

Michigan Law Review

Volume 41 | Issue 4

1943

LEGAL TECHNIQUES AND POLITICAL IDEOLOGIES: A COMPARATIVE STUDY

Alexander H. Pekelis

Political and Social Science, New School for Social Research

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#), [European Law Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Alexander H. Pekelis, *LEGAL TECHNIQUES AND POLITICAL IDEOLOGIES: A COMPARATIVE STUDY*, 41 MICH. L. REV. 665 (1943).

Available at: <https://repository.law.umich.edu/mlr/vol41/iss4/6>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LEGAL TECHNIQUES AND POLITICAL IDEOLOGIES:

A COMPARATIVE STUDY*

Alexander H. Pekelis†

THE problem with which we are going to deal is one of comparative law, a discipline probably even more illusory than legal science itself. A body of laws represents in itself neither a social reality nor a social ideal. One of the difficulties that every historian faces in trying to reconstruct a period of the past with the help of legal monuments is due to the great variety of relations existing between legal rules and social reality.¹ So, e.g., legal monuments generally contain in an inextricable confusion at least two contradictory types of rules: rules which are a simple restatement of an existing custom, and rules which are enacted with the very purpose of reversing existing customs and which, in terms of social reality, should be read as we read the negative of a snapshot: white for black and black for white.

The science of comparative law suffers from the same difficulties, and can acquire a meaning only if it faces them in full and becomes a part of the history of civilization. But in this endeavor, comparative law runs the risk of losing its character of legal science. Once engaged on the sociological path, the temptation to drop the technique of strictly legal approach altogether is great. The difficult task before the comparative lawyer is that of reading the technical results against the light of a more general political, social and historical experience.²

We shall attempt the comparison between some typical principles of the common law at large with those which prevailed—prior to the

*I gladly accept the invitation of the Michigan Law Review to publish this paper, which was read at the General Seminar of the New School for Social Research. It represents the first report of the Research Project on Contemporary Political and Legal Trends, directed by Max Ascoli and myself.

The Spanish text of this article is appearing at the same time in "La Ley" (Argentina).

† J. D., Florence, Italy, Author of *IL DIRITTO COME VOLONTÀ COSTANTE* (1931). Formerly Associate Professor of Law, Royal University of Rome, School of Law. Member, Graduate Faculty of Political and Social Science, New School for Social Research. Editor-in-Chief, *Columbia Law Review*.—*Ed.*

¹ See particularly with regard to studies of foreign law, Justice Holmes in *Diaz v. Gonzales*, 261 U. S. 102, 43 S. Ct. 286 (1923). See also 2 JHERING, *GEIST DES ROEMISCHEN RECHTS*, 2d ed., 133 (1866).

² See Yntema, "Roman Law as the Basis of Comparative Law," 2 *LAW, A CENTURY OF PROGRESS* 346 at 373 (1937); Lepaulle, "The Function of Comparative Law," 35 *HARV. L. REV.* 838 at 853 (1922); Rheinstein, "Teaching Comparative Law," 5 *UNIV. CHI. L. REV.* 615 (1938).

advent of totalitarian regimes—in what we may call Latin countries. We are conscious of all the methodological qualifications involved in the idea of comparison between *types*, based necessarily on a somewhat arbitrary classification. On the other hand, only *typical* characteristics are the proper subject matter of comparative research. The first condition for the solution of this methodological difficulty is to be found, as is usually the case with many “preliminary problems,” in the completion of one or more concrete pieces of work.

In justifying, however, the classification adopted for the present investigation, we might say why we centered it upon some aspects of the law of the Latin type instead of engaging in the more familiar comparison between common law and civil law at large. Such comparative studies have often treated, on the civilian side, institutions of German law to an extent unwarranted by the importance, however great, of the systems of that type on the Continent. Europe is by no means co-extensive with Germany, and it might add to the completeness of the picture to put the emphasis on a different group of countries, for a change. We thought, furthermore, that such an approach was bound to yield results somewhat different from those of studies of the dominant type, since the countries of the German type, although strongly influenced both by the political ideologies and the legal techniques which originated from the so-called Latin countries of Europe, still retain too many old Teutonic institutions and attitudes to present a sufficiently striking contrast with the common-law system. Finally, the expression “civil law” is generally associated with the countries of the European continent, while we are trying to emphasize the fact that the contrast between the two systems we are studying means, today, practically a contrast between North and South America, between English and Latin America.

Among the most frequent general statements concerning the typical features of the common law we find the assertion of its individualistic character, for which it is sometimes praised and sometimes condemned; and, of course, even more often we find the general statement asserting the individualistic character of the American way of life.⁸ It may there-

⁸ See Pound, “Puritanism and the Common Law,” 27 KAN. BAR ASSN. PROC. 45 at 48 (1910); Bohlen, “The Moral Duty to Aid Others As a Basis of Tort Liability,” 56 UNIV. PA. L. REV. 217 at 220 (1908), reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS 291 at 294 (1926); Bryce, “The Influence of National Character and Historical Environment on the Development of the Common Law,” 28 CAN. LAW TIMES 89 (1908); ANCEL, LA ‘COMMON LAW’ D’ANGLETERRE 206 (1927); ELIOT, THE CONFLICT BETWEEN INDIVIDUALISM AND COLLECTIVISM IN A DEMOCRACY 5 (1910); TURNER, THE FRONTIER IN AMERICAN HISTORY 30 et seq. (1920).

fore be interesting to see whether and to what extent a strictly technical legal test would lead to the substantiation or the refutation of that general assertion.

We do not attempt to give an exact definition of individualism. It is safe, however, if not trite, to say that under individualism we all understand a particular type of relationship between individuals and society; and precisely a type of relation in which the interests of the individual and those of society are balanced at a point relatively favorable to the individual. It is, of course, a relative or comparative statement and therefore the existence of individualistic features in a given society can best be ascertained only by comparing it with other existing societies rather than with ideal standards. And in this study the aggregate of the means and devices used by a given society in order to enforce upon the individual the laws of that society, the amount of social pressure used for this purpose, may be fairly indicative of the degree of individualism existing in that society. It seems to us, in other words, that a comparison between the different techniques of enforcement used in the common-law countries and in other types of legal systems may be significant in our investigation.

We shall start our investigation at the very point at which the literature of comparative law generally stops: we shall ask ourselves what happens *after* the judicial decision has been rendered. A good romantic novel ends with a marriage. But sometimes the tragedy starts just afterwards. One of our finest scholars of comparative law concludes a recent article of his by stating that "The problems which courts have to decide are essentially the same on both sides of the Atlantic and, I venture to say, eighty per cent or even more of the solutions are the same."⁴ We think that a far greater degree of dissimilarity between the two systems would have been discovered had the problem of enforcement been given more thorough consideration.

We are going to start with a very simple, even naïve remark: the common law knows an institution, called *contempt of court*, which to our mind is most important for the working of the whole legal system. Legal writers do not indulge too often in rationalizing on this institution, probably because it belongs to the self-evident presuppositions of the legal method. It is, in a certain sense, not surprising that a striking contrast between the two legal systems we are considering may be found just in connection with this institution. The existence of such a contrast becomes certain when we give full weight to the fact that the

⁴ Rheinstein, "Common Law and Civil Law—A Comparison," 12 PA. BAR ASSN. Q. 7 at 19 (1940).

self-evident common-law principle of responsibility for contempt is, as principle, simply unknown in the civil-law countries, at least to the extent to which it represents a sanction for nonperformance of substantive duties.

It may be said that in the Latin countries the relation between the courts and the parties is in general far less close; I should say less intimate, than here. The Anglo-American idea of responsibility for contempt means, indeed, that the party who does not abide by certain specific decrees emanating from a judicial body is a contumacious person and may, as a rule, be held in contempt of court, in the king's mercy, so to say, and consequently fined and jailed. And although the institution is not utilized to the same extent in all areas of enforcement, it is still a highly characteristic illustration of the philosophy underlying the whole mechanism of the Anglo-American legal machinery.

