# Chapter 10 Justice and Lawmaking

## 1. Liberty with Justice

Let us recall Durant's observation that

> Man is not willingly a political animal. . . . If the average man had his way there would probably never have been any state. Even today he resents it, classes death with taxes, and yearns for that government which governs least. If he asks for many laws it is only because he is sure that his neighbor needs them; privately he is an unphilosophical anarchist, and thinks laws in his own case are superfluous. [Durant (1935), pg. 11]

The society (lower case) of an individual human being is his *noumenal* concept of relationships and associations with other people made such that: (1) these are suitable for one or more of his purposes; (2) the idea is represented by the appearances of people; and (3) this thing-called-society is a mathematical Object, the concept of which has no ontological significance whatsoever but does, for the person, have epistemological significance. The higher abstraction, Society (capitalized), is a mathematical outcome of the synthesis of divers individual concepts of society. It retains that which is common in them and discards their differences. Among the concepts represented under the concept of Society are those pertaining to associations we call "political" and those pertaining to relationships of governance in those associations. To Aristotle,

> Every state is a community of some kind, and every community is established with a view to some good; for everyone always acts in order to obtain that which they think good. But if all communities aim at some good, the state or political community . . . aims at good in a greater degree than any other [Aristotle (date unknown), Bk. I, pg. 2].

Aristotle's word translated here as "community" is κοινωνια, which carries connotations of fellowship, partnership, participation, and sharing[1]. Thus the idea of political κοινωνια has connotations of these in the highest degree according to Aristotle.

But if Man is an "unwilling political animal," what is required for such a κοινωνια to form and to stay formed? We already know the answer to this question. The person who seeks membership in a civil association *requires as a condition*: that the association will defend and protect with its whole common force his person and goods in such a way that he can *unite himself with all the other associates while still obeying himself alone*. The members of the association, however, require something from the new joiner in exchange for *accepting* him as one of them. They require of him, as they do of all individual members, *that he put his person and all his power in common with those of all the other associates* under the supreme direction of their general will, and that he, in his corporate capacity, regard *every* other associate *as an indivisible part* of their whole body politic. These are ***conditions*** and ***terms*** of *every* social compact. In a civil Community, it is as Donne said: "No man is an island entire of itself."

Furthermore, each individual member is explicitly required and expected to bear full faith and allegiance to the granted conditions and required terms of their agreement. The condition is the defining condition of the individual's ***civil rights***. Fulfilling the terms places limitations on the individual's natural liberties, including requiring the voluntary alienation (surrendering) of some of them; those liberties which remain are his ***civil liberties***. Because the individual *voluntarily* chooses to alienate *some* of his natural liberties, *he still obeys himself alone* when he forgoes enacting them. *Laws*, when they are just, *identify* those natural liberties the individual is agreeing to alienate. The individual's *freedom* is still intact and whole because ***freedom*** is *the capacity for a person's Self-determination of his own actions*. ***Liberty*** is freedom *plus* the *ability* to realize (make actual) the action undertaken. Every sentient, living human

[1] Scholars of Christianity will recognize this Greek word from its numerous appearances in the New Testament.

being is always *free* (possesses freedom). No person is unlimited in his *liberty*. You are free to flap your arms and try to fly; you are not at liberty to actually take flight by doing so. You are at liberty to sneak up behind one of your fellow citizens and hit him on the head with a club; you are not at *civil* liberty to do so.

Civil rights and civil liberties are not one and the same thing, although many people today speak carelessly as if they were. *Licentiousness* subsists in an individual's (or a group's) enacting of natural liberties that the terms of the social compact require him (or them) to surrender. Licentious actions are always deontological moral transgressions; when done intentionally, they are deontological crimes; when done unintentionally, they are deontological moral faults.

It seems strange to me that declarations of rights, such as the French Declaration of the Rights of Man and the Citizen or the U.S. Bill of Rights, do not include statements of these *fundamental* conditions and terms of their social compacts. For example, Article VI of the French Declaration states that the law is the expression of the general will. In other Articles it states some restraints to be placed on laws but it does not give guidance for *how* the fundamental conditions and terms of every social compact *must always guide processes of legislation and jurisprudence* so as to insure laws *really are* expressions of the general will. Failure to consider this can and does lead to extremely divisive social problems and unjust laws.

