Chapter 7 Justice and the Institution of Governance

1. Law-craft and Governance

The divers laws Mankind has given itself, along with the institutions for administering and enforcing it, exhibit two marked historical characteristics: fluidity and slow evolutionary change over time. Their creations and evolutions have always been *ad hoc* responses to circumstances experienced in local places and times. One sees this in the documented histories of every Society. An excellent example of this for the case of the American colonies and, later, the United States of America is found in Friedman's excellent work, *A History of American Law* [Friedman (2005)]. America is not exceptional in regard to these characterizations as *ad hoc*, fluid, and evolutionary. Laws and the administration of them begin as crafts and often *remain* crafts. Only rarely does one find in the pages of history any examples of law-craft advancing to become a *science* (i.e., a doctrine constituting a system in accordance with a principle of a disciplined whole of knowledge). Certainly there have been attempts to make law-craft a science; the Roman Republic and periods in the history of Imperial China come to mind. But even here the principal feature of a science, namely that it be a system with a principle of a disciplined whole of knowledge, has never quite been successfully realized for law-craft. Lawmaking tends to be learned "on the job."

This situation, i.e. that it has always been a craft, is not an indictment of Mankind's institutions of laws and law administration. Every science, without exception, has begun as a craft and only later, after a great deal of experience with the topic has been achieved, was developed into a science. Not even mathematics skipped the craft stage [Wells (2020)]. More serious, though, is the lack of sustained efforts to try to turn law-craft into a law-science because this lack of effort to systematize our understanding of law-craft means that no corresponding "justice-craft" has ever been developed. The notions of legal science and scientific jurisprudence are not absent in the lexicon of law schools; you can find both of them in *Black's Law Dictionary* [Garner (2019)]. But simply calling a scholarly activity a science doesn't make it a science any more than calling a tail a leg means a horse has five legs.

Institution of laws necessarily implies institution of law enforcement as well because without the latter the former has no practical meaning or use. Likewise, institution of laws requires that there are also law-givers (e.g., Solon in the case of ancient Athens, Lycurgus in the case of ancient Sparta, or Hammurabi in the case of ancient Babylon) or legislators. So it is that laws and their administration have always been conjoined with institutions of Society governance and are viewed as being *part* of governance overall.

It is instructive to take a look at a specific example of the evolution of law-craft. For this, let us look at an American example. Friedman writes,

> Generally speaking, court organization in the colonies followed one fundamental societal law. The colonies began with simple, undifferentiated structures, and developed more complex ones, with more divisions of labor. . . . In the beginning, in tiny, starving, beleaguered settlements, there was nothing like the sophisticated notion of separation of powers. The same people made rules, enforced them, handled disputes, and ran the colony. A special court system grew up, and divided into parts, only when there were enough people, problems, and territory to make this sensible. [Friedman (2005), pp. 7-8]

Human beings, as psychology research informs us, are satisficing problem solvers. It is not to be marveled at that this sort of institutional development is seen so repetitively that Friedman called it "a fundamental societal law." We could hardly find a better example than life in a group BaMbuti Pygmies of "simple, undifferentiated structures" [Turnbull (1962)]. We could hardly do better than today's American legal system for an example of "complex structures with more divisions of labor." A quick check of *Black's Law Dictionary* tells us there are no fewer than *47* different *varieties* of "law" defined in the American legal system.

Continuing with America as our example, it is a common misconception that "American law" in its beginnings was a copied transplant of "British law." Friedman corrects this misconception with telling evidence that, from the beginning, law in the American colonies was something distinct from the legal system of Great Britain. Yes, there were some commonalities; the English language was one of them. But scratching the surface of the matter soon shows the commonalities were very superficial.

To better appreciate characteristics of law-craft institution and development, it is instructive to examine what the sources of American law-craft and legal thinking were. In the beginning,

> One thing is clear: there was no clear-cut theory that the settlements automatically transplanted [English] common law into their midst. The king and his ministers had no idea what problems would arise in the new plantations; they hardly even knew what shape the new ventures would take. The Virginia colony was managed, initially at least, from a London home office; the charter of Massachusetts Bay envisioned management at the seat of the colony, probably from the very start; the proprietary colonies looked toward still another kind of formal structure.
>
> Under the charter of Massachusetts Bay, neither the general court nor the court of assistants was primarily a court in the modern sense. They handled all the affairs of the infant enterprise. Thus, a "Court holden at Boston June 14th, 1631" in Massachusetts Bay ordered "that no man within the limits of its Jurisdiction shall hire any person for a servant for less time than a year unless he be a settled housekeeper." . . .
>
> In 1639, Massachusetts Bay had a full system of courts, organized in a way that would strike a modern lawyer as unduly exotic. The general court, acting both as legislature and as the highest court, stood at the apex of the system. As a court, it confined itself mostly to appeals, though its exact jurisdiction was a bit vague. The court of assistants, made up of governor, deputy governor, and magistrates, heard appeals from lower courts, and took original jurisdiction in certain cases - for example, cases of divorce. Below it were the county courts. They had the same power in civil and criminal cases as the courts of assistants, but "trials for life, limb or banishment" were "wholly reserved unto the courts of Assistants." . . .
>
> As in Massachusetts, the highest court in Virginia was more than a court. The governor and council (and the house of burgesses) decided cases and also made rules. Governor and council functioned as a "Quarter Court"; in 1658, sittings were reduced to three a year, in 1661, to two; the body was then called a "General Court." The general court handled the trial of serious crimes. The county courts began as "Monthly Courts" in 1623; the name was changed in 1642; by then county governments had become fully established. The county courts were manned at first by "commissioners"; after 1661, these men were called justices of the peace. The county courts, as in Massachusetts, had a much broader mandate than contemporary courts. They did a lot of the work we would classify today as administrative - collecting taxes, building roads, and regulating taverns and inns. They also handled probate affairs. This feature of county courts was quite typical in colonial America. It was replicated in other colonies too. [Friedman (2005), pp. 8-11]

A typical American living today would probably scratch his head in wonder if he tried to compare what the county court he knows does with what the county court in 17th century America did. He might - and probably should - be horrified by the thought that the same governmental body that made the laws and were in charge of enforcing them *also* conducted the criminal trials. The currently popular word for that sort of system is "authoritarian" although the more factually correct word is "tyranny."

This modern point of view evolved from the idea of "checks and balances" in government. But where and when did this idea take root in America? For the answer to this question, we must look back to the European Enlightenment and the author who had the greatest influence on America's Founding Fathers: Montesquieu. He wrote,

> It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments - that is, in societies directed by laws - liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we

> ought not to will. . . . Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check on power. . . . In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on civil law. . . . The latter we shall call the judiciary power, and the other simply the executive power of the state. The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another. [Montesquieu (1748), pp. 150-151]

American Patriot leaders - Hamilton, Jefferson, Adams, Madison, and many others - made constant references to Montesquieu. In writings and speeches they adopted the very terminology of *The Spirit of Laws*, and used it continually in their debates during the 1787 Constitutional Convention. You don't have to take my word for this; you can read it yourself in the pages of Farrand's *The Records of the Federal Convention of 1787* [Farrand (1911)] and in the pages of *The Federalist* [Hamilton, *et. al*. (1787-8)].

However, this doesn't mean the Americans had everything simply handed to them as a prescription or a recipe by Montesquieu. They adopted his terminology but there are places where that terminology itself is somewhat vague. For example, Montesquieu held that *both* "democracies" and "aristocracies" are "republics." For slightly more than a century now, there has been a sometimes heated debate/argument in the United States between people who hold that "the United States is a democracy" and others who hold that "the United States is a republic." The latter, however, do not think the United States is or should be an "aristocracy," although their opponents sometimes accuse them of promoting and favoring aristocracy.

This debate isn't actually new in America. Hints of it appear in the records of the 1787 convention, and the Framers of the U.S. Constitution ended up *defining* what *they* meant by "republic." Madison explained their definition in *The Federalist*, no. 39, and that definition is nearly indistinguishable from what Mill called "representative government" and most Western nations today call "representative democracy." Let us briefly look at what Montesquieu, the author of this definitional argument, actually wrote:

> There are three species of government: republican, monarchical, and despotic. In order to discover their nature, it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: that a republican government is that in which the body, or only a part of the people, is possessed of the supreme power; monarchy, that in which a single person governs by fixed and established laws; a despotic government, that in which a single person directs everything by his own will and caprice. . . .
>
> When the body of the people is possessed of the supreme power, it is called a democracy. When the supreme power is lodged in the hands of a part of the people, it is then an aristocracy.
>
> In a democracy the people are in some respects the sovereign, and in others the subject.
>
> There can be no exercise of sovereignty but by their suffrages, which are their own will; now, the sovereign's will is the sovereign himself. The laws, therefore, which establish the right of suffrage are fundamental to this government. And indeed it is as important to regulate in a republic in what manner, by whom, to whom, and concerning what suffrages are to be given, as it is in a monarchy to know who is the prince and after what manner he ought to govern. . . .
>
> The people, in whom the supreme power resides, ought to have the management of everything within their reach; that which exceeds their abilities must be conducted by their ministers.
>
> But they cannot properly be said to have their ministers without the power of nominating them; it is, therefore, a fundamental maxim in this government, that the people should choose their ministers - that is, their magistrates.
>
> They have occasion . . . to be directed by a council or senate. But to have a proper confidence in

> these, they should have the choosing of the members, whether the election be made by themselves, as at Athens, or by some magistrate deputed for that purpose, as on certain occasions was customary at Rome. [Montesquieu (1748), pp. 8-9]

The U.S. Constitution ended up adhering very closely to Montesquieu's ideas; closely, but not precisely. The "Athens model" was flatly rejected by the 1787 delegates, but neither did they adopt the "Rome model," which reserved membership in the Roman Senate to members of the aristocratic class. What they eventually settled on was a modified version of republic:

> If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period or during good behavior. It is *essential* to such a government that it be derived from the great body of society, not from an inconsiderable portion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. [Hamilton *et al*. (1787-8), no. 39, pg. 210]

It is easy to overlook the nuanced differences between the American republic and Montesquieu's democracy. The first nuance is found in the little phrase "*derives* all its power." Power is *delegated* to representatives and is not, as it was in Athens, directly exercised by the citizens. Of course, Montesquieu allowed for some matters, those that "exceed the abilities" of the body of citizens to administer directly, to be handled by "ministers." But Athenian democracy also did precisely this for a few select offices that required particular skills or experience most of the people did not have. It isn't *quite* the same thing as what Madison wrote. Another nuance in Madison's definitional statement, very easy to miss, is that what Madison described *implicitly* excludes *political parties* from being considered "the great body of the people." Any political party is a faction, and a faction formed by a political party is practically no different in effect than "a handful of tyrannical nobles." In 1787 there were no *national* political parties in the United States, although there were *local* political parties within the individual states. The Framers tried very hard to put up roadblocks to factions being able to seize and wield power. Unfortunately, when national political parties did emerge later, in the form of "the two-party system," that development defeated all of these safeguards. How it did so is discussed in chapter 8.

Another of Montesquieu's contributions - one eagerly accepted by the American colonies and retained by the Framers - was the idea of a *confederated republic*. He wrote,

> If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by internal imperfection.
>
> To this twofold inconvenience democracies and aristocracies are equally liable, whether they be good or bad. The evil is in the very thing itself, and no form can redress it.
>
> It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a confederated republic.
>
> This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations till they arrive at such a degree of power as to be able to provide for the security of the whole body. [Montesquieu (1748), pg. 126]

Montesquieu cited Holland, Germany, and the Swiss cantons as examples of confederated republics. One reason this idea had such a ready reception was that the Americans had already tinkered with ideas of alliances and a union of the colonies in 1754. There had been a New England confederacy from 1643 to

1684 [Jernegan (1929), pp. 145-147] styled The United Colonies of New England, and the 1754 Congress of Albany had proposed a confederacy for all thirteen American colonies [Hart (1907), pp. 28-30]. It was authored by Benjamin Franklin but failed to gain the support of any of the colonies. When tensions between America and Britain boiled over on Lexington Green in 1775 and the ensuing Battles of Lexington and Concord erupted, twelve of the thirteen colonies convened the Second Continental Congress in Philadelphia on May 10, 1775, to represent what that Congress initially called The United Colonies [Hart (1907), pp. 73-77].

