Spring 1992

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Book Review

LAW AS SOCIAL THOUGHT

PAUL H. BRIETZKE

The Human Measure: Social Thought in the Western Legal Tradition,
Pp. xiv + 358, $35.00.

I began Professor Kelley’s book on a long plane journey and finished it after grading a tall stack of exams. This context to my reading may have enhanced the sense of refreshment the book gave to me, but other lawyers should also feel refreshed by Kelley’s inquiry into our “Roots.” All too often, our workaday efforts proceed in ignorance of the fact that we stand on the shoulders of giants. If we have considered the matter, we have perhaps heeded Holmes’ warning about “the pitfall of antiquarianism”: while doing our job of predicting future legal outcomes, we are easily led into a “blind imitation of the past.”¹ Such an attitude is unfortunate because, as Kelley notes, “it is fascinating to see the jurists giving shape and meaning to their world through linguistic and hermeneutical virtuosity. On several levels their mission was to . . . ‘civilize’. . . their contemporaries.”²

Their world is not ours. But our contemporaries can still use some civilizing, to say nothing of ourselves, and the refreshing nature of Kelley’s book largely stems from his undertaking a civilizing mission that would never be attempted by a lawyer qua lawyer. As an intellectual historian, Kelley does not address questions familiar to (well-trained) American lawyers, questions of

¹ Professor, Valparaiso University School of Law. I am grateful to Kevin Geiman, Jack Hiller, Zack Schiffman, and Tom Thorson for reading a draft of this review, but errors remain my responsibility.

² Donald R. Kelley, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 146 (1990). It may be that “their world” is an Ivory Tower or a rendering of service while in the livery of a corrupt master, but this does not make their work less interesting. For a striking failure (Ronald Dworkin’s) to acknowledge a predecessor’s (Plato’s) contribution, see Paul H. Brietzke, Dworkin Today, 21 VAL. U. L. REV. 321, 344-45 n.65 (1987).
how law functions in society over time. Rather, he describes how, until the nineteenth century, social thought is law; law/social thought was usually its own cause because thinkers almost always pondered their predecessors' insights in ignorance of the social context in which those insights arose. The result was a life of the mind called the civil law/civil society tradition. This tradition is older, more influential and more cosmopolitan than the common law tradition. Kelley describes briefly for purposes of comparison and contrast. He thus adds to and ties down our thoughts about law stemming from our liberal arts background, Kelley's jurists being the generalists or common carriers of Western civilization.

Kelley warns that the Roman law principle of patria potestas, of the absolute male supremacy in a quest of property and empire that continues to dominate much of current legal thinking, is the intellectual "prototype of the male chauvinist who has dominated history -- or at least the history of political

3. See Kelley, supra note 2, at 55 (Justinian's legal canon was the "prototype of systematic social thought"); id. at 113 ("civil science" as the "infancy of modern European social thought"); id. at 130 (Bartolus' imperialistic civil science claimed a universality and a precedence over the arts, medicine, and theology); id. at 213 (quoting G.W. Leibniz, 1667: "Not content with the glory of being identified with the highest philosophy, jurisprudence is driven to occupy alone the throne of wisdom.").

4. John H. Merryman, The Civil Law Tradition 3 (1969). During the struggle over Royal supremacy that Parliament ultimately won, James I used an argument loosely based on the civil law: he could interpret the law as well as anyone, by using a "natural reason. This contention stiffened the English resolve to oppose civil law influences -- a resolve exported to the U.S. -- by adopting the "artificial reason" advanced by the King's main intellectual opponent: Edward Coke. Common law lawyers saw the general concepts and the rationalizations of the civil law as tools of a Roman cosmopolitanism and authoritarianism. They took pride in an "empirical" reasoning from particular to particular, and in adopting particular analogies or fictions when difficulties were encountered. Carl J. Friedrich, The Philosophy of Law in Historical Perspective 55, 79-81 (2d ed. 1963); Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 202 (Tony Weir, trans., 1977) [hereinafter Zweigert & Kotz] (quoting Max Weber). See id. at 190-205. The defects and weaknesses in this approach did not become widely apparent until the nineteenth century, and we continue to struggle under them today.

There are many similarities between Kelley's book and the briefer, older, and no less excellent study by Carl Friedrich. Both authors reject a professional, disciplinary or strictly historical approach. See Kelley, supra note 2, at 5. They both emphasize the creativity of the intellectual and spiritual life, rather than the political, social, and economic context of law. See Friedrich, at vii, 3. But there are two major differences in approach, in addition to inevitable differences in coverage and emphasis: Friedrich finds that intellectual history exhibits design and that successive legal philosophies embody progressive insights, id. at 7; but see infra note 10 and accompanying text, and he seems more aware of studies undertaken by twentieth-century lawyers. For example, Kelley notes (at x) that he thought of calling his book The Idea of Law, in imitation of R.G. Collingwood's The Idea of Nature (1945). But Kelley makes no mention of possibly creating confusion between such a book and Dennis Lloyd's, The Idea of Law (1974), leaving the reader to conclude that he does not know of this admirable "lawyers" book.
and social thought." 5 There are no feminist, non-Western or (other) victims' perspectives on law in Kelley's book, a fact which makes the book politically incorrect in some circles. Nevertheless, this book is a painless way for those favoring a multicultural approach to law to know their enemy -- by knowing where he came from. Some Critical Legal Studies (CLS) scholars would disparage the emphasis on the power of reason that is a constant feature in the long history of juridical analysis, and they might quote Marx's fear of legitimating "the baseness of today with the baseness of yesterday." 6 But they should be interested in Kelley's discussions of their Enlightenment predecessors, and they should ponder the outcomes of the most massive legal "deconstructions" (and reconstructions) in history: the imperialism and (what is perhaps worse from a CLS perspective) the "social engineering" of Justinian and Napoleon. Why did the CLS-like questioning and criticizing habits of the Reformation evolve into a "natural" law that embodies the conventional moralities that CLS scholars most disdain? 7 Kelley tells us, and he even has things to say to those who are keen to (re)invent a tradition of Republicanism for America. 8

5. Kelley, supra note 2, at 39. See, e.g., id. at 280-81 (there is little Nietzsche or Marx, less Foucault, and no Derrida, women, or "people of color" in Kelley's book); infra note 65 and accompanying text. See also Nancy J. Holland, Is Women's Philosophy Possible? (1990): women's experiences are excluded from Anglo-American philosophical traditions. (Newton's or Einstein's accomplishments are not criticized on the basis of gender or bourgeois origins, however). But this does not mean that Kelley's survey of the Western "Greats" is analogous to the canon recommended by Bloom. See Allan Bloom, The Closing of the American Mind: How Higher Education Has Failed Democracy and Im impoverished the Souls of Today's Students (1987).

6. Kelley, supra note 2, at 257 (quoting Marx). This sentiment echoes that of Holmes, supra note 1 and accompanying text.

7. See Kelley, supra note 2, at 48, 54, 162, 168, 226, 280; Dennis Lloyd, The Idea of Law 82, 88 (1964); Zweigert & Kotz, supra note 4, at 136-37.

