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The great alliance: history, reason, and will in modern law

A grande aliança: história, razão e vontade no direito moderno

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Abstract

This article offers an interpretation of the intellectual and political origins of modern law in the nineteenth century and its consequences for contemporary legal thought. Social theoretical analyses of law and legal thought tend to emphasize rupture and change. Histories of legal thought tend to draw a picture of strife between different schools of jurisprudence. Such analyses and histories fail to account for the extent to which present legal thought is the continuation of a jurisprudential settlement that occurred in the nineteenth century. That settlement tamed the will of the masses under the influence of authoritative legal thought, conceptions of political morality, and a general sense of social evolution. The principal mechanism of the settlement was a compact between legal rationalism and historicism to which popular will acceded. After a period of polarization around the time of the American and French revolutions, nineteenth century legal rationalism came to see historical events as the outcome of the cunning operation of reason in the world, and legal historicism came to appeal to the rationalizations of legal reason in order to endow historical matter with both conceptual stability and intellectual authority. Popular will bought into both. Modern law and the main schools of legal thought have remained, ever since, bound to this convergence of reason and history in the face of will. Modern law is therefore as much about continuity as it is about rupture; as much about unity as it is about strife.

Keywords: modern Law; law as moral imagination; legal rationalism; legal historicism; popular will and law; The Great Alliance.

Resumo

Este artigo oferece uma interpretação das origens intelectuais e políticas do direito moderno fincadas no século dezenove, bem como de suas consequências para o pensamento jurídico contemporâneo. Estudos sócio-teoréticos do direito e do pensamento jurídico tendem a enfatizar ruptura e mudança. Histórias do

pensamento jurídico tendem a oferecer uma imagem de combate entre as diferentes escolas de teoria do direito. Tais estudos e histórias falham em dar conta do quanto o pensamento jurídico do presente é uma continuação de um pacto teórico-jurídico lavrado no século dezenove. Um pacto que domou a vontade das massas através da influência de um pensamento jurídico de autoridade e prestigio, de concepções morais do político e de uma ideia generalizada de evolução social. O principal mecanismo do pacto teórico foi uma aliança entre racionalismo e historicismo jurídicos, ao qual aderiu a vontade das massas. Após um período de polarização ao redor da época das revoluções americana e francesa, no século dezenove o racionalismo jurídico passou a ver eventos históricos como produto da sabia e habilidosa operação da razão no mundo, e o historicismo jurídico passou a socorrer-se das operações racionalizadoras da ciência jurídica para dotar o material histórico tanto de estabilidade conceitual quanto de autoridade intelectual. A vontade popular aceitou ambas as operações. O direito moderno e as principais escolas do pensamento jurídico permaneceram, desse então, aprisionadas à esta convergência entre razão e história em face da vontade popular. O direito moderno é portanto tanto marcado por continuidades quanto o é por rupturas; tanto por unidade quanto o é por querelas.

Palavras-chave: direito moderno; direito como imaginação moral; racionalismo jurídico; historicismo jurídico; vontade popular e direito; A Grande Aliança; The Great Alliance.

I Introduction

Modern revolutions remind observers of social and political phenomena that power ultimately rests with political masses. The stability of legal and political orders over time indeed depends on a sufficient level of consent on the part of the governed. Absent support by the will of the governed, mechanisms that operate to obstruct destabilizing collective action on their part are destined to ultimately fail. A gifted historian, David Hume, had this in mind when he wrote:

> Nothing appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.[1]

However, the relationship between the will of the political masses, on the one hand, and established legal order, on the other, is not unidirectional. Since Hume's time, the complexities of modern society have grown exponentially, and legal ideas and institutions occupy a central and still-expanding role in the formation and operation of mass opinion in such societies.[2] Put simply, law plays a significant role in providing the content, the incentives, and the fora for popular will formation and in the end carries out its mandates with relative autonomy. And it does all that in several complementary ways. This article analyzes how modern law plays this role at the level of the principles and presuppositions that

[1] DAVID HUME, Of the First Principles of Government, in ESSAYS MORAL, POLITICAL, AND LITERARY 31, 32 (1777).

[2] On this point, see generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992); NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Ziegert trans., Oxford Univ. Press 2004) (1993); ROBERTO UNGER, LAW IN MODERN SOCIETY (1976).

characterize the popular will of modern political masses.

A warning to the reader: the argument of this article moves several notches up the ladder of theoretical abstraction, seeking to offer both a phenomenological account of the structure of modern legal thought and experience and a normative vista from which it can be criticized and changed. The risk of operating at this level of abstraction is well known—that is, that the argument may be inaccurate in its descriptions and irrelevant in its normative views. The possible reward of gaining clarity without sacrificing complexity is worth the risk, though.

It is helpful to provide some important definitions before proceeding. In this article, "will" means popular will. In legal doctrine and thought, it is expressed as deference to democracy, to the elected branches of government, to public opinion, to evolving cultural standards, to trends in legislative production, to social movements, to current common knowledge, and so on. "History" stands for historical events as they inform the law (such as war as justification for extreme measures), historical tradition (such as legal precedents or, more broadly, legal–political–moral traditions), and historical meaning (such as the original meaning of the constitution). In legal doctrine and thought, history appears as a form of argument that appeals to the past as a basis for legal regulation of the present and the future. "Reason" includes instrumental reason (concern with consequences, expediency, cost-benefit analysis), cognitive reason (science, expertise), and idealist reason (revelation of the true meaning and the legitimate forms of social manifestation of values such as freedom, equality, justice, and dignity). In legal doctrine and thought, reason appears as a form of argument that appeals to the faculty of reason to chart broad directions of development for the law.

The first transnational political masses belong to the nineteenth century. They were the first to see social and economic problems as essentially universal political issues.[3] Urban and rural workers on both sides of the Atlantic embraced

[3] The literature usually refers to the occupation of the "political" by the "social." *See, e.g.*, HANNAH ARENDT, ON REVOLUTION (Penguin Books 2006) (1963); HANNAH ARENDT, THE HUMAN CONDITION (1958); JACQUES DONZELOT, L'INVENTION DU SOCIAL: ESSAI SUR LE

class identities, adopted diagnoses of their predicament, and developed a new confidence in their ability to solve the puzzle of its causes. This newly discovered class-consciousness was anchored in a sense of shared destiny and a refusal to explain away economic immiseration, political oppression, and social subjection as natural phenomena. The nineteenth-century masses interpreted these instantiations of personal and collective vulnerability as products of human will, which they could galvanize, own, transform, and ultimately exercise in favor of the downtrodden. Workers and intellectuals who aligned with them believed that destiny was in their hands and history on their side.

Following their entrance onto the world stage, these political masses denounced and often violently challenged the Restoration and post-Restoration constitutional settlements of western nation-states and subnational political units. Simultaneously, economic, military, and social crises everywhere compounded and developed into political crises, further weakening the perception of the stability of social orders in the eyes of the populace as well as of the ruling elites. In that context, ruling elites could not help but feel as though they were standing on the precipice of chaos, a predicament for which they blamed an unbridled and uncultivated popular will. To the waves of democratic expansion, social unrest, political revolutions, economic debacle, geopolitical uncertainty, and war, important intellectual elites of the Victorian Age responded with a deep and sweeping new approach to law: a "Great Alliance" between historicism,[4] rationalism,[5] and popular will. This alliance turned out to serve as a highly adaptive,

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DÉCLIN DES PASSIONS POLITIQUES (Éditions du Seuil, 1994). However, the converse is equally as true: the politicization of the social.

[4] I refer to it interchangeably as consequentialist or conservative historicism. It is the view that reason is hyposufficient to discharge the tasks utopian rationalism gives it. For this type of historicism, the best cognitive and normative chances that societies have rest in protecting and following the lessons taught by trials and errors over a long period of time and the institutions they have created. *See* DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1740).

[5] I refer to it interchangeably as utopian, idealist, or critical constructivist rationalism. It is the view that reason is able to satisfactorily solve the ontological and causal riddles of social reality, to imagine ever better models social reality should approximate and to control the processes that lead from here to there. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS (Victor Gourevitch ed., Cambridge Univ. Press 1997) (1762).

resilient, and attractive settlement process in the form of an intellectually and legally authoritative cognitive- normative-practical project. This article lays open the nature of this process.

In its most general terms, the nineteenth-century rapprochement of legal rationalism and historicism started in the first half of the nineteenth century and assumed features attractive simultaneously to common prudential understandings and to high jurisprudence.[6] During that time, rationalism became increasingly committed to inherited legal frameworks and values as manifestations of reason's cunning operation in the world. As a consequence, improvised, highly contextual, constitutional arrangements became enshrined as ontologically essential. Moving from the opposite camp, historicism appealed to the rationalization of legal reasoning to conceptually tame, systematize, and bestow endurance and adaptability on historically contingent materials, leading in the first moment to a formalist jurisprudence of concepts and later to all sorts of social stasis processes. However, even more consequential was that the will of the masses acceded to the ratio-historicist rapprochement. In short, the masses bought into ideals of constitutional veneration. To miss this last piece of the sociological and philosophical puzzle of modern law is to be condemned to see only a distorted and partial image of its making.

The Great Alliance in law between reason, history, and the political will of the masses in the nineteenth century has ever since provided the conceptual and ideological conditions for the many ups and downs in the history of legal positivism, pragmatism, and reflective equilibrium idealism.

The Great Alliance encompasses apologetic as well as critical legal thought. In our days, advocates of positivism as sapless philosophy of language and metajurisprudence, of positivistic decisionism as an existential or political strategy to achieve choice closure, of reflective equilibrium rationalizations of public and private law, of groundless and directionless cost-benefit analysis, of performative

[6] Legal rationalism and historicism were unusually polarized in the Eighteenth Century. For examples, see the bodies of work of Jean-Jacques Rousseau and Immanuel Kant for rationalism and David Hume and Edmund Burke for historicism.

critique, and of kinetic experimentalism all play in the Great Alliance sandbox.

That all these traditions of legal thought declared war against classical legal thought—as the first generation of Great Alliance jurisprudence is now known[7]—should not distract us. The hard reality is that, under the Great Alliance, legal rationalism now survives as punctuated reformism, as consequentialism, and as a norm of performative critical discourse; and legal historicism survives as traditionalism, xenophobia, and precautionary prudence. This is, furthermore, the circumstance for both the traditional and the new left and right of the legal–ideological spectrum; both share an impulse toward underreflective adaptability and theoretical self-referentiality.