After declaring independence, the Congress drafted the first constitution for the new United States of America. This constitution was ratified by the states in 1777; its official title is *Articles of Confederation and Perpetual Union Between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia*. For reasons that are probably pretty obvious, it was soon known simply as The Articles of Confederation. Note that the phrase "Perpetual Union" in its title signifies that no state could legally *withdraw* from the confederation at any later time.

Article Two of the Articles is particularly noteworthy in regard to Montesquieu's confederated republic:

> Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled. [The Articles of Confederation, Article Two]

The noteworthiness of this article is that it goes beyond Montesquieu's less specific definition of a confederated republic by the explicit language of all of Article Two regarding what I will for convenience abbreviate with the phrase "states' rights." I will also note that this first organization of the United States inherently recognizes the importance of overlapping congruent interests discussed earlier *if* the states were also confederated republics. Figure 1 below repeats for convenience the illustration of this principle.

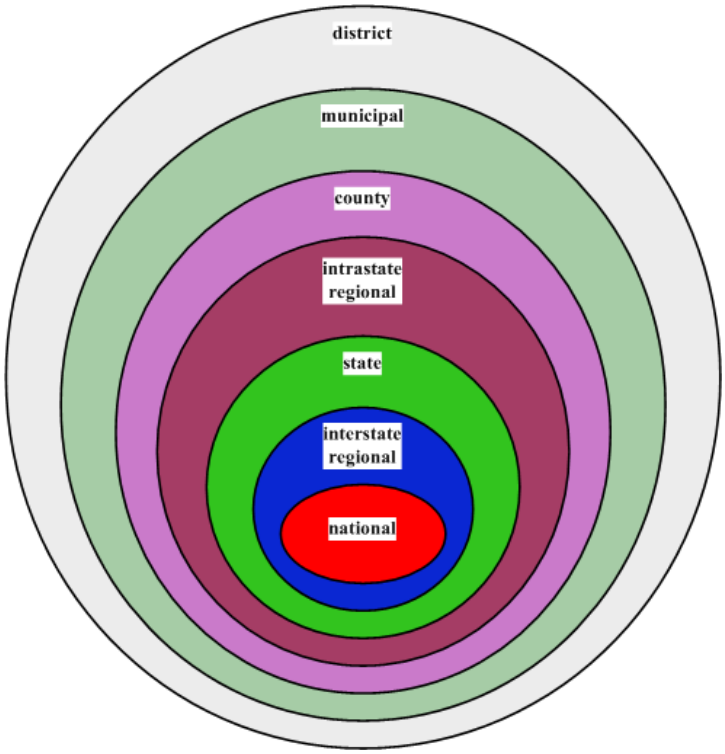

Figure 1: Overlap of congruent interests by population coverage.

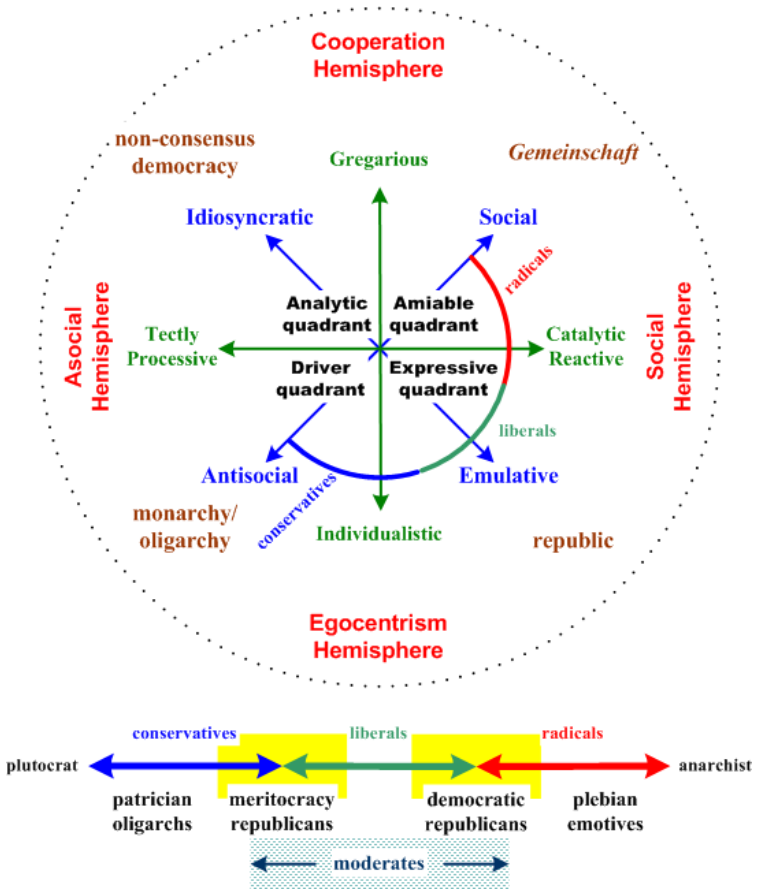

Figure 2: Circumplex mapping of political factions in the Revolutionary era United States.

However, the new thirteen states themselves were *not* organized as confederated republics. Each of them set up in their own state constitutions numerous inequalities and inadequate checks and balances. For example, Jefferson described six defects in the government of Virginia:

> 1. The majority of the men in the state, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders entitled to vote, nor including generally the half of those on the roll of the militia, or of the tax-gatherers;
>
> 2. Among those who share the representation, the shares are very unequal;
>
> 3. The senate is, by its constitution, too homogeneous with the house of delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description;
>
> 4. All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government;
>
> 5. That the ordinary legislature may alter the constitution itself;
>
> 6. That the assembly exercises a power of determining the quorum of their own body which may legislate for us. [Jefferson (1781), pp. 162-176]

Figure 2 provides an illustration of where the various state political factions lie on a circumplex model of the various common social forms of governments. The labels "conservatives," "liberals," "radicals," and "moderates" are the names given to these factions by Americans in the 1776-1780 timeframe. They do not crisply correspond to how those labels are used in present day America.

Table 1: the Revolutionary State Constitutions (1776-1780)

State	political flavor of state constitution	State	political flavor of state constitution
Connecticut	conservatively liberal	New York	conservative
Delaware	liberally radical	North Carolina	liberally radical
Georgia	liberally radical	Pennsylvania	liberally radical
Maryland	conservative	Rhode Island	radically liberal
Massachusetts	conservative	South Carolina	conservative
New Hampshire	conservative	Virginia	conservative
New Jersey	conservative		

Table 1 shows how these factions corresponded to the majority of citizens on a state-by-state basis in 1776-1780. Both Alden (1969), pp. 333-8, and Nettels (1938), pg. 665, provide descriptions of the three major Patriot classifications of political philosophies. Most particularly, *none* of these labels correspond to the present day Republican or Democratic Parties in the U.S. (which didn't exist in 1780). It is true that the contemporary Republican Party has much in common with the views and attitudes of the conservative Patriots. Many of today's "neo-conservatives" are the equivalents of the patrician oligarchs in figure 2; a few ('libertarians') are anarchists. Democratic party "progressives" correspond to the radical Patriots (who, by the way, were also called 'the Democrats'). Those who are called "moderates" today were called "the liberals" by the Patriots. The divisions of figure 2 represent a continuum or spectrum of views in which some conservatives, such as John Adams, held views closer to liberals, such as Thomas Jefferson, than to others who were also identified with the conservative classification. As Alden remarked, "the labels Conservative, Liberal, and Radical are useful; they are not precise and absolute descriptions" [Alden (1969), pg. 336]. The state constitutions reflected these differences in political philosophies and can be classified in terms of them. Table 1 summarizes the political character of the original state constitutions that were established. Nettels described the liberals as "moderate democrats," radicals as "radical democrats," and conservatives as "ultra-conservatives." However, it is important to emphasize that *all three* classifications were, and regarded themselves as, *republicans* except at the far left and far right extremes of the political spectrum. None of the Patriot factions favored non-consensus democracy.

The Articles of Confederation make it clear that the Founders meant for the United States to be a "confederacy," but what exactly did that mean to them and how does a "confederacy" differ from a "federation"? Does membership in a "confederacy" mean the sovereign member states are at liberty to secede from it at will? Or does it mean that they are not at liberty to do so? People hold different opinions on that, and it is a point on which Montesquieu was not specific. Those who uphold a right of secession tend to regard a confederation as being more or less the same as an alliance (e.g. NATO). Those who deny a right of secession regard the union formed by a confederation to be permanent. The only clear cut difference between a "federation" and a "confederacy" is in the former the member states surrender their sovereignty, while in the latter those states retain at least a significant part of their sovereignty. There is conclusive evidence that the Founders did not all fully agree on this question. Delegates at the 1787 convention debated and argued this point over several crucial days, from June 18th to June 21st [Farrand (1911), vol. 1, pp. 294-368]. Views ranged from "abolition of the States" (by which Alexander Hamilton meant abolish the sovereign power of the individual states as *nations*) to "subdivide the jurisdictions of the general and state governments" (the view that ultimately prevailed and was one of the principal reasons for bicameral organization of Congress into a House of Representatives and a Senate). As Madison later explained [Hamilton *et al*. (1787-8), no. 39], the new Constitution established a general government having characteristics that are *partly* "federal," *partly* "national," and partly *neither* "federal" nor "national" but a mixed blend of the two. The United States was therefore ***not*** a federation but *neither was it a confederacy as that term had been understood in Europe*. It was something new in the world, which is why I have elsewhere labeled it an "American Republic." It has long been the careless habit of political speech in the United States to call the general government by the name "federal government," *but this is not correct and falsely describes the roles of the general and state governments*.

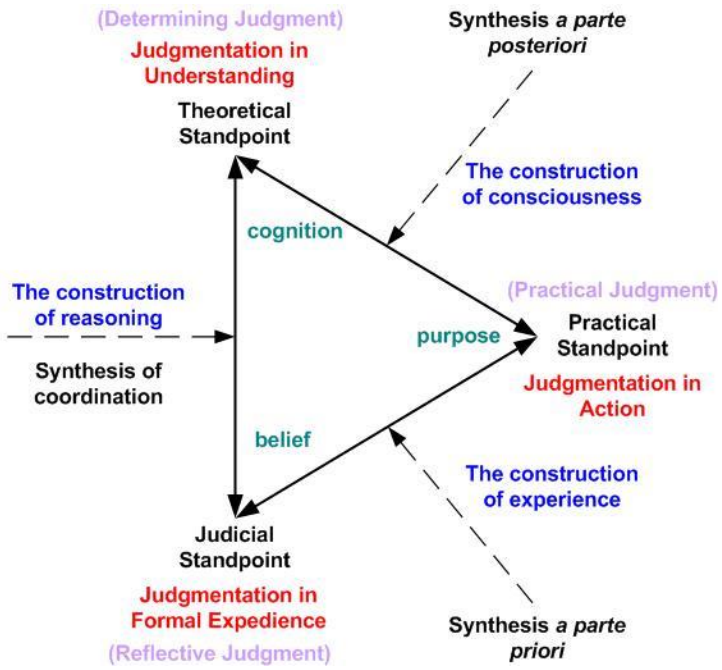

Figure 3: Synthesis of the Standpoints in Critical Epistemology.

All of this has bearing upon and pertinence to the ideas of "checks and balances" and of organizing governance in terms of "branches" of governance (legislative, executive, and judicial). Let us examine this idea of "branches" more closely.