8. Kelley, supra note 2, at 185, states the conventional wisdom: Americans "carried out a 'revolution' against a [non-republican British] government but in no sense against the legal system. . . ." Americans were thus "cut off from the sort of integral social thought created by the older tradition of European civil science." Id. at 186. See infra note 74. But see also William E. Nelson, The Americanization of the Common Law (1975); Thomas L. Pangle, The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke 52 passim (1988) (tracing the influences of Montesquieu and Machiavelli, as well as those of Hume and Locke); infra notes 63-68 and accompanying text. Jefferson and John Adams knew and admired the civil law tradition. Kelley, supra note 2, at 186. Writing what became the Federalist Papers, Hamilton, Jay, and Madison took the name of "Publius," a founder of the Roman Republic. This Republic made Hamilton feel "horror and disgust." The Federalist No. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A fresh start in governance seemed necessary because civil science seemed to provide few public law means for resisting an authoritarianism which was often seen to be inevitable. But the Councils of Constance (1415-17) and Basel (1431-49) attempted to set the nation-state above the Papacy, by applying republican principles to the mystical body of Christ. Kelley, supra note 2, at 158. Gregory of Toulouse wrote a Republic, to counter Bodin's book of the same name and to counter Machiavelli's ideas.
I cannot predict how Kelley's book will fare among intellectual historians, having caught only one apparent blooper from a legal perspective. He presumably forced many of his generalizations from a sprawling, recalcitrant material, in order to give a coherent and relatively brief account of how humanists reacted against the medieval Christians who drew on the Byzantine reworkings of a Roman law heavily influenced by the Greeks. While the book reads (well) forward, it was probably written backwards; significant ideas from later eras seem to govern the selection of ideas for discussion in relation to the earlier periods. Precise dates and intellectual relationships are not always made clear by Kelley, whose brief conclusion does not integrate his many themes as well as the reader might hope. My review is thus organized around the three main themes I gleaned from Kelley, around one lawyer's speculative reading of Kelley's speculative and rather diffuse reading of the "record": the historical depth and breadth of the struggle for an analytical system, the surprising extent to which dichotomies have always dominated legal reasoning, and the persistence of an analytical concern and confusion over the Mine and Thine of property.

**System and Science**

Kelley gives a useful definition of system as the preservation, development, and change of assumptions, of authorities, of juristic language and the closely-related conventions of social thought, and of prejudices and their rationalization. An accumulation which does not display a simple tendency toward improvement, the juridical system has drawn tripartite distinctions since Roman times: distinctions of personality (the subject), property (the object), and social interaction and perceptions of community (the verbs, presumably active and passive). The purpose of system is successive reorganizations and reformations

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*Id.* at 198. Claude de Seyssel posed religion, justice, and the police as bridles, as well as enhancements, of authoritarian powers. *Id.* at 204. Rousseau's controversial and poorly-understood notions of the General Will also merit investigation by American Republicanists. See *Id.* at 226. See also *supra* note 4.

9. See *Kelley*, *supra* note 2, at 104: "Positive law — which refers to law that is 'posited,' without any relation, except through later confusions, to legal 'positivism' — remained normally on the side of history." Eliminate the aside Kelley sets off with dashes and you get an apparent tautology: "normally" can be deleted since, as an artifact of historical processes, positive law is history and must in some sense be on history's "side." Further, if Kelley's aside is correct, Hans Kelsen, John Austin, and even Thomas Hobbes are wrong or confused. See *John Austin, The Uses of the Study of Jurisprudence* (H.L.A. Hart ed., 1954), reprinted in *Lord Lloyd & M.D.A. Freeman, Lloyd's Introduction to Jurisprudence* 23 (5th ed. 1985) [hereinafter *Lloyd & Freeman*] (the credo of legal positivism is that positive law is "established or 'posietum', in an independent political community, by the express or tacit authority of its sovereign.. ."). *Friedrich*, *supra* note 4, at 84, 91 (using natural law verbiage but draining it of substance by regarding it as merely prudential, Hobbesian law was markedly positivist and much like Austin's in effect); *Edwin Wilhite Patterson, Jurisprudence: Men and Ideas of the Law* 15, 82 (1953).
of the legal canon, to fulfill its own (systemic) ideals as well as those of the society where the system is deployed. Kelley's history of the struggle for system is exciting intellectually, especially when a system requires the gloss

10. Kelley, supra note 2, at 6, 8, 35, 66. See id. at 187-88; but see Friedrich, supra note 4, at 7 (discussed supra note 4).

11. Efforts at a system probably began with the fifth-century Greeks, for whom consciousness emerged (according to Nietzsche) from efforts to separate culture from nature; see infra notes 33, 48-50 and accompanying text. The Greeks came up with a law-centered distinction between the private life of "existential" rewards and punishments and the public life of rights and duties. Kelley, supra note 2, at 5, 82, 88.

In Rome, a priestly monopoly over divination became, under the influence of (Greek) Sophist models, the public vocation of law; social law gave way to the civil law which is based on political or practical decisions and which became an expert's law through the interpretatio Romana. As the "natural" keystone of society among the more practical Romans, the family provided an organizing principle for Roman law, most notably for property and contractual concepts and even for public law. Political authority was patrifamilias writ large (see supra note 5 and accompanying text), a private virtue projected into a public trust and service. Kelley, supra note 2, at 35, 39-42. This analytical tactic has caused trouble ever since, most notably in contemporary constitutional theory and in law and economics: a complex society cannot be organized along the lines of what was then the single-celled institution of the family.

The Roman system came centrally to distinguish persons, things (discussed infra at notes 62-67 and accompanying text), and the actions that were perhaps modeled on the relation between subject and predicate in Indo-European grammar. Roman personhood emphasized free will and the degrees of liberty, of a person's "status" as the private counterpart to a public authority. Kelley, supra note 2, at 50. There are many parallels between Roman developments and those occurring later in England, especially in the dominance of procedural thinking and of equitable maxims. Zweigert & Kottz, supra note 4, at 195. But abolishing differences in the liberty (status) of persons, and establishing the indelibility of their liberty, began much later and still continues today.

Christianity serves as the prime link between ancient and modern thought, though an "eclectic, mystery-laden, but no less imperialistic tradition." Kelley, supra note 2, at 66. Justinian's Byzantine canon was the culmination of the Greek impulse to system, the "prototype of systematic social thought," and the means of "giving to the devotees of Christ access to the things that had been Caesar's." Id. at 53-55. Subsequent redactions of "barbarian" laws (customs) bore a heavy weight of Roman conceptual and terminological convention, especially among sixteenth-century devotees of a "civil science." Id. at 93; see infra note 13 and accompanying text. Dialectical methods (see infra notes 54-59 and accompanying text), and the methods of mathematics and the "new" logic were added to what G.W. Leibniz called "the hermeneutical art," Kelley, supra note 2, at 209-10, 214.