Now, this very concept of contempt simply does not belong to the world of ideas of a Latin lawyer. It just does not occur to him that the refusal of the defendant to deliver to the plaintiff a painting sold to the latter, a purely *private* matter between plaintiff and defendant, may, as soon as a judicial order is issued, become a matter to a certain extent *personal to the court*, and that the court may feel hurt, insulted, "contemned," because its order has been neglected or wilfully disobeyed.

The Latin conception of the means of enforcement is of a far more mechanical or formalistic character: it is a play with certain rules, traps, catches and loopholes; and the court itself is one of the cogs of the mechanism, a party to the play. It does not occur to the actors that you have to bow to the judge's will, or that you may be punished by him, or, even more absurd, *blamed* for not having complied with his orders. The court says that the painting belongs to the plaintiff? Very well, let him try to get it! He may send the sheriff, and the defendant certainly will not prevent him from coming into his house and looking for the painting; if he is lucky enough to find it *there*, not elsewhere, well, he has won. Neither the sheriff nor the court can ask where the defendant put the painting. Once, in Italy, a simple-minded creditor who, by special leave, assisted at the futile attempt to attach a painting in the debtor's house, requested the sheriff to inquire of the defendant where the painting had been put. A general chorus of laughs and chuckles, in which even the plaintiff's attorney joined, was the answer. The Anglo-American solution of this situation, namely, to send the debtor to jail until he chooses to deliver the painting—theoretically for life—simply does not occur to the Latin lawyer. His first reaction to this common-law practice is generally: "Don't you think that this kind of

punishment is a little too severe for a simple refusal to deliver?" The answer of the common lawyer—which only adds to the astonishment of the civil lawyer—is that of course we are faced here with so-called *civil* contempt; there is no punishment involved, the proceeding is not a criminal one. He just disobeyed—a term that for a Latin lawyer's ear is likely to suggest a parent-child relation, rather than a court-party relation—he has disobeyed the court, he has been a bad boy, and he has to stand in the corner until he changes his mind. Nothing mysterious about it!

The enforcement device known to the civil law of the Latin countries, which is compared frequently to the contempt sanction,⁵ is the French "astreinte." This is a pecuniary sanction imposed by the court for every single future act or single period of violation of a judicial decision. This sanction can either consist in the simple means of liquidation of damages in futuro or have a comminatory or coercive character. The line between the two forms is not always easily drawn, but it is obvious that only to the extent to which the astreinte has the latter character is it an enforcement device at all and only to that extent does it fall within the scope of our investigations.

It is true that some apparently impressive instances of strong pressure exerted by astreintes assessed in amounts obviously beyond any possible liquidation of damages can be found and are often quoted in support of the analogy. We believe, however, that a closer analysis of the astreinte not only shows that its role is altogether incomparable, in terms of legal reality, with that of the sanction for contempt, but also illuminates the deep contrast in the political approach to the problems of enforcement.

First of all, the decision of a tribunal granting an astreinte never operates in personam. That is to say, the debtor can never be imprisoned for nonperformance of the order. This evidently takes away the usefulness of astreinte in cases where the inadequacy of damages is due to the difficulty of collecting them. Secondly, and this is their most surprising feature, astreintes do not operate in rem either. Strange as it seems, *creditors cannot collect the astreinte* that has been assessed by the court. No process by execution or otherwise assists them. The decision remains on a merely platonic plane. If, despite the judicial threat, the debtor persists in his refusal to comply, the only thing the creditor can do is to go back to the tribunal in order to make the provisional

⁵ See Amos, "Specific Performance in French Law," 17 L. Q. REV. 372 at 373 (1901); Brodeur, "The Injunction in French Jurisprudence," 14 TULANE L. REV. 211 (1940).

decision final.⁶ But this making the decision final is a somewhat euphemistic description of what really happens to the first decision through the process of "finalization." In it, the *astreinte* judgment is, and has to be, *deprived* of every comminatory element and reduced to a simple liquidation of damages. Planiol and Ripert describe in the following way the dilemma confronting the French judges:

"... Now the amount actually collected by the creditor must be measured by the damage suffered by him and serves only to repair it. Indeed, either the judges intended from the beginning to render a final decision, and they had to confine themselves to the allowance of damages calculated in the usual way; or they intended to render a comminatory judgment whose amount they could fix arbitrarily but which cannot be enforced as it is and is subject to revision in order to be reduced to an assessment of damages. This is to say, the penal element which it may be appeared at the beginning, will vanish at this moment and will not materialize."⁷

As the French Supreme Court puts it, an *astreinte* is *either* comminatory *or* final.⁸

In other words, the French judge finds himself in the somewhat peculiar position of one who may threaten but who may not carry out his threat. Strictly speaking, *astreinte* becomes nothing more than strong language intended to impress the recalcitrant loser of a law suit. If, however, the latter is not impressed to the point of performance, so much the worse for the winner. The court has done for him all it possibly could do: it used strong language against his opponent. It is an open secret that before giving the winner title for execution the court *must* reduce the amount of the *astreinte* to the size of the damage suffered. True enough, there is every reason to expect that in assessing such damages the court will solve many if not all doubts about the actual amount of the damage in favor of the winner. But this judicial discretion is strictly limited by the court's duty to explain in its opinion the way in which the damage has been appraised (duty to motivate). It is safe to say, therefore, that there is nothing in the powers of a

⁶ E.g. Coquelin v. Société des Comédiens Français (Ct. App. Paris, April 21, 1896) Dalloz 1897.2.177, 182; Consorts Lantzenberg v. Veuve Dreyfus, (Ct. App. Dijon, April 28, 1910) Dalloz 1912.2.36; Fouché v. Consorts Chancerelle, (S. Ct., Jan. 20, 1913) Sirey 1913.1.388; Société hôtelière de Marseille et de la Riviera v. Comte de Beauregard, (Ct. App. Aix, Feb. 15, 1937) Dalloz Hebdo. 1937.211.

⁷ 7 PLANIOLE AND RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 95 (1931).

⁸ Galbrum v. Durand, (S. Ct. March 14, 1927) Sirey 1927.1.232.

French tribunal in this respect that might exceed the powers inherent in the Anglo-American system of assessment of damages by unmotivated jury-verdict.

One cannot help wondering why the French tribunals use *astreinte* at all if it is just an unrealizable threat. The answer is probably twofold. First of all it must be remembered—and *astreinte* is a revealing institution from this viewpoint—that shadows and ghosts and words and powerless threats have a reality of their own. They might and in fact do impress people, laymen and lawyers, to an extent far greater than that justified by rational expectation. In the second place, the somewhat futile comminatory *astreinte* is still the first step towards the “final *astreinte*” which consists in the anticipatory liquidation of damages generously measured and payable from period to period. The efficacy of the periodical form given to the compensatory sanction increases, of course, its secondary deterring effect. But this is, by and large, all that can be said to explain the existence of *astreinte*. In investigating the psychology of a game one may discover that bluffing is an important weapon and maintain, if in the mood for paradoxes, that to have or not have cards in one’s hands does not make much difference. But we should not be misled by elegant contemplations on the marginal effects of an institution lest we lose sight of its main lines. *Astreinte* is an institution substantially different from contempt of court. It is a bluffing threat by naked words and does not really add to the dignity of the courts, at least as understood in the common-law countries. The truth of the matter is that the French—judges, lawyers and laymen—do not believe in what constitutes the essence of the Anglo-American legal system, i.e., the existence of an inherent contempt power of judges as a fundamental attribute of their being judges. Characteristically enough, a scholar of the standing of Professor Esmein felt the necessity of writing a learned article in which, with the help of historical and political arguments, he attempted to prove that French judges do have contempt powers, and tried to give a foundation to *astreinte* in its comminatory character.⁹ But his has been and is a *vox clamans in deserto*. His main contention, that judges have imperium—a self-evident truth to every common lawyer—presents itself to the French public as a heterodox doctrine militating against the general consensus of jurists and politicians. The work of Esmein has been largely admired, widely quoted, unanimously rejected. In the field of *astreinte* the French judges could never get rid of a certain timidity,

⁹ Esmein, “L’Origine et la logique en matière d’astreintes,” 2 REVUE TRIMESTRIELLE DE DROIT CIVIL 5 (1903).

an unequivocal symptom of their "bad conscience." Esmein tried in vain to tranquilize them (and in so doing he was abandoning his basis of inherent-imperium doctrine) by pointing to some secondary provisions of the French Code. But the provisions were actually saying the contrary of what Esmein attempted to read into them, and every lawyer knew it. One of the highest courts of France, the Conseil d'Etat, speaking of the *astreinte*, considered it a useful and necessary contrivance but without any juridical foundation and a "*procédé anti-juridique.*"¹⁰ Instead of a self-evident, primary and fundamental attribute that judges possess as a matter of principle, we find in France an arrangement confined to the backyard of legal principles, created timidly on the margin of, and perhaps against, the code, this sacred and dominating body of law, an enforcement device surprisingly enough not enforceable itself.