2. Justice and "Branches" of Governance

Montesquieu spoke of three "powers" of government (legislative, executive, and judicial powers) but the idea of dividing these powers into separate agencies (congress, the executive, and the court system) arose from the idea of "checks and balances in government." In the U.S. these separate agencies have come to be called the "branches" of government after the Framers at the 1787 Constitutional Convention codified the division of the powers of the U.S. general government into the legislative power, the executive power, and the judicial power. The English philosopher John Locke had proposed a twofold division of the power of government (legislative and executive); John Adams was the earliest proponent of the threefold division of agencies for the United States that the Framers adopted [Adams (1776)].

From the logical perspective in the theoretical Standpoint of Critical Epistemology, this threefold division conforms to the form of a synthesis *a parte posteriori* (see figure 3 above),

> law making process + law enforcement process → law application process
> (judgmentation in understanding + judgmentation in action → judgmentation in expedience).

In the context of the practice of law (law-craft) this is a quite sensible and mathematically legitimate way to formulate "branches" of government.

We should ask, however, if this formulation is still as sensible when the context is *justice* instead of *law*. It is conformable with the principles of Quantity and Quality in Enlightened institutions (figure 4), but can the same be said for the principles of Relation and Modality (i.e., the principle of human determinability of Progress and the principle of the necessity for flexible institutions)? This treatise has already come to the proposal that law exists to support justice in a Society. Does this formulation place law-craft in its proper *subordinate* position to institution of justice?

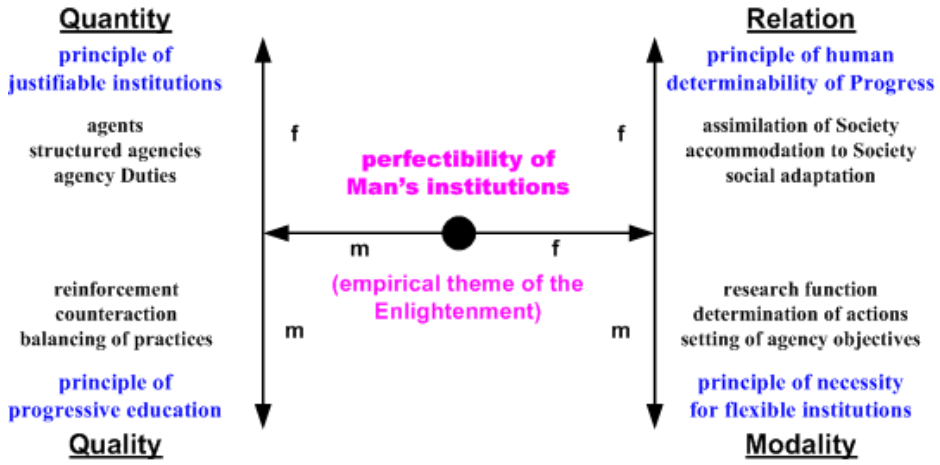

Figure 4: 2LAR of Enlightened Institution.

I noted in chapter 4 that a division of labor into separate and independently-operating agencies has a tendency to produce a "silo effect," i.e., an isolating of the different agencies that hinders communication and cooperation with each other. Does it not seem obvious that law-making, law-enforcement, and law-application must be processes that are mutually cooperative in order for an overall institution of justice to be successful? The tendency for "silo" agencies to become mini-Communities with possibly incongruent corporate interests is not a mere hypothetical possibility; it is *built into* the practical nature of agencies when the primary idea of their divisions of labor is purposely set up to be *adversarial*.

Indeed, the American judicial "branch" is itself *purposively* set up to be an adversarial system by definition [Garner (2019), "adversary system"]. *Non*-adversarial resolutions of conflicting interests in the U.S. legal system are called "out of court settlements" because the legal institutions are kept out of them. The methodology of instituting "checks and balances" by the Framers in 1787 was, likewise, based on an adversarial relationship between the "branches" of government. Madison wrote,

> It is properly agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that neither of them possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to preserve some practical security for each against the invasion of the others. What this security ought to be is the great problem to be solved. [Hamilton *et al*. (1787-8), no. 48]

The factor in human nature that checks and balances built into the Constitution were meant to control is, of course, what Adams called the Passion for Ambition unmoderated by Passion for Emulation. Each of the branches was to keep an eye on the others and use the means provided to it to limit (not control) any excesses they might try to exercise. The tactic they adopted was to pit self-interest against self-interest:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be

> administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. [*ibid*., no. 51]

In a country without national political parties, as the United States was in 1787, "personal motives to resist encroachments" by connecting "the interests of the man" with "the constitutional rights of the place" was not easy to accomplish but was not-impossible in principle. When, however, there are national political parties, the "interests of the man" can become welded by Ambition to "the interests of the Party" and, in this case, "the constitutional means" for defense provided by the Framers in 1787 dissolves. We see *precisely* this occurrence in the United States today at the time of this writing. With its dissolution comes the dissolution of both liberty and justice.

Now, a Kantian synthesis of the form A + B $\rightarrow$ C can always be put into words as "B *regarded as* A synthesizes C." In the example above, this is "law enforcement process *regarded as* law making process synthesizes law application process." The decisions and rulings of a court of law (law enforcement action) become precedents for future cases, and, by doing so, establish how laws are to interpreted (law making process). This synthesis (practical *regarded as* theoretical) is called a synthesis *a parte posteriori* because it requires both a concept (a law) and a purpose (law enforcement) be in hand going into the synthesis. Mankind, after centuries of experience, had the concept and the purpose available and ready for use in constituting an organization of government. The *context* of the synthesis is, again, the context of a *legal system* of law-craft.

But what happens when the context is a *justice* system to be conceived in terms of the human nature of the origins of feelings of justice or injustice? Rulers going back to Urukagina had set out examples of legal codes and systems built upon such notions as retribution, retaliation, combatting official corruption, and promoting consensual and civic public relationships. These considerations were centerpieces in Roman law. But although those rulers boasted they had established "justice" for their subjects, none of them offered an explicit explanation of what "justice" was understood to mean. It was an "I can't define justice but I know it when I see it" sort of situation. For the task set before us here, the situation is very different because here we seek the concept from a synthesis of the practical Standpoint with the judicial (reflective judgment) Standpoint. In figure 3 this is called synthesis *a parte priori* because it is the *construction of experience* from which the theoretical concept is obtained. (In the Critical metaphysic, "*a priori*" means "prior to experience"). Its general form is

> judgmentation in action + judgmentation in expedience $\rightarrow$ judgmentation in understanding .

"Expedience," in the Critical theory, refers to the governing principle of reflective judgment, i.e., "expedience for the categorical imperative." The categorical imperative, again, is the fundamental regulatory law of the process of practical Reason governing all human non-autonomic actions.

As discussed earlier, the real context for any valid notion of justice always involves a Community (whether a non-civil Community, such as a BaMbuti groups, or a civil Community with an at least some-what agreed-to social compact). Rawls is not-incorrect in saying, "Justice is the first virtue of social institutions, as truth is of systems of thought" [Rawls (1999), pg. 3]. But the notion of virtue is planted only in its native soil of *Sittlichkeit* ("moral custom"). In Kant's deontological theory, "virtue" is "the individual's constant disposition to carry out his Duties" [Kant (1793-4), 27: 492]. And, as Piaget liked to put it, "Logic is the morality of thought just as morality is the logic of actions" [Piaget (1932), pg. 398].

Philosophy has long regarded *Sittlichkeit* as properly belonging to *practical* philosophy:

> The distinction [between practical philosophy and theoretical philosophy] reflects the contrast between action and contemplation, and is at least as old as Aristotle. In modern times, Christian Wolff assigned ethics, economics and politics to practical philosophy, and let theoretical philosophy comprise ontology, psychology, cosmology and theology - a structuring clearly discernible in Kant's

Critique of Pure Reason.[1] [Mautner (1997), "practical philosophy/theoretical philosophy"]

Thus, *Sittlichkeit* is a candidate notion for the place of judgmentation in action as an hypothesis for the synthesis we seek to make here if, indeed, "Justice is the first virtue of social institutions."

A candidate notion for the judgmentation in expedience term in the synthesis is *incongruent interests*. In Critical terminology, expedience (*Zweckmäßigkeit*) is a property of a representation regarded as possible only with respect to some purpose from the practical Standpoint. The expedience of something is the congruence of a thing with that property of things that is possible only in accordance with purposes. Expedience in the narrow sense of being regarded in terms of instantiation in an action is called purposiveness. Expedience as a *principle* is the governing principle of reflective judgment. That is, all Desires in reflective judgment's manifold of Desires[2] are representations judged expedient for (congruent with the categorical imperative of) practical Reason. Feelings of injustice arise when actions taken by one person or group in pursuit of satisfying their interests necessarily prevents satisfaction of an interest by the person who *feels* an injustice has been done.

The inherently *subjective* nature of a feeling of injustice poses a knotty problem confronting institution of a justice system. Incongruent interests can be reconciled or resolved only if both parties are able and willing to *transform* their own interests in such a way that these interests become contrary rather than contradictory. Two concepts, *X* and *Y*, are contradictory if: a) both cannot be true at the same time; and b) one or the other must always be held-to-be-true. *X* and *Y* are contrary if a) both cannot be true at the same time of the same object; b) one or the other must be true of that object; but c) neither is necessarily false. If two incongruent interests *can* be transformed into merely contrary interests, then resolution of a conflict of interest is possible *if* the parties can *reconceptualize* their objects of interest so that their interests in their objects become congruent interests - which is to say both parties thereby are able to satisfy their private interests without necessarily preventing the other's satisfaction of *their* interests. All negotiation and compromise is based upon this. This, then, is one task a justice system is faced with. Let us call this Task A for a justice system.

But what if one or the other (or both) parties are *unwilling* to effect such a transformation or if the effect of one's action on the other cannot be undone or satisfactorily recompensed? In these cases, reconciliation between them is *made* impossible by this unwillingness or by the irreversibility of the effect. It is not hard to see in such situations the subjective origins of revenge, retribution, and retaliation. Such situations do actually arise, and so a *second* task facing a justice system is to deal with them as well. Let us call this Task B for a justice system. Task B carries a further complication in its makeup: because the situation is one that is irreconcilable between the two parties involved in it, one or the other party (or sometimes both) will experience a feeling of injustice *from having their special interest frustrated or thwarted* by *any* action a justice system might express. In such a situation it becomes pertinent to justice to consider the distinction that exists in a civil Community between *civic* interests and *uncivic* interests. A **civic interest** is an interest which, if actualized by a person or group, is congruent with his or their Duties under the terms of *a social compact* to which that person or group of persons has committed him or themselves as *obligatio externa*. An **uncivic interest** is an interest which, if actualized by a person or group, is contrary to his or their Duties under the terms of a social compact he or they have committed to as an *obligatio externa*. In this situation, the party to whom justice is owed is t*he civil Community itself* as a body politic. Task B is a task only solvable *within the context* of a civil Community.

In both of these situations there is always found: 1) an *action* taken by one person or a group of persons;

[1] "Clearly discernible," yes - especially from a perspective in ontology-centered metaphysics. But "clearly discernible" doesn't mean "the same." It is an issue of verisimilitude clouded by Kant's decision to retain much of the terminology introduced by Wolff and his school without retaining the Wolffian meanings of those terms.