Perhaps one of the best recent examples of this is provided by the 2022 decision of the U.S. Supreme Court in the case of *Dobbs v. Jackson Women's Health Organization*. This decision, by a 6-to-3 vote, overturned a previous Supreme Court decision, *Roe v. Wade*, that had made abortion, within some particular restrictions, legal (i.e., a civil *liberty* but not a civil *right*)[2] in the United States. In the Court's complex 212 page *Dobbs* decision is found the following excerpt:

> Held: The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. . . .
>
> (3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. . . . Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed "potential life" and what the law challenged in this case calls an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Court's conclusion that the Constitution does not confer such a right does not undermine them in any way. [*Dobbs v. Jackson Women's Health Organization* (6/24/2022)][3]

It is not my intent to provide an in-depth critique of the *Dobbs* decision in this treatise, but it is my intent to criticize some important flaws and unspoken attitudes inherent in this (and other) rulings of the Court. The first criticism is focused upon the taken-for-granted argument that the U.S. Constitution *confers* "civil rights" *of any kind*, or that it *grants* specific civil liberties (abortion in this case). Civil rights spring from the fundamental condition of a social compact and the Duty it places on all associates to "defend and protect with its whole common force" the person and goods of each citizen "in such a way that he can unite himself with all the other associates while still obeying himself alone." The U.S. Constitution doesn't issue civil rights; it prohibits *the general government* from *requiring the alienation* of some specific *natural* liberties. The Court's (and the public's) supposition that "rights" are "conferred" is essentially no different from phrasing this supposition as "civil liberties are conferred." To illustrate my

[2] If it is a civil liberty then a woman is not prohibited from having an abortion. If it is a civil right then *all* other citizens are Duty-bound to assist her in carrying out this action. *Roe v. Wade* re-established a civil *liberty*.
[3] It seems as though the U.S. Supreme Court doesn't know what a "right" is and what a "civil liberty" is.

point by means of a *reductio ad absurdum*, the U.S. Constitution also does not confer "the right to breathe"; does that mean the legislature of the state of Mississippi could, constitutionally, outlaw the use of scuba tanks if it chose to do so, thus forcing divers to make do without them? Civil liberties are not conferred; they are natural liberties that are *not prohibited*. The formula is civil liberties = natural liberties minus alienated natural liberties. The proper issue is not "does a Constitution grant a civil liberty?"; it is "does a Constitution confer upon government the just power *to prohibit* this or that natural liberty?".

A concerning consideration in the majority opinion of *Dobbs* was that "appeals to a broader right of autonomy" could "license fundamental rights to illicit drug use, prostitution, and the like." (Again, this concern is properly phrased "license fundamental civil liberties" to drug use, etc.). What really is at issue in this argument is when and under what conditions or situations a government is empowered to prohibit this or that *natural* liberty. Here Articles IV and V of the French Declaration are pertinent to this question since the declarations they make are not absent from popular attitudes and presumptions found in the United States. These articles declare that "liberty consists of doing anything that does not harm others" and "the law has the right to forbid only actions harmful to Society." The Justices' concern over a "broader right of autonomy" (excess permissiveness) is an extravagance of reasoning. In the first place, there is no such thing as a "broader right of autonomy"; the autonomy of an individual is nothing else than his or her natural liberties and is not a "right" at all. *Laws* are specific, particular, and, originally, *ad hoc*. The question of a *principle* - such as inheres in issues of legal precedents - is properly concerned with if and how particular prohibitions (e.g., of drug use or of prostitution) *safeguard* the persons or goods of *others*. Here "civil right" *is* the issue because civil rights spring from the terms of the social compact, i.e., the *right of Society* to *require* of every citizen that he or she "put his person and all his power in common with those of all the other associates under the supreme direction of the general will, and, in his corporate capacity regard every other associate as an indivisible part of their whole body politic." The adjective "civil" refers to the Community *as a whole* and the Duties owed *to* it by each individual citizen. The Object of a civil right is an intangible property, established by convention, possessed by every citizen as a benefit of their association.