It must be added that in Latin countries other than France even this timid "*astreinte*," this shadow of contempt proceedings, has been considered a tyrannical device opening the door to the worst evils of judicial arbitrariness.¹¹ Indeed, despite the wide influence exercised by the French civil code in almost all countries of the romance language group of Europe and America, in none of them, with the exception of one Swiss canton, Geneva, has *astreinte* been received. A few unsuccessful attempts to introduce it have been made in Europe and in America. The lack of such attempts in the majority of the countries, and their failure where they were made, seem equally revealing of a certain historical tradition, if not of a deep-rooted conception of legal relations at large.

This conception is clearly distinguishable, to say the least, from that prevailing in the common-law countries. While Anglo-American equity bluntly confesses to act in personam, the idea which dominates the civil law of the Latin type is still *nemo ad praecise factum cogi potest.*¹² What is meant by this formula is not simply that a man cannot be coerced into acting in a certain way. That statement would be of a doubtful philosophical value. Indeed, if no line between coercion and inducement were drawn, the statement would be incorrect: *coactus*

¹⁰ Le Noir, (Council of State, Jan. 27, 1933) Dalloz 1934.3.68.

¹¹ Belgium: Commune d'Engis v. Compagnie d'Electricité de Seraing, (S. Ct. Jan. 24, 1924) Pasirisie Belge 1924.1.151; Italy: 2 GIORGI, TEORIA DELLE OBBLIGAZIONI NEL DIRITTO MODERNO ITALIANO, 7th rev. ed., 238 (1930); Argentina: 3 MACHADO, EXPOSICIÓN Y COMENTARIO DEL CODIGO CIVIL ARGENTINA 349 (1932); Colombia: 6 VELEZ, DERECHO CIVILE COLOMBIANO 229 (1926).

¹² See 7 PLANIOL AND RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 76 (1931).

voluit tamen voluit, says another handy Latin maxim. If, on the other hand, the line between inducement and coercion were drawn somewhere, the statement would mean simply that an event is not an *act* if it is coerced, and thus shrink to mere tautology. But under a philosophical cloak, the formula offers political content, and mirrors the conviction that courts cannot, that is to say, *should not*, use personal coercion upon a man in order to obtain his acting in a certain way.

The most common form of personal coercion is represented, probably throughout the world, by the sanctions of the penal law, and these obtain, of course, on the European continent to the same extent as elsewhere. But the uniqueness of the common-law sanction consisting in imprisonment for civil contempt lies in the fact that, unlike the criminal sanctions, it is imposed not so much *quia peccatum est*, not as a *consequence* of a certain act, but *ut agitur*, in order to provoke an act. The legal significance of punishment is in its etiological character, whereas that of the contempt sanction is in its teleological aspect; punishment is mainly a willed *consequence* of human behavior; jail for contempt is mainly a *means* of bringing about certain behavior. Even when the criminal sanctions are explained not on the theory of retribution but on that of deterrence (*ne peccetur* as opposed to the *quia peccatum est*), the intended effect is that of an indirect action upon men generally, not that of directly coercing the punished person into a certain behavior. It is true, of course, that whatever be the theory upon which punishment is predicated, the threat of punishment induces the threatened to behave in a certain way, and that this effect looms large in the intentions of the lawmakers. But the contempt sanction still differs from the punitive one in the exclusiveness of its coercive purpose, in its functional structure well-adapted to its aim. The magnitude of the pressure is measured not by what has been done (be it the heinousness of the crime or other elements) but by the resistance to be overcome. Once the will of the person subject to treatment is bent, coercion ceases. The judge jailing the reluctant party engages in an active struggle with the will of the latter, and as soon as he changes his attitude he is freed, even though the injury which caused the proceedings has meanwhile become incapable of reparation. The future behavior of the defendant or of other individuals is incomparably less in the foreground in a criminal case. What happened—the crime—is now beyond the powers of judges and parties. The law imposes certain consequences, and repentance, reparation, good behavior, reformation, future deterrence, are only secondary characters in the play. In every type of society you can jail a man or put him to death *because* he did

something. But in many societies the doubt is raised whether it is proper to jail him for a single day *in order* to do violence to his incoercible freedom to do or not to do something. Has society an enforceable claim to his specific behavior? Everywhere that contempt sanction obtains the answer is "yes"; where it is missing, the answer is "no."

The same criterion makes it possible to distinguish the contempt sanction (particularly in its pecuniary form) from the sanction of damages and other noncriminal sanctions. Here again it must be conceded and pointed out, from the outset, that an element of coercion or inducement is obviously present in every sanction. What makes for the uniqueness of the contempt sanction is that it is the only one which, in order to achieve the restoration of the legal order, counts upon and aims to provoke the co-operation of the debtor. All other sanctions rely upon a certain behavior of agents of the government directly aiming at the achievement of certain objective results consisting generally in the transmission to the injured party of certain things and/or values from the possession or ownership of the debtor. The structure and mechanism of the sanctions is shaped in a way to dispense completely with co-operation. As matter of fact, the debtor is not expected to *act*, and not even to *forbear* to act, but only to *suffer* other people's action, to *pati*.

Execution, e.g., is not directed against the debtor, whose person remains free from every compulsion, but only against his goods. He might care to stop the march of execution through voluntary compliance. And in this sense every sanction functions as inducement or coercion of the debtor. But this is a collateral and accidental aspect of sanctions other than those for contempt: they may be brought to ultimate and satisfactory conclusion without having exercised the slightest effect upon the debtor's behavior. Only the contempt sanction is directed against the debtor's person, has its magnitude measured not by that of the wrong committed or the injury inflicted, but by the expected resistance and the need of bending the reluctant will. Inducement or coercion is not a secondary, accidental or implicit aspect of this sanction, but represents its essential and exclusive functions conditioning and shaping its structure. The sanction for civil contempt stands alone as a *pure enforcement device*; its sole and avowed purpose is that, declared impossible by Continental law, of *cogi ad praecise factum*, i.e., to coerce a man into a certain behavior.¹⁸

¹⁸ For an attempt at a general classification of enforcement devices somewhat along the above lines, see PEKELIS, DIRITTO COME VOLONTÀ COSTANTE 94-104, 121-131 (1931).

It is probable that at this point the question spontaneously arises: what are the remedies upon which the creditor in Latin countries may count? These remedies consist primarily in the award of damages. This is of course a common-law remedy as well, being the typical, if not the only, remedy at law as distinguished from equitable relief.

Let us see, therefore, how this common remedy of damages works in the two legal systems. For if, by any chance, the remedy of damages were stronger in the civil-law countries than in the common-law countries, this could offset the weakness derived from the lack of specific relief. But on examination of the two systems, it appears that the opposite is true.