In some circles, it became illegal to allege an error in a law seen as the perfect union of theory and practice, of Physis and Nomos connected through a positive law. Id. at 130, 143; see infra notes 48-50 and accompanying text. Sixteenth-century French jurists "elaborated within a series of concentric circles . . . from the civil law to the law of nations and finally to natural law; from Roman experience to international history to universal reason." Kelley, supra note 2, at 190-91. Yet civil science remained wary of grand abstractions — "all definitions are dangerous," for example — and its practitioners turned to the more practical efforts of the codification movement that attracted even Jeremy Bentham in England. Id. at 222, 224. The apex of this movement, the Code Napoleon, was seen as "systematization derived from natural law in perfect form." Friedrich, supra note 4, at 120-21. Blackstone's Commentaries or the Uniform Commercial Code could not reach the French Code's theoretical and systematic mastery, probably because there was no centuries-old, university-taught tradition to build upon. Zweigert & Kottz, supra note 4, at 205.
of a civil "science."

The claims of a legal science (and those of the other social sciences) are now widely seen as pretentious attempts to trade on the prestige of people who actually practice a rigorous scientific method. We now emphasize the prudence in jurisprudence, the art rather than the science. But it has not always been so; jurists' systems were once at least as sophisticated as the methods used by their "hard" science contemporaries. Max Weber saw the encounter between the civil law and Greek conceptualizing as a scientific revolution located at the headwaters of social thought. In medieval times, civil and canon lawyers were thought to be a scientific elite as well as a political one.\(^\text{12}\) While their system of recovering, interpreting, and reconciling ancient texts often deteriorated into "Glosses on glosses of glosses,"\(^\text{13}\) it lent an "ambiguous, manifold, multiform" air to modern social thought.\(^\text{14}\) Claiming that their "authoritarian art" was rational, universal, and capable of certainty, civil scientists variously combined a naive empiricism (which used precedents for its data) with a Cartesian mathematics, with a "harmonic" justice based on a sense of proportions, and with a naturalistic rhetoric influenced by Newtonian science.\(^\text{15}\)

For all practical purposes, the civil science game ended when David Hume showed that this science cannot "be brought to an equal certainty with geometry or algebra" because no philosopher has ever demonstrated a morality scientifically.\(^\text{16}\) This ultimate failure of a legal science contributed to the nineteenth-century collapse of law as the center for social thought. Economists and sociologists proved more adept at adapting and updating their systems than did the jurists, and law's "scientific" concerns were quickly appropriated by other insurgent disciplines.\(^\text{17}\) The failures in the jurists' system that emerge from a reading of Kelley's book are still very much with us today: inadequate accounts of myth, ideology, and custom; the analytical consequences of relying on what are ultimately false dichotomies; and the political consequences of ignoring the fact that there are negative as well as positive correlations between property rights and distributive justice.

\(^{12}\) KELLEY, supra note 2, at 2, 13, 44, 113. For Cicero, law was a choosing between good and evil rather than a mathematically-precise calculation of just desserts. Ulpian's jurisprudence is "the art of the good and just." \textit{Id.} at 45. \textit{See} RONALD DWORIN, LAW'S EMPIRE 16-17, 49-50, 111, 229, 231-34, 248, 250 (1986) (a contemporary jurisprudence posed as an aesthetics).

\(^{13}\) KELLEY, supra note 2, at 114, 118.

\(^{14}\) \textit{Id.} at 126.

\(^{15}\) \textit{Id.} at 137, 143, 183, 236. Civil science became a self-conscious science of society when Montesquieu sought out the "spirit" of laws: that which remains constant while laws, customs, and institutions change. \textit{Id.} at 222.

\(^{16}\) DAVID HUME, A TREATISE OF HUMAN NATURE, reprinted in Morris, supra note 1, at 187, 189.

\(^{17}\) \textit{See} KELLEY, supra note 2, at 279.
Kelley argues that a "scientific" jurisprudence is best understood as what Hans Blumberg calls "work on myth," the "end of myth" (and of ideology) being the most illusory of myths (and ideologies). Each ethnic group has its own myth, which quickly passes from a purely religious status and into a formulaic written law: *Romanitas* for Italians, immemorial custom for the English, Salic law for the French, and ancient liberties for Germans. These attempts to preserve a distinctive group identity comforted members of the group, even in the face of the massive violations of the myth that jurists could not and often would not prevent. For example, the most famous mottoes inscribed on the Roman Twelve Tables -- "Let the welfare of the people be the supreme law" and "Whatever the people has last ordained shall be held as binding by law" -- illustrate Mark Kelman's variation on a rather extreme, Marxian theme: "Rules are the opiate of the masses." Jurists deploying such mottoes were too busy legitimating their own professional myths, and too busy legitimating the acquisition of personal and imperial property, to notice what was

18. *Id.* at 6.
19. *Id.* at 10, 41. German law was intimately associated with myths of a national character: racially unmixed (intermarriage being forbidden), democratically governed by tribal assemblies (and hereditary kings), and loving liberty and the rural virtues of an uncorrupted morality. A proliferation of legends and forms of religious consciousness was given retrospective form as "feudal law." *Id.* at 95-96; see infra notes 62-64 and accompanying text. English "immemorial custom" had its roots traced beyond the twelfth century, as a mythological way of looking at the English past. KELLEY, *supra* note 2, at 165; *see id.* at 118, 182 (see infra note 25). The French saw a Roman political absolutism "moderated by the Parlement and Estates General," and an effective French exclusion of "the old Roman 'tyranny' of paternal power (patria potestas)," *id.* at 192, that is arguably a legacy of Mediterranean Catholicism. Much later, Napoleon saw and represented himself as the new Justinian. *Id.* at 227. *See infra* note 26.
20. KELLEY, *supra* note 2, at 38-39 (Roman ius as nominally derived from the popular will and as evolving into the ideology of the Roman State).
21. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 63 (1987). Americans perhaps comfort themselves with the myth of living in a liberal democracy, a myth which frustrates the formation of a welfare state while allowing a "warfare" state to grow unchecked.
22. Jurists attempted to create the power base of a common European culture that was grounded on the exploitation of the riches of the Romano-Byzantine legacy, on a pure reason, and on the myth that principles were deduced from the "nature of things" rather than from prejudices. KELLEY, *supra* note 2, at 122, 214; *id.* at 219 (citing Jean Domat). Medieval jurists adopted the powerful "myth of the clerks": a "translation of empire," and a parallel "translation of studies" or "wisdom," would pass the best of ancient civilization on to modern nations. *Id.* at 110; *see id.* at 187-88, for analogous Renaissance myths which incorporated humanism, philology, etc. An inaccessible "artificial reason" gave the separate English tradition an even more mysterious quality. *Id.* at 107. Within the German Historical School, the *Volksgeist* was a claim of privileged access to the national consciousness, *id.* at 243, and "a protective fog, shrouding the continuities in the work the jurists were actually doing" and shrouding the operation of ideological forces left and right. *Id.* at 253 (quoting John P. Dawson). Kelley does not choose to note such ideological manipulations earlier in his history, but he does conclude that the nineteenth-century failures of the jurists' system (and its mythical bases) left jurisprudence in conceptual and moral disarray, at worst as an "antiquated 'ideology'." *Id.* at 278. *See id.* at 280-81; *infra* notes 74-75, 79-80 and accompanying text.
happening in the underlying society. "Tradition" becomes a doctrinal continuity fabricated from retrospective and mythopoeic interpretations. 23

