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Title

From Justice to Justification: An Alternative Genealogy of Positive Law

Permalink

<https://escholarship.org/uc/item/8hq9373h>

Journal

UC Irvine Law Review , 1(3)

ISSN

2327-4514

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Publication Date

2011-09-01

From Justice to Justification: An Alternative Genealogy of Positive Law

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I. INTRODUCTION

In 1831, John Austin, professor of law at the University of London, published *An Outline of a Course of Lectures on General Jurisprudence, or the Philosophy of Positive Law*. The outline—like his *Province of Jurisprudence Determined*, published the following year—presents Austin’s now famous thesis that law, properly so called, is positive law.¹ The proper province of law, Austin argued, is that of commands by a sovereign power that are backed by the threat of sanction. While some positivists quibble with Austin’s definition, they accept his basic orientation: “The existence of a law is one thing,” Austin writes, “its merits or demerits are another thing.”² From Austin to H.L.A. Hart,³ legal positivism is the thesis that law is a social fact, something fully separate from morality.⁴ This is, today, well known.

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1. Both texts are published in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (The Legal Classics Library 1984) (1832).

2. *Id.* at 278. The fifth edition of Austin’s work, reprinted as part of the *Cambridge Texts in the History of Political Thought* series, transposes the quotation from Lecture VI to the end of Lecture V. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (Wilfrid E. Rumble ed., 1995).

3. H.L.A. Hart, Austin’s greatest disciple and critic, repeats Austin’s same formula in his *CONCEPT OF LAW* 203 (1961).

4. MARIANNE CONSTABLE, *JUST SILENCES* 32 (2005). See also Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT 99, 114–16 (Jules Coleman ed., 2001).

Less well known—indeed, I cannot find one single reference to it in the academic literature of the past hundred years—is the fact that on the title page of Austin’s *Outline* is a single epigraph by the German philosopher, scientist, and jurist Gottfried Wilhelm Leibniz. Austin’s epigraph is taken from a 1711 letter Leibniz wrote to Heinrich Ernst Kestner, a German jurist. The epigraph reflects Leibniz’s continuing interest in legal reform that began with his youthful work, *A New Method for Learning and Teaching Jurisprudence*, which the twenty-one-year-old Leibniz composed in a carriage en route to Mainz. The treatise was part of his application to become the assistant minister of law at the court of the Bishop Elector of Mainz, Kurfürst Johann Philipp von Schönborn. The epigraph reads:

As long as the powerful let those educated in legal decision making—those who are prudent and well motivated—put their heads together in private consultation and let them think about establishing law such that they render decisions with more certainty than currently—this work could make a mockery of the authority of princes.⁵

The Leibnizian epigraph to Austin’s text is surprising. The epigraph is surprising first because Austin mocks the authority of princes even though he famously argues that law is a product of the prince’s will. It is also surprising because Leibniz is rightly thought to be one of the great thinkers of the natural law tradition. What is an epigraph from the greatest natural lawyer of the seventeenth century doing on the title page of the work that has established itself as the *locus classicus* of nineteenth-century legal positivism? What, in other words, is the connection between Leibniz’s natural law thinking and legal positivism?

The epigraph recalls Leibniz’s lifelong ambition to write and implement a legal code that would “reestablish morality, the basis of right, and equity with a little bit more clarity and certitude than they are accustomed to having.”⁶ At the core of Leibniz’s jurisprudential efforts was what he called the “elements of law,” modeled upon Euclid’s axioms and theorems. If jurisprudence and metaphysics have relied too much on insight and have lacked clarity, Leibniz writes, the remedy is the extension of the use of elemental principles: “One of the chief ways of making jurisprudence more manageable, and of surveying its vast ocean, as though in a geographical chart, is by tracing a large number of particular decisions back to more general principles”⁷ Just as in arithmetic large and complex numbers

5. Leibniz’s very difficult Latin reads: “Dum potentes aliud agunt, jurisconsulti eruditi, prudentes, bene animati, conferant capita privatim, cogitentque de jure constituendo, ut reddant certius quam nunc: posset is labor praeludere principum auctoritati.” AUSTIN, *supra* note 1, at A. For the source of Austin’s epigraph, see 3 GOTTFRIED WILHELM LEIBNIZ, *EPISTOLAE AD DIVERSOS* 254 (Christian Kortholt ed., Leipzig, Sumtu Bern. Christoph. Breitkopfii 1738). I thank my colleague Benjamin Stevens for assistance with the translation.

6. In GOTTFRIED WILHELM LEIBNIZ, *OEUUVRES CHOISIES* 33 (Lucy Prenant ed., 1942), cited in HANS-PETER SCHNEIDER, *IUSTITIA UNIVERSALIS* 52 n.113 (1967) (my translation).

7. G.W. LEIBNIZ, *NEW ESSAYS ON HUMAN UNDERSTANDING* 425 (Peter Remnant & Jonathan Bennett eds. & trans., 1996).

can be broken down into their component parts, and just as geometrical theorems can be traced back to their most fundamental axioms, so can the diffuse truths of juridical insight be set upon a foundation of first principles and maxims. It is precisely this task that Leibniz envisions for himself.

Austin too sought a clear “science of jurisprudence.” As W.L. Morison has argued, Austin set himself an ambitious goal of creating a “map of a legal system” in which particular laws and decisions would be traceable back to the most general elements of law.⁸ These elements, what Austin calls “miniscule elements,” are Austin’s response to Bentham’s effort to organize his codification of law around single commands that Bentham, following Leibniz, names “monads.”⁹ Importantly, Austin’s codified map of the miniscule elements of law is the province of jurists, not of kings or legislators. It is the work of legal scientists—not political sovereigns—to organize the laws according to rational principles of utility. This means that even though Austin defined law as “the command of a sovereign, the sovereign does not figure in [his] account of the law except incidentally.”¹⁰ What Austin embraced in Leibniz’s jurisprudential project was the ambitious dream to create a scientific code of law that would elevate scientifically trained judges above princes as the true creators of a rational legislation.