*Dobbs* did not fail to take into consideration notions of tradition and history. In another part of the decision we find,

> Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day *Roe* was decided. *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. [*ibid.*]

There is a serious flaw in this way of regarding the role and power of precedent. It applies an over-powering weight in favor of Order over Progress in Society. This bias fully ignores Jefferson's important observation,

> 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 are disclosed, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times. [Jefferson (1816)]

By the reasoning stated above in *Dobbs*, only landholders should have suffrage in America, women's suffrage should never have been granted, labor unions should have remained illegal conspiracies, and scientific discoveries should have no bearing whatsoever on lawmaking. *None* of these consequences in any way represents "the general will" of the present day American body politic. although there were times in our past when each of them did. The general will of a body politic is not static, and this part of the reasoning in *Dobbs* is a recipe for creating an arrested Society doomed to eventual disintegration.

Next, let us suppose for a moment that a law banning or restricting abortion is justifiable. An immediate question here is: Who is the person or persons suffering harm by the action of abortion? Many people will immediately answer that "the unborn baby" is obviously the person who is harmed. The *Dobbs* decision did not altogether ignore this question. The Justices made reference to "what *Roe* termed 'potential life' and what the law challenged in this case calls an "unborn human being'." They declined, however, to pass judgment upon what the key idea, "life," *means* or to rule on "when life begins." In effect, the Justices punted this question back to the states and washed their hands of it. That they so declined is neither surprising nor unreasonable because *this*, the key question of the entire matter, has no objectively valid answer obtainable through any ontology-centered "way of looking at the world." It does have an epistemology-centered practical answer. A technical explanation of what this answer is can be found in chapter 10 of Wells (2019). For purposes of this treatise, let it be enough to say that there is an early period in pregnancy when the developing fetus is not yet alive *as an individual human being*[4], and that in a later period, but still before birth, the conditions for life are met for the baby *as a person* and a *living* human being. Science has not yet established precisely when the life of a baby, *as an individual person*, first begins, but it is certainly not until *after* at least 8 weeks of pregnancy and it certainly has by just slightly less than three months before normal birth [Wells (2019), chap. 16].

On the other side of the question, there is no reasonable doubt that the *Dobbs* decision has harmed and is harming many women, and their families, by permitting states to impose unjustifiable restrictions that in effect ban abortions during the period before predication by fiat of "life" as a distinct individual baby is deontologically valid. The effect of *Dobbs* is to perpetuate an injustice on some U.S. citizens. The ruling is a violation of the most basic condition of a social compact, therefore unjust, and imposes the *rulership* of the honestly held but nonetheless subjective *opinions* of some on other citizens. It is a tyranny by fiat.

Things that 'go without saying' usually don't, and things 'taken for granted' often can't be. From the time of the ancient Sumerians to the present day, most people take it for granted that the concept of "government" is more or less as Bealey describes it:

> To govern is to control. The supreme controlling force within society is the STATE. Government (without the definite article) is an abstract term referring to the style, range, scope, purposes and degree of control. . . . 'The government' usually refers to the rulers, the group of people who are in charge of the state at a particular time. [Bealey (1999), pg. 147]

The notion that "the group of people who are in charge of the state" are "rulers" is a notion even Mill seems to have habitually taken for granted; e.g.,

> A time, however came in the progress of human affairs when men ceased to think it a necessity of nature that their governors should be an independent power, opposed in interests to themselves. It appeared to them much better that the various magistrates of the State should be their tenants or

[4] The developing cells *are* part of a living human being - namely, *the mother*. A time will eventually come, in a healthy pregnancy, when this cell organization functionally meets the Critical condition that defines an individual human life, and it is at this point where it is objectively valid to say a new, distinct, and individual human life has begun. Science is not yet capable of identifying when that point is reached, but in time and with proper research we can expect that it will become capable of this. Until then, any crisp definition of "when a new life begins" is merely a mathematical fiat lacking objectively sufficient grounds for holding the definition to factually be true. The often heard predication "Life begins at conception" is false and nothing but an extravagance in religious reasoning.

> delegates, revocable at their pleasure. . . . By degrees, this new demand for elective and temporary rulers became the prominent object of the exertions of the popular party wherever any such party existed [Mill (1859), pg. 2].

