

Democratic Legitimacy and the Scientific Foundation of Modern Law

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This Article explores the unacknowledged impact of the scientific provenance of modern law. Justice, I argue, is threatened by social scientific thinking that subordinates justice to legitimacy, efficiency, and fairness. In doing so, I show that the power of the asserted connection between positive law and democracy depends upon a dangerous blurring of the distinction between justice and legitimacy. Finally, I offer an alternative genealogy of positive law that shows modern law to have been transformed into a science. My hope is that by pointing to the threatened loss of justice as an ideal, my work can help to hold open the possibility that law reclaim its foundation in the art of judgment instead of the science of law.

1. Modern law is an expression of will. As willful decisions, today's laws can be different from yesterday's. Abortion can be illegal yesterday, legal today, and illegal tomorrow. The malleability of law has, of course, great advantages. Law can be adapted to pressing needs. Torture can be legalized to meet new threats. Especially in the fast-paced world of business, the adaptability of modern law enables it to be an important and powerful instrument for the willful promotion and regulation of social and economic relations.

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2. As willful, law is changeable. Changeable law is positive law, which, as Niklas Luhmann insightfully writes, is valid by the power of a contingent and alterable decision: "We can reduce this concept of positive law to a formula, that law (*Recht*) is not only *posited* (that is, selected) through decision, but also is *valid* by the power of decision (thus contingent and changeable)."¹ Positive law, in other words, is law that is posited. It is based on the authority of a willful and alterable decision.

3. The willfulness of positive law does not, however, signal its arbitrariness. On the contrary, the very willfulness of positive law requires that positive laws be justified. Critics of positivism must not simply dismiss it as an immoral doctrine that authorizes any law with the power to institute itself. Instead, a meaningful critique of legal positivism must seriously consider the characteristic kind of justification offered by positivist thinking.

4. Contemporary legal and political theorists argue that positive laws are justified by democracy. In this Article, I offer an alternative genealogy of positive law. Rather than democracy, I argue that the need for scientific justification is the characteristic impulse of positive law.² In doing so, I show how law seeks justification through science even as it abandons the quest for justice itself.

5. The claim that positive law has its provenance in science opposes the consensus opinion amongst legal theorists that positive law is an offshoot of the democratic revolution. Modern law, writes Robert Post, must base its authority on the claim of democratic autonomy; only when citizens "experience their government as their own," will they accept the legitimacy of the rule of law.³ Indeed, if law's authority must be accepted by a reasoning citizenry, positive law, writes Jürgen Habermas, cannot "be had

1 "Wir können diesen Begriff der Positivität demnach auf die Formel bringen, daß das Recht nicht nur durch Entscheidung gesetzt (das heißt ausgewählt) wird, sondern auch kraft Entscheidung (also kontingent und änderbar) gilt." NIKLAS LUHMANN, RECHTSSOZIOLOGIE 210 (3d ed. 1987) (author's translation).

2 For a fuller history of the transformation of law into a product of science, see ROGER BERKOWITZ, THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION (2005).

3 Robert Post, *Democracy and Equality*, 1 J.L. CULTURE & HUMAN. 142, 142-44, 146 (2005).

or maintained without radical democracy."⁴ Law, Habermas argues, draws its "legitimacy from a legislative procedure based for its part on the principle of popular sovereignty."⁵ For Habermas, as for Post, the legitimacy of modern law demands democratic foundations.

Jeremy Waldron accepts the conclusion that positive law has its ethical basis in democratic values; however, he disputes Habermas' belief that democracy legitimates law by providing procedures for conversation that lead to reasoned consensus. Against "modern proponents of 'deliberative democracy' [who] stress conversation and consensus as the key values" of democratic legitimacy, Waldron values democracy precisely because it offers legitimacy even in the absence of consensus.⁶ It is because democracies make law amidst disagreement regarding the purposes and ends of laws that "the political value most naturally associated with the modern legislature and with the authority of its product — legislation as positive law — is *democratic legitimacy*."⁷ For Waldron, the authority of positive laws depends upon a "sort of constitutional instinct" according to which "discussion and enactment by a *large* assembly of representatives is indispensable to the recognition of a general measure of principle or policy, put forward by the powerful, as law."⁸ Positive laws, Waldron maintains, have an inextinguishable ethical basis in democratic and legislative values.

For theorists of democratic legitimacy, positive laws enable democracy insofar as democratic majorities can quickly align the laws to their economic and political interests. At the same time, democracy serves positive law by offering a powerful and much-needed legitimation for law's authority. Since secular law is shorn of its foundations in religion, custom, and tradition, positive law must seek its foundations in reasons that are accessible, calculable, and knowable by every reasonable citizen. The constitutive feature of legal legitimacy is that the people themselves must agree that the laws are valid and legitimate.⁹

4 JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS*, at xlii (William Rehg trans., MIT Press 1998) (1992).

5 *Id.* at 83.

6 JEREMY WALDRON, *LAW AND DISAGREEMENT* 91, 93 (1999).

7 *Id.* at 53.

8 *Id.* at 51.

9 HABERMAS, *supra* note 4. Habermas also writes: "I take as my starting point the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law." *Id.* at 82.

6. The close relationship between democracy and positive law that is accepted in theory has historical support as well. The early positivists — from Thomas Hobbes to Jeremy Bentham and John Austin — regarded legislation by a sovereign (whether a king or a legislature) rather than judicial decision as "the paradigm of what law is and certainly the paradigm of what law ought to be."¹⁰ Similarly, England has long accepted the doctrine of parliamentary sovereignty, which holds: "Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts."¹¹ As Jeffrey Goldsworthy writes in his account of the history of parliamentary sovereignty, "there can be no doubt that for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule" that has been factually recognized and is not subject to judicial control.¹² While it is possible for a legal system to place the ultimate authority for legal validity in courts or other institutions, the imperatives of democracy make such a practice rare. Indeed, even in countries like the United States that limit the authority of the Congress through a written constitution, the power to amend the constitution is held by the federal and state legislatures.¹³ Modern law appears to seek its power and legitimacy in the representative function of democratic legislatures.

7. The consensus amongst legal theorists that democracy is both the historical and the best legitimating institution for positive laws must confront serious obstacles. One obvious difficulty is that most legal positivists have not been strong proponents of democracy.¹⁴ Austin, Hobbes, and Bentham largely speak of the sovereign in the singular, belying the fact that not democracy but sovereignty — whether in the person of a monarch or the body of a legislature — is the formal and necessary lawgiving power that legitimates positive laws.¹⁵

¹⁰ WALDRON, *supra* note 6, at 33.