Distinctions among myth, ideology, and custom are vague at best, especially if we consult sociological and anthropological writings that are beyond the scope of Kelley’s treatment. 24 But an ancient topos, "Custom is second nature," best locates the theme of Kelley’s book: describing the human efforts that are dialectically opposed to the “first” nature of a natural law. He also highlights Blaise Pascal’s quarrel with most other jurists: “Custom should be followed only because it is custom, and not because it is reasonable or just.”25 The ruler of speech, habit, and collective life, custom 26 is the “local knowledge”27 that jurists forced to coalesce into more universal, Romanized and Platonic, principles.28 The central problem attending this transition from custom to customary law is one of making “authenticated transcriptions from popular memory” when there are no living proofs of prehistorical materials.29 Once, custom thus comes to have the force of public authority, rather than the

23. KELLEY, supra note 2, at 72 (referring to the Christian myth of a continuity with pagan and Judaic antiquity, a continuity tied to an apostolic tradition assumed to be in the bishops’ hands); id. at 96. See id. at 98; id. at 253 (quoted supra note 22).

24. See id. at 93 (Greek, Roman, and European customs are hardly severable from the myths creating them); id. at 269; LLOYD, supra note 7, at 219, 222-23; SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979).

25. KELLEY, supra note 2, at ix, 50 (quoting Pascal in part). Custom is also “second nature” in English jurisprudence, a “sub-lunar process of generation and decay” within an “organic” society. Id. at 168 (citing Sir John Fortescue). Sir Matthew Hale celebrated this “second nature” as created by a “community of interpretation” through applications of “artificial reason.” Id. at 182.

26. Id. at 44. Custom has an obligation of obedience which is lacking in a habit. LLOYD, supra note 7, at 229-30. See id. at 242-44. Kelley variously, and usefully, defines custom as perceptions of usage and community that precede political sanctions, KELLEY, supra note 2, at 9-10, 193-94, as a law arising from fact and action rather than words, id. at 9-10, as the best interpreter of laws, id. at 91, and as the “spirit” of the laws that Montesquieu sought to understand as the precondition to a philosophy of society, id. at 222. In 1553, Francois Connon saw custom as modifications from nature which emerge under the pressures of collective needs (war, slavery, avarice, commercial conventions, etc.); utility replaces a Christian reason as humanity rises above its instincts. Id. at 194. Custom is relative to time and place, and it is preserved in a cumulative process by “wise men.” Id. at 104-05. See supra note 19. France was the classic land of customary law, the Spanish picture being complicated by geographic particularism and a varying admixture of Roman and Moorish influences. KELLEY, supra note 2, at 102. Especially in France (and England), analyses often had the nationalistic purpose of demonstrating the superiority of one’s own customs. Id. at 191. But St. Ambrose’s or St. Augustine’s relativism — “When in Rome, do as the Romans do” — is also a custom, one presumably grounded in common sense. Id. at 90. Christ proclaimed “I am the truth” rather than “I am the custom,” but an accumulation of human conventions and positive laws was inevitable as the Church became propertied, political, and hierarchical. Id. at 74.

27. Id. at 11, 143, 166-67.

28. Id. at 43-44.

29. Id. at 100.
force of consent within an “organic” community, it can no longer be destroyed as readily as it was created. Like bad tolls, bad customs tend to be perpetuated as unjust exactions by those who benefit from them. 30

In France and England, negotiations among king, parliament, and courts, ostensibly over the promulagation and reform of customs, become ceremonial reenactments of the original and, needless to say, mythical social contract. 31 Montesquieu and many radical Englishmen saw a despotism in this process, and the French Revolution was seen to be the triumph of philosophy over an officially-sanctioned custom. The fact that the juridical system could not fully account for these tendencies contributed to its nineteenth-century downfall, although Savigny posed a Germanic consciousness as a counterweight to the “cancer” of Napoleon’s legal imperialism. 32 Like myth and ideology, custom continues to play a significant role in juridical and other social science systems. As visions of the “good” society, myth, ideology, and custom account for things that the jurist’s system cannot explain. Manipulations of ideology, myth, and custom are conducive to an analytical indeterminacy, and their inevitable contradictions demonstrate that no system can be objective and predetermined. But indeterminacy and contradictions can perform the useful role of pointing up the areas where systemic reforms are most needed.

Dichotomies, Many False

Jurists seem particularly prone to a philosopher’s passion for classifying everything into mutually-exclusive categories. I have written about this tendency before, 33 and Kelley offers many examples of such “polarities” being used: “Custom and written law, Germanic and Roman law, scholasticism and

30. KELLY, supra note 2, at 105-07.
31. Id. at 203. See FRIEDRICH, supra note 4, at 43; supra note 19 and accompanying text.
32. KELLEY, supra note 2, at 225, 243. See id. at 243, 252-53 (discussed supra note 22). Eighteenth-century rulers “hoped to secure their social base through the reform” of “abuses, delays, and irregularities,” but this “cognizance” over custom was usually too little, too late. Id. at 223. But neither the French Utopia, of a culturally and linguistically united Europe under the intellectual leadership of the philosophers, nor the Germanic, custom-based Utopia paid much attention to concrete political arrangements.
33. At great length, alas -- Paul H. Brietzke, Public Policy: Contract, Abortion, and the CIA, 18 VAL. U. L. REV. 741 (1984). Rather than engage in the hard work of devising better or even more categories, jurists will whittle the sharp edges off the awkwardly-shaped data that can then be fitted into false dichotomies. Presuming a classification to be exclusive and exhaustive, jurists will wield Occam’s razor and extend the classification to ever-higher levels of generality — perhaps with the laudable goal of treating apparently like cases alike. This gives legal classifications an open texture that is exacerbated by a frequent recourse to a reasoning by analogy and that serves to screen and simplify perceptions. A far flung Parsimonious Principle of Conserving Existing Classifications kicks into action, id. at 745, 754-59, 761, and almost everything in Kelley’s book becomes one big struggle between Nomos and Physis: see infra notes 34, 50-51 and accompanying text.
humanism, tradition and novelty, legislation and jurisprudence, positive and natural law -- and . . . Nomos and Physis." 34 Many other overlapping dichotomies emerge from the course of Kelley's analyses: 35 law versus fact, 36 the historical versus the metahistorical or metaphysical, 37 Aristotle's logic versus practice or a pure reason versus an aversion to abstraction, 38 universalizing aspirations versus cultural particularism and an insular pride, 39 submitting to the forces of history versus trying to master them, 40 authority for the ruler versus liberty for the individual, 41 public versus private or government versus property and markets, 42 and passions and interests versus the human rights that are the French revolutionary ideal. 43 Cicero pleaded for factional causes while crying factionalism; 44 the dichotomy of Caesar and Christ was replayed in many medieval variations; 45 Jean Domat played the "spirit of laws" off against the "spirit of police" that maintains order regardless of public inclinations; 46 and Jeremy Bentham placed his "utility" concept into an enduring opposition to traditional legal values. 47

