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Philip Allott
University of Cambridge

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The True Function of Law in the International Community

PHILIP ALLOTT*

My topic is the future of humanity—no less—and the role of law in the future of humanity. I am especially grateful that, through Mr. Snyder's vision and generosity, I am able to speak about these matters in the United States of America. I want to suggest three reasons why it is important to speak about the future of humanity in the United States, and to speak about it as frankly and as constructively as possible.

(1) The first reason is that the people of the United States bear a very heavy responsibility for the future of humanity—an imperial responsibility. It is the same kind of responsibility that the British exercised, for better and for worse, in the nineteenth century; that Rome exercised in the last century B.C. and the first and fourth centuries A.D.; that Greece exercised at the time of Alexander, in the fourth century B.C. It is a responsibility based on the sheer facts of American military and economic and cultural power, and the extent of American economic and political and military investment in the rest of the world—that is to say, American dependence and vulnerability in relation to the rest of the world.

(2) The second reason is that an important section of America's ruling elites believes, at least when they are in their optimistic mode, that the spread of democracy and capitalism to most countries in the world will produce an orderly world, by a sort of natural process of self-ordering and self-improvement, without any special effort of imagination or will.

I call this the Consoling Myth. Or one could call it the Kantian Myth. Immanuel Kant, the great German philosopher of the late eighteenth century, thought that this is how Europe would sort itself out.¹ Two World Wars later,

* Fellow of Trinity College and Reader in International Public Law, University of Cambridge. Dr. Allott was formerly a Legal Counsellor in the British Foreign and Commonwealth Office. He is the author of *EUNOMIA: NEW ORDER FOR A NEW WORLD* (1990). The present text is a revised version of his Earl Synder Lecture in International Law delivered at the Indiana University School of Law on September 10, 1997.

1. Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose and Perpetual Peace: A Philosophical Sketch*, in *KANT'S POLITICAL WRITINGS*, 41, 93 (H.B. Nisbet trans., 1970). There is a neo-Kantian school of academic International Relations specialists who are seeking to reinforce the faith of the ruling elites in the Consoling Myth. See John MacMillan, *A Kantian Protest Against the Peculiar Discourse of Interliberal State Peace*, 24 *MILLENNIUM J. INT'L STUD.* 549-62 (1995) and John MacMillan, *Democracies Don't Fight: A Case of the Wrong Research Agenda*, 22 *REV. INT'L STUD.* 275 (1996).

having tried, on four occasions, various forms of areopagitic league of nations, as envisaged by Kant, and having in the meantime also experienced chronic episodes of genocide, nationalism, and constitutional disorder, we in Europe are not so benignly optimistic any longer.

The Consoling Myth is not at all consoling. It is a dangerous myth, based on profound misunderstandings of the nature of democracy and the nature of capitalism and, incidentally, a misunderstanding of the nature of law. It is also based on a serious underestimate of the capacity for disorder in the rest of the human world and a serious underestimate of the cultural complexity of the rest of the world, a complexity which is, at one and the same time, a source of the strength-in-diversity of the human species and an obstacle in the way of simple solutions to problems of global social development.

(3) The third reason for speaking about these matters in the United States is more complex. The United States is a particularly interesting phenomenon of world history. It is itself a law-state. It is itself a world-state. The transformation of the American colonies into a new kind of society at the end of the eighteenth century was achieved through law. The reconstituting of the colonies through law was a product of a thousand years of British constitutional history. One may be permitted occasionally to say that the United States of America is Britain's Greatest Achievement. (We British have to console ourselves somehow in our new, more modest circumstances.)

We in Britain had used law to make some sort of integrated society out of a motley collection of tiresome and aggressive peoples. In British history and the British psyche, law has played a very similar role to that of law in the history and psyche of Rome, not only republican Rome, but also imperial Rome. For the British, as for the Romans, law has been a sort of substitute for religion. Like the Romans, we used law to make an empire, to hold together a ragbag of peoples, some with ancient cultures of their own, in some sort of constitutional package.

The United States was made as a law-state, a *Rechtstaat*. But, at some time in the nineteenth century, it began to become a world-state, a *Weltstaat*.² The United States is a microcosm of the human world, of the actual human world, and of a potential human world.

Instead of imperializing externally, in the manner of Rome or Britain, the United States imperialized internally. With amazing aggressive energy you took over the rest of southern North America, and then you began to people the vast

2. *Rechtstaat* and *Weltstaat* are intended as neologisms, differentiated from *Rechtsstaat* and *Weltstadt*.

new spaces with people brought in from outside—a sort of internal American empire, composed of people from every part of the world, living together in the U.S. law-state. One Nation under Law, as Thomas Jefferson would, perhaps, have preferred to call it.³

In my work, I class the United States as a *generic* nation, as opposed to a *genetic* nation.⁴ Your collective self-identity is based on common allegiance to a constitutional system and to a powerful idea of an American way of life, rather than, as in the case of genetic nations, on ethnic homogeneity or a collective charismatic vision of a national past. The United States manages to combine an oppressive social uniformity with a celebration of subcultural diversity. That is an ingenious achievement which is all your own work.

So it is in a rather more profound way that the United States will have a determining influence on the future of humanity—not simply through your mastery of the social forms known as democracy and capitalism, not merely through your imperial-scale power, and certainly not through your perennially unsatisfactory long-term diplomacy—but especially through your remarkable experience as a law-state and a world-state, a cosmopolitan polis, a universal society-under-law. It is tempting to call this the Manifest Destiny of the United States, if that expression would not now be politically impolitic. So we might call it the Historic Destiny of the United States—to inspire and encourage the true constitutionalizing of all humanity.

These are vast and intensely controversial matters. What I want to do is to focus in on one portion of this great canvas—the role of law in the making of the human future: the possibility of a world law-society, the possibility of One Humanity under Law.

