

Chapter 5 Challenges for Institution of Justice Systems

1. The Empirical Complexity of Justice and Injustice

In chapter 4 it was established that the experientially manifested basis for positing the *Dasein* of noumena of justice and injustice subsists in *feelings of injustice* and *feelings of justice*. The first arises when an interest held by one person or party is hindered or thwarted by the actions of another person or party. The second arises when something happens subsequently that either restores the thwarted satisfaction of interest or else brings about what the aggrieved person or party feels is a *satisfactory* punishment of those whose satisfaction of their own mutually incongruent interest is blamed for causing that original feeling of injustice. In this case it is usually said that "justice has been served."

If we are to speak of a "justice system" at all, the word "system" necessarily implies the *Existenz* of a Society that has at least some degree of social organization and some capability of instituting such a system. People living in a state of nature are no less capable of feelings of injustice and justice, but in that state every grievance is a private grievance "in the mind of" the aggrieved party, and to speak of "visiting justice upon" an offending party is a mere sophistry because, in that case, "visiting justice" upon someone has no other meaning than revenge or retaliation. Furthermore, the vengeful party might very well be unable to exact his revenge or retaliation. For example, such would be the case if the target of revenge kills the person or party seeking revenge. As Hobbes put it,

[It] is manifest, that during the time when men live without a common Power to keep them all in awe, that they are in that condition which is called War; and such a war as is of every man against every man. [Hobbes (1651), pg. 77]

The state of nature, then, is a condition outside the scope and context of the idea of a justice system. It is an idea of a system that finds meaningful context only in the environment of a *civil* Society.

To "establish justice" it seems remarkably clear that any institution tasked with this goal - a justice system - faces some very difficult problems. One is to determine and validate when and under what circumstances particular actions are culpable. In Critical epistemology "culpable" means "justly imputable as a fault or defect in meeting or fulfilling what is owed as an *obligatione externa*." *Obligatione externa* was defined in chapter 4 within its discussion of the idea of commitment. We still have to explain or define how the terms "just," "imputable," "fault, and "defect" are to be understood epistemologically, but this will come in due course.

A second formidable task is that of achieving consensus among the citizens of a civil Society over what constitutes "a fault or defect in meeting or fulfilling what is owed" by some citizens to other citizens. Let us call this *the legal problem* for a civil Society. Montesquieu wrote, "Laws, in their most general signification, are the necessary relations arising from the nature of things" [Montesquieu (1748), vol. 1, pg. 1]. In this treatise, that "nature" is human nature. The legal problem is the problem of finding what these "necessary relations" are for the possibility of constituting and maintaining a civil Society.

Feelings of justice and injustice are *affective* manifestations and, like affective perceptions generally, they are autistic representations (unable to be put into words because they are non-objective). Ultimately they arise out of interests and the personal and private codes individuals turn into Duties-to-Self. It as was brought out earlier that every person's manifold of rules and manifold of concepts is *unique*. *Some* of a person's construction of these manifolds share common features and produce interests congruent with those of other people. But *some* of them are not the same as those of other people and produce interests incongruent with theirs. To paraphrase Lincoln, "We can satisfy *all* of the people *none* of the time." Does this necessarily mean the notion of a justice system is an impossible phantasm? I am going to argue that it does not. Whether or not I am able to persuade you to agree with me on this point is something *you* will know when this treatise is concluded. In preview of what is to come, I remark here that it is not necessary

to *satisfy* everyone's interests all of the time; it is sufficient to *not-dissatisfy* a person's interests to avoid a conflict of interest.

Another challenge a justice system must overcome is *the education problem*. One longstanding tenet of legal systems everywhere is "ignorance of the law is no excuse." In the development of a child's moral judgment, the stages of individualism and moral realism precede the development of rule cognizance (chapter 4); in these first two stages, a child can truly be said to be "ignorant of the law" in his understanding of the "rules" he is expected by others to follow. In the individualism stage, he is ignorant of the very *Dasein* of rules and rules for him have no accompanying "sense of obligation." In the stage of moral realism, he is aware of the *Dasein* of rules but lacks understanding of the *intent* that justifies them. They are, to use Piaget's word, heteronomous - something external to himself and *imposed* upon him whether he likes it or not. He feels himself, as Kant put it, *constrained* to obey them rather than *obliged* to follow them. The same is true of adult moral realism; there might be *obedience* to the law but there is not a personal *commitment* to the law. Most religious laws tend to be of this character.

In Critical epistemology, *education* is *the acquisition, development, or perfection of knowledge, skill, mental capability, practical character, or aesthetical taste by an individual* [Wells (2012b)]. Does it need to be said that the efficacy of any justice system is measured by the degree to which the people it serves know how avoid acting unjustly themselves, how to peacefully and justly resolve conflicts of interest with other people when these do arise, and exhibit in their own actions a commitment to justice? No one is born knowing *any* of these things and acquiring the capacity for them is *justice education*.

Still another challenge is *the problem of mini-Communities*. Every person *defines his own society* composed of other people [Wells (2012)]. A personal society is a mathematical object and an individual forms his according to its suitability for one or more of his own purposes. His society is, in logical essence, his concepts of relationships and associations with other people. Furthermore, because these relationships and associations can and do serve different purposes of his by means of different people, his society is logically divided into *different* associations and these *subsets* of his society are called *mini-Communities*. Figure 1 illustrates one typical division of a person's society into his mini-Communities.



Figure 1: A personal society of Person P divided into mini-Communities which serve his different purposes and interests. The figure also depicts other groups of people who are outside his sphere of mini-communities and with whom Person P is either in a hostile relationship with or is indifferent to the people in them.

Figure 1 mathematically depicts a crucial fact: *every person comes to belong to more than one mini-Community*. In infancy and early childhood an individual (Person P) is almost always a member of just one Community - namely his immediate family - even though he has no *distinct* understanding of this at this age. (Have you ever seen a three-year-old "take shelter" behind his daddy's leg in a store when someone comes up to speak to the father?) But as he grows and comes to meet and know other people, he begins constructing his personal society in ways that "compartmentalize" people into distinct groups along the lines of his interests and purposes. These groupings form his mini-Communities. Construction of a personal society and its mini-Community subdivisions is an on-going process and, just as new mini-Communities come into *Existenz*, they also go out of *Existenz*. If a labor union dissolves, its former members no longer have that union as one of their mini-Communities (although a former member can and not infrequently does have some of its other former members in one or more of his *other* mini-Communities). At one time you likely had a "first grade mini-Community" made up of at least some of your first-grade companions and, perhaps, your first grade teacher as well. Do you ever wonder what became of it? Do you even know if your first grade teacher is still alive? For most people, their old first grade mini-Community dissolved long ago.

Another factor, not illustrated in figure 1, is this: *some* people in one of his mini-Communities *also* belong to one or more of his *other* mini-Communities. Examples can include: coworkers *and* friends; family *and* fellow church member; business associate *and* neighbor; & etc. Mini-Communities are formed around congruent common interests and shared purposes, and nothing necessarily prevents someone in one of Person P's mini-Communities from also sharing other congruent common interests and purposes upon which Person P forms a different mini-Community. I have a very dear friend who I first met and got to know in our workplace mini-Community. He came to also belong to my recreation mini-Community. Our association in my personal society (and I in his) began 44 years ago and is still going strong today.

The phenomenon of mini-Community not only greatly complicates the tasks of a justice system, but also greatly complicates the task of political systems and governments. Another name frequently used for mini-Community is "faction." James Madison said of factions,

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of a whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community. . . .

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for pre-eminence and power, or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, enflamed them with mutual animosity, and rendered them much more disposed to vex and oppose each other, than to cooperate for their common good. [Hamilton *et al.* (1787-8), no. 10, pp. 52-53]

In framing the U.S. Constitution, Madison and the other framers tried to moderate and blunt the harmful effects of factions. However, they did not really understand the human nature of mini-Communities. The formation of national political parties, beginning in the 1820s, subsequently defeated their safeguards. Eventually, further misunderstandings of the nature of mini-Community brought the U.S. to the divided and faction-riddled condition in which Americans find themselves today. One victim of an inadequate understanding of mini-Community is the cherished democratic notion of "one man; one vote." It is generally taken for granted that every person is "a faction of one" in regard to every legal or policy issue that arises in a Society based on representative government. An unintended consequence of this untested notion of the mechanisms of popular self-governance is this: many issues and questions are framed in such a way as to set up conflicts of interest *among the individual's divers mini-Communities*. In other words, it leads to feelings of self-confliction in many individuals, and these feelings can produce effects

psychologists call "frustration" to a baneful degree. Psychology professor Harald Leavitt wrote,

Frustration is a "feeling" rather than a "fact." It is a feeling that arises when one encounters certain kinds of blocks on paths to certain kinds of goals. These feelings arise when the block seems insurmountable and when failure to surmount it threatens one's personal well-being - when the goal involves the self.