[2] The manifold of Desires is the *nexus* in reflective judgment presenting a manifold in formal expedience. A manifold is the entirety of the arrangement of many parts or units of one kind arranged in such a way as to constitute a faculty. A faculty is the form of an ability insofar as the ability is represented in an idea of organization.

and 2) a second person or group of persons who *feel* they are or would be harmed in some way by the action of the first person or group. The second person or group is not *necessarily* the person or group immediately affected by the actions of the first. The action might mediately rather than immediately affect them. As a clarifying example, suppose Person A causes the death of Person B. Clearly Person B is the person who is *immediately* affected by A's action. However, Person B likely had family, friends, and other associates who are *mediately* affected by the death of B. In a civil association formed by social compact, the *entire* civil Community, as an abstract person, is the aggrieved party. This is the origin of the maxim, "making someone *pay his debt to society*." When the matter at hand is one involving actualization of an uncivic interest, the aggrieved party is the entirety of the civic Community regarded as a body politic because uncivic interests are potential threats to the well-being of the entire civil association, and the terms of a social compact[3] *requires* people to alienate their uncivic interests in exchange for civil liberties as members of the civil association.

Are Tasks A and B the only two tasks a justice system must face? It might appear to be so upon a first look. However, there is a third Task C, and it arises when the matter before a justice system is a *mixture* containing factors of *both* Task A and Task B. This is the situation presented when some but not all factors in a clash of initially-incongruent interests can be transformed into contrary interests but there still remain factors preventing the parties from reaching a full reconciliation of interests. Here also, in this situation, civic and uncivic interests are determining factors for how a justice system settles the matter.

It is not-inappropriate to regard Tasks A, B, and C as *the interests of a justice system*. They are, in a manner of speaking, the **goals** a justice system must be expected to strive to achieve and the ideal of a civil Society's *expectation of authority* by which that Society measures its performance. If it should seem to you that the challenges a justice system faces, in realizing (making actual) satisfaction of these interest, are hugely daunting, I can only reply that your apprehensions are quite sound. *Justice is never easy to achieve*, nor are the means for achieving it simple and obvious. Let us then ask: Does the organization of governance into branches (legislative, executive, and judicial) promote or hinder achieving the goals of a justice system?

3. Justice and Law

A Society's legal system is one of the more-easy-to-recognize means by which a Society tries to achieve justice goals. It is not strictly necessary for a Community to have a legal system in order for it to meet the goals of justice; BaMbuti Society has been successfully doing so with no laws and no legal system for millennia. But this success does fundamentally depend on the tiny populations of BaMbuti groups and the *Gemeinschaft* nature of their civil association (figure 2). Larger Societies always exhibit laws and legal systems in their civil organizations[4]. Western civilizations have legal systems that can be regarded as deriving in many essentials from Roman law with customized additions and variations that took root in particular countries from local customs and practices in medieval Europe. It is instructive to briefly look at the general form by which Western law is organized.

By general consensus, this form is comprised of three broad subcategories of law: criminal law; civil law; and common law. **Criminal law**, as the name implies, is law that relates to crime. But what *is* a crime, i.e., what is its *real* meaning? Most criminal law is established by statute, which means the law was established by a lawgiving authority (that is, a legislature, congress, or parliament). The ostensible intent of criminal law, when the lawmaking process is non-corrupt, is to proscribe conduct by individuals that is regarded as threatening, harmful, or otherwise poses a danger to individuals' safety, health, or property. Some scholars regard the valid scope of proscription as including proscription of individual

[3] The fundamental term of a social compact is: Each associate is to put his person and all his power in common with those of the other associates under the supreme direction of the general will, and that each associate, in his corporate capacity, will regard every other associate as an indivisible part of their whole body politic.
[4] The necessity for their citizens to know the vast majority of their fellow citizens only as stereotypes is one reason.

conduct regarded as harmful to the moral welfare of the people who comprise the Society. Criminal law likewise prescribes punishments and, sometimes, rehabilitation provisions for lawbreakers.

Several important questions immediately attend this idea of criminal law. The first, rather clearly, is the question of *who* is to be the person or persons in whose view particular conduct is *regarded* as threatening or endangering or harmful? If they are members of a legislative faculty, what *standard* is to be used for judging and evaluating this regard? Is some particular conduct criminal just because someone *says* it is? As the pragmatic-minded Romans never tire of reminding us, *quis custodiet ipso custodes*?[5] What *is* "crime"? What *is* "property"? What *is* "the moral welfare of the people"? Are these one thing in one place and time, and a different thing at another place and time? What is "breaking the law"? Does *intent* factor into "lawbreaking" or is "lawbreaking" to be understood only in terms of purely objective actions or outcomes, as moral realism holds-to-be-true? Perhaps it is clear to you that, without clear answers to questions like these, the explanation of "criminal law" as described above is without adequate context.

I will circle back to these issues soon. First, though, let us finish exploring the other two subcategories of law. **Civil law** is also a body of statute laws (and is therefore attended to by all of the same questions above) but it differs in emphasis. In civil law the emphasis is placed on dispute resolution and victim compensation rather than on punishment or rehabilitation. If you lose in a civil law court case, you might have to pay a fine or damages to the other party, or be ordered to perform some community service, but you won't go to jail for it. If you lose a criminal law court case, you likely *will* receive a prison sentence or, possibly and depending on the law in question, end up on a gallows or facing some other form of execution. Civil law is not so much a question of committing a "crime" as it is of "wrong-doing." This, of course, at once raises the question "what is the difference between 'wrong-doing' and 'crime'?"

Common law, also known as "judicial precedent" or "case law," is the body of law made by judges instead of by statute (legislative branch) or regulation (executive branch). It arises as precedent according to the principle that cases should be decided according to consistent principled rules so that similar facts yield similar results. This principle is called the principle of *stare decisis*. If the court finds that a current case is fundamentally distinct from previous cases and that legislative statutes either do not cover this case or are ambiguous, judges have the authority and the duty to resolve the issue at hand, and the judge's opinion then becomes a precedent for future cases. Judicial precedents stand on equal footing with statute laws (or, at least, are supposed to). Common law also includes judicial interpretations of the Constitution, statutes, agency regulations, and applications of law to specific facts. This is a vital role because any codified statute or precedent is, at root, an *ad hoc* rule that may cover facts of experience known at the time of its codification and reasonable generalizations of possible future cases. But it is beyond human capability to correctly predict *all* future situations and facts, or to predict *societal changes* that might alter the reasoning that went into law codification and gain a general assent that the law is *just*. Future changes in a Society's *Sittlichkeit* can turn what is today regarded as a just law into an unjust one. It is as Jefferson said,

> 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 know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new 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 coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. [Jefferson (1816), pg. 559]

The authority of judges to interpret and even, on occasion, to strike down statutes and regulations has

[5] "Who will keep the keepers themselves?"

not-infrequently led to friction between the judicial branch of government and the legislative and executive branches. In the U.S., some members of the state legislatures and Congress hold that law-making is the exclusive privilege of lawmakers, and have sought to roll back or limit the ability of the judicial branch to check the power of the legislative and executive branches [Walker & Epstein (1993), pp. 10-14]. There has often been a display, in such actions, of Adam's passion for Jealousy as well as the passion for Ambition by legislators and congressmen. Tactics that have been used include: a) attempts to "pack" the courts with judges who are thought to be sympathetic to some political ideology favored by the particular political faction who controlled the appointment process; b) attempts to "pack" the courts by changing the size of the court or the number of judges; c) to limit or remove the court's appellate jurisdiction; and d) attempts to limit the courts' authority by constitutional amendment [*ibid*., pg. 12].

It has almost always been the case that attempts by the legislative or executive branches to hinder or weaken the judicial branch have been perpetrated along strict lines of political party factions. In the U.S., the first instance of this occurred in 1800 when the Federalists, a political party that had formed around Alexander Hamilton, lost in the congressional and presidential elections to the Democratic-Republicans party (which had formed around Thomas Jefferson) and "packed" the courts before Jefferson took office. The most recent "packing" example (at the time of this writing) happened at the end of the Obama administration and during the Trump administration. These serve as examples of how political parties are cancerous to the body politic of Societies based on popular governance. The phrase "popular government" does not mean "rule of the majority"; it means Sovereign power is vested in the people rather than in their elected or appointed *servants*. As Tocqueville put it, the *office* should be powerful but the *officer* should be insignificant [Tocqueville (1836)].

Actions taken to "pack" the courts along ideological lines of political parties and factions are subversive to the principle of justice because ideologies almost always favor special interests of one group or class of people over those of other people. Factions produce tyranny, so control of factions is a key reason the judicial branch must be able to check the powers of the other two branches. Walker & Epstein noted,

> Supreme Court scholars often employ the terms *liberal* and *conservative* as shorthand ways to describe individual justices. Similarly, the court itself can be classified as either liberal or conservative depending on the dominant political ideologies of the sitting justices and the nature of the decisions being rendered. While there has been some variation in the meaning of these concepts over time, conservative justices are those whose decisions tend to benefit the politically and economically advantaged classes. Conservative rulings give a preference to private property rights over the authority of the government to regulate the economy. Conservatives traditionally have a pre-disposition to favor states' rights on federalism questions and to be less supportive of expanded civil liberties and the rights of the criminally accused. Liberal justices, on the other hand, generally prefer legal change that works to the benefit of the disadvantaged classes. Liberals also have a greater faith in the power exercised by the federal government rather than by the states. Liberal courts tend to give greater support to expanded civil liberties and the rights of the criminally accused. Over time the ideology of the Court majority has varied between liberal and conservative positions on major issues of legal and public policy. [Walker & Epstein (1993), pg. 15]

Individuals are always going to have "ideologies" because an ideology is more or less "the way one thinks or prefers how things ought to be." But if, therefore, agents of the judicial branch are going to have ideologies, should not these ideologies be centered around notions of *justice* rather than *law* or political party ambitions? Is not passion for Emulation preferable to Ambition in officers of the judicial branch?

Among the many controversies argued by scholars, the public, and political parties, one of the perennial and most hotly contested of these is the role the judicial branch should play in governance. Walker & Epstein wrote, in regard to the U.S. Supreme Court,

> Those who support judicial review assert that the court must have this power if it is to fulfill its most important constitutional assignment: protector of minority rights. By their very nature as elected

> officials, legislators and executives will reflect the interests of the majority. But those interests may promote actions that are blatantly unconstitutional. So that a majority cannot tyrannize a minority, it is necessary for the one branch of government that lacks an electoral connection to have the power of judicial review. This is an important argument, one whose veracity has been demonstrated many times throughout [U.S.] history. . . .
>
> The view of the court as a protector of minority interests is not without its share of problems. First, it conflicts, at least in the opinion of some, with democratic theory. To these analysts, it is completely counter-majoritarian for a court composed of nonelected officials to strike laws passed by legislators who represent the people. . . . Second, empirical evidence suggests that at times the Supreme Court has not used judicial review to protect the interests of disadvantaged minorities. Rather, according to Robert Dahl, many of the acts struck down by the Supreme Court before the 1960s were laws that harmed the privileged class, not politically powerless minorities. [Walker & Epstein (1993), pp. 13-14]

I ask: how many elected legislators actually "represent the people" instead of just *some* of the people? Who are they? To these remarks, I will add Mill's observation:

> Democracy, thus constituted, does not even attain its ostensible object, that of giving the powers of government in all cases to the numerical majority. It does something very different; it gives them to a majority of a majority who may be, and often are, but a minority of the whole. [Mill (1861), pg. 76]

It is simply untrue that elected officials necessarily represent the interests of a majority of the people. National political parties exacerbate this fundamental flaw in non-consensus democracy. Use of deceptive propaganda is one weapon in their arsenal of exacerbation. Furthermore, rule by political ideology is by its nature subversive to the fundamental condition of all social compacts, namely, "that 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*." The possibility for the last clause in this statement of the condition of social compacting is grounded only in personal moral commitments by these associates *to serve the congruent common interests of all* and to act upon special interests *only* when those interests *are-not incongruent with the common interests*.