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To talk about law is to talk about the eighth Wonder of the World. One would not normally accuse lawyers of excessive modesty. But it is a strange

3. Jefferson regarded the disestablishment of the Anglican Church in Virginia (eventually achieved by legislation in 1786) as one of his greatest achievements. At least as revealed in his published correspondence, his own religious sensibility was characteristic of an eighteenth-century rationalist, not unlike Voltaire's—hovering between deism, epicureanism, and unitarianism. His attitude toward law was also characteristically rationalistic—respecting the Anglo-Saxon origins of the English common law inherited by the American colonies, acknowledging in a mild Lockean way some sort of higher natural law, deploring the tendency to sacralize “the Constitution” (which would be a tyranny of the dead over the living), opposing the temptation of the judicial branch to regard itself as a quasi-sovereign, accepting legislated law as the expression of the will of the people, but foreseeing the possibility of a tyranny of the legislature and, eventually, of the executive.

4. Philip Allott, *The Nation as Mind Politic*, 24 J. INT'L. L. & POL. 1361 (1992).

fact that lawyers take so little pride in the sheer wonder of the law. The extraordinary progress of the human species would not have been possible without law. We have created a vast law-world in which collective human effort is organized through law, a world of unlimited possibilities of complexity and sophistication. An observer looking at our planet from afar would see all the signs of social activity, from settled agriculture to shopping malls, and, if the observer had at least the human level of intelligence, would eventually infer the existence of law, as we infer the existence of law abidingness in the natural world.

This is the much scorned point that Montesquieu makes in the first sentences of the *Spirit of the Laws* (1748), that book which is as peculiar as it has been influential, including in the United States. His critics have always said that Montesquieu makes a simple category mistake in confusing different sorts of law abidingness—natural and human—confusing what the Greeks separated as physis, nomos, taxis, and dike.⁵ But what the Greeks saw, and Montesquieu

5. See ERNEST BARKER, *GREEK POLITICAL THEORY: PLATO AND HIS PREDECESSORS*, chs. 3, 4 (1918) (introducing ancient Greek deconstruction of ideas of law); JOHN PLAMENATZ, *MAN AND SOCIETY* 260-271 (1963) (critiquing Montesquieu's discussion of law, including the notorious first sentence). Montesquieu's six chapters on law are "the worst in the book." They are "snares and delusions. They lead to nothing." In discussing Montesquieu's views on the appropriate size of a republic, Hamilton (disagreeing with him in the matter) refers to him as "that great man." *THE FEDERALIST* NO. 9 (Alexander Hamilton). In discussing Montesquieu's views on the separation of powers, Madison refers to the "celebrated Montesquieu" as "the oracle who is always consulted and cited on this subject." *THE FEDERALIST* NO. 47 (James Madison). Although there was the precedent of Cromwell's Instrument of Government in 1653, not to speak of a long tradition of talk about "the balance" of the English Constitution, it is surely Montesquieu's famous eleventh chapter which is most directly reflected in the most important structural features of the Constitution of the United States.

Jefferson seems rather to have been influenced directly by John Locke. Responding to Richard Lee's assertion that Jefferson's draft of the Declaration of Independence was "copied from Locke's treatise on Government," Jefferson said, "I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas and to offer no sentiment which had ever been expressed before." Letter from Thomas Jefferson to James Madison (Aug. 30, 1823), in *THE PAPERS OF THOMAS JEFFERSON* (Julian P. Boyd ed., 1950). In terms reminiscent of Voltaire (at least at one stage of Voltaire's intellectual development), Jefferson said that he considered Bacon, Locke, and Newton as "the three greatest men that have ever lived, without exception, and as having laid the foundation of those superstructures which have been raised in the Physical and Moral Sciences." Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789) in *THOMAS JEFFERSON: WRITINGS* 939-40 (1984). Jefferson was more reserved in his opinion of Montesquieu. "I had, with the world, deemed Montesquieu's work of much merit; but saw in it, with every thinking man, so much of paradox, of false principle and misapplied fact, as to render its value equivocal on the whole." Letter from Thomas Jefferson to A. L. C. Destutt de Tracy (Jan. 26, 1811), in *THOMAS JEFFERSON: WRITINGS*, *supra* note 5, at 1242. Later, Jefferson, after saying in much-quoted words that the Declaration was designed to "place before mankind the common sense of the subject," he said:

Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind. . . . All its authority rests then on the harmonizing sentiments of the day, whether

saw, and I agree with him, is that law abidingness is a common condition of all existence. It is simply that human beings have the interesting characteristic that we have consciousness, which means that we can be aware of our law abidingness, and that we can use it purposively for the unlimited further self-evolution of the human species.

If I were to put the title of this lecture in the form of a question—"What is the true function of law in the international community?"—then my answer would be very simple and very controversial.

The true function of law in the international community is precisely the same as the true function of law in any human society.

This would be controversial in an all too familiar sense. Most people, including most international lawyers, albeit *in petto*, believe that international law is some special, anomalous sort of law, that it is not "law properly so-called", as John Austin said in his lectures as the first Professor of Jurisprudence in the University of London.⁶ It is law only in some rhetorical or metaphorical or analogical sense. And the reason people give for this view is that international society lacks the usual requirements of a legal system, especially a sovereign to legislate, to execute, to adjudicate.

It is, of course, a European obsession, this search for a legal sovereign. In the United States you dispensed with a sovereign, not only in the sense of poor misguided George III, but also in the institutional sense. Of the four kinds of sovereign known to European systems—a person, the nation, the people, an institution (say, Parliament)—you chose to have none of them. Internal sovereignty is not a necessary part of the theoretical explanation of your constitution, as it is in European, at least in continental European, constitutions.⁷

But there is another, more interesting, sense in which my assertion about the true function of international law is controversial. The problem is that no one has any clear or settled idea about the true nature and function of law in

expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney &c.

Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in THOMAS JEFFERSON: WRITINGS, *supra* note 5, at 1500-01.

6. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 141-42, 200-01 (1832). At the end of the twentieth century, the philosophically sensitive would find it difficult to use the word "properly" in such a way, after we have, in the meantime, been subjected to marxism, legal anthropology, pragmatism, logical positivism, linguistics, semiotics, analytical philosophy, post-modernism, and deconstructionism.