¹¹ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (Liberty Fund 1982) (1885), *cited in* JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* 10 (1999); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 145 *passim* (1986).

¹² GOLDSWORTHY, *supra* note 11, at 234.

¹³ U.S. CONST. art. V; *see* HART, *supra* note 11, at 103.

¹⁴ WALDRON, *supra* note 6, at 256.

¹⁵ *Id.* at 42 *passim*.

Similarly, contemporary positivists have largely ignored the democratic foundation of positive law. Although H.L.A. Hart distances himself from Austin's claim that positive law is simply the command of a sovereign, he does not turn to a theory of democratic sovereignty to legitimate law's authority. What matters about a law requiring motorists to stop at a traffic light is not that the law is a product of rational consensus (Habermas) or that the law was issued by a large legislature (Waldron), or that citizens imagine themselves to be the authors of the law (Post). Instead, what matters is that the people will stop because they "accept and voluntarily co-operate in maintaining the rules" that are the valid and legitimate laws of society.¹⁶ Hart foregoes an interest in democracy for an interest in a master rule that helps citizens to know when other legal rules are valid and when they are not.

Hart's solution, the rule of recognition, offers a complex rule according to which courts, officials, and private persons can identify a rule as a valid law by reference to certain criteria.¹⁷ The rule of recognition, in other words, is simply a formal mechanism that marks "the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes . . . binding on all members notwithstanding their disagreement with it."¹⁸ Importantly, the rule of recognition is not a rule arrived at through democratic procedures or posited by a democratic legislature; instead, the rule of recognition exists as a "matter of fact."¹⁹

It is the fact that a law is recognized as a law, apart from any particular procedural or democratic provenance, that is the mark of positive law.²⁰ Indeed, one possible rule of recognition that Hart recognizes is, simply, that a valid law is one posited by a person or institution with the right to make such a law.²¹ Hart, in other words, accepts that positive laws can be upheld as valid simply because they are issued by a recognized sovereign, be it a unitary monarch, a legislature, or judge. As long as legal officials recognize

16 HART, *supra* note 11, at 88.

17 *Id.* at 107; WALDRON, *supra* note 6, at 38.

18 JOSEPH RAZ, *THE AUTHORITY OF LAW* 51 (1983), *cited in* WALDRON, *supra* note 6, at 39.

19 HART, *supra* note 11, at 107.

20 MARIANNE CONSTABLE, *THE LAW OF THE OTHER* 68-75 (1994); see also Constable's discussion of FREDERICK SCHAUER, *PLAYING BY THE RULES* (1993) in MARIANNE CONSTABLE, *JUST SILENCES*, ch. 5 (2005) [hereinafter CONSTABLE, *JUST SILENCES*].

21 GOLDSWORTHY, *supra* note 11, at 13-14.

the fact of a sovereign's right to posit laws, those laws are valid. The validity of law comes from the fact of sovereign authority so that, as Hobbes writes, law is valid "without expecting other reason than the Will of him that sayes it."²² Let loose from its democratic foundation, positive law is a merely formal command theory of law.

The central importance of a factual validity to positive lawyers — from Hobbes to Austin to Hart — means that laws are recognized as social facts; in other words, the factual validity of law must be recognized by legal officials. A judge, for example, recognizes a rule as valid through an internal recognition that "the rule satisfies the tests for identifying what is to count as law in his court."²³ There must be some "supreme criterion of validity" that is recognized as the test of a legitimate and valid law.²⁴ Whether the factual validity of law comes from the social fact of sovereign authority or from the fact of social norms, law, for Hart, is made possible by a kind of presupposed agreement concerning the socially existing fact of a rule of recognition appropriate for identifying valid law.²⁵ "Law," in other words, "is made possible by the existence of a certain kind of social fact: the existence of a practice among officials of setting out criteria of legality or validity."²⁶ As Jules Coleman rightly argues, the basic thesis underlying all legal positivism is that the essence of positive law is the claim that law is a social fact.²⁷

8. The ramifications of the social fact thesis have not always been clearly seen. That law is a social fact is one way of saying that law is whatever the people accept as law. When laws condoning torture are accepted as valid law like laws punishing murderers, then law loses any connection to an ethical world. Law, as Friedrich Nietzsche writes, becomes nothing but an "understanding," a "negotiated settlement" reached by those with the power to legislate. Within the field of negotiated settlement, law has no

22 THOMAS HOBBS, *LEVIATHAN* 176 (Cambridge Univ. Press 1994) (1651).

23 HART, *supra* note 11, at 102.

24 *Id.* at 103.

25 See Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in *HART'S POSTSCRIPT* 99, 115 (Jules Coleman ed., 2001): "The powerful thought in Hart . . . is that law is made possible by an interdependent convergence of behaviour and attitude: what we may loosely think of as a kind of 'agreement.'"

26 *Id.* at 115.

27 See *id.* at 116.

limits, since "everything has its price; *all* can be paid for."²⁸ In a world of positive law, all laws can be justified if the expected benefit justifies the cost. Unmoored from ethical limits, law becomes an un-conditioned self assertion of what Nietzsche terms will-to-power.²⁹

9. Modern positivists — writing in the shadow of Hart and the darker shadow of Nietzsche — are exclusively concerned with law's legitimacy; since law's legitimacy is granted by the acknowledged fact of law's validity, positivists ignore what Waldron calls the "general worry about positive law": namely, why does the social fact that officials accept and obey a sovereign's command make that command "more reasonable, respectable or attractive"?³⁰ Hart's response is that clarity regarding what is a valid law is different from the questions of whether that law is good or whether it deserves to be obeyed and enforced.³¹ Hart, therefore, insists on the positivist thesis of the factual separation of law from morality.

10. Against Hart's equation of legitimacy with validity, Waldron and Habermas insist that even positive law must be normatively legitimated. "Positive law, too," Habermas suggests, "must be legitimate."³² And Waldron, who raises the question of the "legitimacy" of posited laws, responds that we base the "authority of law on the fact that it is a product of a large popular assembly."³³

11. It is unclear, however, why the fact that law is posited by a large assembly rather than a smaller assembly — or even by a court of nine judges — better guarantees law's legitimacy. Indeed, Waldron's question of legislatively posited laws is equally relevant to laws announced by a judge or a king: "why should any of us be additionally impressed (let alone conclusively impressed) by the fact that one of these views has secured

28 5 FRIEDRICH NIETZSCHE, *Zur Genealogie der Moral*, in KRITISCHE STUDIENAUSGABE, pt. II, § 8 (Giorgio Colli & Mazzino Montinari eds., 1993).