As pointed out before, and illustrated by figure 1, a larger-sized population will have fewer congruent common interests than a smaller-sized population does, and will have a greater number of incongruent special interests than a smaller-sized population does. This fact of human social-nature underlies the necessity for heterarchical institution of popular government. It is also a central reason why traditional "states' rights" arguments are extravagances in reasoning; if those arguments were valid then it would immediately follow that county and municipal governments should have "rights" over which state-wide government should have *no* say. However, most agents in *every* state government in the U.S. presume the authority of state government rightfully supersedes that of local government whenever agents of state authority choose to exert their power over local city councils, mayors, or county commissioners. This hypocrisy dates back to before the founding of the United States. It was reflected in clashes between the colonial and the congregational governments of 17th century Puritan New England [Wells (2013), chap. 2].

It remains true that national/general government is to be rightfully entrusted with codifications of law touching on national congruent common interests; state governments with codifications of law touching on state-wide congruent common interests; and so on until we reach the level of neighborhood and family congruent common interests. For example, segregation laws in 1950s Kansas, based on a so-called "separate but equal" doctrine, conflicted with the fundamental condition of *all* social compacts at the nation-wide level of a confederated republic; and so it was not merely just but, indeed, the *Duty* of the general government to intervene and strike down those state-level laws, as the Supreme Court did in the 1954 case *Brown v. the Board of Education*. This decision struck down segregation laws across the U.S.

Logical divisions of law-making authority among different branches of government serves a functional purpose and so is not an imperfection of an organization of government. However, *justice* does not lend itself to so neat and tidy a logical division and cannot be cleanly set apart from either *Sittlichkeit* (moral custom) or from interests in Progress in Societies. Ideology is no reliable basis for justice, nor is the traditional logical division of government into just three branches of government necessarily sufficient to establish justice in a large Society. The possibility of popular governance is grounded in a common interest of *civil liberty* ***with*** *justice for all*, and no organization of governance that ignores this fact will be able to avoid devolution into a despotism. But how and by whom is civil liberty with justice for all to be judged and adjudicated? Are the traditional three branches of governance sufficient to establish and maintain an institution of justice in popular government?

This brief exploration of justice and systematic law has brought up many questions this treatise must answer. They are:

1. What is the real meaning of the term "crime"?
2. Who is to be the person or persons in whose view particular conduct is *regarded* as threatening or endangering or harmful?
3. If they are members of a legislative faculty, what *standard* is to be used for judging and evaluating this regard?
4. Is some particular conduct criminal just because someone *says* it is?
5. What *is* "property"?
6. What *is* "the moral welfare of the people"?
7. Are these one thing in one place and time, and a different thing at another place and time?
8. What is "breaking the law"?
9. Does intent factor into "lawbreaking" or is "lawbreaking" to be understood only in terms of purely objective actions or results, as moral realism holds-to-be-true?; is violating an unjust law "lawbreaking"?
10. What is the difference between 'wrong-doing' and 'crime'?
11. Should judges be elected or appointed? if appointed, who should appoint them?
12. What qualifications should a judge have?
13. Should judges have the power to review and strike down statute laws or executive regulations?
14. What precautions are needed to isolate judges from political pressure and influence?
15. Are the traditional three branches of governance enough branches to institute justice in popular government? If not, what else is necessary?
16. What provisions must be made in a justice system to satisfy Relation and Modality in enlightened institution?
17. How and by whom should appellate jurisdictions be determined?
18. How and by what measures is the institution of justice to be evaluated regarding its performance in achieving the goals of justice (tasks A, B, and C)?
19. How and by whom is civil liberty with justice for all to be judged and adjudicated?

We have also seen that the interests of a justice system are threefold and described its goals. These are:

Task A: Mediating conflicts of incongruent interests when it is possible for both parties to *reconceptualize* their objects of interest so that both parties are able to reconcile their private interests without necessarily preventing either's satisfaction of their reconceptualized interests.

Task B: Deciding cases of irreconcilable conflicts of interests by a criterion of the civic interests of the body politic as a whole according to Relations of *obligatio externa*, and prescribing just punishments and/or compensations for the party found to be the transgressor in the case.

Task C: Adjudicating and deciding cases in which some, but not all, incongruent interests are reconciled by the parties, and prescribing for those remaining transgressions just punishments and compensations favoring the civic interests of the civil Community.

These three Tasks align somewhat, but not one-to-one, with Western ideas of civil, criminal, and common

law. Because establishment of justice is superior to establishment of laws, realignments of criminal, civil, or common law ideas may be necessary in order for law to serve justice. *Laws* can always be decreed by *rulers* of a non-civil Community - as most monarchies, aristocracies, and non-consensus democracies have historically done - but *justice* is possible *only* in civil Communities living according to the civil convention of some social compact. Only then can *all* associates enjoy civil liberty to pursue their private civic interests while at the same time enjoying the protection of recognized civil rights.

To people who were born and have lived all their lives in a civil Community - even an imperfect one - this emphasis on civil Community and social compacts might not seem as important as it actually is. Habits brought about by socialization in childhood tend to make Society fade into the background of a person's consciousness in the face of his or her normal day-to-day activities. But life in a Society is, in a sense, an artificial condition because a Society is an artifact of human determinations. Mankind has no social instinct and, indeed, many of the occasions when Society penetrates a person's consciousness are occasions that stir the individual's hostility toward it by arousing feelings of injustice. Communities exist only because their benefits outweigh their costs in the judgment of those who choose to live in them; Communities fail and fall when those costs seem to outweigh the benefits. Every social institution carries out an educational function, whether it is intended to or not, affecting the members of the Society. By doing so, it gives rise to culture in the Society. Of the cultural effect of that education Kant said,

> It must be seen that the human being becomes *prudent* also, suited for human society, popular, and influential. This requires a certain form of culture which is named *being civilized*. For this are needed manners, good behavior and a certain prudence in virtue of which one is able to use all human beings for one's own final purposes. It conforms, accordingly, to the changeable taste of each age. [Kant (1803), 9: 450]

I would ask you to note Kant's remark about "the changeable taste of each age." Human institutions are never static in a healthy Society because changes in social tastes exert a social force on them. This is why unchecked reactionary ideologies eventually become fatal to a Society. So, too, is the case for unchecked reconstructionist ideologies imposed by force of law. Both are extravagances in reasoning. It is as Montesquieu said,

> Manners and customs are those habits which are not established by legislators, either because they were not able or were not willing to establish them.
>
> There is this difference between laws and manners, that the laws are most adapted to regulate the actions of the subject, and manners to regulate the actions of the man. There is this difference between manners and customs, that the former principally relate to the interior conduct, the latter to the exterior. [Montesquieu (1748), pg. 300]

4. Deontological Transgressions and Principles of Justice

The pertinence to justice theory of *Sittlichkeit* and the subjectivity of moral taste greatly contributes to difficulties and controversies attending applications of ontology-centered systems of ethics and morals to legislation. One not-infrequent result of these difficulties is that oftentimes we see a tendency for adult moral realism ("the letter of the law") to bias the administration of justice. Important differences between consequentialist ethics, virtue ethics, and other ontology-centered persuasions historically have contributed many times to heated disagreements over laws and legislations. Consequently, it is a frequent tendency for people to try and separate "moral questions" from "legal questions." As Montesquieu put it,

> Laws are established; manners are inspired; these proceed from a general spirit, those from a particular institution. [*ibid*., pg. 297]
>
> We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs

> are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and customs. [*ibid*., pg. 298]

Current heated controversies in the U.S. over such things as gender identity, civil rights concerning sexual preference, women's health issues, gun control, the exclusion of particular topics in public school history classes, and other presently divisive issues illustrate the pragmatism in Montesquieu's observation.

Yet trying to cut ties between justice and *Sittlichkeit* is a great error. There is one constant common ground which underlies *all* moral customs, manners, and social compacting. This common ground is human nature. And it is from this common ground that the Critical theory of deontological *Sittlichkeit* and human interests spring. The term "deontological" is most often used by philosophers to denote "moral theories according to which the rightness or obligatoriness of at least some actions is not exclusively determined by the overall value of the consequences" [Mautner (1997)]. When one's "way of looking at the world" is ontology-centered, this usage is not without merit. However, from an epistemology-centered "way of looking at the world" it does not provide a sufficient explanation for the term. The Critical real explanation of ***deontological*** is ***not grounded in or deduced from an ontology-centered metaphysic***. Deontological ethics is an epistemology-centered doctrine of social-natural Obligations and Duties grounded in the Critical theory of the phenomenon of mind. The deontological theory of morals is that part of the Critical theory of the phenomenon of mind covering the grounds and conditions of human beings' constructions of private moral codes and acts of private moral judgment [Wells (2016)].

Kant used the word *Triebfeder* ("mainspring") as a metaphor to denote a *motive* in the connotation that "motives are what make us go" just as the mainspring of a clock is "what makes the clock go." A Kantian mainspring is a representation that serves as a condition for a *causatum*[6] of spontaneous activity. The object represented by a *Triebfeder* is called an *elater animi* ("driver of mind"). One valid English translation for *Triebfeder* is "motivating force"; I use it in that sense here to mean principles grounding ideas for the institution of a justice system and for proposing answers for the nineteen questions above. I conclude this chapter with the first question on that list, "What is a 'crime'?". The others will be addressed in subsequent chapters.

Deontological ethics defines a **transgression** as **any deed contrary to Duty** [Kant (1797), 6: 223-224]. The idea of a transgression is thereby tied to *Sittlichkeit* and Kant's moral categories (the 2LAR of which is repeated for convenience as figure 5). Kant tells us,

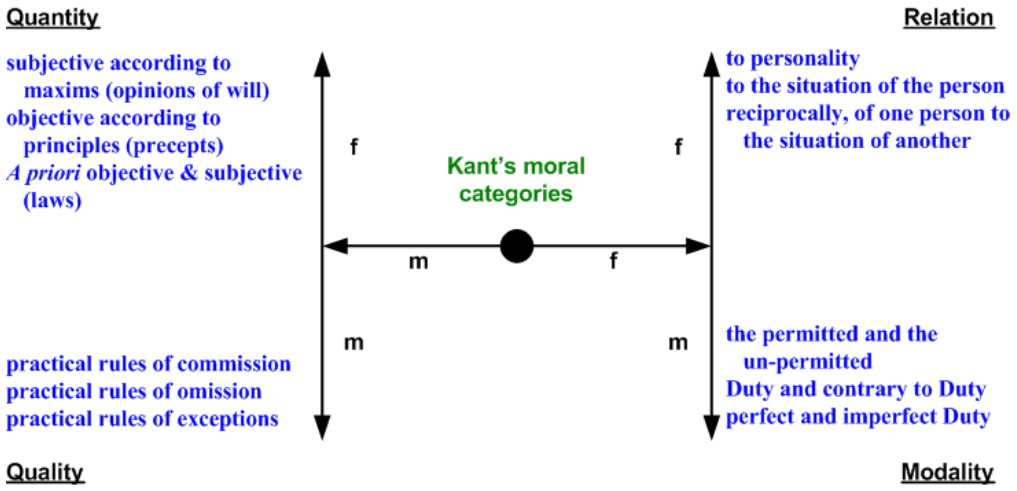

Figure 5: Kant's moral categories.

[6] A *causatum* is a rule for the determination of a change under the condition of a cause.

> An act is called a *deed* so far as it stands under laws of Obligation and hence so far as the subject, in doing it, is regarded from the freedom of his choice. By such an act the agent is regarded as the *author* of its effect, and this, together with the act itself, can be *imputed* to him if one previously knows the law by virtue of which an Obligation rests on these. [Kant (1797), 6: 223]

Kant's explanation here does contain some ambiguities that need to be cleared up. First of all, and strictly speaking, a "law of Obligation" does not refer to any statute law but, rather, to tenets of action a person constructs in his manifold of rules in practical Reason. But representations in the manifold of rules never are *conscious* representations. Therefore, to say "one previously knows the law" can mean nothing else than that the person has conceptualized a *concept* of an obligation (in his manifold of concepts). We say the person "is cognizant" of an obligation.