7. See Philip Allott, *The Courts and Parliament—Who Whom?*, 30 CAMBRIDGE L.J. 79-117 (1979) (discussing the supposed sovereignty of the British parliament).

general, least of all lawyers. It is an extraordinary fact that most lawyers leave law school without any clear idea of the nature and function of law. If they have studied jurisprudence or legal theory, they may leave law school not in ignorance but in irremediable confusion. It is also an extraordinary fact that theoretical sociologists can offer hypothetical explanations of society in which law is not the central feature of the explanation.

For the lawyer, law is what law does. It is the most obvious of social phenomena, the most unavoidable, the most unquestionable. Who needs an explanation? This is another Consoling Myth, especially favored by self-satisfied lawyers in the Anglo-American tradition. The fact is that revolutions have been made, and much blood spilt, in the name of social theories and, hence, of legal theories. Law is concerned with the ultimate distribution of social power, and the justification and enforcement of that distribution. And when you begin to extrapolate the law-phenomenon from a national context to the global context, into a situation of great cultural diversity and great social inequality, it matters a very great deal what explanation of law you have in mind.

The lawyer who does study legal theory finds that there are certainly many interesting explanations of the nature and function of law. And that is precisely the problem. There are far too many such explanations, and they are all incompatible with each other. Since ancient Greece, not to mention ancient China or ancient India, there have been countless competing and conflicting explanations of law.

I want to suggest that, if one tries to make sense of the overwhelming profusion and confusion of philosophies of law, there are five distinct explanatory horizons of the law-phenomenon.⁸

(1) You can explain law as a self-sufficient, self-explaining system. Law is its own realm of significance. This is known as legal positivism or command theory or pure theory. A legal system contains its own grounds of validity, its own rationality. The founding parent is Thomas Hobbes, and the high-priests have been John Austin and Hans Kelsen.

(2) You can take a realist or pragmatist view, and explain law as a particular subordinate social system, processing the values of society into particular forms. *Law is a value-processing system.* Law is a specific social

8. What is proposed here is a *field-theory* classification of legal philosophies, related to their respective fields of theoretical explanation, as opposed to the many substantive classifications, such as those contained in ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW ch. 2 (1922).

system analogous, say, to the economic system of society, or the educational system. This is very much the average Anglo-American view. The founding-parent is Aristotle, and the high-priests include Machiavelli, Locke, Rousseau, and Bentham. In academic terms, it takes the form of Legal Realism, of the American and Scandinavian varieties. And it includes modern American liberal-democratic theory—Fuller, Rawls, Nozick, and Dworkin.

(3) A third horizon goes still wider in its field of vision and takes in the whole of the given society. *Law and society are coterminous*. You cannot explain law without explaining society as a whole. Law is not just a closed system of significance, and it is not just a subordinate social system. It is an integral part of the structure of society, including the economic structure of society, expressing not only the will of the people but the whole ethos of the society, the spirit of the society, its past, its *Geist*. The founding parent of this approach is Montesquieu, but it is haunted inevitably by the capacious mind of Aristotle. Its presiding genius is Karl Marx. But it includes also such diversely interesting people as Edmund Burke, Hegel, the German Historical School, and Max Weber.

(4) The fourth horizon of law goes beyond the confines of a particular society, into an order which transcends all societies. *Law is the social actualizing of reason*. Law is the natural self-ordering of human beings, applying reason to reconcile the crude facts of human existence with some ideal of human flourishing. This is the Natural Law tradition. It was an important part of the Roman idealizing of law. And it played an important part in the history of international law. Its founding parents are the Stoics and Cicero, inspired by the spirits of Plato and Aristotle. Its presiding minds are Aquinas and Grotius and Wolff and, in his own idiosyncratic way, Hegel.

(5) The fifth horizon goes beyond society to meet up finally with God. *Law is a participation in universal order*. In the Western philosophical tradition, the founding parent of Idealism is Plato. But, for countless religions, including several of the world-religions, law can only be explained in the context of an explanation of all existence, and the orderliness of all existence.

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A first effect of separating out the possible horizons of explanation of legal philosophy is, indeed, in relation to the problem of the nature and function of international law. It reminds us that the nature and function of law itself is so much a subject of controversy that there can be no simple answer to the question: is international law law?

A second effect is what we may call the Russell-Wittgenstein effect. We can begin to see that the notorious confusions and endless debates among legal philosophers could be regarded as based on category mistakes or a confusion between distinct realms of discourse. You cannot expect a Natural lawyer to have much to say to a Realist or a Positivist, and vice versa. You cannot expect a Marxist, who challenges society's hegemony over thought processes including value-forming processes, to have much to say to an American Liberal Pragmatist, who is content to interpret and reinterpret a given society's values. Wittgenstein said that his aim in philosophy was "to show the fly the way out of the fly-bottle."⁹ The challenge is to help philosophers to stop running around each other in small circles of incomprehension and contempt by showing that they are talking at different levels of explanation in different realms of discourse.

But it is a third effect of the five-horizon approach to legal philosophy which is, for me, the most significant. My own work is designed to demonstrate the rather extreme proposition that the wonder of law is precisely that law is an integrating of *all five* levels. The wonder of law is that it links everyday human behavior to the order of the universe through the self-ordering of society.

Law *is* a closed system of rationality, a thought-world unto itself. Law *is* a systematic actualizing of a given society's values. Law *is* an expression of the totality of a society's existence. The law of a given society *is* in dialectical tension with ideas which transcend the given society, ideas of morality and justice and rationality. And law *is* inevitably connected with our ideas about the ultimate things—our ultimate ideas about the natural world, and our ultimate ideas about humanity's relationship to the supernatural and the spiritual.

This is the wonder of the law-phenomenon. Law achieves this wonderful feat of dialectical integration in an amazingly efficient way, day after day, year in, year out, like some marvelously engineered machine. And, needless to say, a main theme of mine today is to say that it is our job to make sure that, hereafter, international law becomes able to do all these things for all humanity, for the society of all societies.

