the spirit of a nation before you can share even one of its thoughts or deeds.<sup>217</sup>

Herder reserves his greatest scorn for the Eurocentric philosopher of the Enlightenment who would measure all ages and all peoples by his own tepid standards. Kant, recall, had proposed that human history be interpreted as a series of attempts to achieve a perfect political constitution. Herder, years earlier, had already castigated this way of thinking:

<sup>216</sup> *Id.* at 215.

<sup>217</sup> *Id.* at 181. Or again:

A learned society of our time proposed, doubtless with the best of intentions, the following question: "Which was the happiest people in history?" If I understand the question aright, and if it does not lie beyond the horizon of a human response, I can only say that at a certain time and in certain circumstances, *each* people met with such a moment, or else there never was one. Indeed, human nature is not the vessel of an absolute, unchanging, and independent happiness, as defined by the philosopher; everywhere it attracts that measure of happiness of which it is capable: it is a pliant clay which assumes a different shape under different needs and circumstances. Even the image of happiness changes with each condition and climate. (What is it then, if not the sum of "satisfaction of desires, realization of ends, and a quiet surmounting of needs," which everyone interprets according to the land, the time, and the place?) Basically, therefore, all comparison is unprofitable. When the inner sense of happiness has altered, this or that attitude has changed; when the external circumstances and needs fashion and fortify this new sentiment: who can then compare the different forms of satisfaction perceived by different senses in different worlds? Who can compare the shepherd and the Oriental patriarch, the ploughman and the artist, the sailor, the runner, the conqueror of the world? Happiness lies not in the laurel wreath or in the sight of the blessed herd, in the cargo ship or in the captured field-trophy, but in the soul which needs this, aspires to that, has attained this and claims no more—each nation has its centre of happiness within itself, just as every sphere has its centre of gravity.

*Id.* at 185-86.

As a rule, the philosopher is never more of an ass than when he most confidently wishes to play God; when with remarkable assurance he pronounces on the perfection of the world, wholly convinced that everything moves just so, in a nice, straight line, that every succeeding generation reaches perfection in a completely linear progression, according to *his* ideals of virtue and happiness. It so happens that he is always the *ratio ultima*, the last, the highest link in the chain of being, the very culmination of it all. "Just see to what enlightenment, virtue, and happiness the world has swung! And here, behold, am I at the top of the pendulum, the gilded tongue of the world's scales."<sup>218</sup>

Although Herder was the first and greatest philosopher of nationalism, it should be clear from these quotations that his conception of nationalism is cultural rather than political. His interest was in language, traditions, poetry, myth, music, *not* politics; one of his sharpest criticisms of Kant's philosophy of history is that it seeks to reduce the whole of human history to the one dimension of politics.<sup>219</sup> His conception of nationalism left no room for the domination of one culture by another, no room for conquest or militarism or oppression. He, like Kant, condemned slavery and the expropriation of the American Indian in the harshest terms, saying, "Our part of the earth should be called, not the wisest, but the most arrogant, aggressive, money-minded: what it has given these peoples is not civilization but the destruction of the rudiments of their own cultures."<sup>220</sup>

Herder regarded Enlightenment cosmopolitanism not just as an intellectual error, but as a moral vice; and in a famous passage, almost certainly written with Kant in mind, he says:

The savage who loves himself, his wife and child, with quiet joy, and in his modest way works for the good of his tribe, as for his own life, is, in my opinion, a truer being than that shadow of a man, the refined citizen of the world, who, enraptured with the love of all his fellow-shadows, loves but a chimera. The savage in his poor hut has room for every stranger; he receives him as his brother without even inquiring where he comes from. His hospitality is unostentatious, yet warm and sincere. The inundated heart of the idle cosmopolite, on the other hand, offers shelter to nobody.<sup>221</sup>

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<sup>218</sup> *Id.* at 214.

<sup>219</sup> See BERLIN, *supra* note 212, at 157-58 (1976).

<sup>220</sup> See *id.*

<sup>221</sup> SOCIAL AND POLITICAL CULTURE, *supra* note 215, at 309. The translation is

All of these doctrines are bound up with Herder's own metaphysical views on the relationship of language to thought and to culture. For Herder, language is not separable from thought; instead, thought *is* language, and thus thought is inextricable from its embodiment in the traditions and culture of a particular nation. Before Herder, philosophers, including Kant, had regarded words as the mere external clothing of ideas—a kind of national dress that could be stripped away to reveal the naked, nonlinguistic and as it were international thoughts that lie beneath. But Herder will have none of this. For him, language and thought and cultural activity are an inseparable whole. Humans are above all the symbol-using creatures, the creatures who express their feelings and attitudes in symbolic forms—in poetry and worship, in ritual, folk dance, myth, law, and the hunt.<sup>222</sup>

I apologize for offering these quotations from Herder, not because they are too long, but because they are not at all adequate to convey the full vigor and scope of his thought. To the extent that any one thinker can be responsible for such a thing, his ideas ushered in the national and historical consciousness that was to dominate the intellectual life of the nineteenth century. The origins of pan-Slavism, German romantic poetry, the historical theory of law, comparative linguistics, and much more are all to be found in

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from "Ideas for a Philosophy of the History of Mankind," published in 1784.

<sup>222</sup> This thesis, of course, has radical implications for the theory of human rationality. Where Kant had sought to determine the structure of a universal, supranational and indeed supra-human reason, Herder insists that there is no such thing: all reason is historical, local, rooted in the linguistic community. In the following quotation, observe the *empiricism* of his approach:

It now becomes evident what human reason is. Far from being an innate automaton, as so many modern writings tend to imply, reason, in both its theoretical and practical manifestations, is nothing more than something *formed by experience*, an acquired knowledge of the propositions and directions of the ideas and faculties, to which man is fashioned by his organization and mode of life. An angelic reason is . . . inconceivable . . . Man's reason is the creation of *man*. From infancy man compares the ideas and impressions, particularly those of his finer senses, according to the delicacy, accuracy, and frequency of his sense perceptions, and in proportion to the speed with which he learns to combine these. The result of these combinations constitutes thought, a newly created unity . . . This ongoing process, which fashions our lives as human beings, is reason. Instead of viewing it, then, as an inborn *a priori* faculty, we have to see it as the accumulation or product of the impressions that are received, the examples that are followed, and the internal power and energy with which they are assimilated within the individual mind.

*Id.* at 264.

his writings.<sup>223</sup> He did not construct a philosophical system that lends itself to easy summary—not just because his interests ranged so widely (he wrote on topics from folk songs to human physiology, from poetry and law to the influence of climate on culture) but more importantly because his theory is a deliberate non-theory, his system a deliberate non-system. After all, his central thesis—the idea that human cultures are diverse, values are plural, truths are partial, and philosophical systems are lies—could hardly itself have been erected into a rigid, monistic, timeless system of the sort he so fervently deplored.

Herder's ideas penetrated so deeply into the surrounding culture that we must understand their general impact if we are to understand the effects they had on the law. Nations and works of history had of course existed before Herder; but nationalism and historicism were new, and were elevated by Herder into metaphysical first-principles: a world view.<sup>224</sup> It would be difficult to exaggerate the extent of his influence, especially on the thinkers of the beginning of the century, both in Germany and in the Slavonic world. They found in him a brew of not entirely consistent ideas—a quasi-religious view of history as a process leading into the infinite; the idea of the nation, not just as an *object* of value, but as the *source* of value; a consequent fascination with national origins, and a longing to recover the moral purity and authenticity of the past; a new reverence for the plain speech of the common people and their myths and legends and folk traditions; a discovery of the expressive power of the primitive in art and in language; a new theory of literature as the expression of the national soul, and a corresponding reinterpretation of Shakespeare, Homer, and the Hebrew prophets; a veneration of genius and especially of poetic genius; and behind all these a philosophical exaltation of spontaneity and the passions, and an antipathy towards the working of the mere intellect.<sup>225</sup>

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<sup>223</sup> See BERLIN, *supra* note 212, at 145-56.

<sup>224</sup> The classic study of the rise of historicism was written by Friedrich Meinecke, see FRIEDRICH MEINECKE, *DIE ENTSTEHUNG DES HISTORISMUS* (1936), who devoted nearly a hundred pages to Herder. It is important to observe that the movement towards nationalism and historicism was not just a German, but a European phenomenon, and owes much to such thinkers as Montesquieu, Rousseau, Burke, Hume, Vico, and many others. Meinecke is clear on this point. A deeper investigation of the legal issues raised by this Article would have to explore the points of contrast, similarity, and influence with legal developments in other nations.

<sup>225</sup> See generally BERLIN, *supra* note 212.

Herder's greatest influence was as the father of romantic nationalism. It is important to remember that in the eighteenth century there was no movement for German or Italian or Slavonic national unification. Kant would have described himself politically as a subject of Frederick the Great rather than as a German; and indeed the language spoken by Frederick himself was French.<sup>226</sup> German was regarded by the court at *Sans Souci* as a barbarous tongue, the language of the *canaille*; as for the romantic glories of German history, the dark medieval past was to be swept aside in favor of the reforms of the Enlightenment. And as with literature and history, so too with politics. There was no sense among the people of national unity and no sense of loyalty to Germany rather than to the dynasty of the King. As for the king's loyalty to his people, one historian has written,

Frederick knew the people only as 'population' of a state's territory, the primitive basis of state power, a mass of subjects whose nationality had no political significance. His state was not yet the living expression and political form of a particular popular consciousness, it was not yet the carrier of a national idea.<sup>227</sup>

All this was to change as a result of the intellectual and emotional revolution inaugurated by Herder. The new national consciousness, the new sense of the *language* as the focus of national life, was destined, in time, to have political consequences, even if the Napoleonic invasions had not hastened the process, and even though, as we saw, Herder's own conception of nationalism was cultural rather than political. By the early years of the nineteenth century the philosopher Fichte was explicitly linking language to the political demand for national unification. "Wherever a separate language is found," he wrote in his influential *Address to the German Nation* of 1808, "there a separate nationality exists which has the right to take independent charge of its own affairs and to govern itself."<sup>228</sup> Soon a chorus of writers made the same argument; and by mid-century it was a commonplace that language, and not kings or princes, was the cement that holds the national organism together.<sup>229</sup> The movement of thought that Herder inaugurated was

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<sup>226</sup> Frederick found it difficult to read or write German, and as he said spoke it "like a coachman"; he ordered that the proceedings of the Royal Academy in Berlin be conducted in French or Latin. GERHARD RITTER, *FREDERICK THE GREAT* 46-47 (Peter Paret trans., 1968).

<sup>227</sup> *Id.* at 47.

<sup>228</sup> ERGANG, HERDER, *supra* note 213, at 173 (quoting Fichte).

<sup>229</sup> For a typical expression of this view, see M. WIRTH, *DIE DEUTSCHE NATION-*

responsible for the political forces that, in time, united Germany and Italy, and somewhat later disunited the Austro-Hungarian Empire. Herder's writings echoed loudly in the Slavonic world, and made him a spiritual founder of pan-Slavism. The young people of Riga are said to have referred to him as "their Christ,"<sup>230</sup> and in Germany itself he became a national icon, a quasi-religious figure to whom it was appropriate to make a solemn pilgrimage.<sup>231</sup>

#### D. Savigny

The sudden emergence of Herderian ideas in German legal thought, the great shift to historicism and nationalism, can be dated with precision to the year 1814, and to the debates, in the wake of the victory over Napoleon, about the desirability of a German civil code. This was the seminal event for the development of German private law; the great importer of Herderian ideas into German legal thinking was the young jurist Friedrich Karl von Savigny. Savigny, easily the most influential legal scholar of the nineteenth century, has an importance that extends well beyond Germany. One English writer called him "the greatest jurist that Europe has produced";<sup>232</sup> John Austin called his *Treatise on Possession* "of all books upon law the most consummate and masterly."<sup>233</sup> His works were hailed in France and in Italy; in Germany, it has been said, the name of Savigny became "sacrosanct."<sup>234</sup>

Let us recall the background to the great codification debate. In 1814 Germany as a political unit did not yet exist, but was

ALEINHEIT 363 (Frankfurt, J.D. Sauerlander 1859).

<sup>230</sup> GILLIES, *supra* note 212, at 114.

<sup>231</sup> Consider the following account:

In the autumn of 1780 . . . a young student of theology at Göttingen, Johann Georg Müller, from the Swiss Canton of Schaffhausen, started on foot to make a pilgrimage to Weimar. . . . Georg Müller was impelled by a mysterious desire to see the famous Herder; like a true devotee of Lavatar, he had even had a dream, in which he saw Herder in a classical temple, surrounded by the wisdom of the ages, beckoning to the neophyte to approach and enter. Armed with a letter of introduction . . . the young hero-worshiper successfully avoided the dangers of bad weather and recruiting-squads (no mean danger in 1780) and arrived in Weimar early in October. . . . For a week he was a guest of the Herders, and wrote at length to Häfeli about the life and ways of his idol.

CLARK, *supra* note 212, at 279.

<sup>232</sup> Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. REV. 326, 326-27 (1937) (quoting Sir John Macdonnell).

<sup>233</sup> *Id.* (quoting John Austin).

<sup>234</sup> *Id.*

instead divided into a checkerboard of principalities, each with its own body of laws; as Voltaire had said, it was not possible in Germany to take ten paces without entering another jurisdiction. This situation had existed since the medieval past, but the professors of Roman law in the universities had mitigated its effects and provided the German states with a more-or-less uniform body of private law. Indeed, under the peculiar institutional arrangement known as *Aktenversendung* ("the sending of the documents") difficult cases would be taken from the local judiciary and referred to a university law faculty for decision; the faculty usually sat in a different jurisdiction. The learned jurists would typically base their decisions on principles of Roman law, and, in this way, in the sixteenth and seventeenth centuries, the rules of Justinian's *Digest* became a kind of common law for the German states.<sup>235</sup>

But in the eighteenth century the old system unravelled. The story, both political and intellectual, is complex. Very roughly, the traditional authority of the *Digest* came under attack from the school of Natural Law, and at the same time the absolutist princes found it expedient to take control of their own legal systems. The new ideal (evident, for example, in the lawmaking of Frederick the Great) was Enlightenment codification: medieval backwardness was to be swept aside in favor of new codes based on Reason and the authority of the prince.<sup>236</sup> As a consequence, at the beginning of the nineteenth century, although *Aktenversendung* had not yet been officially abolished, the legal influence of the universities was in decline; and within the universities the teaching of Roman law had been displaced by the school of Natural Law.<sup>237</sup> The school of Natural Law continued to dominate German legal education until it was swept aside in the aftermath of the codification debates of 1814.

The immediate occasion for the debate was the victory by the German states over the armies of Napoleon: a victory that had depended upon an unprecedented act of political unity. With this event at the front of his mind, the Heidelberg law professor Anton Thibaut published a pamphlet, *On the Necessity of a General Civil Law for Germany*.<sup>238</sup> He disclaimed any intention to argue for a politi-

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<sup>235</sup> For an account of the German developments, see WHITMAN, *supra* note 188, at 41-91.

<sup>236</sup> For a general discussion of the ideology of natural-law codification, see WATSON, *supra* note 85, at 83-98.

<sup>237</sup> See WHITMAN, *supra* note 188, at 54-65.

<sup>238</sup> ANTON F.J. THIBAUT, ÜBER DIE NOTWENDIGKEIT EINES ALLGEMEINEN

cal unification of Germany or to upset the existing political balance, but he urged the German states to end the legal chaos by pursuing a unification of their private law. Specifically he advocated the adoption, by all the German states, of a civil code—not, to be sure of the *French* civil code, but nevertheless a code of the sort Napoleon had recently introduced in France. (That this should have been Thibaut's proposed manner of celebrating the German victory over Napoleon is only the first of many paradoxes associated with the codification debate.) In another paradox, although Thibaut was himself one of the most distinguished professors of Roman law, he opposed professorial lawmaking, and argued that the German code should be based, not on Roman models, but rather on modern principles of natural law. One should strive for clarity, completeness, and the purity of mathematics.<sup>239</sup> He further notes:

To be sure, special circumstances can call forth special laws, as is often the case in economic and administrative legislation. But the civil laws, which, as a whole, are grounded in the human heart, on reason and understanding, will very seldom need to bend to circumstance; and if here and there small difficulties should arise from the uniform nature [of a civil code], the numerous advantages of this uniformity completely outweigh the disadvantages. Just consider the individual parts of the civil law! Many are as it were just a kind of pure juristic mathematics, on which no locality can have a decisive influence—for example, the law of property, of inheritance, of mortgages, of contracts, and the general part of legal science.<sup>240</sup>

Thibaut's pamphlet is today remembered solely for the withering reply it provoked from Savigny, and to those who know of Thibaut only through Savigny's famous critique, his pamphlet sounds like a *réchauffée* version of Enlightenment codificationism. Certainly there is a strong Enlightenment strain in Thibaut. The very idea that there could be a complete, gapless code, based on natural reason and possessing the purity of mathematics, is both a typical manifestation of the *Aufklärung* and the dominant strain in Thibaut's pamphlet. But there is a romantic strain as well. Thibaut was far from the Francophilia of Frederick the Great, and his pamphlet

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BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (1814), *reprinted in* HANS HATTENHAUER, THIBAUT UND SAVIGNY: IHRE PROGRAMMATISCHEN SCHRIFTEN 61 (1973). My page references to Thibaut and to Savigny are to the original editions; that pagination is reproduced by Hattenhauer.

<sup>239</sup> *Id.* at 54.

<sup>240</sup> *Id.* (translation by author).

opens with the lament that “many of our officials have been corrupted by the subtle poison of French examples and French influence.”<sup>241</sup> More significantly, his argument against the adoption of Roman law is not that of modernizing Enlightenment *philosophes*, but the new argument of German romanticism: that Roman law is inappropriate to the national character of the German people.<sup>242</sup>

But the decisive turn to a Herderian view of law came with Savigny. At the time of the debate Savigny was already well-established; a member of the aristocracy, he had in 1803 published a celebrated work on the law of possession, and was the leading professor of law at Berlin. But his reply to Thibaut—*On the Calling of Our Age for Legislation and Legal Science*<sup>243</sup>—was to make him world famous, and to change the direction of European legal thought. *Vom Beruf* appeared like a bolt of lightning—sudden, illuminating, and very jagged. The following year Savigny was to found the *Zeitschrift für geschichtliche Rechtswissenschaft*; his introductory essay to that journal,<sup>244</sup> together with *Vom Beruf*, marked the advent of the Historical School of law that was soon to sweep through the German universities. It will be worth our while to linger over his reply to Thibaut and to try to untangle its hidden complexities. For it influenced the development of German private

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<sup>241</sup> *Id.* at 5.

<sup>242</sup> For Thibaut's criticisms of Roman law, *see id.* at 16-27. The point about Thibaut and romanticism is well made by James Whitman. *See* WHITMAN, *supra* note 188, at 105. Whitman there says that in treating Roman law as “the work of an alien nation” Thibaut was drawing on “a vocabulary Herder had pioneered”; and he cites a German source, one P. Bender, to show that Thibaut had such views about Roman law as early as 1797. *Id.* I have not seen Bender's work, but would caution against pressing the point about Herder too far. Thibaut's pamphlet seems to me primarily a work of the *Aufklärung*; in contrast to Savigny's reply it makes no use of the deeper elements of Herder's thought—the theory of history, of language, of the organic growth and development of societies. Denunciations of Roman law were in any case so common among the natural lawyers of the Enlightenment that Thibaut's adoption of a loosely Herderian language to express his patriotic views does not show that he was deeply under Herder's influence—especially considering that his pamphlet was written in the superheated atmosphere of 1814.

<sup>243</sup> FRIEDRICH KARL VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1814), *reprinted in* HATTENHAUER, *supra* note 238, at 95. My page references are to the original edition, whose pagination is also given in the Hattenhauer reprint.

<sup>244</sup> *See* Friedrich Karl von Savigny, *Zweck der Zeitschrift für geschichtliche Rechtswissenschaft* (1815), *reprinted in* 1 FRIEDRICH KARL VON SAVIGNY, *VERMISCHTE SCHRIFTEN* 105 (Berlin, Vein und Comp 1850) (5 vols.).

law like no other work, and contains within itself, *in nuce*, the ideas that were to dominate European legal thought for the next century.

*Vom Beruf* was not originally conceived as a response to Thibaut. It seems to have been planned as an introduction to Savigny's magisterial, seven-volume *History of Roman Law in the Middle Ages*,<sup>245</sup> a work that he had in view at least as early as 1812.<sup>246</sup> But in the wake of the victory over Napoleon, and in opposition to the (incidentally very popular) French codes that had been introduced in the states of the Rhine, he decided to publish the work as an independent booklet. Thibaut's pamphlet appeared after most of *Vom Beruf* had already been written. These circumstances explain why Savigny so often seems to be talking past Thibaut; they also explain why *Vom Beruf* contains harsh attacks on the Napoleonic Code and on French legal scholarship.<sup>247</sup> (In the preface to the second, 1828 edition of *Vom Beruf* Savigny was to apologize for the anti-French tone.<sup>248</sup>)

*Vom Beruf* begins by conceding the ills that beset German law. But, says Savigny, codification is not the answer. The advocates of codification assume that law is an abstract system of rules, independent of time and place, and readily transportable from country to country: we need only discover those rules, enact them in a code, and the positive law will have been perfected forever. But this conception of law is radically mistaken.<sup>249</sup> Law, he says, is deeply rooted in local traditions; it is an expression of the deepest beliefs of a people, inseparable from their manners and morals, their customs and history: there is "an organic link between law and the essence and character of the nation."<sup>250</sup> Savigny later introduced a term of art to refer to this complex of beliefs and traditions and aspirations. He called it the *Volksgeist*—very roughly, "the spirit of the nation."<sup>251</sup> Central to his conception is an analogy with

<sup>245</sup> FRIEDRICH KARL VON SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER* (Heidelberg, 1815-1831) (6 vols.) (reprinted Aalen, Scientia Verlag 1986).

<sup>246</sup> This chronology came to light after the discovery in the 1930s of some previously unknown correspondence of Savigny, which was then published. See J. Henning, *Vom Beruf unserer Zeit und Geschichte des römischen Rechts im Mittelalter, ihre Entstehung und ihr Verhältnis zueinander*, 56 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG*, GERM. ABT. 395 (1936).

<sup>247</sup> See *id.*

<sup>248</sup> See HATTENHAUER, *supra* note 238, at 228.

<sup>249</sup> The arguments occur in the famous Chapter 2 of *Vom Beruf* (*The Origins of Positive Law*). See SAVIGNY, *supra* note 243, at 8-15.

<sup>250</sup> *Id.* at 8.

<sup>251</sup> The concept of the *Volksgeist* has roots that go back well beyond Montesquieu

*language*: law exists in the consciousness of the people just as does language; and just as language does not depend for its existence upon the activity of the grammarian, so law does not depend on the activity of the codifier.

What were the principal sources for Savigny's new conception of law? Montesquieu and Burke certainly, whom he had read and admired; but the particular constellation of ideas—the emphasis on nation and history, and the crucial analogy with the organic growth of language—owes more to Herder than to any other single thinker.<sup>252</sup> Savigny was closely associated with many of the literary figures of early German romanticism. He was the brother-in-law of Clemens Brentano and the von Arnims, and also a close friend of Jakob Grimm,<sup>253</sup> and all the members of this group stood under

and into classical antiquity; for an historical discussion, see Jan Schröder, *Zur Vorgeschichte der Volksgeistlehre: Gesetzgebungs- und Rechtsquellenlehre im 17. und 18. Jahrhundert*, 109 ZEITSCHRIFT FÜR RECHTSGESCHICHTE, GERM. ABT. 1 (1992). It seems to me, however, that the concept of the *Volksgeist*, as employed by the post-Herder German idealists is philosophically quite different from what one finds in earlier thinkers: it is embedded in the doctrines of German idealism, and carries a sense of radical epistemic relativism that is quite foreign to Montesquieu. According to Erik Wolf, the term was introduced into German legal discourse by Puchta in 1828, and then adopted by Savigny. See ERIK WOLF, *GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE* 493 (4th ed. 1963). The term was however at that time already in use among philosophers, notably in Hegel, in whose works it bears a different sense than in Savigny. On the concept of the *Volksgeist* as it appears in the philosophy of Hegel, see S. BRIE, *DER VOLKSGEIST BEI HEGEL* (1909). The concept of a *Volksgeist* is easy to caricature, but it should be observed that, as a concept, it is related to problems still reflected by such modern ideas as Dworkin's "inclusive integrity," John Rawls's idea of political liberalism, or Bruce Ackerman's discussion of the grounding of political discourse. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* *passim* (1980); DWORKIN, *supra* note 82, at 406-07; RAWLS, *POLITICAL LIBERALISM*, *supra* note 69, at 9, 36-38, 43-48. The task for all these thinkers is to say how the idea of a concrete, historical community is related to the abstract principles of justice; and although Savigny's terminology of the *Volksgeist* now sounds comical, the underlying philosophical *problématique* is still alive.

<sup>252</sup> See WIEACKER, *supra* note 193, at 129; WOLF, *supra* note 251, at 469, 475-76, 478, 484, 510.

<sup>253</sup> Brentano and Achim von Arnim were leading figures in the early romantic movement, and are best known in the English-speaking world for their collection of folk songs, see ACHIM VON ARNIM & CLEMENS BRENTANO, *DES KNABEN WUNDERHORN* (1805-1808) (3 vols.), which were famously set to music by Gustav Mahler. Bettina von Arnim, Achim's sister, was also a well-known poet and author. The philologists Jakob and Wilhelm Grimm wrote the famous collection of folk tales; they also started the definitive historical dictionary of the German language (eventually completed in thirty-three volumes), and carried out extensive investigations into the history of medieval law and folk customs. The very idea of collecting folk tales and folk songs is, of course, directly Herderian in inspiration. The letters of the Grimms to Savigny have been published as BRIEFE DER BRÜDER GRIMM AN SAVIGNY (Wilhelm Schoof ed.,

Herder's star. He shared with the early romantics a distrust of Enlightenment blueprints, a fundamentally cultural conception of the nation, and a taste for the uncultivated and the organic.

But there are subtle differences as well, and it is important to see that Savigny was never entirely a creature of *Sturm und Drang*. His personality also contained a strong classical bent, and it has been said that his strongest psychological trait was a deep need for harmony.<sup>254</sup>

At bottom his criticism of codification rests on the Herderian analogy between language and law, the grammarian and the codifier; he draws the inference that the attempt to codify the private law from scratch is a fundamental error. But—and here his departure from Herder becomes evident—Savigny also makes clear that the activity of the grammarian is indispensable, and not to be despised; and he carefully leaves open the door to future efforts at codification.<sup>255</sup> The point of his argument is thus not that codification is in no circumstances appropriate, but that it must be preceded by a careful study of the existing legal phenomena.

This is an important issue, and closely related to several other seeming ambiguities in Savigny's position. The first is the vexed question of his politics. The aristocratic Savigny was certainly an opponent of the French Revolution; and it has been customary to see his theory of the *Volksgeist* as designed to support a conservative, or even a reactionary, political position.<sup>256</sup> To Savigny it is essential that the law, as an expression of the *Volksgeist*, be allowed to evolve gradually; it cannot be *imposed*, either by codification from above or by a revolution from the street. Marx famously attacked

1953). The first six-hundred page volume of Eugen Wohlhaupter's three-volume study of jurists and literary figures is devoted to the relationships between Savigny, Thibaut, and the early romantics. See 1 EUGEN WOHLHAUPTER, *DICHTERJURISTEN* (1953).

<sup>254</sup> See WIEACKER, *supra* note 193, at 115.

<sup>255</sup> See SAVIGNY, *supra* note 243, at 45-53, 155-62.

<sup>256</sup> According to one recent study:

[A]lthough this was not true in all cases, Germanists had a strong propensity to belong to the liberal movement, while their opponents in the Romanist camp—especially Savigny himself and Georg Friedrich von Puchta—were clearly associated with political conservatism by the 1840s.

MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE* 24 (1989).

James Whitman, in contrast, observes that it is precisely the tendency to think in terms of simple oppositions between "liberal" and "conservative" that one must shake off if one is to understand Savigny. See WHITMAN, *supra* note 188, at 97. The evidence Whitman assembles for this assertion seems to me overwhelming.

the conservatism of the Historical School (he said it tells a mariner to sail, not on the stream, but on its source<sup>257</sup>), and a similar charge was made in 1816 by his brother-in-law, the poet Achim von Arnim:

The innocence of our jurists strikes me as peculiar; the two most famous, Hugo and Savigny, sat here together for a long while; they chatted about the first names of several jurists, and held forth about several unimportant opinions—but something as important as the liberation of the peasants in Prussia, laws on which institutions will be based for many centuries, and indeed that will affect the entire future shape of the nation, happen around them and next to them; but they pay no attention.<sup>258</sup>

But although a conservative and antipolitical strain in Savigny is undeniable, there is, as so often in this protean character, another side to his thought. He carefully distanced himself from the reactionary camp; and at least one contemporary warned the Prussian government of the revolutionary and democratic tendencies in his work.<sup>259</sup> This warning was not entirely unfounded. For on Savigny's theory law was grounded in the consciousness of the *Volk*; and in the early nineteenth century the word "*Volk*" referred above all to the common people. If Savigny's theory were correct, then the ultimate source of legal authority lay, not with the King and not with the *noblesse*, but with the masses: a doctrine that the upholders of eighteenth-century absolutism rightly found subversive.

This ambiguity in Savigny's politics is related to an ambiguity within his legal theory. Alan Watson and others have seen his *Volksgeist* theory as dissolving the study of law into the study of the wider society, and thereby denying the autonomy of the legal realm: the history of law is swallowed up in the history of the People.<sup>260</sup> And indeed in legal theory one might expect him to take a deeply conservative position: to denounce the rationalism of Natural Law codifiers; to deny, like Thibaut, that Roman law should be the foundation of German law; and to rest content with a quasi-mystical

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<sup>257</sup> See WOLF, *supra* note 251, at 532.

<sup>258</sup> Letter from Achim von Arnim to the Brothers Grimm (Nov. 5, 1816), *in id.* at 532 (translation by author).

<sup>259</sup> See Franz Wieacker, *Friedrich Karl von Savigny*, 72 ZEITSCHRIFT FÜR RECHTSGESCHICHTE, ROM. ABT. 1, 4 (1955) (citing NIKOLAUS GÖNNER, ÜBER GESETZGEBUNG UND RECHTSWISSENSCHAFT IN UNSERER ZEIT (1815)).

<sup>260</sup> See WATSON, SOCIETY AND LEGAL CHANGE 1 (1977). As I explain below, *see infra* note 288 and accompanying text, I believe this interpretation seriously misunderstands Savigny's position.

reverence for the sense of law among the People. Had he done so he would have stayed entirely within the romantic camp.

But as with the analogy to grammar, and as with his conservative politics, he did not draw the conclusions one would expect: some other strand of his thought is here at work. In *Vom Beruf*, immediately after he has introduced his historicist theory of law, immediately after he has declared that law is the creation of the *nation*, Savigny's argument takes an astonishing twist. The most perfect and complete system of private law in European history, he says, was that of the Romans, precisely because it had been allowed to ripen slowly, over the course of many centuries. The old Germanic tribes, in contrast, had been primitives, racked by internal divisions and plagued by wars. They never developed a system of law comparable to that of Rome. They had therefore chosen in the Middle Ages to adopt the rules of Roman law. Those rules, once alien, were now an integral part of German law and German history. They had worked their way into the *Volksgeist*; they could not now be amputated. And so modern Germany should seek its law in ancient Rome.<sup>261</sup>

No sooner have we absorbed this twist than we are asked to accept another. Law, recall, is the creation of the common *Volk*. It dwells among them like their folk songs, their myths, their language. But, says Savigny, after legal development has reached a certain stage of complexity, the law no longer resides in the consciousness of the people *tout entier*, but rather in the consciousness of professional *jurists*: the *Volksgeist* is no longer lodged in the *Volk*, but in a scholarly *élite*.<sup>262</sup>

It is important to observe that, for Savigny, the function of developing the law is to be performed, not, as in the common-law world, by judges, but by scholars. His conception of law was closely bound up with his conception of the universities; and his stature as an educational reformer is nearly as great as his stature as a reformer of the law.<sup>263</sup> Indeed, as we shall see, for Savigny, at root, the two tasks were the same. On his view the German universities had a unique *mission civilisatrice*: they were to transmit

<sup>261</sup> See SAVIGNY, *supra* note 243, at 27-37.

<sup>262</sup> I slur the fact that, at the time Savigny wrote, there was, strictly speaking, a distinction between jurists and professors. See PAUL KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* (1947). But in *Vom Beruf* Savigny speaks of "jurists," and it is clear that the term is meant to encompass professors. See SAVIGNY, *supra* note 243, *passim*.

<sup>263</sup> Savigny's subsequent fame as a reformer of the German universities is discussed by Kantorowicz, *supra* note 232, at 335.

to the present the wisdom of the past, and to serve as a home for intellectual freedom and impartial scholarship. It should be noted that Savigny here was knitting together two ideals of scholarship. On the one hand, Savigny envisioned a romanticizing, historicist ideal that saw professors as a kind of Herderian priesthood,<sup>264</sup> an apostolic succession entrusted with the transmission, from generation to generation, of the cultural heritage of the nation: to be a professor was not to pursue an occupation, but to occupy a “priestly office.”<sup>265</sup> And, on the other hand, Savigny sought to integrate an ideal of free and impartial inquiry that had received its canonical expression in Kant’s essay, *What Is Enlightenment?*<sup>266</sup> (Plainly Savigny needed both ideals: the historicist ideal insures the continuity of the *Volksgeist*, and the ideal of Kantian impartiality, as we shall see, is crucial to Savigny’s conception of the *legal* role of the universities.) Germany, he said in a short article for an English magazine, had many shortcomings when compared to England and France:

But that which in Germany supplies the want of almost all these advantages, and in which it is unparalleled in any other country, is its *Universities*. . . . By means of them, Germany is that which it in all other respects is in so slight degree—a nation. It may even be asserted that Germany is contained in its Universities.<sup>267</sup>

How is the scholarly *élite* to perform its task? Savigny’s answer is hardly one Herder would have found congenial, and it is more reminiscent of the *Aufklärung* than of romanticism. Jurists are not to rely on intuition alone, but are to supply a *formal* and *logical*

<sup>264</sup> The best discussion of the role of the universities in early nineteenth-century legal reform is given by WHITMAN, *supra* note 188, chs. 4-5. Whitman writes:

As one student wrote, “The beautiful and imposing man [i.e. Savigny] stepped to his lectern like a priest of scholarship”; another spoke of him as an evangelist. Savigny gave new life to Hugo’s twenty-year-old idea that the Roman lawyers formed an apostolic succession.

*Id.* at 107 (footnotes omitted). The similarity of such descriptions to the quasi-religious descriptions of Herder should be observed. See *supra* note 231.

<sup>265</sup> WOLF, *supra* note 251, at 472.

<sup>266</sup> Immanuel Kant, *Antwort auf die Frage, Was Ist Aufklärung?*, in 4 BERLINISCHE MONATSSCHRIFT 481-94 (1784).

<sup>267</sup> Friedrich Karl von Savigny, *On the Present State of the German Universities* (1803), reprinted in R. WELLECK, EIN UNBEKANNTER ARTIKEL SAVIGNYS ÜBER DIE DEUTSCHEN UNIVERSITÄTEN 51 (1931).

elaboration of the system of the law.<sup>268</sup> The Roman jurists are here worthy of imitation:

We saw earlier that in our science all success rests on the possession of the fundamental axioms, and it is precisely this that marks the greatness of the Roman jurists. The concepts and propositions of their science appear to them, not as the creations of their arbitrary will: they are real entities [*wirkliche Wesen*] whose nature and whose genealogy have become familiar to them by long acquaintance. And for precisely this reason their entire manner of proceeding has a certainty not to be found anywhere else outside of mathematics, and it is no exaggeration to say that they *calculate* with their concepts.<sup>269</sup>

We see here a mass of inner tensions and apparent contradictions in Savigny's thought: tensions that could make him seem to some a dangerous revolutionary, and to others a bastion of reaction. On the one hand, he held out a nationalist and historicist theory of law; on the other, he recommended that Germany take its laws from ancient Rome. On the one hand he expressed his faith in intuition, history, and the organic growth of the law; on the other, jurists were to emulate logic and mathematics. On the one hand, law was the creation of the *Volk*; on the other, it was an autonomous, technical enterprise, to be pursued by a scholarly *élite*. The cascade of paradoxes continues to flow; the real Savigny seems hidden behind a series of conflicting masks: the conservative bent on reform, the great critic of codification who became Prussian Minister for Legislation, the aristocratic spokesman for the *Volk*, and the member of the romantic circle whose prose is as cool and un-hysterical as a Roman statue.

What lies behind these tensions? The question is important, not only for our understanding of Savigny, but for our understanding of subsequent German legal thought. For the paradoxes and tensions hardly went unnoticed; later thinkers were to develop one side or another of Savigny's many-faceted system. Some were to reject his Romanism, and develop instead a Historical School of German law; others were to develop the theory of the *Volksgeist* into a descriptive legal sociology.<sup>270</sup> Some scholars chose to deepen

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<sup>268</sup> The two requirements of formality and logicity are introduced in SAVIGNY, *supra* note 243, at 25, 30.

<sup>269</sup> *Id.* at 28-29.

<sup>270</sup> It should be observed that—somewhat surprisingly—the birth of modern legal sociology also owed much to the Kantian tradition in German legal thought. See WOLFGANG BESSNER, *DIE BEGRIFFSJURISPRUDENZ, DER RECHTSPOSITIVISMUS, UND DIE*

Savigny's historical studies of Roman law; others, to elaborate the formal aspects of his thought into the logical science of "conceptual jurisprudence." These movements spread to France, to Italy, to Austria, to Spain; progressives and conservatives alike stood under his influence, even when the influence took the form of strenuous disagreement.<sup>271</sup> All of these divergent trends in nineteenth-century European legal thought can be traced back to the tensions implicit in Savigny's *Vom Beruf*—as it were, the Big Bang of German jurisprudence.

What explains the fissures in his thought? Savigny scholars divide into three classes on this issue. The first and largest class treats him foremost as an historian, not as a philosopher; or, if his philosophy is considered, he is classed as an "historical positivist."<sup>272</sup> The tendency is to stress his organicism, his medievalism, his irrationalism, and his romanticism, but to play down or ignore his rationalist and systematizing side.<sup>273</sup> Of this class,

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TRANSCENDENTALPHILOSOPHIE IMMANUEL KANTS ALS GRUNDLAGEN DER SOZIOLOGIE UND DER POLITISCHEN ETHIK MAX WEBERS (1968) for a well-argued discussion on this point.

<sup>271</sup> See WIEACKER, *supra* note 193, at 133-43.

<sup>272</sup> This charge goes back to Eduard Gans, the student of Hegel, who attacked Savigny for an excessively positivistic view of law. See 1 GANS, *supra* note 5, at v-xli.