When people encounter such obstacles, they react with aggression; aggression mostly toward the obstacle when the person is sure of his own ability and aggression mostly toward oneself when the person is pessimistic about his ability, i.e., when he has a history of failure. [Leavitt (1972), pg. 38]

Eighteenth century ideas of systems of legislation institution (lawmakers), executive institution (management and law enforcement), and judicial institution (court systems) were significantly influential improvements over monarchical and aristocratic systems of rulers and were among the better things that grew out of the 18th century European Enlightenment. But, even so, the designs of these institutions, as we know them today, do fall short of their aims because of the fluid, ever-changing, and difficult-to-track phenomenon of mini-Community.

John Dewey wrote,

Society is one word but many things. Men associate together in all kinds of ways and for all kinds of purposes. One man is concerned in a multitude of diverse groups, in which his associates may be quite different. It often seems as if they had nothing in common except that they are modes of associated life. Within every larger social organization there are numerous minor groups: not only political subdivisions but industrial, scientific, religious associations. There are political parties with differing aims, social sets, cliques, gangs, corporations, partnerships, groups bound closely together by ties of blood, and so [on] in endless variety. [Dewey (1916), pp. 89-90]

Ancient legal codes - Ur-Namma, Hammurabi, Hittite, Roman Republic - seem to have recognized this in their laws to at least some degree, and instituted laws that applied to specific groups along with other laws that suggest concerns for fairness and equity in the administration of laws. These were Societies divided into classes or castes of people (as was Europe later on), and our modern ideals of classless Societies disapprove of the way these divisions were effected by the ancients. Nonetheless, the phenomenon of mini-Community does in part help us better understand the ancients and their Societies.

2. Design Principles for the Institution of Justice Systems

Ideas of the European Enlightenment of the 18th century had a profound influence on America's Founding Fathers and influenced the design of the U.S. Constitution in 1787. However, while there was much talk of justice by Enlightenment thinkers, the idea of justice systems actually was given relatively little development. In their framing of Article Three of the U.S. Constitution, the judicial branch of the new government received noticeably less attention or debate than Article One (the legislative branch) or Article Two (the executive branch). The framers appear to have placed a great deal of emphasis on the design of the legislative branch, only slightly less emphasis on the executive branch, but gave slight treatment to the judicial branch. Despite the talk one often hears today about "the three co-equal branches of" the U.S. general government, the framers did not design them with equality in mind. Alexander Hamilton even wrote that the judicial branch had been deliberately designed to be the weakest of the three branches. The framers - many of whom had themselves been members of the Continental Congress - seemed to be jealous of lawmakers' prerogatives and worried that judges might usurp some of their law-making power. The 1787 Constitutional Convention had many former and current legislators as well as former governors but few men with any experience as judges. This underrepresentation shows in the design of the judicial branch. It is a well known and time tested maxim that people are the best judges of things they have knowledge and personal experience with, but poor judges of things they do not. The Enlightenment Age thinkers, among their other ideas, found *principles* for *designing* institutions.

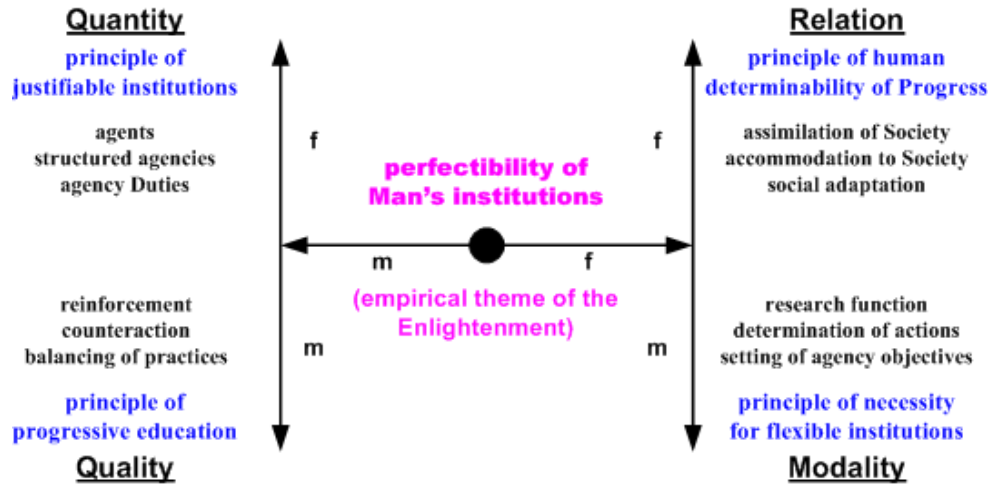


Figure 2: 2LAR organization of institutional design principles of the Enlightenment.

People don't often think of it in these terms, but a Society's institutions are designed institutions. It can not be said that the Enlightenment produced well-articulated specific methods and practices for *how* to design social institutions; but they did produce four principles covering how they *ought to* be designed under an empirical theme of the perfectibility of Man's institutions. These principles make up the headings of the 2LAR presented in figure 2. The Enlightenment did *not* produce the synthetic *momenta* shown under each of these headings. They seem to have thought these were matters of common sense (if they thought about them at all). The Enlightenment's prominent writers - Voltaire (1694-1778), Montesquieu (1689-1755), Diderot (1713-1784), Alembert (1717-1783), Rousseau (1712-1778), and Kant (1724-1804) - were not engineers in the modern technical sense of that word even though the description "social engineering" can be aptly applied to some of their work. The *momenta* in figure 2 were deduced in Wells (2014), chapter 2, from Critical principles of human nature.

Mill wrote,

Governments must be made for human beings as they are, or as they are capable of speedily becoming; and in any state of cultivation which mankind, or any class among them, have yet attained or are likely soon to attain, the interests by which they will be led, when they are thinking only of self-interest, will be almost exclusively those which are obvious at first sight, and which operate on their present condition¹. It is only a disinterested regard for others, and especially for what comes after them, for the idea of posterity, of their country, or of mankind . . . which ever directs the minds and purposes of classes or bodies of men towards distant or unobvious interests. And it cannot be maintained that any form of government would be rational which required as a condition that these exalted principles of action should be the guiding and master motives in the conduct of average human beings. [Mill (1861), pp. 72-73]

So, too, it is with the design of justice systems. The challenges discussed in the previous section, and especially the challenge of mini-Community, make the Enlightenment principles in figure 2 extremely important for understanding and instituting a justice system congruent with the human nature of feelings of justice and injustice.

2.1 The principle of justifiable institutions

The **principle of justifiable institutions**, in its Critical statement [Wells (2014), chap. 1], is: *all human*

¹ Self-interested thinking of this kind resembles what Piaget called "the stage of preoperational thought" in childhood. This stage is exhibited by children of from two to six years of age.

institutions are justifiable only if they contribute to the advancement and welfare of the instituting Society. Critical epistemology draws a distinction between a Society (capitalized) and a society (non-capitalized). The latter is synonymous with what was called a person's "personal society." A Society is the mathematical union of the personal societies of all its members [Wells (2012)]. Like a society, a Society is a noumenon and a mathematical Object. It can therefore be defined (as all formal mathematical Objects can be), and *how* it is defined affects what is "justifiable" in its institutions. If it is defined to coincide with a *nation*, its membership consists of all the people residing in or holding allegiance to that nation. However, here the phenomenon of mini-Community comes into consideration. There are relatively few *national* interests that are *congruent* interests of a nation's entire population. These relatively few nationally congruent interests make up the *common interests* of the entire nation.

Generally speaking, the smaller a population is, the larger the number of congruent common interests of that particular population will be. For example, the members of a union local will typically share more common interests among their members than will either the people of the city where they are located or the members of the national union to which the local belongs. This is because the local union members do share the common interests of their local community as well as those of the national union. But they have *additional* common interests peculiar to the local's mini-Community and not shared by other people outside their local union. To use a religious metaphor, a local union is "congregationalist" rather than "episcopal" in their common interests. Figure 3 illustrates this inverse relationship between population size and relative number of congruent common interests in the context of a nation-Society.

It follows from this that what is justifiable in an institution very much depends on the scope of a Society, or of one of its mini-Societies, the institution is intended to serve. "Well-being" and "advancement" are, from the judicial Standpoint, ideas understood "in the eyes of the mini-Community" and are restricted in their scope by the congruent common interests of that Community.