More concretely, the influence of the Great Alliance is found everywhere. First, it is found in intellectual and political projects in and through law, where standing structural components of public life are justified as having passed the test of historical institutional evolution by carrying an intrinsic rational core. Second (and here the influence flows in the opposite ideological direction), it is found in the demystifying effect that various versions of positivism and pragmatism once exerted upon enchanted depictions of the nature of law, therefore preparing the terrain for a view of standing social arrangements as expressions of evolutionary accommodations that ought to be respected at their core and experimented with at their margins. Third, it is found in the confined and ideologically scripted institutionalized and noninstitutionalized ways in which the will of the masses comes onto the stage of history. Fourth, the influence of the Great Alliance is found in the way theories of social justice (speaking from the vantage point of impartiality) and constitutional theories of law's integrity (charting the development of the doctrines of a living constitution) freshen up and repackage standing structural components of public life as outcomes produced both rationally and historically. Fifth, the Great Alliance influences how the legal ideals

[7] For a definition of classical legal thought, see DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (1975).

of freedom,[8] authenticity,[9] and democratic control respectively map onto persuasion, tradition, and political power, and more fundamentally onto reason, history, and will. The internal discursive economy of these triads constitutes different subgroups of views about law within the Great Alliance, including distinct ideas about legal causation and types of legal arguments. Finally, the Great Alliance's predominant approach (pragmatic policy[10]), technique (conceptual analysis and synthesis), and forms of justification (traditionalism, reflective equilibrium, or democratic deference) remain dominant in law.[11]

In principle, all of this can be for good or ill, or good and ill. The Great Alliance thesis of this article has two aspects, one historical and the other normative. Historically, it advances the idea that contemporary law and legal thought are best understood in light of three experiences: the entrance of the will of the masses onto the political stage of Western nations via institutionalized (primarily through the expansion of franchise and relaxation of eligibility requirements to hold office) and noninstitutionalized (often revolutionary) processes; the reconvergence of rationalist and historicist legal philosophies after two generations of considerable polarization; and, finally, the increased momentum that various versions of positivism, pragmatism, and reflective equilibrium idealism in law gained from the previous two experiences. The normative argument, which receives less attention in this article,[12] concerns what became of rationalism, historicism, and popular will under the Great Alliance, and

[8] This refers to "freedom" as defined by Georg Wilhelm Friedrich Hegel. *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 8th ed. 2003) (1820).

[9] This refers to "authenticity" as defined by Freidrich Karl von Savigny. *See* FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., The Lawbook Exchange Ltd. 2002) (1831).

[10] For a learned study of how schools of jurisprudence tended to merge into "pragmatic liberalism" in the United States, see Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041 (2014). I believe this tendency is even more universal.

[11] See the bodies of work of authors such as J.L. Austin, Oliver Wendell Holmes Jr., Rudolf von Jhering, François Gény, Léon Duguit, Karl Nickerson Llewellyn, Wesley Newcomb Hohfeld, Hans Kelsen, H.L.A. Hart, John Rawls, and Ronald Dworkin for illustrations of these.

[12] Both dimensions are addressed in my book in progress. PAULRO BARROZO, LAW AS MORAL IMAGINATION (forthcoming).

why we might wish to loosen its grip in the name of a better alliance between reason, history, and will in law and legal thought.

The idea that historicism and rationalism combine in new ways in modern law is not new. Roberto Unger speaks of "the campaign" in contemporary law "to split the difference between rationalism and historicism by deflating rationalism and inflating historicism."[13] He presents his alternative future for "legal analysis" in part as a reorientation of ratio-historicism. As "a special case of a more general alternative to rationalism and historicism," reoriented, legal analysis becomes an instrument of democracy in the work of institutional imagination.14[14] Unger's work advances understanding of the predicament of contemporary law, but it calls for both complementation and rectification.

Not every type of rationalism and historicism merged in the Great Alliance. Specifically, the alliance was between utopian rationalism and consequentialist historicism. The Great Alliance did not simply split the difference between them. I show below the terms of their coming together and how they changed in the process. I argue that Unger's images of inflation and deflation are insufficient and may lead to inaccurate conclusions. Importantly, the Great Alliance split the difference between the law's legitimacy to coerce compliance and the legal obligation on the part of the governed to obey the law. The Great Alliance offered an attractive model that functionally unified the analytically and sociologically separable concepts of legitimacy and obligation.[15]

Of even greater import, standing theories of classical legal thought fatally fail to integrate the will into the alliance. Even those who conceive popular will as daring democracy tend to see the will as an entity standing outside the

[13] ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 171 (1996).

[14] *Id.* In a previous work, Unger exposed the cores of rationalism and historicism as, respectively, logical and causal explanations of society. *See* UNGER, *supra* note 2, at 8–23. While "logic" and "causation" capture the predominant explanatory mechanisms of rationalism and historicism, important cognitive, normative, and attitudinal characteristics of different types of rationalism and historicism are left insufficiently accounted for and distinguished.

[15] For the distinction between obligation and legitimacy and a lucid, comprehensive, and elegant analysis of the different theories of legal obligation, see LESLIE GREEN, THE AUTHORITY OF THE STATE (1988).

mechanisms of the Great Alliance, thus failing to appreciate the extent to which the will served as a party to the compact from the beginning. It is in the symbiosis of the three forces—history, reason, and will—that the Great Alliance finds its impressive strength and adaptability. Until the Great Alliance is well understood, any reorientation of jurisprudence proposed by the twentieth century schools will tend to further the alliance at the practical level, while remaining insufficiently persuasive at the theoretical level. For example, such reorientation misses the historicist dimension of law as reaching into the future only because it reaches from the past, and it misses the potential of critical idealism in the making of law as an exercise in moral and sociological rational imagination.

To prescribe—as Roberto Unger and Jeremy Waldron do[16] —that law assists in and reflects the democratic work of a citizenry that is embarked on institutional experimentation as antidote to the preservationist view of law as immanent moral order or as the province of an elite of jurists insufficiently responsive to its will is to incompletely understand what it requires to loosen, to the extent we ought to try to do so, the grip of the Great Alliance. That task requires the engagement of rational critical imagination before institutional imagination can usefully play its ancillary role. In contemporary law and legal culture, there is an ever-present, if often unarticulated, reliance on the belief that the legal and institutional edifices of society rest on a morally defensible (in deontic or evolutionary terms) foundation. This belief is a spell cast on moral and sociological imagination, and it is hard to see how, except by chance, law as institutional imagination can break free from it.

The task of reason and rationality should be more than critique and opportunistic exploitation of the cracks that apt criticism is able to open in the consciousness of the time. Rationality should not merely be a vulture circling reflective equilibrium on the lookout for mishaps. Contemporary critical theory

[16] *See generally* UNGER, *supra* note 13; JEREMY WALDRON, LAW AND DISAGREEMENT (1999). *See also* ALLAN C. HUTCHINSON, THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED (2008); Haunke Brunkhorst, *Demokratischer Experimentalismus*, *in* POLITIK IN DER KOMPLEXEN GESELLSCHAFT (1998); Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

tries to split the difference between sociological positivism and utopianism. But only the idealism of rational, reflective moral imagination can do so effectively, for critical theory trades—at a great loss—imagination for immanence.

In the end, then, I propose that the way to loosen the grip of the Great Alliance on cognition, imagination, and practice is not through the institutional imagination of democratic experimentalism or performative criticism, both of which play into the hands of the Great Alliance, but through rational, reflective moral imagination. To take this route without falling prey to the traps of reason[17] or becoming oblivious to the need for a theory of social change is a tall order, and the odds against success stack higher at every step. I take it, in cognizance of these dangers and also of the certainty that there is no place outside language, culture, power, and history from which to speak with immaculate reason, because it is the only way forward.

II Order, freedom, and moral imagination in modern law

Human evolution, it is worth remembering, is not something that happened once upon a time in the distant past. The struggle over the quality, breadth, depth, and contours of the horizon of human capabilities has always been the real struggle. All others, with rare exceptions, are merely skirmishes. The institutional imagination of democratic experimentalism cannot hope to serve the expansion and deepening of the human capacities to learn, reason, create, judge, invent, connect, and act if it continues to fail to provide compelling reasons as to why and in which direction to experiment. “No wind,” Montaigne reminds us, “is right for a

[17] *See* MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE (Vintage Books 2010) (1969); MAX HORKHEIMER & THEODOR ADORNO, DIALECTIC OF ENLIGHTENMENT (Gunzelin S. Noerr ed., Edmund Jephcott trans., Stanford Univ. Press 2002) (1947); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (Keith Ansell-Pearson ed., Carole Diethe trans., Cambridge Univ. Press 1994) (1887); PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998); MAX WEBER, *Science as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills trans., Oxford Univ. Press 1958) (1919).

seaman who has no predetermined harbor."18 [18] Unless preceded and accompanied by rational moral imagination, law as democratic experimentalism risks remaining just another product of the pragmatic offshoot of the Great Alliance. To make real progress, we must address our efforts to the admittedly daunting task of finding a formula to rekindle and transform the utopian rationalism that once voiced our best hopes while, at the same time, appreciating the role of law as a broker between the past and the future of social orders and the social functions of legal doctrine.

Legal evolution, it is equally worth remembering, is also an ongoing process. By the end of the nineteenth and beginning of the twentieth century, Holmes in the United States, Jhering in Germany, Gény and Duguit in France, Orlando in Italy, Dicey in England, Beviláqua in Brazil, and many others in the West were invested in the retooling of law and legal thought to meet the perceived needs of the new century. They all shared the view that law was a means to achieve social ends, and that the mission of legal thought was to further the evolutionary perfection of that instrument, although doing so would require bracketing questions relating to constitutional essentials. That bracketing seemed to be a plausible and useful posture, for the social needs seemed all too urgent, and attractive answers to the fundamental constitutional issues were already available. For these thinkers, the background intellectual environment for the evolution of law and legal ideas as social problem-solving tools was already in place, as "the conditions for evolution are a product of evolution"19 [19]themselves, and by then the principal such condition was the political and intellectual authority of the Great Alliance.

Niklas Luhmann20 [20] recognizes that "evolution happens only if both

[18] MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 379 (M.A. Screech trans., Penguin Books 1991) (1580).

[19] *d.* At 243.

[20] Doing justice to the topic of legal evolution is not an easy task. For plural perspectives among contemporary authors, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1998) (1992); ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW (2005);

difference and *adaptation* are preserved in the relationship between system and environment, for otherwise the object of evolution would disappear." [21] The nineteenth century witnessed profound changes in the social, political, cultural, geopolitical, economic, and military environment that systems of law and legal thought inhabited. How did law and legal thought manage to retain their relative autonomy, or differentiation, from the rapidly changing environment while simultaneously adapting to it? Luhmann understood well that "society depends on structural coupling with systems of consciousness. Law likewise."[22] It was to be expected, therefore, that the differentiation and adaptation of law within an increasingly complex and unstable social context would benefit from sharing a system of consciousness capacious enough to provide for constant complexification *cum* stabilization. I will show that the Great Alliance was— and still is—the system of consciousness in point.

Luhmann further postulates that

> the threshold for the autonomy of the evolution of law is given by the operative closure of the legal system.... The decisive variation, as far as the evolution of law is concerned, relates to the communication of unexpected normative expectations.[23]

But how operative can closure be when the system is bombarded by novel normative claims such as those voiced by the masses in the nineteenth century? Luhmann answers this question in the abstract, stating that

> the evolutionary achievements of language and law not only adjust society as a collection of living beings to its environment *structurally* but also enable *transient* adjustments to deal with *transient* situations. As soon as conflicts explode, they have to be solved, or at least diffused, case by case... the greater density of such problems leads to the demand for stable orientations, which can be formed... in the

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NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Fatima Kaster et al. Eds., Klaus Ziegert trans., Oxford Univ. Press 2004) (1984); UNGER, *supra* note 2.

[21] LUHMANN, *supra* note 20, at 231.

[22] *Id.* At 232–33.