29 See Philippe Nonet, *Time and Law*, 8 THEORETICAL INQUIRIES L. 311 (2007). For an exploration of Nietzsche's understanding of positive law, see Roger Berkowitz, *Friedrich Nietzsche, The Laws of Manu, and the Art of Legislation*, 24 CARDOZO L. REV. 1132 (2003); Philippe Nonet, *What is Positive Law*, 100 YALE L.J. 667 (1990).

30 WALDRON, *supra* note 6, at 95.

31 HART, *supra* note 11, at 205; WALDRON, *supra* note 6, at 95; see also Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT, *supra* note 25, at 410, 410-34.

32 HABERMAS, *supra* note 4, at 31.

33 WALDRON, *supra* note 6, at 49.

expression or promulgation in the particular manner and in the particular array of social circumstances that amount to the positing of law."³⁴ Why, in other words, should the fact that laws are posited in a democratic assembly be anything but a technicality?

Waldron's answer — that laws posited by a large, diverse, and democratic assembly have a natural or at least instinctive legitimacy — is an empirical claim. It is a claim that, as recent events in Iraq suggest, is limited at the very least. Democracy, it should be obvious, does not automatically confer legitimacy amidst disagreement. Indeed, when "democracy spreads into countries containing populations that are long and deeply divided, the result is commonly that the state fragments."³⁵ Democratic and majoritarian decision-making cannot legitimate any and every decision.

And yet, Waldron points to a powerful history of the effectiveness of democratic legitimacy: "In the United States, in Western Europe, and in all other democracies," he writes with only a little too much assurance, "every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement, but taken nevertheless in a way that managed somehow to retain the loyalty and compliance (albeit often grudging loyalty and compliance) of those who in good faith opposed the measures in question."³⁶ Given both the fact of moral and political disagreement and the "felt need among the members of a certain group for a common framework or decision or course of action,"³⁷ it is the case that democratic decision-making lends to governments and laws a powerful legitimacy.³⁸ As long as citizens

³⁴ *Id.* at 108.

³⁵ John Gray, *The Mirage of Empire*, N.Y. REV. BOOKS, Jan. 12, 2006, at 6.

³⁶ WALDRON, *supra* note 6, at 106.

³⁷ *Id.* at 102.

³⁸ Even opponents of democracy accord it grudging respect. Ernesto "Che" Guevara, for example, has warned guerrilla fighters not to underestimate the legitimating power of even the most tenuous democracy: "Where a government has come into power through some form of popular vote, fraudulent or not, and maintains at least an appearance of constitutional legality, the guerrilla outbreak cannot be promoted, since the possibilities of peaceful struggle have not yet been exhausted." CHE GUEVARA, *GUERRILLA WARFARE* 8 (1985). However, see *id.* at 146-67 for Guevara's musings on the possible weakness of democratic legitimacy. I thank Pierre Ostiguy for alerting me to these references.

"experience their government as their own," they will experience the laws as legitimate.³⁹

Although majority voting may seem like a merely technical mechanism of decision, Waldron argues that it is more: democratic decisions, he writes, pay tribute to the difficult nature of politics and the political need "for action-in-concert, even in the face of disagreement."⁴⁰ There is, he rightly concludes, an undeniable legitimating force to democratic decisions. Moreover, Waldron argues that democratic decisions approach a "natural" legitimacy and are "likely to be adopted almost automatically in all types of deliberative councils and assemblies."⁴¹

12. The grounding of positive laws in democratic legitimacy does not, however, overcome the factual and ultimately social nature of legitimacy. The turn to social fact as the basis for democratic legitimacy exposes an important and often overlooked truth about the nature of legitimacy as opposed to justice in modern legal and political systems. Legitimacy, as Max Weber argues, is grounded not in justice or in truth, but in a *belief*: namely, legitimacy has its ground in the "belief in the legality of posited rules."⁴² As a question about belief in the authority of posited legal rules as opposed to justice, the inquiry into legitimacy becomes a factual question of how to secure general societal acceptance of positive law's claim to legitimate authority.

13. To a degree that has not been fully appreciated, the fact of legitimacy — as opposed to the ideal of justice — is the characteristic standard of justification for positive laws. Take, for example, the case of a farmer whose creek and soil are polluted by a neighboring factory.⁴³ Private law names

39 See also Post, *supra* note 3, at 142, 146.

40 WALDRON, *supra* note 6, at 117.

41 *Id.* at 108 (citing HANNAH ARENDT, ON REVOLUTION 164 (1991)).

42 MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 124 (1980); see also Max Weber, *Politik Als Beruf*, in GESAMMELTE POLITISCHE SCHRIFTEN 495 (Johannes Winckelmann ed., 1958): "[D]er Legitimitätsgründe einer Herrschaft . . . Herrschaft kraft 'Legalität,' kraft des Glaubens an die Geltung legaler Satzung und der durch rational geschaffene Regeln begründeten sachlichen 'Kompetenz . . .'"

43 For the following, see *Whalen v. Union Bag & Paper*, 101 N.E. 805 (1913); *Boomer v. Atlantic Cement*, 357 N.E.2d 870 (1970). See generally Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919 (1994); James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 9 *passim* (2002). For comments on nuisance law in particular, see M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 574 *passim* (1996).

such an intrusion on one's property a nuisance and grants to the landowner legal rights and remedies against the factory owner. Until the early 20th century, the farmer would have been able to seek an injunction that would have required the factory to stop polluting his land or to cease operation. Enjoining a polluter, however, is no longer considered an efficient remedy to the existence of a nuisance. Instead, courts today will impose a fine on the polluting factory owner that pays the farmer for his economic losses. In other words, the law permits factories and other wealthy landowners to purchase a license to continue their wrongdoing. If the factory owner calculates that it is preferable to pay damages to his neighbor or fines to a regulatory agency than to change his practice, the law allows him to strategically violate the law to maximize profit.