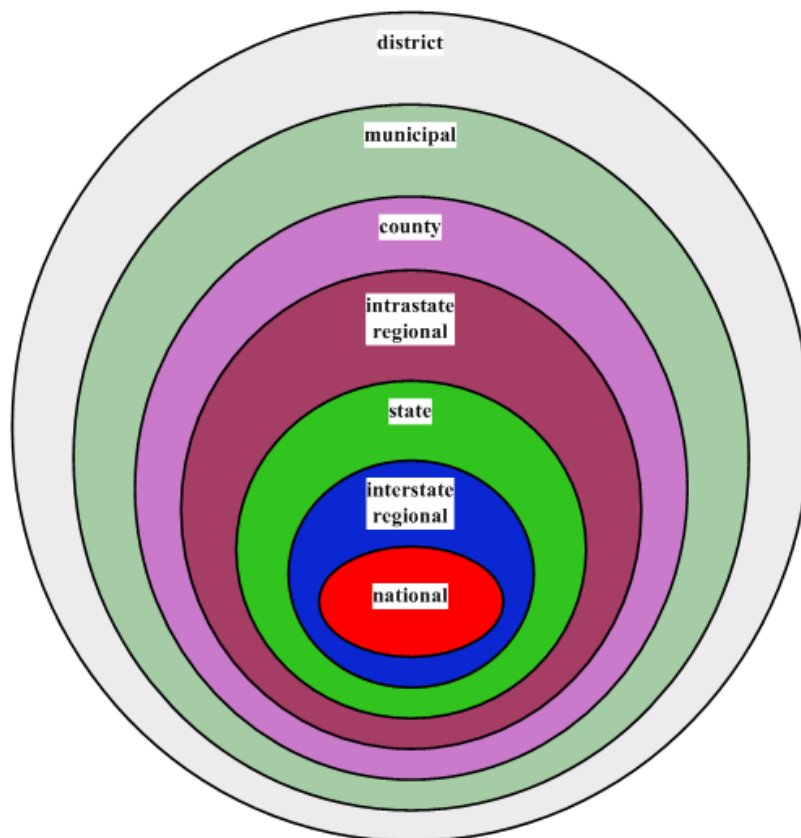


Figure 3: The inverse interests relationship between population size and levels of government in a nation-Society.

The inverse relationship between population and common interests has immediate implications. One of these is that the justifiable scope of an institution is greatest at the most local sub-Society level and least at the level of the overall Society. For governmental institutions this means that justifiable governmental organization, in terms of power and scope of authority, is heterarchical and distributed rather than hierarchical and centralized. In its beginning, overall government in the United States had this character. Tocqueville said of early 19th century America,

It was never assumed in the United States that the citizen of a free country has a right to do whatever he pleases; on the contrary, more social obligations were there imposed on him than anywhere else. No idea was ever entertained of attacking the principle or contesting the rights of society; but the exercise of its authority was divided, in order that the office might be powerful and the officer insignificant, and that the community should be at once regulated and free. In no country in the world does the law hold so absolute a language as in America; and in no country is the right of applying it vested in so many hands. The administrative power in the United States presents nothing either centralized or hierarchical in its constitution; this accounts for it passing unperceived. The power exists but its representative is nowhere to be seen. [Tocqueville (1836), vol. I, pg. 71]

Institution that is centralized and hierarchical is monarchical in character. Institution that is distributed and heterarchical is republican in Rousseau's sense of that word. If that distribution and heterarchy are defined and designed to match the divisions of congruent common interests at the sub-Society or mini-Community levels for which the design is intended, then this institution is designed to *serve justice*. If not so properly designed, it will be faced with making rulings in situations where conflicts of interests are present and, under those circumstances, its rulings and authority are more likely to produce injustices.

None of this is to say that institution design in accord with the principle of justifiable institutions is easy or straightforward. Nor is it to say that mistakes will not be made in an initial institution or that any original institution will not need modification as the Society evolves and changes. This consideration is covered by the principles of Relation and Modality. Human beings live in an empirical world and no human institution design is ever absolutely free of mistakes and none will endure unchanged forever.

Heterarchical institution is potentially unstable as a system *unless* the officials chosen for its various offices are competent not only to carry out their own official Duties but also to faithfully serve those additional common interests that bond the sub-Societies their offices serve to other sub-Societies and the Society as a whole. Figure 3 illustrates, for example, that the *national* interests are contained in the larger spheres of smaller segments of the nation. An official at the county or municipal level is still in the service of national interests; only the scope of his authority over it is limited in its exercise, not the quality of that authority². That means there are significant challenges needing to be adequately met in the process of determining who is to be selected and entrusted with carrying out the Duties of an office, and with the process of evaluating the fitness of an officer to continue to hold his office. Most importantly, the officials must be people who willingly make it their Obligation to always act as public servants and *never as rulers* in the performance of their Duties³.

2.2 The principle of progressive education

This principle states: *education is the principal means for Progress in any Society*. Critical Progress is a mathematical Object subsisting in increasing the kind and amount of objective good people deem to be possible to realize (make actual). At the same time, true Progress occurs in such a way as to preserve and maintain all kinds and amounts of good people already have. So-called "progress" in one thing bought at

² In Critical epistemology, *authority* is possession of the ability (*Kraft*) to cause something to become greater, to increase, to be strengthened, or to be reinforced in some way. Less formally, it is the ability to *competently* do a job.

³ A ruler is a person who premises his actions on Duties-to-Self and regards himself to be at liberty to take actions that unilaterally attempt to subjugate those over whom the authority of his office is extended.

the expense or loss of another kind of good is not Progress at all and is likely to result in an injustice.

Progress is not itself a political or an ideological idea, although ideas of how to achieve it often come out of political or ideological thinking. Rather, Progress is a mark of successful change bettering the ability of people to satisfy their interests without sacrificing the satisfaction of interests by other people. Insofar as Progress is an outcome conducive to forestalling and preventing feelings of injustice, it is an idea pertinent to institution of a justice system.

In Critical terminology, *education* is the acquisition, development, or perfection of knowledge, skill, mental capacity, practical character, or aesthetical taste by an individual. An *educational activity* is any activity by which an individual makes an undertaking to develop and perfect his own knowledge, skill, mental capacity, practical character, or aesthetical taste. There are different kinds of educational activities, and every enlightened institution must make good provisions for ensuring it provides some of them.

Instructional education is education by means of the transmitting of knowledge, skill, etc. to a pupil or student from a teacher. Examples include schools, apprenticeships, basic training camps in the military, athletic camps, formal management training by a business, and personal mentoring. Examples of instructional education have been found going back to ancient times. A child's educational activities begin *before* he or she begins attending school and takes place in the home, during play, and in socializing with his or her playmates. Indeed, most educational activities are informal and accidental, and these are sometimes the kinds of educational activities that have the greatest impact on a person's life.

Since ancient times most people have habitually equated education with schools and children or young people. Other non-school types of instructional education were and are typically thought of as "training." But instructional education in schools is only one kind of education. *Every* public institution, including private businesses transacting business with the general public, actually acts as an educating institution whether it intends to or not; and it does so either positively for overall Progress in Society or negatively to the detriment of Progress or even Order⁴ in a Society. What Mill said of government also applies equally to every other kind of public institution and commercial business, and it applies to justice systems:

A government is to be judged by its actions upon men, and by its actions upon things; by what it makes of its citizens, and what it does with them; its tendency to improve or deteriorate the people themselves, and the goodness or badness of the work it performs for them and by means of them. Government is at once a great influence acting on the human mind, and a set of organized arrangements for public business [Mill (1861), pp. 20-21]

Institution of *progressive* education aims at aiding people to acquire and develop knowledge, skill, mental capacity, practical character, and aesthetical taste by which they can make improvements to both their own and the public well-being. This aim is what gives education the adjective "progressive" because the intention of the institution is to make Progress in a Society possible and attainable. Toynbee called a Society that does not exhibit manifestations of Progress an "arrested" Society and noted that arrested Societies frequently go on to become *fallen* Societies, i.e., Societies that undergo disintegration.

2.3 The principle of human determinability of Progress

This Enlightenment principle states: *Man designs the lines of human Progress*. Most 18th century Enlightenment thinkers saw science and scientific methods as the best means of accomplishing this and so the principle implied the primacy of science in determining, moderating and controlling progressive social innovation, over reliance upon tradition, superstition, imitation, or fiat. Today, over two centuries later, it has become clear that dead-matter science alone (physics, chemistry, biology, and their offspring specialties) is not enough all by itself. The tools producible by science can be used for positive

⁴ Critical Order is an Object subsisting in the preservation of the degree of all kinds and amounts of objective good people deem to already actually exist.

accomplishments but can also be turned to sinister purposes just as easily. Understanding this at least partially vindicates the views of the Romanticism movement insofar as to make clear that human aspects of affectivity, imagination, and human interests, along with appreciation of external nature, must not be neglected. Man the Determiner must better understand his own determinate Nature. The poetic and the philosophic in Man has an honorable place alongside the scientific and mathematic in him.