[23] *Id.* At 243.

form of normative principles....[24]

However, concretely, what "stable orientations" allowed modern law and legal thought to get into the instrumentalist, experimentalist mode of adaptation to the social upheavals characteristic of the nineteenth century and the deepening industrialization and urbanization—with the accompanying uprootedness and dislocation—characteristic of the twentieth? Equally puzzling, how do "normative principles" that give form to stable systemic orientations come to develop an adaptive synergy with instrumental and experimentalist legal policy at the legislative and adjudicative levels? In other words, what gave the works of Holmes, Jhering, Gény, Duguit, Orlando, Dicey, and Beviláqua the seemingly incompatible qualities of comfortable cultural plausibility and iconoclastic modernist innovation? Or, in yet other words, what gave their work the ability to engage in "legal innovation within the wider intellectual tradition"?[25] Once again, the answer seems to be the Great Alliance between reason, history, and will that this article attempts to elucidate.

Though Luhmann advances the understanding of law in evolutionary terms, and though he was correct in concluding that this evolution is driven by increasing social complexity rather than by much narrower epiphenomena such as economic efficiency, [26] his evolutionary model failed to identify the all- encompassing normative guarantor—the Great Alliance—of adaptive continuity. In that he was not, of course, alone.

To go back to consciousness, it has been argued that modern law and jurisprudence inhabited and traveled the world in three waves of legal consciousness: classical legal thought, the social, and what I prefer to call idealizing reflective equilibrium. Duncan Kennedy has persuasively described this phenomenon, and his thesis of the globalization of the three types of legal

[24] *Id.* At 246.

[25] I am here inspired by the title Catharine Wells gave to her classical article *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988).

[26] LUHMANN, s*upra* note 20, at 271.

consciousness seems right to me.[27] However, understanding the typology and its globalization waves as adaptive phenomena within the confines of the Great Alliance complements and rectifies Kennedy's argument in important ways.

Kennedy locates the rise of classical legal thought (CLT) between 1850 and 1914 and of the social between 1900 and 1968. Idealizing reflective equilibrium is a post–World War II phenomenon. As a form of legal consciousness, each casts its own cognitive-normative-practical plan onto the world. CLT's was a liberal one, centered on the aspirations of science and on the ideas of rights- holding legal subjects and insulated spheres of autonomy of the will within which private and public actors could operate in socially unconditioned ways. Against this backdrop, the social's legal consciousness reinserted sociological sensibility into legal thought. Its aim was to facilitate the operation of social- economic systems through the deployment of instrumentally expedient policies "from the family to the world of nations."[28] The social recognized the interdependence of social spheres and actors, to which it reacted with a mosaic of compromises and policies protective of privileged private interests. Unsurprisingly, this mosaic created a world of distributive and regulatory conflicts, the resolution of which could be achieved only at a higher level of rationalizing abstraction. Idealizing reflective equilibrium scaled these heights on the back of American postwar constitutional law. The ever-elusive but continually reassured equilibrium to be achieved was that between socioeconomic expediencies and the idea of individual rights.

The three types of legal consciousness were, Kennedy points out, essenceless, ideologically plurivalent vessels.

> The "thing" that globalized was not, in any of the three periods, the view of law of a particular political ideology. Classical Legal Thought was liberal in either a conservative or progressive way, according to

[27] *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT (David Trubek & Alvaro Santos eds., 2006); Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631 (2003). The rest of this part freely borrows ideas from both works to reconstruct Kennedy's most relevant arguments for the present article.

[28] Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *supra* note 27, at 22.

> how it balanced public and private in market and household. The social could be socialist or social democratic or catholic or social Christian or fascist (but not communist or classical liberal). Modern legal consciousness [my Idealizing Reflective Equilibrium] is the common property of right wing and left wing rights theorists, and right wing and left wing policy analysts… Nor was it a philosophy of law in the usual sense: in each period there was positivism and natural law within the mode of thought, various theories of rights, and, as time went on, varieties of pragmatism, all comfortably within the Big Tent.[29]

Indeed, but Kennedy's story is incomplete. The Great Alliance, I argue, envelops the Big Tent and provides a firm point from which to explain the internal processes within each type of legal consciousness and their cross- fertilization and partial continuity. In the pages below I suggest causal, functional, and correlational hypotheses for the Great Alliance, explaining what in it appealed not only to elites but also to popular will. The explanation offered herein is valid for all the three types of legal consciousness discussed by Kennedy.

It was language and the capacity to speak that made politics possible.[30] Because of its discriminating and normative capacities, language transmutes fact into value, matter into meaning, and nature into politics. Because of language, social-coordination mechanisms and institutions such as the family or the state become the arena for contesting conceptions of the good life.[31] Hobbes did not dispute the centrality of language, but he deeply lamented its consequences. In the meaningdom inhabited by the Aristotelian *zoon politikon*, Thomas Hobbes saw

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[29] *Id.*

[30] As Aristotle writes:

> [T]hat man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals… The power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.

ARISTOTLE, *Politics, in* THE COMPLETE WORKS OF ARISTOTLE 1986, 1988 (Jonathan Barnes ed., Benjamin Jowitt trans., Princeton Univ. Press 1984).

[31] "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life." *Id.* At 1987.

social order constantly on the verge of chaos and violence, where life would be "solitary, poore, nasty, brutish, and short."[32]

With the exhaustion of the medieval regimes of intellectual discipline and social order in Western Europe and the cultural changes associated with the Renaissance, the unfolding scene was characterized by Hobbes and many of his contemporaries as a general state of apprehension and latent or manifest strife. The imprecision and malleability of language was, according to Hobbes, to be blamed in large part for insecurity and war.[33] Except when in the service of official science or the politics of the sovereign, language was more a burden than an asset. Hobbes's proposed solution is well known: the instauration of a supreme nominalist arbiter who was to bring unison to meaningdom and, consequently, order to social life.[34] The trade-off was clear: freedom for order.

Hobbes's solution to the problems of social order caused by the struggle for meaning was the therapeutic operation of an authoritarian institutional framework. The sovereign was to use its awesome powers to forge among its subjects habits of mind conducive to intellectual pacification and social stasis. Under the application of these institutional and mental apparatuses of intellectual and social order, the expansion of creative, practical, and moral faculties was to be

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[32] THOMAS HOBBES, LEVIATHAN 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

[33] It is worth citing Hobbes at some length here:

To these Uses [of speech], there are also foure correspondent Abuses. First, when men register their thoughts wrong False Secondly, when they use words metaphorically; that is, in other sense than that they are ordained for; and thereby deceive others. Thirdly, when by words they declare that to be their will, which is not. Fourthly, when they use them to grieve one another: for seeing nature hath armed living creatures, some with teeth, some with horns, and some with hands, to grieve an enemy, it is but an abuse of Speech, to grieve him with the tongue, unlesse it be one whom wee are obliged to govern; and then it is not to grieve, but to correct and amend.

Id. At 25–26.

[34] Again, to quote Hobbes:

To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law; where no Law, no Injustice. . . . Justice, and Injustice are none of the faculties neither of Body, nor Mind. . . . They are Qualities, that relate to men in Society, not in Solitude.

Id. At 90.

abandoned and freedom (as we have come to understand it) relinquished.

This solution was never feasible in the long term and, at least since the American and French revolutions, has become unacceptable even where it still survives. All the same, the challenges of cognitive discipline, social cohesion, and cultural reproduction—the challenge of order, taken as a whole—are still very real. In modern times, cultural uprootedness, economic vulnerability, constant—if sometimes only epithelial—social change, and the ever-present possibility of political turmoil have made the difficulty of achieving order greater rather than smaller.[35] At least one lesson, though, survives from Hobbes's solution: the real action lies in how to imbue historical matter and possible futures with meaning. The real action, that is, lies in shaping the lenses through which we make sense of the world.

To understand how (through the good offices of the moral imaginary of the Great Alliance) thought has safeguarded selected aspects of culture, economy, society, and politics from change is to understand how in the nineteenth century a powerful legal worldview was forged. The preservationist bias of this worldview is the price that the Great Alliance exacts to soothe the anxieties of those vested in the status quo as they contemplate the arrival of the will of the masses on the stage of history. This price has duly been paid.

Nonetheless, we seem unprepared to accept the full price that the Great Alliance continues to exact in order to avoid the Hobbesian trade-off of freedom for order. If anything, the idea of freedom has become more demanding. It is now insufficient to grant freedom of conscience and expression. Freedom as autonomy demands that the content of conscience be, in matters of the greatest import, experienced as authored, or at least willingly and reflectively accepted, by the self.

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[35] Émile Durkheim saw centripetal mechanism of cohesion (forms of collective consciousness) Evolving as centrifugal mechanism of destabilization emerged (for instance, transformations on productive structures and segmentation of social roles therein). *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., Free Press, 1997) (1893). That modern organic solidarity can be more efficient at the task of forging social cohesion than was the mechanical solidarity of previous eras does not belie the claim that the social cohesion challenge increased from the premodern to the modern type of society. More on social integration follows below.

Only then does the self mean what it says, creates, feels, and does. Autonomy is freedom qualified by authenticity. Freedom as dignity demands recognition by others and responsiveness on the part of institutions of governance.[36] To the extent that the Great Alliance stands in the way of the new demands of autonomy, recognition, and authentic authorship, its grip on the moral imagination should be loosened.

III Will on the world stage

When popular "will" came onto the world stage, the nineteenth-century masses set the world alight from Tucson and Recife to Budapest and Prague.

In 1863, Ferdinand Lassalle brought to the attention of workers the Prussian statistics on income distribution, which placed the incomes of more than seventy-two percent of the taxpaying population at less than the pittance of one-hundred thalers. But when he then called on the workers "to constitute [themselves] an independent political party," they were not the only ones listening.[37] When Eduard Bernstein and Rosa Luxemburg debated which route to power—economic and democratic reform or revolution—that the proletariat should take, neither the debate nor a vision of its end result escaped those with vested interests in the status quo.[38] A specter was haunting elites everywhere, threatening to "melt into air," in Marx's well-known expression, all that had

[36] On recognition and responsiveness, see AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (Joel Anderson trans., Polity Press 1995) (1992); Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326, 326–53 (2010).

[37] Ferdinand Lassalle, *Open Letter to the National Labor Association of Germany*, *in* GERMAN ESSAYS ON SOCIALISM IN THE NINETEENTH CENTURY 79, 79 (Frank Mecklenburg & Manfred Stassen eds., 1990).