<sup>273</sup> Thus Hermann Kantorowicz says that Savigny stressed the "irrational element in the formation of the law" because this was "more mysterious and therefore more romantic than climate, economic system or density of population"; he observes that Savigny's work was calculated to appeal to Francophobes, romanticists, the classically-minded, democrats, princes, and historians; but in explanation of Savigny's turn to Roman law offers only the observation that Savigny "loved" the *Corpus Juris Civilis*, and "all is fair in love and war." He makes no effort to deal with the underlying intellectual issues. See Kantorowicz, *supra* note 232, at 335-38.

Alan Watson, I think, falls into a similarly one-sided interpretation of Savigny; I discuss the issue below. See *infra* note 288.

The position of James Whitman is subtle, and is related to the larger issue of how best to view the romantic movement as a whole. Whitman writes:

I will refer to the period after 1780 as "the romantic era" in German political history, and I will focus on the medievalizing strain so typical of the time, the desire to revive the ancient constitution of the Holy Roman Empire.

The medievalizing character of the romantic era has often been neglected by historians. But contemporaries had no doubt that the revival of pre-absolutist tradition lay at the movement's heart. To Germans, literary romanticism was always a medievalizing movement first and foremost . . .

WHITMAN, *supra* note 188, at 67-68 (footnotes omitted). In a footnote to the first sentence of the second paragraph of the above-cited passage, he adds:

Most often, the substantive fascination with the Middle Ages and the Reformation has been neglected in favor of an emphasis on romanticism as a "style of thought," to use Karl Mannheim's phrase, as a new mode of

which was predominant in the nineteenth century, the legal philosopher Julius Binder observed that “to be sure, most of his biographies, which are in general quite wretched, skip over his philosophical ideas.”<sup>274</sup> But Binder himself belongs to the second, much smaller class who emphasize the systematic elements in Savigny’s thought, while failing to address their relationship to the romanticism and the historicism.<sup>275</sup> The third class notices that these divergent tendencies exist, and that Savigny’s method of proceeding was both historical and philosophical, but typically does not say how these two strands can be consistently combined.<sup>276</sup>

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thinking that replaced the mode of thinking characteristic of the Enlightenment . . . Mannheim was hardly alone: many of the finest intellectual historians have focussed, in one manner or another, on “irrationalism” or some other “style of thought” as the key feature of the period . . .

WHITMAN, *supra* note 188, at 68 n.4.

Whitman’s emphasis on the medieval yearnings of the Historical School is a welcome change of emphasis, and yields a rich historical harvest: for instance, in his evocation of the still quasi-medieval system of law in the early nineteenth-century German countryside. See *id.* at 92-150. But one must not, in stressing the medievalizing tendencies of literary romanticism, forget that the romantic movement was also, at its core, a movement in philosophy; and in Whitman’s account Savigny the systematic legal philosopher is, to an extent, submerged beneath the picture of Savigny the medievalizing historian. If my argument is correct, the accounts of Savigny offered by the foregoing historians need to be supplemented by an examination of the specifically philosophical difficulties he faced in devising his theory of law.

<sup>274</sup> JULIUS BINDER, *DAS PROBLEM DER JURISTISCHEN PERSÖNLICHKEIT* 10 (1907).

<sup>275</sup> For an example, other than Binder, see Hans Kiefner, *Der Einfluß Kants auf Theorie und Praxis des Zivilrechts im 19. Jahrhundert*, in J. BLÜHDORN & J. RITTER, *PHILOSOPHIE UND RECHTSWISSENSCHAFT* 3 (1969). (It should be observed that neither Binder nor Kiefner attempted to give a detailed exposition of Savigny’s thought, but rather tried to correct the exaggerations of the members of the first class by emphasizing his systematizing tendencies.)

<sup>276</sup> Wolf, for example, simply observes that Savigny’s system rested on ideas of organicism and on Herder’s theory of historiography, and adds:

On this foundation, which was more poetically felt than philosophically thought through, . . . Savigny erected in his early work on methodology . . . his program for the scholarly renewal of jurisprudence: it should combine the philological-historical manner of proceeding with the philosophical-systematic, in order to attain to the “absolute” theory of legal science . . .

WOLF, *supra* note 251, at 484 (translation by author).

Wieacker observes that Savigny both held that law is the product of the *Volksgeist* and that it is now to be developed by jurists in reliance on Roman law; he explains this tension by saying that Savigny possessed “a literary conception of the *Volksgeist*”—a formula that seems to label a problem rather than solve it. WIEACKER, *supra* note 193, at 130.

Some of Savigny’s interpreters have asserted that the Historical School rests on “crypto-Natural Law” foundations, and that it takes from Natural Law, not only the ideal of a systematic exposition, but also the idea that the historical process works to perfect the *substantive content* of the law. See ERNST-WOLFGANG BÖCKENFÖRDE, *RECHT*,

One gets a long list of thinkers who influenced (or are said to have influenced) Savigny—Vico, Montesquieu, Burke, Shaftesbury, Hugo, Herder, Kant, Schelling, Fichte, Hegel<sup>277</sup>—and one gets perhaps the observation that, in the end, Savigny's attitude was primarily aesthetic—that he was simply not a very consistent thinker.<sup>278</sup>

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STAAT, FREIHEIT 20 & n.33 (1991); WIEACKER, *supra* note 193, at 131; WOLF, *supra* note 251, at 502. However, as I already observed, Savigny clearly thinks it is possible for the law to enter a phase of decline: he does not believe that history will necessarily bring about the best of all possible legal worlds, but rather that the improvement of the law is something scholars must struggle to achieve. And, more importantly, there is no sign in his work that, as the Natural Lawyers had believed, he thinks there is any *unique* best system of law, valid for all persons, at all times, everywhere; so the comparison of the Historical School with the school of Natural Law must be taken with caution.

Böckenförde rightly observes that Savigny holds a metaphysical conception of the *Volksgeist*, but does not address the central issue: How is that metaphysical *Volksgeist* to be construed, and if law is the product of the *Volksgeist*, how exactly does the authority to make law pass into the hands of law professors, and how can they justify their activity of quasi-mathematical systematization? See BÖCKENFÖRDE, *supra*, at 15-16.

Likewise, on a related issue, many of these Savigny scholars content themselves with observing that Savigny held a strong interest both in educational reform and in the law; but they tend to treat these two interests as only biographically related, and do not attempt to explore the theoretical interconnections. The result is to lose sight of the systematic character of Savigny's thought. A conspicuous exception here is Whitman, who explores at length the relevance of Savigny's conception of the university to his plans for legal reform. See WHITMAN, *supra* note 188.

<sup>277</sup> For an exchange on the relevance of Hegel to Savigny's thought, see KNUT WOLFGANG NÖRR, *EHER HEGEL ALS KANT* (1991). A book review of Nörr by Okko Behrends appears in 22 JURISTEN ZEITUNG 1073 (1991). Julius Binder observes that some scholars have attempted to see Hegel as an influence on Savigny, but notes the implausibility of the attempts. See BINDER, *supra* note 274, at 10-11.

<sup>278</sup> Thus Erik Wolf, in discussing Savigny's neglect of Germanic law in favor of Roman law, says:

In order correctly to understand this much deplored attitude, one must observe that Savigny's thought about law and the world never attained the theoretical closure of a system. And given his general intellectual style he had no need to seek such a thing. Nor did he consciously develop his basic juristic doctrines in a political manner, or supply them with social-ethical foundations.

WOLF, *supra* note 251, at 498. Or again, Wolf portrays Savigny as having principally an *aesthetic* attitude towards history, although:

If Savigny did not develop a "system" of fundamental ideas for his "historical school of law," this was not *just* the consequence of his fundamentally aesthetic point of view. It also had other, *methodological* grounds. He feared that a devotion to a system would bring about a loss of the historical richness of legal life. For this reason he applies his fundamental ideas, like "People," "Spirit of the People," "Consciousness of the People," "Consciousness of Law" in an unsystematic jumble; they are designating signs that can always be interchanged, but not fixed concepts.

In view of the sheer number and diversity of seeming paradoxes in Savigny's thought, this last conclusion is hard to stomach, unless one is willing to acquiesce in the conclusion that the greatest jurist of the last century was incapable of proceeding ten paces without falling into a contradiction. Savigny himself repeatedly insisted that his ideas formed a system; and before we dismiss his claim, it would be instructive to try to extract as much coherence as possible from his writings. Evidently what we need is some account of how Savigny could have believed all these things simultaneously, and of how they seemed to him to hold together; and for such an account we need to know, not just in general that Herder or Burke or Montesquieu was an influence, but precisely what kind of influence, and for what ends: we need to know the exact location of the influence, and not just its general whereabouts.

Here we run into an immediate textual problem. Savigny is an exceptionally elusive thinker; he rarely discusses the ideas of others, does not explicitly describe the influences on his thought, and often proceeds from premise to conclusion without bothering to state the intervening steps of argument. So we must try to reconstruct the way his system was intended to hold together, and this obliges us to think ourselves back into the way the problems must have presented themselves to him. The hope is that in this way we can reconstruct the subterranean parts of his argument.

This is a hard assignment, and before it can be considered complete it will require a detailed exegesis of the entire corpus of his writings. I do not propose to embark on that task here. But the issue is important, for, as we saw, the tensions in his thought explain the fissive development of German legal theory in the nineteenth century. Indeed, in certain ways, after the work of Rawls and Dworkin, and after the revival of Kantian thought in German legal theory,<sup>279</sup> we are perhaps today in a better position to appreciate the specifically philosophical problems faced by Savigny than were the various positivist and historicist schools that dominated German legal scholarship in the century after his death. For present purposes a sketch will have to suffice; the details must be left to be filled in later.

As a first approximation, let us consider Savigny's conception of *history*, and ask exactly how far it corresponds to the conception

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*Id.* at 500 (translations by author).

<sup>279</sup> For these developments, see DREIER, *supra* note 198.

found in Herder. What are the similarities, and what are the points of difference? Savigny, as we have seen, was firmly committed to several propositions: that law is the expression of the *Volksgeist*; that it is peculiar to time, place, and condition; that it is, like language, an organic growth; that it is not merely a matter of abstract reason, but must also be explained in terms of intuition and will. So far we are on solid Herderian ground. What of Savigny's thesis that the German *Volksgeist* had absorbed Roman law? This thesis is more problematic, but not, I think, really a radical departure. At any rate, in the *History of Roman Law in the Middle Ages*,<sup>280</sup> Savigny was able to argue that the modern German states could be viewed as an organic evolution out of the Holy Roman Empire, which in turn had been (at least in theory) the successor to classical Rome. If this argument is correct, it is sufficient to reconcile his thesis about Roman law with the Herderian conception of the *Volksgeist*.

But at this stage in the analysis Savigny confronts a problem that Herder did not. Herder, *qua* national historian, *qua* student of the past, could here have rested with a simple description of the evolution of Romano-Germanic law. But Savigny's interest in these matters was not that of an antiquarian. He could not rest with a simple description of the past. For Roman law had to be *applied* in modern Germany and now comes the obvious difficulty with the Herderian theory of the *Volksgeist*. Savigny could not simply instruct the deciders of actual cases, whether in the universities or in the courts: *Apply Roman law!* For Roman law was not a single thing. Its rules went back more than two millennia; they had been repeatedly re-arranged and were now encrusted with commentaries and later accretions. Even the original writings of the Roman jurists were gappy and inconsistent: Ulpian could not always be relied upon to agree with Paul. So (one can hear a sceptic ask) to what source were modern Germans to look? To the rules of the Roman Republic? To the *Digest* of Justinian? To the medieval Glossators? Savigny is entirely clear on this point:

The way in which, on the view I have been advocating, the *ius commune* and the *Landesrechte* are to be made truly useful and unobjectionable, is by pursuing the strict historical method of legal science. The character of this method does not consist (as several recent opponents have incomprehensibly declared) exclusively in praising Roman law, and also not in demanding the unconditional

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<sup>280</sup> See *supra* note 245.

preservation of any given legal material; indeed, this is precisely what it seeks to guard against, as the above evaluation of the Austrian civil code has shown. Its aim is rather to pursue any given material to its roots, and in this way to discover an organic principle that can be used to separate that which is still alive from that which is dead and belongs only to history.<sup>281</sup>

Plainly the chaotic and contradictory mass of accumulated legal rules could not, by itself, serve as the foundation for German private law. Before it could be applied Savigny would need, as he said, to find an “organic principle.” More precisely, he needed to solve two difficult problems, and it is important to observe that for both problems the Herderian system was ill-suited to come to his aid. First, he needed to impose some sort of organized *structure* on the raw historical data. As we shall see, he had deep-lying philosophical motives to this task, but there was a practical incentive as well: for if Roman law were to rival the highly-organized systems designed by the Natural Lawyers, a clear structure was necessary both to make the law perspicuous and to eliminate obvious inconsistencies. The second task followed from the first. In picking through the existing rules, in devising a coherent system of laws, Savigny would need to *choose* which rules to incorporate and which to reject; for manifestly the heap of rules he had inherited was inconsistent and therefore inadequate to ground a modern legal system. He needed, in other words, some criterion for saying which rules *should* be incorporated into his new system, that is, he needed some vantage point outside the historical *Volksgeist* from which he could judge its productions. And it was precisely the central claim of Herder’s theory of history that no such external vantage point could be found. But if Savigny were to solve the practical problems of German private law, he would, *pace* Herder, have to undertake both tasks. That is, he would need (1) to find some philosophical criterion that (2) would allow him to *construct* a system from the historical bits and pieces. The result of this construction would then be something of a paradox: a system of *modern* Roman law. Let us sum up this problem by saying that Savigny needed to find a philosophical leitmotif—some way both of imposing structure on the raw material of history and of saying which rules ought to apply.

It is this need for a leitmotif, I think, that drove Savigny to a different conception of history than we encounter in Herder and

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<sup>281</sup> SAVIGNY, *supra* note 243, at 117-18 (translation by author).

the romantics. This is an important point, and has been overlooked by those who interpret Savigny as a simple “historical positivist.” But if we look closely at *Vom Beruf* we can see that he did not treat history (as Herder and the romantics sometimes did) as a blind process whose productions were immune from criticism or evaluation. Savigny instead repeatedly speaks of legal systems as ripening into perfection and as falling into decay: some products of the historical process are evidently on his view better than others.<sup>282</sup>

But to make this observation about Savigny is not yet to solve the problem of his seeming inconsistency. It is only to observe that he upholds, on the one hand, the theory that law is the creation of the *Volksgeist*, and, on the other, the theory that some productions are better than others. He is, nonetheless, still vulnerable to the charges both of theoretical incoherence and inconsistency, for his theory of legal formalism is inconsistent with his theory of law as an organic growth.

How might Savigny have replied to this charge? In *Vom Beruf* he does not say; and so to ask this question is to ask what theoretical tools were available to him in 1814 and to try to reconstruct how he might have thought of the issue. The beginnings of an answer can be seen if we look to the political philosophy of the age. The Herderian theory of history has several points of similarity to the ideas of other thinkers, and in particular to Rousseau’s theory of the social contract. Specifically, the *Volksgeist* theory that law is the product of the Spirit of the People bears an obvious resemblance to Rousseau’s theory that legitimate government rests on the Will of the People.<sup>283</sup> But Rousseau—like Savigny and unlike Herder—faced the problem of saying how this theory was to be applied in practice. How was the Will of the People to be gotten from the inconsistent and chaotic wishes of the individual citizens? The details of Rousseau’s answer are here most instructive and can be used to illuminate the deep philosophical problems that Savigny faced, but for present purposes a discussion of these matters would take us too far afield. We need only observe that Rousseau’s

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<sup>282</sup> See *id.* at 26. But this point is evident from the entire course of Savigny’s argument, which holds that Germanic law is inferior to Roman, and also that German law is not yet ripe for codification.

<sup>283</sup> See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL; OU, PRINCIPES DU DROIT POLITIQUE passim* (Amsterdam, Marc Michel Rey 1762) [hereinafter ROUSSEAU, *DU CONTRAT*], reprinted in 2 JEAN-JACQUES ROUSSEAU, *OEUVRES COMPLÈTES* 513-80 (1971).

solution to the problem required him to draw a distinction between the abstract *general will* of the people as a whole, and the *particular will* of concrete, individual citizens.<sup>284</sup> This sort of distinction between the People-considered-as-empirical and the People-considered-as-ideal became a commonplace of the political philosophy of the early nineteenth century; it is to be found, in various guises, in Kant and in Fichte, in Schelling and in Hegel—and indeed, in Rawls and in Habermas. The philosophical difficulties of the doctrine are enormous and are of cardinal importance if one wishes to understand the foundations of modern legal theory. But that is not at present the point. The point is that these problems were well known, and Savigny in 1814 need not have been a mere re-combiner of inconsistent ideas; he could plausibly have sought to explain the seeming paradoxes in his position by invoking one of the then-current metaphysical distinctions between the empirical and the ideal.<sup>285</sup> I shall return later to the question, exactly which of these distinctions would best have served his purposes; but the general contours of the strategy are clear enough. Specifically, he would have sought to draw a distinction between the *empirical* (and self-contradictory) rules in the old Roman law books, and the *ideal* rules that are the true concern of the *Volksgeist*. If some such view underlies Savigny's thinking, then the *Volksgeist* is not to be identified with the *empirical* will of the nation—with the concrete beliefs and desires of actual individuals—but with an *idealized* will abstracted from the concrete particulars. Let us call this the *problem of the ideal*, and observe that it is different from the problem of finding a leitmotif. This distinction between the empirical and the ideal is evidently crucial, for on it rest (1) Savigny's theory that the academic élite have become the representatives of the (idealized!) *Volk*; (2) his theory of the autonomy of legal scholarship; (3) his call for a systematic, logical exposition of the rules of private law; and, (4) his explanation of the transplantation of Roman law into Germany.

It would, I think, be reasonable to impute such a theory to the early Savigny of *Vom Beruf*, even though the distinction is there only

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<sup>284</sup> See JEAN-JACQUES ROUSSEAU, DISCOURS SUR L'ÉCONOMIE POLITIQUE *passim* (Geneva, Émanuel du Villard 1758), reprinted in JEAN-JACQUES ROUSSEAU, 2 OEUVRES COMPLÈTES 276-305 (1971); ROUSSEAU, DU CONTRAT, *supra* note 283, bk. I, ch. 7.

<sup>285</sup> I note in passing that in section 3 of *Vom Beruf*, Savigny refers to legislation as being able, in certain circumstances, to bring to light "actual law, the real will of the People." SAVIGNY, *supra* note 243, at 17 (emphasis added). But the reference is probably too slight to bear much interpretive weight.

implicit. If I could presume upon unlimited time and patience, I think I could show that, beneath the Herderian elements that are so conspicuous in his purely historical work, the outlines of such a philosophical theory can be discerned even in the great treatise of his middle period, the *History of Roman Law in the Middle Ages*.<sup>286</sup> But he is most explicit on these points in his encyclopedic and unfinished work of the 1840s, which is significantly called the *System of Modern Roman Law*.<sup>287</sup>

In the first chapter of the first volume he introduces the *Volksgeist* as follows:

If we inquire about the subject in which and for which positive law has its being, we find that it is the People. Positive law lives in the common consciousness of the People, and so we can also call it *the law of the People* [*das Volksrecht*]. But this [law of the People] must not at all be conceived as though law were created by the arbitrary will [*Willkür*] of the individual members of the People; for this arbitrary will of the individual could perhaps choose that law, but it could just as well choose quite a different law, and is perhaps more likely to do so. Rather it is the spirit of the People [*der Volksgeist*], dwelling and working in all the individuals together, which creates the positive law, and that therefore, not accidentally but necessarily, is for the consciousness of each individual one and the same law.<sup>288</sup>

(It is important to observe that the term *Willkür*, which I have translated as “arbitrary will,” is a term of art in post-Kantian German philosophy, and would have been spotted at once by Savigny’s readers. Roughly, Kant had distinguished between the *Willkür* of empirical individuals, which is determined by their arbitrary, empirical desires, and the necessary, *a priori* *Wille* of the

<sup>286</sup> SAVIGNY, *supra* note 245.

<sup>287</sup> 1 FRIEDRICH KARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 14 (Scientia Verlag 1981) (1840-1851) (8 vols.).

<sup>288</sup> 1 *id.* Alan Watson quotes this passage in WATSON, *supra* note 260, at 1. He takes Savigny here to be urging that law is a mirror of society and therefore opposite to the ideas of legal transplants and of the autonomy of law. (I discuss these issues in Ewald, *supra* note 8.) Watson’s target is such mirror theories of law generally, of which there exist plentiful examples. But if the foregoing argument is correct, Watson’s interpretation of this particular passage gets Savigny backwards: Savigny’s intention is to turn the *Volksgeist* away from a sociological-empirical conception, and towards an abstract, philosophical conception, and it is precisely this move that permits him to affirm the autonomy of the law, the value of legal systematization, and the legitimacy of the transplantation of Roman law into Germany.

noumenal self, which is not determined by empirical causes, and consists essentially in adherence to the moral law.)

But we now must move to another stage of the argument. If the foregoing reconstruction of Savigny's reasoning is correct, it explains, at a deep level, why the universities play such a central role in his thought, and also explains why, in his account, they are required to serve both a Herderian and a Kantian ideal. Savigny's interest in legal reform and his interest in university reform are not just related by a biographical accident—two projects that happened to strike his fancy—but are intimately connected. Let us try to see why.

It should be clear that, on the foregoing account, the scholars have a complex task. On the one hand, in working with the empirical materials of the law—the documents and rules and practices that their research uncovers—the scholars serve as a kind of Herderian priesthood, as the guardians and preservers of the legal tradition; their task is to transmit the accomplishments of the *Volksgeist* from generation to generation. But in addition, as lawgivers, they must express the *idealized* spirit of the People; and this requires them, as we have just seen, to evaluate and organize the legal materials and in this way to declare the law. Plainly if such a conception is to work, if university professors are to become the oracles of the law, then the jurists must also satisfy an ideal of free and impartial inquiry. Specifically, they must satisfy two conditions, and it is important to see that those conditions pull in somewhat opposite directions. First, the scholars must become the voice, not of any particular class or faction, but of the People as a whole; that is, they should be impartial and, in this sense, non-political. Second, they must be able to present their legal judgments as the reflection of an ethical ideal that is already implicit in the legal practices of the nation.

We are thus led back, by another route, to the original problem of the philosophical leitmotif, but along the way we have picked up some complex additional requirements that that leitmotif must satisfy. Savigny needs to find a set of principles that will satisfy four strenuous conditions. They must be: (i) substantive principles that give him a criterion for picking and choosing among the inherited rules; (ii) systematically arranged so that they enable him to impose

a coherent structure on the mass of Roman materials; (iii) politically neutral; and, (iv) implicit in the existing body of private law.<sup>289</sup>

If this reconstruction of Savigny's train of reasoning is correct, it explains the complexity and the intensely paradoxical nature of his thought. And more importantly it shows that the tensions we have observed in *Vom Beruf*—the tensions that were to have such a powerful effect on subsequent German legal thinking—were in a sense inevitable: for once you combine the Herderian idea of the *Volksgeist* with the practical requirement that law be applied in actual cases, you are confronted with a difficult task of reconciliation, and must, sooner or later, face the problems I have here called the problem of the leitmotif and the problem of the ideal. Had Savigny died in the Napoleonic Wars, some such set of problems, I think, would still have arisen for the legal thinkers of the nineteenth century, although perhaps not in exactly the same form: for those problems are already implicit in the work of the eighteenth-century philosophers.

It remains now to ask: What leitmotif did Savigny in fact adopt? Around what principles did he organize his system of Roman law?

To answer this question we must turn to the texts, and in particular to the *System of Modern Roman Law*. But before we do so it will be helpful to consider how the choice of a philosophical leitmotif must have appeared to him at the time. The two most obvious candidates were not available. He could not have chosen a positivist solution, for, as a matter of positive fact, the rules of Roman law were a disorganized jumble, and the very purpose of a leitmotif was to bring them into a system. Nor could he have resorted to any of the traditional systems of Natural Law; for, as we saw, the Kantian criticisms had undermined all of the traditional groundings. So he needed something that would steer a middle course between positivism and natural law, *and* that would satisfy the four strenuous requirements I mentioned earlier.

How did Savigny in fact proceed? He was, as usual, elusive; and to answer this question one must piece together scattered remarks that crop up throughout the *System*.

All law, he said, stands under the sovereignty of the moral law,<sup>290</sup> but specifically: "All law exists for the sake of the moral freedom that dwells in every individual person."<sup>291</sup> The concept

<sup>289</sup> See *supra* text accompanying notes 281-84.

<sup>290</sup> See 1 SAVIGNY, *supra* note 287, at 347, 370-71.

<sup>291</sup> 2 *id.* at 2 (translation by author).

of freedom of the will brings with it numerous metaphysical difficulties that are best left to the philosophers,<sup>292</sup> but there is no doubt that it is the ultimate underpinning of the legal system, and that laws are meant to regulate the *external* conduct of human beings:

Man stands within the external world, and for him the most important element in his environment is his contact with those that are similar to him in their nature and their condition. Now if, in such contact, free beings are to exist side-by-side, mutually aiding one another, and not hampering their development, then there must be acknowledged an invisible boundary within which the existence and the activity of every individual is guaranteed a secure space of freedom. The rule that determines this boundary, and thereby the free space, is the law. In this way we see both the relationship and the difference between law and morality. Law serves morality, not because it executes her commands, but because it makes possible the free unfolding of her power, which dwells in every individual will.<sup>293</sup>

Because law occupies an autonomous realm distinct from (although not independent of) morality and because its purpose is to determine the formal boundary of individual freedom, Savigny opposed attempts to introduce substantive, political, or economic goals into law.<sup>294</sup> Law is fundamentally a matter of guaranteeing the freedom of the will of the individual; and on this foundation Savigny erected his theory of *subjective rights*.<sup>295</sup>

From the point of view we have just outlined, it appears that every particular legal relationship [*Rechtsverhältnis*] is a relationship, determined by a legal rule, between person and person. But this determination consists in the fact that a realm is assigned to *the*

<sup>292</sup> See 3 *id.* at 102.

<sup>293</sup> 1 *id.* at 332.

<sup>294</sup> See, e.g., 1 *id.* at 55, 62; 8 *id.* at 35.

<sup>295</sup> In German, *subjektive Rechte*. The concept of subjective rights lies at the core of German thinking about private law; I believe the term was coined by Savigny. There is an untranslatable duality in German between the idea of *ein subjektives Recht*—roughly, an individual right—and *das objektives Recht*—roughly, the objective law; English uses two distinct words, *law* and *right*, for concepts that are closely linked in German and many of the other continental languages.

Franz Wieacker observes that, "Above all Savigny's *System of Modern Roman Law* leaves no doubt that Kant's formal ethics of duty and freedom underlies his definition of subjective rights." FRANZ WIEACKER, *INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG* 11 (1974).

*individual will*, in which that will rules independently of any foreign will.<sup>296</sup>

It is important that the law can be logically conceived as flowing out of these fundamental principles about freedom, rights, personality, and the will, for law must be presented as a *system*:

The essence of the systematic method lies in the knowledge and the representation of the inner connection or relationship by means of which the individual legal concepts and legal rules are bound together into a greater unity.<sup>297</sup>

Savigny took this systematic manner of proceeding into the analysis of particular legal doctrines. For example, in his analysis of coercion in the law of contracts:

Although coercion does not in itself remove the freedom of the agent to make a declaration of will . . . it nevertheless stands in direct contradiction to the goal of all law, which is directed to the secure and independent development of the personality.<sup>298</sup>

It should, I hope, by now be clear whose philosophical world Savigny inhabited, and from where his leitmotif came. It would be an interesting and instructive exercise to carry the analysis further back and to compare Kant and Savigny on the foundations of contract law, property, or marriage. The correspondences are close, although not exact: Savigny, for example, flatly rejected the social contract theory of the state,<sup>299</sup> and he differed from Kant on numerous points of detail.<sup>300</sup>

But despite these differences, in retrospect there is a certain inevitability to his selection of a Kantian leitmotif. It seems to me that, far from being a mere syncretist, a confused aesthete, an historian with little interest in abstract ideas, a snapper-up of whatever philosophical theory took his fancy, Savigny was not only the greatest of legal historians, but also, as he himself declared, a

<sup>296</sup> 1 SAVIGNY, *supra* note 287, at 332.

<sup>297</sup> 1 *id.* at xxxvi (translation by author). Savigny, like Kant, explicitly warned against confusing a *system* with a mere "external" arrangement of the elements of the system. *See id.* at xxxvii.

<sup>298</sup> 3 *id.* at 103. In this passage, Savigny includes a cross-reference to the first passage I quoted on the "free unfolding" of the moral law; the phrases "independent development . . . of the personality" and "free unfolding . . . of the moral law in each individual" are closely related, and should be remembered. *Id.* We shall encounter them again.

<sup>299</sup> *See* 1 *id.* at 29.

<sup>300</sup> For example, he speaks of the motive to moral action as being "the feeling [Gefühl] of duty." 3 *id.* at 177 (emphasis added).

rigorous and systematic thinker, grappling with deep intellectual problems.<sup>301</sup> I would further suggest that a considerable part of his importance consists in his having seen, whether consciously or unconsciously, how Kant's legal philosophy might be employed to solve the problems that he encountered as soon as he attempted to import Herder's way of thinking into the law. The solution is masterly; one has the feeling of a key fitting snugly into a lock, of finally seeing a tapestry from the right side.

First, the Kantian theory of law was based, at a very deep level, on the demand for *system*: justice and indeed reason itself require that law be applied in a consistent fashion and that the state explain how its legal principles are related among themselves. The Kantian theory offered Savigny a highly structured framework, grounded neither in positivism nor in Natural Law, that could be used to impose order on the raw historical materials.

Second, through its emphasis on the autonomy of the individual and on the "free unfolding of personality," the Kantian theory supplied him with a substantive moral standard both for setting the limits of state authority and for choosing between the various inherited rules of Roman law. Third, and most importantly, this substantive standard, as applied by Savigny's jurists, could claim to be impartial and therefore, in an important sense, non-political. For Kant's Categorical Imperative was intended to be, at a very deep philosophical level, neutral between persons: indeed, neutral between rational agents. The Moral Law, as we saw earlier, is radically egalitarian, and insists that rational agents are always also to be treated as ends in themselves, and never merely as means. But it follows that if jurists confine themselves to developing the formal, legal implications of this Moral Law—that is, if they interpret and organize the doctrinal materials so as to protect the private sphere of individual autonomy—then they can regard themselves as impartial upholders of the law, and as speaking, not for any particular faction or party, but for the nation as a whole.

Finally, Kant's system of concepts—his analyses of personality, will, freedom, contract, property—can fairly easily be treated as implicit in the legal tradition and turned into a foundation for the existing body of private law. The reasons for this close correspondence between Kantianism and Roman law are complicated. On the

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<sup>301</sup> Wieacker indeed notes that "[Savigny's] true glory lies not in the efflorescence of his intuition, but in his logical power of distinguishing and combining." WIEACKER, *supra* note 193, at 141.

one hand, Kant had himself studied the textbooks of Natural Law, which were themselves based on medieval arrangements of the rules of Roman law. Exactly how much of his legal schematism can be traced back to the tradition of Roman law, and ultimately to the categories of the *Institutes*, is a question to which I do not know the answer, but that such an influence existed is certain.<sup>302</sup> On the other hand, Kant's modern, metaphysically grounded doctrine of autonomy, his emphasis on private spheres of action and on the free development of the individual, found a natural echo in the old Roman-law cleavage between private law and public. In the realm of private law the actors were free Roman citizens and were, to a considerable extent, allowed to devise their own legal relations; the task of the state was limited to enforcing the arrangements freely arrived at by the parties.<sup>303</sup> What could have been more natural than to graft onto this ancient Roman conception the new Kantian ideal of radical autonomy and to treat the freedom of the individual as an organizational principle that was already implicit in the legal tradition?

Savigny's underlying Kantianism is easy to miss. He rarely mentions Kant by name, nor does he explicitly elaborate the train of thought that I suggested led him to his philosophical leitmotif. His subsequent biographers have tended to portray him primarily as an historian and to treat Kant as but one intellectual influence among many. It is unusual to find an observer as acute as Julius Binder, who flatly declared that, "It is certain that Savigny's system is built on one of the foundation-stones of Kantian and post-Kantian philosophy, namely, on the concept of personality in the ethical and philosophical sense."<sup>304</sup>

At this point, however, we must be careful not to overstate the matter. For what Savigny offers is not Kantianism *pur sang*, but rather Kantianism *as a device for rendering the history of Roman law*. This, I think, is the crucial point. Savigny owes a deep allegiance *both* to Kant *and* to Herder. From Kant he takes the idea that the private law rests on principles of substantive justice; that it exists to further the autonomy of the individual; and that scholars should

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<sup>302</sup> See WATSON, *supra* note 85, at 83-84. Watson does not specifically discuss Kant. The fullest discussion of the historical legal influences on Kant's thought is RITTER, *supra* note 194.

<sup>303</sup> This topic is, of course, vast, and is discussed at length in most works on Roman law. For an illuminating introductory treatment, see FRITZ SCHULTZ, *PRINCIPLES OF ROMAN LAW* 140-63 (Marguerite Wolff trans., 1936).

<sup>304</sup> BINDER, *supra* note 274, at 10 (translation by author).

bring its rules into a systematic, logical ordering. From Herder he takes his historicism, his theory of the *Volksgeist*, and the idea that law is an organic, unsystematic outgrowth of the consciousness of the nation. This double allegiance, I suggest, is the key to Savigny: it explains the tensions and seeming paradoxes in his thought, and is at bottom the source of his influence as a legal thinker.

I said earlier that Savigny's ideas in *Vom Beruf* are the Big Bang of German legal theory and that in the end his system exploded under the strain of holding together so many divergent tendencies.<sup>305</sup> Where did the problem lie? Not, I think, so much with the selection of a leitmotif as with the next step, the step that Savigny failed to take—namely, the problem of how ultimately to reconcile the attitude of Kant with that of Herder. Savigny never squarely faced the issue, and perhaps it was concealed from him by the possibility of treating Kantianism as implicit in the legal tradition. But in hindsight we can see that he needed to solve not just the problem of the leitmotif, but also the problem inherited from Rousseau that I termed the problem of the ideal. Just how, precisely, are his jurists to extract their ideal *Volksgeist* from the empirical mass of texts and commentaries? Is the ideal only one among many competing interpretations that we construct of the past? Or is it something we discover, something that already exists in the legal tradition? Or is the Kantian ideal instead a kind of external vantage-point from which we are to evaluate the outpourings of history? And just how are we to discover that ideal? By Rawls's method of reflective equilibrium? By the methods of Dworkin's Judge Hercules? By Habermasian discourse ethics? By Ackerman's neutral dialogues? By G.E. Moore's direct metaphysical intuition?

To address these questions historically, to say how they might have been answered by Savigny, would require us to plunge deep into the waters of nineteenth-century political idealism and to consider the evolution in philosophy that led from Rousseau to Kant to Hegel.<sup>306</sup> We would be unable to escape a close examination of metaphysics, of the views of these thinkers on freedom,

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<sup>305</sup> See *supra* text accompanying note 272.

<sup>306</sup> For a fine recent study in English of the beginnings of this evolution, see the two volumes, FREDERICK C. BEISER, *THE FATE OF REASON: GERMAN PHILOSOPHY FROM KANT TO FICHTE* (1987); and FREDERICK C. BEISER, *ENLIGHTENMENT, REVOLUTION, AND ROMANTICISM: THE GENESIS OF MODERN GERMAN POLITICAL THOUGHT, 1790-1800* (1992). For the classic account in German, see RICHARD KRONER, *VON KANT BIS HEGEL* (1921-1924) (2 vols.).

history, empiricism, moral cognition, and abstract entities; for as we have seen those issues lie at the core of the problem of the ideal. But it should also be observed that, as I have just hinted, those issues are still alive in present-day legal philosophy. Indeed, in the years from about 1850 onward legal philosophy in most of the Western world took a decided turn towards positivism; Savigny's *problématique* became lost from sight, and it was natural to read him as an "historical positivist" and the forerunner of conceptual jurisprudence. Only in recent decades—first, somewhat haltingly, in Germany, and then, with the work of Rawls, in America<sup>307</sup>—have the old Kantian themes been restored to the center of attention; and it is now possible to read Savigny with a better appreciation of the problems he faced and of what he was attempting to do.

At bottom, I think, the problems go back to the great *massif* in Western legal thought that divides the post-Kant, post-Herder, post-Revolutionary world from what went before. And ever since, legal philosophy has been afflicted by the philosophical condition that Tom Nagel calls "double vision."<sup>308</sup> On the one hand we must, as it were, look at the law externally as the product of the empirical beliefs and desires of the people; we are driven to this external point of view not just by the—ultimately very Herderian—requirements of what Herbert Hart called "descriptive sociology,"<sup>309</sup> but also by the political theory of modern democracy. But on the other hand judges must decide cases, and in deciding cases they cannot simply adopt the point of view of a descriptive sociologist. They must interpret the past and make judgments about how the power of the state should be exercised; this requires them to employ their practical reason and to adopt the internal point of view of a participant in the legal order.<sup>310</sup> How exactly the external point of view is to be combined with the internal is a contentious problem, and it will suffice here to observe that that problem is still, at root, intimately bound up with the metaphysical issues that were faced by the German idealists.<sup>311</sup> One can, of course, find deep

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<sup>307</sup> The revival of Kantianism and the impact of Rawls on the German thinkers is sketched in DREIER, *supra* note 198, at 287-88.

<sup>308</sup> NAGEL, *supra* note 82, at 86-89.

<sup>309</sup> H.L.A. HART, *THE CONCEPT OF LAW*, at v (1961).

<sup>310</sup> On the distinction between the internal and the external points of view, and the importance of this distinction for modern legal philosophy, see DWORKIN, *supra* note 82, at 78-85.

<sup>311</sup> The continuing importance of these metaphysical problems, and their interconnections with each other and with modern moral and political philosophy, is made

connections between law and metaphysics in earlier thinkers, from Plato onwards.<sup>312</sup> But the problem of double vision, the connection to democratic political theory, the interjection of historicism and nationalism are all new, and the metaphysical issues have taken on an intensity that sets them apart from everything that went before.

Before we leave these matters, one final point is in order. I began this inquiry into the foundations of comparative law by observing that, at least *prima facie*, there exists a connection of comparative law to legal philosophy, and that philosophers can take an interest in questions of yield, of design, and of execution. This made it sound as though the connection were loose and contingent: a matter of certain problems striking a philosopher as worthy of investigation. But the course of our argument has brought us, by an unexpected route, to a different and deeper conclusion. For precisely one of the creations of early nineteenth-century philosophical idealism was the new academic discipline of comparative law, a subject that had scarcely existed before Herder elevated historicism and nationalism into a new world view.

The story of the origins of comparative law is complex and surprising. Although one might expect a link to the Historical School, the new subject owed less to Savigny than to the ideas of his critics: Savigny himself was cool to comparative scholarship. But those critics, too, based their arguments on Kant and Herder and Hegel: one finds the same metaphysical issues, the same struggle with the task of idealism, in Feuerbach, in Hugo, in Zachariae, in Mittermaier, and above all in Eduard Gans, as one does in Savigny.<sup>313</sup> Comparative law, in other words, was hatched from

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abundantly clear in Tom Nagel's study of "the view from nowhere." NAGEL, *supra* note 82.