Echoing Emerson, Mill wrote,

Let us remember, then, in the first place, that political institutions (however the proposition may at times be ignored) are the work of men; owe their origin and their whole existence to human will. Men did not wake up on a summer morning and find them sprung up. Neither do they resemble trees which, once planted, "are aye growing" while men "are sleeping." In every stage of their existence they are made what they are by human voluntary agency. Like all things, therefore, which are made by men, they may be either well or ill made; judgment and skill may have been exercised in their production, or the reverse of these. And again, if a people have omitted, or from outward pressure have not had it in their power, to give themselves a good constitution by the tentative process of applying a corrective to each evil as it arose, or as the sufferers gained strength to resist it, this retardation of political progress is no doubt a great disadvantage to them, but it does not prove that what has been found good for others would not have been good also for them, and will not be so still when they think fit to adopt it. [Mill (1861), pp. 3-4]

True as this is for institutions of government and law, a complete understanding of this quote calls for a broader understanding of the idea of "politics" than is customary, and for a keener appreciation of the Greek roots of our English word, *viz.*, *politikos* (relating to a citizen) and *polis* (a city). There is a broader theme contained in the Enlightenment idea going beyond the narrow understanding of 'political institution' and encompassing in scope a broader connotation, *i.e.*, *political* is *anything pertaining to citizens and citizenship*. Public education is a political institution because it is established for purposes of promoting civil Order and aiding in the achievement of civil Progress. Montesquieu wrote,

It is in a republican government that the whole power of education is required. . . . It is not the young people that degenerate; they are not spoiled till those of maturer age are already sunk into corruption. [Montesquieu (1748), pg. 34]

The principle applies as well to economics and the practice of civic free Enterprise [Wells (2017)]. Indeed, the principle is one that directs us away from the trend of ever-increasing specialization and toward a better moderated balance between being a generalist and being a specialist. Aristotle wrote,

Again, each man judges correctly those matters with which he is acquainted; it is of these that he is a competent critic. To criticize a particular subject, therefore, a man must have been trained in that subject; to be a good critic generally, he must have had an all-round education. [Aristotle (*c.* 340 BC), pg. 9 (1094^b30-1095^a1)]

Specialization to a limited degree has proven to be beneficial to the general welfare of a Society, but this degree stops far short of what Plato believed and argued for in the antlike social communism of his book called *Republic*⁵. Overspecialization is characteristic of what Toynbee called "arrested societies" who later went on to become fallen Societies. He noted,

Two characteristics, common to all these arrested societies, stand out conspicuously – caste and specialization [Toynbee (1946), pg. 181].

Arrested Societies are Societies who are no longer achieving Progress. Toynbee went on to say,

⁵ *Republic* is actually a misleading translation. Plato called this work Πολιτεία, which would be more accurately translated as "Body Politic."

When we have completed our analysis we shall find that the qualitative change which disintegration brings with it is exactly opposite in character to that which is the outcome of growth. . . . We shall find that . . . the qualitative effect of disintegration is standardization. This tendency towards standardization is the more remarkable when we consider the extent of the diversity which it has to overcome. The broken-down civilizations bring with them, when they enter on their disintegration, the extremely diverse dispositions – a bent towards art or towards machinery or whatever the bent may be – that they have severally acquired during their growth. [*ibid.*, pg. 367]

There is, of course, a notable exception to Toynbee's finding, namely, the Society of the BaMbuti Pygmies of the Ituri Forest. They were a *stable* arrested Society - so long, at least, as other Societies did not invade the Ituri Forest - who exhibited little to no specialization in social life. Toynbee did not study so-called "primitive societies" like the BaMbuti but his finding *does* apply to so-called "higher civilizations" whose "arrest" came after a long period of Progress. This apparent contradiction remains an unsolved question for anthropology but does suggest specialization and social stability are antagonistic.

In America today, and in Europe as well, the word "scientist" has come to be used almost synonymously with the word "specialist." This, however, ignores the fact that a science is a doctrine constituting a system in accordance with a principle of a disciplined *whole* of knowledge. A person can be *more* expert (specialized) in one or a few areas than in the majority of others, but this does not preclude having *breadth* of practically-sufficient knowledge in *many* fields. Specialization was not what Enlightenment thinkers had in mind for the principle of Relation or envisioned for application of scientific methods to designing social institutions. Rather, they envisioned as wide a diffusion of as much knowledge as possible for as many people as possible.

2.4 The principle of necessity for flexible institutions

This principle states: *human institutions must be designed to accommodate changes affecting Society as they occur insofar as these changes alter the circumstances challenging Society's civil Communities.* In his study of history, Toynbee found that every challenge a civilization successfully meets contains in its successful resolution the seed of another future challenge that will eventually confront it. He tells us there are three possible responses a Society might make to a challenge confronting it. He wrote,

One source of disharmony between the institutions of which a society is composed is the introduction of new social forces – aptitudes or emotions or ideas – which the existing set of institutions was not originally designed to carry. . . . Ideally, no doubt, the introduction of new dynamic forces ought to be accompanied by a reconstruction of the whole set of institutions, and in any actually growing society a constant readjustment of the more flagrant anachronisms is continually going on. But *vis inertiae* tends at all times to keep most parts of the social structure as they are, in spite of their increasing incongruity with new social forces constantly coming into action. In this situation the new forces are apt to operate in two diametrically opposite ways simultaneously. On the one hand they perform their creative work either through new institutions that they have established for themselves or through old institutions that they have adapted to their purpose; and in pouring themselves into these harmonious channels they promote the welfare of society. At the same time [the new forces] also enter, indiscriminately, into any institution that happens to be in their path – as some powerful head of steam which had forced its way into an engine house might rush into the works of any old engine that happened to be installed there.

In such an event, one or the other of two alternative disasters is apt to occur. Either the pressure of the new head of steam blows the old engine to pieces, or else the old engine somehow manages to hold together and proceeds to operate in a new manner that is likely to prove both alarming and destructive.

To translate these parables into terms of social life, the explosions of the old engines that cannot stand the new pressure . . . are the revolutions which sometimes overtake anachronistic institutions. On the other hand, the baneful performances of the old engines which have stood the strain of being

keyed up to performances for which they were never intended are the social enormities which a "die-hard" institutional anachronism sometimes engenders. . . . If harmonious adjustments predominate, the society will continue to grow; if revolutions, its growth will become increasingly hazardous; if enormities we may diagnose a breakdown. [Toynbee (1946), pp. 279-281]

130 years earlier Thomas Jefferson had expressed a similar maxim for the American Republic:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with because, when once known, we accommodate ourselves to them and find practical means of correcting their ill effects. But I also know that laws and institutions must go hand in hand with the progress of the human mind. As discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times. We might as well require a man to wear still the same coat which fitted him as a boy as civilized society to remain ever under the regimen of their barbarous ancestors. . . . Let us, as our sister states have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, though wise, virtuous, and well-meaning councils. [Jefferson (1816), pg. 559]

The necessity for flexible institutions arises because of what mathematicians call "ill-posed problems." Well-posed problems – the staple of mathematics education – are different in kind from ill-posed ones. Well-posed problems admit to well-posed direct solutions. For ill-posed problems, *the problem itself* cannot be stated with sufficient precision to allow for *direct* methods of solution. What is necessary for their solution is to understand how, in effect, to design systems *to design themselves* by a process of trial-and-error or by heuristics. This means that cultivating skills for designing flexible institutions requires cultivating mathematical abilities that by and large are not cultivated in existing institutions of public education (and so this lack, in time, turns old institutions into anachronisms).

Human beings are in most cases heuristic problem solvers dealing almost daily with ill-posed problems. Our skill in doing so is one factor in saying human beings are more intelligent than animals. The *ad hoc* character of the ancient legal codes manifests heuristic adaptation of their justice systems as these grew to deal with widening spheres of situations and circumstances.

However, heuristics is not, all by itself, sufficient for proficiency in the design of complex systems for solving ill-posed problems. Time, experience, and changing Society all bring to light shortcomings and deficiencies in human-designed institutions, and the institutional design itself must be designed with means and mechanisms for progressively adapting to new or better understood situations and circumstances. One challenge presented here is that people tend to be averse to change, especially in regard to things they have come to know well and for a long time. A second is that zeal for change can often produce extravagant overgeneralizations and too much haste in adopting untried, unpracticed, or understudied speculations. As Caesar Augustus said, "Make haste slowly." Institutional flexibility is itself a designable attribute of human institutions.

3. The *Momenta* of the Enlightenment Principles

The twelve *momenta* in figure 2 were deduced in chapter 2 of Wells (2014) from principles of Critical Epistemology. Some of these - and especially the *momenta* of Quantity - in the figure 2 2LAR possibly seem obvious at first encounter because long history and tradition in crafting organizations makes them seem familiar to us. However, we must be wary of this familiarity. Institutions - and, particularly, justice system institutions - have historically been established through a combination of traditions, practical considerations, mimesis, and ontology-centered presuppositions and habits of thinking. We are concerned with institution of *justice systems* in this treatise; the manifestations which ground the ideas of the *Dasein* of both injustice and justice in human experience are aesthetical *feelings* (as we saw earlier). The historical and traditional lines of thought in developing institutions are largely *objective* and

consequentialist in character, derived through mimesis from examples rooted in monarchy/oligarchy or theocratic systems of government. They therefore tend to be reflective of adult moral realism rather than fully mature moral cognizance. The *momenta* therefore must be examined Critically to be understood.