[38] *See* Eduard Bernstein, *The Most Pressing Problems of Social Democracy*, *in* GERMAN ESSAYS ON SOCIALISM IN THE NINETEENTH CENTURY, *supra* note 37, at 120; Rosa Luxemburg, *Reform of Revolution?*, *in* GERMAN ESSAYS ON SOCIALISM IN THE NINETEENTH CENTURY, *supra* note 37, at 139.

seemed solid after the great European Restoration.[39]

On the institutional front, voting reforms were spreading across continental Europe. In Britain, a constitutional settlement favoring the parliament was achieved. That made the political system at once more adaptable to, and more vulnerable to, mass politics. The Whig-introduced Reform Act of 1832 extended the franchise to one in seven adult males by lowering the minimum property requirement and including rented land as property. Then, the Reform Act of 1867 increased the electorate by 88% by expanding the franchise to the working class (all urban male householders, regardless of property value) for the first time. In 1884, the year the Fabian Society was founded, the Representation of the People Act amended the Reform Act of 1867 to incorporate the countryside, increasing the voting population to over 5,000,000, which amounted to about 60% of the adult male population. As a percentage of the total population, the electorate increased from 1.8% in 1831 to over 12% in 1886. By 1883, apportionment designed to align distribution of seats and population had been adopted. All the while, the Chartist Movement (founded in and taking the name from the People's Charter of 1838), culminating in the meeting on April 10, 1848 (the 1848 Petition to Parliament) in London that attracted hundreds of thousands of people, kept within sight the specter of spontaneous revolutionary eruption.[40]

In France, indirect elections for the national assembly had been established as early as 1789, and elections became direct in 1817. From 1831 to 1848, the single-member constituencies system was changed to allow candidates to stand for election in more than one district, and in 1848, universal male suffrage for assembly elections was adopted. From 1852 until the Franco-Prussian War of 1870 and the establishment of the Third Republic, the government defrauded and variously manipulated elections so as to elect friendly representatives. In Italy,

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[39] This is to paraphrase the *Manifesto of the Communist Party,* published in Europe in the most revolutionary year of all time: 1848. Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, *in* MARX: LATER POLITICAL WRITINGS (Terrell Carver ed., 1996) (1848).

[40] *Voting Rights Before 1832*, NATIONALARCHIVES.GOV.UK, http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm (last visited Jan. 10, 2015).

during this period, the wars of independence were waged from 1848 to 1866, and in 1861, shortly after the 1860 *Risorgimento* (unification of the country), the Piedmont constitution of 1848 was adopted nationwide. The electoral system was characterized by male franchise based on a minimum age (25 years), literacy, and a property requirement, which amounted to the extension of suffrage to about 2% of the total population. In 1882, reforms, which included reduction of the age requirement to 21 years and lowering of the property requirement, as well as granting the franchise based on educational attainments, increased the electorate from 2% to 7% of the total population.[41] In Germany, universal, direct, and secret suffrage was adopted for the North German Confederation in 1867 and for the Imperial Parliament in 1871.[42]

European society was, at the same time, in ebullition.[43] Declining economic security caused by the shift from agrarian to industrial production, internal migration to cities, and the immiserating effects of unregulated market economies resulted in significant mass dissatisfaction. At the same time, cultural changes took place, including the expansion of the press[44] and the dispersion of socialism, liberalism, and nationalism. These economic and cultural trends collided head-on with the political institutions of absolute monarchy or, in the few countries where that was not the system of government, with the democratic limits of constitutional monarchies *cum* representative parliaments.

This collision deeply shook the European social order and led to experiments with leftist democracy and nationalist movements almost everywhere on the continent. In 1848, a revolution of Italian states broke out in January;

[41] In Italy, in 1894, a stricter educational requirement reduced the electorate from about 9% to 6% of the population. Only in 1912 was universal male suffrage introduced. ANDREW M. CARSTAIRS, A SHORT HISTORY OF ELECTORAL SYSTEMS IN WESTERN EUROPE 150 (1980).

[42] For the history of franchise in the United States and Europe, see *id. See also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

[43] Helpful summary and lucid analysis of 1848–1851 in Europe can be found in JONATHAN SPERBER, THE EUROPEAN REVOLUTIONS, 1848–1851 (1994). I rely heavily on it here.

[44] On its history and signification, see JURGEN HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (1962).

France was afire by February; and Germany followed in March. From March to July of that year, demonstrations, riots, and uprisings of both rural and urban populations spread throughout the continent in the form of strikes, land invasions, boycotts of feudal and seigneurial duties, as well as attacks on industrialists, landowners, and bankers.

In France, beginning from the 1847 *Campagne des Banquets* (banquet campaign) in favor of franchise expansion, Paris was in continual ferment until 1951. Suppression of the banquets by the army and police ended in street uprisings and led to the fleeing of Louis-Philippe and the proclamation of the Second Republic. The Luxembourg Commission was created to investigate and reform the living and working conditions of the lower classes. National Workshops offering jobs to the unemployed and workers' political associations followed. Disagreement over the timing of the election for a constituent assembly turned violent. When the results of the election produced a monarchist majority, the populace attempted to invade and overthrow the constituent assembly. The National Guard intervened to secure the assembly and arrested political and workers' leaders. With the government taking a conservative turn, the Luxembourg Commission was dissolved, and the National Workshops closed. This only spurred greater interclass hostility. Three days of conflict in the barricaded streets left whole neighborhoods of Paris covered in blood and debris.

With the victory of the government's forces, leftist ministers were forced into resignation, and oppositional political clubs and trade associations were closed. The constituent assembly concluded its work and called for a presidential election the following month, in which Louis-Napoleon was selected. In the meantime, the left was reorganizing around the contested issue of the invasion of the Italian Republic by French troops, which ended with French victory and the order to restore Papal authority. Left representatives in the National Assembly called for the impeachment of Louis-Napoleon. Street demonstrations in Paris and insurgents who barricaded the streets of Lyon were subdued by government forces. Despite the apparent victory of the conservative forces, radical secret

societies were growing everywhere in France, including the rural areas and small towns. On December 2, 1851, after seeing his aspirations to re-election quashed by monarchists in the National Assembly, Louis- Napoleon propelled the country into almost two decades of authoritarian rule with himself as the emperor. His rule ended only with his capture in 1870 during the Franco-Prussian War.

The revolutionary fire burned in Italy, too. In January of 1848, an insurrection began in Palermo and then spread to the rest of Italy. The king of the Two Sicilies was coerced into granting his subjects a constitution. The governments of Piedmont-Savoy and Tuscany were also forced to grant constitutions. Uprisings in Venice and Milan (the capital of Lombardy), both Habsburg territories at the time, installed in power provisional revolutionary governments. Upon the defeat of the intervening Austrian army, Carlo Alberto of Piedmont-Savoy declared war on Austria and sent his forces into Lombardy and Venetia. Pope Pius IX was moved to grant a constitution for the Papal States. Disputes between the Two Sicilies and Naples turned into armed conflict. A period of constantly changing alliances and armed conflicts among the various Italian provinces, the Pope, and Austria ensued. In November, the constitutional-monarchist minister of the Papal States was assassinated and his government overthrown by a movement led by democratic clubs, after which the Pope fled to safety in the Kingdom of the Two Sicilies. Shortly thereafter, democrats in Florence called for a constituent assembly for the nation. Revolution, republican governments, and war spread across the peninsula. Louis-Napoleon's France intervened, sending forces to battle those of the Roman Republic. In August of 1849, the French occupied the Roman Republic and restored Papal authority. Venice, besieged by Austrian troops, surrendered.

As early as 1847, leftists and constitutional monarchists were pressing for national unification and a broad agenda of reforms in Germany. In March of the following year, fights erupted on the streets of Berlin, leading to the victory of the insurgents and the retreat of the army from the city. In consequence, the King of Prussia was forced to agree to a constitution and announce support for national unification. Everywhere coerced; rulers appointed liberal and leftist ministers

throughout the German states. In Frankfurt, elections for a German national assembly were called. Simultaneously, armed conflict between Danish and Polish neighboring populations and the government escalated. By midyear, German democratic and constitutional-monarchist clubs were busily at work. In Frankfurt, artisans and masters called their separate corporative congresses. Pressed by Russia and England, Prussia signed the Malmo armistice with Denmark and, without consulting the provisional central government, withdrew its military support from German nationalists in Schleswig-Holstein, then part of Denmark, but with a considerable ethnic German population. After the National Assembly reversed its condemnation of the Malmo armistice, insurgents tried to overthrow it by force, but were defeated after a battle against Prussian forces on barricaded streets in Frankfurt. Republican forces rebelling in Baden were also defeated. Prussia's monarch appointed a conservative prime minister, who staged a military occupation of Berlin and declared a state of siege in the capital. In response, the state's Constitutional Assembly called for a tax boycott. Although Berlin was quiet, revolt spread in the greater state. In Bavaria, the left obtained the majority in elections. In December, the Prussian government dissolved the Constitutional Assembly and established an authoritarian constitution by decree.

The year 1849 began with the National Assembly in Frankfurt issuing a Declaration of Basic Rights. Elections in Prussia were polarized between conservative and democratic forces. Liberals and socialists won elections in Saxony. Also in that spring, the National Assembly in Frankfurt concluded the project of a national monarchical constitution for a unified Germany, which was approved by twenty-eight states, and offered the crown to Friedrich Wilhelm IV of Prussia. Wilhelm IV rejected the constitution and threatened its supporters with military force. Democrats organized demonstrations in support of the national constitution, some of which led to street fighting. Revolutionary governments were instituted in Saxony, the Palatinate, and Baden. Prussian forces defeated revolutionaries in the Palatinate, and the National Assembly in Frankfurt fled to Stuttgart, only to be dissolved by the ruler of Wurttemberg. By that summer, Prussian forces had

subdued revolutionary insurgents everywhere. By the end of 1850, the German Confederation had been restored under Austrian leadership. Austria had itself witnessed street fighting beginning in Vienna in 1848 and culminating with the flight of Metternich. At about the same time, the revolutionary flames were spreading further east.

The European revolutions and uprisings reached their climax in the years of 1848 to 1851, bringing millions onto the political stage; popular will broke out of its cage. Following the years of the European Restoration from 1814 onward, elites across Europe had thought that they could still take the institutional path to concentrate and preserve their power. The revolutions of 1848 awoke those elites from their dreams of a partial modernity that would combine the social structure of the old political order with the profits of the new economic one. To an even greater extent than the French revolution, the revolutions of the nineteenth century, and the transnational masses responsible for them, left indelible scars on the European consciousness.

Many European "forty-eighters," as the immigrants who had been involved in the 1848 European revolutions became known, migrated to the United States. Here, industrialization and urbanization in the North, which created a modern working class, along with the powerful ideals of equality and democracy, furnished combustible material for the national drama that would unfold in war[45]. Many immigrants fought in the civil war, but their intellectual and political impact was greater than that of their military service. On the institutional front, war, emancipation, settlers' mobility, the consolidation of the two-party system, and grassroots mobilization of the disenfranchised all contributed to a convoluted electoral history in which many battles of the Civil War period were refought. African Americans were formally enfranchised by the adoption of the Fourteenth and Fifteenth Amendments, but in the South and parts of the North they remained effectively disenfranchised, as did immigrants, women, and many among the

[45] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

working classes. In fact, from 1850 to World War I, enfranchisement was de facto if not de jure restricted, with the eager support of the racist and economically insecure middle and upper economic classes. This was the case in spite of, or perhaps partially because of, the fact that the period before that, starting from about 1790, had brought a considerable expansion of suffrage with the abolishment of property, income (tax), and, occasionally, citizenship requirements. The literature even speaks of an "upsurge of democracy" in America by the mid-nineteenth century[46].