One of the strengths of Kelley's book is his attempt to cabin most of these dichotomies in a grand "dialectical" struggle between Nomos and Physis; the history of law/social thought is one of successive attempts to synthesize, through positive law, this dichotomy of culture (second nature) versus the biological or

34. KELLEY, supra note 2, at 245 (describing Savigny's attempted synthesis).
35. Id. at 21, 93, 143, 243, 271. See id. at 21, 29 (law is both made by and set above (wo)man, the creator and denier of all things); id. at 127 (social planning versus the tacit consent of the people); id. at 176 (the communal values of the common law versus the republican values of civilian lawyers); id. at 179 (discussed infra note 53); id. at 186 (quoted infra note 74); id. at 246 (realism versus idealism). Analogous dichotomies have been described by other authors: see, e.g., A.P. D'ENTREVES, NATURAL LAW 17 (1970) [hereinafter D'ENTREVES] (invisibility versus duty); FRIEDRICH, supra note 4, at 78 (in Bonham's Case in 1610, Coke put Acts of Parliament into opposition with the "common right"); id. at 124 (Rousseau's General Will is simultaneously and inconsistently transcendental and rational); infra note 59.
36. KELLEY, supra note 2, at 65.
37. Id. at 119.
38. Id. at 57, 214.
39. Id. at 176.
40. Id. at 127.
41. KELLEY, supra note 2, at 59.
42. Id. at 57, 59, 65, 179.
43. Id. at 192, 194.
44. Id. at 43.
45. Medieval variations on the Caesar versus Christ dichotomy include sin versus grace, id. at 79; flesh versus spirit, id., human tradition versus universal truth, id. at 76, nature versus supernature, id. at 119, and history versus metahistory, id.
46. KELLEY, supra note 2, at 220.
47. Id. at 222-23.
divine virtues ascribed to nature itself. Although Nomos supposedly derives from the popular will, it quickly becomes politicized and encrusted with the hyperrationalism of jurists straining to reach Physis. Little in human organization is taken directly from nature, although the "natural" rights of family, liberty, equality or property are useful myths (or legal fictions) with which to oppose “sinful” realities like class divisions or slavery. But nature (Physis) is an ambiguous metaphor which can easily be manipulated (as natural law) in ideologically self-serving ways, so as to limit, transform or rationalize absolutism, feudalism, capitalism, etc. Jacobins and Bonapartists claimed a victory of Physis over Nomos, but their victory was a hollow one: the French civil law remained conventionally Roman, especially in its absolutist private property and its paternalistic family law. The English tendency to equate insular experiences with nature and reason is perhaps typified by an apocryphal London Times headline: “Fog in the Channel; Continent Isolated.”

48. KELLEY, supra note 2, at x, 20-21, 44, 143, 180, 219, 276. See id. at 65: Roman law formed and in some ways institutionalized several fundamental polarities in Western culture which still, if only inadvertently through linguistic convention, inform Western social thought. Of central importance here is the distinction, inherited from Greek philosophy, between the "natural" and the "civil" — naturalizer, in contrast to civiliter, for example, or "natural possession" in contrast to "civil possession." Analogously, civil law recognized a basic disjunction between matters of "fact" and of "law," though it is important to realize that the term "fact" itself was applied specifically to human behavior and again represented a legal and social rather than a natural and philosophical concept. The distinction between "public" and "private" was also essential to the structure of Roman jurisprudence even though the spheres were never precisely defined; and indeed concepts like "liberty" and "property" have become notoriously and increasingly political in the work of later jurists and publicists who drew, as most did, upon the legal tradition.

Less obvious but no less essential was the distinction between unwritten and written forms.

49. Id. at 227-28.

50. Id. at 180. FRIEDRICH, supra note 4, at 121; KELLEY, supra note 2, at 10, 38-39, 117, 215; LLOYD & FREEMAN, supra note 9, at 125 (discussing the ideas of Edmund Burke). The Greek Nomos concept is anthropocentric and in some ways anthropomorphic. KELLEY, at 8. It comes to mean particular customs, rules, solutions, and, eventually, the positive law. Id. at 19. Nomos is the conceptual home of Sophism and its central topos (id. at 28): "Man is the measure of all things." Id. at 31.

In a victory for Nomos, Dumoulin combined mores gallicus and italicus as a vital expression of national culture in sixteenth-century France. Id. at 163. While women were "inferior but not wholly subordinated," French customs declared men "by nature free," although this freedom is eroded by a "secondary law of nations." Id. at 192. Arguing against Grotius, Samuel Rachel contended that international law was not a law of nature but a set of arbitrary agreements and customs. Id. at 216, 218. Natural law, which has ranged from a commonplace morality to a monarchy-shattering doctrine of revolution, seeks to encompass its own dichotomy of inevitability and duty. D'ENTREVES, supra note 35, at 16-17 (quoting Lord Bryce at 16). Following the Roman practice, a "modern" natural law seeks to incorporate the splendors of Plato's Republic. KELLEY, supra note 2, at 43. See also infra notes 75, 79 and accompanying text.
The problem with solving problems by reasoning one's way through a Nomos versus Physis (or some other) dichotomy is that many of one's analytical successors will feel forced to choose between one's two unrealistically-polarized alternatives. Only the bravest of minds can fight free of a taught tradition and explore the grey areas lurking between the polarities Kelley discusses, grey areas where the sources of change, new interpretations, and solutions to pressing problems are frequently to be found.51 Centuries of attempts at a clear thinking in law have yielded only two reliable means: transcending a dichotomy through a dialectical reasoning, and passing between the horns of the dichotomy by discovering something like Aristotle's mean between the extremes.

In Aristotle's example about "giving and taking money, the mean is generosity, the excess and deficiency are extravagance and stinginess," and the conceptual and political problem is that generosity looks like extravagance to the stingy52 -- as in American policies concerning "welfare" for the poor. Aristotle's problem crops up time after time in legal analysis. For example, Justinian (and most Muslim jurists) posed social stability as the mean between liberty for the individual and authority for the ruler.53 But a ruler such as Justinian, preoccupied with his own authority, is unlikely to discover a genuine mean, especially when liberty was seen as embodied in the Roman property concepts that emphasized material autonomy for some, at the expense of political and spiritual autonomy for the many. Conscious and unconscious bias is likely to inhibit the discovery of a viable mean, and the tendency is otherwise to attempt the impossible: having it both ways by attempting the simultaneous implementation of incompatible extremes.