But first we have to try to answer the question: how *does* law achieve all this? What is the secret of its amazing society-making capacity? To answer

9. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 103 (G. Anscombe trans., 1974). "Philosophy is a battle against the bewitchment of our intelligence by means of language." *Id.* at 47. *See also* BERTRAND RUSSELL, *AN INQUIRY INTO MEANING AND TRUTH* ch. 4 (1940) (discussing the "hierarchy of language" and "theory of types" centered on the idea that grounds of truth at one level of discourse are inapplicable at another).

this question we have to move the focus in one step closer and say how law works. It is another extraordinary fact that law students leave law school with very little idea of how law works. They have learned the procedures, the tricks of the trade, some legal principles, perhaps, the names of famous cases, where to look to find the law. But, normally, they have not even the most rudimentary idea of how law works, mechanically, so to speak, of what is under the hood of the legal motor car.

What law does is to allow a society to choose its future. Law is made in the past, to be applied in the present, in order to make society take a particular form in the future. Law carries a society's idea of its own future from the past into the future. Law carries society's structures and systems from the past into the future. Law makes possible society's possible futures.

For example, a law on environmental management. Such a law conditions the behavior of those who may be planning a new industrial project. It conditions the behavior of those who want to react to that proposal. It conditions the behavior of those who have power to permit, prohibit, or modify the proposal. When the environmental management law is applied in a particular situation, the outcome is produced by an intersecting of the behavior of all the relevant people in such a way that the net outcome is within the range of possibilities which have been defined by the law as serving the common interest of society as a whole.

That is the way law works. It enacts in a particular form the common interest of society as a whole. It then disaggregates that common interest by relating it to the actual detailed behavior of particular society members. And the result is that, in taking their individual self-interested decisions, individual society members, if they act in conformity with the law, also and inevitably serve the common interest of society.

You are free to make your own life-choices, from moment to moment. But, to the extent that you do so in conformity with the law, you are also serving the common interest of society. Private interest is then also public good. Private well-being and public well-being are reconciled through law. We make our own future by making our everyday life-choices. But society has chosen a range of *its* possible futures, and that range of possible futures is embodied in the law. So, in conforming to the law, we are society's agents in making a future for

society which is within the range of possibilities which society has chosen. This is law's thaumaturgy.¹⁰

It is precisely this blueprint of the law-machine which must come to be our blueprint of the international-law-machine—incorporating the common interest of all humanity in legal form, then disaggregating that common interest through the law-conforming behavior of all human beings and all subordinate human societies, so that the private interest of each human being and each human society is reconciled with the common interest of all humanity.

But before we extrapolate all this to the global level, we must close in the focus of our jurisprudential microscope two further steps. How does law do these things? How does it insert the common interest of society into the private interest of society members, into our everyday behavior? How does law work its wonder, as a matter of sheer social mechanics? This brings us down to the molecular level of law. We must do some molecular jurisprudence.

Most lawyers are led to believe that the law works by creating legal rules, through legislation or through decided cases. Most lawyers think that a legal system is a set of legal rules. This is an awful error. Law is not a set of legal rules. Law is a system of *legal relations*. Law does not say: thou shalt not murder, thou shalt carry out thy contractual promises, thou shalt not park in a no-parking area. Law fixes a legal relationship between two or more persons in relation to a given situation.

We owe a great debt to Wesley Hohfeld, the American legal theorist, for his work on the topic of legal relations.¹¹ Of course, it had long been seen—by Hobbes, Bentham, and Salmond among others, and by a number of German legal theorists—that, at the deep-structural level, law is made up of rights and duties.¹² But Hohfeld suggested a simple framework of analysis of legal relations, including a particularly enlightening analysis of the difficult word *right*. He suggested that, in fact, the law makes use of

10. Bernard de Mandeville's seemingly paradoxical thesis, *Private Vices, Public Benefits*, demonstrated allegorically in his *A Fable of the Bees*, proved to be prophetic of the dynamic development of eighteenth century social and economic philosophy, which found that it was possible to reconcile, theoretically and even practically, self-interest and public interest. The highly productive society of vicious bees fell apart when Jove suddenly made the bees virtuous. Or, as the prophet of modern capitalist society asserted, "I have never known much good done by those who affected to trade for the public good." ADAM SMITH, *THE WEALTH OF NATIONS* 292 (K. Sutherland ed., 1993) (1776).

11. His writings on the matter were published posthumously. WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (W.W. Cook ed., 1923).

12. See R. W. M. DIAS, *JURISPRUDENCE* Ch. 2 (5th ed., 1985) (discussing a synoptic view of legal-relations analysis).

four different kinds of rights. This is a wonderfully illuminating idea, which can help to solve countless everyday legal confusions. Others have taken the analysis further. And it has been criticized and defended. But the underlying idea is still wonderfully illuminating, and all law students, not to mention all judges, should be compelled to master it.

The amazing fact is that the whole vast edifice of the law depends on a tiny handful of possible legal relations. All legislation, all law, is an endless permutation of rights, powers, freedoms, duties, liabilities, immunities, and so on. There is nothing else.

The parties to a contract, neighboring property owners, a married couple, a government department, an industrial corporation, Congress, the Supreme Court; all are tied into each other by a vast, infinite web of legal relations, designed to condition actual interactive human behavior. We may conform to the law without intending to do so. We may choose to break the law. But every moment of our lives, every thing that we do and say is always and everywhere subject to the infinite interlocking network of potential legal relations. So how does a legal relation work? We must now examine the atomic and sub-atomic levels of law.

A legal relation is made up of abstract patterns—citizen, voter, company, nuisance, act of Congress, contract, collision, interpersonal violence.¹³ Legal relations are patterns of potentiality into which actual persons and things and events and places can be fitted. The law creates a sort of parallel universe, alongside everyday human reality and the reality of the natural world, a virtual law-reality in which persons and things and events and places have a particular and special law-significance.¹⁴ A particular legal

13. See Philip Allott, *The International Court and the Voice of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 17, 19-39 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (analyzing a legal relation as matrix, heuristic, and algorithm).