The American Civil War of 1861 to 1865 wiped out two percent of the population of the United States at that time, bringing about a profound change in the economy, demography, and spirit of the nation.[47]In the Battle of Gettysburg alone, in early July 1863, the blood of more than fifty-thousand casualties stained the battlefield. The United States emerged from the Civil War into Reconstruction with a stronger federal government. It is also of no small consequence that the most prestigious American jurist of all time, Oliver Wendell Holmes Jr., almost died in the conflict and never throughout his life lost sight of the devastation it left behind.

Either by taking an institutionalized path marked by democratic reforms (including constitutional reform, complete with removal of voting requirements such as property, education, race, gender, and income), or a noninstitutionalized path via civil wars, uprisings, strikes, and revolutions, the nineteenth-century masses took their place on the world stage. Their will would, one way or another, change the face of the old order; the wild horse of politics was unleashed. The march of equality and democracy proved to be just as unstoppable as de Tocqueville had predicted.[48]

The reaction of entrenched-interest holders to the events of 1848 in

[46] *Id.* At 34.

[47] *See* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (2008).

[48] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (H.C. Mansfield & D. Winthrop trans., Univ. Of Chi. Press 2000) (1835).

Europe and the Civil War in the United States was heavy-handed and, in the short term, successful. By the summer of 1849, open revolutionary conflict in Europe had already ended. Revolutionaries and their sympathizers were persecuted all across Europe. In the United States, Reconstruction inaugurated a new era of conservative hold on power and racial oppression on the ground. But historical time, as even then the conservatives knew all too well, is measured on a larger scale. To tame the wild surges of mass politics once and for all would require a feat of thought: nothing less than the creation of a form of consciousness capable of limiting reform while speaking in the language of the revolutionary reformers. The Great Alliance of legal historicism and rationalism would bring this creation into being.

Benedetto Croce, the idealist liberal, regretted that the liberal and democratic fervor of the mid-nineteenth century and the corresponding acknowledgment that ethical ideals were the engines of society did not lead, in the latter part of the century, to a renewed philosophy. Instead of philosophical hope and political enthusiasm, a period of mysticism, empiricism, naturalism, positivism, irrationalism, and pragmatism ensued. Indeed, where one would expect greatness of ambition and imagination, thought was politically disciplined. The prosaic and narrow kinds of thought that developed in the decades following the uprising of popular will were not directly generated by the events of the revolutionary period, Croce submitted. Instead,

> narrowness and prosaicness were the attributes of the intellect that considered [the uprisings of the age and their inspiring ideals] in its development, of the imagination that set it in a bad light, and of the spirit that instead of embracing it and lending it warmth left it on the outside or despised it.[49]

This predicament amounted, he thought, to a "mirage of false ideals" to be

[49] BENEDETTO CROCE, HISTORY OF EUROPE IN THE NINETEENTH CENTURY 323 (Henry Furst trans., Harcourt, Brace and Co. 1933) (1931).

sooner or later overcome.[50] He may have been wrong. On this last point, Croce and many like him greatly underestimated the pull and resilience of the type of thought the nineteenth-century alliance of historicism and rationalism was in the process of weaving.

Such was also the case in law. In nineteenth-century legal thought, reason and history were united in challenging the is–ought separation thesis.[51] Both rationalism and historicism sought to derive a prescriptive view of law and of legal obligation from history. Each assigned a task to reason, rationalists demanding that it capture the conceptual essence of law and seek its gradual implementation in reality, [52] and historicists seeking to give reason-as-legal- science the responsibility for excavating legal history so as to uncover and conceptually elaborate its living elements, as determined by their organic connections with the spirit of a given people. It is true that rationalists and historicists meeting midway had important points of disagreement, especially relating to the ultimate test for the value of state-enacted and state-backed law. For those coming from the rationalist camp, such as Hegel, it was the extent to which state law faithfully mirrored the concept of law in all its departments, starting with the theory of will, which secured its legitimacy. For those approaching the midline from the historicist camp, such as Savigny, the extent to which posited and customary law mirrored, free from all elements of voluntarism, the legal dimension of the spirit of the people was the ultimate test of legitimacy for law. Those differences pale, however, when contrasted with the terms of the compromise achieved between reason and history.

As mentioned above, by the end of the century, Holmes in America, Jhering in Germany, Gény and Duguit in France, Orlando in Italy, and Dicey in England had cemented the fusion of reason and history. All of them connected law

[50] *Id.*

[51] On the fact–value distinction see HUME, *supra* note 4; HILARY PUTNAM, *The Fact/Value Dichotomy and Its Critics*, *in* PHILOSOPHY IN AN AGE OF SCIENCE: PHYSICS, MATHEMATICS, AND SKEPTICISM 283 (Mario De Caro & David Macarthur eds., 2012).

[52] In Hegelian jargon, idea = concept + its actualizing determination.

to the character of the people, to the exigencies of the time, and to reason. Material interests and ideals, existing constitutional essentials, and the expediency of legal policies and institutions as means to foster industrialism and other social ends were the relevant elements of law. This has not changed.

Indeed, jurists as a class are peculiarly sensitive to social change.[53] In the Western centers of production (principally France, Germany, Italy, and the United Kingdom) and reception (principally Argentina, Brazil, Colombia, Mexico, and the United States) of legal thought, jurists reacted to the threat of the will of the masses in the way they knew best: with legal doctrines. With the expansion of democratic franchise, the increased proliferation of legislation, and the spread of war and revolution, the intellectual energies of legal and social philosophy turned to the conceptual recolonization of politics, inventing vistas from which a new discourse of authority would tame and once again ride the wild horse of politics.[54] In the eighteenth century, many thought that law could be conquered through reason, and many others that it could be conquered through history. Nineteenth-century jurists knew better. Only the combined insights of historicism and rationalism could forge the kind of legal consciousness capable of reining in and corralling modern popular "will." History has thus far proved them right.

IV The structure of the great alliance

And now this is "an inheritance"—
Upright, rudimentary, unshiftable planked
In the long ago, yet willable forward
Again and again and again.

[53] Jurists tend to deradicalize all they touch. For an example in contemporary America, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). The same tendency can be detected in all areas of social welfare and workers' protection, from the New Deal to the Americans with Disabilities Act.

[54] I believe the argument of the article would equally hold for causal, correlational (elective affinity) or functionalist claims. Throughout, I make all three types of argument as seems most persuasive in the pertinent historical context.

—Seamus Heaney[55]

This part outlines the central elements of the Great Alliance. For the sake of intelligibility and containment, I focus on the exemplary way in which G. W. F. Hegel and F. K. von Savigny combined rationalism and historicism. In their works, the reciprocal movement of rationalism and historicism to close the distance that had separated them in the eighteenth century appears in its most compelling and influential form. Importantly, the influence of both authors went far beyond Germany to reach the whole of Europe and the Americas in the late nineteenth and early twentieth centuries.[56]

Eighteenth-century elites—in the century of the American and French revolutions—were shaken awake by revolutionary movements that took by assault the legal and political orders of the Ancien Régime and the territories of the British Empire. Overnight, the perception of social order, long corroborated by daily experience, was rendered obsolete. However, social chaos was practically, cognitively, and emotionally unendurable. To counter it, those sympathetic to the new, postrevolutionary legal and political tendencies prescribed reason as an antidote for chaos; their opponents, craving restoration, recommended a return to tradition (as *nomos*). The will of the masses had little sympathy for either.

After the first quarter of the nineteenth century, democratic franchise was expanding in the West while the legislative process became increasingly more meticulous, prolific, and pervasive. Simultaneously, deep social, cultural, political, and economic transformations were hard at work breeding dissatisfaction, causing insecurity, and triggering war. It was not accidental that, during the same period in which the will of the transnational European and American masses came onto the stage of history, the most reputable and influential currents of thought were directed toward finding the formula for taming a society in flux, a task they sought

[55] Seamus Heaney, *Fretwork: On Translating* Beowulf, SALTANA, http://www.saltana.org/1/esc/91.html#.VF0kdvl4rYh (last visited Nov. 23, 2014).

[56] Autochthonous jurisprudence is a twentieth-century phenomenon in the United States. Up to the time of Llewellyn, for instance, American scholars were open to and largely dependent upon British, German and, to a lesser extent, French jurisprudence.

to accomplish through the articulation of clusters of authoritative discourse effectually overlegitimizing and shielding from challenge select constitutional essentials. Only when holding this backdrop in view can one properly understand and appreciate the breadth, depth, and reach of the Great Alliance. The mission assigned to (or the function assumed by or the elective affinities of) legal thought in this context was to subdue popular will through a jurisprudence serving a preservationist ethos, while paying due homage to reason and incremental reform. Here lies the birth of the Great Alliance between historicism, rationalism, and will.

This new strategy of relying on the Great Alliance to concede some political power to the masses through the mechanisms of democracy while retaining cultural authority proved to be more effective, subtle, palatable, and adaptable than overt efforts at conservative restoration or top-down rationalist social engineering. What is more, under the practical drive to reconquer will through thought, formalist elements present in the rationalism and historicism of the eighteenth century were pragmatically co-opted, theoretically integrated, and finally intensified by nineteenth-century ratio-historicism.

Certainly, any minimally sophisticated legal heuristic combines reason and history. From as early as the times of Roman private law, Greek constitutionalism, and Judeo-Christian religious law, it has been the province of law to act in the present as a broker between the past and future of social orders. This has to do not only with the culture of jurists, but also, at an even deeper level, with the functional need for impersonal mechanisms of social cohesion and cultural reproduction over time.

More generally, the impulse to weave together reason and history lies at the core of the human condition and at the foundation of thought. For example, the historicism in Hegel's rationalism can be traced all the way back to Plato. In the *Symposium*, in reaching the last stage of his quest for philosophical knowledge of the idea of beauty, the thinker "may be constrained to contemplate the beautiful as appearing in our observances and our laws, and to behold it all bound together

in kinship."[57]The philosophical *gravitas* and complexity of the Hegelian approach does justice to Plato, placing the historicization of rationalism into an evolutionary framework. In fact, what appeared as rationally putative and static in Plato is presented as dynamic and necessary according to historical laws in Hegel. But the point is still the same: history and reason attract more than they repel each other.

The attraction between reason and history in law differs from that in philosophy only in relation to the specific institutional dimensions it gains in law. In the pragmatic, cognitive, and normative conventions forged by the Great Alliance, conservative and utopian elements of eighteenth-century historicism and rationalism converged to create powerful theoretical and institutional structures.[58] Hegel's rationalist legal philosophy presents historical stages and institutional arrangements as the manifestation of reason's operational bite in the world. Savigny's historicist legal science appeals to the rationalizations of legal science in order to endow historical data with both conceptual stability and intellectual authority. The practical and theoretical implications of the approximation of rationalism and historicism exemplified in the works of Hegel and Savigny cannot be overestimated.

Among the main intellectual protagonists of the Great Alliance, Hegel and Savigny challenged the notion, as influential in their time as it is now, of the absolute epistemological separation between "is" and "ought." In their works, they derived both descriptive and normative conclusions from the social status quo and historical data. They did so in the way each assigned tasks to reason: Hegel charged reason with extracting from the actual law and legal institutions of

[57] PLATO, SYMPOSIUM 203 (W.R.M. Lamb trans., Harvard Univ. Press 2001).