But, temporary or not, is it not obvious that the concept of a "ruler" and the concept of a "tenant or delegate" are concepts in real opposition with each other? Would you see someone who thinks his authority to make laws is a warrant giving him *unilateral* power to give *you* orders you must obey - and to punish or threaten to punish you with legal sanctions if you don't obey him - as *your* tenant or servant? Is his tenure in office "revocable at *your* pleasure"? American congressmen have no great difficulty in neatly dividing their usurped power *to rule* from their tactics of reelection if "the people" forget, or never knew, what the terms and conditions of their Society's social compact are. Can civil liberty ***with*** justice for all survive when members of the body politic take it for granted that the authority figures of their government exist *to rule* over them? Or is a Sandburg clamor,

> In the night and the mist these voices:
> What is mine is mine and I am going to keep it.
> What is yours is yours and you are welcome to keep it.
> You will have to fight me to take from me what is mine.
> Part of what is mine is yours and you are welcome to it.
> What is yours is mine and I am going to take it from you.
> In the night and the mist
> the voices meet
> as the clash of steel on steel
> Over the rights of possession and control and the points:
> what is mine? what is yours?
> and who says so? [Sandburg (1936), pg. 72],

the more likely outcome?

## 2. Legislative Schemas

When and where bands of humans began using assemblies and councils to decide upon local affairs, settle disputes, and agree upon laws is lost in the fog of prehistory. Almost certainly it began at different times in different places where it began at all. We know some Societies - e.g. the BaMbuti Pygmies of the Congo and the Inuit (formerly called "Eskimos") of Alaska - never bothered to do so at all. Indeed, what most of us are generally accustomed to think are "necessary organized government institutions" are often not seen at all in cultures where armies and rulers are absent. Pedro de Castañeda, one of Coronado's soldiers, wrote of Arizona's Zuni tribe of Native Americans,

> They do not have chiefs as in New Spain, but are ruled by a council of the oldest men. They have priests, who preach to them, whom they call *papas*. [The Zuni word for 'elder brothers.'] These are the elders. . . . They tell them how they are to live, and I believe that they give certain commandments for them to keep, for there is no drunkenness among them nor sodomy nor sacrifices, neither do they eat human flesh nor steal, but they are usually at work. . . ." [Brandon (1987), pg. 119]

The Zuni, the Hopis, and other Native American tribes Coronado's army encountered in the American Southwest were generally peaceful peoples, although the Spaniards did discover they nonetheless were capable of violent and quite effective resistance to the conquistador and his men:

> Coronado honestly did his utmost to avoid violence. But why wouldn't they submit? Unfortunately, the Pueblos didn't have any history of submission. They didn't know how. Even the quiet Hopis insisted on a fight. The Hopis name, by the way, is their own word for themselves, from Hopitu, "the peaceful ones." [*ibid*.]

Following the advice of or taking directions from a person you trust and respect does not imply any element of rulership in the interaction. It is merely indicative of a leadership dynamic at work in the relationship. It might perhaps be, and perhaps is even likely, that many traditions, customs, and folkways - and some of the mores - of a Society have their origins in such a dynamic and are often motivated by impersonal factors of environment and climate that impact people's personal welfare. In recent years a tongue-in-cheek semi-jest about "people becoming their parents" has gained popularity. It was preceded much earlier by another semi-jest of a young man in his twenties making the remark, "It's amazing how smart my father has become in the past ten years." Both jests make oblique reference to such enduring conditions of environment, climate, commerce, and financial prudence that give rise to enduring ways of doing things. "Laws" appear when people codify and formalize their traditions, customs, folkways, and mores, either all or in part, and make them part of their normalized social expectations.