The factory owner who chooses to "pay to pollute" does not, of course, think of himself as acting unjustly. The owner, like the CEO who nominally moves his company headquarters to the Bahamas with the intent of avoiding taxes, does not say: "I am acting legally even if also unjustly." On the contrary, both view the very legality of their act as proof of its justice. The owner and the CEO have internalized the injunction to follow the rules as the first principle of justice. Their actions, they would insist, are legally permitted; in addition, they are thought to be legitimate and just because they are legally permitted. Following the rules, in other words, has come to be equated with a norm of ethical action.⁴⁴

At the same time, however, the factory owner who pays his legal fine and continues to pollute is clearly acting as a bad neighbor; similarly, the CEO who avails herself of legal loopholes to avoid paying taxes is a bad citizen. While both insist that they are simply playing by the rules, there is an important sense in which such legalistic behavior is known to be unjust — even if it can be justified on grounds of social utility or economic efficiency. We know, for example, that being a good neighbor demands more than simply paying for the damage one does. It is similarly unneighborly for a farmer to insist absolutely on his rights against a factory owner who makes a good faith effort to accommodate his complaints. Indeed, a good neighbor does not rely on the strategic value of legal rules, but understands that he is enmeshed in an ethical world with all of the ensuing duties of neighborliness and citizenship.

⁴⁴ This paragraph follows closely my argument in *The Gift of Science*. BERKOWITZ, *supra* note 2, at xi.

That the ethical actions of neighbors speak to justice in a register beyond the rules has proven difficult to understand for legal scholars. While socio-legal scholars like Robert Ellickson and Carol Greenhouse have recognized that neighbors seek to settle disputes outside of the law, they have sought to explain observable examples of neighborliness according to social norms.⁴⁵ As Ellickson writes, "Law-and-society scholars have long known that in many contexts people look primarily to norms, not to law, to determine substantive entitlements."⁴⁶ And yet, even as socio-legal scholars look beyond legal rules, they don't turn to a realm of ethical freedom; instead, they seek to gird and limit action according to predictable and knowable social norms. From fairness to legitimacy and from utility to efficiency, socio-legal scholars seek to discover the existing norms that govern the lifeworld beyond the law.⁴⁷

Whether law is located in fixed rules or in social norms, law, for socio-legal scholars, is understood as a social fact. The social nature of law means that modern law is presumptive positive law (as Marianne Constable terms it). As Constable argues, socio-legal research (by which she means Ronald Dworkin just as much as Hart) transforms the regular things of the lifeworld into the regularized norms and principles of sociological and normative analysis.⁴⁸ All normative approaches to law — be they sociological or philosophical — can be understood in two ways. On one hand, normative connotes moral or ethical principles. On the other hand, its root sense is normal. As a normalization, norms are regulative in the way that habits and usages form themselves, over time, into rules of normal conduct.⁴⁹ Because "presumptive positivism explains decision making as resultant behavior" that follows from social, psychological, moral, and political factors, it ultimately grounds legal action on extra-legal social norms that provide external reasons

45 See RALPH ELLICKSON, *ORDER WITHOUT LAW* 141-47 (1991); CAROL GREENHOUSE, *PRAYING FOR JUSTICE* (1986); Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 *YALE J.L. & HUMAN.* 285, 312-16 (1994).

46 ELLICKSON, *supra* note 45, at 141.

47 For an exhaustive demonstration of the way that socio-legal scholars ignore justice in their focus on social norms, see CONSTABLE, *JUST SILENCES*, *supra* note 20, ch. 2.

48 *Id.* at 121.

49 *Id.* at 120-21. As Ellickson writes: While "[m]ost luminaries of the law-and-society movement currently embrace the sensible position that both law and norms can influence behavior," they recognize that law itself can influence norms so that paying fines to pollute or legally evading taxes can come to be seen as both legal and just. ELLICKSON, *supra* note 45, at 148.

that guide and mandate action.⁵⁰ The social ground of law means that law, as a technical implementation of social rules and normative principles, is inevitably divorced from justice.

The sociological collapse of the distinction between laws and norms, however, ignores the possibility that justice exists as an imperative to act according to ideals that exist beyond both laws and norms of morality. Justice, as Immanuel Kant insists, is not concerned with legitimacy or other social norms of belief. Justice is, instead, an ideal that can never be reduced to or known through examples.⁵¹ Beyond simply the legitimacy granted by following rules and even beyond the legitimacy of acting in accordance with social norms of propriety, just action demands attention to oneself and to others that responds not only to laws and norms but also to an "already presupposed ethical world."⁵² Beyond legitimacy, in other words, is the call of the ideal of justice.

14. The distinction between justice and the legitimacy of positive laws suggests that the poor opinion that jurists from Carl Friedrich von Savigny to Christopher Columbus Langdell traditionally held of positive legislation is not merely an elitist disdain for the unruliness and dirty nature of legislating.⁵³ If jurists share an "almost snobbish reluctance to regard legislation as a form of law at all,"⁵⁴ this is, at least in part, because there is an insipid tendency in legislation to subordinate justice to legitimacy. A law that incorporates torture into the criminal justice system may, like a law that imprisons a person for life for a minor felony, grudgingly be accepted as legitimate by a democratic citizenry; but a law's legitimacy and validity does not make it a just law. Whereas democratically legislated laws offer the promise of legitimacy and order, that very mantle of legitimacy often veils the demand for justice.

It is not elitism only, but also a passion for justice that informs the suspicion

50 CONSTABLE, JUST SILENCES, *supra* note 20, at 125.

51 IMMANUEL KANT, CRITIQUE OF PURE REASON 363 (Werner S. Pluhar trans., Hackett 1996) (1781) (B372).

52 G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS § 93 (Johannes Hoffmeister ed., 1955).

53 See CARL FRIEDRICH VON SAVIGNY, *Vom Beruf Unsrer Zeit Für Gesetzgebung Und Rechtswissenschaft*, in POLITIK UND NEUERE LEGISLATION (Hidetake Akamatsu & Joachim Rückert eds., 2000); see also Waldron's account of Langdell's hostility to legislation in JEREMY WALDRON, THE DIGNITY OF LEGISLATION 9-10 (1999).