[58] For a deeper understanding of nineteenth-century legal thought, see generally GRANT GILMORE, THE AGES OF AMERICAN LAW (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870–1960 (Oxford Univ. Press 1992); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 (1977); OLIVIER JOUANJAN, UNE HISTOIRE DE LA PENSÉE JURIDIQUE EN ALLEMAGNE (1800–1918) (2005); DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITIONS (1990); KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAF (1991); Gustav Radbruch, *Legal Philosophy*, *in* THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 47 (Ass'n of Am. Law Sch. Ed., Kurt Wilk trans., 1950) (1932) (especially helpful to interpret the significance of Jhering); FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE (Tony Weir trans., Oxford Univ. Press 2003).

the time the idea and concept of law (in Hegelian vocabulary, the idea results from the tangible realization of a concept in its empirical determination); Savigny charged reason as legal science responsible for discovering, revealing, and systematizing the legal dimension of a living *Volksgeist*.

As mentioned above, an important difference between the two can be found in the final test of the value of legal systems and existing constitutional structures. For Hegel, the final test was the extent to which historically given law and institutions faithfully reflect the concept of law as stipulated by reason. For Savigny, on the other hand, the definitive proof of the value of existing legal and political institutions was to be found in the extent to which these would faithfully reflect, once purified of ahistorical (primarily legislative) voluntarism, legal and political principles rooted in the spirit of their hosting people.

In the nineteenth century, Hegel and Savigny were regarded as titans of high culture and repositories of authority and prestige. As is well known, they viewed themselves as irreconcilable intellectual rivals.[59] It is a legitimate question whether it makes sense to present them as allies in what is arguably the most consequential change in modern legal thought. By way of response, consider how, when viewed from the vantage point of the early twenty-first century, the discord between them pales in comparison to the hegemony of the worldview they helped create.

Hegel's reaction to utopian rationalism and conservative historicism was complex, and included criticism of what he considered its "one-sidedness," especially in the strain coming out of German idealism.[60] An important provocation came from Kant. Postulating the final alliance between nature and reason in the eighth and ninth propositions for the formulation of an all- encompassing universal history of nature and humanity, Kant suggested that

[59] For a comparative study of their legal thought, see Luc Ferry, *Droit, Coutume et Histoire: Remarques sur Hegel et Savigny*, *in* LA COUTUME ET LA LOI: ETUDES D'UN CONFLIT 83 (Claude Jornès ed., 1986).

[60] For a learned history of German idealism before Hegel (that of Kant, Fichte, Schelling, and the young romantics), see FREDERICK C. BEISER, GERMAN IDEALISM: THE STRUGGLE AGAINST SUBJECTIVISM 1781–1801 (2002).

> the history of the human race as a whole can be regarded as the realization of a hidden plan of nature to bring about an internally... perfect political constitution as the only possible state within which all natural capacities of mankind can be delivered completely.[61]

He intimated further that "a philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind, must be regarded as possible and even as capable of furthering the purpose of nature itself."[62] And as to the future author of such a history, Kant expected that nature, just as she produced a Kepler and a Newton, would create "someone capable of writing it along the lines suggested."[63]

Hegel volunteered. His work shows a preoccupation with the odyssey of the human spirit towards the highest point of reflective historical self-consciousness. In his jurisprudence, Hegel claims to demonstrate how, within this larger philosophical horizon, rationalism and historicism converge, at the point of fusion, to authorize the postulate that the empirical particulars of law and the state in every case must necessarily reflect the universal element of the concepts of law and of state as a "fact of reason."

To be sure, Hegel did distinguish conceptual from historical explanation. For Hegel, the understanding (*Verstehen*) that historical sciences promise is insufficient and nearly always deceptive. For the jurist, true discourse about mundane events must necessarily emerge on the conceptual plane in order to cast nets over the world that will capture, in the form of ideas, the empirical and singular cases of the manifestation of corresponding universal rational constructs.[64] Hegel's rationalism thus ratifies the archetypal rationalist thesis of the will under the orientation of reason, but here "the will is a particular way of

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[61] EMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, *in* POLITICAL WRITINGS 41, 50 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (1784).

[62] *Id.* At 51.

[63] *Id.* At 42.

[64] *See* HEGEL, *supra* note 8, at 29–30.

thinking—thinking translating itself into existence, thinking as the drive to give itself existence."[65] While maintaining a long-term macrostrategic alliance with nature, the will is the citadel of free thought and expresses itself first as concept.[66] The concept is the product of the rational will and the form of expression of things-in-themselves. In the same way, the will necessarily contains within itself the concept of the thing-in-itself that it represents as object of volition in its mundane manifestations.

In these terms, the Hegelian "I" is initially pure intellectual volition, volition of thought, or the idealization of volition. Only in the second moment does the "I" come out expediently, leaving upon the world its impressions according to historically given constraints and possibilities. Viewed collectively and diachronically, these impressions constitute the legacy of thinking volition. This legacy is nothing other than history, which thus ultimately springs from reason. So understood, history carries a conceptual core that corresponds to the will that engendered and enacted concepts in the events that are the stuff of history. It is worth quoting Hegel at some length here:

> To generalize something means to think it. "I" is thought and likewise the universal. When I say "I," I leave out of account every particularity such as my character, temperament, knowledge, and age. "I" is totally empty; it is merely a point—simple, yet active in its simplicity. The colorful canvas of the world is before me; I stand opposed to it and in this [theoretical] attitude I overcome its opposition and make its content my own. "I" is at home in the world when it knows it, and even more so when it has comprehended it. So much for the theoretical attitude. The practical attitude, on the other hand, begins with thought, with the "I" itself, and seems at first to be opposed [to the world] because it immediately sets up a separation. In so far as I am practical or active, i. e. in so far as I act, I determine myself, and to determine myself means precisely to posit a difference. But these

[65] *Id.* At 35.

[66] As a rationalist on the way to ratio-historicism, Hegel still subscribed to the authority of the Rationalist absolute good described in the previous chapter. The basis of the right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free*, so that freedom constitutes its substance and destiny and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.

Id.

> differences which I posited are nevertheless also mine, the determinations apply to me, and the ends to which I am impelled belong to me. Now even if I let go of these determinations and differences, i. e. if I posit them in the so- called external world, they still remain mine: they are what I have done or made, and they bear the imprint of my mind…. The theoretical is essentially contained within the practical; the idea that the two are separate must be rejected, for one cannot have a will without intelligence. On the contrary, the will contains the theoretical within itself…. It is equally impossible to adopt a theoretical attitude or to think without a will, for in thinking we are necessarily active. The content of what is thought certainly takes on the form of being; but this being is something mediated, something posited by our activity. These distinct attitudes are therefore inseparable: they are one and the same thing, and both moments can be found in every activity, of thinking and willing alike.[67]

As nomothetic aspects of tradition as *nomos*, legal customs were, according to this view, worldly remnants of past volition; in some way, they too express the concepts of state, right, morality, and so on, formulated by reason. There is, however, one important difference in degree of consciousness, volitional determination, and universality between, say, legal customs and positive laws. Because customs assume their content in a manner less voluntary and conscious, their ontology is more precarious and their authority less determined and commanding. Positive laws, because they are proactive, require greater awareness and volitional determination. In the case of law, this not only implies a more precise connection with the concept of law, but also affords greater prospects for universalism.[68]

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[67] *Id.* At 35–36.

[68] Hegel writes:

> To posit something as universal—i.e. To bring it to the consciousness as a universal—is, as everyone knows, to think…; when the content is reduced in this way to its simplest form, it is given in final determinacy. Only when it becomes law does what is right take on both the form of its universality and its true determinacy. Thus, the process of legislation should not be represented merely by that one of its moments whereby something is declared to be a rule of behaviour valid for everyone; more important than this is the inner and essential moment, namely cognition of the content in its determinate universality. Since only animals have their law as instinct, whereas only human beings have theirs as custom, customary rights contain the moment of being thoughts and of being known.

Id. At 241–43.

Another crucial point about the rationalist approach to historicism is the permanently open possibility of reinoculating historical facticity with an ever-purer version of the embryonic rational concept in a potentially endless process of dynamic (reflective) equilibrium between reason and history. Once inoculated with a better determined and more reflective version of the concept, historical processes deflect their course from the particular, precarious, and imperfect in the direction of the universal, stable, and true:

> One of the main sources of the complexity of legislation is that the rational, i.e. that which is rightful in and for itself, may gradually infiltrate primitive institutions which contain an unjust element and are therefore of merely historical significance…. But it is essential to realize that the very nature of the finite material entails an infinite progression when determinations which are universal in themselves and rational in and for themselves are applied to it.[69]

The Hegelian philosophy of law and state operates with three normative orders in which functional complementarity and jurisdictional superimpositions create different spheres of the social order. The three normative orders of the modern constitutional "State" (with a capital S) are those of law, morality, and ethical life (*Sittlichkeit*). The sphere of civil society—the pragmatic interests of social agents—is formed by the union of law with morality and must operate under their shared jurisdiction. Along with other subspheres of lesser relevance, the family and civil society form the contexts of ethical expression by way of emotions. If family is considered to be connected to civil society and the constitutional and administrative structures of the modern state, the all-encompassing resulting sphere is that of the State as thick ethical life.

Every normative order is supposed to incorporate in its nucleus universal content in the form of a concept revealed by reason. Consequently, every sphere of society regulated by the respective normative order necessarily carries within itself—though to different degrees—its rational formulation in concept. Social spheres and their normative orders are, as explained, always susceptible to

[69] *Id.* At 247–48.

inoculation by the virus of rationality, a phenomenon which occurs systematically in modernity. Hence, one concludes that the modern human condition is such that "what is rational is actual; and what is actual is rational."[70] Coming from the rationalist end of the historicism-rationalism spectrum, Hegelian thought detected at the very heart of historical reality an element of rational legitimization, for reality is apprehended as an idea, as the actualization of a concept stipulated by reason, whose concrete manifestation has become necessitated irrespective of the level of consciousness of social agents.

Through this movement toward the center of the reason-history continuum, Hegel's views abandon in important ways the Socratic conception of thought as the means to hatch from the hardened shell of one's own institutional and cultural contexts.[71] In eighteenth-century utopian rationalism, one could still encounter this Socratic conception of philosophy. In it, the tools of thought were still committed to slicing up and excavating the social world in search of arcane causal connections and esoteric historical or subjective processes.

With Hegel, the Socratic conception of philosophy as cultural criticism is considerably abated. In his *Philosophy of Right*, Hegel is much more interested in the Herculean effort to extract evidence of stability from contingency, to see an instance of the universal in the particular, to interpret the historical as a moment of the rational, and to see the perfection of the conceptual in the imperfection of the material.

Consider now the same movement toward the midline, but now coming from the opposite direction. Similarly to David Hume, Savigny envisioned law and customary institutions as spontaneous phenomena, at least at their best. For him, the customary law of the Romano-Germanic world was an impersonal, anonymous, and involuntary product of an organic cultural process. A result of the primitive operation of strategic reason and traditional beliefs in the world, customary law was much more a mosaic than a system of social ordering. And the normative

[70] *Id.* At 20.