When we say a person's act is "imputed" to him, this imputation is an act of *another* person. There is a qualification placed on imputation; namely, that the author of the deed "knows the law" in the manner just explained. There are several logical consequences following upon this qualification. The first of these is the role of *intent*. An *unintentional* transgression is called a **fault** [*ibid*., 6: 224]. Now, to impute fault to a person's action necessarily requires that the person was cognizant of an obligation; but a transgression is not an act contrary to Obligation. It is an act contrary to Duty. Is it possible for a person to *un*intentionally act contrary to a Duty if that person is cognizant of an obligation? If so, *how* is this possible? To explain this, we must recall that Duty is an idea of a represented matter, Obligation the idea of a represented form. To understand the possibility of an unintentional transgression, enacted despite the actor's cognizance of an obligation, let us recall a quote from Nell given earlier in this treatise:

> It was assumed that it could be discovered when an agent's maxim was inappropriate to his situation or to his act, or when the agent was acting on the basis of a mistaken means/end judgment. But when we act we are not in that position. Once all reasonable care has been taken to avoid ignorance, bias, or self-deception, an agent can do nothing more to determine that his maxim does not match his situation. Once an agent has acted on his maxim attentively, he can do no more to ensure that his act lives up to his maxim. We cannot choose to succeed, but only to strive. Once he has taken due care to get his means/ends judgments right, he can do nothing further to ensure that they are right. Agents are not simultaneously their own spectators. In contexts of action they cannot get behind their own maxims and beliefs. We can make right decisions, but not guarantee right acts. [Nell (1975), pg. 227]

Act, ends, means, Obligation, and Duty are distinct from each other. It is indeed quite possible for a person's means to be not-incongruent with some Obligation *without* his being aware that the deed by which he actualizes his intent is contrary to a Duty. **A moral fault is "wrong-doing."**

Deontologically, a **crime** is an *intentional* transgression. However, Kant's original theory does contain an error - namely, his reification of his idea of "the moral law within me" I discussed earlier. In Kant's original formulation of deontological theory, phenomena of human sociopaths and psychopaths would not be possible. Correcting Kant's error brings out some additional qualifications in understanding what a deontological crime is.

First, let us recall the empirically observed stages of the development of moral judgment in children. Figure 6, repeated below for convenience, summarizes these findings from psychology research [Piaget (1932)]. In early childhood, a child does not understand the rules imposed on him by adults and does not begin to understand them until the stage of rule cognizance is reached beginning around age eight. This stage overlaps his achievement of the cooperation stage of the practice of rules. Socialization of the child in the adult connotations of that word does not properly begin until then. The child is capable of feelings of injustice before then, but these feelings are still rooted in egocentrism, individualism, and moral realism due to the child's inability to understand the phenomena of *Sittlichkeit*. It follows from this that he lacks understanding of ideas of both Obligation and Duty. He does have a notion of "I have to" but this notion is properly called prudence and carries only the Modality of the permitted and the un-permitted.

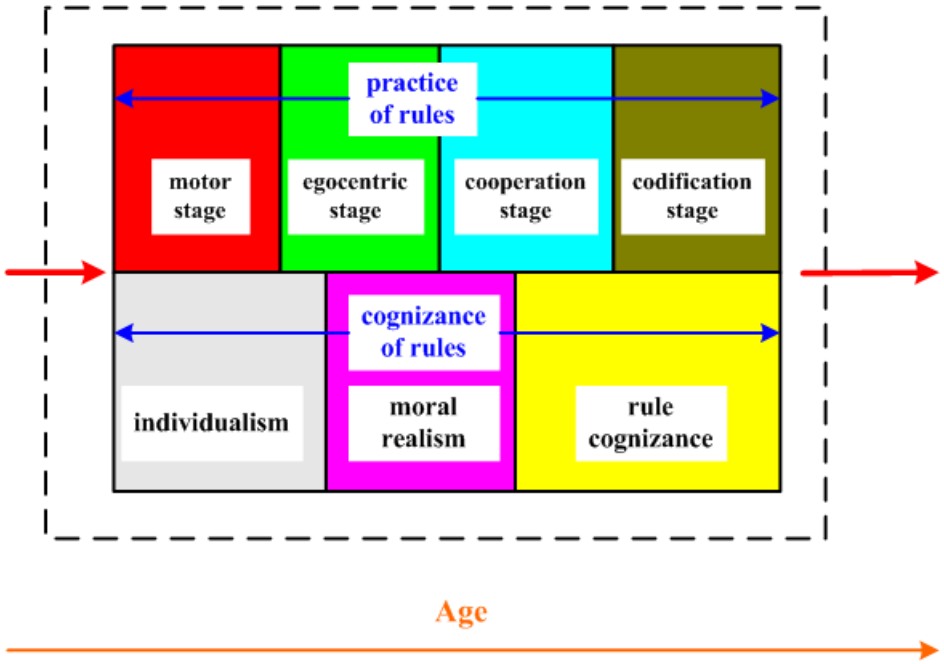

Figure 6: Empirical stages in the child's development of moral judgment.

It follows from this that a child cannot be properly imputed to have committed any transgression before the onset of the stage of rule cognizance because he lacks cognizance of any sort of "laws of Obligation." You can call him "naughty" because his developing cognizance of rules is still strictly based on obedience (and this is moral realism) but you cannot *deontologically* call him a "transgressor" because "naughty vs. nice" is not "evil vs. good" or "wrong vs. right."

Secondly, human beings are not born possessing any universal and innate "moral law within me." Kant thought that every "wrong-doer" did experience feelings of "guilty conscience" about his wrongful action (because he had a universal "moral law within me"). However, modern psychology and neuro-psychology research has taught us that a sociopath has *no* "feeling of guilt" over his actions. A Mafia hitman feels no more guilt over an act of murder than other people do over swatting a fly. As an example let us look at an antisocial personality identified as "Krista" [Millon & Davis (2000), pp. 103-106] who was presented for therapy by court order on charges of fighting with her neighbor and drug possession. Other illegal conduct in her record included robbing people at knifepoint, drug dealing, shoplifting, and animal abuse. Millon & Davis tell us,

> Like most antisocials, Krista appears to lack a conscience. Her statement "No one ever felt guilty about what they did to me" is probably partly true and partly manipulative, intended to evoke pity, give insight into her past, and justify her absence of remorse all at the same time. She sneers at religious faith, and instead puts forward her own principle: "Do unto others before they do unto you." With no obvious prosocial impulses and no internal moral restraint on action, Krista is free to do whatever she wants whenever she wants. The only barrier is society itself, and the only constraints she respects are those that society can enforce through its police presence and the threat of punishment, or those that others can enforce through their own threats of harm or revenge.
>
> Her lack of conscience creates and amplifies a variety of other antisocial characteristics. Krista is chronically deceitful. Her use of aliases "keeps anyone from tracking your shit back to you," a calculated means of pursuing illegal activities while avoiding detection, either by the law or anyone else. There is no way of knowing for what crimes she might actually be responsible. She also has no conscience where her own safety or that of others is involved, as indicated by her admission of needle sharing, followed by the frankly stupid statement that she is not afraid of HIV. Finally, Krista shows

> no inclination to involve herself in the mainstream society, as evidenced by her consistent inability to stay employed. For her, illegal activities provide much more money and immediate reward. [Millon & Davis (2000), pg. 105]

While Krista's "do unto others before they do unto you" is not regarded as a moral maxim by most people, note that *for her* it occupies the role of a moral imperative *she* holds to be universal. Krista very much believes that, given the opportunity, *you* would do to *her* what *she* does to other people. It is part of her private and personal moral code she holds to be a Duty to herself in Relation to her situation.

The actual *Dasein* of people like Krista immediately points to a problem with Kant's definition of transgression. A transgression is "any deed contrary to Duty," but, since Duties are not universally agreed to by everyone, ***whose*** Duty applies in Kant's definition? This issue relates directly to question 4 above, and almost as immediately to question 2.

Although the answer might seem obvious out of habit, the key point involved is *the absolute necessity of the Idea of a social contract and of commitment by **all** members of the civil Community to uphold it*. Social compacts are established as ***civil conventions***. Rousseau wrote,

> Since no man has a natural authority over his fellows, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men. [Rousseau (1762), pg. 7]

However, there are three general kinds of conventions. A *civil convention* is *a form of association which will defend and protect with the whole common force the person and goods of each associate and by which each associate, while uniting himself with all other associates, may still obey himself alone and remain as free as he was before joining the association*. There are several crucial points vital to this *condition* of social compacting. First, licentious liberty is no part of the clause "as free as he was before." Every associate participating in the social compact must commit himself, by his own free choice, to the alienation of particular *natural* liberties in exchange for obtaining particular *civil* liberties, and to personally commit to an obligation, called the *term* of the social compact. This term is: *that each associate is to put his person and all his power in common with those of the other associates under the supreme direction of the general will, and that each associate, in his corporate capacity, will regard every other associate as an indivisible part of their whole body politic* [Rousseau (1762)]. Commitment to the *term* of the social compact is the *quid pro quo* to the *condition* living in a civil Community makes possible. It is the *price* each associate pays in exchange for the *benefits* of civil Community. The person's free choice to commit himself to fulfilling the term of the social compact is what preserves him in the freedom he had before voluntarily becoming a member of the civil Community. To repeat the remark by Tocqueville quoted earlier,

> 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 upon him than anywhere else. No idea was ever entertained of attacking the principle or contesting the rights of society [Tocqueville (1836), pg. 71].

Not every person residing in such a Community is actually a deontological member of that Community. Krista, for example, is not an associate of a civil Community because she alienates none of the liberties she would have in a state of nature, does not consent to abide by the term of any social compact, and so she chooses *not to* unite herself with others in her Society and does not agree to live under any civil convention. In Critical terminology, she lives in an *outlaw* relationship with civil Society. Civil conventions are based upon mutual relationships which serve a common social-natural purpose for forming a civil Community in the first place. In general, that fundamental common social-natural purpose is mutual safety and protection of the associates themselves, and of their stocks of personal goods which they use as their means of achieving personal welfare and happiness [Wells (2012), chap. 12, sec. 3], [Wells (2010), chap. 7, sec. 4.1].

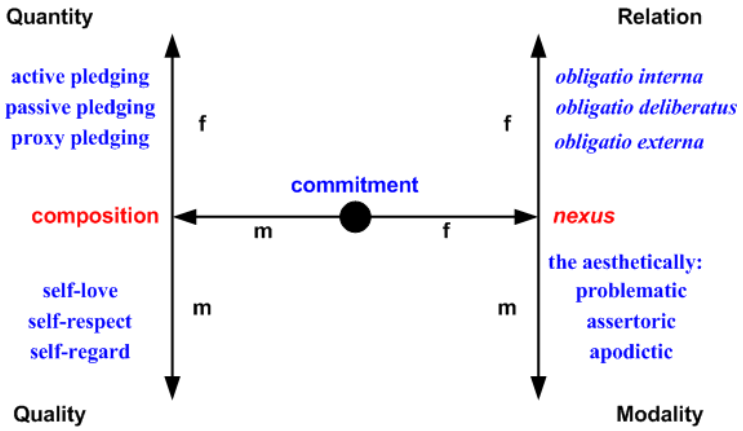

Figure 7: The 2LAR of deontological commitment.

Commitment by each associate to fulfil the term of the social compact (figure 7) is a *sine qua non* of the possibility for maintaining a civil Community. It is his *freely made* pledge of *obligatio externa* by which he *places himself* under external Obligation to other associates of the Community. It is from this *obligatione externa* that we finally arrive at the explanation of what Duty pertains to "transgression." The Duties which pertain to the definition of "transgression" are *reciprocal Duties in the Relation of the person to the situation of another person*. Only his actions contrary to a reciprocal Duty can be imputed to him as a transgression. Duties to oneself that are congruent with reciprocal Duties are not justly subject to any imputation of transgression. For example, there is no such thing as a "thought crime" because every person is at civil liberty to *think* whatever he chooses. There is no imputable transgression made when a person writes anything which is never going to be published or which is a work of fantasy because such writing is on equal footing with one's *private* thoughts.