54 WALDRON, *supra* note 53, at 9.

of the democratic claim for the sovereignty of positive law. Which is why, in spite of the great aspirations for and paeans to popular democracy, the genius of modern legal systems is, as Hannah Arendt argues, that they invent a higher source of law than positive law, typically in the form of a constitution. As brakes on the legitimate but unjust power of democratic lawmaking, constitutions tame and bridle the dangerous, fickle, and potentially tyrannical tendencies of legislative democracy.⁵⁵

15. The great problem of modern politics and law, Arendt argues, is the founding of a form of government that puts law above man.⁵⁶ The loss of religious sanction, the emancipation of politics from custom, and the rejection of the authority of tradition, have resulted in the transformation of law from an ethical relation into an absolute command.⁵⁷ With the loss of religious and traditional authority, "the very word 'law' had assumed an altogether different meaning."⁵⁸ As a posited command, modern law is shorn of its ground in either a higher law or in an ethical order; yet, even positive law finds itself in need of an absolute ground that law itself cannot provide.⁵⁹ Positive laws, as I have argued elsewhere, are not simply commands or social facts; instead, precisely because positive laws threaten to be mere social facts, they are in need of external grounds. Positive laws, therefore, "are precisely those laws most in need of reasons; in other words, positive laws must be justified."⁶⁰

In *On Revolution*, Arendt argues that the success of the American founding resulted from the founders' causing the U.S. Constitution to be worshipped.⁶¹ Only when the Constitution took on a certain magisterial quality free of force and will could it establish itself as the ground of authority for the new republic. And only once the Supreme Court established itself as the institutional home of the Constitution could it — by combining lack of power, permanence of office, and the claim of judgment — become "the true seat of authority in the American Republic."⁶² In America, Arendt argues, the authority for positive laws has its origin in the mystical reverence and awe that "has

55 HANNAH ARENDT, *ON REVOLUTION*, chs. 4, 5 (1990); *see also* CLAUDE DE SEYSELL, *THE MONARCHY OF FRANCE* (1981).

56 ARENDT, *supra* note 55, at 183.

57 *Id.* at 188-89.

58 *Id.* at 189.

59 *Id.* at 182.

60 BERKOWITZ, *supra* note 2, at xiii.

61 ARENDT, *supra* note 55, at 198-99.

62 *Id.* at 200.

continued to shroud the" Constitution "against the onslaught of time and changed circumstances."⁶³

The initial success of the American foundation of a higher authority for law was, Arendt saw, fated to fail. The genius of the founders was to combine the opposing forces of a founding act — the devising of a stable and durable government — with the experience of foundation — the exhilarating awareness of the human capacity of beginning. These two opposing forces — the aristocratic conservatism of founding durable structures and the democratic and progressive joy in the new — are, together, what Arendt terms the revolutionary spirit that allows for the institutionalization of freedom.⁶⁴ As it turned out, however, the American republic left no room "for the exercise of precisely those qualities [i.e. the experience of founding] which had been instrumental in building it." As Arendt writes:

[I]f foundation was the aim and the end of revolution, then the revolutionary spirit was not merely the spirit of beginning something new but of starting something permanent and enduring; a lasting institution, embodying this spirit and encouraging it to new achievements, would be self-defeating. From which it unfortunately seems to follow that nothing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about.⁶⁵

The sad fate of the American Constitution and its institutional home in the Supreme Court, Arendt suggests, is that the need for conservation and stability will overwhelm the equally important drive for newness and the experience of beginning something new. The Court's unaccountable power — its ability to do justice as a new act beyond the laws — threatened its legitimacy.⁶⁶

⁶³ *Id.* at 204.

⁶⁴ *Id.* at 220-21.

⁶⁵ *Id.* at 232.

⁶⁶ Patchen Markell has recently argued that Arendt opens an alternative to the paradoxical reading of democratic action as either stabilizing and archic or destabilizing and anarchic. Arendt's theory of democratic action, he argues, offers a way of responding to the necessary newness of events with "practical attunement." See Patchen Markell, *The Rule of the People: Arendt, Arché, and Democracy*, 100 *AM. POL. SCI. REV.* 1, 7 (2006).

In a world of positive law, there is an unstoppable drive to ground the law in a stable, secure, and unquestionable authority. When the authority of religion, tradition, and custom wane, law threatens to become a mere command. And yet, precisely because law, as law, must be more than simply a command, law is compelled to offer up justifications for its authority. The rise of democracy and constitutions in the modern era speak to the need that law justify itself. However, as Arendt saw, neither democratic legislatures (subject as they are to whim and passion) nor even constitutions shrouded in mystery (subject as they are to the demands of precedent, predictability, and transparency) can satisfy the modern demand that law have a certain and knowable ground.

16. When neither democratic legislatures nor constitutional ideals can justify the willful force of positive law, only one alternative remains. Law must be granted the objective authority of science. Science, by providing positive law with an objective claim to justice, becomes a necessary element of all positive law.

Arendt herself understood the law's need to become a product of science. She attributed to Grotius the effort to set law on the firm foundation of science. When Grotius insisted that "even God cannot cause that two times two should not make four," he expressed the conviction that "only mathematical laws were . . . sufficiently irresistible to check the power of despots."⁶⁷ Mathematical laws, which since Plato have been the paradigm of true and certain knowledge, are, in the Age of Enlightenment, the only kinds of truths that man will bow down to.⁶⁸

The problem with mathematical truths, for Arendt, was that they are not of the same nature as political and legal truths.⁶⁹ To the extent that mathematics is a rational knowledge of extension, space, and number, it can have no substantial connection with the real world. That is why Aristotle separates mathematics from the world and says it exists "no place" (*atopos*).⁷⁰ Mathematics, in the

⁶⁷ ARENDT, *supra* note 55, at 193.

⁶⁸ *Id.* at 192. "There is perhaps nothing surprising," she writes, "that the Age of Enlightenment should have become aware of the compelling nature of axiomatic or self-evident truth, whose paradigmatic example, since Plato, has been the kind of statements with which we are confronted in mathematics."

⁶⁹ *Id.* at 193.

⁷⁰ ARISTOTLE, METAPHYSICS 1092a17 (Hugh Tredennick & G. Cyril Armstrong trans., Harvard Univ. Press 1990).

ancient tradition, is a property of thought separate from the sensible world;⁷¹ it has no influence on things in the actual world. Because of mathematics' separation from the world of things, including political and legal things, its truths are powerless in the ethical world.

What Arendt overlooks, however, is that the rise of science in the 17th century and the advent of the social sciences in the 18th and 19th century promised to extend the supersensible certainty of mathematics to the physical and also the ethical worlds. Science, as opposed to geometry, is not simply an abstract thinking of relations, analyses, and syntheses. What distinguishes the scientific method that developed in Europe in the 16th and 17th centuries is, instead, that science offered a systematic way of knowing the world as it proceeds out of divine and rationally certain first principles. The grand insight of the natural scientists was not simply to rediscover Euclid and ancient mathematical reasoning; rather, it was to extend the mathematical method from logical beings to actual beings in the world.