Take, for instance, the case of libel or slander: in many cases the issue fought by the lawyer in this country is to find out whether or not special damages have to be shown in order to make the defendant liable. The ruling of the court that the plaintiff must show special damages because the oral defamation did not fall into any of the classes of slander *per se*, is often considered a substantial defeat for the plaintiff. But this is all a plaintiff in a typical Latin country can reasonably hope for in any event; the idea of getting what is called here general damages does not even occur to him. The only recovery he can secure in any case is these meager special damages, and he knows that he has to prove specifically and concretely each and every penny thereof. It is true that you speak sometimes about moral or nonpecuniary damages. But how modest and cautious they are! According to the doctrine prevailing in Italy, they may be awarded only in the case of a criminal offense, and even there some writers contend that the monetary reparation is justified only to the extent to which these moral damages have produced financial loss.¹⁴ The same result obtains substantially in Latin American countries.¹⁵ The rule is even more strict in Germany.¹⁶ In France and in Belgium, things are apparently different, but a student who makes the effort to go beyond the words of the decisions and look

¹⁴ E.g., *Ronsini v. Lettieri*, (S. Ct. May 21, 1932) *Il Foro Italiano* (1932) 57.1.1322, and *Unione Italiana Tramways Electrici v. Marugo*, (S. Ct. May 7, 1934) *RIVISTA DI DIRITTO PRIVATO* 1935.2.17. See also Montel, "La Réparation des Domages Moraux en Droit Italien," 64 *BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE* 361 (1934).

¹⁵ E.g., for Argentina: *Scaramuzzi v. Parma*, (Ct. App. Rio de Janeiro, June 18, 1907) *Juris. Civil V* 187.394. For Brazil, see 5 *CLOVIS BEVILAQUA, CODIGO CIVIL, COMMENTADO*, 4th ed., 321 (1939).

¹⁶ *Bürgerliches Gesetzbuch*, (1938), art. 253. See also zu Dohna, "Die Stellung der Busse im reichsrechtlichen System des Immaterialgueterrechts," 1 *ABHANDLUNGEN DES KRIMINALISTISCHEN SEMINARS AN DER UNIVERSITÄT BERLIN, N.F.*, No. 4, esp. 443-444 (1902).

into the actual awards of damages will find rather instructive results. Thus, in defamation cases the awards average between 5,000 fr. (\$200) and 100 fr. (\$4). And these latter cases are by no means six-cent verdicts; they are considered to be genuine compensation for the injury suffered. Malicious and intentional libel by big newspapers results as a rule in verdicts for about 500 fr. (\$20), hardly enough to compensate the unfortunate plaintiff for the inconvenience of prosecution, and certainly by no means a deterrent penalty.¹⁷ In a single case there was a substantial deviation from the average range of recovery. A French nobleman, M. de Brissac, succeeded in collecting 75,000 fr. (\$3,000) from an American motion picture company,¹⁸ but even that sum does not appear substantial when compared with the £25,000 (\$125,000) awarded in 1934 by an English jury in the analogous case of *Princess Youssouloff v. Metro-Goldwyn-Mayer*.¹⁹ That is why a European newspaper would classify under the heading "Things American"—"Americana"—the news that a girl in New York has been awarded \$5,000 because the defendant kissed her in the street.

These instances are but an illustration of the general contrast, based, on the one hand, upon the existence of such institutions as exemplary or multiple damages, and, on the other, upon the idea—fundamental for the modern civil lawyer—that damages are strictly a compensation for injury suffered. This explains why he does not understand institutions such as nominal, punitive and multiple damages. The concept that, while judicially ascertaining your damages to amount to \$100, the judge may award you \$200 or \$300, simply does not fit into the structure of a contemporary civil-law system. And the comparative investigation of the law of damages only stresses further the greater energy of the common-law enforcement technique.

Thus, considering, among other instances, the "civil" contempt of court involving fine and imprisonment, thinking of punitive and multiple damages, we cannot help feeling that the line separating public law and private law in Europe is far less clearcut in Anglo-American countries, and that a certain *penalistic flavor* is a characteristic of the whole common-law system. But it is probably impossible to fully understand the true spirit of the common law without recognizing and

¹⁷ E.g. *Callman-Lévy and Psichari (Anatole France) v. X.*, (Ct. App. Paris, April 24, 1936) *Dalloz-Hebdo.* 1936.319; and *Me. Roche v. Bozon Viallé*, (Ct. App. Chambéry, October 22, 1936), *Gaz. Pal.* 1936.2.780. See also GIVORD, *LA RÉPARATION DU PRÉJUDICE MORAL* 258 (1938).

¹⁸ *De Brissac v. Société Paramount des Films*, (Civ. Trib. Dec. 1, 1926) *Dalloz-Hebdo.* 1927.127.

¹⁹ (Ct. App. 1934) 50 T. L. R. 581, 99 A. L. R. 864.

frankly admitting its religious and moralistic character. The philosophy of the civil-law countries is that law has to do with the *external* behavior of man in society, and questions of conscience are reserved to the moral forum. The law has to translate its aims in a series of *objective* rules which will be the guide of the individual, who is bound only by what is said, and who is free where loopholes are to be found in the network of the laws. Franz von Liszt, the great German criminologist, used to contend that the criminal code is the Magna Charta of the criminal.²⁰ No law, and particularly no court, shall meddle with the conscience of the litigants. While this is the secular civil-law approach, we have on the other side, in England, a Court of Chancery, which had its very origin in the aim, to use its own words, to meddle with the "Conscience of the Party."²¹ The Court of Chancery was of course not an ecclesiastical court: but it is just its secular structure and its secular functions that make certain aspects of its tradition significant. The fact that until 1529 the Lord Chancellor had always been a high ecclesiastical dignitary, that he exercised civil jurisdiction in his capacity of the Keeper of the King's Conscience, that his devices were those used widely in ecclesiastical tribunals, contribute to the obliteration of a clear-cut line between the techniques of ecclesiastical and secular courts. And we are not surprised to find lay chancellors using a typically ecclesiastical language. For instance, the opinion in the famous case of the Duke of Norfolk, decided as late as 1682, was based in part on the reasoning that certain long-lasting arrangements of property holdings could not be protected by the law because they disclosed a mentality inconsistent with that of a true Christian: "such do fight," said Lord Nottingham, "against God, for they pretend to such a stability in human affairs as the nature of them admits not of."²²

The influence of religious beliefs upon the economic development and the very origin of English capitalism has been the subject of many valuable and famous studies.²³ The influence of religious philosophy and ecclesiastical technique upon the substantive and adjective law was not less important. As a matter of fact, this influence is probably the

²⁰ von Liszt, "Die deterministischen Gegner der Zweckstrafe," 13 ZEITSCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 325 at 357 (1893).

²¹ Arguments Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery, 1 Chan. Rep. (Appendix) 1 at 47, 21 Eng. Rep. 576 at 587 (1616).

²² Duke of Norfolk's Case, 3 Cas. Ch. 1 at 31, 22 Eng. Rep. 931 (1682).

²³ See, e.g., MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM, translated by Parsons (1930); TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926).

only factor in the development of Anglo-American legal institutions that can show a continuity of more than a thousand years. Almost two centuries before the Norman invasion, Alfred the Great thought it advisable to begin his *Dooms* with the re-enactment of a somewhat revised edition of the Ten Commandments. Thus, in section 3 he made legislatively certain that "in six days Christ wrought the Heavens and the Earth, the Seas and All Creatures that are in them and rested on the seventh day and therefore the Lord hallowed it."²⁴ And the commandments are still a part of the law of the land. Thus, a few months ago, a judge in Pittsburgh held a witness in contempt of court who, in a divorce suit, said, "My mother is not a lady." "Honor thy father and thy mother, whom the Lord hath given thee," says the Bible. American tradition backs the Pittsburgh judge. We find, for instance, a paragraph in the Blue Laws of New Haven reciting: "If any child above sixteen years old and of sufficient understanding shall curse or smite his natural father or mother he shall be put to death . . . Exodus Ch. 21, verse 17; Leviticus 20; Exodus 20:15." The same provision is to be found in section 13 of the 1671 version of the Liberties of the Massachusetts Bay Colony. We all know that biblicism was extremely strong in American colonial life; a great number of the laws enacted in New England contained as a usual feature a reference to the biblical passage deemed to be their truest source of authority. To "deny God or His creation or government of the world" was one of the capital offenses in the Massachusetts Colony, and probably not there alone.