The bond between Leibniz and Austin is their mutual commitment to enlist science to respond to a similar phenomenon—the loss of law’s natural, rational, and traditional authority and the rise of positive law. What shocks Leibniz in the seventeenth century and is obvious to Austin in the nineteenth century is that human laws have come to have no necessary connection with morality, reason, or justice. Living through what Friedrich Nietzsche later called “the death of God,” both the natural lawyer Leibniz and the positive lawyer Austin confronted head on the fact that laws had lost the patina of divine rationality that had for centuries secured their authority. Law, stripped of its natural authority as a *ratio scripta*, confronted its subjects as mere will, the decision of one with the power to enforce it.

Austin accepted and even celebrated this transformation of law into positive law, as did Hobbes, Bentham, and other early proponents of positive law. Law, the positivists argued, is first and most importantly a means of keeping order. While it is to be wished that positive laws reflect a moral, ethical, or useful ideal of a just society, the lack of agreement on the content of moral, ethical, and utilitarian ideals means that a reliance on natural laws threatens to devolve into disorder and chaos. In the name of order, the science of positive law must sacrifice justice for clarity.

Unlike Austin, Leibniz saw positive law’s elevation of order over justice as a

8. See W.L. MORISON, JOHN AUSTIN 107–19 (1982).

9. *Id.* at 115.

10. *Id.* at 114.

grave danger that could only be neutralized by transforming law into a science. Writing in an age in which the divine, rational, and customary insights that grounded the traditional authority of law had lost their power, Leibniz turned to science as the specifically modern way to justify law and thus repair the frayed connection between law and justice. Science, Leibniz believed, speaks with the authority of objective truth that could reinvigorate law and resuscitate law's lost claim to justified authority.

Leibniz's turn to science to authorize and justify positive law has been ignored by legal and political scholars. This is strange given the overriding prevalence of science in law today. Beyond Austin's own invocation of Leibniz's scientific project, the entire history of law over the last three centuries can be told as a history of the various sciences of law. From Austin's science of utility to Hart's sociological jurisprudence, from law and society to law and economics, and from legal realism to analytic jurisprudence, modern lawyers have sought to validate, critique, and justify law by recourse to the social sciences. The science of law is, it seems, a corollary of the rise of positive law.

I want to suggest that the connection between science and positive law is so deep that science, by providing otherwise arbitrary positive laws with objective claims to justice, is a necessary element of all positive law. For positivist jurists, therefore, law cannot simply be understood as the bare will of a sovereign—as Austin holds—or even as a body of legitimate rules that are obeyed in fact—as modern positivists like H.L.A. Hart insist. The omnipotent will of the sovereign as well as the law's claim to legitimacy are both—in ways overlooked by positivist legal scholars—compelled to deck themselves with the legitimating mantle of scientific justification. It is a mistake to think that positive laws are willful commands divorced from reasons and justifications. Rather, positive laws are precisely those laws most in need of reasons. In other words, positive laws are those laws that must be justified. Since positivist lawyers deny that laws can be justified by transcendent principles, they seek law's reason and justification in the only source of objective norms accepted today: science.

To argue that positive law is most essentially a product of scientific justification flies in the face of the overwhelming conviction that positive law is rooted in will. Since H.L.A. Hart chose to begin his inquiry into positive law with Austin, legal scholars have traced the roots of positive law back to Thomas Hobbes's voluntarism. Austin himself cites Hobbes's claims that “no law can be unjust” as precedent for his own view that “no positive law is legally unjust.”¹¹ And as does Austin, Hobbes understands law as a command: “Law in general, is not counsel, but command; nor a command of any man to any man; but only of him, whose command is addressed to one formally obliged to obey him.”¹²

11. AUSTIN, *supra* note 2, at 217 n.20.

12. THOMAS HOBBS, *LEVIATHAN* 175 (J.C.A. Gaskin ed., 1996).

Hobbes, as Leo Strauss argued, sets law under the willful assertion of right and defends the primacy of a sovereign “right” over natural law.¹³ As a result of his subjection of law to will, Hobbes’s voluntarism and his separation of law from morality have come to be seen as the unchallenged foundation of positive law.

Against this consensus view, I offer an alternative genealogy of positive law. Rather than Hobbesian will or Austinian command, I argue that the need for scientific justification is the essential impulse of positive law. In doing so, I suggest that the intellectual history of positive law is to be found, not in the tradition of legal voluntarism that runs from Hobbes through Austin to Hart, but, instead, in the rise of legal science that begins with Leibniz and has its great flourishing in nineteenth-century Germany. Part II of this paper locates the birth of legal science in Leibniz’s seventeenth-century scientific metaphysics. Parts III and IV trace the development of Leibniz’s scientific approach to law through the work of Friedrich Carl von Savigny and Rudolf von Jhering, two of the leading members of the school of legal science in Germany. Finally, by situating the rise of positive law in the impulse to transform law into a product of science, I show how positive law seeks its justification through science even as it abandons the quest for justice itself.

II. LEIBNIZ

Wilhelm Gottfried Leibniz was the first jurist to think about law as a product of modern science. That Leibniz would turn to science to justify law’s authority should not be surprising. Leibniz lived during the well-publicized social crises of the seventeenth century, which included a spiritual crisis of authority that touched politics and law every bit as much as population and religion.¹⁴ 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 otherwise in some form of universality,” the pillars of traditional legal and political authority were shaken.¹⁵ 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,”¹⁶ Leibniz saw 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

13. LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS*, at viii (Elsa M. Sinclair trans., Univ. of Chi. Press 1952) (1936).

14. See generally PAUL HAZARD, *THE EUROPEAN MIND 1680–1715* (J. Lewis May trans., Meridian Books 1963) (1935).

15. JACOB BURCKHARDT, *DIE KULTUR DER RENAISSANCE IN ITALIEN* 88 (Horst Günther ed., 1989). In English, JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* 98 (S.G.C. Middlemore trans., 1990).