Let us begin by reminding ourselves that figure 2 is a 2LAR of the empirical idea of the perfectibility of Man's institutions. There is an important difference between the idea of the *perfectibility* of something vs. the idea of something *being perfect*. Something is said to be "perfect" if it is complete, i.e., lacks nothing essential to it. Now, nothing *empirical* can ever be *known* to be perfect. Empirical experience is always contingent and we never know *a priori* that tomorrow will not bring to light something new that gainsays our understanding of the perfection of something. Something might be made *more* perfect than it was yesterday; that merely means some deficiency has been reduced or eliminated. But we can never know that absolute perfection of something has been achieved. "Perfectibility" means a capacity for improving something, i.e., a capacity to make it less imperfect. That capacity requires only the ability to be cognizant of flaws, faults, shortcomings - in a word, manifest *imperfections* - in something and an ability to do something that reduces those manifest imperfections.

Secondly, let us also bear in mind that the very idea of an institution presupposes some civil Community said to do or to have done the instituting. That is the fundamental *context* of the idea of a justice system. All civil Communities, of whatever size, are composed of people who have worked out the ways in which they can live together peaceably and to the benefit of one and all. Such a "way of living together" implies some commonly shared formal, informal, or mixed set of *mores* (moral customs; *Sittlichkeit*). The agreement made with one another, again either formal, informal, or mixed, by the civil Community's people is called a **social contract** [Wells (2012)]. Rousseau wrote,

The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only, when the voice of duty takes the place of physical impulses and the right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations. Although, in this state, he deprives himself of some advantages he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually the happy moment which took him from it forever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man. [Rousseau (1762), pg. 19]

Implicit in this paragraph we find the human-natural *purpose* of any justice system. If "the abuses of this new condition" (life in a civil Community) were to "degrade him below" life in the state of nature, then ***the purpose of a justice system is to redress those abuses and restore to him the benefits of living in a civil association.*** Those who intentionally committed those abuses are the deontological ***outlaws*** and ***criminals*** from whom redress is to be exacted by the justice system. This is so *even if the abuse was perpetrated by actions of the justice system itself*. Those who accidentally and unintentionally perpetrate an abuse commit a deontological **moral fault**, and are liable for redressing the abuse, but are not deontological outlaws or criminals. And those who are wrongly or mistakenly accused of perpetrating an abuse but did not do so are **innocent** (not culpable) and are not liable for any redress. All of the *momenta* in figure 2 when applied to the idea of a justice system must be viewed in the context of this purpose.

3.1 The Momenta of Quantity for Institution of Justice Systems

The logically singular *momentum* of Enlightened institution subsists in a human **agent** of the Institute whose intentionally systematic actions, competently performed, focus the energetics of affective perception into actions for realizing (making actual) the purposes of the institution. It is important to stress that an agent is a *human* being who makes decisions and carries out activities expected of the

institute by the civil Community it serves. An agent performs functions that cannot be automated and *competently* performed by machines. Recent developments in so-called artificial intelligence (AI) do not eliminate the need for human judgment and decision making, *especially* in matters involving feelings of justice or injustice, although the day might not be too far off when such technology might be of some useful benefit to the agent as he carries out his Duties. Technology can provide tools but any tool can be turned away from its intended benefit and used to do harm. Despite marketing propaganda to the contrary, AI tools do not think and do not have the human capacity to feel or sense that is vitally necessary for the possibility of human understanding, moral judgment, and choice⁶.

The logically particular *momentum* of Enlightened institution subsists in systematic organization of *specialized* agents working conjointly and cooperatively to actualize the achievement of the institution's purpose. This is called the institution's *agency*. I am confident you have at least heard the job description labels normally given to the specialists in a justice system. Examples include: judges; attorneys; law clerks; bailiffs; court recorders; jurors; legal secretaries. In addition, a *justice* system also includes *other* specialists, e.g.: lawmakers (legislators and regulatory body rule-makers); police officers; forensic scientists; witnesses; information technology specialists; legal scholars; police trainers; crime scholars; and medical examiners. Traditionally most of these specialists are not thought of as being agents of a justice system but, like those in the first group, their role and purpose in the *agency* of justice is to, quite simply, make the justice system fulfill its purpose. The ideas of justice and injustice do not fall neatly into arbitrary divisions of executive, legislative, and judicial branches of government because people's feelings of justice and injustice do not neatly divide into these categories. The danger of trying to divide up these roles by fiat is that such arbitrary divisions can institutionalize *injustice*.

Within an agency, each agent has particular tasks and responsibilities he carries out. The agency is the system in which the individual actions of agents are combined. But *how* are these actions to be combined? To say *how* they are combined is not the same as saying they *are* combined, and the concept of the former is different from the concept of the latter. To say how they are combined is to say how the diverse roles of agents are intentionally organized and provide procedures by which they operate. This is the logically-universal *momentum* of Enlightened institution and it is called the *agency Duties*. It is not sufficient for the institution merely to specify a list of Duties and procedures. The institution must also provide in its design the conditions under which cooperation emerges from dynamical interactions among agents. This requires a basis in a set of common understandings, shared by interacting agents, of how their individual actions are to combine and be *co-determined* to fulfill the objectives and satisfy the purposes of the Institute. The system of organized Duties and procedures draws its practical and real objective validity from the principle of justifiable institutions: *All human institutions are justifiable only if they contribute to the advancement and welfare of civil Society*. All sub-objectives, Duties, and procedures must be able to trace their roots back to this principle. Where any incongruence is discovered, the incongruent sub-objective, Duty, or procedure must give way to the priority of justifiable institution.

3.2 The Momenta of Quality for Institution of Justice Systems

The governing principle of Quality for institution of justice systems is the principle of progressive education. However, the institution of a justice system is not *directly* an institution of schooling or of an instructional institute. As Mill correctly pointed out, all human institutions do produce educating effects on the people of the Society they serve. They do this whether their agents *intend* to or not. The *momenta*

⁶ Over the several decades of my engineering career, I have designed and built a number of so-called "smart" or "intelligent" machines. I understand the principles by which they are designed, how they actually work, and the limitations to what they can and cannot do. Such a machine can seem very impressive to people who do not know how it works or what it is actually doing - and *compared to* "dumb machine" predecessors, it *is* impressive - but in the end the only thing it does is execute well-designed preprogrammed algorithms. Like Pinocchio, it is not a real boy no matter how sincerely its Geppetto wishes it was.

of Quality pertain to what sort of desirable educating effects are to be produced by a justice system and what is necessary in its institution to produce these effects.

The sort of educating effect to be produced was well stated by Mill:

The first element of good government, therefore, being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves. [Mill (1861), pg. 18]

Mill was speaking broadly about government. John Adams, though, especially stressed how crucial the justice system is in this context:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and the executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. [Adams (1776), pg. 239]

The notion of making a crisp division between judicial power and legislative power sounds very logical and desirable. What more ideal way could there be to effect the "dignity and stability of government, the morals of the people, and every blessing of society"? *Practically* achieving the crisp division Adams spoke of, however, is something a great deal more difficult than simply dividing things up in terms of lawmakers, executives, and judges can accomplish. Friedman points out,

In a common-law system, judges make at least some of the laws, even though legal theory has often been coy about admitting this fact. American statesmen were not naive; they knew that what judges believed, and who they were, made a difference. How those judges were to be chosen and how they were supposed to behave was a political issue in the Revolutionary generation, an issue whose intensity has rarely been reached since that time. . . . The bench was not homogeneous. Judges varied in quality and qualification from place to place and according to their positions in the judicial pyramid. Local justices of the peace were judges; so were the justices of the U.S. Supreme Court. English and colonial tradition had allowed for lay judges, as well as for judges learned in the law. There were lay judges both at the top and the bottom of the pyramid. [Friedman (2005), pp. 79-80]

That "judges make at least some of the laws" is and has always been a fact. The "coyness" Friedman speaks of subsists in the notion of "precedents." When a judge makes a ruling in a particular case, the ruling becomes a "precedent" for future cases, i.e., judges in future cases are expected to conform their rulings to "earlier precedents," and what is this if it is not a form of law? The earnest heat and passion that has attended recent Supreme Court appointments in the U.S. was directed and focused upon whether the nominee in question would or would not follow the precedent set by the case *Roe v. Wade*; the outrage that followed the Court's overturning of *Roe v. Wade* is outrage over what is perceived as the newly appointed justices "going back on their word" in voting to overturn that precedent. It is indeed true, and always will be true, that "what judges believe and who they are makes a difference."