One of the most impressive consequences of the influence exercised by the ecclesiastic procedural technique through the medium of the equity courts upon the administration of justice at large is to be found in the creation of a closer, almost confessional atmosphere in the relation between the court and the party. This somewhat vague atmosphere has materialized in at least two very precise legal relationships, which can be described as the duty of disclosure and its far-reaching complement, the right of investigation. The decisive importance of this duty and this right for our investigation becomes clear when we consider that, under the rules of civil procedure in Latin countries, no person may testify under oath in his own cause, not even if willing to do so. You cannot be a witness in your own case any more than you can be a judge in your own case. In the Anglo-American system, on the contrary, every party has the right today to testify under oath in his own case, and has, as a rule, a strong interest in doing so. It

²⁴ THORPE, ANCIENT LAW AND INSTITUTES OF ENGLAND 44-45 (1840).

is true that we sometimes see a party take an oath in, say, an Italian or a French court; but never as a *witness*. The party may swear upon a given formula. He cannot be examined, much less cross-examined. The party's oath is not a means of finding the truth; it is rather a means of closing a litigation haphazardly, or a chance taken by a party who feels he is going to lose and tries to put his opponent under pressure by making him swear to his allegations. This, of course, makes the party oath an institution of very limited practical importance, and it is in no way comparable to the cross-examination of the parties under oath which takes place in the common-law countries. Prior to 1933 there were a few exceptions to this rule; the most prominent of these was the Austrian *Parteivernehmung*, shaped expressly on the British pattern,²⁵ and an outstanding and rare instance of successful reception of a common-law institution on the European continent.

The situation of the defendant in a criminal proceeding is not less significant. I do not know of a single civil-law country in Europe or America in which the defendant in a criminal suit is allowed to take the stand in order to make declarations under oath. This is, however, the defendant's privilege today in England and in all but one of the American jurisdictions, a situation perfectly in line with one of the most basic chancery traditions. This right of the defendant to testify is, of course, at the same time quite a burden, and the defendant who fails to avail himself of the privilege is liable as a matter of fact to discredit himself in the eyes of his judges. At the International Congress of Criminal Law held in Palermo in 1933, the question of the defendant's oath appeared to be almost the only point of unbridgeable conflict between the common and the civil lawyers.²⁶ The attitude of the latter was that the defendant has to be given a chance in his struggle against the accusation. After the criminal code, the code of criminal procedure becomes the Magna Charta of the criminal. The argument of the civil lawyers—and it is noteworthy that one of the most violent indictments of the United States' system of criminal proceedings was read by the delegate from Cuba—was that in order to make the common-law guarantees against self-incrimination effective, not only the duty but also the right to testify in their own case must be taken from the parties; otherwise the *prejudice de facto* is an incentive to perjury.

This sweeping duty of disclosure in Anglo-American countries is

²⁵ See 2 POLLAK, *SYSTEM DES OESTERREICHISCHEN ZIVILPROZESSRECHTS MIT EINSCHLUSS DES EXEKUTIONSRECHTES* 2d ed., 687-688 (1932).

²⁶ TROISIÈME CONGRÈS INTERNATIONAL DE DROIT PÉNAL, *ACTES DU CONGRÈS* 491-533 (1935).

beyond doubt of ancient origin. The Court of Chancery subpoenaed the defendant to present himself before the court and to file under oath an answer containing the full disclosure of all facts pertaining to the cause. This duty of disclosure reached its climax in the proceedings before the High Commission and its *ex officio* oath, which invited the thunders of Sir Edward Coke, who argued that judges "ought not examine *partem ream*; upon their oath." To prove the point, he explicitly had recourse to a civil-law principle, and went on to say "for as a civilian said, that this was *inventio diaboli ad destruendas miserorum animas ad infernum*."²⁷ The High Commission disappeared, King Charles I was beheaded, but it is still the spirit of the chancery, and not that of Lord Coke, which rules common-law procedure.

The importance of the right to investigate and of the duty to disclose goes, in Anglo-American society, far beyond the scope of judicial activity. Even where there is no question of violation of existing laws, an individual may be subpoenaed to appear before an administrative agency or a legislative investigating committee and disclose every detail of his business and his life, and a subpoena *duces tecum* may order him to produce every possible kind of record or document pertinent to the inquiry. We tried to explain elsewhere the reasons for our belief that the power of the American administrative agencies and the scope of their activity are much greater than those of administration in civil-law countries.²⁸ Here it is enough to stress the fact that the subpoena is the main weapon of administrative and legislative investigating bodies. Without the duty to disclose, their activities are unthinkable, and indeed an investigation as sweeping, for instance, as that described by Judge Pecora in his *Wall Street under Oath*²⁹ is a phenomenon practically unknown in the civil-law countries. In France, for instance, the powers of the parliamentary committees are uncertain at best, and the success of their investigations practically depends upon the willingness of witnesses to testify.³⁰ The timid legislative reform of 1914 failed to change the situation substantially, but did not escape the vigilant attention of leading constitutional lawyers and statesmen, who, like Duguit, Berthélémy and Reynaud, were ready to see in it an

²⁷ 12 Coke 26, 77 Eng. Rep. 1308 (1607).

²⁸ Pekelis, "Administrative Discretion and the Rule of Law," 10 SOCIAL RESEARCH 22-37 (1943).

²⁹ PECORA, WALL STREET UNDER OATH; THE STORY OF OUR MODERN MONEY CHANGERS (1939).

³⁰ See JOSEPH BARTHÉLÉMY, ESSAI SUR LE TRAVAIL PARLEMENTAIRE ET LE SYSTÈME DES COMMISSIONS 245 (1934) (International Institute of Public Law, Vol. 5).

obvious violation of the doctrine of separation of powers and a curtailment of the fundamental rights of man and citizen.³¹ The ideological strength of this individualistic principle was such that even the indignation provoked by events like the Panama scandal or the Stavisky affair was not sufficient to swing the balance of public opinion. Not even in Germany, where the Weimar constitution followed the English precedent by introducing the principle of parliamentary investigation, was the situation different. An early episode is probably sufficient to show the difficulties with which the reception of the common law on European soil usually meets. The German right-wing leader Helfferich, while testifying before a parliamentary committee, declared that he would not answer any question put to him by Oscar Cohn, one of the members of the committee. The outraged committee, in the climax of its fury, assessed a fine of no less than 300 semi-inflated marks. The order was sent for collection to a local court, which apparently upheld certain procedural exceptions of the contumacious witness and cancelled the fine.³² It is highly probable that an English or American committee would, in a similar case, have kept Mr. Helfferich in jail "as long as we please."³³

It is important for the purpose of our investigation to note that this far-reaching duty of disclosure in common-law countries has its roots not only in the clerical and moralistic manners of approach we have spoken about, but also in another characteristic of the common-law tradition. This feature is represented by the importance of the control that the community at large exercises over the individual. To a certain extent the law represents always and everywhere social custom and public opinion about what is wrong and what is right. But the common-law countries possess a series of institutions which succeed in maintaining a constant relationship between the state of law and the state of public opinion, and particularly the state of opinion of the immediate community to which a given individual belongs.

The main device through which this constant check is effectuated is probably the institution of the jury, and, possibly even more, of the grand jury. Trial by jury is the birthright of every Englishman, ac-

³¹ See 4 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL*, 2d ed., 398 et seq. (1924); Berthélemy, "Les Limites du Pouvoir Législatif," 125 *REVUE POLITIQUE ET PARLEMENTAIRE* 355 et seq. (1925); *LE TEMPS*, November 14, 1925. The problem of parliamentary investigations will be dealt with in more detail by Mr. Henry W. Ehrmann in one of the forthcoming papers of our research project.

³² See W. Jellinek, "Revolution und Reichsverfassung," 9 *JAHRBUCH DES OEFFENTLICHEN RECHTS DER GEGENWART* I at 91 (1920).

³³ See, e.g., *CONG. GLOBE*, 42d Cong., 3d sess. (1873), p. 982.

cepted and guaranteed in the Constitution of the United States. It may be worthwhile to recall some of the ancient English institutions which may place in relief the true significance of the jury.