<sup>312</sup> It may at this point be worthwhile to observe that there exist significant parallels between the issues that confronted Kant and his successors and the issues that arose in the exchanges between Scotus and Occam at the beginning of the fourteenth century. I shall not discuss the issue here, since to do so would take us too far astray; but it is important to observe that these philosophical debates, seemingly unrelated to "practical" legal issues, in fact had a large impact on the development of the substance of the law. GORDLEY, *supra* note 142, at 23-29.

<sup>313</sup> The historical origins of comparative law are complicated, and I must defer their detailed discussion for another time. Prior to the early nineteenth-century, philosophers such as Montesquieu and Vico had suggested, and to some extent undertaken, a comparative study of law. See MONTESQUIEU, *DE L'ESPRIT DES LOIS* (Geneva, Barillot 1748); GIAMBATTISTA VICO, *DIRITTO UNIVERSALE* (Naples, Felice Mosca 1720-1722) (3 vols.), *reprinted in* *OPERE GIURIDICHE* (Florence, Sansoni 1974). But these works did not give rise to any organized academic discipline. The first

the same philosophical incubator and marched to the same philosophical drum, as the modern theory of law—and it is ultimately this fact that makes the subject's link to legal philosophy much more profound than one would at first expect. This fact also explains why the practically minded lawyer's approach—"just match the rules and let's not talk about ideas"—has been such an intellectual disaster, stunting the growth of comparative law, and robbing legal philosophy of one of its most fertile sources of insight.

If my argument is correct, then an inquiry into the foundations of comparative law leads directly into deep philosophical problems. And those problems are not just contingently related to legal philosophy: they are, and have been for two centuries, the central problems of the field. The two inquiries are thus not so much related as, at root, identical. But perhaps this conclusion was to be expected, for did not legal philosophy commence when the Greeks wondered why fire burns everywhere, but the forms of law change from nation to nation?<sup>314</sup>

The detailed investigation of these issues is a task for another time. Let us merely note that, just as legal philosophy is important to comparative law, so too a properly grounded comparative law is important to legal philosophy. But for now our concern is not with philosophy or with the details of Savigny scholarship, but with the impact of his views on the law. Here three points deserve to be stressed.

First, Savigny's professional career lasted approximately from 1803 (the date of his *Treatise on Possession*) to 1849 (the date of the last volume of the *System*). For most of this time, and certainly from 1814 onwards, he dominated German legal scholarship like no other jurist before or since. The dominance continued through his students: Kantorowicz's story about Jhering and Bismarck is well known.<sup>315</sup> Savigny's *Vom Beruf* of 1814, despite or because of its

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systematic scholarly school of comparative lawyers that I am aware of is the group of German law professors just mentioned. They came to comparative law from a variety of different motivations, and, as a group, were far more philosophically-minded than their twentieth-century counterparts. See RODERICH VON STITZING & ERNST LANDSBERG, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* (Munich, R. Oldenbourg 1880-1910) (4 vols.). But their influence faded with the growing trend towards legal positivism, and by 1850 this first blossoming of comparative lawyers had largely vanished. The details are too complex to allow a capsule summary, so I shall have to return to the topic in a subsequent article in this series.

<sup>314</sup> See *supra* note 75 and accompanying text.

<sup>315</sup> Kantorowicz tells the story as follows:

internal tensions, was the source, directly or indirectly, of most of the movements in the legal thought of the nineteenth century, and not just in Germany. It marks the start of modern legal history, legal anthropology, legal sociology, the revival of Roman-law studies, the preparatory scholarly work for the German civil code, and of various forms of relativism and scepticism and positivism that had never previously been known. One can say without exaggeration that Savigny taught law to speak the language of modernity.

Second, the tensions in *Vom Beruf*, the problems that caused his system to burst, were at bottom *philosophical* problems that were also implicit in the writings of Herder and Kant. In other words, the radical shift in legal scholarship had its roots in post-Kantian philosophy. In a sense, the underlying metaphysical problems were already on the scene before Savigny, and they are with us still.

Third, what made Savigny the most influential legal scholar of the century was not (as the telephone-book approach to comparative law would imply) his technical mastery of the black-letter doctrines of Roman law; if that were so, then Thibaut and Gustav Hugo would be very nearly his equals. Savigny was far from the mentality of the Cornell Project on the Formation of Contracts.<sup>316</sup> Rather his greatness came from his fundamentally philosophical vision of the

Among the great scholars the name of Friedrich Carl von Savigny is unique in the sense that in his country it has become sacrosanct. By sacrosanct I mean it is protected by public opinion to the extent that an attack on it no matter how justified is condemned as positively wicked, even as the act of a traitor. I am told there are no sacrosanct names in this country [Britain], but one could cite George Washington in America, Garibaldi in Italy, Lenin in Russia. As to Germany . . . such names are for example those of Frederic the Great and Bismarck, but also that of Savigny. This is astonishing, since except in China the greatest fame has never been achieved by scholars, and particularly not by jurists, whose work is so very technical. Let me give three amazing examples. One of the highest of Savigny's successors, Rudolf Ihering, paid a visit to Bismarck in 1885, and for the benefit of his own family wrote down an account of their conversation which was published long after his death. Many were astonished that a man like Bismarck could have talked of nothing but trivialities, and that a man like Ihering could have written a long report full of nothing but gossip. The explanation was that Ihering's heirs had cut out the one important part, namely, that on Savigny. Savigny had been the teacher of both men and both were agreed in a highly unfavourable judgment on Savigny's character, and had exchanged a series of anecdotes about him which were highly amusing, though perhaps not equally true. There exists a separate publication of this part, too, but none of the biographers of the three great men has ever mentioned it.

Kantorowicz, *supra* note 232, at 326-27 (footnotes omitted).

<sup>316</sup> See *supra* note 132.

private law, a vision of what it is and what it can become. He held out to his contemporaries not just a collection of rules, but a view of Rome, a view of Germany, a view of history, a view of the universities, a view of the role of legal scholarship within the life of the nation, and an interpretation of the principles on which the private law is grounded. And I have been arguing that the core of this entire enterprise was his highly original effort to combine the insights of his two great philosophical predecessors. Later thinkers, developing the divergent tendencies latent in his thought, would arrive at different combinations and different visions; but it was Savigny who imported into German legal thought the ideas of Kant and of Herder, and made them central to all subsequent thought about the foundations of private law.

### E. Conclusion

This has been a long discussion of Savigny and the philosophers, but the effort has yielded important results for our central topic. We can now understand why, throughout the German legal scholarship of the nineteenth century, the ideas of Kant and Herder play such a central role. This insight should help to explain why Alan Watson's example of the ancient law student is so profoundly misleading. Recall the claim. Romulus, says Watson, confronted with the German *BGB* (or the Austrian *ABGB*):

would not be greatly astonished by the substance of the law, though he might well be taken aback by the abstract way in which the rules are set out. Differences of substance of the law there certainly are, but scarcely what might be termed major developments.<sup>317</sup>

But, as we have seen, the very fact that the *BGB* is based on the works of nineteenth-century scholars of Roman law is itself an historical accident, for the study of Roman law was in terminal decline at the end of the eighteenth century and only revived by Savigny's pursuit of a philosophical program. But this fact about the revival of Roman law, important though it is, is not the most significant aspect of the story. For, strictly speaking, what Savigny revived was not, in fact, Roman law, but Roman law on a new intellectual foundation. The rules of the *Digest* were now seen as the products of the German *Volksgeist*; they were embedded in

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<sup>317</sup> The passage is quoted in full at *supra* note 186 and accompanying text.

history, organized into a philosophical system and interpreted in light of Kantian ideals of individual autonomy. This way of looking at Roman law would have been alien to Romulus: the rules, at least on the surface, may look the same, but the underpinnings are entirely different.

Watson has addressed this objection, and his reply is revealing. It places him in the camp of the traditional comparative lawyers, if not quite altogether in the Cornell School. The objection, he says, is “too academic.” He favors the attitude of “commercial lawyers and business men.”<sup>318</sup> If the *rules* of the two systems are the same, then for practical purposes we can ignore the intellectual underpinnings: “It is scholarly law reformers,” he says, “who are deeply troubled by historical factors and habits of thought.”<sup>319</sup>

So, too, with Romulus. The substance of German law and Roman law is the same, although Romulus might be “taken aback” by the abstract presentation. What matters is the *rules*; all that succeeding ages have done is rearrange their sequence. And—we may be tempted to conclude—just as with Roman and German law, so too with the Latin and German language. At root they are identical. For what matters is the underlying Roman alphabet; everything else is just a question of how you sequence the letters.

<sup>318</sup> WATSON, *supra* note 2, at 96-97.

<sup>319</sup> These comments come in a strategically placed passage at the end of *Legal Transplants*. *Id.* Watson there quotes a former Scottish Law Commissioner. The Commissioner, who had been responsible for attempting to reconcile English law with Scots law, had said,

Indeed in many contexts English solutions have to be studied to identify fundamental differences from Scots law cloaked by superficial similarity. Endeavours to achieve unified solutions in the field of Contract law have in particular revealed that what has been assumed to be common ground was approached by members of the Scottish and English Contracts Teams through conceptually opposed habits of thought.

*Id.* To this Watson then replied:

Now this, to me, is rather too academic. If the *rules* of contract law of the two countries are already similar (as they are) it should be no obstacle to their unification or harmonisation that the legal *principles* involved come ultimately from different sources, or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and business men in Scotland and England do not in general perceive differences in habits of thought, but only—and often with irritation—differences in rules.

*Id.* at 96. This passage occurs at the beginning of the penultimate chapter, which is entitled “Some General Reflections,” and in which Watson sums up the principal results of his inquiry.

This analysis, it will be evident, seems to me to get matters backwards. Let us grant—very much *arguendo*—Watson’s claim that the rules of the *BGB* are nearly identical with the rules of the *Digest*. And let us further observe (it can scarcely be doubted) that Romulus would quickly find himself at sea in attempting to communicate with modern German lawyers. What follows from these two facts? Exactly the opposite, I think, of Watson’s conclusion. We can infer that what matters here is not the rules, but the things that cause Romulus his bewilderment. And those things, I have argued, are the new philosophical ideas that underlie the modern German legal system. Watson’s attempt to block this conclusion by invoking the attitude of grumpy “commercial lawyers and business men” does not change my mind; nor am I impressed by his too quick dismissal of “historical factors and habits of thought” as only of interest to “scholarly” thinkers about law. (Why, incidentally, this gratuitous slur on his own species?) For those “habits of thought” lie at the heart of how the law is interpreted, how it is applied, how it develops, how it is reformed, and how its purposes are understood. And those matters are not merely related to the practice of law: they are its core.

I said earlier that the philosophical approach to comparative law is, somewhat surprisingly, of greater utility than the approach that tries to be directly of service to the imagined needs of practicing attorneys. We can now see that the reasoning that commences with a demand that everything be excluded from consideration except the black-letter rules must culminate in a view of comparative law that is too narrow to be practically useful: if “scholarly” is to be a term of abuse, it fits the black-letter theory better than it does mine.

## V. THE DEVELOPMENT OF THE CIVIL CODE

The foregoing argument has furnished us a powerful tool for understanding the development of the modern German civil code. For, as we have seen, Savigny gave to German legal scholarship what might be called the “classical model” of private law—an individualistic model, broadly based on Kantian ideas, that revolves around the concepts of will and of the autonomous personality, and that views the private law as a device for facilitating the legal interactions of free and equal individuals. With the work of Savigny and his followers German legal thought had also decisively turned towards historicism and nationalism; and for the rest of the century

Herderian and Kantian themes were to play themselves out in the field of private law.

The task in what follows is to sketch the impact of these ideas on the law, to give an indication of the extent of their influence, and of the way they continue to affect modern German legal thought. The topic is vast, and I can here give only a schematic overview of some of the most important issues; certain related issues, like the influence of economic theory, I must leave entirely to one side.

For a start we can observe that Savigny's work in private law had implications for public law as well. The arguments for and against a unified German civil code were intimately bound up with the arguments about national unification, but even if we ignore this political background,<sup>320</sup> the classical model implied a certain conception of the role of the state and of the limits of its authority. The private law was to be neutral between individuals; it was to uphold their autonomy while not interfering with the arrangements that they had freely made. In this sense, it was to be removed from politics.

Of course, such a conception of law and the state was certain to be politically controversial, and it is reasonable at this point to conjecture that, despite the asseverations of traditional comparative lawyers, the development of the private law is not to be understood in isolation from the development of constitutional theory. I wish now to explore this conjecture, and to begin, not with private law (which is my ultimate goal) but by considering the ways in which the ideas of Kant and Herder influenced the growth of German constitutional theory. I wish in particular to discuss two central ideas: Kant's conception of the *Rechtsstaat*, and Gierke's conception of the *Sozialstaat*.

### A. *The Influence on Constitutional Law*

#### 1. Kant and the *Rechtsstaat*

In the political thought of the nineteenth century, Savigny's conception of private law fit naturally with the idea of what the Germans call the *Rechtsstaat*—very roughly, a state governed by the rule of law. Nor is this fact surprising, for just as the classical model is grounded in Kant's theory of private law, so the conception of the

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<sup>320</sup> The topic has filled many books; for a valuable recent discussion in English, see JOHN, *supra* note 256, at 42-72.

*Rechtsstaat* is grounded in Kant's theory of public law. They are the twin sides of the same philosophical coin.

The intellectual roots of the *Rechtsstaat* are complex. The central idea of legal limitations on the authority of the prince goes back at least to the Investiture Controversy of the early twelfth century,<sup>321</sup> and one can find foreshadowings in, for example, the writings of medieval German constitutionalists and in Calvinist political theory, as well as in Machiavelli, Locke, Montesquieu, and Rousseau—all of whom were invoked by the political theorists of the nineteenth century. But the term *Rechtsstaat* itself is a term of art; it has no exact counterpart in other languages.<sup>322</sup> The term first came into use at the beginning of the nineteenth century,<sup>323</sup> and its philosophical sense, for some purposes, is perhaps better conveyed by the term *Staat der Vernunft*—the state governed by Reason—in which the government is to follow the rational will of the entire community.<sup>324</sup>

It is important for the discussions that follow to remember that, in the political discussions of the nineteenth century, the term *Rechtsstaat* did not possess a unique meaning. It was the central concept in constitutional theory at a time when constitutional theory lay at the heart of national and local politics; and its exact sense varied over time, over geography, and over the political spectrum. In the early decades of the century (as James Whitman has persuasively shown) it was bound up with a richly historical, romanticizing tendency that looked backwards to the constitutional traditions of the medieval past; later, from about the 1840s onwards, it was to become associated with the abstract, logical style of the school of conceptual jurisprudence.<sup>325</sup> The term was employed in

<sup>321</sup> See generally HAROLD BERMAN, *LAW AND REVOLUTION* (1983).

<sup>322</sup> See BÖCKENFÖRDE, *supra* note 276, at 145; see also Ralf Dreier, *Der Rechtsstaat im Spannungsverhältnis zwischen Gesetz und Recht* (briefly introducing a history of the concept of the *Rechtsstaat*), in RALF DREIER, *RECHT-STAAAT-VERNUNFT* 73 (1991). The central idea, as we shall see, has a number of specifically German peculiarities; in particular one must avoid confusing it with the English idea of the rule of law. See BÖCKENFÖRDE, *supra* note 276, at 144; MARTIN KRIELE, *EINFÜHRUNG IN DIE STAATSLAHRE* 328 (5th ed. 1994).

<sup>323</sup> The term was introduced by Robert von Mohl. See BÖCKENFÖRDE, *supra* note 276, at 144 (citing ROBERT VON MOHL, *STAATSRICHT DES KÖNIGREICHS WÜRTTEMBERG* (Tübingen, M. Laupp 1829)).

<sup>324</sup> According to Böckenförde, the term *Staat der Vernunft* was used by Carl Theodor Welcker in his work *Die letzten Gründe von Recht, Staat und Strafe* which was published in 1813. See BÖCKENFÖRDE, *supra* note 276, at 146 n.6.

<sup>325</sup> On the backward-looking and historicizing tendencies of the early, romantic *Rechtsstaat* thinkers, see WHITMAN, *supra* note 188, at 95-99. For the connection of

one way by the Prussian theorists and in another by the *Rechtsstaat* theorists of the South; moreover, it became so entangled in the political and constitutional disputes of the age that its meaning can at times be hard to pin down with exactitude.<sup>326</sup>

Nevertheless, in retrospect it is possible to make some broad generalizations about the German concept of the *Rechtsstaat*: to say how it evolved in the course of the nineteenth century, and what set it apart from related conceptions in France and Britain.<sup>327</sup> The concept of the *Rechtsstaat* is now generally agreed to have been first formulated by Kant,<sup>328</sup> although he did not himself use the term, and although related ideas had earlier been afoot among the natural-law political theorists of the Enlightenment.<sup>329</sup> Kant viewed the state as an *a priori* concept, as a "union of persons under laws,"<sup>330</sup> and he formulated the basic principles of such a union as follows:

The civil condition, then, considered solely as a legal condition, is founded *a priori* on the following principles:

1. the freedom of every member of the society as a human being;
2. the equality of each member with every other as a subject [*als Untertan*];

later *Rechtsstaat* thought with the conceptual jurisprudence of Puchta, see WHITMAN, *supra* note 188, at 121-24. Whitman gives a rich and nuanced account of the other *Rechtsstaat* thinkers of the period and their various political agendas; readers seeking a fuller treatment are advised to begin with his book.

<sup>326</sup> Savigny himself is hard to classify. Whitman describes him as an adherent of the *Rechtsstaat*, and even as advocating a program that would be "truly, radically liberal." WHITMAN, *supra* note 188, at 101, 111. Eric Wolf, in contrast, describes him as neither an adherent of the *Rechtsstaat* nor a liberal. See WOLF, *supra* note 251, at 508. Both descriptions are defensible. Savigny's thought, as we have seen, contains liberal, Kantian elements; but it also contained an antirevolutionary and conservative strand. The idea of the *Rechtsstaat* and of liberalism became so involved with the political issues of the day—German unification, land reform, individual political liberties—and the meanings shift so readily that one throws up one's hands. See the remarks on the word "liberalism," *infra* note 334.

<sup>327</sup> A helpful brief introduction is the essay by Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in BÖCKENFÖRDE, *supra* note 276, at 143-69.

<sup>328</sup> This is for instance the view expressed in the influential account by Böckenförde, see BÖCKENFÖRDE, *supra* note 276, at 146. Herbert Krüger, in contrast, is dismissive of Kant's influence on the political theory of the nineteenth century; for his (in my opinion, thoroughly unpersuasive) arguments, see Herbert Krüger, *Kant und die Staatslehre des 19. Jahrhunderts*, in PHILOSOPHIE UND RECHTSWISSENSCHAFT 49-56 (J. Blühdorn & J. Ritter eds., 1969).

<sup>329</sup> See GERD KLEINHEYER, STAAT UND BÜRGER IM RECHT 29-52 & n.143 (1959).

<sup>330</sup> KANT, *supra* note 195, § 45; see also *id.* §§ 43, 52.

3. the independence of every member of a commonwealth as a citizen.

These principles are not just laws that are handed down by a state that is already in existence, but principles that are a necessary precondition for the establishment of a state that is in accordance with the pure principles of reason as they concern external human law.<sup>331</sup>

Kant's conception of the state contained two elements that were to be fundamental for all future theorists of the *Rechtsstaat*. First, the state was grounded, not in some divine order, nor in the coercive power of the sovereign, but in the rational autonomy of the individual; the purpose of the state was not, as it were, to impose a government on human beings from some external source, but to serve the interests of free, equal, and self-determining individuals. Second, the functions of the state were to be *limited*: a sphere of private action was to be left to individuals, and within that sphere they were to be free to pursue the development of their own personalities.

As we have seen, the Kantian conception of the state cannot be understood apart from its place within the rest of his philosophical system. In particular, Kant's conception of autonomy and his conception of moral personality were heavily colored by his metaphysics of freedom, and in particular by his doctrine that autonomy is expressed by adherence to the moral law. But when the German political theorists of the nineteenth century elaborated the concept of the *Rechtsstaat* they made two significant changes. Both changes were relevant to private law, and both were in harmony with the attitudes of the entrepreneurial middle class, which was rapidly rising to political and economic power. First, the theorists discarded the metaphysical conception of freedom, and replaced it with a much more empirical conception typical of nineteenth-century laissez-faire economic liberalism: roughly, the conception that freedom consists in the satisfaction of one's material needs and desires.<sup>332</sup> Second, they added a crucial

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<sup>331</sup> IMMANUEL KANT, ÜBER DEN GEMEINSPRUCH: DAS MAG IN DER THEORIE RICHTIG SEIN, TAUCHT ABER NICHT FÜR DIE PRAXIS § II (1793). (This essay—*On the Common Saying: That May Be True in Theory, But Not in Practice*—has several times been translated into English, with no standard pagination; the quotation occurs near the beginning of section II, *On the Relationship of Theory to Practice in Constitutional Law* (contra *Hobbes*).)

<sup>332</sup> For a general account of these developments, see WIEACKER, *supra* note 193, at 430-68.

*economic* component that was not to be found in Kant, namely, security of private property.<sup>333</sup> To put the point crudely, where for Kant the essence of the *Rechtsstaat* lay in the triad, freedom-equality-independence, for the economic liberals it lay in freedom-equality-property: for Kant, freedom was interpreted in a moral sense, for the liberals, in a materialistic sense.<sup>334</sup> This is a crucial point, for it explains how Kant's ideas could have been central both to the liberals and to their opponents, and why so many of the political debates of the nineteenth century were disguised as debates about the proper interpretation of the Kantian theory of property.

Certain basic political implications followed from the new conception of the state; and in particular certain rights that had not been acknowledged as rights in, say, the enlightened despotism of Frederick the Great were now seen as fundamental to a well-ordered society: freedom of speech, freedom of the press, freedom of travel, freedom of contract, freedom to acquire private property, equality before the law, constitutional government, independence of the judiciary, and the right of the people to be consulted in the making of legislation. The idea of the *Rechtsstaat* provided the theoretical underpinnings for these demands which, as the middle classes grew in education and in influence, had by mid-century been introduced as constitutional reforms almost everywhere in Germany.<sup>335</sup>

But there existed another, less democratic and progressive side to the German *Rechtsstaat*. It is important to observe that nine-

<sup>333</sup> These remarks should not be taken as a full characterization of the idea of the *Rechtsstaat*; in particular, I here leave out of account the theme of procedural justice which was central to the theoreticians of the nineteenth century.

<sup>334</sup> The term "liberal" is multiply ambiguous and can lead to confusion. In nineteenth-century Germany, and still today in continental Europe generally, the "liberal" political parties are broadly speaking identified with the protection of *economic* rights—more so than in the English-speaking world, and especially America, where *political* rights are closer to the core of concern. In the discussion that follows I shall attempt, wherever confusion might result, to use the term "economic liberal" whenever the special, continental sense is intended. For a detailed analysis of the many different senses of the word, see the entry *Liberalismus*, in 5 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE 255-71 (1980).

<sup>335</sup> Thereby introducing (as it is a commonplace to observe) many of the accomplishments of the French Revolution without the necessity for a revolution. See BÖCKENFÖRDE, *supra* note 276, at 151. Excellent recent studies of German constitutional history are ERNST-WOLFGANG BÖCKENFÖRDE, *MODERNE DEUTSCHE VERFASSUNGSGESCHICHTE 1815-1916* (2d ed. 1981); DIETER GRIMM, *DEUTSCHE VERFASSUNGSGESCHICHTE 1776-1866* (1988); 2 MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND* (1992).

teenth-century German political theorists in the Kantian tradition held a wide range of views about the proper institutional organization of the state. Some, like the "Göttingen Seven" were believers in parliamentary government; but others, like the influential F.J. Stahl, were conservative monarchists.<sup>336</sup> In terms of political power the conservatives held the upper hand for most of the nineteenth century. In the aftermath of the French Revolution, and with the growing influence of conservative political thought in Germany, the official doctrine held that the *pouvoir constituant* was lodged in the King: although in a constitutional *Rechtsstaat* the King was obligated to govern in accordance with the principles of freedom, equality, and human dignity, and was obligated to consult with the people before enacting new legislation, there was no further requirement of a democratic constitution, and no right of the people to rebel.<sup>337</sup> The movements for democratic reform that arose in Hanover in the 1830s, in the Revolution of 1848, and in the Prussian constitutional conflict of 1862-66 were put down by force.<sup>338</sup>

It has been customary to see in this repressive political history a great divergence between authoritarian Germany and the democratic West. British constitutional thought (it is said) was forged in the struggle between Crown and Parliament, and, as a result, in the writings of the Levellers, of the radical Whig tradition, and even of Locke, one can find a strong dose of democratic political theory. Whereas Germany was heir first to the enlightened despotisms of the eighteenth century, and then to conservative reaction to the French Revolution. These traditions saddled Germany with profoundly undemocratic political institutions. As one German scholar observes, in contrast to the Anglo-American

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<sup>336</sup> The "Göttingen Seven" were seven professors dismissed from their posts in 1837 when they protested the suspension of the Hannoverian Constitution by King Ernst August; two of the seven were the brothers Grimm. See WHITMAN, *supra* note 188, at 146. Whitman also notes the diversity of political views among the theorists of the *Rechtsstaat*, observing that R.V. Mohl, who popularized the term, eventually became strongly parliamentarian; that K.S. Zachariae was "an obstinate moderate, difficult to classify," and that F.J. Stahl was a prominent monarchist. *Id.* at 95.

<sup>337</sup> As I remarked earlier, the terms "conservative" and "liberal" must here be taken with caution. See *supra* note 334; see also *supra* note 190 (James Whitman's cautionary remarks). For a general account of the intellectual origins of German conservative thought, see KLAUS EPSTEIN, *DIE URSPRÜNGE DES KONSERVATISMUS IN DEUTSCHLAND. DER AUSGANGSPUNKT: DIE HERAUSFORDERUNG DURCH DIE FRANZÖSISCHE REVOLUTION 1770-1806* (1973).

<sup>338</sup> See KRIELE, *supra* note 322, at 320, 322, 326.

ideal of the rule of law, "it was of the essence of the German conception of the *Rechtsstaat* in the eighteenth century that it was compatible with absolutism."<sup>339</sup> And to this fact he ascribes all the catastrophes of German political history, from the failure of the revolution of 1848 to the Third Reich.<sup>340</sup>

I do not wish to deny all legitimacy to this familiar stereotype: even melodramas have their kernel of truth. But the simple opposition of authoritarianism and democracy is plainly inadequate to capture the complexities of German and British constitutional thought in the nineteenth century. Indeed, strictly speaking Britain is even today not, in the eyes of the law, a democracy: for sovereignty resides, not in the people, but in the Queen-in-Parliament; and Parliament represents, not the mass of British subjects, but the Estates of the Realm. And the Kaiser's Germany, like Victoria's Britain, was a Parliamentary monarchy, a *Rechtsstaat* with a flourishing diversity of political parties; indeed, in the closing years of the century the German Social Democrats set the European standard for democratic political reform.<sup>341</sup>

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<sup>339</sup> KRIELE, *supra* note 322, at 313. Note that the *Kantian* conception of the *Rechtsstaat* was not compatible with absolutism: it was compatible with constitutional monarchy, which is a different matter altogether. The foregoing view of the contrast between Germany and the democratic West can be found in its entirety in Kriele's work. Kriele also attributes the differences to the fact that Germany and England held different conceptions of the role of law within the state. The common-law tradition conceived of law as a process for removing injustices one-by-one as they emerged from below; whereas the continental tradition, following in the footsteps of Justinian, conceived of it as a system of justice handed down by the sovereign from above. He observes:

The idea of natural law that underlies the idea of the *Rechtsstaat* has as its starting-point the ideal of positive *justice*. The orientation on the correction of injustice fills the [English] ideal of the rule of law with concreteness and life. The orientation on justice alienates natural law from reality.

*Id.* at 329 (translation by author).

<sup>340</sup> Kriele notes that none of the nineteenth-century efforts at democratic constitutional reform succeeded. And as a result:

Germany never fully lived in the natural-law tradition of parliamentary government; for it never experienced parliamentary government, and in the collapse of 1849 it fell out of the common-European tradition of natural law altogether. The consequence was that the natural-law foundations of parliamentarianism were also not understood later, in the years of the Weimar Republic; the Weimar Constitution was therefore unable to develop any legitimacy or stability. One can date the "dark century" in Germany quite precisely, namely, from 1849, the catastrophic turning-point in German history, to 1949, the year of the creation of the modern Constitution.

*Id.* at 330 (translation by author).

<sup>341</sup> See generally RUSSELL, *supra* note 191.

The intellectual issues here are subtle, and in part have been misunderstood because inadequate attention has been paid to the philosophical relationships between the *Rechtsstaat* and the classical conception of private law. As a first step towards seeing why this should be so, let us observe that the significant distinguishing fact about the *Rechtsstaat* is that it was not *per se* committed to monarchy or democracy or indeed to any particular institutional form of government.<sup>342</sup> The post-Kantian German constitutional theorists were scarcely advocates of monarchical tyranny; and what needs to be explained about their thought is not why they were absolutists (which they were not), but something quite different: how a proponent of monarchy and a proponent of democracy could both be proponents of the *Rechtsstaat*. The answer, I think, for many German theorists lies ultimately in a distinctive manner of partitioning the universe of political theory. To many German thinkers of the nineteenth (and indeed twentieth) century, and in contrast to the prevailing attitude in Britain and America, liberalism and democracy were not so much companions as diametrical opposites. Liberalism aimed at the greatest possible freedom for the individual, and at limiting the power of the state; its origins were to be found in Kant and in the anti-monarchical tradition of England and of medieval Germany. The origins of democracy, on the other hand, were to be found in Robespierre and the Terror: the true heirs to the absolute despotism of the French monarchs. The aim of democracy was not liberty, but community, and the maximum possible participation of the individual in the power of the state. Distrust of democracy and the desire to protect the rights of the individual against the oppression of the majority is, of course, to be found in even the most liberal of Anglo-American political philosophers—in Madison, for instance, and even in John Stuart Mill—but the sharp antithesis between liberalism and democracy is more characteristic of German political thought. Its roots go back to Kant, who, in the wake of the excesses of the French Revolution, had classified untrammelled majority rule—which he called “democracy”—as a form of despotism. In a centrally important passage he observed that the form of government in a state will be either *republican* or *despotic*:

*Republicanism* is the political principle of separating the executive power (the government) from the legislative power; despotism is

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<sup>342</sup> I am indebted for this point to Delf Buchwald.

the political principle of the unconstrained execution by the state of laws which it itself has made, and is despotic to the extent that the public will is treated by the regent as his own private will. Of the three forms of state, *democracy*, in the strict sense of the term, is necessarily a *despotism* because it establishes an executive power in which all can decide about and indeed also against the solitary individual (who thus does not consent); and this is a contradiction of the general will with itself and with freedom.<sup>343</sup>

The nature of the nineteenth-century *Rechtsstaat* ideal can best be seen if we consider, not what it supported, but what it opposed; and it opposed theocracy and despotism, but not monarchy or aristocracy.<sup>344</sup> For a large and influential class of German political theorists the central task was the protection of individual rights, and the most promising means was not so much to secure democracy as to guarantee the impartiality of the state. This fact explains why some adherents of the *Rechtsstaat* could favor an extension of the franchise, while others could be monarchists: in a sense, the precise institutional form of the state and the precise degree of popular participation were side issues.

But how was the impartiality of the *Rechtsstaat* to be secured? The solution that emerged in the second half of the nineteenth century among the most important constitutional thinkers is peculiar to Germany and cannot be understood unless one knows both the Kantian background and the earlier developments surrounding Savigny's theory of private law. The central idea was to rely, not primarily on a form of *government*, but on a form of *law*: legal rules enacted by the legislative power were to conform to certain abstract, formal requirements, and to certain requirements of logical system. (One should at this point recall that, for Kant, the Categorical Imperative imposed just such requirements on the principles of action. That is, you can act from a particular principle

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<sup>343</sup> IMMANUEL KANT, ZUM EWIGEN FRIEDEN 25 (Königsberg, F. Nicolovius 1795). (The passage occurs in the section entitled, *First Definitive Article for Perpetual Peace*.) Kant's own opinion of democracy is difficult to pin down with certainty; the issue is complex, and has been much discussed. He greeted the French Revolution enthusiastically, and his anti-democratic remarks in his published writings may in part have been intended to satisfy the Prussian censors. For Kant's complex views on these subjects, see PETER BURG, KANT UND DIE FRANZÖSISCHE REVOLUTION (1974); Iring Fetscher, *Kant und die französische Revolution*, in BATSCHA, *supra* note 194, at 69-70; Dieter Henrich, *Kant über die Revolution*, in BATSCHA, *supra* note 194, at 359-65. For a discussion of the views of Hegel on the Revolution, see JOACHIM RITTER, HEGEL UND DIE FRANZÖSISCHE REVOLUTION (1972).

<sup>344</sup> This point is well-made by BÖCKENFÖRDE, *supra* note 276, at 148.

*P* only if it passes the following formal test: Imagine that, acting as a legislator, you were to enact *P* into law; *P* may contain no reference to any specific individual, and it is to be applied equally to everybody in the community, including yourself. If under these circumstances you would be willing to live under *P*, then *P* passes the test of the Categorical Imperative, and is morally permissible.)<sup>345</sup> In a similar manner, said the theorists of the *Rechtsstaat*, the laws enacted by the legislative power were to satisfy certain formal requirements: to respect individual liberties; to apply equally to all; to be arranged in a perspicuous, logical order. And then—this was a crucial component of *Rechtsstaat* thought, and grew directly out of Kant's political theory—the statutes were to be applied by an impartial bureaucracy, institutionally independent of the legislature.

The result was the much-maligned Prussian bureaucratic and administrative state. To many constitutional theorists of the Kaiser's Germany, this Kantian solution seemed to offer a promising way to secure the liberal values of equality and individual autonomy: more effective, in the end, than the adoption of majority rule.

## 2. Gierke, Herder, and the Social State

The economic-liberal conception of the *Rechtsstaat*, recall, as it was developed by the theoreticians of the nineteenth century, contained two important elements: first, it was concerned with the freedom and equality and independence of *individuals*; second, it was concerned with protecting the acquisition and possession of *private property*. Both elements were controversial, and both came under attack in the nineteenth century. These attacks are central to our story; for although they commenced in constitutional law, they soon overflowed into private law as well.

It was natural, given the strength of the movement for German national unification, and given the historical turn that Savigny had introduced into legal scholarship, that in addition to the Historical School of Roman law there should also arise a Historical School of German law, studying, on Herderian principles, the evolution of the unique legal tradition of the ancient Germans, and paying special attention to the law of the Middle Ages.<sup>346</sup> The leading theoretician

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<sup>345</sup> This is one of the five or so distinct formulations Kant gives of the Categorical Imperative. See KANT, *supra* note 58, at 421-22. I have of course squelched all the philosophical details.

<sup>346</sup> See JOHN, *supra* note 256, at 108-16 & *passim*; FRANZ WIEACKER, *PRIVATRECHTS-*

among the Germanists, and the most influential writer of his time on the concept of the state, was Otto von Gierke. Gierke's magisterial four-volume study of the history of political theory in Germany appeared between 1868 and 1913.<sup>347</sup>

Gierke and his fellow Germanists, while committed to the general conception of the *Rechtsstaat*,<sup>348</sup> were critical of the individualistic and (in the European sense of the term) liberal foundations Kant and the later *Rechtsstaat* theorists had given it. (His four-volume treatise was in fact entitled *The German Law of Associations*, and dealt not only with the state, but with all the legally recognized forms of human *groups*;<sup>349</sup> the treatise thus investigated the foundations of the state in tandem with the foundations of the law of the corporation.) In Gierke's analysis, individualistic economic liberalism, whether in private law or public, was not, as the Romanists claimed, politically neutral. Rather, under the guise of an impartial legal formalism, individualistic economic liberalism fostered harsh economic competition between individuals, broke down the sense of community that had been fostered by the medieval guilds, and favored the propertied classes at the expense of the have-nots.

As a general rule, in the debates about codification in the final third of the nineteenth century, the advocates of a code based on Roman law tended to be economic liberals and to side with the propertied middle classes. The advocates of a code based on medieval German law tended to be economic communitarians, and to side with the rural peasantry, the traditional apprenticed craftsmen, and the new class of urban industrial laborers. It can, however, be misleading to describe the debate between Romanists and Germanists as a debate between conservatives and liberals. The

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GESCHICHTE DER NEUZEIT 403-05, 468-88 (2d ed. 1967). For Gierke's own retrospective summary of the controversy, see OTTO VON GIERKE, DIE HISTORISCHE RECHTS-SCHULE UND DIE GERMANISTEN (1903).

<sup>347</sup> OTTO VON GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Berlin Weidmannsche Buchhandlung 1881) (4 vols.) [hereinafter GIERKE, GENOSSENSCHAFTSRECHT]. Parts of this work have been translated. See, e.g., OTTO VON GIERKE, NATURAL LAW (Ernest Barker trans., 1934) [hereinafter GIERKE, NATURAL LAW]; OTTO VON GIERKE, THE THEORY OF SOCIETY (Ernest Barker trans., 1934) [hereinafter GIERKE, THEORY OF SOCIETY]; POLITICAL THEORIES OF THE MIDDLE AGE (Frederick W. Maitland trans., 1900).

<sup>348</sup> Indeed, one of the central documents of *Rechtsstaat* theory was written by Gierke's Germanist colleague, Otto Bähr. See OTTO BÄHR, DER RECHTSSTAAT (Göttingen, G.M. Wigand 1864).

<sup>349</sup> See generally GIERKE, GENOSSENSCHAFTSRECHT, *supra* note 347.

Romanists were certainly, in a sense, conservatives, preoccupied with social stability and with the protection of private property, but their conservatism rested on a theory of economic liberalism that had been developed in conscious opposition to the social ideas of late feudalism. The Germanists, in contrast, upheld the interests of the working classes, and occupied a middle ground between the Romanist conservatives and the socialists; they were certainly, in a sense, progressives, but their progressivism looked back to an ideal of medieval community. Both the Romanists and the Germanists, indeed, stood in a complex relationship both to the medieval past and to the new political ideas of post-Kantian philosophy. For reasons of space I must slur the complexities in the discussions that follow.

The starting point for Gierke's alternative theory of the *Rechtsstaat* was not the individual, but the group; in taking this starting point he explicitly followed Herder.<sup>350</sup> On his view, the state and (significantly) such institutions as private property are not founded on a social contract. That is, they do not rest on an agreement between free and equal individuals who exist in a state of nature.<sup>351</sup> The group, conceived of as an organic unity, comes first; it has its own personality, its own existence. "The idea of the juristic personality of the state," he wrote, "is the central concept of constitutional law, and must form the starting point for the juristic construction of all the basic constitutional doctrines."<sup>352</sup>

Gierke had numerous interrelated motives for adopting the theory of the state as an organic unity. One grew out of his general theory of corporate and labor law. The traditional social contract theory of the state, which he opposed, conceived of associations as legal *fictions*: they were created by the state, and had no independent existence. In particular (and politically this was the central issue) labor unions and other organizations designed to protect the welfare of the working class had no claim to legal recognition. To this fiction theory of the corporation, Gierke opposed his theory of groups as having "real juristic personality"; the theory is complicated and in many points obscure, but the basic idea was that the

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<sup>350</sup> See GIERKE, *supra* note 346, at X-X n.1-7; GIERKE, *NATURAL LAW*, *supra* note 347, at 103-07; WOLF, *supra* note 251, at 690-95. A useful introduction to the general topic of organic conceptions of the state is Ernst-Wolfgang Böckenförde, *Der Staat als Organismus: Zur staats-theoretisch-verfassungspolitischen Diskussion im frühen Konstitutionalismus*, reprinted in BÖCKENFÖRDE, *supra* note 276, at 263-72.