14. Throughout his lifetime Jeremy Bentham struggled, in a way which foreshadowed the travails of twentieth-century linguistic philosophy, with the problem of the fictional character of law. At Oxford University, he had reacted strongly against what he considered to be the archaism and obscurantism of William Blackstone's view of English law, including Blackstone's defense of legal fictions. In his youthful *Fragment on Government* (1776), Bentham spoke of "the pestilential breath of Fiction." However, he subsequently came to see that law is a system of language, and that it necessarily uses language to create pseudo entities (such as *property, contract, rights*, etc.). Yet the fictive use of language had also been the means by which despots and deceivers of all kinds, including priests and judges, had taken power over people's minds. He returned to this vexing problem in many of his writings. See CHARLES KAY OGDEN, *BENTHAM'S THEORY OF FICTIONS* (1932) (relating Bentham's work to a later philosophy). Bentham believed that legal relations (right, duty, etc.) would rightly be included in what he called "the metaphysics of jurisprudence," and should hence form part of what he envisaged as a possible "universal jurisprudence" (relating to law of all places and times). JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 325 (1948). See JAMES STEINTRAGER,

relation—in fact, a vast web of legal relations—becomes applicable, is switched on, when a particular person, thing, event, or place matches the pattern of the legal relation.

When we get into a car, order a meal, register as a voter, set up a corporation, or whatever, we log into a sort of sub-program of the vast seamless computer program known as law. And our behavior in relation to each other—the behavior of the parties to the legal relation—is law-conforming behavior if it matches the pattern of the legal relation; if we obey the rules of the road, if we pay our bill when called on to do so, register our vote in the correct way, do business as a corporation in accordance with corporation law.

This picture of society-under-law is thus a model of society as a three-tiered structure, a sandwich, with law in the center. Below the law is actual human life and behavior, the infrastructure of law. Above the law is the rest of the social process, the superstructure of law—religion, education, philosophy, society's ideas and ideals, the public realm in general, and what I call the *public mind*—social consciousness. Above all, the superstructure contains politics. Politics is the struggle to determine the common interest of society and the struggle to dominate society's public realm, especially its lawmaking and law-executing systems. Through politics we struggle about who shall dominate the lawmaking process, about what the content of the law shall be, about how law shall be implemented.

Returning to the analogy with a motor car, we may recall that a motor car requires three things to make it move—gas, oil, and air to fire the engine; the system of the car itself, including its engine; and the driver to switch on the engine and to direct its line of travel. Infrastructure, structure, and superstructure. Or, to return to the five horizons of legal philosophy, we can now identify the way in which law may be seen as being, indeed, a very special form of social system, but a system that is inextricably embedded in all the rest of social and transcendental reality, in all the structures and systems of ideas which make social life possible.

To explain completely how a motor car works you cannot stop at the three necessary elements mentioned above. You would have to go much further and incorporate the whole explanation of the natural world—gravity, thermodynamics, the chemistry of oil, quantum mechanics even. And you would have to offer an explanation of the human world—how and why

human beings have harnessed particular aspects of the natural world in a particular way. To explain a motor car fully and to explain law fully you must in the end include a transcendental explanation of the universe as a whole.

In this way, we are enabled to see that *democracy* is a wonderfully efficient version of the three-stage social machine (infrastructure, structure, superstructure), in which the three stages mesh together with exceptional efficiency, with a very lively superstructural public mind producing vast amounts of structural law to condition infinitely complex human social behavior which in turn flows into the dynamic of the superstructural life of society.¹⁵

And we may also see that capitalism is a very closely analogous system, efficiently intermeshing the three levels around the central structure of law—linking the wealth of the individual with the wealth of the nation, reconciling private interest and public interest, through the mediating system of law, but also involving transcendental ideas about property, the good life, human happiness, and so on. It is law, and only law, which makes possible, even in so-called free-market capitalism, the infinitely dense and infinitely dynamic reconciling of private and public interest.

Law moves from the particular to the general to the universal, and back again, in a ceaseless reciprocating motion. Law is the dynamic principle of society—change in stability, stability in change. You step twice into the same river of law, but not into the same water.¹⁶

It took thousands of years of hard experience and hard thinking for humanity to reach this stage of self-directed social development.

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What happens when we try to extrapolate such an idea of society-under-law to the global level, to imagine all humanity as a society-under-law, the society of all societies? There are very many obvious ways in which our ideas of international society differ profoundly from the society-under-law model that I have sketched so far.

15. The three structural elements postulated here are representations at the level of practical theory of the pure-theory conceptions (*real constitution*, *legal constitution*, *ideal constitution*) proposed in PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* ch. 9 (1990). See also *id.* ¶ 2.49 (distinguishing between pure and practical theory).

16. The dialectical character of law reflects the ultimately dialectical character of all society, which, as a matter of pure theory, may be analyzed as a set of five dialectically interacting “perennial dilemmas”, each of which is itself a dialectic of change. See ALLOTT, *supra* note 15, at chs. 4-6.

(1) *The substructure of human behavior* in the case of international law seems to be, not the behavior of human beings, but the behavior of so-called governments acting on behalf of so-called states, some 190 states. The international system, as it is sometimes optimistically called, is regarded as consisting of the more or less systematic interaction of the national public realms. All the other aspects of the national social systems are only involved indirectly and virtually and marginally and haphazardly.

(2) The network of *legal relations* under international law does not apply to vast areas of extra-national, non-statal human activity, in particular, vast quantities of economic transactions conducted by industrial, commercial, and financial corporations, whose behavior is covered by legal relations arising under 190 conflicting, overlapping, and uncoordinated legal systems. This means that international capitalism, although it profoundly affects the lives of all people everywhere, is not itself the product of, or subject to, any universal social or legal system but is some sort of aggregate product of national capitalist social and legal systems.

(3) *International law* is regarded as arising, not as the product of an international social superstructure, but from the substructural behavior of governments—in the form of so-called treaties and customary international law. The theory of customary international law is that the law-conforming behavior of states itself generates the law. International law is conceived of as *horizontal law*, in which the subjects of the law are also the makers of the law.