Jurists have been trying to transcend dichotomies through a dialectical reasoning since at least medieval times. Posing Christ as a higher Platonist, canon lawyers tried to place Logos, a religious vision, above Nomos and Physis.54 Their efforts did not produce a genuine synthesis because they purported to ignore the centrality of reason -- expressed in the thesis of Nomos and in the antithesis of Physis -- and because Nomos got smuggled back into analyses so that the Church could manage its burgeoning secular affairs. Bartolus and Baldus were more successful; they welcomed the "antimonies

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51. See Kelley, supra note 2, at 41, 57.
52. Aristotle, Nichomachian Ethics, Bk. 2, ch. 7, 8 (Martin Oswald trans., 1962).
53. Kelley, supra note 2, at 59-60 (discussing Justinian's efforts). See id. at 179 (discussing Bacon's attempt to demystify and depprofessionalize English law by finding an equitable balance between public and private, between government and property); id. at 181 (discussed infra note 73).
54. Id. at 75-76. See id. at 67; id. at 118-19 (medieval canonic science applied the dialectical method to ecclesiastical materials, so as to join humanity (the son) to divinity (the father) through the linkage of the holy spirit). Twelfth-century efforts to raise the human to the divine deployed a scholastic Aristotelianism against the Roman civil law, but these efforts were increasingly guided by secular challenges and the standards of "necessity" and "utility." Id. at 109, 120.
(contraria) . . . whose very existence had been denied by Justinian, and they helped create the synthesis called Italian humanism. Similar efforts at a synthesis by Savigny and by Coke produced the doctrines of the Historical School and of modern British constitutional law respectively. But Georg Hegel's subsequent mysticism of the dialectic repels many lawyers today, and explicitly dialectical reasoning is thus infrequent, incapable of commanding a consensus, and bedeviled by the supposed incommensurability of what "is" and what "ought" to be. Kelley correctly concludes that the Nomos versus Physis dichotomy is still in our intellectual baggage if not in our preferences, and that Nomos still rules: "We continue to live anthropocentrically, to judge anthropomorphically, to live within the confines of 'the small bright circle of our consciousness.' Needless to say, contemporary lawyers cannot imagine it any other way.

Property and Public Law

Kelley says a great deal about his approach to the subject in what seems to

55. Id. at 141. Their synthesis had positive law serving as a supplement to nature, to limit free will in the interests of social stability in ways which differed significantly from Justinian's formulation. Id. at 143. See id. at 209; supra notes 48, 53 and accompanying text. By way of comparison, Hobbes' Leviathan "offered a simple and brutal resolution" of the Nomos versus Physis dilemma. KELLEY, supra note 2, at 180.

56. Supra note 32 and accompanying text.

57. FRIEDRICH, supra note 4, at 82: Coke attempted to resolve the dilemma of whether the king or Parliament should have the last say by asserting that both must act together.

58. See GEORO W. F. HE格尔, PHILOSOPHY OF RIGHT, Introduction, § 31 (1831), reprinted in Morris, supra note 1, at 303, 306. "The concept [of self-conscious freedom] develops itself out of itself is expounded in logic and is here likewise presupposed." The "concept's moving principle, which alike engenders and dissolves the particularizations of the universal, I call 'dialectic'. . . ." It is "the matter's very soul putting forth its branches and fruit organically." Id. See KELLEY, supra note 2, at 256 (quoting Hegel): The Nation recapitulates nature since "the system of right [that is, law] is the realm of Freedom made actual, the world of mind brought forth out of itself like a second nature."


60. KELLEY, supra note 2, at 276.

61. Id. at 283.
be a throwaway line: it is “notoriously difficult” to gain access to feudal law.\textsuperscript{62} Feudalism seems no more difficult than other juridical systems however, if we follow the lead of F.W. Maitland\textsuperscript{63} and others: feudalism is a constitutionalism without a constitution, in which lordship and landlordship are each other’s cause and effect. The granting of property rights -- really, grants of the power to compel labor bonded to the land -- was the “carrot,” and a ready resort to treason laws was the “stick,” of effective governance under feudal conditions. This formula of governance came undone only after the “estates” demanded additional rights under the Magna Carta, etc. Kelley assembles much of the material necessary for constitutional analyses, but he does not press his advantage. This may be because he neglects the roles of a distinctively public law and of theories of a distributive justice that have influenced events since Aristotle’s time.\textsuperscript{64}

For Kelley, property is an attempt to extend the self, a Roman “possessive individualism” that is still widely thought to be inseparable from liberty. Echoed in much of law, the distinction between mine and thine is the basis for many wars, other conflicts, and alienation in both the lawyers’ and the sociologists’ sense of that term. The extent of property holding determined the degree of liberty -- one’s political, social, and economic status -- until late in the eighteenth century (and beyond) because lawyers helped rulers and clerics to legitimate a “natural” inequality. Throughout history, property was necessarily embroiled in politics, the family, and other relations based on power, and public law attempts to regulate these relations usually got drowned by the powerful in a private law and morality.\textsuperscript{65} This dubious legacy can be seen at work in the

\begin{itemize}
\item \textsuperscript{62} Id. at 96.
\item \textsuperscript{64} See infra note 68 and accompanying text. Feudalism illustrates Bloch’s aphorism that “law originates in fact;” local customs were later forced to coalesce around congenial Roman property and contract concepts. Kelley, supra note 2, at 97-98, 122. Property is the primary link between the person and society, as mediated through the family. Id. at 51. This is no less true of contemporary law and economics than it is of ancient Rome. The dissatisfaction of the poor and powerless have been assembled into theories of distributive justice by intellectual elites since Aristotle’s time, and these formulae are sometimes given expression through rebellion. Kelley could have shown how Elizabethans like Thomas Smith and Richard Hooker sought to replace feudal authority and a Thomist papal authority with an authority based on the consent of the governed. See Friedrich, supra note 4, at 67, 71-72.
\item \textsuperscript{65} Kelley, supra note 2, at 8, 47, 51, 117, 233. See id. at 39-40, 50-51; supra note 5 and accompanying text. Kelley could have cited the influential Crawford B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962), to document the persistence through history of this tendency. He does cite Hegel for a definition of alienation as the separation of persons and goods in Roman law. Kelley, supra note 2, at 256. There is a close tie between property and political authority in the empires (large and small) of father-priest-king, and in the projection of private virtue into public trust. Id. at 40, 47. The “Res Publica always depended on the right ordering of the res privatae,” and the emphasis was on protecting and strengthening the governing class. Id. at 52. Like a contemporary law and economics, Louis
\end{itemize}
curricula of many American law schools.

Stripped of feudal trappings and described in Locke’s natural law terms, the property concepts of Blackstone and his contemporaries became a common-law “fetish” that provides a basis for a powerful contemporary ideology. Libertarians, (neo-)conservatives, and mainstream economists capitalize on historical arguments to assert the broadest property rights imaginable. Their hope is thus to relegate the state to its nightwatchman role, and so to undo hard-won reforms: those of the New Deal and the Warren Court in the U.S. and of a social democracy elsewhere. The conceptual basis for these reforms is provided by a century-long intellectual revolution beginning in 1776. Perhaps because his narrative tails off in the nineteenth century, Kelley’s book seems to miss the significance of this revolution: a more circumscribed and secular natural law, a distinctively public law embodying constraints on property rights in the public interest, and guarantees of a legal equality -- admittedly, only so far as these guarantees are practicable. Other than a useful discussion of Marx, Kelley leaves us no wiser about how and why demands for equality emerge in social thought.