<sup>351</sup> See GIERKE, *NATURAL LAW*, *supra* note 347, at 103-07.

<sup>352</sup> OTTO VON GIERKE, *DIE GRUNDBEGRIFFE DES STAATSRICHTS* 79 (1915).

state is but one association among many, and that it therefore cannot arbitrarily deny recognition to other co-equal, real juristic entities.<sup>353</sup> A second motive, directly related to the codification of private law, was his desire to criticize the liberal *laissez-faire* conception of private property; I shall return to this topic shortly. A third motive was his desire to bind the state more closely to the idea of *law* than some of the more positivistically inclined theorists of the *Rechtsstaat* had done. In particular, for Gierke the state was not *toto caelo* different from the associations it contained: both were organic unities with their own juristic personalities; the state was distinguished merely by being the supreme association that encompassed the nation itself. It followed for Gierke that the *Rechtsstaat* could not set itself above the other associations, and could not be regarded as a *sui generis* institution in which the rulers, unconstrained by legal norms, were authorized to issue orders to their subjects. Law was an organic outgrowth of human associations; and it followed that the state had to be situated *within* the law, not *over* it. In the *Rechtsstaat* thus conceived there must be an organic "unity of state and law."<sup>354</sup> All governmental functions must be carried out in accordance with the constitution,<sup>355</sup> in particular the actions of the administrative agencies, which until that time had been subject to few constraints, should now, he argued, be open to judicial scrutiny.<sup>356</sup> We see here a significant departure from the original Herderian conception of the nation: where for Herder the organic conception of the nation had been essentially non-political or even antipolitical, for Gierke it served to link the state tightly with the concept of law.

I said above that Gierke had two principal criticisms of the nineteenth-century liberal *Rechtsstaat*. One was of its individualism; the second concerned its emphasis on private property and on the freedom of contract. The new individualistic ideal to be sure was a liberation from the status-based society of the Middle Ages; but as

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<sup>353</sup> For a general discussion of the problem of juridical personality as that problem developed in the nineteenth century, see BINDER, *supra* note 274.

<sup>354</sup> This idea is explored by Gierke in his booklet *Die Grundbegriffe des Staatsrechts*. See GIERKE, *supra* note 352.

<sup>355</sup> Gierke often returns to this theme. See, e.g., 1 GIERKE, *GENOSSENSCHAFTSRECHT*, *supra* note 347, at 831.

<sup>356</sup> See BÖCKENFÖRDE, *supra* note 276, at 154; ERNST-WOLFGANG BÖCKENFÖRDE, *GESETZ UND GESETZGEBENDE GEWALT* 234-35 (1958). For contemporary works covering the same ground, see ALBERT HAENEL, *DEUTSCHES STAATSRECHT* (Leipzig, Dunckner & Humblot 1892); HUGO PREUSS, *GEMEINDE, STAAT, REICH ALS GEMEINSCHAFTSCHAFT* (Berlin, J. Springer 1889).

critics were quick to observe, it also opened the door to vigorous competition between individuals, and to the almost unlimited acquisition of wealth by the few. These inegalitarian economic consequences of the bourgeois *Rechtsstaat* were already being pointed out in the middle decades of the nineteenth century, notably by the constitutional scholar Lorenz von Stein, who made one of the earliest attempts to reconcile the *Rechtsstaat* with a mild form of socialism.<sup>357</sup>

It is important to observe that Kant himself did not emphasize private property in the way that later *Rechtsstaat* theorists did. (His three fundamental principles, remember, were freedom, equality, and independence;<sup>358</sup> not freedom, equality, and property. Moreover, his conception of freedom was moral and idealistic, rather than acquisitive and materialistic.) For this reason the debate in Germany about social democracy and its compatibility with the *Rechtsstaat* has often been couched in Kantian terms. It has been argued that Kant's theory of property, when combined with his categorical imperative that human beings are always to be treated as ends and never solely as means, provides the philosophical foundation for social welfare legislation within the *Rechtsstaat*.<sup>359</sup> Leading philosophers of social democracy in the nineteenth century tried to reconcile Kant with Marx<sup>360</sup> and indeed Engels himself declared: "We German socialists are proud of our descent, not only from Saint-Simon, Fourier, and Owen, but also from Kant, Fichte,

<sup>357</sup> Von Stein's principal works on these subjects were: LORENZ VON STEIN, *DIE GESCHICHTE DER SOZIALEN BEWEGUNG IN FRANKREICH VON 1789 BIS AUF UNSERE TAGE* (Leipzig, O. Wigand 1850) (3 vols.); LORENZ VON STEIN, *DER SOCIALISMUS UND COMMUNISMUS DES HEUTIGEN FRANKREICHS* (Leipzig, O. Wigand 1842); LORENZ VON STEIN, *SYSTEM DER STAATSWISSENSCHAFT* (Stuttgart, J. Gotta 1852-1856) (2 vols.). For an introduction to his thought, see Ernst-Wolfgang Böckenförde, *Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat*, reprinted in BÖCKENFÖRDE, *supra* note 276, at 170-208. The ideas of von Stein were taken up by Karl Marx, and provided part of the intellectual basis for the nineteenth-century movement for social democracy. See GERD KLEINHEYER & JAN SCHRÖDER, *DEUTSCHE JURISTEN AUS FÜNF JAHRHUNDERTEN 270* (1983) (reporting that "Marx knew his writings, and used them extensively" (translation by author)).

<sup>358</sup> See *supra* text accompanying notes 330-34.

<sup>359</sup> The history of these arguments is summarized by Ralf Dreier, *Eigentum in rechtsphilosophischer Sicht*, reprinted in DREIER, *supra* note 322, at 168, 174-83.

<sup>360</sup> See, e.g., Hermann Cohen, *Introduction* to F. A. LANGE, *GESCHICHTE DES MATERIALISMUS* at xiii-lxxvi (Leipzig, J. Baedeker, 5th ed. 1896) (providing an excellent example of late-nineteenth-century neo-Kantian socialist thought); Karl Vorländer, *Kant und Marx*, reprinted in BATSCHA, *supra* note 194, at 419-51.

and Hegel. The German labor-movement is the heir of German classical philosophy."<sup>361</sup>

The crucial point about Gierke's theory of public law is that it occupied the middle ground between the economic individualism of the Romanist *Rechtsstaat* and the collectivist tendencies of the socialists: He sought to uphold the moral ideal of the *Rechtsstaat*, but to address the problems it had spawned of social and economic inequality. The result was the theory of what became known as the *Sozialstaat*—the Social State.

I said earlier that he had two political purposes in promoting his theory of the state as an "organic justice personality": first, to embed the *Rechtsstaat* firmly within the law (and in particular to subject the actions of the administrative branch to legal control); second, to correct the harmful consequences of *laissez-faire* economics, which, in his view, had undermined the social cohesion of the Middle Ages. The task, in other words, was to preserve the virtues of the *Rechtsstaat* while freeing it from the bourgeois-liberal construction that had been placed upon it. Gierke's principal tool in this endeavor was his theory of property. In his view Locke had erred in making the *individual* the ultimate logical foundation of the state. On Locke's theory the individuals who existed in the state of nature already owned private property; and as a result, when they came together to create the state through the social contract, their chief aim was to secure their possessions. In other words, private property is prior to the state, and the purpose of the state is to protect it. For Gierke, in contrast (and here he draws explicitly on Herder) the ultimate foundation of the state is not the bare individual, but the *community*; in the state of nature all property is held in common, and only *after* the state has been established does the institution of private property arise. Private property is created by the state to serve the common good; it follows that any socially harmful mis-distribution of property, and in particular any gross inequality in wealth, demands a special justification.<sup>362</sup>

Gierke never joined the socialist party, and always accepted the institution of private property.<sup>363</sup> But the emphasis of his thought

<sup>361</sup> RUSSELL, *supra* note 191, at 1 (quoting Engels).

<sup>362</sup> This argument is a recurring theme throughout Gierke's work; it is particularly evident in his criticisms of the drafts of the *BGB*, which we shall come to later. See *infra* part V.B.2. For a treatment in English, see his discussion of individualistic theories of property in GIERKE, *THEORY OF SOCIETY*, *supra* note 347, at 103-07.

<sup>363</sup> See WOLF, *supra* note 251, at 701.

is crucially different from the economic liberalism of his day. And as with his theory of the state, so with his theory of property: he occupied the strategic middle ground between the dominant economic liberals and their principal challengers, the socialists.<sup>364</sup>

### 3. Conclusions on Constitutional Law

We have now, briefly and very superficially, considered the nineteenth-century debates between the Romanist proponents of the economic-liberal *Rechtsstaat* and the Germanist proponents of the *Sozialstaat*, and we have noted the influence of the ideas of Kant and Herder. It would be easy to expand the example to cover the rest of public law; to show the influence of these ideas, and of other philosophical ideas, on criminal law,<sup>365</sup> on administrative law,<sup>366</sup> and on tax policy.<sup>367</sup> But, as I said at the outset, this is only a sketch, and for present purposes it will suffice if we limit our attention to constitutional law.

Gierke's idea of "social law" and his belief that it was compatible with the underlying principles of the *Rechtsstaat* proved enormously influential; as trade unionism grew, as the Social Democratic Party gained in strength, and as the need for social legislation became increasingly obvious, especially in the years after World War I,

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<sup>364</sup> Thus he could both declare:

[I]n the modern age Roman law, natural law, economic liberalism, individualism, and capitalism stand as the destroyers of the organic and social inheritance of German law;

and also warn that

from the other side the ideas that in the socialist doctrines have been raised into a system, and which conceive of and value human beings exclusively as members of society, thereafter to turn all laws into an administrative order run by the state.

*Id.* (translation by author).

<sup>365</sup> Here the obvious starting-point would be the works of Gustav Radbruch or of Hans Welzel, both of whom were distinguished legal philosophers as well as theorists of the criminal law. See GUSTAV RADBRUCH, *GESCHICHTE DES VERBRECHENS* (1951); GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* (1932). See also the discussion of Radbruch in WOLF, *supra* note 251, at 713-66. See generally HEINRICH MITTEIS & HEINZ LIEBERICH, *DEUTSCHE RECHTSGESCHICHTE* 400-08, 471-74 (19th ed., 1991) (discussing the development of the criminal law and citing copious references to the philosophical literature).

<sup>366</sup> For the history of public law generally the best place to start is with the masterly account by STOLLEIS, *supra* note 335. Other useful works are cited by MITTEIS & LIEBERICH, *supra* note 365, at 408.

<sup>367</sup> See, e.g., ERNST FORSTHOFF, *RECHTSSTAAT IM WANDEL* 52-53 (1964) (containing a famous discussion of the use of tax law in the *Sozialstaat*).

Gierke's ideas, with their Kantian and Herderian underpinnings, gradually displaced the traditional *laissez-faire* conception of the *Rechtsstaat*.<sup>368</sup> And his ideas, even his terminology, have become a central pillar of German constitutional law. Although his arguments represented an unorthodox, minority view in the nineteenth century, his "third way" between *laissez-faire* liberalism and socialism has been the dominant German tradition in the twentieth century.<sup>369</sup> The German Constitution of 1949 addressed the two traditional problems of *Rechtsstaat* theory—its compatibility with non-democratic government, and its possessive individualism—by declaring, in the first article dealing with the structure of government, that "The Federal Republic is a federal democratic and social state." With this sentence Gierke's idea of social law had been written into the Constitution. As for his theory that the state must be embedded within the law, that it emerges from the people and is not placed over them, the next line of the Constitution provides: "All state power proceeds from the people. It is exercised by the people in elections, in referenda, and through special organs of legislation, administration, and adjudication."<sup>370</sup> As for the central concept of private property, the focal point of the nineteenth-century debates, section 14 of the 1949 Constitution, contains elements from both traditions:

(1) Property and the right of inheritance are guaranteed. The content and limitations [of this provision] are to be determined by statute.

(2) Property imposes obligations. Its use must at the same time serve the public good.

(3) A deprivation of property is only permissible in the public good. It can only be carried out through or on the basis of a statute that determines the manner and extent of the compensation. Compensation is to be determined in accordance with a just balancing of the interests of the public and the affected individual. If the amount of compensation is in question, the matter may be removed to the courts.<sup>371</sup>

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<sup>368</sup> See WIEACKER, *supra* note 346, at 546.

<sup>369</sup> This point is made by Wieacker in his seminal article, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (1953), reprinted in WIEACKER, *supra* note 295, at 9, 19-20.

<sup>370</sup> GRUNDGESETZ [Constitution] [GG] § 20, para. 2 (F.R.G.) (translation by author).

<sup>371</sup> *Id.* (translation by author).

But in addition to these broadly *sozialstaatliche* and communal provisions, the Constitution also contains individualistic provisions like: "All persons have the right to the free unfolding of their personality, so long as they do not injure the rights of others or violate the constitutional order or the moral law (*das Sittengesetz*)."<sup>372</sup> That phrase, "the moral law," should be familiar: it comes straight from Kant.<sup>373</sup> And the phrase, "free unfolding of the personality" also embodies a Kantian ideal. The exact words we have encountered before: they occur in Savigny's *System of Modern Roman Law*, where they are offered as the fundamental principle of law.<sup>374</sup> And indeed the first words of the Constitution are "[h]uman dignity is inviolable. To respect it and to protect it is the duty of all state power."<sup>375</sup> This, too, is an idea and a formulation which comes directly from Kant.

As we saw, the Germanist and Romanist ideals stand in considerable tension with each other, and the insertion of both ideals into the Constitution has not ended all controversy. A large and lively literature has arisen discussing the compatibility of the *Sozialstaat* with the Kantian ideal of the *Rechtsstaat* and arguing about how the constitutional provisions are to be applied. Some theorists urge it as a constitutional principle to be enforced by the courts through the mechanism of judicial review; others treat it as a principle of statutory interpretation; still others see it as merely aspirational and as setting a task for the legislature.<sup>376</sup> In view of what we have seen, is it any surprise that the debate is carried on with Kant as one of the chief points of reference, and that the issues are treated as involving, not just questions of politics, but deep issues of political philosophy as well? Without a firm grasp of the intellectual background in Kantian and post-Kantian philosophy, it is impossible for a foreigner—let alone for a foreigner as alien as Romulus—to understand the modern constitutional debates, or the intellectual underpinnings of the German legal system; to understand why there is an extensive literature on the topic of legal irrationalism,<sup>377</sup> or

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<sup>372</sup> *Id.* § 2, para. 1 ("Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.").

<sup>373</sup> See *supra* text accompanying note 199.

<sup>374</sup> See SAVIGNY, *supra* note 287.

<sup>375</sup> GG § 1, para. 1 ("Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.").

<sup>376</sup> See the discussion in BÖCKENFÖRDE, *supra* note 276, at 159, for a summary of these issues.

<sup>377</sup> See, e.g., Ralf Dreier, *Irrationalismus in der Rechtswissenschaft*, reprinted in DREIER,

why it is natural for one of the most popular elementary textbooks on constitutional law to contain chapters with titles like "The Calling into Question of Practical Reason" or "Value Relativism and the Plurality of Interests" or "The Concept of Dialectical Discussion."<sup>378</sup> For whatever may be true of Engels's claim about the German labor movement, the German Constitution is unquestionably the heir of German classical philosophy.

This fact, and the fact that the controversies in the nineteenth century rotated around the private-law concept of property, and the fact that those constitutional issues are still active today, should now cast considerable doubt on the ability of Romulus to understand private law independently of the great constitutional debates between the Romanists and the Germanists. Indeed, as we saw earlier, the arguments about the *Rechtsstaat* carried implications far beyond the mere question of the proper organization of the state. The Romanist-liberal *Rechtsstaat* ideal combined a view of private law, of public law, of legal scholarship, and of the bureaucratic machinery of the state. The technical, legal elaboration of the *Rechtsstaat* was grounded in the formal, conceptual style of legal analysis pioneered by Savigny and his followers in their studies of Roman private law; this *scholarly* ideal became linked to an *institutional* ideal of formal, bureaucratic neutrality; and that ideal, in turn, gave fresh impetus to the efforts of private-law scholars to refine the classical model and to develop a logically-based "conceptual jurisprudence." All of these tendencies, public and private, scholarly and bureaucratic, are, I have argued, related: they have a common root, *via* Savigny, in a particular interpretation of Kant.

The Germanists, in turn, had a different interpretation. They challenged the individualism of the Romanist theory, and the pretense of political neutrality; in so doing they were led to challenge the ideal of formalist scholarship, the classical model of private law, and the idea that the bureaucracy should be neutral between private parties, no matter how vast the relative disparity of economic power.

Can Romulus understand the private law without understanding these debates? Well may we wonder, and our doubts can only be

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*supra* note 322, at 120-41. This is a central topic for the philosopher Jürgen Habermas and his legal followers; for the canonical statement of Habermas's theory as applied to law, see ROBERT ALEXY, *THEORIE DER JURISTISCHEN ARGUMENTATION* (1978).

<sup>378</sup> KRIELE, *supra* note 322, at 249, 257, 261.

increased if we observe that, although the debates between the Romanists and the Germanists have left a deep mark on the modern German Constitution, they were originally not debates about the text of the Constitution at all, but, on the contrary, about the substantive provisions contained in the drafts of the German civil code—the very text that Romulus is supposed to find so readily intelligible.

## B. *The Influence on Private Law*

### 1. The Classical Model

Let us now pick up again the thread of private law. To recap the earlier history: in the first decades of the century, while Germany was still politically fragmented, debates about the desirability of a uniform civil code were bound up with the political question of German unification. Savigny's reply to Thibaut, the *Vom Beruf* of 1814,<sup>379</sup> was not by itself responsible for preventing the project of codification. That was done rather by the political rivalries among the German states. But Savigny's writings introduced two enormously influential (and not, perhaps, entirely reconcilable) ideas into German legal scholarship. Speaking imprecisely we can call them the material and the formal sides to his thought. The material side was the theory of the *Volksgeist*, that is, the theory that law is intimately bound up with the history of the wider society. This side of his thought owes much to Herder; the formal side owes equally much to Kant. The formal side is the theory of private law as the expression of individual autonomy, and in particular the theory that autonomy is to be guaranteed by a formal body of rules, arranged into a coherent, logical system, and applied equally to all. (To call this side of Savigny's thought "formal" can be misleading, since the Kantian value of autonomy is a *substantive* value. But it was to be secured by formal means; and certainly in the work of Savigny's followers the stress was to be on logic, system, and formalism.) In the middle decades of the century the calls for codification had largely petered out. Legal scholarship, following Savigny's lead, devoted itself to the careful historical investigation of Roman law. There were initially some clashes with the new Historical School of Germanists (Karl Friedrich Eichhorn,

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<sup>379</sup> SAVIGNY, *supra* note 243.

Jakob Grimm); but those clashes, too, gave way to a spirit of live-and-let-live.

In 1874 the question of codification was to be revived, but in circumstances very different from those that had confronted Thibaut and Savigny. Germany was now united, and Roman law was no longer the disorganized mass that Savigny had inherited sixty years earlier. Savigny himself, as we saw, had carefully left open the door to eventual codification,<sup>380</sup> and now even his most eminent Romanist disciples argued that a uniform code was both possible and desirable.<sup>381</sup> It was agreed on all sides that the time was ripe for the new nation-state to adopt a civil code; and in 1874 a commission—the first of two—was appointed by the Bundesrat to begin the task of drafting the *BGB*.<sup>382</sup>

This commission carried out its deliberations behind closed doors; its size fluctuated slightly, but was roughly ten members. The leading intellectual spirit was the eminent Romanist scholar, Bernhard Windscheid; he, more than any other figure, was responsible for determining the style and content of the *BGB*. Windscheid was an authority on what was known as *Pandektistik*. "The Pandects" was another name for the *Digest* of Justinian; but nineteenth-century *Pandektistik* was defined not just by its subject matter, but by a particular style of scholarship.<sup>383</sup> The Pandectists

<sup>380</sup> See *supra* part IV.D. For a full discussion of this issue, see P. Caroni, *Savigny und die Kodifikation: Versuch einer Neudeutung des "Berufes"*, 86 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, GERM. ABT. 97 (1969).

<sup>381</sup> As Michael John observes, this was the consensus among legal scholars as early as the end of the 1850s. See JOHN, *supra* note 256, at 36. For samples of the views of Savigny's followers, see MORITZ AUGUST VON BETHMANN-HOLLWEG, ÜBER GESETZGEBUNG UND RECHTSWISSENSCHAFT ALS AUFGABE UNSERER ZEIT (Bonn, A. Marcus 1876); C. G. BRUNS, ZUR ERINNERUNG AN FRIEDRICH CARL VON SAVIGNY (Berlin, Academy of Sciences 1879); Bernhard Windscheid, *Die geschichtliche Schule der Rechtswissenschaft* (1878), in BERNHARD WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN 66-80 (1904). See generally Heinrich Brunner, *Die Rechtseinheit* (1877), reprinted in 2 ABHANDLUNGEN ZUR RECHTSGESCHICHTE: GESAMMELTE AUFSÄTZE VON HEINRICH BRUNNER (K. Rauch ed., 1931).

<sup>382</sup> The topic of the drafting of the *BGB* has been deeply studied in a series of recent monographs. The literature is overwhelming in its scope; but a representative selection of recent studies would include: PETER KÖGLER, ARBEITERBEWEGUNG UND VEREINSRECHT: EIN BEITRAG ZUR ENTSTEHUNGSGESCHICHTE DES BGB (1974); HANS-GEORG MERTENS, DIE ENTSTEHUNG DER VORSCHRIFTEN DES BGB ÜBER DIE GESETZLICHE ERBfolge UND DAS PFLICHTTEILSRECHT (1970); WERNER SCHUBERT, DIE ENTSTEHUNG DER VORSCHRIFTEN DES BGB ÜBER BESITZ UND EIGENTUMSÜBERTRAGUNG: EIN BEITRAG ZUR ENTSTEHUNGSGESCHICHTE DES BGB (1966); WERNER SCHUBERT, MATERIALIEN ZUR ENTSTEHUNGSGESCHICHTE DES BGB: EINFÜHRUNG, BIOGRAPHIEN, MATERIALIEN (1978); THOMAS VORMBAUM, DIE RECHTSFÄHIGKEIT DER VEREINE IM 19. JAHRHUNDERT: EIN BEITRAG ZUR ENTSTEHUNGSGESCHICHTE DES BGB (1976).

<sup>383</sup> Strictly speaking the terms "pandectistics" and "conceptual jurisprudence" do

were the direct offspring of Savigny's *System of Modern Roman Law*, and they carried his demand for system and for logical rigor to new extremes. Their technique of scholarship was *Begriffsjurisprudenz*—the “conceptual jurisprudence” developed by Georg Friedrich Puchta and his followers.<sup>384</sup>

It is important to understand the intellectual sources and the purpose of conceptual jurisprudence; for, as Watson notes, the systematic way in which the rules of the *BGB* are set forth would cause Romulus to goggle. Indeed, the goggling here goes in both directions, and to modern eyes the most immediately striking characteristic of Justinian's *Digest* is its chaotic organization.<sup>385</sup> Topics are thrown together higgledy-piggledy, with no attempt at a logical arrangement, and abstract principles—say, a theoretical formulation of the basic principles underlying the law of contracts—are nowhere to be found.<sup>386</sup> It was the scholastic philosophers of

not have exactly the same reference, but the overlap is great enough so that, for present purposes, the differences can be ignored.

<sup>384</sup> For a general discussion of the growth of legal positivism in Germany in the latter half of the nineteenth century, see Gerhard Dilcher, *Der rechtswissenschaftliche Positivismus*, 61 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 497 (1975).

<sup>385</sup> See generally SCHULTZ, *supra* note 303, at 40-65.

<sup>386</sup> The general point is well made by Fritz Schultz. See SCHULTZ, *supra* note 303, at 43-49. But an example will perhaps make the point clear.

The great compilation of the writings of the Roman jurists, Justinian's *Digest*, is filled with such statements of the law as this:

- Ulpian, *Sabinus*, book 20: Sabinus states plainly in his books on Vitellius that those things are included in the *instrumentum* of a farm which are provided for the producing, gathering, and preserving of the fruits. Thus, for producing, the men who till the soil and those who direct them or are placed in charge of them, including stewards and overseers, also domesticated oxen and beasts kept for producing manure, and implements useful in farming, such as plows, mattocks, hoes, pruning hooks, forks and similar items. For gathering, such things as presses, baskets, sickles, scythes, grape-pickers' baskets in which grapes are carried. For preserving, such things as casks, even if not set in the ground, and tuns. 1. In certain regions, there are added to the *instrumentum*, if the villa is of the better equipped sort, such items as majordomos and sweepers, and, if there are also gardens, gardeners, and, if the farm has woods and pastures, flocks, shepherds, and foresters.
- Paul, *Sabinus*, book 4: With reference to a flock of sheep, the following distinction must be made. If it was assembled for the purpose of deriving profit from it, it is not owed; but if the profit of the woodland can be gathered in no other way, the opposite will be the case, because the profits of the woodland are gathered by means of the flocks.
- Ulpian, *Sabinus*, book 20: If the revenue also consists of honey, the hives and bees are included.

the Middle Ages, under the influence of Aristotle's logical treatises, who first attempted to reduce Roman law to a coherent system<sup>387</sup> and who first formulated its principles explicitly and in the abstract.<sup>388</sup> The trend towards systematization and abstraction continued under the influence of the natural-law philosophers of the Enlightenment<sup>389</sup> and as a major component of the movement towards codification.<sup>390</sup> Savigny, as we have seen, accepted this ideal,<sup>391</sup> and indeed insisted that it should be possible to *calculate* with legal concepts, almost as though one were doing a bit of mathematics.<sup>392</sup>

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- Javolenus, *Cassius*, book 2: The same rule applies to birds, which are kept on islands in the sea.

See THE DIGEST OF JUSTINIAN D.33.7.8-11. (Alan Watson English trans. and Theodor Mommsen Latin trans., 1985). The example was chosen at random, and is a typical specimen; it is neither more nor less abstract than most of the other statements of law in the *Digest*. This sort of writing goes on in the *Digest* for thousands of pages. The jurists of classical Rome all worked in this style. They shunned generalization, and rather than extracting an abstract *rule* would instead content themselves with relating the facts and decisions in a series of cases: so one gets in sequence oxen, majordomos, sheep, bees, and birds. They seem to have regarded general statements of the law as perilous, and they avoided giving abstract *definitions* just as doggedly as they avoided abstract *rules*. So Roman law contains no general definition of *contract* or *possession* or *legal personality*; and the foundations of criminal law are even more murky. A similar observation holds for the organization of the legal materials as a whole. The Roman jurists showed no interest in imposing an over-arching logical structure on their body of laws. Even the organization of the *Institutes* (a much shorter work, intended as a textbook introduction for law students) by modern standards leaves a great deal to be desired.

<sup>387</sup> See generally WIEACKER, *supra* note 346, at 45-97; see also generally HERMANN KANTOROWICZ, *STUDIES IN THE GLOSSATORS OF THE ROMAN LAW* (1938); KOSCHAKER, *supra* note 262, at 55-105; WALTER ULLMANN, *JURISPRUDENCE IN THE MIDDLE AGES* (1980).

<sup>388</sup> See SCHULTZ, *supra* note 303, at 40-65.

<sup>389</sup> The demand for *system* in the presentation of any science was, as we have already seen, a commonplace of Enlightenment thought, and appears forcefully in Kant. See *supra* part IV.B.

<sup>390</sup> For a general discussion, see GIOVANNI TARELLO, *STORIA DELLA CULTURA GIURIDICA MODERNA: ASSOLUTISMO E CODIFICAZIONE DEL DIRITTO* (1976); Helmut Coing, *Zur Vorgeschichte der Kodifikation: Die Diskussion um die Kodifikation im 17. und 18. Jahrhundert*, in *LA FORMAZIONE STORICA DEL DIRITTO MODERNO IN EUROPA: ATTI DEL TERZO CONGRESSO INTERNAZIONALE DELLA SOCIETÀ ITALIANA DI STORIA DEL DIRITTO* (1977).

<sup>391</sup> See *supra* part IV.D.

<sup>392</sup> For a general account of the influence of the mathematical ideal on German private law, see HANS HATTENHAUER, *DIE GEISTESGESCHICHTLICHEN GRUNDLAGEN DES DEUTSCHEN RECHTS* 191-93 (3d ed. 1983); see also HANS SCHLOSSER, *GRUNDZÜGE DER NEUEREN PRIVATRECHTSGESCHICHTE* 212 (5th ed. 1985) (discussing the influence of Christian Wolff's *mos geometricus* on the law).

This ideal of a legal system so logically arranged and so precise that one could calculate with its concepts was to have a profound influence on the development of German private law in general, and on the drafting of the *BGB* in particular. The hope was that one could construct a “formal jurisprudence of concepts” that would possess all the certainty and the clarity of the sciences. Savigny’s ideas, which merged with the ideas of Comte and Mill about the possibility of a science of society,<sup>393</sup> and with nineteenth-century ideas about the natural sciences,<sup>394</sup> provided the foundation for the conceptual jurisprudence of the German legal scholars of the latter half of the nineteenth century.

The ideal for scholars like Puchta<sup>395</sup> and Windscheid<sup>396</sup> was a “pyramid of concepts” arranged into a logically-closed system in which specific legal conclusions could be deduced by pure logic from the most fundamental and abstract propositions. In theory this approach to the law, modelled as it was on the methods of the sciences, would deliver objective and non-controversial legal truth, uncontaminated by social or political strife. Law was to be neutral, non-political, insulated from external conflicts.<sup>397</sup> This ideal exerted a powerful influence on the drafting and the arrangement of the *BGB*, and in particular on the creation of an opening “General Part” in which the central concepts of the private law are set forth in all their abstract splendor.<sup>398</sup> (This is an important element in our story, and in the story of Romulus; for conceptual jurisprudence is responsible, not only for the existence of the General Part, but also for a new method for interpreting the code; and that method is still influential today.)<sup>399</sup>

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<sup>393</sup> See LARENZ, *supra* note 136, at 36-37; see also HATTENHAUER, *supra* note 392, at 191-93; WIEACKER, *supra* note 346, at 430-68. See generally LARENZ, *supra* note 136, at 19-81.

<sup>394</sup> For the influence of the new materialism, see LARENZ, *supra* note 136, at 20-21, 27-31; WHITMAN, *supra* note 188, at 213-28. For an account of the influence of natural-scientific ideas on the methodology of the early Jhering, see LARENZ, *supra* note 136, at 24-27.

<sup>395</sup> For a discussion of the intellectual influences on Puchta, see WIEACKER, *supra* note 346, at 399-402.

<sup>396</sup> The influences on Windscheid are discussed by Wieacker and Wolf. See WIEACKER, *supra* note 346, at 446ff; WOLF, *supra* note 251, at 591-621 (citing many further references).

<sup>397</sup> The power of this ideal of political neutrality can perhaps best be gauged by reflecting that, for a time, it was even shared by Gierke, although he of course later abandoned the position. See the discussion in WOLF, *supra* note 251, at 691.

<sup>398</sup> For the general history, see WIEACKER, *supra* note 346, at 486-88.

<sup>399</sup> See LARENZ, *supra* note 136; see also KARL LARENZ, ALLGEMEINER TEIL DES

The abstract and technical style of the Pandectists does not make for light reading, and in contrast to the elegant, lapidary style of the French *Code civil* (which Stendhal is said to have savored each morning as a literary model, “pour prendre le ton”), the German *BGB* is crabbed and ponderous.<sup>400</sup> But beneath its moonscape surface it, too, possesses a classical elegance: an elegance not of language but of ideas. As we have seen, the Pandectists were the heirs to Savigny, just as Savigny was heir to Kant and to German idealism; and although it is not customary to praise the products of nineteenth-century German metaphysics for lucidity, the philosophical conception of law that emerged at the hands of the Romanists is as balanced and intellectually satisfying as any since the great syntheses of the Middle Ages. Certainly the *BGB* developed certain strands in the Western legal tradition as far as they have ever been taken. For the first time in European history the scientific ideal of the natural-law tradition—a complete and logically-arranged code of law—was to be enacted into positive law; this project enjoyed enormous intellectual prestige, and made the style of legal thought embodied in the code into the exemplar for *all* law, constitutional and criminal as well as private.<sup>401</sup>

I have argued above that, to understand the Romanist view of private law aright, one must see how it is related to their conception of the *Rechtsstaat*. Nowhere is this more true than in attempting to understand the importance of conceptual jurisprudence. As I just mentioned, the ideal of abstract, almost mathematical precision had a powerful effect on the drafting and the organization of the *BGB*, and in particular on the adoption of the “General Part.” But comparative lawyers, because their attention has been confined to the black-letter rules of the private law, have failed to understand the source of this ideal, or the reasons for its continuing importance in German private law. Watson merely mentions in passing that Romulus “might well be taken aback by the abstract way in which the rules are set out.” Others treat the General Part as a Teutonic oddity, reflecting a pedantic obsession with logical classification, and unaccountably adopted by other legal systems. Even John

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DEUTSCHEN BÜRGERLICHEN RECHTS: EIN LEHRBUCH (7th ed. 1989). The title translates as, “The General Part of the German Civil Law: A Textbook.” This textbook is used in required introductory courses; it is some 700 pages long.

<sup>400</sup> See I ZWIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 93.

<sup>401</sup> For a general account, see SCHLOSSER, *supra* note 392, at 127-36; WIEACKER, *supra* note 346, at 468-86.

Henry Merryman, who recognizes the importance of the General Part and who devotes an entire chapter to it, is embarrassed by the degree of logical formality and by “the remoteness of the doctrine from concrete problems.”<sup>402</sup>

But these dismissive ways of looking at the abstractness of the German civil code, I think, miss the point. None of these comparative scholars explains why such an evidently misguided ideal continues to exert such a powerful influence, or why the Pandectist scheme of logical classification appears to so many intelligent lawyers to be (in Merryman’s incredulous phrase) “basic, obvious, and true.”

The answer, I would suggest, is that we must not view the private law in isolation, but recognize that, in the thought of the late

<sup>402</sup> MERRYMAN, *supra* note 128, at 77. At the start of the chapter he announces, “We will sample the contents of the ‘preliminary notions’ and ‘general part’ of a respected elementary work (which shall remain anonymous) on private law.” *Id.* at 69.

It is evident from the editorial comments Professor Merryman interjects into his summary of the work why he leaves it anonymous: he accuses the author of imprecision, inconsistency, excessive abstraction, ideological bias, and remoteness from reality. He concludes his discussion by saying (and these remarks can be taken as typical of the attitude of Anglo-American comparative lawyers):

The progress is from the more general and abstract to the less general but still abstract. The discussion of specific subjective rights and specific legal institutions later in the volume goes on within the conceptual structure established in the general part. More important, the later discussion has the same tone and style; the emphasis is on inclusive definitions, clean conceptual distinctions, and broad general rules. There is no testing of definitions, distinctions, and rules against reality. Indeed, the tone set trains the lawyer to make the concrete facts fit into the conceptual structure . . . .

. . . [I]n most modern civil codes . . . the legislation reflects but does not expressly embody the general doctrinal scheme here described. However, it is enacted, interpreted, and applied by people whose minds have been trained in the doctrinal pattern and to whom the scheme here described seems basic, obvious, and true. The conceptual structure and its inherent, unstated assumptions about law and the legal process constitute a kind of classroom law that hovers over the legal order, deeply affecting the way lawyers, legislators, administrators, and judges think and work.

*Id.* at 78-79.

I do not wish to dispute either this general conclusion or Professor Merryman’s specific criticisms; both are defensible, and his discussion is the fullest I am aware of in English. My point is a different one: if he is correct, and if the General Part is as seriously and obviously flawed as he said, then we still need an explanation of *why* it seems to so many intelligent lawyers “basic, obvious, and true,” and of how such a silly system could even have gotten started. My suggestion is that the system is not, in fact, as silly as it appears, and that, if it is to be understood, one must consider its intellectual roots, and the way in which it is intended to link the ideals of private law with those of public law.

nineteenth-century Roman lawyers, the classical theory of private law was meant to interlock with the classical liberal theory of the *Rechtsstaat*. The result was a comprehensive theory of law, both public and private, with an underlying intellectual coherence that had rarely been achieved earlier, and has certainly never been achieved since. The point here is not to say whether the theory is ultimately tenable, but rather to attempt to understand it: for it is surely one of the supreme accomplishments of European legal thought. The philosophical theory that provided the foundation for the *BGB* represents the summit, not just of one tradition, but of many: of Roman law, of the old scholastic-Aristotelian ideal of logical classification, of German philosophical idealism, of nineteenth-century legal scholarship. We can see in that theory the influence of the classical Roman jurists; of Justinian; of nameless medieval scholars; of Grotius, Montesquieu, and Napoleon; of Kant, Herder, and Savigny. The lines all converge on a single point.

What was the underlying theory of the *BGB*? A full answer would require a book, but we have already seen enough to give a rough sketch.

Bernhard Windscheid, delivering his inaugural address as Rector of the University of Leipzig in 1884—a time when he was clearly the dominant intellectual influence on the first commission—stated his definition of law as follows:

Law is the ordering of the powers of will that exist in the world. The wills that exist in the world, if left to their natural impulses, collide with one another, begin to fight, and try to subjugate each other. Law creates for each will a space within which alien wills bounce off it, and within which it dominates. Law [*Recht*] is in the first instance not a constraint, but the acknowledgement of human freedom; the constraint is only the other side of the acknowledgement thus guaranteed. Positive law [*Rechtsgesetz*] only imposes duties in order to protect rights [*Rechte*]; the moral law [*Sittengesetz*] imposes only duties. If one likes epigrams, one can say: positive law protects rights, the moral law imposes duties.<sup>403</sup>

This conception of law—law as protective of the private sphere—is familiar to us from Kant and from Savigny, from the classical theory of private law and from the liberal theory of the *Rechtsstaat*. Observe that Windscheid's definition does not apply to *private* law alone, but to law *überhaupt*: the goal of *all* law, public as well as

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<sup>403</sup> WINDSCHEID, *supra* note 381, at 101-02 (translation by author). The speech, *Die Aufgaben der Rechtswissenschaft*, was delivered on October 31, 1884.

private, is the preservation of individual autonomy. This idea was the taproot of the entire Pandectist conception of law, from the theory of contract to the theory of the state to the interpretation of classical Roman law as the supreme legal expression of individual freedom.