One of these institutions is the tithing, or the frankpledge. It is an old Saxon institution that existed in England long before the Norman conquest and the Norman invaders were only too glad to develop and strengthen it. It is said that each boy, on reaching the age of fourteen, was obliged to find some such pledge or be *committed to prison*,³⁴ and it is an interesting circumstance that the frankpledge was not unknown to Colonial America, and seems to have been in effect in Pennsylvania.³⁵

We do not think there is any need to comment on the significance of such an institution. Its underlying philosophy is obviously that it is the quality of being a good neighbor that makes a man a good citizen, or better, a citizen at all, that gives him his political status and his personal liberty. Other institutions were inspired by the same philosophy. Take, for instance, the compurgation, or wager of law. A defendant in a criminal or civil proceeding could purge himself by his simple oath, provided, of course, he presented himself to the court with a sufficient number of oath-helpers, or compurgators. This means, of course, that good neighborliness not only imposed certain duties but could pay very well indeed in certain contingencies through this institution of the wager of law. The latter was common to all Teutonic tribes, but England is the only country in which, as late as 1833, it required statutory abolition.³⁶

Against this background, the origin of the jury takes on a particular meaning. It is to be remembered that this reform was not imposed, as some seem still inclined to think, by humanitarian reformers against a cruel royal tyranny. The jury, a device invented by the royal courts, was sometimes rather cruelly imposed upon litigants or at least upon certain types of litigants. A descendant of Norman conquerors, in his "rugged individualism," probably would consider as his inalienable birthright the right to a trial by battle, and not a trial by jury, which would expose him to the mercy of his peers. He wanted to fight his opponent sword in hand, and kill him or hear the grovelling word "craven" issue from his throat—even at the risk of being killed him-

³⁴ BLOUNT, A LAW-DICTIONARY (1670), "Frank Pledge" and "View of Frankpledge."

³⁵ For an urgent recommendation to introduce the frankpledge, see GRANVILLE SHARP, A GENERAL PLAN FOR LAYING OUT TOWNS AND TOWNSHIPS ON THE NEW-ACQUIRED LAND IN THE EAST INDIES, AMERICA OR ELSEWHERE 13-15 (1794).

³⁶ 3 & 4 Will. IV, c. 42, § 13 (1833).

self. And even the humble Saxon would sometimes prefer the terrible trial by ordeal, the judgment of God, who in His infinite mercy and justice had so many times miraculously saved innocents from accusation and persecution. Rather a deal with God than with the neighbors, who had been bad neighbors to him or to whom he had been a bad neighbor. Of course, the more peaceful part of the population was only too happy to pronounce the sacramental words that represented the waiver of their birthright to the ancient forms of trial, and say, "I put myself upon the country, for better or for worse." But a few of them would refuse to pronounce these words, and rather than submit to the Ersatz of the voice of God—the voice of the people—they would submit to the *peine forte et dure*, being pressed to death.

We think that the jury, not only in its historical origins but also in its practical functioning, particularly in the small and medium-sized communities, represents a principle manifestly contrasting with the more formalistic or legalistic functioning of a Latin court appointed by a central authority. This method of selecting the judiciary, especially since it is coupled with the fact that—at least in civil proceedings—the personal appearance of the parties is a rare occurrence, tends to dehumanize the trial. Not only does the judge not know John or Jack personally, as in some small communities the jurors do, but the considerations of being liked or disliked by his neighbors cannot generally affect the judge's appraisal. He has before him certain facts, or, better still, certain legal facts, and to these facts, *as they appear in the files*, he has to apply the law.

One of the fundamental principles of civil-law procedure is that a fact-finding tribunal cannot use in the trial its private knowledge of the facts in issue.⁸⁷ In theory, analogous rules exist in common-law countries. But it is of course an open question to what extent the personal knowledge of the jurors gathered from newspapers and even from back-fence gossip may influence their decision. The old rule that the jurors *had* to know the facts of their own knowledge has of course long been reversed. Nevertheless, more than one defendant could, even today, make the old objection: "These men have their hearts big against me and hate me much because of this ill report which is surmised against me," and therefore refuse to put himself upon "the good folk of this Vill."⁸⁸ It is often said that the institution of the jury is declin-

⁸⁷ See F. STEIN, *DAS PRIVATE WISSEN DES RICHTERS, UNTERSUCHUNGEN ZUM BEWEISRECHT BEIDER PROZESSE* 138 et seq. (1893); 2 (DALLOZ) SAVATIER, *NOUVEAU DICTIONNAIRE PRATIQUE DE DROIT* 224 (1933).

⁸⁸ *THE COURT BARON*, Maitland and Baileton ed., 4 PUBLICATIONS OF THE SELDEN SOCIETY 63 (1891).

ing in America and England.³⁹ However, the reliance upon the judgment of the community and particularly the small community is still extremely strong. The mobilization of millions of soldiers in a nation at war through the selection system operated by local draft boards is certainly a new triumph for the law of the neighbors, and a feature unthinkable on the European continent.⁴⁰

Let us see how the institution of the jury works in those civil-law countries in which this institution is known. Once again the picture is easily drawn, the differences being of macroscopic dimensions. To begin with, there the jury *never* intervenes in private litigations, nor does it deal with misdemeanors, except possibly those committed by the press. Thus, in effect trial by jury is limited to felonies—or better—certain exceptional classes of felonies, numerically an insignificant fraction of the total judicial life. Of particular interest is the fate of the jury in Latin America. Many of the South American constitutions, following the example of the United States, explicitly declared the jury to be the birthright of every citizen, a guarantee of democracy. Actually, however, the jury system has never assumed great importance in the South American countries.⁴¹ In some nations, in spite of the constitutional reception of the jury, no statutes were ever passed providing for trial by jury. Other countries, while passing such statutes, limited them commonly to criminal cases, and even there the jury was not favorably received and was applied to a very limited number of cases. In several recent revisions of codes of criminal procedure, trial by jury has been almost completely eliminated because, to use a characteristic expression of a Mexican writer, the jury is “contrary to the rhythm of judicial life in Mexico.”⁴²

The German experience is strikingly similar. The jury, which had been introduced in the German legal world under the influence of the French Revolution, was abolished by simple governmental decree in 1924. With the exception of a few experts, this act was met with almost complete indifference in the country.⁴³ One can imagine how dif-

³⁹ See, e.g., HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 308-310 (1931); Emery, “Government by Jury,” 24 *YALE L. J.* 265 (1915).

⁴⁰ Compare also the functioning of local rationing boards described by R. Oppenheimer in a forthcoming article in 43 *COL. L. REV.* (1943).

⁴¹ See 3 GARCIA, *JUICIO ORAL*, esp. pp. 520-566 (1938); M. COSTA, *O JURY* (1938), passim, and Bergé, “Etude sur le jury en droit comparé,” 6 *REVUE DE L’INSTITUT DE DROIT COMPARÉ I* at 7-14, 86 et seq. (1913).

⁴² GONZALES BUSTAMANTE, *PRINCIPIOS DE DERECHO PROCESAL PENAL MEXICANO* 189 (1941).

⁴³ See Mannheim, “Trial by Jury in Modern Continental Criminal Law,” 53 *L. Q. REV.* 388 at 404 (1937).

ferent would have been the reaction of the people of the United States had a president tried to abolish trial by jury by executive order—even in the midst of an emergency as grave as the one Germany was facing in 1924.