16. 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).

happiness.

The one legal scholar to perceive a connection between Leibniz and the rise of positive law is M.H. Hoeflich. In his essay, “Law & Geometry: Legal Science from Leibniz to Langdell,” Hoeflich argues that Leibniz is the undisputed founder of a modern geometric paradigm for law.¹⁷ However, what Leibniz and the other natural scientists of the seventeenth century saw in science was not simply a geometric paradigm for logical analysis. Rather, it was an extension of the geometric method from logical certainty to the scientific method of knowing actual beings in the world. While the certainty offered by the geometric paradigm is an important element of Leibniz’s thinking, it is the natural *scientific* conception of law as a knowable and rational system—not geometry—that is the foundation of Leibniz’s philosophic jurisprudence.¹⁸

At the root of Leibniz’s scientific reconceptualization of law is his attempted solution to one of the oldest and greatest philosophical questions: what is a thing? Descartes had famously offered a dualistic thesis that held all things to be comprised of both body and mind. Descartes defined body as absolute extension—that is, absolute physical being—and mind as absolute reason, but he had 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’s radical separation of mind and body, Leibniz argues that either Descartes’s purely mechanical or geometric world has no beginning, which Leibniz believes is absurd, or there must be some nonphysical cause inherent within each and every being. In other words, Leibniz sees in a way that Descartes had not that the scientific method must presuppose a necessarily metaphysical conception of substance. In every being there is, Leibniz argues, a nonphysical and thus unextended and purely rational form that “is.” The Cartesian dualism separating mind and being is, Leibniz insists, impossible.

Leibniz’s proof for the existence of “unextended beings”—what he comes to call monads—proceeds from logic. Every being, he reasons, must come to be and also pass away; every thing has a beginning and an end. Plot the beginning and end of a being on a line *ab* whose middle point is *c*. What is the beginning of the line?

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

17. M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 99 (1986).

18. Nicholas Rescher, *Leibniz and the Concept of a System*, 13 STUDIA LEIBNITIANA 114, 122 (1981).

The segment *ac* cannot be the beginning, because *cd* can be taken from it; nor is *ad* the beginning, because *ed* can be taken away, and so on. No matter how small the point of beginning is made to be, there is no beginning of the line from which a smaller part could not be removed. A true beginning, Leibniz concludes, must be something from which nothing temporal, spatial, or causal can be removed. However, that from which nothing extended can be removed is unextended. Therefore, he concludes, “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.”¹⁹ The beginning of every thing, in other words, is a nonmaterial and thus formal part of the thing—what he calls a monad.

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.”²⁰ 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, nonphysical—reason from which it proceeds. Within a substance, there must be a nonphysical force, “something related to souls, which is commonly called a substantial form”²¹ The formal reason, or monad, for a thing is not the mere cause of the thing. Rather, it 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 to an understanding of “the true concept of *substance*,” or being, as well as to Leibniz’s jurisprudence.²² 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.”²³ 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

19. GOTTFRIED WILHELM LEIBNIZ, *Studies in Physics and the Nature of Body*, in PHILOSOPHICAL PAPERS AND LETTERS 139, 140 (Leroy E. Loemker ed. & trans., Kluwer Academic Publishers 2d ed. 1989) (1956).

20. GOTTFRIED WILHELM LEIBNIZ, *On the Radical Origination of Things*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 19, at 486, 486.

21. GOTTFRIED WILHELM LEIBNIZ, *Discourse on Metaphysics*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 19, at 303, 309.

22. GOTTFRIED WILHELM LEIBNIZ, *On the Correction of Metaphysics and the Concept of Substance*, in PHILOSOPHICAL PAPERS AND LETTERS, *supra* note 19, at 432, 433.

23. G.W. LEIBNIZ, *De Jure Et Iustitia*, in TEXTES INÉDITS 618, 618 (Gaston Grua ed., 1948).

is, then, the science of what is just,” and takes as its object the “force [*vis*] of justice.”²⁴

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 for why it is rather than for 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.”²⁵ Charity, he writes, is understood as “benevolentia universalis,” or a universal well-willing.²⁶ Justice is a charity or love that is above all the love of God, or rightly determined 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.²⁷ Because he understands the highest principle of justice to be a scientifically knowable principle of God’s will, *caritas sapientis*, 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 charity of God.

Leibniz’s introduction of the principle of sufficient reason into jurisprudence promised to give law the scientific grounds for its authority that it so dearly desired. 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 principle of reason, Leibniz names it the “principle of giving back reasons” (“principium reddendae rationis”).²⁸ 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 by reasons.

The result of Leibniz’s scientific understanding of law is that law is

24. *Id.*

25. GOTTFRIED WILHELM LEIBNIZ, *Codex Iuris Gentium (Praefatio)*, in THE POLITICAL WRITINGS OF LEIBNIZ 165, 170–76 (Patrick Riley ed. & trans., 1972).

26. 3 GOTTFRIED WILHELM LEIBNIZ, DIE PHILOSOPHISCHEN SCHRIFTEN 387 (C.I. Gerhardt ed., Berlin, Weidmannsche Buchhandlung 1887).

27. “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.*

28. 7 GOTTFRIED WILHELM LEIBNIZ, DIE PHILOSOPHISCHEN SCHRIFTEN 309 (C.I. Gerhardt ed., Berlin, Weidmannsche Buchhandlung 1890). See MARTIN HEIDEGGER, DER SATZ VOM GRUND 44 (1957).

subordinated to its reasons and justifications and that 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, not 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. 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.

III. SAVIGNY

Largely forgotten today,²⁹ Leibniz’s legal science had a profound impact on the development of modern law and, more specifically, on the rise of positive law. While Leibniz’s influence reaches to contemporary American law, the path of transmission from Leibniz to Anglo-American common law is more complicated than Austin’s epigraph might suggest. As much as Austin may have been intrigued by Leibniz’s jurisprudence, the true flourishing of Leibnizian legal science is in the work of Friedrich Carl von Savigny, the great founder of the German school of legal science.