17. Of the early natural scientists, it is one, Gottfried Wilhelm Leibniz, who did the most to extend the emerging natural science method into law. Leibniz's great contribution to law is not, as M.H. Hoeflich argues, that he is the undisputed founder of a modern geometric paradigm of law;⁷² what must be seen instead is how Leibniz moved beyond geometry and began the transformation of law into a product of science.⁷³

Against the traditional belief in the natural authority of customary and traditional laws and the positive authority of statutes, Leibniz insisted that law's authority be justified through science. This should not be surprising. Leibniz lived during the well-publicized social crises of the 17th century, which included a spiritual crisis of authority that touched politics and law every bit as much as population and religion.⁷⁴ Shorn of the veils of "faith, childish prepossession, and deception" by which man had been "conscious of himself only as a member of a race, people, party, corporation, family or

71 PLATO, *REPUBLIC*, bk. VI (Allan Bloom trans., Basic Books 1991) (in the discussion of the dividing line).

72 M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 *AM. J. LEGAL HIST.* 99 (1986).

73 The following discussion of Leibniz's transformation of law into a product of science is based on my book, *The Gift of Science*. BERKOWITZ, *supra* note 2.

74 See generally PAUL HAZARD, *THE EUROPEAN MIND: THE CRITICAL YEARS (1680-1715)* (1953).

otherwise in some form of universality," the pillars of traditional legal and political authority were shaken.⁷⁵ As a leading figure within a generation that believed that the crisis of authority was to be overcome through enlightened reason and a "renewal of science,"⁷⁶ Leibniz viewed his project to discover a science of natural law as a means to facilitate the knowing of law and thus to advance an ethical politics that would "raise up the common good" and further the public happiness.

18. At the root of Leibniz's scientific re-conceptualization of law is his attempted solution to one of the oldest and greatest philosophical questions: what is a thing? Descartes famously offered a dualistic thesis that held all things to be composed of both body and mind. He defined body as absolute extension and mind as absolute reason, but struggled unsuccessfully to explain how the body can influence the mind and vice versa. The Cartesian thing could only move and act in the world through the intervention of a *deus ex machina*, by which God causes thoughts and bodily actions to arise simultaneously.

Against Descartes' radical separation of mind and body, Leibniz argues that either a purely mechanical or geometric world has no beginning, which he believes is absurd, or there must be some non-physical cause inherent in each and every being. Since science demands a universal and true knowledge of its objects, the scientific method must presuppose a necessarily meta-physical conception of substance.

There are indivisibles or unextended beings, for otherwise we could conceive neither the beginning nor the end of motion or body. The proof of this is as follows. There is a beginning and an end to any given space, body, motion, and time. Let that whose beginning is sought be represented by the line ab , whose middle point is c , and let the middle point of ac be d , that of ad be e , and so on. Let the beginning be sought at the left end, at a . I say that ac is not the beginning, because cd can be taken from it without destroying the beginning; nor is it ad , because ed can be taken away, and so forth. So nothing is a beginning from which something on the right can be removed. But that from

75 JAKOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* 98 (1990).

76 3 KONRAD MOLL, *DER JUNGE LEIBNIZ. EINE WISSENSCHAFT FÜR EIN AUFGEKLÄRTES EUROPA: DER WELTMECHANISMUS DYNAMISCHER MONADENPUNKTE ALS GEGENENTWURF ZU DEN LEHREN VON DESCARTES UND HOBBS* 32-33 (1996).

which nothing extended can be removed is unextended. Therefore the beginning of body, space, motion, or time — namely, a point, conatus, or instant — is either nothing which is absurd, or unextended, which was to be demonstrated.⁷⁷

a . . . e . . . d . . . c . . . b

In this elegant and early proof, Leibniz expresses an idea that remained at the heart of his thinking throughout his life, a thought that has extraordinary importance not only in mechanics but also in metaphysics and jurisprudence. If motion and change are possible, the beginning of motion and change cannot be found among the aggregate of extended substances. What holds for motion and change also holds for all things in the world and even for the world itself, because "a sufficient reason for existence cannot be found merely in any one individual thing or even in the whole aggregate and series of things."⁷⁸ In all contingent or changing things, there must be reasons for the existence of the objects outside of the series of objective things themselves. Every thing, insofar as it is, must have a formal — that is, non-physical — reason from which it proceeds. Within a substance, there must be a non-physical force, "something related to souls, which is commonly called a substantial form."⁷⁹ The formal reason for a thing is the forceful source of all action. Every thing has an active force from which it is driven to act out of itself.

The introduction of force is central for an understanding of "the true concept of *substance*," or being, as well as for Leibniz's jurisprudence.⁸⁰ The science of law must investigate not merely the existing law in a society, but also the principles of law, "or what is the same thing," the "first reasons of justice."⁸¹

77 GOTTFRIED WILHELM LEIBNIZ, *Studies in Physics and the Nature of Body*, in PHILOSOPHICAL PAPERS AND LETTERS 139, 139-40 (Leroy E. Loemker ed., 1989).

78 GOTTFRIED WILHELM LEIBNIZ, *On the Radical Origination of Things*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 77, at 486.

79 GOTTFRIED WILHELM LEIBNIZ, *A New System*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 77, at 309.

80 GOTTFRIED WILHELM LEIBNIZ, *On the Correction of Metaphysics and the Concept of Substance*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 77, at 433.

81 2 GOTTFRIED WILHELM LEIBNIZ, *De Jure Et Iustitia*, in TEXTES INÉDITS 618 (Gaston Grua ed., 1948).

All law that is and that may be has a reason and ground in the principles of natural justice. Law arises not simply from geometric elements but from the rational and substantial forms — that is, forces — that are the metaphysical fundament of all beings. The effort to know law is the scientific inquiry into the formal forces of justice: "Jurisprudence is, then, the science of what is just," and takes as its object the "force (*vis*) of justice."⁸²

19. As a forceful substance, law too must be governed by the first principle of science: nothing is without a reason. By the principle of sufficient reason, all law must have a reason why it is rather than why it is not. Specifically, Leibniz argues that all law can be derived from a single principle of justice: *caritas sapientis*, or "the charity of the wise."⁸³ Charity, he writes, is understood as "*benevolentia universalis*" or a universal well-willing.⁸⁴ Justice is a charity or love that is rightly determined, above all, as the love of God, or by God's eminently wise will. The wisdom of God, not an abstract proposition but the judicious wisdom of an all-knowing, loving, and virtuous being, is the source of justice, and it is this wisdom that Leibniz believes can be scientifically comprehended through a *scientia felicitatis*, a science of happiness.⁸⁵ Because he understands the highest principle of justice to be a scientifically knowable principle of God's will — *caritas sapientis*, in other words, a well-willing of God — Leibniz is the first jurist to set the question of law within the province of scientific will. Law, in other words, is transformed into something knowable, measurable, and calculable as the well-willing of God.