The intellectual revolution that accompanied political revolutions in America and France was an arousal from a conceptual stupor that is partly responsible for law’s nineteenth-century fall from grace. The legal profession still retains much of its power, and claims are still made for jurisprudence as the true philosophy, but much of law’s status as a “liberal” profession has been surrendered; devotion to truth and justice, as these emerge from a deep

Boullenois’ seventeenth-century Cartesian jurisprudence isolates the individual’s economic interests in a way that literally transforms law into a mathematical science. See id. at 215. Less readily quantifiable political and spiritual interests presumably get lost in the analytical shuffle.

66. Id. at 171. Burke thus described the magistrate’s office as the protection of property; anything else “comes within the jurisdiction of mercy.” LLOYD & FREEMAN, supra note 9, at 126. See id. at 125 (quoted infra note 75). By way of contrast, Savigny made property appear to be a purely arbitrary institution. But in 1840, Frederic Taulier argued in opposition to Savigny that the source of property “is divine and its origin eternal.” It “is personality; it is liberty.” KELLEY, supra note 2, at 249.

67. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (3d ed. 1979); ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 86-90 (1990); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); see infra note 75.

68. See FRIEDRICH, supra note 4, at 37; LLOYD, supra note 7, at 142; MERRYMAN, supra note 4, at 15-16. But see also supra note 8 and accompanying text. Under this “new” public law, the protection of an individual right is for the public, rather than an individual, good. Under rent control legislation for example, tenants are protected at the expense of landlords; the equilibrium between mine and thine is broken because the public good requires this under the circumstances. JEAN DABIN, GENERAL THEORY OF LAW, in THE LEGAL PHILOSOPHIES OF LASK, RADDUCH AND DABIN, supra note 42, at 365, 366-67.
knowledge of philosophy, culture, philology, and history, has been displaced by
the logging of "billable hours" and an updating of the "guild-mentality and
chauvinism" pioneered by Edward Coke. A related revolution which is not
discussed as such by Kelley -- the extreme division of academic labor into
"disciplines" and "departments" that began in German universities and quickly
spread throughout the West late in the nineteenth century -- helped to destroy
law's role as the anchor for social thought by demonstrating the impressive
results to be obtained from more narrowly-focused, in-depth analyses. This
revolution leaves many thinkers with a disdain for an amateur's (lawyer's, other
generalist's) poaching on the competing departmental preserves that are
conducive to a closed-mindedness -- and to a long-winded and "inexpert" review
like mine.

Some Lessons from History

Social thought departs from law at the end of Kelley's narrative, having
been constantly nourished by law's terminology, by its attempts to grasp and
control new realities, and by its "praxis": the legal means by which norms can

69. KELLEY, supra note 2, at 172.
70. See id. at 173, 237. Until at least the eighteenth-century, the study of civil law was a major
phase of liberal education, especially of classical learning. But law itself began to change.
Bentham's and Napoleon's "every man his own lawyer" proved a legal reformation akin to Luther's
"priesthood of all believers." Id. at 225, 226. Adrien Duport's "no more judges" was thought
possible because decisions were seen to be based on a legal logic accessible to all, and though which
everything was foreseen. Id. at 226-27. Also, an "invidious" distinction began to be drawn
between hard and soft sciences. Id. at 1. Philosophers followed Kant in denying a scientific status
to law. Id. at 278. Hegel and the young Hegelians plundered European jurisprudence to expose
its social and economic understructure, and social scientists asserted an inability to understand social
reality through law. Id. at 253-54. These intellectual rivals proved more formidable than did the
clerics that jurists had battled for so long. See id. at 183.

Sociology, for example, was "born in a state of hostility to law," id. at 269 (quoting N.S.
Timasheff), probably because it sought to replace law's simplistic science with its own. Vico
convincingly replaced the traditional Roman tripartite division with a sociological triad of
knowledge, will, and power, id. at 236, while Tonnies' Gemeinschaft v. Gesellschaft (community
v. association) dichotomy transformed legal conventions into sociological categories. Id. at 272.
Similarly, economics sought to demystify, de-moralize, and demoralize jurisprudence by hiving off
a narrow but important part of human motivation and behavior. Savigny's lead was then taken down
the narrowly-specialized path of anthropology. See id. at 237, 263. Kelley describes the outcome:
"the lack of historical structure and the conceptual temptations of biologism, evolutionism, racism,
psychologism, functionalism, structuralism, cross-cultural indexing, and other universalizing or
systematizing ideas have often enticed anthropology, in its explanations if not in its field-work,
beyond the familiar terrain of the kingdom of Nomos." Id. at 269. While this description is
accurate, we should not forget that law has succumbed to these same "conceptual temptations"
during a similar struggle for system, and that it is by no means obvious that historical conceptions
of Nomos should anchor the anthropological or legal enterprise. Pondering the then-new learning
of the social sciences, Holmes predicted that the largely-historical study of law would be replaced
by economics and statistics. Holmes, supra note 1, at 428; see supra note 1 and accompanying text.

https://scholar.valpo.edu/vulr/vol26/iss2/4
find communal sanction and institutional expression.\textsuperscript{71} Plato, Aristotle, and many subsequent thinkers stressed (as Kelley does not) the educational task of the law,\textsuperscript{72} especially as an education in civic responsibility. But legal science never lost its Roman scars of class conflict, of an omnivorous expansionism in an ostensibly pan-European “community,” and of the occasional or frequent misuse of rhetoric to attain predetermined results which tend to the conservative. Such qualities offended many thinkers over the last hundred years, as have the jurists’ Romanist insistence on free will, a possessive individualism, rationality, and social engineering.\textsuperscript{73}

Left increasingly to their own specialist devices, practicing lawyers have created new false dichotomies out of an inattention, the lack of an overview such as Kelley’s, and a hostility toward change. Those academic lawyers who are prepared to ignore calls to “give the profession what it wants” -- something practitioners are apparently unable to define for themselves -- have created many competing jurisprudential systems which echo past failures and strengths in legal analysis.\textsuperscript{74} There has been a modest revival in law’s fortunes nonetheless, perhaps because rival social science systems have by now also been debunked and because a legal neo-formalism promises the comfort of certainty -- under piecemeal applications of the latest three-pronged test. We have been up this arid dead end before, prior to the “revolt against formalism” by the sociological jurisprudges and legal realists whose efforts paralleled Freud’s, Picasso’s, Stravinsky’s, and James Joyce’s. This revolt against formalism has grown stale, so the time seems ripe for a new integrative and interdisciplinary jurists’ system. Kelley offers much food for thought about what this system might look like, and

\textsuperscript{71} KELLEY, supra note 2, at 9, 11, 54, 117. See id. at 43, 113.

\textsuperscript{72} FRIEDRICH, supra note 4, at 19.

\textsuperscript{73} KELLEY, supra note 2, at 42-43, 50-51, 53, 88, 113. See id. at 55, 88, 113, 167, 183; id. at 181-82 (Mathew Hale thought it imprudent to risk social discord by trying a new theory rather than preserving ancient law); supra notes 11, 62. KELLEY, supra note 2, at 66, nevertheless concludes “that the surviving and recurring ‘professional monopoly’ of the lawyers has too often been overshadowed by the more sensational political implications of codification and Justinianian (sic) legislative sovereignty.”