In 1790, Gustav Hugo—Savigny’s forerunner as the founder of the German school of historical legal science—published the first volume of a new legal journal, *Civilistisches Magazin*; the first article, written by Hugo himself, was titled simply “Leibniz.” In 1877, Rudolf von Jhering—Savigny’s greatest student—published his magnum opus, *Law as a Means to an End*; Jhering’s first sentence names Leibniz as his precursor and announces that his book is guided by Leibniz’s principle of sufficient reason. Between Hugo and Jhering stands Friedrich Carl von Savigny.

29. Philosophical commentaries on Leibniz routinely ignore the existence—let alone the importance—of his legal writing. While a few recent books address Leibniz’s legal works—most notably Patrick Riley’s *Leibniz’ Universal Jurisprudence*, the only substantial English-language account relating Leibniz’s legal thought to his philosophy—these books are largely focused on the meaning of justice in Leibniz’s metaphysics while they ignore Leibniz’s jurisprudential ambitions. Riley dedicates only one three-page section of his book to “Leibniz’ Codification of *Caritas Sapientis* in His Late Writings.” PATRICK RILEY, *LEIBNIZ’ UNIVERSAL JURISPRUDENCE* 182–85 (1996); see SCHNEIDER, *supra* note 6; Peter König, *Das System des Rechts und die Lehre von den Fiktionen bei Leibniz, in ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT* 137 (Jan Schröder ed., 1998); Klaus Luig, *Die Privatrechtsordnung im Rechtssystem von Leibniz, in GRUND- UND FREIHEITSRECHTE VON DER STÄNDISCHEN ZUR SPÄTBÜRGERLICHEN GESELLSCHAFT* 347 (Günter Birtsch ed., 1987); Klaus Luig, *Die Rolle des deutschen Rechts in Leibniz’ Kodifikationsplänen*, *IUS COMMUNE*, no. 5, 1975 at 56; Klaus Luig, *Leibniz als Dogmatiker des Privatrechts, in RÖMISCHES RECHT IN DER EUROPÄISCHEN TRADITION* 213 (Okko Behrends, Malte Diesselhorst & Wulf Eckart Voss eds., 1985); Klaus Luig, *Die Wurzeln des aufgeklärten Naturrechts bei Leibniz, in NATURRECHT – SPÄTAUFKLÄRUNG – REVOLUTION* 61 (Otto Dann & Diethelm Klippel eds., 1995); Klaus Luig, *Leibniz und die Prinzipien des Vertragsrechts, in GESELLSCHAFTLICHE FREIHEIT UND VERTRAGLICHE BINDUNG IN RECHTSGESCHICHTE UND PHILOSOPHIE* 75 (Jean-François Kervégan & Heinz Mohnhaupt eds., 1999).

If Savigny himself does not engage Leibniz directly, he remains Leibniz's truest disciple. Like Leibniz, Savigny imagines himself a savior of law. Whereas Leibniz responds to the voluntarism of Hobbes that threatened to turn law into mere will, Savigny rises against the danger of positivist legal codification. Both Leibniz and Savigny also reject a return to naïve natural law ideas that imagine a common sense or a shared insight into the essence of rightful action. And most importantly, Savigny shares with Leibniz the belief that the only way to reenliven law is through science. The very *raison d'être* behind Savigny's call for a legal science is his recognition—shared with Leibniz—of the loss of the traditional idea of law's natural authority, an authority that was immediately recognized and accepted.

As deeply as Savigny might embrace Leibniz's project to save law with science, he rejects Leibniz's faith in a purely rational science of law. In place of Leibniz's scientific inquiry into a rational and divine will, Savigny calls for an historically oriented legal science that aims to make manifest “the common conviction of the *Volk*”³⁰ (i.e., the common conviction of the people). In doing so, however, Savigny introduces a radical shift in the relation between law and science. Against the belief of legal positivists that “all law comes to be from out of posited law,”³¹ Savigny argues that law has its origin not in the will of a legislator, but in the *Volksggeist*—the spirit of a people or a nation.

The idea that law originates in the *Volksggeist* names the core thought of Savigny's jurisprudence: the source of law is located in the historical spirit of a nation and not in the rationally deduced laws posited by a legislator. Whereas the concept of the state includes citizens united by abstractions like a social contract, the German word *Volk*—much like the English word “folk,” which shares the same root—identifies a group of men and women bound together as a people; the *Volk* is united by its inner relatedness, its spirit, and its common consciousness.³²

The argument that all positive law originates in the *Volksggeist*³³ means that law is not something that can be made or posited by human command. Law, Savigny argues, is not a product of reason or empirical research that can be discovered and set down in a code. It is not even a thing that is, but a living and changing consciousness that is forever in the state of becoming. Law, therefore, can be said, in an important sense, not to exist.

That law has no independent material existence is in fact what Savigny argues when he writes that “law has no existence in itself, but rather its essence is the life of man itself, seen from one particular side.”³⁴ This is a claim about the nature of

30. Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, in POLITIK UND NEUERE LEGISLATIONEN 219 [8] (Hidetake Akamatsu & Joachim Rückert eds., 2000).

31. *Id.* at 215, 218 [6].

32. See Christoph Mährlein, VOLKSGEIST UND RECHT 20 (2000).

33. “[U]rsprünglich alles positive Recht Volksrecht ist” 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 50 (Berlin, Veit und Comp. 1840).

34. “Das Recht nämlich hat kein Daseyn für sich, sein Wesen vielmehr ist das Leben der

law. Instead of existing in itself, “law has its existence in the common *Volksgeist*, thus in the general will [*Gesamtwillen*] that is, to that extent . . . also the will of each individual.”³⁵ Law, in other words, is indistinguishable from the legal consciousness of a people.