[71] See ROBERTO UNGER, FALSE NECESSITY (1987) for contemporary reimagination of this Socratic spirit. On Socratic citizenship, see DANA VILLA, SOCRATIC CITIZENSHIP (2001).

force of the customary order was derived from the vital energy of a people manifested throughout its history. In contrast to Hegel's call for a progressive rationalization of experience via conceptually informed volition, Savigny refused to concede to lawmaking voluntarism any inch of the legitimacy of legal and political orders. But there was a twist in his argument. Now, contrary to Hume, Savigny allotted to reason all the authority of science to discover, purify, clarify, organize, and disseminate the normative elements organically and spontaneously present in historical fact.

If one considers the most influential of Savigny's writings, *Of the Vocation of Our Time for Legislation and Legal Science*, five preeminent themes stand out: (1) the rejection of a conceptualist, deductive, and a priori approach to the contents of law and the character of legal orders; (2) the analogy of law to a (natural) national language when considering its place among the intrinsic elements of the living spirit of a people, as opposed to a universal set of (artificial) principles; (3) the destructive and meaningless artificiality of codifications, which lack the most important element of the normativity of law: its connection to the *Volksgeist*; (4) the betrayal by jurists seduced by codifications of their responsibilities as authorized intermediaries between the legal elements of the *Volksgeist* and the people itself, responsibilities that stem from their being distinctively epistemologically equipped (in an asymmetry of rationality comparable to the one expressed by eighteenth-century utopian rationalism); and finally (5) the defense of a principle of institutional evolution based on legal science's constant discovery and articulation of the organic principle of the spirit of the people through the separation of what is still alive in it from that which retains only an antiquarian interest and cannot rightfully belong to the people's tradition as *nomos*.[72] These themes, which anticipate the path of ratio-historicism from historicism to rationalism, come together in what Savigny calls the political aspect of law. The technical element of law is found in the rejection of a priori

[72] SAVIGNY, *supra* note 9. On the core elements of *Of the Vocation*, see Ferry, *supra* note 59, at 83–94.

critical and imaginative reason in favor of legal scientific reason as handmaid of spontaneously generated and organically bound-up historical contents. Attention to some of the details of this path is warranted.

In line with the sensibilities of the Romantic movement—which included precursors such as Novalis, Schlegel, and Schleiermacher—Savigny reacted against the Enlightenment creeds of universalist reason and of the march of progress. He connected the codifying movement of his time to the rationalizing and cosmopolitan impetus and the faith in progress of the eighteenth-century rationalists and rationalism's corresponding malaise:

> In the first place, it is connected with many plans and experiments of the kind since the middle of the eighteenth-century. During this period the whole of Europe was actuated by a blind rage for improvement. All sense and feeling of the greatness by which other times were characterized, as also of the natural development of communities and institutions, all, consequently, that is wholesome and profitable in history, was lost; it's [*sic*] place was supplied by the most extravagant anticipations of the present age, which was believed to be destined to nothing less than to being a picture of absolute perfection. This impulse manifested itself in all directions; what it has effected in religion and government, is known; and it is also evident how everywhere, by a natural reaction, it could not fail to pave the way for a new and more lively love for what is permanent. The law was likewise affected by it. *Men longed for new codes, which, by their completeness, should ensure a mechanically precise administration of justice*; insomuch that the judge, freed from the exercise of private opinion, should be confined to the mere literal application: at the same time, they were to be divested of all historical associations, and, in pure abstraction, be equally adapted to all nations and all times.[73]

Savigny reacted equally against both the view of law as a product of officialdom and the view of law as a product of ahistorical reason or the cosmic order of nature. For him, legal positivism and rational natural law were ultimately reconcilable, and both were false. Against both and their apogee in the Code Napoleon of 1804, Savigny reaffirmed the historicist theses of the anonymity and

[73] FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 20–21 (Abraham Hayward trans., 2002) (1831) (emphasis added).

spontaneity of the origin of social order.[74] Hence, to implode the legal consensus and the patterns of legitimation of centralized social engineering exemplified by the Code Napoleon became an important mission of the Great Alliance. With one hand it gave, and with the other it took away.

In Savigny's ratio-historicism, the objective of legal science ceases to be the conceptual elaboration and systematization of legislation, which, for him, should be reserved only for the solution of conflicts between customs or for the classification of legal customs of the nation-state in the same way as, for example, property is classified. Strategically, in the greater scheme of the Great Alliance, the proper object of reason in the form of legal science would be the normative customs that, organically emanating from the *Volksgeit*, contain in their tangle material ripe for ex post rationalization. In the hands of legal science, the imperfections, uncertainties, and conflicts of the real (historical) world were to be sublimated in thought. Thus, in his *System of Modern Roman Law*, Savigny insists not only upon the rational systematizing role of jurisprudence, but also upon its role as instrument of the scientific sublimation of the contingency of history and opinion.[75]

Savigny's refusal to accept legislation as the paramount object of legal science did not mean that the nomothetical aspects of the spirit of the people should be its only object. There was nonetheless an unmistakable preference on the part of legal science for this object. To justify this preference of legal science for historical contents, Savigny, faithful to the teachings of the Historical School, turned to a naturalization of law, the political constitution, and the idiosyncrasies of each people's language:

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[74] *See id.* At 22–23.

[75] As Savigny states: [I]t is desirable that from time to time, the researches and gains of individuals should be summarized in a unifying consciousness. The holders of science, living at the same time, are often in sharp opposition to one another; but those contrasts come out still more strongly when we compare all ages. Here our business is not to choose the one and reject the other; the task consists rather in dissolving the perceived opposition in a higher unity which is the only way to a safe progress in the science.

FRIEDRICH KARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW, VOL. 1, at I (William Holloway trans., Hyperion Press, Inc. 1867) (1993).

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.[76]

This naturalization, insofar as it inserted the law, the political constitution, and the language of a people into the all-encompassing natural way of things, allowed reentry through this side window of the universalism that had been expelled through the front door along with the demiurgic pretensions of reason. Savigny's is a form of cultural naturalization in the sense that the branches of law, political institutions, and the maternal tongue are connected to the trunk of the *Volksgeist* according to a linkage experienced by members of the relevant people to be as compelling as natural laws are in general. Thus, against the a priori rationalism of eighteenth-century utopian rationalism, Savigny offered what he saw as the inescapable historicity of each singular form of collective life; and against the more-or-less arbitrary cumulative sedimentation of historical fact dear to eighteenth-century instrumental historicism, he submitted the internal, organic nature of history's development and the inescapable finishing work of science. In the narrow gap left between these two positions, he advocated on behalf of reason a fiduciary—as opposed to a creative—role with respect to bestowed historical contents.

To comprehend historicism's concessions to rationalism, it is helpful to further interrogate the dynamic nature of the institutional material of each people. In their essence, the institutions of the *Volksgeist* are in permanent organic development as long as the *Volksgeist* retains its identity and force. This organicity is, of course, very different from the view of progress as the result of rational programs. It also differs from the Hegelian conception of progress as the process

[76] SAVIGNY, *supra* note 9, at 24.

of self-purification in history of the idea impregnated by the corresponding rational concept. Progress in the ratio-historicism of Savigny refers to evolution of a people's culture according to principles internal to it. It is here that the ratio-historicism of legal science meets the longing for authenticity of the Rousseauian line in modern thought.[77]

Law as the object of reason as legal science is therefore thought to possess the attributes of historicity, organicity, necessity, scientific pliability, and constant, self-generated development as long as the spirit of the people lives. However, Savigny is not oblivious to the complexities that inhere in the operation of legal science upon history. It is precisely in light of this scientific malleability of historical legal materials, implicating the inherent technicality of law, that Savigny speaks of the twofold nature of law as a type of specialized knowledge and as the object of this knowledge.

> Law is henceforth more artificial and complex, since it has a twofold life; first, as part of the aggregate existence of the community, which it does not cease to be; and, secondly, as a distinct branch of knowledge in the hands of the jurists. All the latter phenomena are explicable by the co-operation of those two principles of existence; and it may now be understood, how even the whole of that immense detail might arise from organic causes, without any exertion of arbitrary will or intention. For the sake of brevity, we call, technically speaking, the connection of law with the general existence of the people—the political element; and the distinct scientific existence of law—the technical element.[78]

To the complexity created by the double nature of law we must add the opacity with which, in conditions of modernity, the *Volksgeist* appears to its respective people. Indeed, the cultural dislocations caused by the transition into modernity adversely affected access to the terms of nomothetic traditions, or so

[77] Savigny writes: [T]his organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency.

Id. At 27.

[78] *Id.* At 28–29.

Savigny, as well as historicists in general, believed. The ordinary person can simply lack an immediate and clear understanding of what tradition commands. How can a people be governed by a legal order that is at least partially elusive to the ordinary members of the order?

As the complexities of the attributes of law combine with the cognitive myopia imposed by the conditions of modern life, the jurist comes into high demand in his role as a privileged cognitive agent capable of deploying reason in the service of traditions as *nomos*. However, in contrast to the demiurgic mission associated with the cognitive skills of the utopian rationalist agents, the mission of Savigny's legal scientist would be the limited one of bringing to light the clauses of traditional law, of rationally organizing this material, and of standing guard as a fiduciary of the people.

In this way, the jurist is elevated to the position of an all-powerful agent charged with operating as the loyal medium of the *Volksgeist*. As such, the jurist is the ultimate agent of the Great Alliance, and his expert discourse speaks to the people in the name of its own true spirit. From the complexity of the object emerges the necessity of the progressive specialization of the jurists, who "now become more and more a distinct class of the kind."[79] As "law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community."[80] Hence, from the jurist's fidelity to his mission as custodian and voice of the *Volksgeist*, as *custus constitutiones* of the form of collective life, emerges the authority and mandate of his science.

When the attributes of the object of his science and his role as the medium between the *Volk* and its *Geist* are taken into account, the jurist is expected to have a double set of skills. First, he is to be a skilled historian; second, an undefeatable and indefatigable rationalizer of the living elements of his legal

[79] *Id.* At 28.

[80] *Id.* At 28–29.

tradition.[81] Thus, reason and history converge in the very consciousness of the privileged cognitive agent. The mind of the jurist is thus the first locus of the fusion between historicism and rationalism, and it is there that the possibility of a rationalizing, and therefore a legitimizing, discourse of the social and cultural establishment begins to materialize. Despite all the fanfare that accompanied the ascent of the will of the masses onto the world stage, that will is to be brought in line with authentic constitutional essentials, and it is the task of the jurist to begin that process and authoritatively spread it to the rest of culture.

Legal science under the Great Alliance retained two beliefs characteristic of the high cognitive and practical confidence with which eighteenth-century rationalism approached the problem of legitimate order. The first is the belief in the possibility of manipulating historical fact, whereby "[t]he historical matter of law, which now hems us in all sides, will then be brought under subjection, and constitute our wealth." [82] But this manipulation is not deliberative and participatory. Quite the opposite: the idea here is essentially one of hierarchy and centralization, although with a conservative bent absent in the rationalism of the previous century. The second belief is that of reason as the spokesperson and guardian of selective historical processes. The difference between Savigny's historical rationalism and utopian rationalism is subtle yet significant on this particular point. Through the controlled generation of a social order founded upon principles supposedly arrived at by unconditioned reason, utopian rationalists yearned to reinvent and rule over society. In contrast, Savigny's historical rationalism retrojects itself upon the past to exercise a method of selective control that changes the normative and pragmatic impact that traditions (as *nomoi*) could

[81] Savigny states:

A twofold spirit is indispensable to the jurist; the historical, to size with readiness the peculiarities of every age and every form of law; and the systematic, to view every notion and every rule in lively connection and co-operation with the whole, that is, in the only true and natural relation. This twofold scientific spirit is very rarely found amongst the jurists of the eighteenth-century; and, in particular, some superficial speculations in philosophy had an extremely unfavourable effect.