(4) There seems to be no concept of the *common interest* of all humanity, only the intersecting and random aggregating of the conflicting interests of the states, as defined by their governments, conducting what is called "foreign" policy through a process known as "diplomacy." This means that, although diplomacy and its failures can profoundly, even terminally, affect the lives of millions of people all over the world, it is not integrated into any worldwide social process, including any normal democratic process.

(5) There seems to be no *global superstructure*, with a general social process—a global public realm, a public mind of all humanity, a social conglomerate of ideas and ideals. And this means that there seems to be no such thing as international politics, a struggle to determine the common interest of all humanity, a struggle to choose possible human futures with a view to their actualizing through law.

(6) There seems to be no concept of the *social unity* of all humanity. Things that happen outside the territory of a given state, or inside the territory of another state, are regarded as foreign or alien; only of interest and concern when they affect or threaten life within the state above some arbitrarily determined level of tolerance, or when they offer some opportunity for material advantage. Below the threshold of the intolerable and when they offer no possible material advantage, foreign things might as well be happening on another planet.

This means that the age-old philosophical debates about the nature and purpose of social life, and the nature and purpose of law, are not regarded as applicable to the condition and the potentiality of humanity as a whole. Social and legal philosophy, whether framed along positivist, liberal, socialist, idealist, or transcendental lines, mysteriously come to a halt at national frontiers.

The anomalous social situation of all humanity, illustrated in the six items listed above, should fill us with the shock of the familiar. We should recognize the characteristics of an underdeveloped society and we should rightly draw upon a specific historical analogy. International society in its current state is peculiarly reminiscent of European societies in our tribal period, from the end of the Roman Empire in the fifth century to the beginning of modern society in the twelfth century. We live an anachronism, the synchronic existence of diachronic social forms. We live in post-1789 societies which are participants in a medieval unsociety.

We in the United States and Britain have privileged mental access to European society of the tribal period. Anglo-American legal culture contains within it, to this day, two elements which derive from the legal culture of the Nordic-Germanic tribes which swept through Europe in that period and which, as they settled, came to form the successor kingdoms of the Roman Empire, including England and France.

(1) In the Nordic-Germanic societies of tribal Europe, law had as its primary function *conflict resolution*. Such procedures as trial by ordeal, by fire, by compurgation, and by champions were designed to find a winner and overawe a loser. It is this ethos which survives to this day in the adversarial nature of Anglo-American legal culture.

(2) In the Nordic-Germanic legal culture, law was not seen as something which was handed down from above. The judge was an umpire or a ringmaster rather than the voice of justice. The king was a tribal chieftain, the umpire of umpires, the fittest who happened to survive. He was himself,

in some sense, under the law. Law arose from experience, custom, regular behavior.

The *horizontal* aspects of lawmaking in both the common law and international law, the centrality of *litigation* in the common law and the obsession with so-called *dispute resolution* in international law, such things show the survival of tribalism into a social world which has otherwise long since surpassed tribalism.

In the twelfth century, continental Europe embarked on a different course, gradually returning to a different model of law. Roman law and its ethos were allowed to flow once again into the tribalistic law systems of the post-Roman societies. Roman law had been a great, perhaps the greatest, achievement of Roman culture, a tradition in which law is something more than a system of conflict resolution, in which law has its ultimate source somewhere above and beyond its subjects and its practitioners, a tradition in which the judge is the voice and agent of the law, *lex loquens*.¹⁷

For several centuries it seemed as if the Roman ethos would determine also the character of international law, that international law would be an ingenious combining, a double helix of two further particular and sophisticated strands within the complex web of Roman law—the idea of a *law* of the nations which transcends the *laws* of the nations, and the idea of a law which reflects the inherent unity of human beings as *rational beings* (Natural Law). Sometime in the eighteenth century, such a Roman model of international law was finally displaced by another model which reflected a new ethos, and which was a by-product of other complex developments of systems and ideas within national societies, especially the societies of Britain and the United States, but a new ethos which would be fatally corrupted in its passage from national society into the international unsociety.

From the fourteenth century onwards the rapid development in the complexity of British society necessitated the introduction of *vertical* law, in the form of parliamentary legislation, drawing, once again, on a Nordic-Germanic tradition, this time that of conciliar kingship, the idea that the king acted with the advice of his leading counselors.

What we now speak of as *liberal democracy* is a reconciliation of horizontal and vertical lawmaking, the exceptionally efficient system

17. See SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900-1300* (1984) (recounting the intricate story of the medieval interaction of elements of Roman law and customary law systems).

considered above for resolving conflicting particular interests within the common interest of society. It is interesting to think how different world history might have been if England had not preserved the anachronistic spirit of tribal customary law.

Government of the people by the people, that brilliant phrase used by Abraham Lincoln, expresses the wonderful paradox of democracy and its daring self-mythologizing. In a democracy we the people believe that we are both the makers and the subjects of law. That idea might not have developed had it not been for the historical chance that England had to find a means of squaring the circle of, on the one hand, a requirement for more and more legislated law, and, on the other hand, a robust visceral rejection of the absolutist ambitions of monarchs and their co-conspirators. Constitutional monarchy, and its successor liberal democracy, are an ingenious and hazardous dialectic of absolutism and anarchy.

It was the spirit of anti-absolutism (in the case of Britain and the United States) and of post-absolutism (in the case of continental Europe), rather than the spirit of liberal democracy, which determined that form of international law which is the law of the existing international unsociety. The post-1789 international unsociety contains the national societies on a footing of fictional equality (the *sovereign equality of states*), whatever the condition of their internal constitutional development (the nature of their *state*, in the internal sense). And it treats the controllers of the national public realms (*governments*) as if they were absolute monarchs, wholly embodying their national societies (*les états, c'est nous*), but still monarchs under the law (a horizontal consensual *international law*). *Government of the states by the governments of the states!*

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And so we return to the Historic Destiny of the United States—to inspire and encourage the true constitutionalizing of all humanity, of One Humanity Under Law. And the historic destiny of the United States is also the Historic Responsibility of Europe, that Europe which has had so profound an effect, in thought and in deed, for better and for worse, on the destiny of all humanity.