20. Leibniz's introduction of the principle of sufficient reason into jurisprudence promised to give law the scientific grounds for the authority that it so dearly desires. The gift of scientific justification, however, brought with it unintended consequences. The principle of sufficient reason is a metaphysical thesis concerning things and how they exist. The principle says that nothing is without a reason. Stated affirmatively, it says that every thing that is has a reason. In one of his most important formulations of the

82 *Id.*

83 GOTTFRIED WILHELM LEIBNIZ, *Codex Iuris Gentium (Praefatio)*, in *POLITICAL WRITINGS* 170 *passim* (Patrick Riley ed., 1996).

84 4 GOTTFRIED WILHELM LEIBNIZ, *DIE PHILOSOPHISCHE SCHRIFTEN* 387 (C.I. Gerhardt ed., Georg Olms Verlag 1996) (1875).

85 "Quia autem sapientia caritatem dirigere debet, hujus quoque definitione opus erit. Arbitror autem notioni hominum optime satisfieri, si *sapientiam* nihil aliud esse dicamus quam ipsam scientiam felicitatis." *Id.*

principle of reason, Leibniz names it the "principle of giving back reasons" ("*principium reddendae rationis*").⁸⁶ Since nothing exists without a reason, nothing exists unless reasons are given for it. All things, therefore, only exist insofar as they have a reason. Similarly, law too must have a reason posited for it if it is to exist. Law, in other words, does not exist in and of itself as a natural or traditional insight into what is right and fitting. A custom may develop or a statute may be announced, but the custom and the statute are only valid law insofar as they are justified.

The result of Leibniz's scientific understanding of law is that law is subordinated to its reasons and justifications. Law is thereby freed from its traditional mooring in custom and insight. The great advantage of understanding law to be a product of science is that judges and lawyers can reduce the unfathomable sea of particular and often contradictory laws to basic principles that are knowable and applicable with certainty. For Leibniz, the striving to turn law into a science leads to his lifelong project to write and implement a scientific legal code.

21. Leibniz's effort to codify law is, like the European codification movement of the 18th and 19th centuries that he inspired, grounded in the scientific metaphysics that has the principle of sufficient reason as its highest axiom. As a result of the principle of sufficient reason, law emerges from a first principle, what Leibniz alternatively calls justice, happiness, and well-willing. Law is transformed by Leibniz from an authoritative statement of a practice into a *forceful* product of the scientific knowing of justice; law, in other words, must be knowable neither as the pure reason of natural law, nor as the pure will of positive law, but as a hybrid form of rational or divine will. Having its origin in the rational and just will of God, law comes to be knowable through a science of justice. Since justice has been re-imagined as the wise and charitable will of God, the scientific inquiry into law is transposed from the absolute and unknowable realm of divine justice to the rational and thus lawful world of social science. It is this scientifically decipherable rationality of law as will that, in the course of the following centuries, proved to be the seed from which positive law would sprout. Law, as Rudolf von Jhering reformulated the original Leibnizian idea two centuries later, is a scientifically guided instrument for the achievement of human ends.

⁸⁶ LEIBNIZ, *supra* note 84, at 309; see MARTIN HEIDEGGER, *DER SATZ VOM GRUND* 44 (1957).

22. The rise of legal science, from its origins with Leibniz to its flowering with the legal-historical school of Savigny and Jhering in 19th century Germany, culminates in the contemporary dominance of social-scientific approaches to law. In law schools and courtrooms, law is increasingly subordinated to the scientific discourses of economics, sociology, normative moral philosophy, and cognitive psychology. Law, today, consciously or unconsciously, is understood as a product of the social sciences.

The social-scientific approach to law has distinct advantages. As a means for the achievement of social and political ends, law is enlisted in the progressive drive for an ever more rational society. Depending on which social science is employed to investigate the rational ends of society, law can be motivated for the ends of fairness, equality, efficiency, and security. Whatever the end, however, law, as a product of science, is uniquely free to bring it about.

But the price of law's scientific freedom is heavy. As law retreats behind reasons and grounds, it loses its natural connection to any ideas of truth and justice except those that are given as its justification. Law threatens to become merely a means to any rational ends that legislators posit. As a product of science, law is limited only by the limits of scientific justification.

23. For positivist jurists under the sway of scientific jurisprudence, therefore, law is not simply the arbitrary will of a sovereign. Even the omnipotent will of the sovereign — either in the guise of a king or a democratic legislature — is compelled to deck itself with the legitimating mantle of scientific justification. The variety of scientific justifications for positive law is enormous: H.L.A. Hart, the father of legal positivism, legitimizes positive law on the basis of an accepted "rule of recognition," which he defines as a "social fact" that is discovered through social science research into the norms of legality;⁸⁷ Richard Posner, one of the founders of the study of law as economics, argues that positive laws should be based on the "scientific study of social rules" that "are designed to bring about an efficient allocation of resources;"⁸⁸ normative legal theorists insist that positive laws be legitimated (if not also justified) by appealing to social norms like integrity, fairness,

⁸⁷ See, e.g., HART, *supra* note 11; see also Coleman, *supra* note 25, at 115-16.

⁸⁸ RICHARD A. POSNER, *The Law and Economics Movement*, in *THE ECONOMIC STRUCTURE OF THE LAW: THE COLLECTED ECONOMIC ESSAYS OF RICHARD A. POSNER* 3, 5, 7 (Francesco Parisi ed., 2000).

and procedural equality;⁸⁹ and most generally, the vast majority of modern legal theorists and judges demand that positive law be grounded by weighing the costs and benefits of different outcomes. While judicial reliance on a balancing test seems to abandon the scientific demand that law justify its rule, the weighing of interests is best understood as a partial and thus desperate appeal to an objective measure of the social good that eternally eludes our grasp.