Since law does not exist separate from life, the task of Savigny’s legal scientist must be to scientifically discover the essential life and spirit of a people. Just as every triangle has definite principles from which all its other characteristics necessarily follow, “so in a similar way does every part of our law have such parts through which the rest is given: we can name these the guiding principles [of law].”³⁶ To discover these principles, “to feel them out,” as Savigny revealingly puts it, “belongs to the most difficult task of our science; more, it is what gives our work its scientific character.” Through the difficult but essential work of legal science it becomes possible “to discover the inner unity and the manner of relating of all juridical concepts and propositions.”³⁷

“History” is the name that Savigny gives to his approach to his sociolegal science. The word “history,” however, has led to a myriad of misunderstandings. Savigny does not mean by legal history the chronologically based study of past laws. The science of history is no mere collection of examples, but is, instead, “the only way to true knowledge of our own condition.”³⁸ The rigorous historical method, Savigny argues,

does not consist, as a few recent opponents have unfathomably maintained, in the exclusive valuation of Roman law: also not in demanding the unconditional preservation of the given [legal] material Its effort is rather to analyze the given material down to its roots so as to discover its organic principle, by which what is still living will automatically separate itself from what is dead and belongs only to history.³⁹

Since our condition is a part of history, the historical study of law requires a broad

Menschen selbst, von einer besondern Seite angesehen.” Savigny, *supra* note 30, at 230 [30].

35. SAVIGNY, *supra* note 33, at 24.

36. Savigny, *supra* note 30, at 226 [22].

37. “Diese heraus zu fühlen, und von ihnen ausgehend den innern Zusammenhang und die Art der Verwandtschaft aller juristischen Begriffe und Sätze zu erkennen, gehört eben zu den schwersten Aufgaben unsrer Wissenschaft, ja es ist eigentlich dasjenige, was unsrer Arbeit den wissenschaftlichen Charakter giebt.” *Id.*

38. 1 Friedrich Carl von Savigny, *Ueber den Zweck der Zeitschrift für geschichtliche Rechtswissenschaft*, in VERMISCHTE SCHRIFTEN 105, 111 (Berlin, Viet und Comp. 1850).

39. Der Charakter derselben [die Strenge historische Methode der Rechtswissenschaft] besteht nicht, wie einige neuere Gegner unbegreiflicherweise gesagt haben, in ausschließender Anpreisung des Römischen Rechts: auch nicht darin, daß sie die unbedingte Beybehaltung irgend eines gegebenen Stoffs verlangte, was sie vielmehr gerade verhüten will, wie sich dieses oben bey der Beurtheilung des Oesterreichischen Gesetzbuchs gezeigt hat. Ihr Bestreben geht vielmehr dahin, jeden gegebenen Stoff bis zu seiner Wurzel zu verfolgen, und so sein organisches Prinzip zu entdecken, wodurch sich von selbst das, was noch Leben hat, von demjenigen absondern muß, was schon abgestorben ist, und nur noch der Geschichte angehört. Savigny, *supra* note 30, at 276 [117–18].

social-scientific inquiry into the sociological, economic, historical, and psychological truth of a people. Savigny can rightly be said, therefore, to be the founder of sociolegal studies and the modern interest in law and society.

How, one might ask, can a sociolegal scientist hope to win knowledge of such an elusive legal object as the truth of a people? If law is invisible, undiscoverable through conventional means, and diffused through the entire historical existence of a nation, how can it possibly be the knowable object of a legal science?

Savigny's answer is that law can only be known through insight. It is only through "insight into the sources" of law that the unified essence of law can be known in its historical development.⁴⁰ As he writes:

The form, however, in which law lives in the common consciousness of the *Volk* is not that of the abstract rule, but the *living insight* into the legal institute in its organic unity, so that where the need arises to come to know the rule in its logical form, that form must first be formed through an artificial process from out of that *total insight*.⁴¹

The form in which scientific knowledge of law comes to be known is insight (*Anschauung*). The knowledge of law through science must aim not at a philosophical understanding of universal and rational legal principles, but rather at insight into the historically grounded legal principles active in the national consciousness.⁴² Savigny's legal history seeks to find "the living unity that binds the present to the past."⁴³ Law, for Savigny, is seen in the scientifically generated insightful vision into the formal historical core of a nation.

The importance of insight for the scientific knowing of law helps explain one of the paradoxes of Savigny's historical approach to law—namely, the minor role that actual historical facts play in Savigny's legal science. In spite of Savigny's name for his historical legal science, the central role he assigns to the *insightful* understanding of legal science leads to the conclusion that legal science depends more on insight than historical research. Legal science, in other words, is not a way of knowing an historically existing *Volksgesist*. Instead, legal science comes to be a second and complementary source of the existing law itself. Law, as a result, increasingly comes to be a product of science.

40. 5 Friedrich Carl von Savigny, *Recension. N. Th. v. Gömmer, über Gesetzgebung und Rechtswissenschaft in unserer Zeit*, in VERMISCHTE SCHRIFTEN 115, 140 (Berlin, Viet und Comp. 1850).

41. Die Gestalt aber, in welcher das Recht in dem gemeinsamen Bewußtseyn des Volks lebt, ist nicht die der abstracten Regel, sondern die lebendige Anschauung der Rechtsinstitute in ihrem organischen Zusammenhang, so daß, wo das Bedürfniß entsteht, sich der Regel in ihrer logischen Form bewußt zu werden, diese erst durch einen künstlichen Prozeß aus jener Totalanschauung gebildet werden muß.

SAVIGNY *supra* note 33, at 16 (emphasis added).

42. "Die besonnene Thätigkeit jedes Zeitalters aber müsse darauf gerichtet werden, diesen mit innerer Notwendigkeit gegebenen Stoff zu durchschauen, zu verjüngen und frisch zu erhalten." Savigny, *supra* note 38, at 113.