There can be, and are, questions and issues in regard to details of *how* to place the boundary between imputable and not-imputable actions, and these are often the most difficult and challenging questions facing the institution of justice. They arise out of what has been the historically-strongest objection to social contract theory - namely, the issue of determining what "the general will" clause in the term of a social compact *means*. In one way or another, this question has pertinent bearing on most of the nineteen questions posed above. Answering this question is not a simple matter but it *is* a vital matter because it makes all the difference between the mere possibility of Sovereignty of the people as a mere platitude and the actuality of a condition where the people *are* sovereign. It is a topic this treatise will be spending a lot of time addressing in the coming pages.

5. Citizens, Criminals, and Outlaws

There is an issue directly pertinent to the ideas of transgression, crime, and fault important enough that I think its introduction should not be delayed. To the sad misfortune of many, it is a fact that living within almost all civil Communities and mini-Communities are individuals who either never commit themselves to the term of the social compact, or who at one time did make such a commitment but later chose to rescind it. In Critical terminology, these people are the outlaws and criminals who are in some manner "in" but not "part of" the civil association. They live in the broader sphere of a civil Society in which civil mini-Communities are embedded. Their presence can affect the ability of that mini-Community and/or the larger civil Society to fulfil the condition of their social compacts. Figure 8 illustrates this situation.

A mini-Community shares with its parent civil Society that Society's overall social compact. At the same time, it has by definition additional special interests not shared by others in the overall Society. Provided that these special interests are congruent with the Society's common interests, this means that it may have additional terms and conditions in *its* social compact others in Society are not bound by.

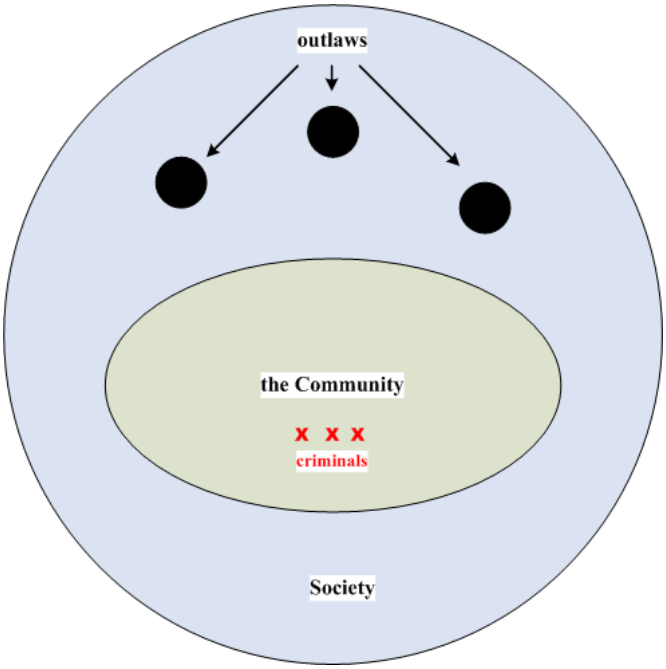

Figure 8: Illustration of the presence of outlaws and criminals in the environment of a civil mini-Community embedded in an overall civil Society and in relationship to those Communities. Outlaws may be found in the civil Society, the mini-Community or both at once. The same is the situation in regard to criminals. The existence of mini-Communities within the larger overall civil Society complicates the institution of justice in civil Society.

One of the most common of these kinds of cases is that of a commercial mini-Community, i.e., a business with an owner, employees, and other stakeholders. There are a great many detailed differences that pertain to a business mini-Community vs. its parent Society, and these are discussed in detail in Wells (2017). Commerce is by no means the only important example of social compacting differences found in civil Societies. Others are presented by religious mini-Communities, homeowners' associations, professional societies, labor unions, trade organizations, cities, counties and states or provinces, and non-commercial institutes such as schools, police and fire departments, recreational mini-Communities, public hospitals, fraternal organizations, departments of government, and charitable organizations.

Whether we are speaking of a mini-Community or of a civil Society overall, those who accept and commit themselves to the mutual Obligations to-and-with its members, and accept as obligation the performance of the reciprocal Duties under its social compact, are called the deontological **citizens** of that association. A **civic action** is an action operationalized by an individual that is congruent with his Duties under the term of a social contract. **Citizenship** is the *actuality* of individual actions congruent with conventional general standards of expectations for civic actions. Deontological citizenship is a social dynamic of relationships and subsists only in the practical actions of individuals.

What we are speaking of here is something quite different from a merely *nominal* citizen. A nominal citizen is nothing else than a person with a title bestowed upon him by legal fiat which conveys to him particular *legal* rights and liberties. By another name he can be called an ***entitlement citizen***. It is usually the case where bestowal of this entitlement also imposes some *legal* requirements upon him, the most common of which is, historically, legal compulsion subjecting him to military conscription by order of the government. For example, in the United States, all men between the ages of 17 and 45 are subject to compulsory conscription into the armed forces by 10 U.S. Code § 246, which is itself authorized by Article I, Section 8 of the U.S. Constitution. Men between the ages of 17 and 45 who are not currently serving in the U.S. armed forces, National Guard or Naval Militia are known as the "unorganized militia" of the United States.

Laws can be imposed on entitlement citizens by rulers but *justice* has meaning which can only be practically applied to deontological citizens because only they are bound by *obligatio externa* to a social compact which establishes a convention of popular social governance - which is what most people mean when they speak of "self governance." To quote Rousseau again,

> 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 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 which 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.
>
> Let us draw up the whole account in terms easily commensurable. What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses. If we are to avoid mistake in weighing one against the other, we must clearly distinguish natural liberty, which is bounded only by the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is merely the effect of force or the right of the first occupier, from property, which can be founded only on a positive title. [Rousseau (1762), pp. 19-20]

One central necessity for establishment and institution of justice is instituting ways and means for making a determination of this still-too-vague notion of "the general will." This treatise will deal with that topic in due course. For the moment, let it suffice to say that Rousseau's naive idea of "one man-one vote democracy" [*ibid*., pp. 30-31] is not adequate as a means of determining "the general will" because of numerous practical shortcomings that Mill skillfully analyzed [Mill (1861), pp. 75-80].

A deontological citizen and an entitlement citizen are not necessarily the same thing, although it is possible for a person to be both at the same time. A person becomes a deontological citizen by committing himself, by *obligatio*, to hold the terms and conditions of a social contract to be necessarily binding (obligatory) on himself, and upon acceptance of his membership by the citizens of the civil Community. A person becomes an entitlement citizen by legal fiat. It is interesting - and perhaps disturbing? - to note that in the United States a *naturalized* citizen is required to pledge his allegiance to the republic, but a person *born* in the United States is given the title of "citizen" *without* requiring of him an explicit public commitment to this pledge of allegiance. All native-born Americans are entitlement citizens but not all Americans are deontological citizens.

The essential difference is that a deontological citizen is a member of the civil Society or a civil mini-Community who has pledged *obligatio externa* (figure 7) to commit himself, as a Duty, to fulfil the terms and conditions of a social compact. A resident of a community who has not made this commitment is a deontological *outlaw* regardless of whether or not he violates any laws of the community. When one views the world through the lens of an ontology-centered metaphysic, there is no objectively valid distinction between a deontological citizen and an entitlement citizen because the understanding of the word "citizen" is then ontological. But the essence of all social compacts subsists in the commitments made by deontological citizens, who are, *ipso facto*, the actual members of the association. Somewhat surprisingly - or perhaps not considering how dominant ontology-centered metaphysics is - the U.S. Constitution and, indeed, the general government of the United States never legally defined who a citizen was until the 14th Amendment to the U.S. Constitution, which declared by fiat that all persons born or naturalized in the United States were U.S. citizens. This is a dangerous flaw in the U.S. Constitution.

The mere presence of outlaws residing in a civil Community does not render its social compact void nor

invalidate the civil association. Rousseau, at least, did recognize this. He wrote,

> If then there are opponents when the social compact is made, their opposition does not invalidate the contract, but merely prevents them from being included in it. They are foreigners among citizens. [Rousseau (1762), pg. 116]

In this he was correct inasmuch as this statement is not contrary to human nature. Unfortunately, he also wrote,

> When the state is instituted, residence constitutes consent: to dwell within its territory is to submit to the Sovereign. [*ibid*.]

Here he was wrong and his statement *is* contrary to human nature. A citizen does not merely *submit* to the Sovereign; that is mere prudence and a serf or a slave does as much. A citizen also commits *to being part of the Sovereign* and, in all his interactions with others, *to demonstrate citizenship* as defined above.

Deontologically, a social compact conveys civil rights *only* to deontological citizens, and not to outlaws, because only deontological citizens commit themselves to the *term* of a social compact in exchange for those civil rights subsisting in its *condition*. It is, however, within the prerogative of deontological citizens to *extend* civil rights to outlaws provided the associates either agree or else not-object to doing so. This is called "consent to the general will." For example, young children are not yet mentally capable of making a meaningful pledge *obligatio externa* because: they do not yet understand it; still lack sufficient ability to carry out Duties of citizenship; and are still undergoing the socialization process that provides them with the experience to make a meaningful pledge and fulfill Duties of citizenship. Every child is a little outlaw with the potential to someday *become* a deontological citizen. Extending civil rights to them is, in effect, extension by proxy of their citizen-parents. Most modern Western Societies recognize and grant this sort of extension. The legal term recognizing this is "the age of majority" which draws, by fiat, the line between "minors" and "majors" (full adulthood). Where an explicit legal fiat is not involved, it is traditionally known as a child's "coming of age."

In other cases, extension of civil rights to outlaws is less clearly justifiable. One example is extension *by grace* as a matter of governance policy that might or might not have been submitted for consensus by all members of the civil association. So-called "rights of convicted felons" is one such example, e.g., right to parole or parole hearings, pardons by fiat of executive branch officials, commutation of sentences, and legal prohibitions against capital punishment. These are examples of this cloudy area in administration of justice. The situation is cloudier still for extensions by grace to convicted criminals because a crime is an intentional transgression and can *only* be committed by someone who has chosen to betray his *obligatio externa*. By doing so, *he forfeits his status as a deontological citizen* even if legal fiat still considers him to be an entitlement citizen. It might make a public official "feel good about himself" to extend grace to an outlaw or a criminal, but a public official *is not* the Sovereign, much less God. Acting *in order to* "feel good about yourself" is an inclination, and *no* inclination is ever a Duty in deontological ethics[7].

Another complication arises when, through public apathy, negligence of governance, or unjust fiats of law, a deontological citizen's civil rights under the condition of a social compact (its "defend and protect" clause) are violated by the body politic of the association in such a manner that perpetrations of this are being *perpetuated* by policy and practice. One singular instance of such a perpetration can simply be a mistake and a moral fault committed by the civil Community; repeated and ongoing perpetrations, on the other hand, perpetuate injustice. Deontologically, ***unjust*** means "anything contrary to the terms or conditions of a social compact." ***Justice, in civil connotations, is the negation of anything that is unjust***. Failure to negate unjust actions is ***civil injustice***. Here we have the deontological real explanations of what "justice" and "injustice" mean in terms of human-natural civil Society.

[7] An inclination is an habitual sensuous appetite. A Duty excludes them from being the *ground* of one's action.