History shows that social progress has very often been the product of imitation and emulation. At each historical period there has been what we may call a *paragon culture*, certain attributes of one particular society which act as an explicit or implicit model for the development of other societies. Ancient Greece was a paragon culture for republican Rome. Monastic

culture was a paragon in the darkest days of the Middle Ages. Norman culture was a paragon culture for medieval England. Arab-Jewish high culture was a paragon in the revival of European culture in the twelfth century. French high culture was a paragon for all of Europe from the twelfth century until 1789. Italian Renaissance high culture was a paragon for Renaissance Europe as a whole. The sociopolitical and scientific culture of seventeenth-century England was a paragon culture for Enlightenment Europe in the eighteenth century. The new America was a paragon political culture for revolutionary France. The new economic system of industrial-revolution Britain was a paragon culture for continental Europe and then for the United States in the nineteenth century. German academic and administrative culture was a paragon for all Europe in the nineteenth century. The imperial powers were paragon cultures for many societies all over the world in the nineteenth and early-twentieth centuries.

Since 1945 the United States has been the paragon culture for the rest of the world. Not all these dominating cultural phenomena have been wholly admirable—not even the post-1945 United States. To speak of paragon cultures is to speak of historical realities rather than to make moral or aesthetic judgments.

Post-1945 United States culture is the culture of impatience and impermanence, the epitome of the frenzy of relentless change which has possessed the Western mind since 1789. It is the culture of pleonexia, of too much and too fast. The treadmill of capitalism and the carousel of democracy never stop. All over the world, cultures which had hardly changed in centuries or even millennia have been swept up into the post-1789 fast-life culture. And yet the United States itself, *Weltstaat* of unity-in-diversity and diversity-in-unity, is also a country of stability-in-change. Its constitutional institutions are still those of the eighteenth century. Despite its massive urbanization, it seems to retain a balance-point of rural and small town dignity, of interpersonal respect, personal aspiration, and moderate idealism, all coexisting with the spirit of the nineteenth-century frontier, a frontier of unlimited possibilities and invincible pragmatism. American culture as a paragon culture for the world is an ambiguous phenomenon.

Frenetic social change is not a new phenomenon. Transcultural social change is not a new phenomenon. And there are precedents for the intelligent management of deep structural social change. In the nineteenth century most European societies experienced fundamental structural change. The fact of the American Revolution and the ideas of the French Revolution

combined with the potentialities of the industrial revolution to make possible a huge development of social complexity and sophistication. And what may be called the Prussian Revolution made possible the increasingly rational management of the public realm of these amazingly complex and dynamic societies.

Can we now see on the horizon fundamental structural change at the level of international society, the society of all societies? What can we do to make a future international society measure up to the standards and the values and the ideals that we take for granted in our national societies? How can we make available for the development of international society the best of the long millennia of thought and experience of society-under-law? How can we take international society from its primitive tribal condition into an advanced social condition?

The essence of all that has been said above is that law will not perform its true function internationally until we have a conception of an international society of the whole human race, an international social system capable of processing conflicting interests and conflicting ideas about the future of the human world—right-wing ideas, left-wing ideas, liberal ideas, conservative ideas, rationalistic ideas, religious ideas, passionate ideas. And it must be an international system capable of forming ideas about the common interest of all humanity and of each human being, and capable of disaggregating that common interest through legal relations, which condition the behavior of all human beings everywhere.

To many Americans the idea of an emerging international social system would seem like a nightmare, a premonition of universal socialism. For many Americans, the very idea of the United Nations is already objectionable. In early nineteenth-century Europe, the development of popular democracy and the rise of an aggressive urban middle-class seemed like a nightmare to the old privileged classes. In certain countries in Europe, the old privileged class stayed on, intransigent and incorrigible, learning nothing, forgetting nothing. In due course, those countries paid a terrible price for their misjudgment of history. And, in this century, we all had to pay some part of that terrible price.

During Britain's prolonged social revolt (1815-48), which was virtually a revolution, even the Duke of Wellington, fervent defender of the old social order, eventually saw that the only way to preserve the best of the past was

to come to terms with the forces of the future.¹⁸ Today, the United States is the Duke of Wellington. The old-order U.S. hegemony of the period 1945-1989 cannot survive unmodified in a new world order of overwhelming complexity and instability. It would be good to be able to say that, in the new global social drama, Europe is playing the role of Sir Robert Peel, an astute manager of Britain's managed revolution.¹⁹ But the European public mind is in a sorry state at the present time—demoralized and confused in the face of a process often referred to anxiously in Europe as "globalization", a process which seems to be beyond Europe's practical and theoretical control. A profound lesson of the turbulent period of 1815-48, in Europe as a whole, is the part played in social change by writers, artists, and intellectuals in general. Liberated by the mental revolutions of the seventeenth and eighteenth centuries, the public mind of Europe overflowed with a torrent of new thinking. The new order in nineteenth-century Europe was as much a product of the pen as of the marketplace, the statute book, or the street demonstration. To mention only a handful of representative British names—it was a new order imagined by Adam Smith, prophet of unlimited economic progress; by William Godwin, prophet of unlimited free-thinking and of human self-perfecting through education; by Jeremy

18. Wellington had been, together with Horatio Nelson, Napoleon's nemesis. Military tactician rather than subtle politician, he could recognize a position that was not worth defending. Epitome of the Protestant, aristocratic, land-owning oligarchy who had managed to retain their privileges after the so-called Glorious Revolution of 1688 and during the development of Cabinet government in the eighteenth century, he "gave way", as a charismatic leader in the House of Lords, on three dramatic occasions, to the dismay of his more extreme Tory allies: the Catholic Emancipation Act of 1829 (removing some of the legal disabilities on Roman Catholics); the Reform Act of 1832 (extending somewhat the franchise of the House of Commons and reforming the electoral process); and the Corn Importation Act of 1846 (repealing the Corn Laws, a system of trade-protection whose principles and mechanisms were remarkably similar to those of the Common Agricultural Policy of the European Community, and which had favored agricultural interests and inflated the price of basic foodstuffs).