How was individual liberty to be secured from the tyranny of the majority or from the tyranny of a despot? We have already seen the outlines of the liberal answer. Public law was to be sharply distinguished from private law. In the private sphere the wills of the parties were to prevail; the task of the state was merely to provide a framework for private autonomy and to enforce agreements voluntarily arrived at, but otherwise to leave the parties to make their own arrangements. And how was one to limit the power of the state? In a constitutional *Rechtsstaat* the executive power was to be institutionally separated from the legislature; in this distinction lay the difference between a *Rechtsstaat* and a despotism. The legislature was to pass laws of general application that would then be applied by a neutral and impartial bureaucracy; scholars, applying the value-neutral techniques of juridical science, were to elaborate the laws into an abstract and coherent system, and to develop their formal and logical implications.

It should be clear that in this system of law the techniques of conceptual jurisprudence provide the crucial connecting link between public and private law. Ultimately the issues here go back to one of the problems Savigny tried to solve when he adopted his Kantian leitmotif: how to issue the impartiality of legal scholars. The answer, recall, was that law was to meet certain criteria of *formality*: it was to respect individual rights and to apply equally to all. Scholars were to cling to this formal ideal, and if they did so, they would then be able to justify their claim to speak in the name of the *Volksggeist*. The Pandectists developed Savigny's idea in greater detail, and extended it to public law; but the underlying insight is the same. We can see, in fact, that the much-derided formalism of conceptual jurisprudence was intended to subserve two important substantive ideals, one of politics, the other of justice. The political ideal is the already-mentioned ideal of the separation of powers: the idea that the interpreters or the appliers of law, whether scholars, bureaucrats, or judges, are not to interpose their own subjective conception of justice, but rather to execute impartially the instructions of the lawgiver, whether that lawgiver be the Parliament or the *Volksggeist*. The ideal of justice is an ideal of consistency, of political integrity: the idea that, if the state is to

treat its citizens equally and with respect, then it must be able to explain how its various laws are related to one another, what ultimate principles they rest upon, and how the entire system is supposed to hold together.

It is a mistake, I think, to see in this conception of law (as usually happens) as nothing but a sterile formalism intended to further the economic interests of a self-satisfied middle class. The conception was not so simple-minded, nor so ignoble. The legal theory of the Pandectists is to be sure “formalistic” and “positivistic”; but the formalism and the positivism rest on a firm Kantian base and were intended to serve moral ends. The vision of law that animated Windscheid and the drafters of the *BGB* is, as I said before, one of the great legal syntheses of Western history. Even today it is a tantalizing vision—the vision of a society of free and equal individuals, governed by a lucid and coherent body of law, whose principal purpose is to allow the citizens to pursue the free development of their own personalities. It is any wonder that this vision has taken such a powerful hold on the continental legal imagination, or that the grand abstractions of the General Part seem to many lawyers to be “basic, obvious, and true?”

That so many comparative lawyers have missed this point; that they have been content, like Romulus, merely to be “taken aback by the abstract way in which the rules are set out,”<sup>404</sup> or to see in the formalism of conceptual jurisprudence nothing but a national quirk, shows, I think, at a deep level a failure of the traditional comparative method to understand the intellectual springs of German private law.

## 2. Gierke's Criticisms

But let us return to the drafting of the code. The first commission published its draft text of the *BGB* in 1887. As I mentioned earlier it had done its work behind closed doors; the members of the first commission had for the most part been Romanists with the interests of the propertied middle classes at heart, and when their draft became public it unleashed a stream of political criticism.<sup>405</sup> From 1888 onwards the tone of the debates over codification shifted and became more overtly political; the arguments were not confined to the universities, but became a central issue of national politics,

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<sup>404</sup> See *supra* text accompanying note 186.

<sup>405</sup> See JOHN, *supra* note 256, at 105-59.

a topic to be debated in the newspapers and in Parliament. In essence, Roman law as developed by the Pandectists was seen as favoring capitalists and the middle classes; and the draft code drew fierce criticism both from the left and the right. To the owners of land in the rural areas of Germany, whether peasants or landed aristocrats, the debate about the code was a debate about whether Germany was to be an agrarian or an industrial nation: at stake were the preservation of family land holdings, and the power of bankers and capitalists over the economic affairs of the countryside.<sup>406</sup>

To the representatives of the new class of industrial laborers, in contrast, the issue was protection of the workers against exploitation by factory owners. Nationalists grumbled about the predominant place of Roman law in a German code; the Catholic Church objected to many of the provisions dealing with family law.<sup>407</sup>

These political controversies became embroiled in a sophisticated debate about the nature of law and about the philosophical underpinnings of the classical model. One incisive critic was Anton Menger, whose prescient *The Civil Law and the Propertyless Classes*,<sup>408</sup> argued that the code's contract rules (and the rules of inheritance in particular) would operate in favor of the economically more powerful classes. Some proponents of social welfare legislation contested the dominant individualistic and positivistic interpretation of Kant's philosophy of law: their arguments rotated around the interpretation of a classic philosophical text.<sup>409</sup> But the most conspicuous, and ultimately the most influential criticisms came from the pen of Otto von Gierke. In a series of books and articles, of which *The Sketch of a Civil Code and German Law*<sup>410</sup> and *The Social Task of Private Law*<sup>411</sup> are the most important, he launched a fierce attack against the proposed Code and against its intellectual foundation. He attacked the individualistic bias of the classical model, and pleaded instead for the legal recognition, within the

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<sup>406</sup> See *id.* at 139-40.

<sup>407</sup> See *id.* at 221-24, *passim*.

<sup>408</sup> ANTON MENGER, *DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN KLASSEN* (Tübingen, H. Laupp 1890).

<sup>409</sup> See the article by Ralf Dreier, cited *supra*, note 359, and the works by Hermann Cohen and Karl Vorländer, cited *supra*, note 360.

<sup>410</sup> OTTO VON GIERKE, *DER ENTWURF EINES BÜRGERLICHEN GESETZBUCHS UND DAS DEUTSCHE RECHT* (Leipzig, Dunker & Humblot 1889).

<sup>411</sup> OTTO VON GIERKE, *DIE SOZIALE AUFGABE DES PRIVATRECHTS* (Frankfurt, Klasterman 1948) (1889).

framework of a *Rechtsstaat*, of a plurality of groups whose social and economic interests had to be accorded protection by the state.

We saw earlier that German legal thought in the nineteenth century inherited, through Savigny, two sets of ideas. One was the Kantian set that emphasized individual freedom, the neutrality of the state, and the logical ordering of formal legal rules. The other set, whose roots go back to Herder, emphasized the dependence of law on the surrounding social group. These two sets of ideas had stood in uneasy tension since the beginning of the century; and Gierke's attacks on the draft code in the 1890s were to introduce yet more variations and refinements on the old theme.

Gierke is here indeed a figure of great complexity, and he managed to appeal both to conservative Junkers and to the representatives of the urban proletariat. On the one hand his theory looked backwards to the pre-industrial traditions of the German guilds and to the communal solidarity of feudal society. (I have already mentioned that his greatest scholarly work was an encyclopedic study of the political theories of the Middle Ages.) But, on the other, it looked forward to the protection of industrial workers, to the formation of labor unions, and to the creation of the modern social welfare state. A detailed examination of his views is not possible here: it would lead deep into constitutional theory, the law of corporations, the law of property, the history of medieval jurisprudence, and into Gierke's idiosyncratic theory of society. But the main features of his attack on the classical model of private law deserve to be mentioned.

We saw earlier that in his constitutional theory of the *Rechtsstaat* Gierke opposed the social-contract view of the state, that is, the view that regards the state as constructed by the will of pre-existing individuals. In contrast he insisted that individuals cannot be considered apart from their membership in social groups; that the state is one human association among others, and that it possesses what he termed "real juristic personality," that is, it is not an artificial creation, and not the *source* of law so much as a coeval organic outgrowth of human society. If there is a *Grundgedanke* to Gierke's thought, a single idea around which everything else revolves, it is this: that human society and human politics must be seen, not as composed simply of atomistic individuals on the one hand and a monolithic state on the other, but as involving an irreducible plurality of associations, with overlapping memberships, and ranging, in graded steps, from the family to charitable and

educational and trade associations, to various forms of corporations, and finally to the state.

On this theoretical foundation rested Gierke's criticism of the classical model of private law and the *BGB*. The classical model pretended to be politically neutral; in fact, said Gierke, it was based on selfish egoism and protected the strong at the expense of the weak. Its emphasis (as in the above quotation from Windscheid) was all on individual rights; it said nothing about social *duties*. Gierke made numerous technical proposals for alterations to the code; they were designed to strengthen the family, to protect land ownership and traditional rural society from the incursions of urban capitalism, and strengthen the position of voluntary associations.<sup>412</sup> To the individualism of the economic liberals he opposed an ideal of community; to their emphasis on individual rights, a reminder of social responsibility; and, above all, to their sharp cleavage between the public and the private, an argument that private property and private contracts exist ultimately to serve the public good, and can therefore be regulated by the state.

Gierke's theory, then, like the classical model, was not merely a theory about the place of private law within a constitutional *Rechtsstaat*. His theory, which combined an organic and Herderian theory of social groups with an organic theory of the *Rechtsstaat*, was also a total theory of law, and seemed to later thinkers to offer a middle path between a top-down command economy of state socialism and the extreme individualism of the *BGB*.<sup>413</sup>

Gierke's criticisms, and the criticisms of many other legal thinkers, had a strong and immediate impact, and from 1890 onwards conceptual jurisprudence and the classical model were intellectually on the defensive. His arguments also had a political resonance, among both conservatives and radicals, and in large part as a consequence of his onslaught a second commission was appointed, containing representatives from a wider cross-section of society.<sup>414</sup> (Gierke himself was treated by the authorities as a hot potato and kept off the second commission.)

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<sup>412</sup> For an account in English of Gierke's specific proposals, see JOHN, *supra* note 256, at 108-12, 134, 154, 244-45.

<sup>413</sup> See WIEACKER, *supra* note 346, at 454, 546-47. See generally JOHN, *supra* note 256.

<sup>414</sup> A comprehensive account in English of the second commission and the political events surrounding its work is provided by JOHN, *supra* note 256, at 105-98.

Despite the pressures for changes to the code, the powerful political parties of the liberal center (and, more importantly, the senior figures in the government in Berlin—this was not a democracy, after all) favored the original conception. The second commission, like the first, was carefully insulated by the government from external political forces. It made some compromises with the landed gentry on the one hand, and also, in response to the arguments of critics like Gierke, introduced “a few drops of socialist oil.”<sup>415</sup> But in general the final draft of the *BGB* differed little from the first; it bore the stamp of nineteenth-century economic liberalism, and was custom tailored to the needs of the bourgeois small businessman. In the law of contracts, the predominant theme was that the parties were formally free and equal; in particular, everyone, regardless of social or economic position, was to have the freedom to decide, on his or her own responsibility, what contracts to enter, and on what terms. The business of the state was then to enforce the agreement as written, and not to intervene on behalf of the weaker party. Similarly in the law of property the property owner was, within the sphere of his or her personal autonomy, absolutely free to dispose of the property without regard to the needs of others.<sup>416</sup> And in the law of torts the basis of delictual liability was the principle of *fault*, with no obligation being placed on a large-scale manufacturer to insure the general public against accidents.<sup>417</sup>

The society envisioned in the *BGB* of 1900 was that of a society of free and formally equal property-owning individuals, whose voluntary agreements were to be upheld by the state, and who were liable to others only for harms they had caused through their own fault. No special role was conceded by the code to the trade unions, industrial cartels, and other organized interest groups that were to play such a large part in the social politics of the twentieth century. An example from the time of the drafting of the code may help give the flavor of the process. The chief intellectual influence, Bernhard

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<sup>415</sup> WIEACKER, *supra* note 346, at 470; 1 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 148, 155. I have not been able to locate the original source of this phrase.

<sup>416</sup> See JOHN, *supra* note 256, at 87 (observing that the “absolute” conception of property—of property as the total domination of a person over a thing—had come to dominate German jurisprudence by the 1860s, and that, although the legislature had introduced some limitations, these were viewed as exceptions to the general rule of unlimited freedom of property).

<sup>417</sup> See 1 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 156-57.

Windscheid, attempted to reintroduce into the modern positivistic and formalistic theory of contract the older Aristotelian-scholastic principle of *material equivalence*: on his view in a contractual exchange there should be some rough correspondence between the objective value of what is given and what is received. Windscheid tried to phrase this principle in terms of “undeveloped conditions” of the contract, and sought to smuggle it into the new Code. But his effort was expressly rejected by the other drafters of the *BGB*. They based their reasoning, first, on an interpretation of Kant’s doctrine of freedom, according to which the law should not interfere with the voluntary arrangements entered into by individuals; second, on scepticism about the possibility of finding a satisfactory measure of objective value.<sup>418</sup>

### 3. The *BGB*

Thus came into force, on 1 January 1900, the duly-ratified text of the *BGB*: “the late-born child of Pandectistic scholarship and of the post-1848 liberal movement towards national democracy.”<sup>419</sup> In the end, the code passed through Parliament with little difficulty: only the Social Democrats voted against.

The ratification of the *BGB*, as we have seen, was the culmination of a century of legal scholarship, which had begun, during the time of the Napoleonic wars, with the debate between Savigny and the Natural Lawyers over the desirability of a uniform code. The process continued with the systematizing scholarly work of the Historical School, and finally concluded, in Bismarck’s united Germany, with conceptual jurisprudence, the theory of the *Rechtsstaat*, and the classical model of private law. The *BGB* was regarded throughout Europe both as a great scholarly accomplishment and as a work of national consolidation; it entered into law with pomp and ceremony and a great deal of not entirely unjustified national pride.

The tremendous prestige of the *BGB* is important, for it placed the *BGB* at the center of the German legal universe and guaranteed that its style of legal thought—formalistic, individualistic, economically liberal—would be seen as the ideal pattern for all law, public

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<sup>418</sup> See WIEACKER, *supra* note 346, at 520 (citing further references). The subject has been much discussed. The references to Kant were explicit. Wieacker notes that the drafters were also presupposing the stability of economic conditions: they did not foresee the inflation that was to follow in the 1920s. *See id.* at 520.

<sup>419</sup> *Id.* at 15.

as well as private. We can think of German law in the first years of the present century as a web with the *BGB* at the center, and with the intellectual lines of force radiating outward from the *BGB* to every other area of law. But this very fact (although it was not noticed at the time) also left the *BGB* vulnerable and exposed to attack. We have already seen that, from the time of Gierke's criticisms in the 1890s onwards, the classical model was intellectually on the defensive; and to many social critics the rules of private law seemed neither economically nor socially nor politically neutral. These arguments were to grow in intensity in the new century, and were to focus on the most conspicuous target, that is, on the social model that had provided the *BGB* with its underpinnings. Moreover, the fact that the *BGB* was so tightly bound to all other areas of law meant that changes in the periphery would also be felt at the center: the lines of force could radiate inwards as well as outward. So in retrospect it is not surprising that the upheavals of the twentieth century should have shaken the *BGB* to its core.

At this point, with the *BGB* duly ratified by Parliament, we come to the heartland of traditional comparative law and to the core issue of our inquiry: How well is Romulus able to understand the statutory text of the German civil code? The claim, recall, was that a law student of the time of Justinian, confronted with the text of the *BGB*, would find little to marvel at: "Differences in the substance of the law there certainly are, but scarcely what might be termed major developments."

From what has already been said about Savigny and Gierke, about the *Rechtsstaat*, about Kant and Herder and the classical model of private law, the perceptive reader should already be able to spot the fallacy. An analogy may help to make the point.

John Marshall, confronted with the text of the U.S. Constitution as it exists in 1995 would find little to marvel at: *qua* texts, the text he knew in 1795 and the text we know today are, apart from a small number of amendments, identical. But would we really wish to say that "differences in the substance of the law there certainly are, but scarcely what might be termed major developments"?

We can now see (as I promised at the beginning of this Article) that the entire issue, the entire grounding of comparative law, comes down to the central question of legal philosophy: *What is law?* Specifically we have here to decide upon the relationship between *text* and *law*. If by "American constitutional law" we mean nothing more than "the text of the U.S. Constitution," then indeed (as for Romulus) the greatest surprise for John Marshall would be

the disappearance of a law of slavery. But if by the phrase “constitutional law” we understand, not just the bare text, but the surrounding tradition of precedent, legislation, scholarship, principles, and interpretations, then it by no means follows from the fact that the two underlying texts are almost the same that they give rise to the same body of law.

(It might here be objected that the text of the U.S. Constitution (*anno* 1995) contains some phrases, like the equal protection clause and the due process clause, whose significance would not be immediately evident to Marshall, so that the modern text is in fact very different from the text (*anno* 1800). But in exactly the same way the *BGB* contains some phrases—the famous “general clauses”—whose significance would not be evident to Romulus.)

An exactly analogous point holds for German private law. The text of the *BGB* (*anno* 1900) is virtually identical with the text of the *BGB* (*anno* 1995), but as we shall see German private law (*anno* 1995) is vastly different from German private law (*anno* 1900)—to say nothing of Roman private law (*anno* 535). To say this is not, of course, to deny that texts and statutory language are important, and no doubt from the perspective of Romulus even the bare text of the U.S. Constitution would be brightly illuminating. But this is only because Romulus is so alien to modern Western legal culture. It is important to remember that Romulus was introduced into our discussions only to make vivid a point about *modern* comparative law, and the question we must ask ourselves as students of modern German law is, should our ambition be to understand German law well enough so that we know how it has evolved in recent decades, and can understand why certain issues are at the center of discussion—or should we instead be content with a level of understanding that would have satisfied Romulus? The latter answer, I think, can ultimately only be defended if one holds a philosophical conception of law that identifies *law* with *rules* and *rules* with black-letter *texts*. Such a conception seems to me to have dogged comparative law for many years, and to be implicit in such works as the *Cornell Study on the Formation of Contracts*.<sup>420</sup> Strictly speaking the issue here is not an issue about legal positivism, but about a rather crude philosophical picture that seems to appeal to legal scholars when they attempt to serve what they imagine to be the practical needs of corporate attorneys.<sup>421</sup>

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<sup>420</sup> See *supra* note 132 and accompanying text.

<sup>421</sup> In particular, I have no reason to believe that a sophisticated philosophical

The crude picture is not, I think, a tenable theory of law; but it is not my present purpose to argue the point. The task is rather to consider how German private law has evolved in the twentieth century, and thereby spike the idea that Romulus can obtain an adequate understanding of the *BGB* simply by reading its text.

It should be borne in mind that a full account of the recent development of German private law would fill a shelf, if not a library. The account that follows must therefore be regarded as a mere sketch, indicating only a small portion of the ignorance of Romulus.

When the *BGB* entered into law on January 1, 1900, it became, as I said before, the center of the German legal universe; and the very fact that the private law was now enacted into legislation was enough, by itself, to cause a major realignment in juristic thought. Until 1900, as we saw, the doctrinal study of private law had been inseparably bound up with the study of legal history, and in particular with the study of Roman law. Savigny indeed had high ambitions for these historical studies, and had hoped that Roman law, as developed by impartial scholars, would be applied directly to cases through a revived *Aktenversendung*. By the 1850s this hope was already dead, and the professors were losing ground to the professional judiciary.<sup>422</sup> But within the universities, and in the scholarly work preparing the way for the *BGB*, the study of Roman law retained a central importance. Once the *BGB* had been enacted into law, however, the center of gravity shifted away from the historical sources and towards the text of the code itself; legal history, which from Napoleonic times onwards had pride of place in German legal education, quickly moved to the periphery and was supplanted by the doctrinal study of the code.<sup>423</sup>

The center of attention shifted in another way as well. Professors, it was now clear, would have to adjust to a new role. With the end of *Aktenversendung* they had lost the power to decide cases; now,

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positivist like H.L.A. Hart would be tempted by the crude picture, or by the idea that comparative law should proceed by matching up the contract rules of one system with those of another. The issues are complex, and I cannot discuss them here, but Hart, I think, would be more interested in comparing, not the primary rules, but what he calls the "Rules of Recognition" of the two systems, and this comparison would lead him into a discussion of many of the issues that (I have been arguing) traditional comparative law overlooks. I believe Hart's positivism is not, in the end, an adequate foundation for comparative law, either; but the argument must be postponed for another day.

<sup>422</sup> See WHITMAN, *supra* note 188, at 212-28.

<sup>423</sup> See *id.* at 200-28.

with the enactment of a civil code, their treatises on Roman law were no longer in demand, and their involvement in the process of legislative drafting was at an end. Henceforth the emphasis would be on the application of the code by the courts; and the courts were therefore to become central in a way they had not been previously. The intellectual center of gravity shifted subtly, from asking the question, "What is the correct interpretation of our legal history, and what are the correct rules of private law" to the question, "How should a judge interpret the code, and what is the function of judges and of private law in a modern, industrial society?"

The history of German private law in the twentieth century can be divided into four periods. The first period lasted from 1900 until the outbreak of the First World War. During this time the courts were still learning to operate with the new Code, and they made few departures from what the drafters of the *BGB* had intended. The underlying classical model was, to be sure, under attack in the universities, and scholars like Rudolph von Jhering and Hermann Kantorowicz<sup>424</sup> (to say nothing of the Social Democrats and the Marxists) had long since called into question the neutrality both of the *BGB* and of the judge. They proposed new theories of law as an instrument for achieving social ends, of law as the resultant of social forces,<sup>425</sup> and generally urged a departure from the individualism and the formalism of the classical model. (Their views were in many ways similar to the views of the American Legal Realists, whom in part they inspired; except that, as often seems to happen when the ideas of continental philosophers are translated into American law schools, the copy was less sophisticated than the original.) But in general the years before the First World War were a time of legal positivism; the *BGB* was new, its prestige undiminished, and its underlying system of values still dominant within most of the society.

But then came the political and legal tumult of the second period, that is, the period from the First World War until Hitler's seizure of power in 1933. These years saw wartime profiteering,

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<sup>424</sup> The two classic texts are GNAEUS FLAVIUS, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906) (Gnaeus Flavius was a pseudonym adopted by Hermann Kantorowicz) and RUDOLF VON JHERING, *DER ZWECK IM RECHT* (Leipzig, Breitkopf 1877).

<sup>425</sup> In particular, in addition to the work of Jhering, Kantorowicz, and others, one has the "jurisprudence of interests," whose leading theorist was Philipp Heck. See generally PHILIPP HECK, *BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ* (1932); PHILIPP HECK, *DAS PROBLEM DER RECHTSGEWINNUNG* (1912).

inflation, unemployment, housing shortages, military defeat, the collapse of the Monarchy, the growth of labor unions, pitched battles between militants of the left and the right, and, in the 1920s, a period of hyperinflation and hyperunemployment. Under the circumstances a formalistic application of the text of the *BGB* was impossible: to have enforced contracts exactly as written, or to have clung to pre-war land law as though nothing had changed, would have worked great inequities, and made the social chaos even worse.<sup>426</sup> Indeed by the end of the First World War the classical model of private law—the model of law as a neutral framework for the interactions of equal, independent, and autonomous individuals, whose chief interest was the moral development of their own personalities—no longer seemed to correspond to reality. The old model was dead, and a flood of new models jostled to take its place.

Ever since the first War, the general trend in German private law has been away from economic individualism and towards a more communitarian conception of the *Rechtsstaat*. The specific, black-letter changes to the substance of the law, it is important to observe, have for the most part not occurred through changes to the text of the *BGB* itself;<sup>427</sup> the text is so tightly organized that additions are difficult, and moreover there has been a reluctance to tamper with a legal monument. Instead the changes have come about in two ways.

First, the legislature has directly intervened to create separate, supplementary bodies of statute law. The pattern was established early in the century in response to the housing crisis caused by the First World War. The *BGB* had treated the ownership of real property as essentially indivisible: in particular the owner of a dwelling was always identical with the owner of the land beneath it. This rule practically speaking placed home-ownership out of the reach of the lower middle class, and contributed to the housing shortage in the cities during the First World War. A new ordinance, passed in 1919, repealed part of the *BGB* and created a law of “heritable building rights”: essentially a landowner could now contract to encumber the land and to sell the building rights for a period of years.<sup>428</sup> This ordinance supplementing the *BGB* is still

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<sup>426</sup> See WIEACKER, *supra* note 346, at 545.

<sup>427</sup> See I ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 157-58. Most of the changes to the *BGB* have been in the area of family law; otherwise the text is much as it was in 1900.

<sup>428</sup> See SCHLOSSER, *supra* note 392, at 137 (citing further references). For a discus-

the foundation for much of German land law, especially in the cities; and in a similar manner, over the years, the legislature has created separate branches of statute law dealing with contracts of employment, landlord-tenant agreements, debtor-creditor relations, and the like.<sup>429</sup>

These facts have an immediate relevance to the example of Romulus. For although these important pieces of social-welfare legislation are central to modern private law, they are not to be found in text of the *BGB*, nor indeed are they based on Roman-law models, but rather on the collectivist ideas of Gierke and his twentieth-century followers. (And Gierke's ideas about groups, I argued earlier, ultimately go back to Herder.)<sup>430</sup> From our point of view it is important to observe that these statutes embody a different conception of private law than that offered by the classical model, a fact which means that the principles underlying the social-welfare legislation of the twentieth century must somehow be reconciled with the principles that underlie the *BGB*: this reconciliation has been perhaps the central theoretical preoccupation of twentieth-century German legal thought.

The second sort of change to the rules of private law has come from the courts. In particular the German Supreme Court has used the famous "general clauses" of the *BGB* to infiltrate *Sozialstaat* ideas into the private law.<sup>431</sup> Those clauses state, for example, that "a legal transaction (*Rechtsgeschäft*) that offends against good morals is void."<sup>432</sup> The most famous clause, section 242, says that "agreements are to be performed as good faith (*Treu und Glauben*), with regard to the ethics of trade, requires."<sup>433</sup>

sion in English, see NORBERT HORN ET AL., *GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION* 177-78 (1982).

<sup>429</sup> Details of this legislation, with copious references to the scholarly literature, can be found in the supplementary chapters of the standard commentary to the *BGB*. See OTTO PALANDT, *BÜRGERLICHES GESETZBUCH* 2167-556 (49th ed. 1990).

<sup>430</sup> See *supra* note 350 and accompanying text.

<sup>431</sup> For a general discussion of the role of the courts in interpreting the *BGB*, see HATTENHAUER, *supra* note 392, at 293-94; SCHLOSSER, *supra* note 392, at 134-37; WIEACKER, *supra* note 346, at 476-77.

<sup>432</sup> *BÜRGERLICHES GESETZBUCH* [BGB] art. 138, para. 1 (F.R.G.).

<sup>433</sup> *Id.* art. 242. I have translated somewhat loosely; it should of course be observed that these clauses contain numerous terms of art, and that their meaning can only be understood through a careful study of the way they are applied in practice. The other principal "general clauses" in the *BGB* are to be found at articles 157, 343, 826, and 903.

These clauses, as originally written, were meant to have a very limited application, and were intended only to serve as “a few drops of socialist oil” for the heavy machinery of the *BGB*; in this respect, as in many others, they resemble the Fourteenth Amendment. But in the course of the twentieth century the courts have used them to create an impressive body of legal doctrine, and have even used them to subvert the intent of other portions of the *BGB*.<sup>434</sup> Those clauses have come to constitute the intellectual core of substantive modern German private law; and the phenomenon known as the “flight into the general clauses”<sup>435</sup> has raised a host of difficult theoretical questions about the role of the judge, the proper scope of judicial authority, and the relationship of the courts both to the legislature and to the text of the code.

These facts raise an important issue for comparative law. I mentioned earlier that the very enactment of the *BGB*—the very fact that private law had now been enacted into legislation—was by itself enough to effect a shift in the center of gravity, away from the university scholar and towards the judiciary. The judge, who now held the power to interpret and apply the code, became an object of theoretical scrutiny; and when judges, using the general clauses, began to develop and modify and even contradict the spirit of the *BGB*, they took a role and an importance that in many ways resembles that of a traditional common-law judge.

But it is important not to overstate the analogy. The status of the German judge within the legal system is subtle and complex, and although twentieth-century German private-law judges are more powerful than nineteenth-century German private-law judges, neither they nor the academic jurists in the universities play quite the same institutional role as their common-law counterparts. In part the reasons are attributable to tradition, and in particular to the Roman-law tradition, which always paid greater respect to the scholar than to the judge.<sup>436</sup> And in part the reasons are attribut-

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<sup>434</sup> This is especially true in the area of strict liability for torts; for a discussion in English, with references to the German literature, see 2 ZWIEGERT & KÖTZ, INTRODUCTION, *supra* note 150, ch. 18, pt. 2. It is worthwhile to observe that similar developments have occurred in France; indeed, the entire French law of torts is based upon five terse paragraphs in the Code civil (C. CIV. §§ 1382-1386), a fact which has compelled the *Cour de Cassation* to develop tort law largely on its own initiative.

<sup>435</sup> The literature on “the flight into the general clauses” and the debate about the merits or dangers of entrusting so much discretionary power to the hands of unelected judges has reached a scale that rivals the American literature on judicial review; the starting point for the discussion is J.W. HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSEN (1933).

<sup>436</sup> This point, and the point about the influence of the Roman tradition, is a

able to the form of a modern German private-law judicial opinion. As I mentioned earlier, even the decisions of the Federal Supreme Court are delivered without dissenting opinions: the Court always speaks with a single voice, stating its reading of the code, and referring to earlier cases and to the scholarly literature, but not, in general, embarking on a complex analysis of the arguments for and against its conclusion. (I speak here only of the Supreme Court—the BGH—and not of the Constitutional Court.) The power to decide is one thing, but individual prestige and influence another; and in some ways the private-law decisions of the German Supreme Court bear a greater resemblance to the decisions of a relatively anonymous agency like the IRS than they do to the decisions of the United States Supreme Court. In contrast to what one finds in the common-law world, the most famous names in twentieth-century German law belong to jurists and not to judges.

The symbiotic relationship between legal scholarship and judicial decisions is intricate. Very roughly the situation is this: the large theoretical issues are thrashed out first among scholars, who argue their positions at length in journals and monographs. The discussions are learned, voluminous, and above all thorough. (It should perhaps be added that for at least some German legal scholars the ideal of thoroughness seems to be, not to dive to the bottom of the lake, but ten feet into the mud beneath it.) These learned arguments, once they have reached a certain ripeness, are then carefully summarized by the authors of treatises and commentaries; copious footnotes are of course provided. The Supreme Court, in turn, in announcing a decision, will refer not only to its own past decisions (recall that officially there is no doctrine of *stare decisis*,<sup>437</sup> so those decisions do not strictly speaking have the force of law) but also to the leading treatises and even to the scholarly literature. And the decision of the court in turn will influence the future scholarly discussions. The reciprocal relationship between the judge and the jurist is thus quite complex and deserves a separate discussion in its own right, but for comparative law the central point is this: Although German private-law judges have, in applying the general clauses, taken on a greater importance than they had in the nineteenth century, the changes they have made in the substance of the private law cannot be understood simply by reading the texts of

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central theme in WATSON, *supra* note 85.

<sup>437</sup> See *supra* note 128 and accompanying text.

judicial opinions. The scholarly literature provides a fuller and more reliable guide to the state of the law, and to the underlying intellectual debates.

I said earlier that the history of the *BGB* in the twentieth century can be divided into four periods; so far I have discussed only the first two: the pre-war period of straightforward application of the code, and the Weimar period, when the legislature and the courts began to introduce modifications. The third period, from Hitler's seizure of power to the end of World War II, raises complicated problems that I cannot discuss here.<sup>438</sup> It is an open question what the Nazis hated most: the *Rechtsstaat*, the fact that the *BGB* was based on Roman law, the bourgeois liberalism of the classical model, or the style of legal reasoning that they denounced as "Jewish formalism." Plans were made to scrap the *BGB* entirely, and replace it with a "People's Code"; the task proved difficult and ultimately came to nothing. The old private-law courts of the pre-Hitler era continued to function; they stood in a complicated relationship to the separate hierarchy of Nazi courts. Although they continued to apply and to develop the *BGB*, they did so under intense and hostile political pressure. Some of the new developments in private law (which would probably have occurred anyway) were widely acknowledged as beneficial and were retained after the War; the rest were scrapped when, in 1949, the *BGB* was restored to its former place in the legal order.

The period since the Second World War has largely continued the trend that was set in the pre-Hitler period. Judges have continued to develop the private law through the interpretation of the general clauses, and especially through the interpretation of section 242. But the Constitution of 1949 has added several important new features to the situation. First, it officially declared Germany to be a *Sozialstaat*, and this constitutional ideal, now enshrined in the positive law, has been used to re-interpret the old theory of the relationship between public law and private law. The task of the *Sozialstaat* is not, as in the classical nineteenth-century conception of the *Rechtsstaat*, simply to serve as a neutral arbiter between the parties, merely enforcing whatever agreements are made in the private sphere; instead, the state, and in particular the judges, must actively engage in social engineering, a task that is

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<sup>438</sup> For a solid historical study, which also discusses the legal theory of the period, see BERND RÜTHERS, *ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH* (2d ed. 1989).

imposed on them by the Constitution itself.<sup>439</sup> Second, “social engineering” here means not just that the *state* must see to the welfare of its citizens but that the rules of private law should be constituted so that *private individuals* as well are encouraged to promote the social welfare of other individuals. This legal conclusion has been derived from various other constitutional provisions: for example, the provision (which we saw earlier) that private property imposes social obligations,<sup>440</sup> or more broadly the provisions of the Constitution guaranteeing individual rights, equal protection, human dignity, and due process. These provisions, whose primary application is to the relationship between citizens and the state, have been held to have a “tertiary effect” in private law, and to bind private-law judges in their interpretations of the general clauses.<sup>441</sup> In all these ways, then, constitutional law has penetrated deep into the substance of private law: the sphere of the public and the sphere of the private can no longer be regarded as separate.

To sum up: in the twentieth-century German judges, using the general clauses, the *Sozialstaat* provision of the Constitution, the *Rechtsstaat* provision, the property clause, and the doctrine of tertiary effect, have, together with the legislature, made profound changes to the substance of private law; they have altered the received interpretation of the text of the *BGB*, and have supplemented that text with new bodies of legislation. The changes have affected every significant part of the private law. Family law has been rewritten to bring it into line with the Constitution’s guarantee of equal rights to men and women;<sup>442</sup> as a result “there is hardly a paragraph in family law that is recognizably the same as in 1900.”<sup>443</sup> New corporate forms have been introduced,<sup>444</sup> and the law of agency has been subjected to a thorough overhaul.<sup>445</sup> In general the trend

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<sup>439</sup> See WIEACKER, *supra* note 346, at 541 (making use of the English expression).

<sup>440</sup> See *supra* text accompanying note 371.

<sup>441</sup> This doctrine of “tertiary effect” is the principle known in German as *Dritt-wirkung*. For a brief account in English, with further references to the German literature, see HORN ET AL., *supra* note 428, at 137.

<sup>442</sup> See WIEACKER, *supra* note 346, at 524, 530, 537. The reforms principally involve marital property rights, the law of divorce, and the status of illegitimate children.

<sup>443</sup> 1 ZWIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 158.

<sup>444</sup> See FRIEDRICH KÜBLER, *GESELLSCHAFTSRECHT* 6-19 (3d ed. 1990); WIEACKER, *supra* note 346, at 516.

<sup>445</sup> See WIEACKER, *supra* note 346, at 517.

has been away from the economic individualism of the classical model and towards the ideal of a social-welfare *Rechtsstaat*.

In the law of torts this trend has encouraged a more moralistic view of the tort relationship, leading courts to develop, for example, tort rules protecting the rights of individual personality,<sup>446</sup> or to make large business enterprises serve as insurers of the general public.<sup>447</sup> The legal mechanisms for accomplishing this latter change have been devious, and can be illustrated by the changes that have taken place in the doctrine of respondeat superior.<sup>448</sup> The view of the scholars who drafted the *BGB* was straightforward and explicit: the only basis for tort liability was fault. In particular, the owner of a business should not be liable for the torts of employees, so long as the employer had exercised due care in hiring and supervising them.<sup>449</sup> In the 1870s this general principle was modified by the legislature for railway accidents and various sorts of mining accidents; but it nevertheless provided the basic tort rules for the *BGB*.<sup>450</sup> Section 831 provided that, in the event of an accident caused by an employee, the *presumption* would be that the

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<sup>446</sup> These rules, based on judicial construction, in particular of section 823 of the *BGB*, create, for example, a cause of action in tort if one's name or photograph or artistic productions are misused in a manner injurious to one's reputation. The modern tort rules were developed by the *Bundesgerichtshof* from 1954 onwards, in explicit reliance on articles 1 and 2 of the German Constitution, which protect the general right of personality. For a discussion of these developments, see 2 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 380-86.

<sup>447</sup> It should be observed in the following examples that German law and American law in many respects developed similar legal solutions to similar problems posed by industrialization, and that, to this extent, the rules of the two systems have been converging. But the routes the two systems have travelled to this common destination have been different, and there are many differences in the conceptual problems the two systems have faced in adapting their private law to the social and economic conditions of the twentieth century. For a detailed comparative account in English of present-day tort doctrines, see the relevant volumes of the *International Encyclopedia of Comparative Law* which is cited *supra* note 153; and see also 2 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 289-400.

<sup>448</sup> Further details on the German doctrine of respondeat superior can be found in 2 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 324-30.

<sup>449</sup> The Pandectists who drafted the *BGB* thought this principle was to be found in Roman law. As Jhering wrote: "It is not the occurrence of harm which obliges one to make compensation, but fault. This is as simple as the chemical fact that what burns is not the light but the oxygen in the air." 2 *id.* at 325 (quoting RUDOLF VON JHERING, DAS SCHULDMOMENT IM RÖMISCHEN PRIVATRECHT 40 (1867)). In fact the Romans did, for some purposes, make masters liable for harms caused by their servants. See 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT 527 (1955).

<sup>450</sup> See BENNO MUGDAN, DIE GESAMTEN MATERIALIEN ZUM BGB 1094 (Berlin, R. Decker 1899).

employer was at fault; but section 831 was not intended to introduce a regime of strict liability. The courts, however, have applied the rules in such a way that for many kinds of business enterprise the principle of fault today scarcely exists.<sup>451</sup> The burden on the company to rebut the presumption and show that it was not in fact at fault is almost impossible to sustain.<sup>452</sup>

Similar changes have occurred in the law of contract where, under the pressure of *Sozialstaat* ideas, the old, individualistic theory of freedom of contract has yielded to a more communitarian conception.<sup>453</sup> In this development the principal tool in the hands of the judiciary has been the general clause section 242 already mentioned, which provides that contracts must be performed "in good faith." The changes that the courts have introduced using this clause have radically altered the theoretical foundations of contract law. For instance, to the drafters of the *BGB* the sole basis for a contract was the declaration of will of the individual parties; as in ancient Roman law, contracts validly executed were to be applied without any deep inquiry by the state into the substance of the agreement. This individualistic and subjective theory of contract has given way to theories of reliance and of objective interpretation "in accordance with good faith";<sup>454</sup> the courts have reduced the sphere of private autonomy in order to take heed of the actual

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<sup>451</sup> This point is noted, for instance, in 1 ZWEIGERT & KÖTZ, INTRODUCTION, *supra* note 150, at 156-57 (observing that the courts have altered the intent of the law "by vastly extending the duty of care . . . or even by openly reversing the burden of proof and sabotaging section 831 *BGB* . . . to such a degree indeed that it is not easy in practice to distinguish between liability for fault and strict liability").