Adams and others placed their faith in the new system largely upon the "moral qualities" of the men who were appointed to be judges. Adams wrote,

There is a voice within us which seems to intimate that real merit should govern the world; and that men ought to be respected only in proportion to their talents, virtues, and services. But the question has always been, how can this arrangement be accomplished? How shall the men of merit be discovered? How shall the proportions of merit be ascertained and graduated? Who shall be the judge? When the government of a great nation is in question, shall the whole nation choose? Will such a choice be better than chance? Shall the whole nation vote for senators? Thirty million of votes,

for example, for each senator in France! It is obvious that this would be a lottery of millions of blanks to one prize, and that the chance of having wisdom and integrity in a senator by hereditary descent would be far better. There is no individual personally known to an hundredth part of the nation. The voters, then, must be exposed to deception, from intrigues and maneuvers without number, that is to say, from all the chicanery, impostures, and falsehoods imaginable with scarce a possibility of preferring real merit. [Adams (1790), pg. 357]

Adams' question, "How can this arrangement be accomplished?" is indeed a vexing one. An arrangement can only be judged *ex post facto* by examination of the results and outcomes that follow from it. As Mill put it,

What, for example, are the qualities in the citizens individually which conduce most to keep up the amount of good conduct, of good management, of success and prosperity, which already exist in society? Everybody will agree that those qualities are industry, integrity, justice, and prudence. But are these not, of all qualities, the most conducive to improvement? and is not any growth in these virtues in the community in itself the greatest of improvements? If so, whatever qualities in the government are promotive of industry, integrity, justice, and prudence conduce alike to permanence and progression; only there is needed more of those qualities to make the society decidedly more progressive than merely to keep it permanent.

What, again, are the particular attributes in human beings which seem to have a more especial reference to Progress, and do not so directly suggest the ideas of Order and Preservation? They are chiefly the qualities of mental activity, enterprise, and courage. But are not all these qualities fully as much required for preserving the good we have as for adding to it? If there is anything certain in human affairs, it is that valuable acquisitions are only to be retained by the continuation of the same energies which gained them. Things left to themselves inevitably decay. Those whom success induces to relax their habits of care and thoroughness, and their willingness to encounter disagreeables, seldom long retain their good fortune at its height. [Mill (1861), pp. 13-14]

It is an old maxim of good management that shortcomings, deficiencies, and failures are less often the direct fault of *people* and more often the direct fault of how the *system* they are constrained to work in is set up and organized. If there ever could be a system so well designed that mistakes, errors, and unintended consequences could never occur to the detriment of "the virtue and intelligence of the human beings who make up the community" through maleducation in the lessons taught by that system, that would be a Utopian accomplishment indeed. But to hope to design an institute with these qualities is foolishly naive. That leaves instead only a recourse to designing an institute to be self-reviewing and self-adjusting. And *that* is the aim of the *momenta* of Quality in Enlightened institution.

The first *momentum* of Quality in Enlightened institution is deduced from the logically-affirmative principle of *demand for agreement* [Wells (2014), chap 2, pp. 42-50]. This principle is understood from the judicial Standpoint of Critical epistemology and denotes the placing of a demand for happiness in acts serving to realize an affective state of satisfaction (*Wohlgefallen*) or negate an affective state of dissatisfaction (*Mißfallen*). The two German words translated as satisfaction and dissatisfaction here have peculiar connotations it is important to note. *Wohlgefallen* expresses satisfaction in a connotation of "oh, this is *not-bad*." *Mißfallen* expresses dissatisfaction in a connotation of "oh, this is *not-good*." That a feeling of justice has a demand for agreement in its context is, I think, not difficult to see.

The first *momentum* of Quality follows from this demand and is called **reinforcement**. The *momentum* is a *demand* function, i.e., a **Duty of the Institute** to preserve and improve a situation that already exists as a part of the condition a social compact. The **fundamental condition** of social compacting is stated as: *the association will defend and protect with its whole common force the person and goods of each associate in such a way that each associate can unite himself with all the other associates while still obeying himself alone*. This condition does not preclude individuals from entering into uncoerced agreements with one another involving mutual commitments of *obligatione externa*, and such commitments do create a

warrant by which either party may demand *the association* compel the other party to uphold his part of their agreement. In the context of justice, this enforcement Duty of the Institute is the ground upon which the members of a Community invest in the Institute an *expectation of authority*, i.e., the demand of the collective citizens of a civil Community for officials holding designated appointments as the Institute's authority figures to exercise their designated authority for the benefit of the whole Community. If they fail to do so then they are held to be *corrupt* officials and their inaction is held to be a deontological crime because it is an intentional violation of their pledge to faithfully execute the office to which they have accepted appointment.

If an Institute fails to take an action legitimately expected of it, if it fails to act with complete integrity, to preserve justice, or undertakes imprudent actions, the lesson it teaches members of the public is that their Society cannot be trusted to fulfill its part of the social contract and protect the person and goods of *each* member of the civil Community with the full power of the association. In contrast, if the Institute takes action demanded by the expectation of authority vested in it, when it acts with complete integrity in its stewardship of the public trust, when it acts to preserve justice for all and its actions are prudent and well-measured, then the lesson it teaches is that every citizen has a Duty to do the same in his social intercourse with his fellow citizens. All this can be summed up by saying that the first *momentum* of Quality in Enlightened institution is *reinforcement* of the social contract.

The second *momentum* of Quality in Enlightened institution is deduced from the logically-negative principle of *demand for opposition* (*Widerstreit*) [*ibid.*]. This principle, which is again understood from the judicial Standpoint of Critical epistemology, is the placing of the demand for happiness in an action *negating* an existing and present state of being. The only difference here is the direction of the action, opposing rather than reinforcing a situation. Unjust situations must be *abolished*, not tolerated or dismissed. If a disaster befalls a town, it is the Duty of all members of the civil Community to lend aid. If a criminal or outlaw harms a citizen, it is the Duty of the civil Community, acting through its Institutes of justice, to render the perpetrator incapable of further harm and to undo the effects of his enormities. The second *momentum* of enlightened institution demands justice be done by the Institute within the scope of its expectation of authority. *Unjust* is anything that violates the social contract of the Society; *justice* is the negating of anything that is unjust. The action the Institute is called upon to perform is a counteraction opposing an unjust circumstance or situation. Thus, the second *momentum* is called *counteraction*. Again, counteraction fills an education function in Society; failure to take counteraction in defense of the social contract teaches affected citizens that the civil Community cannot be trusted to live up to its *obligatione externa* under the social contract – in other words, to fail to provide for civil rights. Failure of an Institute to take action when such action is expected of it, by virtue of the expectation of authority vested in it, is as much an enormity as when an Institute's actions perpetrate an original violation of social contract.

Yes, you might be thinking, but what if no possible action that an institute of justice can take can undo the harm resulting from an unjust action or restore to its victims their situation as it was before? For example, if one man murders another there is nothing anyone can do that will restore the murdered man to his family or friends. The situation cannot be undone. What, then, is the justice system to do? In such circumstances it is not hard to see the origins of retaliation and retribution in the ancient legal systems reviewed in chapter 1. These are the circumstances and situations involving the third *momentum* of Quality in Enlightened institution, and it is called *balancing of practices*.

This *momentum* is deduced from the logically-infinite principle of *demand for equilibration* [*ibid.*]. This principle is again understood from the judicial Standpoint of Critical epistemology and is the placing of the demand for happiness in a *balancing* of the demands for agreement and opposition. This time the Institute is called upon to take some actions of reinforcement *and* some counteractions to preserve or restore justice to as great a degree as possible. In this context, Toynbee pointed out that the degree of fidelity is *observable* insofar as actions of Institutes of a Society conform or fail to conform to this aspect of Quality. He wrote,

In studying the growths of civilization we found that they could be analyzed into successions of performances of the drama of challenge-and-response and that the reason why one performance followed another was because each of the responses was not only successful in answering the particular challenge by which it had been evoked but was also instrumental in provoking a fresh challenge, which arose each time out of the new situation that the successful response had brought about. Thus the essence of the nature of the growth of civilizations proved to be an *élan* which carried the challenged party through the equilibrium of a successful response into an overbalance which declared itself in the presentation of a new challenge. This repetitiveness or recurrency of challenge is likewise implied in the concept of disintegration, but in this case the responses fail. In consequence, instead of a series of challenges each different in character from a predecessor which had been successfully met and relegated to past history, we have the same challenge presented again and again. [Toynbee (1946), pg. 363]

There is in the U.S. today a persistent call for better attention to be paid to "victim's rights." This manifests Toynbee's idea of a failure to meet a challenge and ignorance of that challenge by the legal system. What this means is that inadequate provisions for the balancing of practices exist in the current *legal* system, and this is a manifestation of an inadequate *justice* system. It might be unpopular to say so (but then again, it might not be) but *perpetrators'* rights are less important than *victim's* rights. Thoreau was not wrong when he wrote,

How can a man be satisfied to entertain an opinion merely, and enjoy it? Is there any enjoyment in it if his opinion is that he is aggrieved? If you are cheated out of a single dollar by your neighbor, you do not rest satisfied with knowing that you are cheated, or with saying that you are cheated, or even with petitioning him to pay you your due; but you take effectual steps at once to obtain the full amount and see you are never cheated again. Action from principle - the perception and performance of right - changes things and relations; it is essentially revolutionary and does not consist wholly with any thing which was. [Thoreau (1849), pg. 7]

3.3 The Momenta of Relation for Institution of Justice Systems

The governing principle of Relation for Enlightened institution is the principle of human determinability of Progress. When we speak of "human determinability" we are obviously speaking of the capacities of human beings to act as agents, i.e., of the power of practical causality. Causality, again, is the notion of the determination of a change by which the change is established according to general rules. However, in instituting a justice system the context of causality is not that of independently acting human agents but, rather, of the actions of an organized agency viewed as a "corporate person" acting by means of its *cooperating* individual agents and on behalf of yet another abstract "corporate person," namely, that of the whole body politic of the Community and the Society the institution serves.