43. SAVIGNY, *supra* note 33, at xv.

Savigny's legal science does not just reflect the law living in the *Volksrecht*—the law of the *Volk*, or the law as it exists among people—but gradually comes to replace it. This legal science conceives in concepts and formulas the law unified in the *Volksgeist*; these easily knowable and applicable concepts and formulas herald the rise of conceptual jurisprudence (*Begriffsjurisprudenz*) that eventually comes to supersede the original material content of the *Volksgeist*. As Savigny writes:

A new organic life originates through the scientific formalization of the given stuff, a form that strives to uncover and complete its innermost unity, and which itself constructively works back upon the matter, so that a new way of creating laws emerges irresistibly from out of science as such.⁴⁴

The scientific creation of law is both an organ of the *Volksgeist* and a new, organic, and living form of the law itself—one with its own course of development and evolution. Science, therefore, joins the *Volksgeist* as one of the two original sources of law. Thus, the scientific activity of the jurist has a transformative effect on the law.

Against the reigning vision of the age that subordinates law to posited laws, Savigny counters that law is originally found in the *Volksgeist* and later transformed into scientific law: “[T]his special way of producing law [that emerges in advanced societies],” Savigny writes, “[is what] I call *scientific law*.”⁴⁵

Savigny calls the “scientific life of law” law’s “*technical element*.” In doing so, he distinguishes the scientific nature of law—that is, of *Recht*—from its “*political element*,” by which he clearly recalls the classic conception of politics as expressed in the Greek *polis*.⁴⁶ While the political element of law originates in the event of a multitude of people uniting around a common conviction and common vision of the good, the technical element of law originates in the distinctiveness of the scientific method. Whereas law, viewed from the perspective of its political element, is nothing other than the common consciousness of the *Volk*, the technical side of law is expressed in self-sufficient general rules.

Savigny’s hope, and his belief, is that the technical element active in scientific law will remain connected to and inspired by the spirit of the *Volk*. The aim of legal science is to develop an artificial and technical form for the positive expression of law that is still shot through with life-inspired insight. Ideally, legal science would marry the technical and political sides of law into a harmonious whole. But realistically, the scientific approach is fraught with dangers. Its philosophical and technical qualities could lead to a stale and formalist law of

44. “Indessen entsteht durch die dem Stoff gegeben wissenschaftliche Form, welche seine inwohnende Einheit zu enthüllen und zu vollenden strebt, ein neues organisches Leben, welches bildend auf den Stoff selbst zurück wirkt, so daß auch aus der Wissenschaft als solcher eine neue Art der Rechtserzeugung unaufhaltsam hervorgeht.” *Id.* at 46–47.

45. *Id.* at 49 (emphasis in original).

46. Savigny, *supra* note 30, at 221 [12].

abstract rules, where nuances of specific cases could be lost and individual human concerns would be overridden by rational concepts. If legal science becomes too powerful, it could, like positive law, forget and neglect the original source of law in the *Volksgeist*.⁴⁷

It is helpful to consider Savigny's favorite example of insightful legal science. The value of Roman law, he argues, lies not in the laws of Rome themselves, nor even in the principles used by Roman jurists, but in the method through which the Romans combined a mastery of legal principles with an unparalleled insight into the historical life of the Roman *Volk*.⁴⁸ Above all else, the Roman jurists excelled at the melding of legal knowledge with insight into the historical unity of the people. "What made Rome great," Savigny writes, "[was the] active, living political sense with which this people was always ready to rejuvenate its constitution in such a way that the new served merely the development of the old."⁴⁹ The Romans saw the potential pitfalls of legal science ("Omnis definitio in jure civili periculosa est") and that all efforts to define law and to set it into technical rules risk the gravest danger—neglecting to represent the *Volksgeist*. Yet what distinguished these jurists is that they saw the actual case and the living dispute even when they thought and decided according to abstract principles. Blessed with a vibrant and animated insight into the living spirit of Rome, they developed a precise legal language so they could move "with unmistakable mastery . . . from universal to particular and from particular to universal."⁵⁰ The Romans, in other words, succeeded in developing an artificial science of law "without sacrificing insightfulness and life."⁵¹

In the spirit of Roman jurists, Savigny argues that legal science must connect law's technical side with its political and spiritual unity. Only insofar as scientific law grounds its technical mastery in the depth of its political insight can law find its origin outside the arbitrary will of a sovereign. The law, in other words, is to be at once free and necessary.

For Savigny, as for Leibniz, the scientific approach to law is both a symptom of law's divorce from an original insight into justice and a proffered cure. Just as Leibniz's turn to science as a way of knowing law emerges from his sense that insight can no longer provide a certain knowing of a rational law, so too does Savigny embrace legal science only once law has ceased to be knowable through a common insight into the culture and tradition of a people. Science, Savigny imagines, is a cure for the loss of insight as the source of law.

47. "Ohnehin liegt in der einseitigen Beschäftigung mit einem gegebenen positiven Rechte die Gefahr, von dem bloßen Buchstaben überwältigt zu werden . . ." *Id.* at 227 [24].

48. *Id.* at 230–31 [29–31].

49. *Id.* at 231 [31–32].

50. "In jedem Grundsatz sehen sie zugleich einen Fall der Anwendung, in der Leichtigkeit, womit sie so vom allgemeinen zum besondern und vom besondern zum allgemeinen übergehen, ist ihre Meisterschaft unverkennbar." *Id.* at 231 [30–31].

51. *Id.* at 231 [31] ("ohne die Anschaulichkeit und Lebendigkeit einzubüßen").

IV. JHERING

Savigny died in 1861. Upon hearing of the death of the man “in whom, as in no other, the history of jurisprudence has been embodied since the beginning of our century,” Rudolf von Jhering—one of Savigny’s greatest disciples—sat down to write his obituary.⁵² As befits a man of science and ideas, Jhering moved quickly from eulogy to engagement. He compared Savigny’s towering stature in jurisprudence to Goethe’s in letters; then, after proclaiming that Savigny’s unmatched brilliance would continue to shine brightly for centuries, Jhering attacked the very core of Savigny’s historical legal science.