<sup>452</sup> In addition, the courts have labored to bring these cases under the heading of *contractual* liability. So, for example, if you enter an automobile showroom intending to purchase a car, and if you slip and injure yourself, the defendant car dealership is, under German contract law (section 278 of the *BGB*), liable for the acts of its employees. The theory is that, as soon as contractual negotiations start, the parties owe a duty of care to each other: if the sales premises are not kept appropriately safe, and if an accident results, then on this theory there has been a breach of the duty of care, and the car dealer is liable. (The general doctrine is known as *culpa in contrahendo*, that is, fault in the course of contracting.) This rather strained reasoning is applied even when no document has been signed. This example is taken from 2 ZWEIGERT AND KÖTZ, INTRODUCTION, *supra* note 150, at 327-29.

<sup>453</sup> For a survey in English of the developments in German contract law, see 2 *id.* at 1-228; HORN ET AL., *supra* note 428, at 71-146.

<sup>454</sup> The secondary literature on this topic is vast; for a historical survey, see WIEACKER, *supra* note 346, at 517. Further references can be found under section 242 in any of the standard commentaries to the *BGB* such as PALANDT, *supra* note 429, and JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (13th ed. 1993).

social conditions underlying, for example, contracts of employment, and the consequence has been a general tendency to replace freely negotiated contracts between individuals with standardized, objective mass contracts.<sup>455</sup> In debtor-creditor relations likewise the situation has been radically transformed: where the *BGB* originally conceived of the debt relationship as a set of agreed-upon claims embodied in the contract, the modern theory rather tends to conceive of the relationship as a comprehensive "organism," designed to serve social purposes, and imposing numerous duties of good faith on both debtor and creditor.<sup>456</sup> Indeed, section 242 is no longer regarded by the German Supreme Court as merely a maxim to be resorted to in *interpreting* a debt relationship, but as the foundation for the law of debt in general, and as a presupposition embedded in all contracts between debtors and creditors.<sup>457</sup> With this interpretation of the function of section 242 the courts are now free, within limits, without violating constitutional principles, to modify or set aside any contractual provision that conflicts with the general duty of good faith.<sup>458</sup> And in the general theory of contracts the Supreme Court has taken the position that contractual relationships can be derived, not only from the formal contract itself, but also from the surrounding social circumstances.<sup>459</sup>

The consequences of these changes to the private law, and in particular to contract law, has been to moralize the content of the legal rules, and to encourage courts to intervene in private legal

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<sup>455</sup> See JOSEF ESSER, *SCHULDRECHT* 33-38 (2d ed. 1960); a longer discussion is to be found in SPIROS SIMITIS, *DIE FAKTISCHEN VERTRAGSVERHÄLTNISSE ALS AUSDRUCK DER GEWANDELTEN SOZIALEN FUNKTIONEN DER RECHTSINSTITUTE DES PRIVATRECHTS* (1957).

<sup>456</sup> A standard modern treatise on the law of obligations is KARL LARENZ, *SCHULDRECHT* (14th ed. 1987); see also WIEACKER, *supra* note 346, at 519 (providing a general historical discussion of these changes).

<sup>457</sup> See HANS T. SOERGEL & WOLFGANG SIEBERT, *BÜRGERLICHES GESETZBUCH*, commentary to § 242 (11th ed. 1978). The point is also made by Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB*, reprinted in FRANZ WIEACKER, *KLEINE SCHRIFTEN* 43-76 (1988). The theory of the interpretation and application of section 242 is complex and controversial, and gives rise to similar intellectual problems as are presented by the Fourteenth Amendment in American law. In general, it should be observed that section 242 is a subsidiary ground for a legal action, to be invoked only when all other such grounds have been exhausted; it is not a license for the judiciary to roam at will, but rather must be exercised within narrow limits.

<sup>458</sup> Thus says WIEACKER, *supra* note 346, at 527.

<sup>459</sup> For this point, see WIEACKER, *supra* note 346, at 526 (citing decision 21,319 of the *Bundesgerichtshof*).

arrangements in order to promote the social welfare. Indeed, German private law, in turning away from the formalism of 1900, has been in certain respects turning back to the substantive legal tradition of the Middle Ages which Gierke had so vigorously championed. This fact has been pointed out by Franz Wieacker:

In the law of obligations the case law of the Supreme Court has almost without realizing it returned to the material contract-ethics of the European tradition, last represented by the school of natural law, which was supplanted by the scientific formalism of the nineteenth century. In the reliance theory of the declaration of will; in the return to the principle of material equivalence in cases where the basis of the agreement has disappeared or when the court needs to re-shape the contract; in the acknowledgment of reciprocal duties of care and consideration; and finally in the concrete specification of "good morals" and in the requirement of "good faith," modern case law stands closer to the Byzantine, medieval, and old Natural Law conception of law than it does to that of the classical Roman jurists or to the Pandectist legal science of the nineteenth century.<sup>460</sup>

#### 4. Conclusions on Private Law

Our ancient law student, then, would have at best a superficial understanding of the central themes in modern German private law, and this conclusion holds true even if we restrict our attention to the substantive rules of the *BGB*. For although the *BGB* was indeed based on the Roman-law studies carried out by the Pandectist movement, and although the text is heavily marked by the influence of the *Digest*, the *understanding* and *application* of the original text has undergone a sea change. And that change has not been driven by ideas inherited from Rome, but by the social and economic developments of the twentieth century; intellectually (as we just saw) the new underlying theory has more in common with the scholastic theories of the Middle Ages than it does with ancient Rome. Romulus, knowing nothing of the Middle Ages and nothing of the twentieth century, would be at a loss.

These changes to the substance of the private law have had two important systematic effects: First, recall that when the *BGB* was promulgated in 1900 it sat at the center of the German legal universe. The Pandectist scholars had for the first time created a

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<sup>460</sup> WIEACKER, *supra* note 346, at 540-41 (translation by author).

logically arranged formal system of private law, and a comprehensive theory of law to support it. The old dream of the natural lawyers seemed to have become reality, and the *BGB* became the exemplar for every other branch of law. But the collapse of the old theory of society brought in its wake a large theoretical problem that continues to haunt German legal thought. The classical theory was based on the concepts of individual rights, private property, and personal legal autonomy; the theory of the twentieth century on mutual responsibility, the plurality of groups, and the social state. It has thus (as we saw) been necessary for the legislature to create entire new branches of private social welfare law outside of the *BGB*. These new branches of law have different intellectual underpinnings; and this fact has meant the breakdown of the internal unity of German private law, and its dethronement from the center of the legal universe.<sup>461</sup> It is not surprising that there have been numerous proposals (so far not acted upon) to rewrite the text of the *BGB* to bring it back into line with modern law,<sup>462</sup> or that the greatest intellectual challenge for modern scholars of the private law is to reconcile the communitarian and collective premises of the *Sozialstaat* with the individualistic and Libertarian premises of the *Rechtsstaat*.<sup>463</sup> And it should be clear from everything I have said that this central problem in *private* law touches central problems in *constitutional* law,<sup>464</sup> and that those issues in turn are bound up with the deep philosophical problems first

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<sup>461</sup> For the barest hint of the resulting intellectual turmoil, see ERNST-WOLFGANG BÖCKENFÖRDE, *DIE VERFASSUNGSTHEORETISCHE UNTERSCHIEDUNG VON STAAT UND GESELLSCHAFT ALS BEDINGUNG INDIVIDUELLER FREIHEIT* (1972); 1 GUSTAV BOEHMER, *GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG* 164ff (1950); ULRICH MEYER-CORDING, *KANN DER JURIST HEUTE NOCH DOGMATIKER SEIN?* (1973); LUDWIG RAISER, *FUNKTIONSWANDEL DER PRIVATRECHTSINSTITUTE* (1974); Ludwig Raiser, *Die Zukunft des Privatrechts*, in LUDWIG RAISER, *DIE AUFGABE DES PRIVATRECHTS* 208 (1977).

<sup>462</sup> See 1 ZWEIGERT & KÖTZ, *INTRODUCTION*, *supra* note 150, at 159.

<sup>463</sup> See DIETER GRIMM, *DIE ZUKUNFT DER VERFASSUNG* (1991); HANS NIPPERDEY, *SOZIALE MARKTWIRTSCHAFT UND GRUNDGESETZ* (1961); SCHLOSSER, *supra* note 392, at 198-200; WIEACKER, *supra* note 346, at 547; Franz Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, reprinted in WIEACKER, *supra* note 295, at 9. These writings represent only the tip of the iceberg.

<sup>464</sup> Again, the literature is vast. For an introduction, see M. BULLINGER, *ÖFFENTLICHES RECHT UND PRIVATRECHT* 75 ff. (1968); Dieter Grimm, *Zur politischen Funktion der Trennung von öffentlichen und privaten Recht in Deutschland*, in *STUDIEN ZUR EUROPÄISCHEN RECHTSGESCHICHTE* 224 (W. Wilhelm ed., 1972). See generally Dieter Grimm, *Die Trennung von öffentlichem und privatem Recht*, in *4 SOZIALWISSENSCHAFTEN IM STUDIUM DES RECHTS* (G. Dilcher ed., 1978). The modern debate started with E. MOLITOR, *ÜBER ÖFFENTLICHES RECHT UND PRIVATRECHT* (1949).

broached by Kant. Is it any surprise, then, that he looms so large in the modern debates about private law?

This last point brings me to the second systematic effect of the changes in private law, namely, the breakdown of the previously sharp boundary between private and public law. This, too, is a central intellectual crisis for modern German legal scholarship. As we saw, the constitutional ideals of the *Rechtsstaat* and the *Sozialstaat* have penetrated deep into the substance of private law. Gierke, who is largely responsible for the public-law idea of the *Sozialstaat*, was already clear that the consequences of his theory would spill over into private law, and that the distinction between public and private would thereby come into question.<sup>465</sup> And in fact the twentieth-century *Sozialstaat* has to a considerable degree undermined this traditional distinction, which used to be one of the pillars of the civil law.<sup>466</sup> So the impact of the new idea of social law has indeed been seismic: on the one hand the old fissure between public and private law has narrowed (and in places disappeared); while on the other hand new fissures have emerged in the previously uniform facade of private law.<sup>467</sup>

### C. *The Ignorance of Romulus*

I embarked on these historical discussions of the German *BGB* in order to show the futility of a telephone-book approach to comparative law. It is now time to pull together the threads of the argument.

I suggested we approach these issues by thinking of Alan Watson's example of the law student of the age of Justinian

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<sup>465</sup> See SCHLOSSER, *supra* note 392, at 118-19. See generally SUSANNE PFEIFFER-MUNZ, *SOZIALES RECHT IST DEUTSCHES RECHT: OTTO VON GIERKES THEORIE DES SOZIALEN RECHTS UNTERSUCHT ANHAND SEINER STELLUNGNAHMEN ZUR DEUTSCHEN UND ZUR SCHWEIZERISCHEN PRIVATRECHTSKODIFIKATION* (1979); H. SPINDLER, *VON DER GENOSSENSCHAFT ZUR BETRIEBSGEMEINSCHAFT: KRITISCHE DARSTELLUNG DER SOZIALRECHTSLEHRE OTTO VON GIERKES* (1982).

<sup>466</sup> Thus Wieacker speaks of "the disintegration of private law": "The inner unity of private law has been called into question [by these developments] just as has its strict separation from public law, which even at the beginning of this century was still a presupposition of the traditional legal order." WIEACKER, *supra* note 346, at 553.

<sup>467</sup> The situation was further complicated by the Lüth decision of the German Constitutional Court, Judgment of Jan. 15, 1958, BVerfGE 7, 198, which established that all application of private law must be in accordance with the basic rights enumerated in the *BGB*. For want of space I cannot discuss the details here; the issues are treated at length in any of the standard commentaries to the German Constitution.

confronted with a modern civil code. According to Watson, Romulus

would not be greatly astonished by the substance of the law, though he might well be taken aback by the abstract way in which the rules are set out. Differences in the substance of the law there certainly are, but scarcely what might be termed major developments.<sup>468</sup>

Indeed, according to Watson the “biggest surprise” for Romulus would be the disappearance of the law of slavery.<sup>469</sup> So let us now confront the central question: How much does Romulus in fact know about German law?

I set aside as too obvious for comment the fact that, even if we overlook such academic subjects as legal sociology, legal philosophy, legal history, or the economic analysis of law, Romulus is entirely ignorant of large tracts of modern black-letter law, both public and private: civil and criminal procedure; criminal law; bankruptcy law; insurance law; patent and copyright law; administrative law; virtually the whole of commercial law; tax law; international law, both public and private; the law of the European Union; social welfare law; remedies; evidence; labor law; corporate and antitrust law; mass media law; and transportation law. These are the most active and fertile parts of modern European law, and cannot be adequately understood if we limit ourselves to studying those aspects of private law that have stood still since the Roman Empire.

We saw that to understand modern German private law it is necessary to have a grasp of basic constitutional law as well. The German Constitution is not, strictly speaking, the topic under discussion in this Article; but it should be observed that present-day constitutional theory is still organized around the ideas of Kant and Gierke, and is still conducted in the vocabulary they created. An influential German textbook on the theory of the state provides a typical example.<sup>470</sup> It is divided into two parts. Part One deals with the general theory of the state. We start with the concept of a community, and consider in turn whether a community is an organism, a set of social relations, a normative construction, or a structure of behavior. Then we move to the topic of the state: to the power of the state, and to the relationship between *Staat* and

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<sup>468</sup> WATSON, *supra* note 85, at 179-80. The entire passage is quoted *supra* text accompanying note 186.

<sup>469</sup> *Id.*

<sup>470</sup> See REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLHRE (11th ed. 1991).

*Volk*. Next comes a discussion of the state as a juristic person: the “fiction theory” is contrasted with Gierke’s theory of “real juristic personality.” Then we turn to normative justifications of the state, to anarchism and civil disobedience.

Part Two discusses the legal organization of the state. We begin with a classification of the principal forms: monarchy, oligarchy, and various categories of democracy. Then comes a long section, first on the *Rechtsstaat* in general, then on the regulatory industrial state, on its need to protect social welfare, and on the role of the bureaucracy. The book ends with a discussion of federalism and parliamentary democracy. Almost none of this would be familiar to Romulus, or indeed to any lawyer who lived before the French Revolution: the ideas and the terminology were created by Kant and Herder, Savigny and Gierke, and their nineteenth-century contemporaries.

But let us set aside these matters and confine our attention to the central case of the *BGB*; for the civil codes of France and Germany are what traditional comparative law has expended the most energy in trying to understand. I contend that the telephone-book approach to comparative law is inadequate, no matter how well-executed, to give Romulus even an amateur understanding of the German civil code: the failure is inherent in the method itself.

From our previous discussion it is evident that the various private-law ignorances of Romulus can be divided, like Caesar’s Gaul, into three classes. The first class is the subtlest and ultimately the most instructive: Romulus is ignorant of the reciprocal interrelationships between public law and the civil code. Second, he is ignorant of certain global features of the *BGB*—how, in general, it is to be interpreted and applied, what its *point* is. The third class of ignorances—the local ignorances—contains his various ignorances of the individual rules themselves. Let us examine these three classes in turn.

The essence of the traditional telephone-book method, recall, lies in three elements. It shuns history and theory; it focuses its attention on the black-letter rules; and it studies private law at the expense of public law.<sup>471</sup> We saw earlier that these three elements are related and, in particular, that this approach depends upon sharply distinguishing public law from private; for only in that way

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<sup>471</sup> See *supra* part III.B.

can the rules of private law be shielded from political, and therefore theoretical, contamination.

If ever such an approach was appropriate to the study of a foreign legal system, it should be appropriate to the study of the classical nineteenth-century German theory of private law. The Pandectist private-law scholars who themselves followed in Savigny's footsteps drew a sharp distinction between private and public law: the sharpest such distinction, indeed, that has ever been drawn. It was central to their conception of the *Rechtsstaat* that the rules of Roman law were to be given a logical, systematic, formal arrangement in accordance with the principles of conceptual jurisprudence, and that the entire formal system was to be kept apart from party politics: the job of the state was to apply the rules to all, without partiality.

Despite the sharpness of the Pandectist distinction, it is important to remember that the classical model of private law and the classical theory of the *Rechtsstaat* grew up together, and that they have a common source in the legal philosophy of Kant. As we saw, Savigny, faced with the problem of imposing structure on the disorganized mass of Roman private law, adopted a Kantian leitmotif, and grounded his *System of Modern Roman Law*<sup>472</sup> on the idea of individual autonomy.

These facts, we saw, have a direct connection to politics, and to the understanding of what the Pandectist legal program was intended to accomplish. For although the economic-liberal Pandectist theorists of the *Rechtsstaat* were not, as a rule, ardent democrats, they were far from supporters of autocratic despotism. On the contrary, they were grappling with one of the central problems of modern liberal political theory: how to design, in an effective manner, a state that would protect individual rights against, on the one hand, the tyranny of a despot, and, on the other, the tyranny of an oppressive majority. The solution they arrived at depended crucially on the Kantian idea of the universalizability of moral judgments, and on a particular conception of the private sphere. Their goal was the protection of the individual; and they placed their trust in the form of law, not in majority rule. Laws were to meet certain formal requirements; they were to be of general application; they were to respect the freedom of the person; they were to be applied by an independent and professional

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<sup>472</sup> SAVIGNY, *supra* note 287.

bureaucracy. In this way the private sphere was to be secured against state intrusion.

If we lose sight of the connections between public and private law, we are in danger of misunderstanding both kinds of law. In particular, it should be observed that precisely here the traditional approach to comparative law runs a grave and subtle risk. For consider what will happen if we regard public law and private law in isolation, and if, in addition, we examine only the black-letter rules.

In public law, if we detach it from the underlying Kantian leitmotif of the private sphere, and if we look only at the structure of the governmental institutions, we will be most struck by the fact that the theorists of the liberal *Rechtsstaat* were not democrats—that they placed great emphasis upon order, formality, rules, and correct bureaucratic procedures, but positively shunned the idea of majority rule. This is a real difference between the constitutional history of Germany and that of Britain; but as I argued earlier we must be careful not to exaggerate. For there exist numerous points of affinity (and indeed of direct influence) between the political theory of the liberal German *Rechtsstaat* and the political theory of the British and French constitutionalists; and it is precisely these subtle shadings and differences that comparative constitutional law most needs to understand. The legal minds of all three nations were struggling with the problem of mass participation in the political process; and, strictly speaking, in the nineteenth century only France arrived (for a time) at a solution which contained no element of monarchy.

As for private law, if we consider it in detachment from public law and look only at the black-letter rules, we will be struck by the fact that those rules appear to have changed little since the days of the Romans. All the Germans seem to have added is a demand for clarity, logic, and systematic organization: a new and somewhat pedantic scheme of classification, but nothing truly original. One then loses a sense of the *point* of the formalism, and of the ideal of political justice it was meant to serve.

To put these matters in a different way, we can now see that the separation of public and private law insisted upon by traditional comparative law rests on a subtle but serious logical blunder. From the fact that the *rules* of private law can be distinguished from the *rules* of public law, and from the fact that the Germans themselves drew such a distinction, it does not follow that the *theory* of private

law can be distinguished from the *theory* of public law: and the theories, of course, are what we need to understand.

Let us now return to Romulus. It should be clear that, at least to a first approximation, his ignorance of the foregoing matters reflects an ignorance of *history*, and history of a special kind. He needs to know not just how the black-letter rules have altered since the days of Justinian, but also the shifts in the underlying patterns of ideas. And none of this can he gather simply by reading the text of the *BGB*.

I stressed earlier in my sketch of modern German legal history that there exist two aspects to Savigny's pamphlet of 1814—a formal aspect which seeks clarity, precision, and logical exactitude, and a material aspect which sees law as an organic outgrowth of the underlying culture.<sup>473</sup> On the one hand, we have the ideal of abstract mathematics; on the other, the empirical theory of the historically rooted *Volksgeist*. These two aspects of Savigny's thought coexist in an uneasy tension in his writings, and the tension was to become a brooding omnipresence that hovered over all subsequent German legal thought.

We can push the analysis of this tension in two directions: either backwards, to trace its origins to the highly technical philosophical disputes between Kant and Herder; or forwards, to trace its influence on the subsequent development of German law. We have seen (to be sure, only in a superficial outline) how these two aspects of Savigny's work were combined and re-combined by later thinkers to create the central concepts of German law: the *Rechtsstaat*, the classical model of private law, conceptual jurisprudence, the idea of social law. The history of German legal thought since Savigny has been a kind of symphony of ideas in which each generation has discovered new variations on the old contrapuntal themes.

The important point to observe is that Romulus would understand none of this. He knows nothing of Kant, nothing of Herder, nothing of the debate between Thibaut and Savigny, nothing of Puchta or Windscheid or Gierke, and has not the slightest conception of the historical circumstances surrounding the creation of the *BGB*. All of these ideas belong to the mental world of nineteenth-

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<sup>473</sup> See *supra* part IV.D.

century Germany: they have nothing to do with the age of Justinian.

It might now be objected that Romulus need not understand this history in order to understand the black-letter rules of the *BGB*: after all, the average German law student spends more time mastering the text of the code than studying the works of Kant. Now, in a sense this objection is correct, and if *all* we expect of Romulus is a rough comprehension of the text of the code, such a knowledge can be had without any special training in history. Indeed, it can be had without any special training of *any* sort, for clearly *this* level of comprehension is available to any literate adult, ancient or modern.

The objection itself is vulnerable to two replies. First, whatever may be true of the average German law student, legal scholars are very much aware of the continuing importance of Kant and Savigny and the ideas introduced by the great jurists of the nineteenth century: ideas which continue to provide the backdrop to the legal theories of the present day. Second, it is not clear that it is possible, even in principle, for Romulus to understand an abstract, ahistorical presentation of the modern philosophical debates. Much of what a modern lawyer knows was not specially studied in law school, but is the common possession of post-medieval, post-Enlightenment, post-Romantic late twentieth-century Europeans. It is in the atmosphere. Romulus, says Watson, would be surprised to find that the *BGB* contains no reference to the law of slavery. Yes, and a modern European would be even more surprised if it did. This difference is not really as slight as it seems. The entire modern vocabulary of individual rights, human dignity, free will, equality, autonomy, social welfare, "unfolding of the personality," the *Rechtsstaat*, and the rest is alien to Romulus, and has been slowly constructed, with the attendant philosophical theories, over fifteen centuries. (Incidentally, it is significant that one must speak of Romulus as a male: he would be surprised by the constitutional provision asserting that "men and women have equal rights,"<sup>474</sup> by the various statutes implementing this provision, and by the influence those statutes have had on family law.) If he is to understand the modern terminology and the underlying concepts, he must, I think, however sketchily, try to comprehend their historical development. But the modern law student can take them for granted. They have become a part of the atmosphere, a part of

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<sup>474</sup> GG § 3, para. 2.

the surrounding culture, a part of the *Volksgeist*, and indeed a part of the language itself.

As a result of his ignorance of history and his ignorance of the relationship between public law and private law, Romulus would be unable to understand the central theoretical issue in modern German legal thought: the collapse of the internal unity of the classical model of private law, and the breakdown of the distinction between public and private. Nor could he understand the scholarly literature on this topic, which is deeply concerned with the history of modern codification.<sup>475</sup>

As if this were not enough, Romulus is also ignorant of certain basic facts about the interpretation and application of the text of the *BGB*. Observe first that Romulus is given only the text of the civil code; he is entirely ignorant of the surrounding institutions and the scholarly literature. In particular he knows nothing of the writings of the academic jurists who wield such influence in the civil-law world.<sup>476</sup> Their writings largely determine how the civil

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<sup>475</sup> A good example is provided by Friedrich Kübler, *Kodifikation und Demokratie*, 24 JURISTENZEITUNG 645 (1969). He argues that codification was the product of a bygone historical era. It reflected the desire of the new European nation-states to consolidate themselves, and to rationalize a relatively small number of laws; it was imposed from above by a "scientifically oriented ministerial bureaucracy" who were well-insulated from political pressure. *Id.* at 646 (quoting Wieacker). But these conditions no longer obtain in a twentieth-century mass democracy: "The transformation of the bourgeois command-state into an open industrial society has ended the epoch of the great civil codes." *Id.* at 648. Laws are now made in Parliament, and are subject to the forces of party politics; the complexity of the issues, and the sheer number of new laws that are required, mean that the old, harmonious system is no longer tenable:

One should therefore recognize that the "long-swelling crisis of legislation" is nothing but the normality of a democratically-constituted industrial society. And a part of this normality is the fragmentary and periodic character of the laws.

*Id.* at 651 (citations omitted).

Other scholars, in contrast, fear that the judiciary, in applying such clauses as *BGB* § 242, has usurped the proper function of the legislature, and that the *Rechtsstaat* will become an undemocratic *Richterstaat*, a judge-state; these scholars have argued that the classical model should not be surrendered so readily. Kübler gives references to their works. *See id.* at 649-51. The important point is that in all these scholarly writings an understanding of the argument depends heavily on an awareness of modern legal history.

<sup>476</sup> Alan Watson makes the point often that the heroes and standard-bearers of legal culture in the civil-law world have for centuries been, and are still in large measure today, the academic jurists; indeed, he treats this fact as a defining characteristic of the civil law:

[M]ost civil law systems are codified, they distinguish, to a much sharper degree than do common law systems, public law and private law, commer-

code is to be interpreted, how it is to be applied, and how it is to develop in the future. It follows that Romulus needs, at a minimum, to read the scholarly commentaries as well; he cannot understand modern German law simply by reading the text of the *BGB*.

Romulus, it is important to observe, would comprehend neither the formal nor the material aspects of the German Code that have their origins in Savigny and in the legal thought of the nineteenth century. Consider first the formal aspects. He would find, on opening the book, that the *BGB* begins with the lengthy "General Part" mentioned above.<sup>477</sup> This part contains definitions of persons, both natural and juristic; juristic persons are further subdivided into societies (registered and non-registered), foundations, and juristic persons of public law. Next come definitions of things (movable and immovable); essential parts of things; fruits of things; distribution of fruits. Next come the definitions of legal transactions; subjective rights; absolute and relative subjective rights; legal competence; declarations of the will; revocability; and so on, for 240 heavily-commented articles. (In the standard commentary on the *BGB*, the General Part fills some 200 pages with fine print.)<sup>478</sup> Not a single reference to a case; not a single reference to a concrete set of facts.

The problem here is not just that (as Watson concedes) the Roman "might well be taken aback by the abstract way in which the rules are set out."<sup>479</sup> In fact he would be astounded; but this is not the principal point. For without a ready understanding of the General Part and of the juristic methodology developed during the nineteenth century he would have no conception of how to operate with the *BGB*, or of how to apply its provisions to an actual case. Nor would he be able to follow the modern debates about the organization and structure of the private law, or about the relationship between the *BGB*, the commercial code, and the codes dealing with patent law or private insurance law. Nor would he understand

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cial law and private law; they have a career judiciary; they traditionally ascribe higher prestige to legal academics; and they are much more rule-conscious.

SCHLESINGER ET AL., *supra* note 88, at 309. Or again: "Thus on the eve of codification the heroes of civil law systems were academic jurists, not judges." WATSON, *supra* note 85, at 172-74.

<sup>477</sup> See *supra* text accompanying notes 398-404.

<sup>478</sup> PALANDT, *supra* note 429, at 1-210.

<sup>479</sup> WATSON, *supra* note 85, at 179.

why a General Part is to be found in the German *BGB*, but not in the French *Code civil*.

It might be replied that these areas of ignorance concern only *formal* aspects of the *BGB*, not its *substance*. But the existence of a technical “theory of juristic method,” taught as a required introductory course in the law schools, and determining both the interpretation and application of the *BGB*, is hardly a matter of mere formal structure.<sup>480</sup> The most that can be said for Romulus is that he would have a superficial grasp of at least some rules, and he might be tempted to assimilate them to his own legal experience—to think that he understands them better than he does.

### PART THREE

#### VI. CONCLUSION: A NEW SUBJECT?

Let us briefly recapitulate the main argument. We have for some time been scrutinizing the foundations of comparative law, and we have done so from several radically different perspectives. We started with the rats of Autun and with a highly speculative worry about the limits of intelligibility of a foreign legal system. We then switched to a much more mundane issue. We considered the malaise complained of by the leading theorists of comparative law—the inability of the subject to cohere into a cumulative academic discipline, and its seemingly futile tendency to heap up facts without attaining a deep understanding of foreign law.<sup>481</sup> We conjectured that the malaise might have its origins in the way the subject has so far been pursued. This raised the abstract question:

What does one need to know before one can be said to have an adequate understanding of a foreign legal system?

In order to make the discussion more concrete, we reformulated the question and asked ourselves:

What would an ancient law student like Romulus need to know before he can be said to have an adequate understanding of modern German private law?

The hope was that an answer to this latter, concrete question would cast light on the general problem of comparative law. We are now

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<sup>480</sup> Two massive textbooks by Karl Larenz indicate the scope and difficulty of what the Germans call “juristische Methodenlehre.” See LARENZ, *supra* note 136; LARENZ, *supra* note 399.

<sup>481</sup> See *supra* part III.A.

in possession of at least a rough answer; and we can see that, no matter how much additional information we give Romulus about the black-letter rules, we shall have left untouched the fundamental sources of his ignorance. In other words, the problem with his telephone-book approach to comparative law is not merely that it gets things wrong, but that it can never get them right. To this conclusion we need only add the observation that the ignorance of Romulus is not just the ignorance of an ancient law student, but of any student, ancient or modern, whose grasp of German law is limited to a knowledge of the black-letter doctrines of the civil code. Indeed, if we now examine the authoritative works of traditional comparative law, we shall find that the ignorance of Romulus lurks around every corner. The standard accounts available in English of German private law either fail altogether to mention, or discuss in the most cursory manner, such matters as: the purpose and functioning of the General Part of the *BGB*; the relationships between the theory of contractual obligations and the theory of delictual obligations; the links between the modern theories of private law and the modern theories of the *Rechtsstaat*; the implications of these *Rechtsstaat* theories for the judicial process. Traditional comparative law has failed to understand—and often failed even to notice—the collapse of the traditional distinction between public law and private law; or the significance of the collapse of the classical model of private law; and it has failed to discuss in adequate detail the twentieth-century theories of private law, or the influence of those theories on legal practice.

Three points should be observed about these failures of the traditional comparative method. First, the failures are not, as it were, failures on the outer margins of comparative law. The subject has been in existence, as an organized academic discipline, for over a century; it has devoted its greatest energies to understanding the differences between common-law and civil-law systems. In particular it has sought to understand the nature and the role of a civil code. Yet traditional comparative law has failed to understand the central concepts and central theoretical debates that have determined the structure and content and interpretation of the *BGB* and the German Constitution. Second, the failures cannot be quickly patched simply by adding a few supplementary paragraphs to the existing treatises. This point should be evident from the entire foregoing discussion. The account I offered above of the development of German legal thought is manifestly only a rough thumbnail sketch for a single European country; and an adequate investigation

of the intellectual underpinnings of the civil-law systems will demand a much more exhaustive treatment. Third, the failures we have noticed are not failures that matter only to theoreticians: they matter also to working lawyers. For the standard accounts, because they have overlooked the theoretical debates about the interpretation and constitutional status and social purpose of the *BGB*, are in consequence unable to explain how, as a practical matter, it is applied by the courts or functions in the hands of lawyers. Romulus, for all his knowledge of the text of the law, would scarcely be qualified to make intelligent casual conversation about law in modern Germany, let alone to offer professional advice to a client. If the foregoing observations are correct, then surely here is to be sought the source of the malaise of comparative law.

Our task must now be to explore the reasons for this failure in a more abstractly philosophical manner: to investigate what went awry, and to try, at least in a preliminary fashion, to describe a new approach that can be expected to do better.

#### A. *Two Hunches*

As a start, let us observe that, broadly speaking, the problems of traditional comparative law appear to come from two related sources, one having to do with the scope of the enterprise, and the other with its content.

(1) Traditional comparative law seems to be excessively narrow in the range of phenomena it considers. The full significance of this fact will become apparent in due course; but for now let us observe two points that have emerged in the course of our discussion. First, to understand a legal rule one needs to know, not just the bare text of the rule, but certain global facts about the legal system—for example, how the rule is interpreted, how it is applied, and how it interacts with other rules. In other words, rules are to be understood, not in isolation, but only as a component of an entire legal system, that is, only in context. Call this observation the *context principle* for legal rules. Second, as a logical matter, for any academic subject there exists a close connection between the problem of subject matter and the problem of method; that is, between the questions, *What* is the subject about? and *How* should we study it? In the case at hand, this means that the question *How should we study foreign law?* cannot be separated from the central question of legal philosophy, namely, *What is law?* In other words, any approach to comparative law must in the end rely on some

theory, however shadowy and implicit, of the nature of law; this theory will determine what the subject is about and how it is to be pursued. It follows that we can shed light on any given approach to comparative law by asking ourselves what theory of law it tacitly presupposes.

Now, the tacit theory of law embraced by traditional comparative law seems to be something like this: "law includes statutes and case reports and decisions of administrative agencies—that is, the sorts of things that working attorneys characteristically consult in their day-to-day practice. But law does not include, except peripherally, legal history or the writings of philosophers, or the speculations of academics." We need not at this stage attempt to decide on the tenability of this particular conception of law. For the present it is enough to note that our discussion of the German civil code gives us good reason to suspect that the conception is too narrow. For as we saw in considering the example of Romulus, to understand the *BGB* one must understand how it is applied; to understand how it is applied one must understand how it is interpreted; to understand how it is interpreted one must understand the prevailing theories about what it is for, that is, about what the civil code and private law are intended to achieve within the legal system and within society as a whole. But to understand those theories we must have a solid grasp of the ideas of such influential legal thinkers as Savigny and Puchta, Windscheid and Gierke. And the intellectual problems that occupied those thinkers, and that continue to occupy their modern successors, have their roots in the philosophical work of Kant and Herder at the end of the eighteenth century. Those philosophers supplied the concepts and categories and vocabulary that have shaped the thinking of jurists for the past two hundred years; the impact of their ideas on the law, both public and private, has been all-pervasive. (It is hard to obtain an objective measure of such things, but in Franz Wieacker's classic history of post-medieval private law Kant receives more index entries than anybody except Savigny.)<sup>482</sup> *Ergo* (it seems) to understand the *BGB* in any depth one must be at least minimally conversant with the philosophical problems first broached by Kant and Herder. Yet these thinkers are seldom mentioned, and never discussed, in the standard works of traditional comparative law. It therefore seems to follow, as a result of our inquiry into the intellectual origins of

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<sup>482</sup> See WIEACKER, *supra* note 193, at 634, 636.

the *BGB*, that the tacit conception of law on which traditional comparative law is based is too narrow: it excludes information that is essential at any rate for an understanding of the German legal system.

We must later ask ourselves whether this conclusion holds generally or merely reflects certain peculiarities of the German approach to law. Very roughly the issue is this. We have seen that legal philosophy, *via* the question about the nature of law, is directly relevant to the method of comparative law—to what we earlier called “questions of design.” *If* we conclude that the conception of law on which the traditional approach tacitly relies is too narrow, *then* legal philosophy can become relevant in a second, derivative sense: specifically, it can become relevant to the subject matter of comparative law at the stage of execution. So, for instance, in the German example the philosophical ideas of Kant and Herder formed a part of the phenomena under study. But now there is a further question to be faced, namely, whether philosophy is also (as I believe) *necessarily* a part of the subject matter of comparative law. To establish this conclusion one needs a further argument that the concept of law necessarily includes not just black-letter rules, but also the underlying philosophical ideas and principles. So one is again driven back to consider the philosophical question about the nature of law.

(2) We thus have reason to conjecture that the scope of traditional comparative law has been too narrow, and that it has paid insufficient heed to context. But we also have reason to conjecture that it has studied the wrong *kind* of phenomenon. The issues here are somewhat elusive, and the situation is made complicated by the diversity of different practices within traditional comparative law, and by the absence of explicit theories. But as a first approximation we can say that traditional comparative law tends to view a foreign legal system from the outside; that is, it takes its object of study to be black-letter *rules*, or an authoritative *text*, or the social *function* of a rule, or some other range of empirical phenomena that is capable of being described in sociological or behavioristic terms, from an external point of view. No doubt such an externalist approach can draw upon deep philosophical sources for its justification: after all, for Kant the distinction between law and morality consists precisely in the fact that law is concerned with the regulation of external behavior, whereas morality is concerned

with internal motives to action.<sup>483</sup> But an external approach excludes from consideration the internal ideas that lie behind the observable, external phenomena; that is, it does not address itself to the question that we identified as fundamental to an understanding of the rat trials of the Middle Ages: *What is it like to be a participant in a foreign legal system?* This way of putting the issue makes clear that the problem of externalism in comparative law is closely related to the problem of externalism in the philosophy of mind, and in particular to the question how far an external description of observable human behavior can account for the subjective character of conscious experience. These are important and difficult problems, but we need not attempt to solve them here. For the present, it is enough to note their existence and to observe that our substantive discussions, both of Chassenée and of the development of German private law, give us reason to think that the external perspective may not be adequate for the purposes of comparative law.

These remarks have been somewhat abstract; perhaps an example will make the point more clearly. Alan Watson, on being accused by a sociologist of confounding “law in books” with “law in action,” replied that his concern was with the positive rules of law as authoritatively set down in the statute books; these written rules influence social behavior, so there is no sharp boundary to be drawn between “law in books” and “law in action”—a distinction which Watson says he “cannot accept . . . as basically meaningful.”<sup>484</sup> We see here that Watson holds a black-letter, almost textualist conception of law; this conception is closely related to his belief that the

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<sup>483</sup> See KANT, *supra* note 59, at 42. I do not mean to suggest that a Kantian in philosophy of law must be an externalist in comparative law. On the contrary, the point is rather that we have here a complicated issue, and that the question of externalism must be argued as part of a general philosophy of law.

<sup>484</sup> For example, in defending his theories against the criticisms of Richard Abel and others, Watson writes:

I was, as I repeatedly stated and must now emphasize, primarily concerned with positive rules of law. What I wanted to show was that the rules as set down, were not the most satisfactory available to the society . . . . But I cannot accept Abel’s classification as exhaustive, or his distinction [between “law in books” and “law in action”] as basically meaningful. To a very considerable extent the behavior of lesser officials is hemmed in and restricted by rules of positive law, and the behavior of individuals is also affected by legal rules. If this were not so there would be no point to having legal rules at all . . . . The contrast between rules of positive law and law-in-action is by no means absolute.