Laws, though, imply a lawgiver or, at least, a process of lawmaking. By the time history begins, the kingdoms and empires of the Middle East and North Africa were already ancient political institutions. All of them were absolute monarchies with governments designed along the lines of military organization. The king had his generals and, usually, high priests acting as his advisors, and his generals were often appointed governors in the subjugated provinces of his territories. Not infrequently, his generals were also members of his own family. Rulership was the normal method of governing his subjects. Laws were pronounced by the king, by his local governors or garrison commanders, or, outside the main cities, by local councils who saw to the local administrations and judged local disputes. The lawmaking process was thus distributed in a hierarchy subject to the will of the king, and different officials were empowered to make different strata of laws. For example, in the Hittite Empire:

> The traditional organization of the country was essentially parochial, the scattered townships and valley communities having each its local council of 'Elders'. These would normally deal with local administration, and in particular with the settlement of disputes. Only the great religious centers were organized on a different system. . . . The kings of Hattusa[5] at first retained direct control of the new territories acquired by conquest by entrusting their administration to their own sons. . . . Later, we read of similar appointments conferred on generals, who were usually relatives of the king. The administration of a province involved such duties as the repair of roads, public buildings and temples, the appointment of priests, the celebration of religious ceremonies, and the dispensation of justice. The appointment of such administrators seems often to have been informal and temporary, and the office did not necessarily carry any special title. [Gurney (1990), pp. 70-71]

Government institutions of this general nature usually produce a stratified Society of mini-Communities subjugated to the rule of a dominant ruling caste. As there is little or no social compact between the subjugated mini-Communities and the ruling caste, these mini-Communities can be said to be "in but not of" the general Society. Figure 1 below illustrates this situation. Prudence usually dictates that members of subjugated castes maintain a tactful silence about their subjugated condition for so long as the dominant caste appears capable of maintaining their rule by force. However, if their grip on the subjugated mini-Communities appears to weaken, numerous petty revolts against the rulers tend to break out. A king might spend the majority of the years of his reign putting down such revolts. He also had to worry about his own mini-Community of nobles and courtiers if they perceived him to be losing his grip on the realm or if he committed major blunders. This was the point Cicero was making in his account of the story of the sword of Damocles [Cicero (45 BC), Bk. V, pg. 487].

This "Mesopotamian Model" of hierarchical rulership is perhaps the most frequently occurring way of instituting government seen in world history. However, it is not the only approach taken. Another example is found in Viking Age Scandinavia. For centuries in Scandinavia we find an interesting mix of hierarchically organized petty kingdoms combined with democratic assemblies of freemen called the Thing (*Ting*), where laws and matters of regional importance were ratified. Jones tells us:

[5] Hattusa is the Hittite name for themselves.