Perpetuations of injustices by the civil Community toward any of its citizens destroys and negates the very condition under which that person chose to unite himself with others in civil Community. A person chooses to join in a civil Community as an act of prudence serving his *Duties-to-himself* in relationship to his situation. By doing so, he voluntarily alienated particular natural liberties he had in exchange for civil liberties and the protections of civil rights promised to him by the members of the civil Community. Perpetuated injustices renege on those promises made to him and *this justifies the person in withdrawing his allegiance to the Community and reverting to a state of nature relationship with that Community*. In the Critical theory, this act on his part is called ***moral secession***. A moral secessionist enters an outlaw relationship with the Community, and, likewise, that Community becomes outlaw relative to him. He is not a criminal because his act of secession responds to betrayal by his former Community's body politic of the condition it pledged to *him* as *obligatio externa*. In effect, *the Community withdrew from him*, through ***perpetuated*** unjust actions[8], and so his act of secession is *morally justified* as a Duty-to-himself. The subjective "flavor" of moral secession is well expressed by an old Irish toast,

> Here's to you and here's to me
> And here's to love and laughter.
> I'll be true as long as you,
> And not one moment after. -- An Irish toast

Civil association does not abolish Duties to oneself; it merely moderates and limits *liberties* by which the individual may pursue fulfillment of his Duties-to-Self.

The issues and challenges facing the institution of justice are made more challenging still by the fact that the great majority of people are only vaguely aware, or even completely unaware, of social compacts regulating their lives in a civil Society. There are very few instances where one finds any detailed or documented understanding of a Community's or a Society's *de facto* social compact. Such lack of understanding leads in some cases to individuals who are licentious in their attitudes and maxims of personal liberties. In other cases, both within and outside of mini-Communities, it produces extravagances in reasoning regarding civil rights of mini-Communities and civil liberty restrictions and moderations the social compacts of these mini-Communities might impose on their members. There is almost complete ignorance everywhere of even the *Dasein* of the phenomenon of mini-Community, much less of properties and characteristics of their *Existenz*. Societies generally place almost complete reliance upon "good manners" and moral custom as replacements or substitutes for written social compacts in regulating peoples' attitudes and actions. The lack of success of this reliance is nicely entered into evidence by institutions of *adversarial* legal systems.

The ignorance is promoted by an outstanding indifference among educators and scholars to social contract theory and to the sociology and anthropology of mini-Communities. I know of no public school system in the United States that treats social contract theory or the sociology of mini-Communities in the school curriculum, and of no universities that include it as part of their core curriculum. One partial factor here is the deep skepticism about the idea of social contracts many scholars have due to the many well-known shortcomings and impracticalities of Rousseau's theory - and especially of his naive and impractical treatment of the vague idea of what "the general will" is and how to gauge it. One prominent exception to this state of affairs is the work of John Rawls, who argues for a primary role for the idea of the social contract in his theory of justice [Rawls (1999)]. In his book review of Rawls' 1971 edition, Marshall Cohen wrote,

> John Rawls draws on the most subtle techniques of contemporary analytic philosophy to provide the

[8] Perpetuation is an essential factor in moral secession. A single unjust action can be merely a moral fault arising from mistakes and imperfections of a civil Community's institutions. A moral fault is not a crime and is not sufficient to morally justify moral secession.

> social contract tradition with what is, from a philosophical point of view at least, the most formidable defense it has yet received . . . He also makes it clear how wrong it was to claim, as many were claiming only a few years back, that systematic moral and political philosophy are dead. -- Michael Cohen

I basically agree with Cohen's remarks here, although I would also offer two additional observations. First, that when moral and political philosophy are ontology-centered their findings will not have lasting benefit; second, most educators relegate Rawls' treatise to the silo of law school and ignore it in their own studies within their own academic silos. I personally think Rawls' *A Theory of Justice*, while making a number of fine points, does not provide a systematic basis for enlightened institution of justice. If I did think so, I wouldn't be writing *this* treatise. Rawls himself said,

> Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. Therefore in a just society the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

Respectfully, I could not disagree with this statement more. It ignores the actualities of human social-nature and is an extravagance of reasoning in regard to moral reasoning. Justice is not an ontological thing and *no* human being *innately* "possesses an inviolability founded on justice." That is an ontology-centered extravagance of reasoning. To quote a line from the movie *A Man for All Seasons*,

> "Yes, I'd give the Devil benefit of law, for my own safety's sake!" -- line attributed to Thomas More

The ongoing challenge for every Society is to make and keep its laws *just*. Doing so very much subjects "rights secured by justice" to the political bargaining required to formulate a social compact capable of gaining general consent, and to "the calculus of social interests" because social interests lie at the core of an individual's *self*-determination of Duties-to-self and, through these, his reciprocal Duties in Relation to the situation of others.

There really are outlaws and criminals embedded within every civil Society, and they pose real threats to the ongoing survivals of civil Communities. No appeal to a transcendent and supernatural illusion of "natural law" justifies tolerance of their presence or extension of grace for intentional transgressions. Feelings of injustice are subjective and real for individuals; justice, though, is a civil Society's collective Duty to realize.

There is another and more potentially dangerous consequence of poor understanding of the Idea of a social compact. Moral secession produces over time what historian Arnold Toynbee called a "proletariat" living "in but not part of" a Society [Toynbee (1946)]. Because Toynbee's word "proletariat" differs in important ways from other connotations of this word - for example, its connotations in the writings of Marx and Engels - the term **Toynbee proletariat** is used in the Critical theory to distinctly denote Toynbee's meaning. He wrote,

> For proletarianism is a state of feeling rather than a matter of outward circumstance. When we first made use of the term 'proletariat' we defined it, for our purpose, as a social element or group which in some way is 'in' but not 'of' any given society at any given stage of that society's history . . . The true hallmark of a proletarian is neither poverty nor humble birth but a consciousness - and the resentment that this consciousness inspires - of being disinherited from his ancestral place in society. [Toynbee (1946), pg. 377]

The only note I would add to this is that it is not necessary for a proletarian to *actually* "be disinherited"; it is sufficient if he merely *thinks* he has been or is being "disinherited." On April 19, 1774, with war clouds looming between Great Britain and her American colonies, Edmund Burke gave a speech in Parliament in which he said,

> Reflect how you are to govern a people, who think they ought to be free, and think they are not. Your scheme yields no revenue; it yields nothing but discontent, disorder, disobedience; and such is the state of America, that after wading up to your eyes in blood you could only end just where you begun; that is, to tax where no revenue is to be found [Edmund Burke, *First Speech on Conciliation with America, American Taxation*, April 19, 1774].

In present day America there is a significant proletariat who have been duped by conspiracy theories, such as the so-called "replacement" theory, whose resentment is not the less merely because these so-called "theories" are false and they do not see them for the absurd and preposterous fairytales they are. Their fears and suspicions are enough to fuel the resentment. Particular individuals harboring their own feelings of injustice can convince themselves the fairytale reveals the cause of the feeling, but the Boogeyman is not a justifiable ground for *moral* secession. They are simply Toynbee proletarians and no longer deontological citizens. And if some among them ever did make *obligatio externa* to their country, they have since then made themselves into deontological criminals.

Their example refrains an old, old lesson of history. In debate at the Constitutional Convention on May 31, 1787, delegate Elbridge Gerry of Massachusetts said,

> The evils we experience flow from an excess of democracy. The people do not want virtue[9] but are the dupes of pretended patriots. In Massachusetts it has been confirmed by experience that they are daily misled into the most baneful measures and opinions by false reports circulated by designing men, and which no one on the spot can refute. [Farrand (1911), vol. I, pg. 48]

Injustice is a *feeling*. Attempting to describe it objectively is nothing else than an attempt to identify the *cause* of this feeling, the *author* of that cause, and the circumstances by which it was produced. This is a raw fact of human nature that the institution of a justice system cannot afford to ignore or forget.

6. References

Adams, John (1776), "Thoughts on government," in *The Portable John Adams*, John Patrick Diggins (ed.), NY: Penguin Books, pp. 233-241, 2004.

Alden, John R. (1969), *A History of the American Revolution*, NY: Da Capo Press, 1989.

Farrand, Max (1911), *The Records of the Federal Convention of 1787*, revised edition in four volumes, New Haven, CT: Yale University Press, 1966.

Friedman, Lawrence M. (2005), *A History of American Law*, 3rd ed., New York: Simon & Schuster.

Garner, Bryan A. (2019), *Black's Law Dictionary*, 11th ed., St. Paul, MN: Thomas Reuters.

Hamilton, Alexander, James Madison and John Jay (1787-8), *The Federalist*, NY: Barnes & Nobel Classics, 2006.

Hart, Albert Bushnell (1907), *Formation of the Union 1750-1829*, NY: Longmans, Green, and Co.

Jefferson, Thomas (1781), *Notes on the State of Virginia*, in *The Portable Thomas Jefferson*, Merrill D. Peterson (ed.), pp. 23-232, NY: Penguin Books, 1977.

Jefferson, Thomas (1816), Letter to Samuel Kercheval, July 12, 1816, in *The Portable Thomas Jefferson*, Merrill D. Peterson (ed.), pp. 552-561, NY: Penguin Books, 1977.

Jernegan, Marcus Wilson (1929), *The American Colonies 1492-1750*, NY: Frederick Unger Publishing Co.

Kant, Immanuel (1793-4), *Metaphysik der Sitten Vigilantius*, in *Kant's gesammelte Schriften*, *Band*

[9] By this phrase, Gerry is saying the American people do not *lack* virtue. Such was American grammar in 1787.

XXVII, pp. 476-732, Berlin: Walter de Gruyter & Co., 1975.

Kant, Immanuel (1797), *Die Metaphysik der Sitten*, in *Kant's gesammelte Schriften, Band VI*, pp. 203-493, Berlin: Druck und Verlag von Georg Reimer, 1914.

Kant, Immanuel (1803), *Pedagogik*, in *Kant's gesammelte Schriften, Band IX*, pp. 437-499, Berlin: Walter de Gruyter & Co., 1923.

Mautner, Thomas (1997), *The Penguin Dictionary of Philosophy*, London: Penguin Books.

Mill, John Stuart (1861), *Representative Government*, reprinted by Kessinger Publications, Whitefish, Montana.

Millon, Theodore & Roger Davis (2000), *Personality Disorders in Modern Life*, NY: John Wiley & Sons.

Montesquieu, Charles de Secondat de (1748), *The Spirit of Laws*, Amherst, NY: Prometheus Books.

Nell, Onora (1975), *Acting on Principle*, New York: Columbia University Press.

Nettels, Curtis P. (1938), *The Roots of American Civilization: A History of American Colonial Life*, 1st ed., NY: F.S. Crofts & Co.

Piaget, Jean (1932), *The Moral Judgment of the Child*, NY: The Free Press, 1965.

Rawls, John (1999), *A Theory of Justice*, revised ed., Cambridge, MA: The Harvard University Press.

Rousseau, Jean Jacques (1762), *The Social Contract*, New York: Barnes & Noble, 2005.

Tocqueville, Alexis de (1836), *Democracy in America*, NY: Everyman's Library, 1994.

Toynbee, Arnold (1946), *A Study of History*, Abridgement of Vols. I-VI, New York: Oxford University Press.

Turnbull, Colin M. (1962), *The Forest People*, New York: Simon & Schuster.

Walker, Thomas G. & Lee Epstein (1993), *The Supreme Court of the United States*, NY: St. Martin's Press.

Wells, Richard B. (2010), *Leadership*, available free of charge from the author's website.

Wells, Richard B. (2012), *The Idea of the Social Contract*, available free of charge from the author's website.

Wells, Richard B. (2013), *Critique of the American Institution of Education*, vol. II of *The Idea of Public Education*, available free of charge from the author's website.

Wells, Richard B. (2016), *Wells' Unabridged Glossary of the Critical Philosophy and Mental Physics*, 5th ed., available free of charge on the author's website.

Wells, Richard B. (2017), *Civic Free Enterprise*, available free of charge from the author's website.

Wells, Richard B. (2020), *Mathematics and Empirical Science*, available free of charge from the author's website.