Watson, *supra* note 8, at 1138-39.

proper object of study for comparative law is authoritative *rules*, and that ideas and principles and habits of thought are “too academic.” In particular, this *general* conception of law leads him to think of *Roman* law as a body of black-letter rules: roughly speaking, the rules set forth in Justinian’s *Digest*. And by similar reasoning *German* law becomes identified with the text of the *BGB*. It is then an easy matter to compare the two texts and to conclude that the greatest surprise for Romulus would be the disappearance of a law of slavery: “Differences *in the substance of the law* there certainly are, but scarcely what might be termed major developments.”<sup>485</sup> We have seen ample reason for rejecting this conception of “the substance of the law,” and indeed for rejecting this conception of the history of Roman law in Europe. The *Digest* contains legal rules, but the impact of those rules on European law can only be understood if one considers the different ways in which those rules were interpreted and understood—what *ideal* of law they were held to represent. To the medieval Glossators Roman law was *ratio scripta*, written reason, and enjoyed almost the status of holy writ; to the Renaissance Humanists it was an important but fallible historical document, not in every respect applicable to the modern world; to certain French Revolutionaries or nineteenth-century German nationalists it was a barbarous relic of the past, a foreign encroachment on the native legal tradition. When Savigny and Thibaut debated the merits of a revival of Roman law they were not simply arguing about the rules of the *Digest*. If they had been, their debate

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<sup>485</sup> WATSON, *supra* note 85, at 179-80 (emphasis added). I do not mean to imply that Watson’s historical studies of the influence of Roman Law consist exclusively of studies of black-letter rules: he is well aware of the systemic effects of the *Digest* and especially the *Institutes* on the organization and interpretation of continental private law. The issue has rather to do with the core meaning of the term *law*, and in particular with the extent to which an account of “the substance of the law” must necessarily include an account of underlying *ideas*. Watson, who takes an external perspective, treats ideas as peripheral; in contrast, I have been arguing that ideas belong to the core. The issues raised by Watson’s dispute with the sociologists are complex. Broadly speaking he seems to me entirely correct in his argument that comparative law and legal history should not dissolve “the law” into the surrounding social and economic and political context, but should rather study the history of the legal tradition *stricto sensu*. But I reconstrue his argument as an argument against *sociological* externalism, and then, *contra* Watson go on to reject his *textualist* externalism as well. If this view of the issues is correct, then my criticism of Watson is, in effect, that his criticism of the sociologists is insufficiently radical, and that comparative law is in need of an even more fundamental rethinking than his arguments allow. These remarks are necessarily sketchy and do not do justice to the subtlety of the issues; I discuss Watson’s theories more fully in Ewald, *supra* note 8.

would quickly have sunk into obscurity. Indeed, Savigny's *Vom Beruf* scarcely mentions individual rules. His argument is a *philosophical* argument about the nature of law, its historical development, and its relationship to the surrounding society. He does not present the *Digest* as merely a treasure trove of black-letter doctrines. Instead he appeals to the idea of Rome as a *moral and political ideal*. The point has been well-stated by James Whitman in a brilliant study of the influence of Roman law on early nineteenth-century Germany.<sup>486</sup> Whitman emphasizes that the Romanist lawyers of the early nineteenth century consciously looked back on a tradition that stretched back to Melanchthon and far into the Middle Ages:

The powerful sense of tradition among Savigny and his fellow professors, the conviction that they were the continuators of the work of Roman lawyers of the past, made them faithful to a recognizably Melanchthonian conception of Roman civilization, a conception that had, in turn, roots deep in the Middle Ages. Because Roman law in Melanchthon's time was praised as a law of "peace" and "impartiality," Romanist lawyers of the romantic era would be able to proclaim themselves the guardians of peace and impartiality in the decades after Napoleon's expulsion.<sup>487</sup>

If these observations about Roman law are correct, they reinforce our earlier observation that the scope of traditional comparative law has been too narrow. But they also do more, and suggest that comparative law has studied the wrong *kind* of phenomena. This point may be illustrated as follows. A legal sociologist might agree that Watson's black-letter approach is too narrow, and urge that we look instead to "law in action," that is, to law as it functions in a broader social context. But if this context is understood in external terms (say, as the observable regularities in the behavior of the members of the society) then our observations about Roman law show that, despite its greater breadth, a study of "law in action" falls as short of the target as a study of "law in books." The problem is at bottom the same. The social-context approach gives us external facts about the way people behave; but what we need to understand is the *ideas* and the *reasons* for the behavior. In other words, it seems that what we need to understand is neither *law in books* nor *law in action*, but *law in minds*.

We thus have two related conjectures about the source of the failure of traditional comparative law: first, the general observation

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<sup>486</sup> See WHITMAN, *supra* note 188.

<sup>487</sup> *Id.* at 3.

that the subject has paid insufficient attention to *context*; second and in particular, that it has ignored the context of *ideas*. These observations can be put in a slightly different way. Sometimes in studying a subject one is led, because of a theoretical misconception about what one is studying, to focus one's gaze on the wrong range of phenomena, or is tempted to study the phenomena in isolation from the context that gives them their sense. Logicians call such a misconception "false abstraction." An example may help to make the point clear. A logician seeking to analyze the sentence:

Peter did it for the sake of Paul.

might be tempted to view the expression "the sake of Paul" as playing the same role as the expression "the uncle of Paul" in the sentence:

Peter did it for the uncle of Paul.

That is, "the sake of Paul" is treated as a substantive expression; and it then becomes natural to ask various misconceived questions about sakes: to inquire, for instance, how many sakes Paul has, or whether they are fond of cream cheese. The error here, it should be observed, is a *logical* error and consists in studying "the sake of Paul" in isolation from its true context; in fact the expression is not substantive and indeed has no meaning on its own, but only as a part of the *adverbial* expression, "for the sake of."<sup>488</sup> Our foregoing observations give us reason to suspect that similar false abstractions may be lurking in the foundations of comparative law; specifically that, for a variety of subtle reasons, traditional comparative lawyers have been led to adopt one or another external conception of law, but that, whether one regards *law* as individual rules taken in isolation, or as the text of an entire rule book, or even as a rule book *cum* social functions, all of these conceptions of law represent logically false abstractions, and an illegitimate

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<sup>488</sup> This particular error is neither deep nor consequential. However, precisely analogous errors have a long history in the foundations of logic and mathematics, where they can be extremely subtle and difficult to detect; indeed from certain points of view it was the discovery that notions like *number* and *class* and *infinitesimal* had been analyzed in false abstraction from their proper context that marks the principal point of division between traditional logic and the mathematical logic of the twentieth century. I take the term "false abstraction" from Bertrand Russell; it was central to his thought on the foundations of mathematics. BERTRAND RUSSELL, *On the Substitutional Theory of Classes and Relations*, in *ESSAYS IN ANALYSIS* 165, 165 (1973). This article originated as a speech delivered in 1906.

severing of the phenomena from the context that gives them their meaning.

It might seem from what has so far been said that we already have in hand a solution to the problems of traditional comparative law: the subject should pay more heed to *context*, and in particular it should pay more heed to *ideas*. But this proposal is vulnerable to two related objections. Let us call the first the "All-or-Nothing Objection." This objection concentrates on the context principle, that is, on the claim that rules must be understood in context. The objection asks: What is the meaning of "in context"? One possibility is this: "in context" refers to the context of the entire legal system; to understand a rule one must understand the system as a whole. But if the claim is that one must understand *everything* about the legal system before one can understand *anything*, then the requirement plainly goes too far, and has the consequence that nobody understands anything. So we are, it seems, forced to a weaker thesis: to understand a rule one must understand the rule within its *relevant* context. But this amendment, it may be charged, purchases truth at the price of triviality. For we are given no criterion for determining how far the relevant context extends, and therefore no criterion for distinguishing false abstractions from true ones. Moreover, the context principle seems to imply that one can understand the whole before one has understood its parts; but plainly the process of learning must proceed piecemeal and on the opposite assumption that, before one can be said to have understood the legal system as a whole, one must have grasped its constituent parts.

The second objection is that the proposed reform of traditional comparative law is *prima facie* trivial. That reform tells us that we can obtain a deeper understanding of a foreign legal system if, in addition to its rules, we study also its legal philosophy and its historical evolution. But this is merely to claim that, the more you know about a legal system, the more, in fact, you know. And indeed there exist grounds for thinking that the proposal will make matters worse rather than better. We have already seen that, because of its wide scope, comparative law is condemned as superficial, and has had difficulty in forming a coherent academic subject. It stands accused of piling up an unmanageable heap of facts; but the proposal, it seems, will merely increase the size of the heap. Call this the "Mere Accumulation Objection."

These two objections show that our observations about comparative law are so far only a preliminary hunch about the source of the

difficulties of the subject: they do not yet constitute a rigorous criticism. So we must now attempt to make them more precise.

## B. *A Fresh Start*

### 1. Loose Ends

Before we embark on this task it will be well to take stock of the problems we must address. These problems can be divided into three classes.

(1) We must attempt to discover the source of the malaise of comparative law, and, if possible, show how that malaise is to be corrected. Specifically we must address the two most common and fundamental complaints about traditional comparative law, namely:

- ( $\alpha$ ) that the subject has had difficulty forming itself into a systematic and cumulative academic discipline (the "Dispersedness Criticism"); and
- ( $\beta$ ) that the subject has been insufficiently useful in practice, and, at times, has (as we saw in our example) conveyed an inaccurate picture of the foreign legal system (the "Superficiality Criticism").

(2) We must then attempt to pin down more precisely the proper *subject matter* of comparative law. This task can perhaps be formulated most clearly if we return to an earlier question and ask ourselves: To what extent does comparative jurisprudence constitute a new and self-sustaining subject of academic inquiry? As we saw earlier, the extent to which it does so will depend on the extent to which we are able to establish four things: that comparative jurisprudence is *distinct* both from legal philosophy and from traditional comparative law, and that it is *fruitful* with respect to both subjects. (The requirement of distinctness can be further subdivided into *distinctness of subject matter* and *distinctness of method*; but this is a refinement that need not concern us at the moment.) In other words, the strategy is to demarcate a clean boundary between comparative jurisprudence and the two existing disciplines, and then to show that the new discipline is worthy of being pursued in its own right.

We are not yet in possession of a precise definition of "comparative jurisprudence," but as a preliminary matter we can take it to be the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems. Even with this rough-and-ready definition, we are in a position to

show that comparative jurisprudence satisfies the conditions of fruitfulness and distinctness *vis-à-vis* legal philosophy. Consider first fruitfulness. It should be clear from the entire foregoing discussion that comparative jurisprudence can make two sorts of contributions to legal philosophy. First it raises abstract and intrinsically philosophical questions of *method*; for example, questions about how one should study a foreign legal system, about whether philosophy plays an essential role in the execution of such a study, about the limits of understanding, and about how far it is in principle possible to comprehend the legal practices of a radically alien society. (These questions were particularly evident in our discussion of the rats of Autun.) Second, it supplies *substantive* information about law in foreign countries that can itself be of philosophical interest; for instance, in our example the arguments of Savigny, Gierke, and Windscheid about the German civil code shine a light on the abstract philosophical concepts of *property* and *contract* and *the state*, and show how those concepts, interpreted in a certain way, have influenced legal practice.

As for distinctness, it should be clear even from our rough definition that the boundary between comparative jurisprudence and traditional comparative law is determined by a sharp logical distinction between the underlying subject matters: legal philosophy asks questions about law in general, and considers specific legal systems primarily in order to illustrate its general theses, whereas comparative jurisprudence studies the institutions and practices of a particular legal system, as embodied at a particular time and place.

We are thus left with two tasks: (i) to distinguish comparative jurisprudence from traditional comparative law and (ii) to show that comparative jurisprudence is legally as well as philosophically fruitful, that is, that it supplies useful information for practitioners or scholars who wish to learn about foreign law. The first of these tasks is especially difficult as there seems to be, at least *prima facie*, no crisp underlying logical distinction of the sort that differentiates between legal philosophy and comparative jurisprudence. In the discussions that follow, we must ask ourselves whether this initial impression is correct, and in any case take care to draw the boundary as precisely as possible.

(3) We must also give some consideration, although perhaps not a full analysis, to two claims I made earlier about the *method* of

studying a foreign legal system.<sup>489</sup> Those claims were ( $\alpha$ ) that comparative law is essentially a *single-track* enterprise, that is, that there is at bottom only one way to study a foreign legal system and ( $\beta$ ) that the enterprise is *essentially philosophical*, that is, that in its execution it relies on philosophy in a way that it does not rely on economics or the social sciences.

## 2. Historical Origins of Comparative Law

These then are the principal problems we must address. It will be helpful if we begin by trying to pin down more precisely than we have so far done the origins and the principal characteristics of traditional comparative law.

Apart from the work of isolated individuals like Bacon, Leibnitz, and Montesquieu, comparative law as an organized academic discipline first came into existence in the nineteenth century.<sup>490</sup> The story is complicated and demands a far more extensive treatment than will be possible here, but the history of comparative law in the nineteenth century divides into two periods of activity separated by a long interval of stagnation.

The first period of activity lasted roughly from 1814 (the date of Thibaut's pamphlet calling for Germany to imitate the Napoleonic Code)<sup>491</sup> to about 1839 (the date of the death of Eduard Gans). The leading scholars were German, and were centered principally in Heidelberg. The principal practical task they faced was to understand and learn from the new French *Code civil*. As a group these thinkers were cosmopolitan, politically liberal, open to new ideas from France and America, and ardent proponents of German legal reform. They were overshadowed by Savigny and the Historical School, whose chief interest was in exploring the national *Volksgeist* through a study of the history of Roman law—a project that did not encourage the study of foreign law, and in some ways actively discouraged it, on the ground that the legal products of one national legal tradition could be of only the most limited relevance to any other national tradition.<sup>492</sup> In consequence the early German comparative lawyers lagged behind Savigny both in their

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<sup>489</sup> See *supra* part II.A.

<sup>490</sup> For a discussion of these thinkers, and also of the contributions of Grotius and Vico, see 1 CONSTANTINESCO, *supra* note 95, at 73-89.

<sup>491</sup> See *supra* notes 238-42.

<sup>492</sup> See *supra* part IV.D.

intellectual influence and in the influence of their projects for practical reform.

In contrast to Savigny, whose principal concern was with the historical study of black-letter legal doctrine, the early comparative lawyers showed a strong interest in studying ideas and theories, and much of their work was directly philosophical in inspiration. Thibaut and P.J.A. Feuerbach (1775-1833) were both influenced by Kant and by the cultural ideas of Herder; Feuerbach in particular delved into non-European law, and in his posthumously published essay, *On the Idea and the Necessity for a Universal Jurisprudence*, argued (ultimately on grounds that he took from Kant) for a comparative study of the whole of human legal history.<sup>493</sup> (Feuerbach's argument stressed that the historical research must be a study *both* of the empirical legal institutions *and* of the underlying philosophical principles.)

Easily the most brilliant of these early German comparative lawyers was Eduard Gans, who had studied with Thibaut in Heidelberg before going to Berlin, where he became an assistant to Hegel and the chief philosophical critic of Savigny and the Historical School.<sup>494</sup>

The issues raised by this first period of comparative law are complex and require a much fuller examination than will be possible in the short space available here: the task must be postponed to a later occasion.<sup>495</sup> But two points call for special

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<sup>493</sup> See P.J.A. Feuerbach, *Idee und Notwendigkeit einer Universaljurisprudenz*, in 2 FEUERBACHS BIOGRAPHISCHER NACHLASS 378 (2d ed., Leipzig, J.J. Weber, 1853).

<sup>494</sup> Gans's chief work is his four-volume study of the historical development of the law of inheritance. See GANS, *supra* note 5. Gans is a colorful figure, both intellectually and biographically, and will be discussed in a later article in this series: more than any other figure, he anticipated the criticisms of traditional comparative law that are made in the present essay.

<sup>495</sup> This may be an appropriate spot to mention some of the other leading figures of the movement. Feuerbach is best known as one of the great criminal lawyers of the age. He produced a criminal code for Bavaria in 1813; and much of his work was based on a close study of French and Italian criminal law. But he was not a simple copier of foreign ideas, and, like Savigny, concluded after careful study that the *Code civil* could not simply be imported into Bavaria. Feuerbach's interests were remarkably wide-ranging. He delved into Islamic penal law, old Russian law, the laws of India, Siberia, Mongolia, and Central Asia. His posthumously published writings sketch a project for a "universal science of law"; the science was to include a comparative study of the entirety of human legal history. This science was essentially Kantian in its inspiration, and stressed the fact that one needed *both* an empirical study of human institutions *and* philosophical principles in order to guide the historical research.

emphasis. First, comparative law as a systematic scholarly activity grew up under precisely the same philosophical influence that we have considered in our discussion of the development of German private law; that is, the intellectual tendencies unleashed by the work of Kant and Herder not only shaped the development of nineteenth-century legal theory, but provided the inspiration and the intellectual groundwork for the new discipline of comparative law. Comparative law was thus *au fond* a creation of philosophy.

That the ideas of Herder should have had this influence is perhaps not surprising, since his *idée maîtresse* was the diversity and indeed the incommensurability of human cultures and their constituent institutions, among which he included their laws and morals. But Kant too, for reasons that are less immediately obvious, exerted a powerful dominance over these early comparative lawyers. The intellectual influences are hard to unravel, but for present purposes it is enough to observe that, *pace* those who see in

The center for the flowering of German comparative law, and the center of opposition to the Historical School, was Thibaut's University of Heidelberg (where he continued to teach until his death in 1840). A remarkable group of scholars gathered in Heidelberg in the 1820s and the 1830s—liberal, cosmopolitan, open to French and American ideas, philosophically subtle, widely read, and eager for reform. As legal theorists they were overshadowed by the Historical School, but for a time they made a significant counterpoint to its conservative (and even reactionary) political tendencies.

Two of Gans's Heidelberg contemporaries deserve mention. (Both were older than Gans, but both survived him.) Karl Zachariae (1769-1843), a student of constitutional law, strongly influenced by the philosophy of Kant, was, like his contemporary Thibaut, receptive to French ideas, and above all to the *Code civil*; he joined the call for a codification of German private law. He wrote a hugely successful *Handbook of French Law* (two volumes in 1808; second edition, in four volumes, 1811 and 1812). This work attempted to place French law in an historical and philosophical setting, thereby to grasp its significance for the rest of Europe; such a thing had never before been attempted, and Zachariae's book, in French translation, was even more of a success in France than in Germany.

Zachariae's younger colleague, Karl Mittermaier (1787-1867), who had been a student of Thibaut and Zachariae, was a criminal lawyer who delved deeply into English and American law. He was the least theoretical member of the Heidelberg group. Zachariae and Mittermaier were the guiding spirits of the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslands*. This journal followed closely the development of law in England and the United States. It contained numerous articles with titles like *On English Criminal Law*; *The Study of Roman Law in England*; *American Criminal Law*; *Codification and the Common Law*; *American Constitutional Law*; *English Legal Education*; *Story on Equity*; *The Civil Procedure Statutes of Massachusetts*; and *Recent Developments in American Legal Science*. It reviewed the works of such American jurists as Story, Wheaton, Greenleaf, Bishop, and Parsons, and reported extensively on the opinions of John Marshall.

The foregoing facts are culled from I CONSTANTINESCO, *supra* note 95, at 90-114.

comparative law only a source of practical information for the worldly minded, the subject was itself created, not by the worldly minded, but by speculative thinkers acting in response to a felt *philosophical* need. We observed at the start of this Article that comparative law is today rarely considered in tandem with legal philosophy; but historically, at least, the connection could hardly be closer.

Second, although from some points of view legal history and comparative law are kindred subjects (one being the study of variability across time, and the other the study of variability across space), and although Savigny, as we have seen, stood under the influence both of Kant and of Herder, nevertheless his Historical School tended, on principled grounds, to regard comparative studies as illegitimate. The reasons for this rejection are important for any inquiry into the historical origins of comparative law, for they help to explain both why the philosophically minded style of the first period withered away, and why, when modern comparative law was born at the end of the nineteenth century, it marched under very different intellectual colors. The central figure here is Eduard Gans, who criticized the philosophical presuppositions of the Historical School with remarkable vigor and insight.<sup>496</sup> His arguments did not carry the day, in part because he died young, in part because the Historical School was too well entrenched, in part because his overly eager attempt to study the laws of all times and peoples led him into manifest superficialities, and in part because his arguments were needlessly involuted and obscure. (He was a disciple of Hegel.)<sup>497</sup> But his criticisms of the Savigny school can,

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<sup>496</sup> For a biographical description of the controversy between Gans and Savigny, see Johann Braun, *Schwan und Gans*, 34 JURISTEN ZEITUNG 769 (1979). The chief writings of Gans in this dispute are collected in EDUARD GANS, *NATURRECHT UND UNIVERSALRECHTSGESCHICHTE* (Manfred Riedel ed., 1981). As this Article goes to press, a volume in English has just come into my hands, MICHAEL H. HOFFHEIMER, *EDUARD GANS AND THE HEGELIAN PHILOSOPHY OF LAW* (1995). This book, which contains extensive translations from Gans's *System of Roman Civil Law* and a translation of his preface to Hegel's 1833 *Philosophy of Law*, makes available for the first time in English substantial selections from Gans's writings (although not the writings on comparative law), and contains as well a long introduction on his life, thought, and relationship to Hegel.

<sup>497</sup> As Michael Hoffheimer observes:

As early as 1826 Heine had caricatured both Gans's ponderous prose and his esoteric research interests in the nightmarish fantasy of an opera with a libretto by Gans about inheritance law and set to music by the contemporary Italian Spontini.

HOFFHEIMER, *supra* note 496, at x (footnote omitted).

with only slight modifications, also be read both as a criticism of the style of comparative law that arose at the end of the century and as a defense of the approach which I have dubbed "comparative jurisprudence." Gans's writings fell into oblivion after his death in 1839, and are today scarcely known. A full discussion of his work would take us too far afield and would break the flow of the argument; but he will be discussed in a later article in this series.

With the death of Gans the first period was effectively at an end. By 1843 all the leading theoreticians of comparative law were dead; the leading journal, the *Kritische Zeitschrift*, ceased to appear in 1853. There then followed a period of relative stagnation. The reasons for the failure of early comparative law are difficult to pin down with precision: the enterprise seems to have been the victim of indifference rather than of explicit refutation. But, broadly speaking, in the decades of the middle of the nineteenth century, the legal scholarship of Western Europe turned towards a form of legal positivism that was inimical to the conception of comparative law that had been urged by Gans and his colleagues. The issue at bottom turned on the answer legal scholars were inclined to give to the question, *What is law?* Speaking roughly we may say that the standard positivist answer of the mid-nineteenth century contained two components. First was the theory that law is the totality of authoritative enactments by the Sovereign; those enactments rest on the will of the Sovereign and are at bottom a matter of what the Sovereign is able to enforce; they thus belong to the realm of fact, not of morality. On this conception law is seen as built up by a series of logically distinct choices, each choice being relatively unconstrained by the choices that went before. The result is a theory of law that is, in the scholastic sense, *nominalistic*: it tends to dissolve law into a heap of discrete and independent rules, like a heap of birdshot, with each rule representing a separate, logically unfettered choice. (The "command theory" of John Austin, which dominated Anglo-American jurisprudence during this period, may be taken as a specimen.)<sup>498</sup> The second component is an idea that has its roots in Savigny's theory of the *Volksgeist*<sup>499</sup> and ultimately in Herder's thesis of the incommensurability of national cultures.<sup>500</sup> Just as the individual legal rules are logically indepen-

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<sup>498</sup> See generally AUSTIN, *supra* note 80. For a modern discussion of Austin's command theory, see HART, *supra* note 309, at 18-25.

<sup>499</sup> See *supra* part IV.D.

<sup>500</sup> See *supra* part IV.C.

dent, so too are the various national Sovereigns independent of each other. The German *Volksgeist* legislates for Germany, and the French *Volksgeist* legislates for France; but the traditions they represent are incommensurable, and global comparisons of French law with German law are therefore unlikely to bear fruit for either system. Law becomes a series of heaps of birdshot, each surrounded by a national border.

It is not difficult to see that, on this conception of law, comparative studies, if they take place at all, will occur at the level of specific black-letter doctrines: one will compare particular acts of legislation or particular decisions of the courts, but not attempt to plumb the “spirit of the nation” or to explore the various theoretical conceptions and habits of mind that underlie the decisions of the foreign Sovereign. The most fruitful object of comparison, in other words, is not the heap, but the individual pieces of shot.

When comparative law reemerged in the 1870s, it did so against this conceptual background, which was very different from the Kantianism of Feuerbach or the Hegelianism of Gans. The early comparative law had inquired into theories and ideas; the new comparative law was driven by more practical concerns, and took a narrower view of the nature of law. The chief legal event of the last three decades of the nineteenth century was, as we have seen, the overhaul of German private law and the legislative enactment of the civil code. This enterprise attracted the attention of legal scholars across Europe and generated a demand, especially in France and Germany, for comparative legal research: the French wishing to understand the legal developments afoot in their largest civil-law neighbor, and the Germans wishing to learn from the French experience with the provisions of the Napoleonic Code.

This period of roughly 1870 to 1900 was the founding era of modern comparative law. It was the period when the subject became a professional academic discipline—when the societies were founded, professorships established, and journals inaugurated.<sup>501</sup>

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<sup>501</sup> New journals sprang up across Europe in these decades, for example: *Annuaire de législation étrangère* (1872); *Blätter für vergleichende Rechtswissenschaft und Volkswirtschaft* (1906) (in 1927 renamed *Rabels Zeitschrift für vergleichende Rechtswissenschaft und Volkswirtschaft*); *Bulletin mensuel de la société de législation comparée* (1869); *Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin* (1895); *Rassegna di diritto commerciale e straniero* (1883); *Revista de derecho internacional, legislación y jurisprudencias comparadas* (1886); *Revista di diritto internazionale e di legislazione comparata* (1898); *Revue de droit international et de législation comparée* (Belgium, 1869); *Revue générale de droit de la législation et de la*

And the two facts I have mentioned—the preoccupation with the drafting of civil codes, and the fact that legal thought was dominated by a highly formalistic brand of positivism—determined the direction the new subject was to follow. The idea took root that “[t]he chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law”,<sup>502</sup> and that “[i]n technical terms, comparative jurisprudence [is] only or mainly . . . a handmaiden to the theory of legislation.”<sup>503</sup> The name of the first of the new professional societies, founded in Paris in 1869, is significant: it was called the *Société de législation comparée*. The emphasis of the new comparative scholarship was on the comparison of the black-letter doctrines of statutory law, and in particular of the individual provisions of the various European civil codes; the practical end to be served was the end of good legislation.

This conception of comparative law has cast a long shadow and continues to dominate the practice of the subject. The monumental *International Encyclopedia of Comparative Law*, prepared under the auspices of the Max Planck Institute in Hamburg, is now nearing completion in seventeen large volumes; as I noted earlier, the emphasis falls heavily on those aspects of private law treated by the civil codes; constitutional law, administrative law, tax law, and criminal law are not included.<sup>504</sup> And the primary purpose of the volumes is still legislative: to assist lawmakers in the task of drafting or revising codes of private law.

I do not deny that these researches have made an invaluable contribution to the practical business of lawmaking; they have deepened international understanding, and may in time facilitate the development of a somewhat more uniform system of European private law. These are large accomplishments, but it is important to notice the foundation on which they rest. The researches of the late nineteenth-century comparative lawyers were intended for use

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*jurisprudence en France et à l'étranger* (1877); *Vierteljahresschrift für vergleichende Rechts- und Staatswissenschaft* (1895); *Zeitschrift für vergleichende Rechtswissenschaft einschließlich der ethnologischen Rechts- und Gesellschaftsforschung* (1878).

At the same time, a number of important societies for the comparative study of law were founded. See, e.g., *Gesellschaft für vergleichende Rechts- und Staatswissenschaft* (1893); *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* (1894); *Société de législation comparée* (1869).

<sup>502</sup> HENRY S. MAINE, *VILLAGE COMMUNITIES* 4 (London, J. Murray 1871).

<sup>503</sup> Frederick Pollock, *History of Comparative Jurisprudence*, J. SOC. COMP. LEGIS. 75 (1903).

<sup>504</sup> See *supra* notes 153, 162, 173.

by professional jurists engaged in the drafting of legislation; those jurists could be assumed to share a considerable body of background knowledge. The lawyers of the civil-law world shared a common heritage in Roman law; they knew what a civil code was supposed to accomplish, and how it was likely to function in practice. The information they needed was of a more particular sort, about the specific wording of individual provisions; and for this purpose the general background could be taken for granted. The question, however, is whether this style of comparative research can be applied more widely where the intended audience is perhaps less possessed of the background information, and where the task is not to understand a single provision of the civil code, but to understand the most salient facts about the foreign legal system as a whole.

### C. *The Master Argument*

It is not difficult to see how this conception of comparative law, once established, could by a natural train of thought be generalized so that the same methodology could seem to meet the needs, not just of legislators, but of practitioners more generally. Let us call this tacit train of thought the "Master Argument." It has three parts.

(1) Comparative law is principally intended to serve the needs of practitioners; that is, of legislators, judges, and working attorneys. Its aim is to supply the basic facts about the day-to-day functioning of the foreign legal system, and to provide the kind of information that lawyers typically rely upon when advising a client.

(2) The kind of information lawyers typically rely upon is information about the black-letter rules of the positive law. They need to know—or to be able to look up—the statutes of civil procedure, or the individual clauses of the civil code, or the decisions of the courts; in short, they need access to the sort of information that is contained in the working library of a corporate law firm. So long as these rules have been specified with sufficient completeness and accuracy, all practical purposes have been fulfilled, and the study of history or philosophy can safely be left to the hands of scholars.

(3) It follows from this conception that, given any particular, concrete legal problem, the rules that a lawyer needs to know in order to solve the problem form a relatively discrete and limited set; those rules, at any rate for the practical purpose at hand, can be

enumerated and studied and understood independently of the other rules of the legal system. We need a name to refer to this property of rules; let us call it the property of *severability*. We have encountered it before, in the presupposition of traditional comparative law that the study of private law can be severed from the study of public law; but this presupposition of a deep cleavage between public and private is in fact but a particular instance of the more general property.

The Master Argument thus rests on three interrelated assumptions; let us call them the Axiom of Practicality, the Axiom of Rules, and the Axiom of Severability. It is not difficult to see how the rule-based comparative law of the end of the nineteenth century could have become entangled with the Master Argument, and how a technique that was originally designed to assist the process of legislation could in this way have been extended beyond its original boundaries. The Master Argument, and, in particular, the Axiom of Severability, is a natural offshoot of the heap-of-shot-within-a-border conception of law; but it does not depend for its plausibility on the acceptance of any elaborate argument in legal philosophy. On the contrary, it is firmly anchored in the realities of legal practice, and is the sort of argument a busy corporate attorney might make: therein consists its appeal. This fact explains why, once the particular style of comparative scholarship based on the Master Argument had become established, it found little difficulty in perpetuating itself—the method seems so obvious, so manifestly the only possible way to proceed, that it stands in need of no examination.

The Master Argument, in some form or other, seems to me to lie at the root of much of the comparative law of the twentieth century. The three axioms are seldom stated explicitly, and different comparative lawyers may adhere to them to a greater or lesser degree. They represent an attitude, a settled habit of thought, rather than a consciously elaborated theory. But the axioms seem to lurk not very far in the background of much comparative scholarship, and seem to be held in common by writers who are otherwise very different from each other, such as Alan Watson<sup>505</sup> and the authors of the *Cornell Study on the Formation of Contracts*.<sup>506</sup>

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<sup>505</sup> See *supra* text accompanying notes 2-3.

<sup>506</sup> See *supra* text accompanying notes 154-60.

Perhaps more importantly, the axioms underlie the *practice* of much comparative scholarship. We saw above that the two opening sessions of the most recent International Congress of Comparative Law were devoted to the topics "Recent Developments in Extinctive Prescription" and "Current Development Concerning the Form of Bills of Lading."<sup>507</sup> Is it conceivable that the choice of such topics could rest on any other foundation than the Master Argument? Such a style of proceeding must rest on the assumption *either* that the background sources are irrelevant, that the ideas they embody are the same as the background assumptions of American law, *or* that the rules in question can readily be severed from the rest of the legal system and understood independently of context. I do not deny that these assumptions may sometimes be correct. The rules for bills of lading may provide an example. But the question to which we must now turn is whether these assumptions are *generally* correct, and in particular whether they can be justified when one's purpose is not to draft a clause in a civil code, but to obtain a useful and accurate understanding of a foreign legal system.

So let us now examine the Master Argument axiom by axiom, keeping always in mind what we have learned from our consideration of the examples of Romulus and of the medieval animal trials.

Consider first the Axiom of Severability. We saw in our discussion of the historical origins of the *BGB* that, in the nineteenth century, the leading theorists of the German legal system (with the exception of Gierke) drew a sharp distinction between the public and the private spheres. This distinction was built into the system, and was one of its central and most cherished presuppositions. Many modern comparative lawyers, as we have seen, also take for granted that private law can be studied independently of public law, and some even assert that a deep chasm between the public and the private is a characteristic mark of the civil-law systems.<sup>508</sup> Let us leave to one side the question whether this assertion is true at the present day: certainly it was true in Germany in the nineteenth century. So if the Axiom of Severability holds at all, we should expect it to hold here. Nevertheless we found when we examined the development of the German civil code that severability could not be maintained: it was impossible to understand private law in isolation from constitutional law. (And indeed when we considered

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<sup>507</sup> See *supra* text accompanying note 6.

<sup>508</sup> See *supra* part III.B.3.

Chassenée and the trial of the rats of Autun we encountered an even more surprising failure of severability. In our attempt to fathom the animal trials of the Middle Ages we found ourselves forced at every turn to consider, not just questions about the law, but questions of metaphysics and speculative philosophy: an entire manner of thinking and feeling towards the world.) So let us ask now why severability was so difficult to uphold.

Recall that we earlier formulated a couple of hunches about the reasons for the failure of traditional comparative law: first, the *context principle* that legal rules are not to be understood in isolation, but only as a part of an entire system of rules; second, the observation that the traditional subject took an *externalist* approach and paid inadequate attention to ideas.<sup>509</sup> The first of these hunches seems relevant to the issue of severability. For the argument for the axiom seems to rest on the following picture of legal practice. A lawyer is handed a practical problem by a client, and turns to the rule book for a solution: the lawyer then looks up the appropriate provisions of (for example) the civil code, and those provisions constitute the answer to the client's problem. But our discussion of the ignorance of Romulus shows that this picture is oversimplified, and specifically that it overlooks the context principle. It depends for its plausibility on the tacit assumption that the lawyer has already mastered the relevant background and knows, for instance, how the code is to be interpreted and how the courts go about their business. For without this knowledge the lawyer would be in precisely the situation of Romulus.

The advocate of severability could at this point reply that the example of Romulus indeed shows that a bare knowledge of the rules of the civil code is not enough, but nevertheless argue that this fact is no threat to the Axiom of Severability. For the example shows that, in addition to the *local* rules of the substantive law, the lawyer also needs to know certain *global* rules—what some have called *secondary* rules—which state how the local rules are to be recognized and understood, created and amended, and applied.<sup>510</sup> But in any concrete case the number of global rules to which the lawyer must have recourse is limited. It is then the relevant local rules *plus* the relevant global rules that constitute the solution to the

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<sup>509</sup> See *supra* part VI.A.

<sup>510</sup> For a discussion of the distinction between primary and secondary rules, see HART, *supra* note 309, at 77-96.

client's problem; but that set of rules can now be severed and studied in isolation.

This reply acknowledges the force of the context principle, but nevertheless seems not to understand why we found severability so difficult to maintain. An example may help illustrate the point. When we considered the evolution of the German civil code we saw that, at the most general level, the *theory* of private law is inextricably bound up with the *theory* of public law in ways that are foreign to any lawyer whose experience is limited, say, to the American legal system. American lawyers do not typically see private common-law adjudication as raising important issues of constitutional theory; nor do they characteristically think about the problem of the inner unity of the private law, or worry about the collapse of the traditional boundary separating public law from private; nor do they wonder whether, within the field of private law, the constitutional right to a "free unfolding of one's personality"<sup>511</sup> is compatible with the constitutional mandate of a social state. But in German legal thinking such issues are of paramount importance, and the theory of private law is suffused with the constitutional ideals of the *Rechtsstaat* and the *Sozialstaat*.

It might be said that such general issues of legal theory have little relevance to the day-to-day functioning of the legal system. What happens when we pass to a more concrete level, say, to the theory of contractual obligations? Here too we find that the ideals of public law and of private law are impossible to disentangle. The general theory of private law shapes the more specific theory of contracts, and gives rise to the question: What sorts of arguments between private individuals deserve to be enforced by a *Rechtsstaat*? In particular: How should the state strike the appropriate balance between the individual liberty to make agreements of one's own choosing, and the duty of the state to provide for the welfare of its citizens? Still more particularly: How far should the German courts, in the name of social welfare, employ section 242 of the *BGB*—the requirement that contracts are to be performed "in good faith"—in order to impose additional requirements upon the parties?<sup>512</sup> Manifestly these questions about the law of contracts cannot be severed from the earlier questions about the constitutional status of private law. And the same is true if we descend yet

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<sup>511</sup> This principle is discussed *supra* notes 372-74 and accompanying text.

<sup>512</sup> See *supra* part V.B.3.

further to the level of the individual contracts that arise in a workaday legal practice. For section 242 is not just a matter of theory; it is used by the courts to decide how the provisions of particular contracts are to be enforced, and its operational significance, its cash value, is to be found in the world of practice. As we have seen, the understanding of section 242 and the way the courts have applied it have shifted over the years in response to the changing situation in constitutional theory.

To say this is not, of course, to assert that every contract signed in Germany raises novel issues of constitutional import. It is, however, to assert, first, that German contract law is suffused with constitutional theory in a way that American contract law is not, and, second, that this suffusion is important for legal practice. The German system of contract law may superficially resemble the American; but as soon as we start to scratch about under the surface we find that the two systems rest on subtly different presuppositions. They ask different questions, and they throw different issues into prominence. As a result, when a German lawyer goes to analyze a problem in contract law, the entire intellectual frame of reference is different: the lawyer brings to the concrete problem a different range of sensibilities, and is alert to a different range of issues. We may sum up this observation by saying that the black-letter rules of the German legal system are conceptually *differently wired* than the American rules. And this observation brings us back, by another route, to our second hunch, namely, that traditional comparative law has paid too little attention to the ideas and the turns of mind that lie behind the black-letter doctrines of a foreign legal system.

The issues here bear directly on the question of severability, and enable us to explain with greater precision why, even in our encounter with nineteenth-century German law, it was so difficult to understand private law in isolation from public law. The reason for the difficulty is not just that the two bodies of substantive rules are linked by a set of global rules dealing with adjudication, interpretation, and the like, but that they are also linked by ideas, by background theories, and by styles of thought that give to the German legal system its characteristic conceptual resonances. The *rules* of nineteenth-century German private law can indeed be severed from the *rules* of public law, and in fact this particular severance was insisted on by the nineteenth-century German legal system itself. But even in the nineteenth century the *theory* of private law was inseparable from the *theory* of public law. And as

our protracted consideration of Romulus has shown, in order to have an adequate practical understanding of German contract law one needs to know the motivating theories: the way the system has been wired, and the ideas that hold it together.