The heart of Savigny’s teaching, Jhering writes, is that “laws are not *made*, but rather *become*, that they come forth like language and custom from the innermost life and thinking of a nation unmediated by calculation and consciousness.”⁵³ In setting the essence of law in the invisible activity of history, Savigny, Jhering insists, concedes too much to the past and underestimates “the worth and the significance of human activity and human force.”⁵⁴ To elevate history to the highest source of law is to devalue “the role that free resolve, reflection, and intention play in history” and in law.⁵⁵ Savigny’s fatal error is that he imagines law to “become” without the active participation of human force. Against Savigny, Jhering advances his own thesis that the original essence of law is not an historical becoming but a human act.

Jhering’s insistence that law is a product of human activity challenges Savigny’s attempt to meld historical and technical legal science under the ambiguous heading of historical insight. Just as Savigny denied the accessibility and reality of Leibniz’s situating a truer source of law in divine reason, so now does Jhering deride as a “flight from historical fact” Savigny’s faith in a truer source of law in history.⁵⁶ For Jhering, Savigny’s conviction that historical science can uncover the invisible laws behind the creation of law partakes of the basic natural law fantasy that the true scientist must expose. By invoking science, Jhering makes clear that his criticism of Savigny’s thesis is anything but an abandonment of the scientific approach to law. On the contrary, Jhering seeks to replace Savigny’s “lazy” science with his own rigorous and courageous science that stays true to the facts of life.⁵⁷

52. Rudolf von Jhering, *Friedrich Karl Von Savigny*, in 5 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 354, 355 (C.F. von Gerber & R. Jhering eds., 1861).

53. *Id.* at 364–65 (“daß die Rechte nicht gemacht *wären*, sondern *würden*, daß sie hervorgingen, wie Sprache und Sitte, aus dem Innersten des Volks-lebens und –Denkens, ohne das Medium der Berechnung und des Bewußtseins”).

54. *Id.* at 368–69 (“den Werth und die Bedeutung der menschlichen Thatkraft, die Rolle, die der freie Entschluß, die Reflexion und Absicht in der Geschichte spielen, ebenso unterschätzen”).

55. *Id.*

56. *Id.* at 369.

57. RUDOLPH VON JHERING, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS 13

The science of law, Jhering argues, must come clean with the facts and admit that law is a creation of man. That man makes law, however, does not mean that Jhering endorses a brute positivism that subordinates law to arbitrary will. On the contrary, Jhering curses simple nonscientific positivism as the “deadly enemy of jurisprudence” against which jurisprudence must constantly defend itself.⁵⁸ Beyond the mere facts of willful legislation, the science of law must see through the apparent willfulness of human action and thereby raise positive laws to a higher idea of law. Above the mere formality of judicial logic, Jhering continues to believe, there is a scientifically knowable “substantial idea of justice and ethics” that must be actualized in particular legal institutes and rules.⁵⁹ He insists, however, that the substance of justice is contained in humanly posited ends and interests. Since law is first a product of human action, its higher second source cannot exist outside of the world made by man; the “justice” of law is a creation of man that follows the ultimate law of all social development: the law of ends.⁶⁰ “The end”—as Jhering writes in the epigraph to his most famous book, *The End in Law* (or, alternatively, *Law as a Means to an End*)—“is the creator of the entirety of law.”⁶¹ That law is essentially a means to an end, Jhering asserts, is the “motto” governing his legal thought.

Jhering’s focus on ends is, on one level, reminiscent of the scientific drive to justify law through jurisprudence that has its most forceful beginning in Leibniz’s legal thinking. It should not be surprising, therefore, that Jhering names Leibniz as a precursor to his own project and that the opening sentence of *Der Zweck im Recht* announces Leibniz’s principle of sufficient reason as the guiding idea of Jhering’s legal thinking.⁶² For Jhering, as for Leibniz and Savigny, the principle of law is that law must have a reason—what Jhering renames an “end.”

On another level, however, Jhering’s scientific grounding of law differs fundamentally from the legal science that came before him. Whereas Savigny and Leibniz imagine that law has its organizing principle in a transcendent unity that

(Leipzig, Breitkopf & Hartel und Duncker & Humblot 1894).

58. RUDOLF VON JHERING, IST DIE JURISPRUDENZ EINE WISSENSCHAFT? 55, 52–58 (Okko Behrends ed., 1998).

59. See the footnote Jhering adds to his *Geist des Römischen Rechts* in 1883:

[U]ber dem bloß Formalen der juristischen Logik steht als Höheres die substantielle Idee der Gerechtigkeit und Sittlichkeit, und eine Vertiefung in sie, d.h. wie sie in den einzelnen Rechtsinstituten und Rechtssätzen zum Ausdruck und zur Verwirklichung gelangt, ist nach meinem Dafürhalten die schönste und erhabenste Aufgabe, welche die Wissenschaft sich stellen kann. Mein Werk: ‘Der Zweck im Recht’ ist der Lösung dieser Aufgabe gewidmet.

RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG 361 n.506a (Scientia Verlag 6th ed. 1993).

60. JHERING, *supra* note 58, at 90–92.

61. “Motto: Der Zweck ist der Schöpfer des ganzen Rechts.” 1 RUDOLF VON JHERING, DER ZWECK IM RECHT, at iii (Leipzig, Breitkopf & Hartel 3d rev. ed. 1893).