In civil-law countries the jury plays almost no political role whatsoever, and does not have that social significance which it has in England and the United States. A study by Dr. Alvin Johnson has shown the educational importance of the jury in a small New England community.⁴⁴ Alexis de Tocqueville remarked, more than a century ago, that if trial by jury is not always the best possible way to accomplish justice for the parties, it is of the greatest moral benefit to the jurors. But the jury is not only the object of education—it is also an educator.⁴⁵ In amplifying this, we have to consider that in civil-law countries the jury—if it intervenes at all—can render only a decision analogous to the common-law “special verdict,” that is, the jury has to answer specific interrogatories limited as far as possible strictly to questions of fact. In this country, on the contrary, it is the duty of the trial court to expound the law to the jury. The jurors are not only going to ascertain the facts; it is equally their function to apply to those facts the law which the trial court has had to explain or translate to them. This job of translating law into plain, popular language, or of reviewing the translation made by the court below, to which the most influential class of common lawyers—I mean the judges—are daily compelled, is a kind of job that a European jurist faces perhaps once in his life, when, rather reluctantly, he has to deliver a paper on legal problems at what is called over there a people’s university. The everyday link between judge and jury, between law and plain English, makes again for the popular, neighborly character of the common-law institutions. This may also be one of the many reasons why the common-law writers indulge less in efforts at generalization and systematization than do the civil-law writers. The need to expound the law to a lay jury would break down every ambitious excursion into the higher spheres of jurisprudence.

If we try now to give an answer to the question we formulated at the beginning, we must say that the aspects of legal life in England and America which we have just examined do not substantiate the contention of the individualistic character of the common-law technique.

⁴⁴ Johnson, “The Substance of American Democracy,” *POLITICAL AND ECONOMIC DEMOCRACY*, ed. by Ascoli and Lehmann, 318 at 320-321 (1937).

⁴⁵ 2 DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, translated by Reeve, 2d ed., 195-200 (1836).

On the contrary, the strength of the enforcement devices, the clerical and moralistic character of legal approach at large, the duty of disclosure, the close control exercised by the community upon the individual and upon the law, if compared with the analogous legal institutions of the Latin countries, seem to disclose rather a more collectivistic than a more individualistic character of the common-law system. Does this mean, however, that the contention of the individualistic character of the common law and of the American social structure is only and simply a commonplace? And were it but a commonplace, would not we still have to account for its rise and appeal?

We ask leave to submit an explanation and to a certain extent a reconciliation of our preceding remarks with the prevailing individualistic thesis. It seems to us that what is generally considered as and taken for the individualistic aspect of American life is simply the existence and coexistence of a plurality of communities and—let's not be afraid of this quantitative element—of an extremely great number of communities of various types. Through a kind of optical error this phenomenon of decentralization of collectivistic pressure, which by its very decentralization only *increases* in power, has sometimes been taken for individualism. "Things are so well arranged in America that the strict allegiance to collective behaviour is called individualism," remarked Max Ascoli many years ago, and added, "The highways are filled with cars running towards the solitude of the country."⁴⁶ When, for instance, such students of the structure of American society as F. J. Turner or C. W. Eliot emphasize the individualistic and antisocial character of the early American colonists, stressing at the same time the importance of the family, the group, the town, and the section, in American life,⁴⁷ they identify individualism with intolerance of a *central* authority. As a matter of fact, what they called individualism seems to be in reality collectivism within a smaller group, and what they called the antisocial tendency may be simply an antigovernmental one.

Now is this only a question of words? Is what we would call collectivism or pluricollectivism just what is usually classified as individualism? We think that, to say the least, the use of the term individualism greatly beclouds the true issue. Should it be admitted that what is typical for the English and American way of life is not the lack

⁴⁶ ASCOLI, *INTELLIGENCE IN POLITICS* 199 (1936).

⁴⁷ See TURNER, *THE FRONTIER IN AMERICAN HISTORY*, esp. 125, 258-268 (1920); ELIOT, *THE CONFLICT BETWEEN INDIVIDUALISM AND COLLECTIVISM IN A DEMOCRACY*, esp. 7, 8, 31, 91 (1910).

of social control but its decentralized character, then, e.g., the popular issue individualism and free enterprise versus collectivism and social control appears as a phantom issue that neglects the third and decisive element, the factual prevalence of a strong social control in its decentralized pluralistic form.

We could speak of an essential federalism of America and we would not, of course, have in mind just forty-eight or forty-nine American jurisdictions. We think of a wider and deeper network composed of a plurality of legal systems enjoying an extremely great amount of autonomy. Not only the forty-eight states, but the smaller territorial communities, the unions, the churches, the trade associations, the exclusive groups, the fraternities, the various clans, the viligantes, the pressure groups, all these cellular organisms have their own written and unwritten laws, their own enforcement devices, their own forms of social control, their own framework of pressure. When we see the individual challenging the power of the central authority he does not, as a rule, act as an individual. He acts as a member of one of these communities. He is one of the tithing. He presents himself with his neighbors or with others with whom he has common interests. He leans upon the power that even the smallest community has.

Before the rise of the modern state, the existence of a plurality of legal orders was probably too obvious to be remarked on. But even after the claim of the state for the monopoly of lawmaking had made itself felt, the existence of nonofficial systems of law was recognized. As early as 1878, the German jurist August Thon affirmed the existence of a plurality of legal orders, some of which were even illegal, as the Roman Church under the Roman Emperors.⁴⁸ Benedetto Croce published in Italy in 1906 a clear exposition of the pluralistic theory.⁴⁹ The names of the modern English pluralists are well-known.⁵⁰ But an investigation into the real structure of these legal systems, representing, so to speak, as many states within the state, is almost completely neglected. To give only a single instance, in spite of the enormous development of commercial arbitration in this country, not a

⁴⁸ See THON, *RECHTSNORM UND SUBJECTIVES RECHT; UNTERSUCHUNGEN ZUR ALLGEMEINEN RECHTSLEHRE*, esp. XI-XII, 7-8 (1878).

⁴⁹ See CROCE, *RIDUZIONE DELLA FILOSOFIA DEL DIRITTO ALLA FILOSOFIA DELL'ECONOMIA* (1907), reprinted 1926.

⁵⁰ See, among many, FIGGIS, *CHURCHES IN THE MODERN STATE* (1913); GEORGE D. H. COLE, *GUILD SOCIALISM RE-STATED* (1920); LASKI, *THE STATE IN THEORY AND PRACTICE* (1935) and *STUDIES IN THE PROBLEM OF SOVEREIGNTY* (1937); BARKER, *POLITICAL THOUGHT IN ENGLAND FROM HERBERT SPENCER TO THE PRESENT DAY*, esp. 175-183 (1915).

single systematic report on the content of the arbitration awards has been published here. The fact would be amazing if one did not suspect that at certain stages of development lack of publicity and systematization is probably the condition of growth, and if one did not recall the reluctance of early equity to keep records, publish reports and become aware of its compliance with precedents.

At least to a certain extent this lack of legal data on the various minor and less formal legal organisms existing in society at large, such as the constitutions of trade unions and trade associations, etc., is probably responsible for certain formalistic limitations to the investigations of the school of institutional economics. It appears to us that studies of the forms of social or collectivistic controls of economic activity have the tendency to confine the research to the regulation exercised by legislature and court, by the legal agencies in their most narrow sense. Even when outstanding scholars go to work on topics such as monopolistic competition or the economics of imperfect competition, questions in which the consideration of the extent and ways of functioning of group behavior and group control would seem inevitable, they either maintain themselves "in an atmosphere rarefied by the adoption of very severe simplifying assumptions"⁵¹ or limit their study mainly to the problems of state controls.⁵²

We find, to be sure, that some economists discuss controlling social factors other than state control.⁵³ But their statements are usually either overgeneralized statements of principles or investigations on too specific topics. There appears to be as well a lack of any developed techniques or methodology for dealing with the factors of nonofficial controls, and we are probably still far from a systematic treatment of the problem of pluralism in the economic field.

It is certain that much more must be done in the field of law and in the field of economics before public opinion is to realize that the historical development of the American economy cannot be interpreted as a phenomenon of the growth of individual enterprise, and that the real choice is not, and never has been, between freedom of enterprise and state control. This historical development can be viewed only in terms of the relationship between various types of social controls and their

⁵¹ ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION* 327 (1938). See, also, CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1936).

⁵² See, e.g., BURNS, *THE DECLINE OF COMPETITION* 522 (1936).

⁵³ See, e.g., JOHN M. CLARK, *SOCIAL CONTROL OF BUSINESS* (1939); COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1932); VEBLLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1940) and *ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA* (1923).

relative checks and balances in the total economy. The complete insight into these social controls, which could be outlawed but not destroyed by these antitrust laws, is probably the prerequisite for every type of efficient economic legislation.