Although a few anti-positivist jurists may still dream of an objective and universal legal science, modern lawyers accept that the universalist ambition of legal science has failed; every justification for law is acknowledged to be partial, interested, and political. The result is an unprincipled competition among divergent criteria of justice that has led to the widespread belief that "force, mitigated so far as may be by good manners, is the *ultima ratio*" of law.⁹⁰

That might makes right has been a theoretical seduction since Thrasymachus; however, it is only in the modern era that law, as positive law, has come to be defined as the command of a sovereign backed by the threat of sanction.⁹¹ Once law is severed from its connection to a higher truth, it is, as Oliver Wendell Holmes Jr. once quipped, whatever a judge says it is.⁹² In this "realist" account of legal positivism, law, as a command, is a willful decision.

What such a bare positivism misses, however, is that positive law, stripped of its traditional sources of authority, is in need of science as its last and ultimate ground. While Holmes is correct in saying that modern law is a decision, the realist claim that positive law is nothing but sovereign will does not escape the grounding claims of a scientific legal system. Instead, the radical

89 While most normative theorists offer themselves as critics of positive law, they share the need to justify law with science that I argue is the essential mark of the positivist approach to law. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); HABERMAS, *supra* note 4.

90 Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Feb. 1, 1920), *cited approvingly* in RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 83 (1990); see also Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1459 (1990) (agreeing).

91 JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21 (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832).

92 3 OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARV. L. REV. 457 (1972), *reprinted in* THE COLLECTED WORKS OF JUSTICE HOLMES 291 (Sheldon M. Novick ed., 1995).

reduction of law to will merely shifts the metaphysical grounds of the legal system from the pursuit of justice to the preservation of order. The recourse to fiat and to judicial decision as grounds for law sets law in the service of the orderly resolution of disputes. In the name of order, legitimacy replaces justice as the highest aspiration of law. The realist embrace of sovereign and judicial will as the essence of positive law, therefore, is not a retreat from the scientific grounding of law in justice so much as it is a redefinition of justice as security.

24. Contra Hart, the essence of positive law is not merely that it is a social fact divorced from morality. And yet, contra Waldron, it is also the case that positive law is not simply that law enacted and legitimated by a democratic legislature. Just as the social fact thesis needs, in Waldron's telling, a legitimating narrative that democratic legislatures provide, so too do the willful decisions of democratic legislatures show themselves to be in need of the rational and objective truths that are promised by science. Modern law as positive law must be understood to have its essence in its need for scientific justification. Modern law, in other words, is a product of science.⁹³

25. The emergence of a new form of law — law as a product of scientific reason — is both a symptom of and a purported cure for the crisis of authority that Friedrich Nietzsche later called the death of God. Nietzsche traced the death of God back to Socrates' ambitious but futile attempt to save a decaying Greek civilization by a new reliance on reason. However, just as Socratic reasoning proved to be another kind of sickness that invariably served to undermine further the very belief in truth it was meant to support,⁹⁴ so too have the social-scientific offspring of Leibniz's legal science ruthlessly refuted all grounds for legal authority. No science of law — be it Savigny's historical science, Jhering's social and economic sciences, or even Waldron's political science — has succeeded in establishing itself as a true science of justice. For some, the failure of science to re-found law's authority has led to the recognition that science itself is interested, subjective, and suffused with political and metaphysical presuppositions. For others, the failure of legal science is an embarrassment. Most legal scholars, however, simply carry on

93 See my argument that law in the modern age has been transformed into a product of scientific knowledge, in BERKOWITZ, *supra* note 2.

94 6 FRIEDRICH NIETZSCHE, *Götzen-Dämmerung*, in KRITISCHE STUDIENAUSGABE, *supra* note 27, at 55, 72-73.

as if the recourse to economic and democratic grounds for law were as natural as it is necessary. We all, to some degree, ignore the basic fact that the scientific cure for law has failed to restore law's once vibrant bond with justice.

That the scientific cure has failed does not diminish either its impact on law or its importance to us today. Shorn of its traditional and religious foundations, law remains dependent on science for the rational grounds of its authority — the only grounds that modern man is willing to recognize. Law continues to seek its justification in the ever paling scientific notions of efficiency, objectivity, and legitimacy; however, even these diminished goals are increasingly seen to be partial, contestable, and even illegitimate. The gift that science bequeathed to law has proven unreturnable: the reduction of the activity of justice to the refinement of a technique, one that strives for little better than the pursuit of political, social, and economic ends.

26. The failure of science to bring about a rebirth of law, however, is neither the end of history nor the end of law. As long as the legal ideal of justice is still heard, albeit faintly — as long as we can still make sense of the idea of justice that connects us with our friends and fellow citizens without the need for law and contracts — there is the possibility that acts of justice will inspire, ennoble, and enable some to heed the call. The call and those who can hear it are rare, and yet it persists: when a pharmaceutical company foregoes legal rights and agrees to treat its neighbors with the dignity due persons; when a doctor spends hours operating to save a young child without thinking whether she is insured; when a teacher sits in his office for hours upon hours, week after week, guiding his student along the painful, even excruciating, ascent from the cave into the light; when a friend speaks honestly and plainly, lovingly showing you your error — in all these instances both grand and delicate, we are witness to the actuality of the thoughtful and ethical activity of justice.

All the more terrible, depressing, and humiliating must the everyday subjection of law to a product of science strike those who have glimpsed the beauty of law's active presence in themselves and others. For those of us living through the divorce of law from justice, the rules of law appear naked, stripped bare of any claim to a higher good. We may praise law for its legitimacy, its fairness, or its efficiency, but we do not love it for its justice. Sequestering justice in the world beyond leaves this world prisoner to the whim of calculating bureaucrats, legislators, and judges. With the reduction of law to policy, the weighing of interests, and the overwhelming demand that law achieve political and social ends, the ethical ideal of law

as justice has fled the earth. Law, the last bastion of the ethical world's resistance to the rule of scientists and experts, has succumbed to the lure of social engineering.⁹⁵ Just as man has become a human resource in the service of whatever social or commercial end, so too is law nothing in itself.

Might it be, however, that consciousness of the death of God can open a path to redemption? To bring the transformation of law into a product of science into question is a first essential step in any effort to preserve the ideal of justice beyond law. Whether the science of law can give way to an art of legislation that would summon the just, the true, and the beautiful — what Plato in the *Phaedrus* calls the most purely shining-forth⁹⁶ — is the question of our age.

95 Philippe Nonet, *In the Matter of Green v. Recht*, 75 CAL. L. REV. 363, 363-64 (1987).

96 PLATO, *Phaedrus*, in EUTHYPHRO. APOLOGY. CRITO. PHAEDO. PHAEDRUS 250d-e (G.P. Goold ed., Harvard Univ. Press 1995).