\textsuperscript{74} Kelley notes that the “crisis” out of which sociology was born also fragmented jurisprudence into “positivist, idealist, formalist, sociological, socialist, and ‘pure’ sectors with little in common” except a conceptual and moral disarray. Id. at 278. Many of our problems arise from Americans buying into the “natural” course set by the English common law and from our consequent adoption of the “foreshortened and narrow-ranged view” that is provoked by a dichotomy: American “thought, even more than its English counterpart, has been torn between a technical system of jurisprudence and a highly abstract system of political thought, and has in various ways been cut off from the sort of integral thought created by . . . European civil science. . . .” Id. at 186. But see supra note 8. Perhaps, but it is more likely that Americans mastered both grand abstractions and technical details, in both law and politics, only to muddle the “middle-range” means of linking the two together effectively? If so, is this the kind of “glue” a European civil science can offer?
not merely in terms of the natural law mistakes to be avoided.75

If Kelley’s book were a novel, the fourteenth-century Italian humanists would be easily its most attractive characters.76 Unlike that of positivists and some legal realists and sociological jurispruders, the Italians’ skepticism was always tempered by a humanism which is currently in very short supply. The Italians’ encyclopedic and liberalizing impulse took the form of a selective and secular natural law, of an opposition to scholasticism that bore fruit in the French and American Revolutions. Such a tactic could now be used to expose deficiencies in various jurisprudential systems, and to broaden the discipline by countering a fashionable empiricism with a values inquiry. There are some (but probably not many) objective moral principles, legal “oughts” which can be derived from the social “is” and justified by the rational means that most of today’s moral relativists could accept.77

Given the widespread distrust of would-be Platonic guardians, legal authority must ultimately stem from an informed consent by the governed. Eternal verities, created by God or by some policy “expert,” are not acceptable bases for law in a democracy which aspires to be tolerant of diversity, and which distrusts simplistic and absolutist solutions based on something like a Newtonian mechanics. There is a need, seen by Spinoza among others, to deal with candor and power through law, and a need to restore the balance between Hume’s principles of self-love and of the benevolence and humanity that were discarded by Bentham and his utilitarian successors. Finally, there is a need to

75. Despite centuries of (re)construction, an “antique-modern” natural law is still an unfinished monument, id. at 213, quoting Gierke; see id. at 62, where an ambiguous “nature” is made to serve particular conventions, ideologies, and myths, and where international law principles are constantly sacrificed to a power politics. To their credit, natural lawyers were not satisfied with the facts of law and State, and they insist on asking from whence these forces came. But they largely missed out on the insights of modern philosophy concerning the dependence of law on the State. RUDOLPH VON INERING, LAW AS A MEANS TO AN END (Isaac Husik trans., 1913), reprinted in Morris, supra note 1, at 398, 410-14. Occasionally a revolutionary doctrine and more recently a useful expression of the revulsion toward Nazism, natural law has largely reverted to its long-accustomed role of legitimating private power, see supra note 67 and accompanying text. For Hugo Grotius, for example, natural law tends “to the conservation of society . . . abstaining from that which belongs to other persons . . . the fulfilling of promises, and the reparation of damage done by fault; and the recognition of certain things as meriting punishment.” HUGO GROTIEUS, THE LAW OF WAR AND PEACE (1625) (William Whewell trans., 1853), reprinted in Morris, supra note 1, at 82, 83. Much like contemporary law and economics scholars, Edmund Burke “saw a competitive self-regulating market economy as a necessary part of the natural order of the universe.” LLOYD & FREEMAN, supra note 9, at 125; see id. at 126 (quoted supra note 66). Grotius’ and Burke’s views cannot command a consensus among academic lawyers today.

76. See KELLEY, supra note 2, at 128-47; supra note 55 and accompanying text.

77. FRIEDRICH, supra note 4, at 165, 175-76; KELLEY, supra note 2, at ix (discussing Pascal’s skeptical humanism); LLOYD, supra note 7, at 81; LLOYD & FREEMAN, supra note 9, at 93, 103, 105. See FRIEDRICH at 184-86 (quoted infra note 80); KELLEY, at 242.
counter Modernism’s “abolishing of the human agent, as implied variously by Foucault, Heidegger, and deconstructionist criticism.” These needs come together in a humanism which retains an Italian, and some Modernist, skepticism: improving the human condition is the ultimate and the only validation of law; a doctrinally-desirable (neo-formalist) result, such as the efficiency praised by devotees of law and economics, cannot be pursued at the expense of the misery of the few or the many. This precept amounts to a victory for Kelley’s Nomos, for an individual and collective measuring and, potentially, denying of all things.

Treating each jurisprudential system as valid and as essential to a completeness, we could attempt a grand synthesis and put it to the test of informed consent. The most useful technique would be the one applied by Italian humanists: the recovery, interpretation, and reconciliation of texts, both ancient and modern. Other disciplines would be “raided” in a re-integration of social thought, where law would play a significant, but not an overweening, action-oriented role. A juristic synthesis should aim to resolve as many of Kelley’s dichotomies as possible, and to purge the others of their most obvious reductionisms and ideological manipulations. A patient clearing of the conceptual underbrush would make it more difficult to conceal or to spread the horns of false dichotomies: of pro-choice versus right to life, for example.

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The dialectical tension among systems, rules, and policies is responsible for much of law’s vitality and fascination. Kelley gives us a rich historical context for understanding and perhaps synthesizing these materials, a “general map of

78. Id. at 280. See FRIEDRICH, supra note 4, at 96, 110, 121, 179, 182; id. at 67, 71-72 (discussed supra note 64).
79. See KELLEY, supra note 2, at 29.
80. LLOYD & FREEMAN, supra note 9, at 18, 26; Brietzke, supra note 33, at 929, 934. See KELLEY, supra note 2, at 18, 57; id. at 144 (quoting Rabelais): “The books of law seem like a beautiful robe of gold, triumphant and marvelously precious, and embroidered with shit.”

The “price of improvement is dedication to purpose, precision in usage, acceptance of stringent rules of evidence and methods of argument, and changes in the machinery used to make policy, monitor consequences, and adjust performance to improve results.” EUGENE J. MEEHAN, REASONED ARGUMENT IN SOCIAL SCIENCE 180 (1981). FRIEDRICH, supra note 4, at 184-86 hints that such a synthesis would resemble the “natural law” of Leonard Nelson: the basic concept of law is “the practical necessity of mutual limitation of the spheres of freedom in the mutual relation between persons.” Id. at 184. Contra positivism, “no arbitrary proposition can contain a ground of obligation.” id. at 185, and “rational beings will recognize a certain distribution of property.” Id. at 186.
the intellectual milieu of the laws" done well. A broad-brush interpretation such as Kelley's must be an intensely personal one. But the reader comes to trust Kelley’s judgment and to respect the breadth of his learning, even while disagreeing with a few of his conclusions. He forces us to realize both that there is nothing really new in law and social thought, and that Aristotle would find recent Supreme Court decisions puzzling and even bizarre.82


82. See D’ENTREVES, supra note 35, at 16 (citing A.J. Carlyle).