We cannot fully understand the political significance of the pluralistic structure unless we are aware of the fact that centralization of power and individualism are far from being contradictory and inconsistent. They may sometimes appear as concurrent and complementary concepts. A historical concurrence of this kind probably explains the tyranny of Renaissance Italy, and why France has been at the same time a typically centralized and a typically individualistic country. The distant boss, the stranger-judge, and other features of centralized government may be more favorable to the development of individualism than the pressure of government by neighbors in a decentralized state. The formalistic and legalistic approach which the very fact of centralization develops by necessity brings about a form of individualism which sees its Magna Charta even in the most severe code. It can be said, furthermore, that the connection between centralized despotism and individualistic tendencies of a country is probably a two-way proposition, and that the strong individualistic attitude of the population may be the source of a decline of political interests and communal solidarities, and become the ideal ground for the rise of antidemocratic institutions.

The strong collectivistic pressure typical for the common-law countries is, on the other hand, outweighed by the fact that the closely controlling communities are here so numerous that, as a practical matter, the great majority of individuals can find a community that suits them more or less perfectly, and to which they may adjust themselves more or less painlessly. Only the "rugged individualists," the eternal dissenters, the true outsiders, will have a much harder time in the common-law countries than in what used to be in the past a typical European democracy.

The historical tradition of the pluralistic approach in England and America is very strong. We shall mention here only an example which, although on a different plane, is nonetheless an extremely significant manifestation of this way of thinking. We refer to the known episodes of the struggle among the English courts that constitute in our opinion an absolutely unique feature. The history of the European Continent knows of struggles and conflicts between barons and states, towns and empires, state and church, feudalism and central power. But it does not present us with a struggle between two courts both emanating from the

same authority, fighting each other in a period in which that very authority exercised a very strong *central* power. And that is what happened during the Tudor and Stuart periods in England. The King's Bench would, for instance, render a judgment in favor of a plaintiff, but the Court of Chancery, on the prayer of the defendant, would enjoin the winning party from exercising his rights recognized by the King's Bench, and would jail him for contempt if he tried to enforce the mandate of the King's Bench. The latter would then issue a writ of habeas corpus and free him. Sir Edward Coke, Chief Justice of the King's Bench, tried even to indict the Master in Chancery under the Statute of Praemunire for having interfered with the judgment of the King's Bench, and, as Bacon said, "make the Chancellor sit under a hatchet, instead of the King's arms."⁵⁴ James I intervened in this conflict between his two courts and decided it, upon the advice of Bacon, in favor of the Chancellor, thus maintaining the plurality of independent courts in his kingdom. He fully appreciated the advantages of a legal polytheism and would not deprive the Olympus of the common law of one of its most industrious gods, the court of equity.

In a way, this royal decision, restated in England by statute in 1872,⁵⁵ is also a methodological justification of this paper. It must be conceded, indeed, that most of its conclusions rely rather on rules and practices of equity rather than on those of common law proper. If we thought this to be a proper approach, it is because equity appeared to be the *ultimo ratio* of the Anglo-American law, prevailing wherever it came in conflict with the common law proper. We must also be conceded that the latter, considered in itself, appears rather similar to the civil law at large. But the very idea of considering common law proper *in itself* implies a disregard for the functional unity of the institutions studied. We are inclined to explain the conclusions reached by the prevailing doctrine of comparative law by a certain neglect of equitable institutions. To us the main distinguishing feature of the common-law countries is in the fact that not common law but equity prevails there. If someone were compelled to explain the essence of civil law to a common lawyer in one sentence, he could perhaps say that civil law is what common law would have been if it had never known a court of chancery. It is true that the answer would hardly be helpful, the picture suggested being probably beyond the imagination of a common lawyer.

The picture of conflicting and coexisting jurisdictions is equally in-

⁵⁴ 6 BACON, LETTERS AND LIFE, Spedding ed., 91 (1872).

⁵⁵ The Supreme Court of Judicature Act, 1873, 36 & 37 Vic., c. 66.

conceivable to a Latin or even a German lawyer, who believes in the *Einheit der Rechtsordnung*, the uncompromising and sometimes cruel unity of the legal order. Our late colleague, Nino Levi, had long ago noted in his special field this contrast of approach between the English and the Italian type of regulation.⁵⁶ The former left the findings of the civil and criminal courts completely independent of one another; the latter declared that the civil judge is strictly bound by the findings of the criminal court, and thus reaffirmed the irrefractibility of the judicial decision upon the same set of facts, and the fundamental unity of the legal order.

This need for unity probably reached one of its climaxes during the French Revolution. In 1790 two significant events took place in Paris. In that year the first steps leading to the establishment of the metric system were taken in France in order to supersede the medieval complexity of weights and measures. It is true that the French influence strongly felt in the United States in that period manifested itself also in this field through Jefferson's proposals to introduce a decimal division of the various units. But this project, adopted in France, was, except in the matter of the currency, rejected in this country; symmetry, legal or arithmetical, has evidently never been a decisive argument in the common-law countries.

The second event that took place in France in that very year of 1790 was the enactment of the famous *Décret sur l'Organisation Judiciaire*, directing judges to *refrain from the interpretation of laws*, and to consult the central legislative authority whenever need for such interpretation should arise.⁵⁷ And we certainly do not have to point out that the adoption of a principle depriving judges of their power to interpret statutes would be inconceivable in a common-law country, even during the excitement of a revolution. Not even the *dissenting* opinions of the judges are here considered seditious or subversive. In Europe, with significant exception of Switzerland, a judge who would dare to reveal publicly or in private conversation that he disagreed with his brethren on the bench would be guilty of grave misconduct, liable to impeachment and removal. The court is considered a unity, its voice is the *viva vox juris*, and it must be assumed that the judges can speak but in a unisonal chorus. The contrapuntal conception of law in common-law countries is shown by the importance that dissenting opinions have in the process of legal change.

We do not forget, on the other hand, that the exigency of unity and

⁵⁶ LEVI, *LA PARTE CIVILE NEL PROCESSO PENALE ITALIANO*, 2d ed., 3 (1936).

⁵⁷ *Décret sur l'organisation judiciaire*, August 16-24, 1790, Tit. II, art. I, no. 12.

of geometric perfection of the legal world has deep roots in human nature. Ptolemy was the first man to give scientific foundation to the hypothesis that the world is a sphere. It is said that the origin of his conception was not a strictly mathematical reasoning, but rather an aesthetic intuition. Since the world could not have been created, he felt, but beautiful and perfect, since the sphere is the most beautiful and perfect form human mind can conceive, our earth must necessarily be a sphere. I personally have always admired the pathos of abstractness which inspired such a thought. Here was a man who did not have sufficient affection and love for what makes for mortal beings the beauty of the world in which they live—the unevenness of the landscape, the shape of mountains, the fanciful ribbon of rivers. To him beauty was something else: an abstract and cool geometric perfection. This Egyptian certainly had in his soul the spirit of the race of Semitic shepherds who, in sleepless dreams under the nocturnal sky at the borders of the desert, conceived the dogma of monotheism.

I must add, on the other hand, that my admiration for Ptolemy is equalled only by my admiration for the man who first had the extraordinary daring to conceive the idea that while singing or playing two or more themes simultaneously you could bring about, not a terrible musical cacophony or political anarchy, but a newer, better, more perfect union and beauty. The strong fabric of the common law, the social structure of the common-law countries, building a unity of their very variety, represent one of the most astonishing achievements of legal and political contrapuntal harmony.

Civil law and common law represent, therefore, not only the two main legal systems of Western civilization, but also two fundamental trends of human nature. It would be childish to try to find out which one is better. It is only unfortunate that their mutual contact has so far been rather limited. A greater reciprocal influence of the ideas inspiring the two systems is probably one of the prerequisites for a real understanding between English America and Latin America and, through it, of the unity and survival of the Western civilization at large. Their deeper interpenetration could eventually become an important factor in the development of less imperfect forms of human coexistence.