62. The first sentence reads: “Nach der Lehre vom zureichenden Grunde geschieht nichts in der Welt von selbst (*causa sui*), sondern alles, was geschieht, d.h. jede Veränderung in der Sinnenwelt ist die Folge einer vorangegangenen andern, ohne die sie selber nicht eingetreten würde.” *Id.* at 3.

connects the individual to a more-than-human whole, Jhering answers emphatically: “NO! My friends, the truth does not lie outside of the world, she lies in the world, and that is the great advance jurisprudence has made in our present century.”⁶³ Jhering gives up on the dream of a transcendent law. His innovation is to argue that legal science, in the name of science, must abandon the search for an unknowable ethical ground of justice. The attempt to justify law according to ends, Jhering argues, is a political rather than a metaphysical project. The search for ends is destined to lead not to a single rational or historical truth, but to the conclusion that all ends in law are interested ends.⁶⁴

That law must be justified by extralegal and scientifically knowable ends means, for Jhering, that the science of law is divided into two fully separate yet dependent sciences. On the one hand, the science of law is a technical and formal science of legal rules. The technical science of law employs logical rules of analysis and synthesis to secure the clearest and most objective interpretation of legal rules. On the other hand, the science of law must address the science of extralegal ends; it depends, therefore, upon the study of human ends undertaken by philosophers, sociologists, anthropologists, economists, psychologists, and other social scientists. Lawyers must be aware of these ends if law is to serve them well. The two sciences of law relate in that the technical science of law serves the normative science of ends. What the science of law (as opposed to the science of ends) requires is, above all, a technical legal system that makes law serviceable to the social, political, and economic ends of society. Law—the technical science of law—becomes a means by which to administer the justified ends set by the scientifically driven sciences of legislation.

Jhering’s subordination of a merely technical law to the social and political ends or reasons of law is at once the culmination of Leibniz’s original insight that positive law must be subordinated to reasons and the unintended betrayal of Leibniz and Savigny’s dream that science might preserve the sacrosanct bond between law and justice. By subordinating law to the ends of the various sociolegal sciences, modern law replaces law’s traditional concern with justice with the pursuit of diverse social and economic ends: efficiency sought by economics; order sought by sociology; normativity sought by philosophy; and security sought by politics. Once law comes to serve social, economic, and political ends, law—and with it justice—becomes subservient to its diverse justifications. Law, thus, becomes a means to whatever justified ends it must serve. Law’s need for justifications, therefore, means that law loses its traditional connection with justice.

63. JHERING, *supra* note 58, at 68.

64. Clearly, Jhering’s scientific overcoming of truth illustrates the “Wille zur Wahrheit” that Nietzsche describes as the self-overcoming of the will to truth, which is the last stage in the unfolding of nihilism. See 4 FRIEDRICH NIETZSCHE, *Also sprach Zarathustra II*, in SÄMTLICHE WERKE: KRITISCHE STUDIENAUSGABE 103, 146–49 (Giorgio Colli & Mazzino Montinari eds., 1980).

V. CONCLUSION

The rise of German legal science that seeks to justify law—from its origins with Leibniz to its flowering with the legal-historical school of Savigny and Jhering in nineteenth-century Germany—is the precursor of almost all of twenty- and twenty-first-century Western legal thought. For John Austin, the claim that law is positive law flows from a scientific utilitarianism, according to which the social need for order demands that laws be clear, verifiable, and knowable. Later positivists, like H.L.A. Hart, disagree, arguing that Austin’s command theory of law may give rise to obedience, but not to obligation.⁶⁵ Instead, Hart argues that law must seek to justify its authority by appealing to the social fact of the law’s legitimacy.⁶⁶ Similarly, Jürgen Habermas argues that modern law draws its “legitimacy from a legislative procedure based for its part on the principle of popular sovereignty.”⁶⁷ For Habermas, as for Hart, the justification of modern law depends on legitimacy, whether that is found in “habits of obedience,” as Hart holds, or majoritarian rule, *pave* Habermas. What all modern theories of law share is the felt need to offer scientifically grounded justifications for laws that have lost their natural and insightful authority.

That law is justified does not mean that law is just. The science of economics can justify a factory paying for the right to pollute a neighbor’s stream as efficient and therefore legal. The science of politics can justify torturing suspected terrorists to protect the security of the nation. But justifications, unlike justice, are subject to argument. When law ceases to be just and must instead be justified, then law, as Friedrich Nietzsche writes, becomes nothing but a “negotiated settlement” reached by those with the power to legislate. Within the field of negotiated settlement, law has no limits, since “everything has its price; *all* can be paid for.”⁶⁸ 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 unconditioned self-assertion of what Nietzsche terms “will to power.”⁶⁹

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’s ambitious but futile attempt to save a decaying Greek civilization by a new reliance on reason. However, just as Socratic reasoning

65. See HART, *supra* note 3, at 20, 79–88.

66. See *id.* at 97–107.

67. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 83 (William Rehg trans., The MIT Press 1996) (1992).

68. 5 FRIEDRICH NIETZSCHE, *Zur Genealogie der Moral*, in SÄMTLICHE WERKE: KRITISCHE STUDIENAUSGABE 245, 306 (Giorgio Colli & Mazzino Montinari eds., 1980).

69. See Philippe Nonet, *Time and Law*, 8 THEORETICAL INQ. 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. 1131 (2003); Philippe Nonet, *What is Positive Law?*, 100 YALE L.J. 667 (1990).

proved to be another kind of sickness that invariably served to undermine further the very belief in truth it was meant to support,⁷⁰ 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 Leibniz's rational jurisprudence, Savigny's historical science, Jhering's social and economic sciences, Austin's utilitarianism, Hart's sociological jurisprudence, or Habermas's normative jurisprudence—has succeeded in establishing itself as a true science of justice. For some, the failure of science to refund 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 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 hope that science might reinvigorate law's connection to justice has failed. Instead, science has transformed law into a technical means for governments to pursue political, social, and economic ends.

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 about 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

70. 6 FRIEDRICH NIETZSCHE, *Götzen-Dämmerung*, in SÄMTLICHE WERKE: KRITISCHE STUDIENAUSGABE 55, 72–73 (Giorgio Colli & Mazzino Montinari eds., 1980).

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.

Might it be, however, that consciousness of the divorce of law from justice can open a path to redemption? To bring into question the transformation of law into a product of science 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-forth”⁷¹—is the question of our age.

71. PLATO, *Phaedrus*, in EUTHYPHRO APOLOGY CRITO PHAEDO PHAEDRUS 405, 484–85 [250 D–E] (G.P. Gould ed., Harold North Fowler trans., 1914).