19. Sir Robert Peel, Prime Minister from 1841-46, is regarded as the founder of the (British) Conservative Party (superseding the old-regime Tories). Peel was of middle-class origin, at least in the sense that his father, the first baronet, had been a successful businessman. In a letter addressed in 1834 to the electors of his constituency (since known as the Tamworth Manifesto), he appealed to "that great and intelligent class of society . . . which is much less interested in the contentions of party, than in the maintenance of order and the cause of good government." He had opposed the parliamentary reform of 1832 but now accepted that it was "a final and irrevocable settlement of a great Constitutional question" and spoke of what he took to be "the spirit" of the new constitutional order, involving "a careful review of institutions . . . undertaken in a friendly temper" and the "correction of proved abuses and the redress of real grievances." ROBERT PEEL, MEMOIRS BY THE RIGHT HONOURABLE SIR ROBERT PEEL 58 (1858). In Parliament in 1833 he had said that he was "for reforming every institution that really requires reform; but he was for doing it gradually, dispassionately, and deliberately . . ." *Id.* at 69.

Bentham, prophet of rational social change through legislation;²⁰ by S.T. Coleridge, prophet of the idealist reconciliation of reason, faith, and art; by J.S. Mill, prophet of the strengths and weaknesses of mass democracy; by Robert Owen, prophet of the redeeming of the slavery of capitalist society through pragmatic idealism.

In that period of profound and self-conscious human self-reconceiving and self-reconstituting, the rich products of the mind articulated the possibilities and structured the choices in making a different kind of human future. We are going to have to be very clever, more clever even than our clever predecessors in the nineteenth century, if we are going to redeem the current situation, a global situation which is much more complex and challenging than were the national revolutionary transformations of the nineteenth century.

The first step is to try to detect and to measure the deep currents of change already present in the international situation, the first signs of an emerging new human world, a new human self-conceiving and self-constituting. For those who are able to remain calm in the face of such disruptive social change, such things are (to abuse a Shakespearean image) the darling buds of May, still vulnerable to very rough winds from every point of the compass.

(1) *International Community*. The use of this expression by politicians, diplomats, journalists, and academic specialists is tending to establish within general consciousness a fictitious conceptual entity with effects and characteristics which surpass the practical purposes of those who make use of it. Among the implications arising by-the-way, as it were, are the ideas of universal judge (*Weltgericht*),²¹ of universal standard setter, and of universal accountability (for the actions of governments and their agents).

(2) *International security*. Despite the hallowed origins of the expression (League of Nations Covenant; U.N. Charter), use of the expression has intensified since 1989 as an intrinsically binary or defense conception of international public order (epitomized in the Cold War balance

20. In perhaps the most readable of his writings, Bentham poured scorn, one by one, on dozens of fallacious arguments which are habitually used to resist rational social change, all of which continue, to this day and despite his eloquence, to be used for that purpose. See JEREMY BENTHAM, *HANDBOOK OF POLITICAL FALLACIES* (H. Larrabee ed., 1952).

21. Hegel borrowed from Schiller the saying, "the history of the world . . . is the world's court of judgment." G. W. F. HEGEL, *PHILOSOPHY OF RIGHT* 216 (T. M. Knox trans., 1942). For Hegel, out of the history of the infinitely contingent behavior of nations there arises a "world mind" which sits in judgment objectively, abstractly, and ideally. *Id.* at 36.

of power) has been giving way to an idea of the interdependence of social order everywhere.

(3) *Ecology*. The idea of the interdependence of every aspect of the human physical habitat is now in dialectical tension with the institutionalized self-interest of "states" and industrial and commercial corporations.

(4) *Global economy*. The idea of the interconnectedness of all economic activity everywhere is generating the corollary idea that the maximizing of the wealth of any particular national society may depend on the quality of the governmental, administrative, and legal systems of many or all other national societies.

(5) *Universal values*. The possibility of truly universal human values is itself a highly controverted matter, given the intense cultural diversity of the human world, but there is a real sense in which universal values are in the process of formation whenever cross-cultural value judgments (ethical, legal, religious, political, pragmatic, aesthetic) are made, especially when they are expressed, as more and more frequently they are, in an articulated and permanent form (treaty, judicial decision, resolution, declaration).

(6) *International legislation*. The volume of international prescriptive texts is now very great, very often giving rise to social systems for their implementation, interpretation, and enforcement. Such prescriptions more and more frequently relate to behavior and events within the social systems of the "states."

(7) *Public responsibility*. The extension of the principles and even the procedures of criminal law to the behavior of governments and their agents, including the personal responsibility of those agents, has introduced into international society ideas of enforceable accountability which surpass traditional international law concepts of state responsibility and which are reminiscent of the development of "rule of law" conceptions in national social systems.

(8) *Non-governmental organizations*. The allegiance of such bodies is to no government. They may represent particular non-governmental interests, but they may also seek to represent the common interest of all human beings. In such cases, they are in permanent dialectical tension with representatives of more particular interests.

(9) *Differentiated patterns of consciousness*. Regionalism, pluralism, transnational ethnic and religious consciousness, involve patterns of consciousness which do not fit established patterns of national consciousness.

(10) *Global consciousness.* A form of universal consciousness—of science and engineering, of the universities, of high culture and popular culture, of the global computer network, of the mass media—is becoming a powerful counter-consciousness to all forms of local and sectional consciousness.

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For those of us who devote our lives to thinking about these things, the great task of the coming decades is to imagine a new kind of international social system, to imagine a new role for the United Nations in the new kind of world which is forming so rapidly, and to imagine at last a new kind of post-tribal international law, which extends to the level of all humanity the wonder-working capacity of law, when law is properly understood.

For those who would preserve the best of the human world as it is, the best form of defense is law—law in our local neighborhood, law across the whole world. For those who suffer, in body or in spirit, from the imperfection of the human world as it is, the best way to make a better world is the way of law.