It is well known that groups of people behave differently than do single individuals, and groups organized around a common purpose behave differently from non-organized groups of people. The idea of a corporate person is tightly coupled with the idea of mini-Communities. A corporate person, epistemologically, is the regulative Idea of a "one-ness" of a mini-Community in terms of the congruent interests of people in that mini-Community. The idea of a corporate person differs from that of the legal idea of an "artificial person," which is an entity created by law (such as a corporation) and given certain legal rights and duties as if it *were* a human being for the purpose of legal reasoning. A corporate person is a mathematical idea and principles for this mathematical entity are deduced from homologues of human nature [Wells (2012), chap. 13, pp. 467-492]. Mathematical details of this theory are highly technical but, fortunately, for the purposes of this treatise we need not dive deeply into mathematical technicalities.

The first *momentum* of Relation in Enlightened institution is deduced from a logically-categorical principle of *internal agent-patient Relation*. The corporate person homologue for this principle subsists in *the processes by which its agents become informed of data and facts about the body politic of the general Community* insofar as these data and facts pertain to the Institute's functions for serving Order and

Progress in its Society. Institutional homologues of processes of apprehension and apperception subsist in the ways and means by which information is communicated within the Institute and related to the Duties and functions of the Institute. From such determinations the actions of the Institute in effecting changes to the body politic of the general Community are determined. The determinations are thus homologous to an Institute's *assimilation* of societal situations and circumstances. In this context, the first *momentum* of Relation in Enlightened institution is the ***assimilation of Society*** function, not in terms of policy or procedure *as such* but rather in terms of how data gathering, communication and decision-making processes are *designed* for determining the Institute's effects on the general Society. Assimilation in this context is the connection of social situations and circumstances to actions that are expressed by the Institute. Situations and circumstances are said to be *assimilated into action schemes*. For a justice system in a republic, the purposes of its actions, first and foremost, must be to maintain the sovereignty of the citizens of the republic by requiring government to fulfill its legitimate role of serving the people.

In Western traditional legal systems, such as that of the United States, judges rely upon the attorneys for the adversarial parties to a case to bring into the court their arguments and precedents favoring their own individual clients and rebutting the arguments and precedents raised by the other side. Judges then rely on their own legal training and perhaps some legal library research often assigned to their law clerks. This is, to put it bluntly, a sterile process that pays no notice to what the state or situation of Society presently is. Assimilation means "incorporation of a representation or scheme into a general structure." Assimilation of Society is a function whereby societal situations and circumstances are assimilated into the operations of the judicial system (in this case) for determining the effects of the justice system on its Society. The present U.S. legal system makes no attempt at all to do this; it instead passively relegates this responsibility to the legislative branch of government - where, in representative government, this responsibility properly belongs *in principle* but which, *in practice*, it often neglects by preferring to give instead its loyalties and priorities to partisan party factions out of: fear of the "party base" and its extreme special interests; individual self-interests in gaining reelection; corrupt interests in receiving donations of money for political campaigning; and sometimes simple corruption for personal gain. When the *judicial* branch makes no effort to assimilate the common interests of Society into its deliberation, it can make legal rulings but it cannot fulfill its most important Duty, namely, assuring justice for all. Perhaps, as the saying goes, justice must be blind in relationship to individuals and special interests; but it must not be either blind, deaf or dumb in relationship to Society and its common interests overall. Thoreau wrote,

Unjust laws exist; shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil. But it is the fault of the government itself that the remedy *is* worse than the evil. *It* makes it worse. Why is it not more apt to anticipate and provide for reform? Why does it not cherish its wise minority? Why does it cry out and resist before it is hurt? Why does it not encourage its citizens to be on the alert to point out its faults and *do* better than it would have them? [Thoreau (1849), pg. 7]

The second *momentum* of Relation in Enlightened institution is deduced from a logically-hypothetical principle of *external agent-patient Relation*. In a human being this is the principle that *soma* has a capacity to cause, through receptivity in *psyche*, noetic effects. Metaphorically speaking, for a corporate person the correspondence can be likened to "the body politic affecting the 'mind' of the Institute." Put more precisely, the corporate homologue is exhibited when the Institute *accommodates* itself in response to social circumstances. Institutional ***accommodation to Society*** thus constitutes the second *momentum* of Relation in Enlightened institution. It is the function of making the Institute change to match changes that have occurred in its Society.

In this context, another of Toynbee's observations is very pertinent:

It is evident, then, that, whenever the existing institutional structure of a society is challenged by a

new social force, three alternative outcomes are possible: either a harmonious adjustment of structure to force, or a revolution (which is a delayed and discordant adjustment) or an enormity. It is also evident that each and all of these three alternatives may be realized in different sections of the same society . . . If harmonious adjustments predominate, the society will continue to grow; if revolutions, its growth will become increasingly hazardous; if enormities, we may diagnose a breakdown. [Toynbee (1946), pg. 281]

The need to provide for organized mechanisms of Institution accommodation because of lessons learned by experiences was recognized by the Framers of the U.S. Constitution at the Constitutional Convention of 1787, and this consideration was written into Article V of the U.S. Constitution. Madison said of this article,

That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the [constitutional] convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out on one side or on the other. [Hamilton *et al.*, no. 43, pg. 246]

The provision of which Madison speaks is the provision in the Constitution requiring either approval of two-thirds of the Congress to propose constitutional amendments or the approval of two-thirds of the state legislatures to call a constitutional convention for the purpose of proposing amendments. In both cases, ratification by three-fourths of the state legislatures is required for any proposed amendment to pass.

Clearly an institution of a justice system can and must be provided with its own rules and requirements for amending its Institutes. What the Enlightenment principle requires is that there be periodic *and* occasional reviews of whether the system's operations are still suitable for expectations and needs of Society and to provide for its own accommodation to changes in Society.

The third *momentum* of Relation in Enlightened institution is deduced from a logically-disjunctive principle of *interior agent-patient Relation*. In a human being this is the principle that the phenomenon of mind is its own agent for effecting changes to itself. The homologue for a corporate person subsists in the Institute acting as the agent for changes to itself. It is the function for an Institute's self-transformation in making the agency equilibrate its effects on Society with Society's effects on the Institute. Let us call this the *social adaptation* function of Relation.

Most institutions human beings erect are designed without a thought given to ongoing social adaptations of its structures or operations. History, however, tells us that ignoring this function is a mistake. Mill wrote,

What is suggested by the term Progress is the idea of moving onward, whereas the meaning of it here is quite as much the prevention of falling back. The very same social causes - the same beliefs, feelings, institutions, and practices - are as much required to prevent society from retrograding as to produce a further advance. Were there no improvement to be hoped for, life would not be the less an unceasing struggle against causes of deterioration as it even now is. Politics, as conceived by the ancients, consisted wholly in this. The natural tendency of men and their works was to degenerate, which tendency, moreover, by good institutions virtuously administered, it might be possible for an indefinite length of time to counteract. [Mill (1861), pg. 16]

The Enlightenment principle of Relation is the principle of human determinability of Progress, i.e., men design the lines of human Progress. The functions of *assimilation of Society*, *accommodation to Society*, and *social adaptation* can be seen in this context as organizing functions for common lines of Progress in the general Society. For the idea of justice, they are necessary and crucially essential in a justice system.

3.4 The Momenta of Modality for Institution of Justice Systems

Judgments of Quantity, Quality, and Relation are judgments made about the object of the judgment. Judgments of Modality have the peculiarity that they add nothing to one's objective knowledge and only pertain to the relationship between the objective judgment and the state of mind of the judger. Again, a corporate person has no 'mind' and so homologues for the Modality functions are again required. These functions must go to establishing the manner in which common understandings of social situations and Institute actions are produced.