Id. At 64–65.

[82] *Id.* At 154.

be expected to have over *modi vivendi*, were they unaided by legal science.

> The essence of [the view of the Historical School] rather consists in the uniform recognition of the value and independence of each age and it merely ascribes the greatest weight to the recognition of the living connexion which knits the present to the past, and without the recognition of which we recognize merely the external appearance, but do not grasp the inner nature, of the legal condition of the present. The view, in its special application to the Roman law, consists not, as is asserted by many, in assigning to it an improper mastery over us; it will rather first of all search out and establish in the whole mass of our legal condition what in fact is of Roman origin, in order that we may not be unconsciously governed by it: further however, in order that freer space may be gained for the development and healthy operation of the still living parts of that Roman element, it will, in the circle of those Roman elements of our legal consciousness, separate that part of it which is in fact dead and, merely through our misunderstanding, still drags on a perturbating show of life.[83]

Equally drawn to each of the poles of rationalism and historicism, the great ratio-historicist alliance becomes trapped by demands which, if not entirely incompatible, are in tension with each other: to safeguard the traditional while sublimating it; to affirm the profound historicity of core legal arrangements while rejecting their arbitrariness; to aspire to the scientific appropriation of historical material while postulating its sacred nature; to rely on a selective rational filter for historical evolution while postulating the supreme authority of its organic development; to celebrate the impersonality of the collective spirit while subjecting it to the dominion and control of a class of social agents distinguished by their epistemological skills; and, finally, to embrace simultaneously the fixation on the traditional and the dream of reason. In reading passages such as this one—

> By reason of the great and manifold legal material with which centuries have supplied us, our task is incomparably more difficult than that of the Romans; our aim thus stands higher and when it

[83] SAVIGNY, *supra* note 75, at iv–v.

> happens to us to reach it, we shall not merely have repeated in mere imitation the excellence of the Roman jurists, but have accomplished something much greater than they did. When we shall have been taught to handle the matter of law presented to us with the same freedom and mastery as astonishes us in the Romans, then we may dispense with them as models and hand them over to the grateful commemoration of history.[84]

—we may wrongly either take it for the spirit of the Great Alliance or discount it altogether as insincere. To do either is to mistake the nature of the thought complex that came to dominate legal culture and practice, and under whose mantle schools of jurisprudence as distinct as pragmatism, positivism, and reflective equilibrium idealism find shelter from implausibility. The Great Alliance has all the adaptability and incoherence required for the task of safeguarding constitutional essentials in democratic and revolutionary times. In its appeals to tradition, to expectations of rational efficiency and justifiability, and deference to democratic processes, the Great Alliance has thus far been successful. To escape its grip presents more than extraordinary practical challenges; it presents almost insurmountable cognitive and imaginative obstacles. The proof is that it not only survives but also co-opts left and right in contemporary legal thought.

In eighteenth-century conservative historicism, the practical and cognitive advantages expected from compliance with the norm commanding the preservation of a tradition were connected at a deep level. On the other side of the polarized divide, the same deep connection characterized contemporaneous progressive rationalism. In the Great Alliance, the ideational strategies of ratio-historicist jurisprudence shield background constitutional essentials from ultimate challenge while setting up a playground for consequentialist critique, positivistic fiat, and policy experimentation of all sorts.

In the interwar period, contest over (1) the content and meaning of historical experience and (2) a sense of the limits of reason in adjudicating between competing ultimate conceptions of the good life fostered a type of jurisprudence deeply aware of the predicament of a disenchanted worldview and

[84] *Id.* At xv.

an immanently ethically irrational world.[85] At the same time, the institutions and practices of democracy respectful of constitutional essentials were spreading across the western hemisphere and beyond. The experience of the acceleration and deepening of social change and of the ever-expanding potential for personal tragedy and collective catastrophe deeply undermined the plausibility of claims to authority based in history or reason alone— antinomianism and reinvented normativism reigned. Legal philosophy, by allocating decisive weight to historical experience that is encapsulated in particular cultural manifestations, by assigning legitimizing tasks to reason, and by showing sufficient deference to democracy, steered its course in this disenchanted and intrinsically irrational world in order to deliver modern society to coming generations. This was no small accomplishment—cognitive discipline and transgenerational social cohesion and cultural reproduction are serious and delicate matters. But can we silence the longing for deeper and more universal emancipation in justice, equality, freedom, dignity, and reason? Should we? I do not think we can or should.

V Conclusion

[F]or the present enshrines the past.
—Simone de Beauvoir[86]

To idealize and to unify…
—Samuel Taylor Coleridge[87]

This article reconstructed in very general terms the causes of the nineteenth-century elites' anxieties and the principal theoretical and argumentative maneuvers whereby the Great Alliance addressed them. The Great Alliance created and set in motion a powerful preservationist ethos in legal and political

[85] *See generally* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., Univ. Of Cal. Press, 1978) (1922).

[86] SIMONE DE BEAUVOIR, the second sex iii (H.M.Parshley trans., penguin press 1972).

[87] SAMUEL TAYLOR COLERIDGE, BIOGRAPHIA LITERARIA 378 (1881).

thought. The cognitive, normative, and practical conventions of the Great Alliance combined the conservative elements of eighteenth century historicism and the utopian elements of its contemporaneous rationalism to create a powerful and pervasive political settlement to which the popular will accedes.

I showed, using the example of Hegel, how rationalism came to decipher in social stages and arrangements the manifestation of the power of reason to work itself out as teleological history. According to this view, in history, reason operates homeward. Coming from the opposite extreme of the rationalism- historicism continuum, and using the example of Savigny, I showed that historicism came to appeal to the rationalizations of legal science in order to endow historical data with both conceptual stability and intellectual authority. The momentum for this rapprochement, I argued, was provided by the extraordinary transnational turbulence and political reforms that marked the nineteenth century. The ultimate cunning or political fortune of the rapprochement was to bring the will of the masses into its fold, creating a steady tripod of mental and social order.

I have also argued that there is at least an elective affinity between, on one side, the cognitive-normative-practical plan for the social world of the Great Alliance and, on the other, positivism, pragmatism, and reflexive-equilibrium idealism in legal thought. Those legal theoretical positions fit well within the normalizing purview of the Great Alliance, under which they find shelter from accusations of theoretical implausibility or of causing social upheavals. This is the story of the creation of a resilient, flexible, highly adaptive, inclusive, and attractive legal worldview, complete escape from which has proved to elude even the best minds and most defiant spirits. The practical implications of the Great Alliance are equally significant and include the fact that the legal and institutional framework of contemporary Western democracies is left overlegitimized and substantially shielded from deep-cutting rational challenge and reimagination.

Ultimately, the explanatory force of the Great Alliance thesis was tested against Roberto Unger's account of the splitting of the difference between rationalism and historicism, against Niklas Luhmann's evolutionary model of law,

and against Duncan Kennedy's typology of forms of legal consciousness and their globalization mechanisms. It is my contention that the explanatory force of the Great Alliance thesis withstood those tests well.

Under the Great Alliance, contemporary law and legal thought ultimately fail history, reason, and will. At this late moment in the tenure of the Great Alliance, reason swings back and forth between cost-benefit rationalism and rationalizing reflective equilibrium; history translates into a constitutional veneration that glorifies fables of foundation, founding personalities, and chosen peoples; and popular will as democracy is spasmodic at worst and directionlessly experimentalist at best, often seeing its infrequent best work undone by courts operating under the Great Alliance. In this context, constitutional *stare decisis* is not merely the "best hedge against reversal,"[88] but one of the preeminent ratio-historicist instruments for bestowing the stability of intellectual and institutional authority upon legal doctrine in democratic times. Around appellate decisions and the cult of appellate decision makers, a towering and self-reinforcing edifice of legal education and scholarship is built. But in all that, law is, and will always be, the creation and the institutional expression of moral imagination. The dispute is over the type of moral imagination that will influence law and legal thought. Will law and legal thought become the terrain of open and reflective moral imagination or will they continue to function as a limited space for creative problem solving?

That law is moral imagination is discernible from the vantage point of the problems of social integration. Modern individuals have a proclivity to see things, from astronomy to social organization, as parts of ordering mechanisms. From this angle, one central question stands out: What is the meaning and existential implication of our being parts of such mechanisms? After all, mechanisms are, by definition, superordinate vis-à-vis their parts and oblivious to them. Those, such as Hegel, coming to the Great Alliance from the rationalist end answered this question with a call for freedom and the promise of liberation in the evolving rationality of *modi vivendi*, through which one can be freely at home in modern

[88] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 341 (2002).

society. Others, such as Savigny, who come from the historicist end, answered with a longing for authenticity in social ordering, imagining the key to individual belonging in impersonal and organic cultural authorship worked by reason into legal science. The idea of democracy claims for the will of the masses the power to rule over social order, hoping that self- imposed coercion translates into freedom and self-government. These promises, longings, and hopes have proved much harder to fulfill than once thought, but the social and moral vision that they created together rules over modern law.

Granted, from the times of ancient Athens, Rome, and Jerusalem, law has always been found at the intersection of history, reason, and will. With one foot in the past, law passes through a positing will in the present and reaches with the other foot into the future. Modern democracy is now the placeholder for will at this intersection, and in thought and practice, law cannot avoid passing through it. The challenge that lingers is twofold. First, we are challenged to imagine a new covenant between history, reason, and will, one that is able to further expand authentic and recognized freedom in evolving social orders without failing to provide for the functions of social integration and cultural reproduction. Second, we are challenged to imagine a new covenant able to serve the expansion and deepening of the human capacities to learn, reason, create, judge, invent, connect, and act.

Both challenges are played out on two planes: the first, and less important plane, is that of the rules and procedures that regulate status, relations, and allocations. The second, and more important plane, is that of legal worldviews: the particular way the social world is seen and interpreted through the lenses of legal thought. This second level is the tangible site of public reason (even if only a ghost of what reason could be) in contemporary societies, and legal thought is at once the creator, medium, and manifestation of those legal worldviews. The problem is that for almost two centuries now the reigning legal worldview has been the Great Alliance.

However, and importantly, if one takes the long view of history, legal

thought is never permanently containable within intellectual settlements. Legal thought recurrently comes back to the challenges of expanding the conditions under which reasons are demanded and given, to systemic coherence and integrity, and to the struggles over the moral reimagination of society and self. We cannot avoid these issues, even though we will never be able to address them from a place untainted by culture, power, language, and other imprints on our subjectivity. We have only rational, reflective moral imagination, but that may be all we need.

Given the limits it inevitably encounters, the Great Alliance model of moral imagination may not last forever. And the masses, from Rio and New York to Cairo, Tehran, and Kiev, seem to be returning to the world stage, again challenging legal philosophy to imagine their place in contemporary law, but this time not out of fear, but out of hope.

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