### 1. Rules and Principles

It is important to observe that when we pass from the study of rules to the study of the intellectual background we are not merely adding new information to the existing stock, but moving to the study of a fundamentally different kind of thing. This observation, as we shall shortly see, holds many implications for both the subject matter and the methodology of comparative law. But first a digression is in season on the distinction between rules and principles.<sup>513</sup>

If the argument to this point has been correct, then the wires that hold together the rules of the German legal system are such things as: the *theory* of the *Rechtsstaat*, the *ideal* of personal autonomy, or the constitutional *principle* that citizens are entitled to the free development of their personalities. There are important differences between these things, and in a more detailed discussion it would be necessary to distinguish between theories and ideals and principles, and to fit all of them into a general account of legal reasoning. But for the task we presently have in hand, it will be a harmless over-simplification if we take theories and ideals to be embodied at the more specific level of principles, so that we need only consider the latter. So our task now reduces to the problem of distinguishing rules from principles.

A full discussion of this problem would take us deep into contested issues in the philosophy of mind and the theory of social explanation.<sup>514</sup> But for the purpose of examining the foundations of comparative law we need only a brief account of the relationship between rules and principles and of the different ways they function in practical reasoning. The following remarks are to be understood

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<sup>513</sup> The distinction between rules and principles was introduced into modern jurisprudence by Ronald Dworkin in *Taking Rights Seriously*. See DWORKIN, *supra* note 7, at 14-80. The account of the distinction given below differs from Dworkin's in numerous points of detail and of emphasis, primarily because the task of studying a foreign legal system raises a different range of problems; but the underlying distinction seems to me to be the same.

<sup>514</sup> An introductory survey of the issues is provided by the essays collected in *THE PHILOSOPHY OF HISTORY* (Patrick Gardiner ed., 1974).

only as a sketch of the typical case, shorn of many possible refinements; but at least they should serve to make clear the central issues.

As a first approximation let us observe that legal rules typically describe how people are to conduct themselves, or stipulate the legal consequences of a particular action; principles, in contrast, typically provide the underlying justification for the rule. Crudely: rules say *what* is to be done, and principles explain *why*. The characteristic relationship between a rule and its background principle is thus given by the following general schema:

In situation S one is to follow rule R because of principle P.

In this schema one has an *injunction*, and a *reason* for the injunction; the injunction should be understood to include not only a specification of the *situations* in which it applies, but also of the *exceptions* in which it does not apply and of the legal *consequences* that will ensue if the injunction is not followed.

At this point it is necessary to distinguish an ambiguity in the phrase, "one is to follow R because of P." A rule can be considered either *ex ante*, as though one were regarding it from the point of view of a legislator, or *ex post*, as though one were regarding it from the point of view of an agent to whom the rule is addressed. The phrase can be applied in both situations, but to different kinds of reason. The legislator considers what we may call *enactment* reasons, that is, reasons for bringing the rule into existence ("because a large crowd will disrupt the parade"). The agent, in contrast, is guided by *obedience* reasons, that is, reasons for following a rule that has already been laid down ("because I will be arrested"). The distinction here is thus between a reason for the *rule* and a reason for *following* the rule. The two sorts of reason can of course overlap, and a virtuous citizen may follow a rule for the same reasons that impelled the legislator to enact it; but it is a characteristic of legal rules in particular that obedience reasons and enactment reasons can diverge, and that a citizen can follow a rule without understanding why it was enacted.

This observation provides us with a clue to the special role of rules within legal reasoning. By hypothesis a rule is brought into existence for an enactment reason. But given that the enactment reason already exists, why does one also need a rule? Why does one not just rely on the underlying reason? An example may help to clarify matters. A legislator may begin with the principle that motorized traffic on the public highways should be made as safe as

is reasonably possible. But plainly this enactment principle is as yet inadequate, by itself, to guide the conduct of motorists. One must introduce more specific rules to solve specific points of possible confusion. For instance, the legislator must, in pursuance of the enactment principle, decide whether traffic is to drive on the right or on the left. Technically this is a solution of a "coordination problem": it is *ex ante* a matter of indifference which solution one adopts, so long as the conduct of motorists is coordinated and governed by a common rule. Or the legislator must bring clarity and definiteness to an area that is not in this way a matter of indifference. For example, it is clear that driving at a high speed or driving while intoxicated is incompatible with the enactment principle; but in the interest of enabling motorists to regulate their conduct, the legislator may set a definite speed limit, or stipulate a maximum level of blood alcohol.

These examples all have a common structure. In each a matter that was either indifferent or left imprecise by the enactment reason is crystallized, by an explicit convention, into a rule for action. The hope is that, if the rule is followed by the motorists, the enactment principle will be furthered, and safety on the highways will increase. But for this purpose to be served it is not necessary that the motorists should follow or even understand the enactment principles. It is enough that they follow the rules, for whatever obedience reasons they may have. Indeed, the special significance of rules within legal reasoning generally is that, if they are well drafted, they crystallize the enactment reasons into an explicit and peremptory reason for action that applies within certain well-defined circumstances, and that relieves the agent of the burden of balancing the enactment reasons afresh on each separate occasion.<sup>515</sup>

These observations about the function of rules in practical deliberation bring with them several further contrasts between rules and principles that are relevant to our present inquiry. The contrasts can be loosely grouped into two clusters, according as we consider principles subjectively, that is, in the way they present themselves to the mind of a legislator or judge, or objectively, that is, in the way they appear if we look at them somewhat more abstractly, as the set of principles that forms the background of the legal system. I propose to call the first cluster the *psychological*

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<sup>515</sup> On the nature of rules in practical reasoning generally, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

*aspects* of principles, and the second the *structural aspects*. (The distinction between subjective and objective here is not precise, and breaks down if too much weight is placed upon it; but I adopt it as an expository convenience only, and not as an ultimate metaphysical distinction.)

Let us begin with the psychological aspects. There are here three points to notice. (1) Enactment principles are situated within the logical space of reasons, and are thus essentially *cognitive*. In particular, to understand a principle is to possess, to a greater or lesser extent, an ability to reason about the principle, to say what it implies, and how it is related to other principles. A rule, in contrast is concerned with regulating certain bits of external behavior in certain stipulated circumstances; it is not concerned with internal motives to action, and indeed is often specifically designed to preempt and make unnecessary a delicate balancing of the enactment principles. To know what is required of one by a rule is not akin to possessing a complex ability, like the ability to play the piano, which one can do more or less well. It is rather like knowing a fact, which one either knows or does not: one knows that one must drive on the right, just as one knows that Albany is the capital of New York. (Indeed, it is possible to follow a rule for the thinnest of obedience reasons, and to have no inkling of the underlying enactment principles that summoned the rule into existence and that constitute its justification: even an automaton can be trained to drive on the right.)

(2) Practical reasoning with principles takes place against a background of knowledge and beliefs, desires, and ambitions, whether one's own or the society's, that are constantly in flux; one's understanding of a principle can change with further experience or deeper thought. Principles therefore possess, in their very essence, an open-ended character and an ability to evolve to meet changed circumstances; rules, in contrast, are designed to be rigid and to apply only within certain well-defined states of affairs.

(3) The next observation is crucial for understanding the foundations of comparative law. It is natural to think of legal inference as following what might be called the *subsumption model*, whereby specific cases are subsumed under general rules. On this model (which we have already encountered in the Master Argument) one has, as it were, a rule book—the civil code, say, or the *Digest* of Justinian—and legal reasoning consists in applying the given rules to specific cases. To put the point schematically, legal reasoning characteristically takes the form of a syllogism in which the major

premise is a rule and the minor premise a description of a specific case. For example:

All speeders get a ticket  
Socrates is a speeder

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*Therefore,* Socrates gets a ticket.

It is important to observe that, as a logical matter, even in such simple cases the law cannot live by rules alone: otherwise one would fall into an infinite regress.<sup>516</sup> Even at the most rudimentary level, there is a fundamental distinction of kind between a *rule* and the *application* of a rule: the activity of subsuming a case under

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<sup>516</sup> The point can be illustrated by the story of the State Trooper—named, as it happens, Parmenides—who sought to give Socrates his ticket. Their conversation went like this:

Socrates: Why are you writing me that ticket?

Parmenides: Because you were speeding.

Socrates: I fail to see the connection.

Parmenides: It's because of a rule. It says here that all speeders get tickets; you were speeding, so you get a ticket. I'm just following my orders.

Socrates: I think I see. But, tell me Parmenides, do you ever *not* follow the rules?

Parmenides: Certainly not. That would be illegal. In fact, it says here, "State Troopers shall follow the rules at all times."

Socrates: That certainly seems clear. But tell me, my friend, what rule were you following when you applied the rule about speeding to me?

Parmenides: Why, the rule about speeding.

Socrates: Then I fear I still do not understand. You say you never do anything without a rule. And you say there is a rule about speeding—let us call it R. My question is: What rule are you following when you apply R to me?

Parmenides: Now I see the point of your question. Yes, of course there is another rule, but it seems to have been left out of the book. But I can write it down for you. R says that all speeders get tickets. The new rule—let me call it R'—says that R together with the proposition "Socrates was speeding" imply "Socrates gets a ticket." So there you are.

Socrates: I am still not sure. To justify applying R to me you have introduced a rule R' that applies to R. But what lets you apply R' to R?

Parmenides: That is easy, Socrates. The rule R"—which also seems to have been left out of my book—says that R' can be applied to R; and R', you will recall, says that R can be applied to yourself. Now you are surely satisfied.

Socrates: Forgive me, for I am slow of wit, but would you please write it down for me?

Parmenides: Of course.

Socrates: I think I now understand everything you have said, except one small matter—what rule lets you apply R" to R'?

The remainder of this dialogue seems not to have survived.

a rule is not itself a rule, but a certain kind of ability which, in however rudimentary a form, requires the exercise of practical reason.

Cases of straightforward subsumption do of course occur; but as issues get complicated, legal reasoning becomes less and less a matter of subsuming a case under a known rule, and increasingly a matter of employing the background ability directly, and even of examining the rule itself to see how well it serves the purposes for which it was originally introduced. A rule, recall, is a placeholder for the enactment principles that brought it into existence; and novel circumstances, or an unexpected case, or a residue of vagueness in the statement of the rule can all raise the question whether the rule still fits the principles—that is, whether the rule should be modified, or reinterpreted, or extended, or replaced entirely. These questions must be faced by whatever institution within the legal system has the competence to introduce or amend the formal rules; and it is for this reason that the deliberations of an appellate court passing on an intricate question of law diverge so sharply from the subsumption model of legal reasoning. For at this level of difficulty the job of the court is not so much to *apply* a premise as to *search* for one: rather than being given a rule and a case and being asked to deduce the outcome, it is given a case and some problematic legal doctrines, and is asked, in the light of its understanding of the background principles, to grope its way towards a satisfactory rule.

So far we have been considering principles in their subjective aspect, that is, as they present themselves to the consciousness of an individual engaged in the task of practical reasoning. But we can also consider them objectively, as they might appear to an outside observer of the legal system, and ask about their structure and their relationship to the black-letter of the law. Here there are three further points to notice.

(4) Rules, because of the function they are supposed to serve in legal thought, are *situation specific*; that is, they are intended to apply within specific states of affairs, but carry no implication outside of those states of affairs. So, for example, the rules for making a valid will can be neatly separated from the rules for completing a bill of lading. The two bodies of rules are independent, and there is no inconsistency in, say, requiring witnesses and a signature for the will but not for the bill of lading. Principles, in contrast, because they are situated within a larger network of reasons, typically cut across states of affairs and across doctrinal divisions of the law. They

cannot be neatly segregated by subject area, and the principle of good faith, or the principle that citizens have a right to the free development of their personalities, give *general* reasons such that, if they are conceded to have weight in one area, then they cannot without inconsistency be denied to have weight in other areas as well.

(5) Similarly, in order to serve their special role in legal reasoning, rules are designed to have *peremptory force* within the situations that they govern: their function is to preempt the enactment reasons, and thereby provide a clear guide for the persons to whom they are addressed. For this reason a rule, when it applies, applies all-or-nothing. But principles, in contrast, are more fluid, more elastic; several principles may apply at once to the same situation and come into conflict, and one must then balance one principle against another and decide, relative to the given situation, which is the more important.

These two properties of rules—that they are situation specific and that they have peremptory force—explain why the Axiom of Severability can seem so plausible; for it simply restates, in a different guise, two of the fundamental logical properties of rules. We thus see that the Axiom of Severability is a consequence of the Axiom of Rules. And the Axiom of Rules, in turn, is a consequence of the subsumption model. For so long as one thinks of legal reasoning as being a matter of subsuming particular cases under general rules, it is natural to equate a knowledge of *law* with a knowledge of the *rules* that apply to a given case; and this is just another way of stating the Axiom of Rules. It follows that a particular abstract conception of legal reasoning lies at the taproot of the Master Argument.

(6) The final distinguishing mark of principles is their *interconnectedness*, that is, the fact that, within the logical space of reasons, they form a single, interconnected web. This property is somewhat elusive and difficult to state with precision; it is reflected in the facts, already mentioned, first, that principles are open-ended and that their content is determined relative to one's total stock of knowledge; second, that they possess a certain generality so that, for any two given principles, one can imagine a situation in which both principles are relevant and must be balanced against each other. But whereas the preceding five properties follow from a consideration of the special role, within practical reasoning, of rules as preemptive of the original set of enactment reasons, this property of interconnectedness rests on certain general properties of human

practical reason *tout court*. The issue here (which, in modern times, was central to the philosophy of Kant)<sup>517</sup> is the issue of the *unity of practical reason*: very roughly the claim is that the human mind cannot acquiesce in a disconnectedness within the practical sphere, but that, given any two seemingly unrelated principles, it will attempt, by exploring their grounds and the scope of their applicability, to reconcile them and to bring them under a more general unifying principle. A full consideration of this claim would take us far more deeply into abstract philosophical issues than would be appropriate in the present context. But it is important to observe that there exists a strong and entirely natural link between the general theory of practical reason and the question: How should one attempt to understand a foreign legal system? For, as I have been arguing throughout this Article, to understand a legal system is to understand its characteristic style of legal reasoning; and legal reasoning is but a species of practical reasoning. (In particular, it should be observed that the Kantian thesis of the unity of practical reason is the ultimate philosophical foundation for the claim that comparative law must be, *per necessitatem*, a single-track enterprise.) But these matters, although they are important and deserve further attention, need not detain us here; for present purposes it is enough to observe that, whatever the ultimate explanation, the operative principles in a developed legal system do not organize themselves into islands. That is, one cannot find, within a modern legal system, two important bodies of legal principles, entirely unrelated to one another, such that one island governs one area of law, and the other governs another, and such that the principles can never interact in any conceivable set of legal circumstances.

## 2. Principles and the Master Argument

Let us now briefly take stock and consider what these various philosophical distinctions tell us about comparative law. We are engaged in examining the Master Argument that underlines the methodology of traditional comparative law. That argument rests on three fundamental assumptions: the Axioms of Practicality, of Rules, and of Severability. We started by examining the Axiom of

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<sup>517</sup> In particular, it is a central strand in the *Critique of Practical Reason*. See IMMANUEL KANT, *KRITIK DER PRAKTISCHEN VERNUNFT* (Riga, J.F. Hartknoch 1788). For a general survey of these issues, see DIETER HENRICH, *THE UNITY OF REASON: ESSAYS IN KANT'S PHILOSOPHY* (1994).

Severability, and asked ourselves why it was so difficult, in our consideration of the history of the German civil code, to separate issues of private law from those of public law. The answer, roughly, was that although the surface rules can indeed be sorted into two distinct groups, they are nevertheless held together by the background conceptual wiring of the legal system, and that that wiring must be taken into account if we are to understand how the legal system operates in practice.

We then observed that the conceptual wires—the theories and ideals and turns of thought that hold together the legal system—are a different kind of thing altogether from a black-letter legal rule. This observation prompted us to investigate the distinction between rules and principles. We saw that the Axiom of Rules has its foundation in the subsumption model of legal reasoning, which views legal inference as a matter of bringing particular cases under general and pre-existing rules. The subsumption model, if it is taken to be a complete account of legal reasoning, leads to what we earlier called a *false abstraction* of rules from their context; for it overlooks the crucial fact that rules are place-holders for the background enactment principles, that is, that rules are designed (i) to be situation specific, and (ii) to preempt the original enactment reasons. It is these two properties of rules that underlie the plausibility of the Axiom of Severability; and so we found that the Axiom of Rules and the Axiom of Severability are in fact deeply connected, and have a common root in the false abstractions engendered by the subsumption model.

The subsumption model in turn we saw reason to reject on the essentially logical grounds, first, that it confuses *rules* with the *conditions of application* of rules, and, second, that it treats rules as though they could be severed from their enactment principles. The importance of this conclusion for the Master Argument and for our general inquiry into the foundations of comparative law would be difficult to exaggerate. For it implies (as indeed our consideration of the ignorance of Romulus has already given us reason to conjecture) that to understand a legal system is not just a matter of possessing *information* about a text or a body of rules, but is rather akin to possessing a certain kind of *ability*: to have mastered the enactment principles, and to be able, with a certain degree of skill, to marshal a legal argument, and to offer reasons for one's conclusions. To say this is not, of course, to deny the existence of rules, or their importance to a comparative inquiry. But it is to point out that they must be understood in their relevant context.

We saw further that the distinctions between rules and principles fall into two clusters, according as we look at principles subjectively, in their psychological aspect, or objectively, in their structural aspect. It is important for comparative law that this clustering takes place and that principles can be viewed either subjectively or objectively; for this fact shows that there is a close link between the subjective principles by which the foreign lawyers think and the objective principles we need to grasp in order to understand the workings of their legal system.

The foregoing abstract analysis explains many things that baffled us earlier, and pulls them together into a unified framework. We can see, for instance, that the Master Argument rests on the fallacious subsumption model of legal reasoning; that the textualism of Romulus (that is, the assumption that, to compare Roman law to German law, one need only compare the *Digest* to the *BGB*) is a special case of the Axiom of Rules; that the attempt to study private law independently of public law is a special case of the Axiom of Severability. And our distinction between the psychological and the structural aspects of principles has yielded, by an unexpected route, an explication at a deeper logical level of the two hunches with which we began, namely, that traditional comparative law has paid insufficient attention to ideas, and that it has examined rules in too narrow a context.

These observations suggest that the malaise of traditional comparative law has its origins in a deeply rooted philosophical mistake: in a too hasty acceptance of the subsumption model of legal reasoning, and a consequent failure to appreciate the importance of the distinction between rules and principles. The academic discipline which emerged at the end of the nineteenth century was initially intended to serve the needs of private-law legislation, and quite properly confined its attention to the comparative study of rules; but the Master Argument made it seem that the same technique could be applied more generally, and as the purposes of the subject expanded, the method has gone to seed.

If this diagnosis is correct, then it gives us a sharp logical distinction between two kinds of subject matter—rules and principles—and this distinction translates into a distinction between two ways of studying a foreign legal system. The first way concentrates its efforts on providing a catalogue of the black-letter rules of the positive law; the second, on understanding the rules within the context of their background principles. This last distinction, it is important to observe, is, in contrast to the distinction between rules

and principles, a matter of degree, and depends on the relative emphasis one accords to rules or to principles. But to the extent that traditional comparative law has devoted itself to the study of rules, and to the extent that it has neglected the study of principles, it has been the victim of a false abstraction, and may be regarded, in a fundamental sense, as a different subject from a study whose purpose is to master the underlying principles and thereby to understand how foreign lawyers think.

#### D. *The Axiom of Practicality*

It will be recalled that, to justify the claim of comparative jurisprudence to be a new subject, we must show, not only that it is distinct from its parent disciplines, but also that it yields insights that are fruitful both for theory and for practice. The boundary with traditional comparative law having been established, it remains only to inquire what light the preceding analysis sheds on questions of practicality. What kind of methodology does our analysis imply, and how well does it deal with the two components of the malaise of comparative law—specifically, with the accusations that the subject ( $\alpha$ ) fails to cohere into a cumulative academic discipline, and ( $\beta$ ) is superficial in practice?

To start, let us consider once again the Master Argument. We have rejected two of the three axioms on which that argument relied—the Axiom of Rules and its cousin, the Axiom of Severability. What of the remaining axiom, the Axiom of Practicality? The issue here is important, for the Master Argument purports to show that the rule-based approach of traditional comparative law is *mandated* by the needs of legal practice; and at bottom it is the Axiom of Practicality that leads to the subsumption model of legal thought and thereby gives the other axioms their plausibility.

Recall how the argument goes: (1) Comparative law is to serve the needs of practicing attorneys. (2) Practicing attorneys, in their day-to-day functioning, need information, not about philosophy, but about statutes, rules, and judicial decisions. Therefore, (3) comparative law, in studying a foreign legal system, should seek to deliver concrete, practical information about the doctrines of the positive law.

Let us examine this reasoning more closely. Step (1) may be taken as a stipulation, and therefore unassailable. What of step (2)? We may grant that an American attorney, writing a brief for a corporate client, will characteristically turn, not to a work of theory,

but to the black-letter of the law—to a Restatement, or to a statute, or to the case reports. And similarly a *French* attorney, similarly situated, will turn to the *Code civil*, or to a standard treatise, or to some other account of the current state of the positive law. But problems arise with the attempted inference to step (3). For it does not follow from these facts about French and American attorneys that an American attorney, attempting to investigate a complex issue of French law, can proceed in the same way as a French attorney attempting to investigate the same issue. There is a fundamental disanalogy between the two cases. We have seen the reason in our discussion of Romulus. The standard tools of domestic legal research are intended for use, not by the laity, but by professionals who, in the course of their education, have absorbed a great deal of background information about the functioning of their legal system and, more importantly, about the *reasons* why it functions as it does. The necessary theory, in other words, has already been mastered and can be taken for granted. The American attorney working on a complex problem of American law is able to draw on a reservoir of information, and knows, *inter alia*, how American law is organized, what weight to give to *obiter dicta*, how to recognize a possible violation of the Due Process Clause, how the system of jury trials functions, how the law of bankruptcy has recently been evolving, the circumstances under which a judge is likely to overturn an act of the legislature, and so on. But the crucial point to observe is that this information does not carry over from one legal system to another: shift the system, and you shift at the same time the cognitive background. The attempted inference from propositions (1) and (2) to proposition (3) therefore collapses.

These considerations, in fact, show not only that the Axiom of Practicality does not mandate that comparative law confine its attention to the listing of black-letter rules, but that it positively requires an understanding of the background principles as well. We have seen abstract philosophical reasons for thinking that rules can only be understood in the context of their enactment principles; but the same conclusion can be reached by a more direct route. For our example of Romulus has shown that successful legal practice, whether domestic or comparative, requires the exercise of a complex ability, a skill in legal reasoning, a grasp of theory, and an understanding of an entire network of principles and ideals and tacit assumptions.

At this point it might be objected that widening the scope of the inquiry can only make worse the malaise of comparative law; for if

the existing subject is already too dispersed to cohere into a cumulative academic discipline—if it is already overwhelmed by details—then enlarging the number of details can hardly be expected to bring about a fundamental improvement.

The answer to this objection lies in the structural properties of principles. The dispersed quality of much existing comparative law is, in fact, a direct consequence of its focus on rules. For as we saw, rules are both situation specific and independent. And this means that so long as comparative law conceives of itself as the study of rules, it must proceed in a piecemeal fashion, and describe each rule in its turn. But then it loses all sense of the wiring of the system, that is, of the way the various rules are linked together; and the sheer number of rules in a modern legal system means that the enterprise of listing them can never congeal into a cumulative academic discipline.

Principles, in contrast, bring a much needed simplification to the comparative inquiry; and they do so in two ways. First, principles are more general than rules: they are not situation specific, and characteristically a single principle will underlie a multitude of rules. Second, they are significantly structured. Some principles are broader and more fundamental than others, and play a more significant role in shaping the intellectual landscape of the legal system; consequently, one can start by studying the more fundamental principles at a fairly superficial level, and gradually deepen the investigation, always building cumulatively on what went before. So, paradoxically, the cure for the dispersed quality of comparative law is not to narrow the field of inquiry, but to broaden it. This answers the Mere Accumulation Objection.

These last remarks may be illuminated by an analogy. It will be recalled that Savigny drew a comparison between a nation's laws and a nation's language, both of which he saw as an outgrowth of its history. We may appropriate his metaphor, and say that learning a nation's laws is like learning a foreign language. The enterprise is not just a matter of memorizing a collection of words, but of acquiring a certain kind of ability—the knack of knowing how to participate in a complex social practice. A language, like a set of principles, is *interconnected*, so that any two people who study Italian will inevitably learn much the same thing: the ability to speak Italian, in other words, is a *single* ability, and the learning of Italian is therefore a *single-track* enterprise in which one must first master the basics before one graduates to the more advanced aspects.

It should now be observed that the foregoing analysis is able to explain, in a unified manner, several disparate issues that have troubled us throughout this Article, and that we can now trace them to a common root. (1) The hunch that traditional comparative law has paid insufficient heed to context; (2) the methodological claim that comparative law must be pursued as a single-track enterprise; (3) the Axiom of Severability; (4) the attempt to sever the study of public and private law; (5) the Dispersedness Criticism that comparative law merely heaps up factual information about legal rules—these things seem on the surface to be unrelated, but if the arguments I have just made are correct, they are all consequences of ignoring the structural aspects of principles.

What of the psychological aspects? And what of the remaining loose ends? At this point we will do well to remember an observation we made at the start of this Article. The theory and practice of traditional comparative law has tended to oscillate between the study of *text* and the study of social or economic *context*: between “law in books” and “law in action.” Both of these tendencies take an externalist perspective on the foreign legal system; and we can now see that this externalism is a consequence of the Master Argument—specifically, of the misplaced emphasis on rules, of a failure to heed the three psychological aspects of principles, and of the consequent tendency to think of comparative law as a matter of piling up heaps of information.

This observation needs to be made more precise, and in addition to distinguishing between rules and principles we also need to distinguish between *internal* and *external* principles. The distinction can be illustrated as follows. Suppose one is studying a legal system that is deeply saturated with religious beliefs. (The legal system of Chassenée’s France may be taken as a specimen.) And suppose an economist or a sociologist is able to produce a theory about that system which describes all of its rules purely in terms of “hard” observable data about social functions and economic relations of production and exchange. So the animal trials, let us suppose, are explained by the theory as a certain (admittedly rather bizarre) form of wealth-maximization. Let us suppose further that the theory is perspicuous, that it does a reasonably good job of predicting the legal system’s behavior, and that it satisfies any other conditions one might wish to impose on a descriptive, empirical model of social phenomena. But finally let us suppose that the theory is purely external: it is couched entirely in the language of observable data, and makes no reference to Chassenée’s religious or

philosophical beliefs, or indeed to any beliefs at all. The subjective element is entirely excluded.

Such a theory is plainly not identical with the legal rules it models; for it offers reasons for those rules, and so, in the loose sense in which I use the term, it belongs to the realm of principles. (Note, indeed, that the theory, regarded from the point of view of the modelling economist, possesses both the structural and the psychological properties that are characteristic of principles.) The issue is not whether such a model is possible. Valiant attempts have been made to construct such models,<sup>518</sup> and, if they succeed, would be a valuable contribution to the economic theory of law. The question is rather whether such an external theory ought to be counted as belonging to comparative law.

We have here an important issue of line drawing. The argument thus far has established the existence of a fundamental distinction between rules and principles. We have seen that traditional comparative law tends to overlook it and to proceed in a higgledy-piggledy manner, giving a rule here, and a bit of sociology there, and from time to time straying into the realm of principles. To say this is not to deny that sociological information can at times be useful, both in its own right and as a means of fathoming the beliefs of foreign jurists. But the point is that it is the *beliefs* we are after: we must be careful here not to confuse ends and means. The purpose of comparative law is to facilitate the practical task of *communication* between lawyers from different traditions; and it should be clear, both from our abstract discussion of principles and from our discussion of Chassenée and the animal trials of the Middle Ages, that effective communication requires more than the possession of an external model. We saw that what we need is insight into the way Chassenée thinks, some sort of answer to the question, *What was it like to try a rat?* And this sort of information external models are by their very nature unable to provide. The distinction here is sufficiently fundamental that it therefore seems best to restrict the term “comparative jurisprudence” to the study of the *internal* principles that underlie the rules and the institutions of a foreign legal system.

This distinction between internal and external principles sheds light on the methodological claim that, although comparative

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<sup>518</sup> See, e.g., Levmore, *Good Faith*, *supra* note 141 (applying functional analysis to ancient Near-Eastern law, post-Biblical Jewish law, and Mongolian tribal law); Levmore, *Tort Law*, *supra* note 141.

jurisprudence is not identical with comparative legal philosophy, nevertheless, at the stage of execution it is an essentially philosophical enterprise. For the broad internal principles that underlie the fundamental institutions of the positive law are characteristically principles of political and moral philosophy: principles about the nature of law, the extent of the justified power of the state, the political responsibilities of courts and legislatures, the legitimacy of private property, the nature of contractual obligation, the justification of punishment, and so on. We have seen in our example that the development of German private law can usefully be viewed as a series of responses to a set of abstract questions in philosophy; and indeed our consideration of Chassenée showed that, under certain circumstances, the philosophical questions can even include questions of metaphysics. In general law is the expression of the political and ethical beliefs that society considers of such importance that they must be enforced by the power of the state. Those beliefs, at the most general level, although they may contain elements of economic or sociological theory, are in essence *philosophical* beliefs about how the society should be governed and why; it is for this reason that the internal principles that underlie the legal system may be regarded as applied moral philosophy, and it is for this reason that comparative jurisprudence is an essentially philosophical activity.

This is an important point which can be put in a slightly different way as follows. Let us take economics as an example. An economic theory can be either *descriptive*, that is, a model of a certain kind of social behavior, or *normative*, that is, a theory about how one should act. And the theory can be either *internal* to the legal system under study, or *external*. This gives us four cases to consider. (1 and 2) *External* theories, whether descriptive or normative, do not answer the "what was it like?" question, and do not directly facilitate communication; I have therefore suggested they belong to the economic study of law rather than to comparative jurisprudence. (3) *Internal descriptive* theories—for example, the beliefs of a society about the way its political economy in fact functions—are relevant to the comparative inquiry, but only to the extent that they affect our understanding of the internal principles of the legal system. (4) *Internal normative* theories, if they are relied upon by the legal system to guide its reasoning, are in contrast directly relevant to comparative jurisprudence. (The extent of this reliance will of course vary from system to system.) But this sort of economic theory might equally well be called "normative economic

philosophy"; and it should be observed that the normative literature of the American "law and economics" movement shares many points in common with the philosophical tradition of utilitarianism. Similar observations apply, *mutatis mutandis*, to sociology or anthropology or any other social science.

The psychological aspects of principles thus underlie the methodological claim that comparative law, properly pursued, is an essentially philosophical activity. But they also cast light on the malaise of traditional comparative law, and in particular on the charge that the subject can furnish only a superficial understanding of a foreign legal system. So let us now consider what we gain as comparative lawyers if we study reasons and principles and habits of thought, and not just the black-letter rules. It seems to me the gains are twofold.

First, for practicing attorneys, an approach that concentrates on ideas and principles is likely to be more illuminating and therefore more useful. For what is likely to cause bewilderment in practice is not the substantive content of the tort rules and contract rules, but the more subtle facts about how the foreigners think: the tacit assumptions they make, the way they reason, their sense of what is important and of what counts as a persuasive argument. These are the sorts of facts that are most easily overlooked; for since they lurk in the background, there is a perpetual temptation to assume that the foreigners share the same deep presuppositions as oneself.

Second, a study of principles and habits of thought offers a deeper theoretical understanding of the foreign legal system. This claim can be illustrated by our stock example of the *BGB*. (i) It should be observed that the standard rule-based approach to comparative law not only *overlooks* the influence of constitutional theory on German private law, but, by elevating the public-private distinction into a distinguishing mark of the civil-law systems, and in contrasting those systems with the common-law systems, it positively gets matters backwards. It is in fact the American and English legal systems that place contract law and constitutional law into separate intellectual compartments, and the German system that sees the requirement of "good faith" as involving deep issues of the *Rechtsstaat*.<sup>519</sup> (ii) But there is a second gain besides a

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<sup>519</sup> For a full page of citations, in fine print, to the literature on the constitutional aspects of section 242 of the *BGB*, see PALANDT, *supra* note 429, at 216-17.

deeper insight into the foreign legal system, namely, a deeper insight into our own. Seeing familiar things through somebody else's eyes can produce a jolt, and raise novel questions for domestic legal theory. For example, the German system, by virtue of its particular conceptual wiring, has thrown into high relief the question of the relationship between the classical theory of contract and the theory of the social welfare state. American law does not usually juxtapose the constitutional and the private-law questions in his way; but I would suggest that just this sort of contrast is one of the chief benefits to be gained from the comparative study of law.

The conclusion that comparative law should occupy itself with the study of principles is, I think, supported by an independent train of reasoning. It will have occurred to many readers of the foregoing sketch of the twentieth-century developments in German private law that similar changes have occurred in the United States. Strict liability for industrial accidents, the objective theory of contract, the creation of the modern welfare state—all these developments have made inroads on the free-market *laissez-faire* individualism that prevailed in America at the time of *Lochner*. As far as the specific *rules* are concerned, the two systems (and indeed all the mass industrial democracies) have been steadily converging. But precisely for this reason the rules are not what makes foreign law foreign. What matters—the criterion that distinguishes one legal system from another—is not so much the specific legal conclusions, but how the foreign system reaches them: the underlying reasons and how they are applied.

These observations, it should be noticed, can all be traced to the psychological aspects of the logical distinction between rules and principles. We thus see that, just as the structural aspects of principles provided a unified account of several seemingly unrelated phenomena, so too (1) our hunch that comparative law has paid inadequate attention to ideas, (2) the criticism that it yields only superficial insight, (3) the methodological claim that it must, at the stage of execution, be pursued as an essentially philosophical enterprise, and (4) our rejection both of textualism and of contextualism—all these things are intimately bound up with the psychological aspects of principles.

### E. *The Justification of Comparative Law*

These methodological reflections, if sound, should cast light on the justifications that are usually offered to students for the study of comparative law; for plainly how a subject is pursued is closely related to the ends it is intended to serve.

We observed earlier that the literature justifying comparative law tends to oscillate between two extremes.<sup>520</sup> At one extreme are the pragmatic justifications. Comparative law, it is said, will give you a certain expertise in foreign legal rules, enabling you to give better advice to your clients, or to dispute a point of foreign law if it should arise in litigation. But this group of justifications is open to a conclusive objection. Points of foreign law arise so seldom, and the number of foreign rules that would have to be mastered is so overwhelming, that true expertise is not to be had in a reasonable time: for *these* purposes the most expedient thing is to seek the assistance of foreign counsel. Faced with this objection, the literature (perhaps also in reaction to the dryness of a subject that is grounded in the study of black-letter rules) often lurches to the opposite extreme, and urges comparative law as a means of promoting International Understanding and World Peace.

It is significant that both sorts of justification—the pragmatic and the visionary—see the purpose of comparative law as something strictly speaking extrinsic to the subject. The rules are not regarded as of interest in their own right, but only as a means to some further end. Whereas if comparative law is viewed instead as the study of the internal principles that govern a foreign legal system, it can offer a more plausible and more intrinsic justification for its existence. The study of comparative law will not, on this view, enable students to practice law as though they were members of a foreign bar, nor will it directly help to bring about a state of World Peace. Both of these goals are too ambitious. It will, however, give them an insight into the ways other nations and other ages have thought about legal issues; in the process it will provide them with a contrast to their own tacit presuppositions, and lay the groundwork for effective communication. This justification is more modest than the others, but it appears to place the emphasis more nearly in the right place.

Let us now bring together the main conclusions of this investigation. In this Article we have attempted to scrutinize the foundations

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<sup>520</sup> See *supra* part III.A.

of comparative law—to diagnose the source of its malaise, and to obtain a deeper understanding of its subject matter, its methodology, and its justification. We have approached these problems from several different directions, examining in turn the animal trials of the Middle Ages, the influence on law of the philosophical theories of Kant and Herder, the development of German private law, and the philosophical presuppositions of traditional comparative law. Each of these inquiries deepened our understanding of the central problem, and we can now see all our investigations point to a common conclusion. The malaise of traditional comparative law, its focus on the black-letter rules, its tendency to sever the rules from their context, its failure to distinguish clearly between an internal and an external study of a legal system—these things all have a common taproot in the failure to observe the two related logical distinctions between rules and principles, and between internal and external explanations. If this analysis is correct, then it both supplies us with a boundary between traditional comparative law and comparative jurisprudence, and gives us reason to hope that the new subject will be more fruitful and less prey to the old maladies.

But it is important to emphasize how much remains to be done. The foregoing investigations have necessarily been sketchy and incomplete, and an example may serve to illustrate the depth of the issues that still remain. The particular historical example we chose of the German civil code is in fact much more intimately related to the theoretical concerns of the present paper than has so far appeared. We chose the example initially for the light it sheds on a perennial problem of comparative law, namely, the study of the difference between the civil-law and the common-law systems. By looking to the intellectual forces that drove the creation of the *BGB* we hoped to find an example that would illustrate the shortcomings of the traditional black-letter approach to comparative law. But we found ourselves forced to consider one of the great philosophical turning points in European thought. As we saw, the development of German legal thought in the nineteenth century is intimately connected to the work of Kant and Herder, and through them is linked to the historical emergence of the academic discipline of comparative law. We saw in our discussion of Chassenée and the animal trials of the Middle Ages that the question, “How well can we make sense of *medieval* beliefs about punishment?” had a tendency to turn into the question “How well can we make sense of *our own* beliefs about punishment?” The same thing is true more

generally, and the abstract question about how one should study a foreign legal system has led us to inquire into the origins of our own practice of comparative law—to see the subject as bound up with much wider issues in European intellectual history: and to see that the philosophical problems first raised by Kant and Herder are still alive, still problematic, and still at the root of our own approach to the subject. So, in a sense, the argument in this Article has been an application of the methods of comparative jurisprudence to its own foundations.

I said at the outset that this Article has two related morals. The first is this: How you pursue a subject like comparative law depends, in the end, on how you answer certain philosophical questions. And this is true whether the answer is explicit or merely tacit. In particular, as we have seen, a too narrow conception of law, especially if it is held *sub silentio* without adequate conscious scrutiny, can throw the entire subject off kilter. In place of the theory that sees law as chiefly a matter of rules and doctrines, authoritative texts and holdings of courts, I have been urging a broader conception, one that views law as an essentially cognitive activity, carried on in public, and involving the giving of publicly accessible reasons. This conception, I think, not only yields a more elevated view of the creativity and intelligence of lawyers, but is truer to the facts, and a more promising foundation for an academic discipline.

The second moral is this: If comparative law is to be practical, it cannot afford to ignore philosophy. Indeed, the entire argument of this Article has been a consequence of never losing sight of two observations. First, the central task of comparative law is a practical one: to understand foreign lawyers well enough so that you can communicate with them. Second, communication is not possible if you know nothing but black-letter rules. You also need to know the underlying philosophy. The point can be summed up by adapting a motto from Horace: *Metaphysicam expellas furca, tamen usque recurret*<sup>521</sup>—You can drive away philosophy with a pitchfork, but it always comes back.

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<sup>521</sup> Cf. HORACE, EPISTLES 316 (Loeb Classical Library ed. 1926) (“*Naturam expellas furca, tamen usque recurret*”).