Metaphorical sensibility of an Institute subsists in its processes by which its agents grasp and become conscious of data and facts about the body politic of Society insofar as its duties and functions pertain to Order and Progress in Society. These data and facts are the determinable *materia* of corporate sensibility. The *determinable* is that which can be used in a synthesis of determination but which has no logical context prior to this synthesis. A *determination* is a synthetic attribution to an Object of one of a pair of characteristics-propositions that are in opposition to one another. The first *momentum* of Modality is therefore a synthetic process of problematically apprehending data and facts about Society in preparation for the determination of meaning implications for them. The function goes beyond mere "data-basing" of pertinent facts and requires a process of relevance-setting within a general context of the Institute's role and mission. This, however, merely describes using other words a **research function** to be made part of the institution. Here I use the word "research" in its connotation of "careful, patient, diligent inquiry or examination."

Many Institutes have some sort of research function either directly incorporated into it or indirectly supplied to it by another Institute. The Census Bureau and the Office of Management and Budget are two examples of indirect suppliers instituted in the general government of the United States. Usually the argument in favor of this approach is "efficiency." There is, however, significant concern that the indirect practice has antisocial disbenefits. Most importantly, the indirect method sets up two distinct corporate persons – the Institute that carries out the research and the Institute that uses the research – but does not deal with the issue of making these two corporate persons function as a single unified corporate person in their interactions. Put another way, it neglects the Quantity and Quality functions of institution. The researching Institute usually does not have adequate knowledge pertaining to context and meaning implications important to the research-consuming Institute and its roles and mission. Context and relevance-setting, however, are key factors in the research function of Modality. This inadequacy is sometimes reflected in structures of actual Institutes. For example, the Office of Management and Budget is an office within the Executive branch of the U.S. general government. In 1974, however, Congress set up a separate Congressional Budget Office within the legislative branch – presumably because there were some members of Congress who felt that the OMB did not adequately provide the research function that Congress required. Enlightened institution clearly favors *direct* institution of the research function.

In addition to matter, we must also always consider form. Form is the representation of a connection. Matter and form are the two poles in every complete representation, and the synthesis of form function produces the determination of the complete representation. The function is logically assertoric. The homologues of corporate personhood make their connections with the world through the actions externally expressed by the corporate person, and this characteristic is alike in context to *Lust per se* in a human being. In this case, the context is judicial expedience, i.e. the suitability of the determination for satisfying a purpose. The assertoric homologue function of Modality is nothing other than **determination of actions** expedient in fulfilling the purposes for which the Institute is designed. This is the point at which the corporate person has its immediate connection with Society. If the Institute is an Institute specifically established to provide public education, its actions would make up its *teaching function*. If it is a police department, this would be its *law enforcement function*. If it is a state legislature, this would be its *legislating function*. If it is a manufacturing Enterprise, this would be its conjoint *marketing-sales-production function*. If it is an army, this would be its *war-fighting function*. And if the institution is a

justice system, its determination of actions function must be expedient for the purpose of establishing and maintaining justice in Society through satisfaction of the feeling of justice and negation of the feeling of injustice.

The third *momentum* of Modality is deduced from the principle of *presentation in belief*. This is the presentation of a condition of expedience for happiness and it is the logically-apodictic function. This is perhaps the most difficult of the twelve homologous functions to deduce because a corporate person is not said to "be happy" or to "have desires" or to be "certain" about anything. At most we can liken "corporate happiness" to situations in which the corporate person is unaware, through the awareness of its agents, of unmet realizations of satisfactions or negations of dissatisfactions. To say this is to say that the metaphorical Object of happiness is *domestic tranquility* exhibited by the Society the Institute serves. Domestic tranquility is the collective tranquility of the members of a Society insofar as this tranquility pertains to their "social molecule" within the Society's body politic. This, however, can only be judged in the negative. This is to say that *untranquility* can be observed through the actions of the members of a Society but individual tranquility is an inner state-of-being of a person and is unobservable by other persons. Merely because a person appears to be tranquil, this does not mean he actually *is* tranquil. Many a tyrant has had courtiers who appeared to him to be tranquil minions just before they assassinated him.

A logically-apodictic judgment is *understood* as a necessary judgment, e.g., "if *A* is true it is necessary that *B* is true." This, however, requires the judger to have constructed a deductive *model of a system*, in the contexts of which particular judgments are made conditioned under other concepts. This is an explanation of "necessity" that draws empirical support from psychology research into the logical function filled by the notion of necessity in human cognitive development. Piaget concluded,

The principal results of the present research can be summarized in the following three points: (1) Necessity pertains to the compositions carried out by the subject and is not an observable datum inherent in objects; (2) it is not an isolated and definitive state, but the result of a process (necessitation); and (3) it is directly related to the constituting of possibilities that generate differentiations, whereas necessity is related to integration – hence the two formations are in equilibrium. . . . In short, necessity does not emanate from objective facts, which are by their nature merely real and of variable generality and therefore subject to necessary laws to a greater or lesser extent. They only become necessary when integrated within deductive models constructed by the subject. The necessity of *p* can thus not be characterized only as the impossibility of not-*p*, since new possibilities can always emerge, but must be described in Leibniz's manner as the contradiction of not-*p*, and this relative to a specific, limited model. [Piaget (1983), vol. II, pp. 135-136]

This insight leads us to the homologue function. To have conditions held-to-be expedient for the domestic tranquility of the Society, the Institute must have laid down specific objectives that are to be fulfilled by the actions of its agency. This is properly called the *objectives-setting function* of the Institute. Note that this function is *understood* as a synthesis of the other two, i.e., the research function regarded as an assertoric determination.

Let us also note Piaget's comment that "new possibilities can always emerge." All human knowledge of experience is contingent knowledge; we never obtain a complete knowledge of everything we might encounter in experience, and future experience can and often does gainsay conclusions of past experience. The synthesis

research + action determination → objectives-setting

clearly illustrates that the Modality homologues are congruent with the Enlightenment principle of the necessity for flexible institutions.

4. Root Challenges to Achieving Enlightened Institution of Justice

The earlier sections of this chapter have outlined the task and large-scale empirical challenges faced by

any institution having for its purpose the establishment of a system of justice. But, important as these challenges are, every one of them has its roots in human nature and the uniqueness property of individual human subjective constructions of an individual's manifold of practical rules and concepts of Duties and Obligations. The challenges posed by: the affective character of feelings of injustice or justice; congruent and incongruent interests that produce mini-Communities and lead to special (non-universal) interests; the general inability to recognize 'positive' manifestations of such ideas as 'domestic tranquility' and honesty in a person's pledging and commitment to reciprocal agreements of *obligatio externa*; the potential ambivalence between an individual's Duties to himself vs. his Duties to others - all of these challenges grow out of subjective Desires and personal feelings of *Lust* or *Unlust*. If we are to understand grounds upon which an Enlightened institution of justice might be built, we must know more about the human factors that underlie these challenges.

In the following chapters, we will examine and explore some of the most crucial human factors which bear upon the idea of justice. To conclude this chapter, I will merely point them out and leave to the next chapters the task of examining each of them in greater depth. The process of examining them resembles the process of peeling an onion in the sense that the deeper causes of the larger scale challenges we face underpin intermediate levels of empirical manifestations of these causes. We will be following Aristotle's dictum of proceeding from "what is clearest to us" empirically to "what is clearer by" human nature.

One of them is the phenomenon of *stereotyping*. We must understand what stereotyping is, why it is a natural product of human judgmentation, why it is not possible for human beings to not stereotype things, and how to avoid unjust and unbeneficial acts of stereotyping.

Another is the phenomenon of *extravagance* in reasoning and judgmentation. Here what we will look at is the factor of over-generalizing concepts of noumena to produce objectively invalid ideas of noumena reified beyond the horizon of possible human experience that Kant called transcendental illusions.

A third baleful factor is the phenomenon of *bigotry*. This phenomenon is the offspring of stereotyping and extravagance in reasoning and it takes on many forms. Actions taken by some members of a civil Community based on bigoted judgments are invariably unjust to other members of the Community. One pernicious characteristic of bigotry is that people are often unconscious of the fact that a judgment *is* bigoted. Even more baleful to the welfare of a Society is the fact that unconscious bigotry can and does lead to *institutionalized bigotry* in a Society's well-meant designs and operations of many of its Institutes.

A fourth factor exists in affective motivating factors that are bound up with the individual's constructs of his unique personality. The strongest and most serious of these factors pertain to what Adams called "*the passion for distinction*." There are a number of generalized categories empirically descriptive of these passions, and not one of these categories is primitive in human nature. Nonetheless, an action recognized as falling into one of these categories is a signpost of an empirical manifestation of a motivating factor.

With this brief introduction, let us now go on to examine and understand them. We will not, however, rest contented with merely examining the problems they produce. Understanding them comes first, of course, but our task is unfinished unless we also look for practical ways of negating or at least mediating the problems they cause.

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