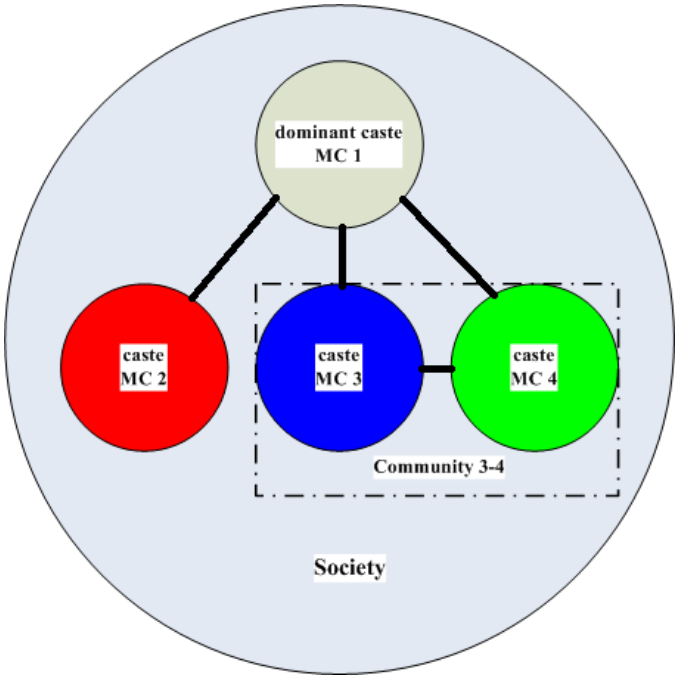


**Figure 1:** Hierarchy-ordered caste Society typical under the rule of a monarchy or aristocracy.

> This class of free men[6] was extensive; it ranged from impoverished and humble peasants at one extreme to men of wealth and authority (especially local authority) at the other; but what they had in common were legal and political rights, a wergeld ["man price"], and land. As to this last there was much variation. Ideally a man had a farm, even a cot, of his own; in practice young men must often live with their parents, or farm land at the hand of a big proprietor. Even so their status was clear, and these were the men who tilled the land and raised stock, bore witness and produced verdicts, said aye or no on matters of public concern at the Thing (including matters as important as the election or approval of a king or a change of religion), attended religious and lay ceremonies, worked in wood and metal, made and wore weapons, manned ships, served in levies, were conscious of their dues and worth, and so impressed these upon others that as a free peasantry they stood in a class of their own for Europe. . . .
>
> Above the free men was the ruling caste, the aristocracy, most of it king-allied or god-descended. Here belonged the families with wealth, land, and rank. At different times during the Viking Age, and in different parts of Scandinavia, we observe some of these families partly or fully independent of other authority, so that they enjoyed the rank of king or jarl over a defined territory. But we should not conclude that because the aristocracy existed by virtue of rank, and descent and the recognition of degree, it felt any automatic respect for a supreme monarch. . . . In the case of Sweden we are ill-informed, but till at least the early tenth century we read that Danish Jutland bore its crop of kinglings, while in Norway the situation was worse. . . . The power of a Norwegian king had always been circumscribed . . . He depended heavily on the loyalty of the leaders of provinces, the farmer republics, and the jarls . . . He depended, too, on the approval of his free subjects. His very election depended upon their favorable voice at those public assemblies where he first presented himself to them. He had to carry them with him on all important decisions. . . . The king of the Swedes must make a progress . . . through his dominion and present himself for popular acclaim at all the Things. [Jones (1968), pp. 150-151]

The Thing was not a legislative assembly in the modern sense of that idea. The assembled freemen did not draft or propose laws. Their role was to ratify or reject laws proposed by the king or local jarl.

[6] The freemen were not the lowest caste in Scandinavian Society. The lowest caste were the thralls (slaves). Above them were the *freed*men, people who had been thralls and were emancipated. Neither were represented at the Thing.

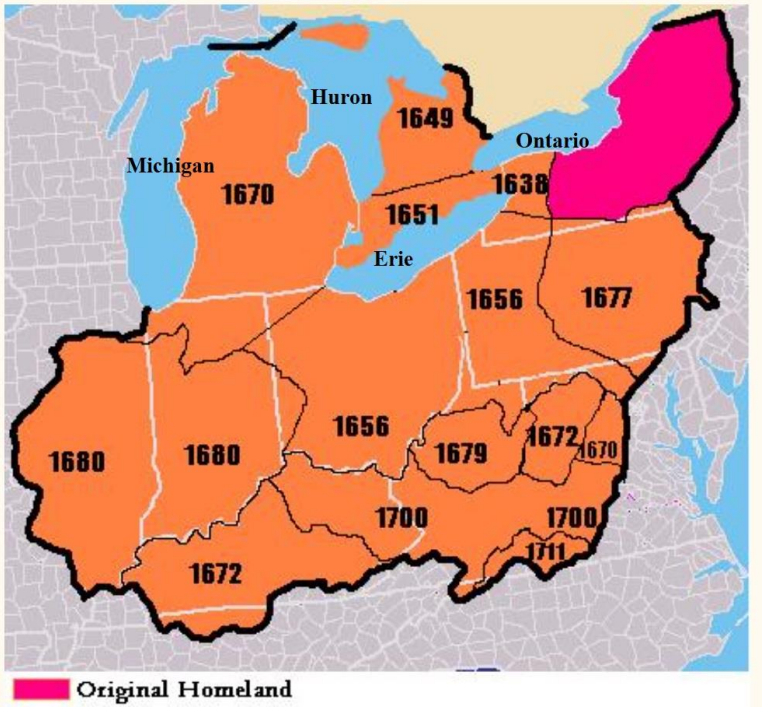


**Figure 2:** Territory of the Haudenosaunee Confederacy from 1638-1711.

Scandinavian Society was not a democracy in either the Athenian or modern understanding of that word. Neither was it a republic in the Roman sense with Rome's various lawmaking assemblies (the Curiate, Tribal, and Centuriate Assemblies). But the Thing did serve as a means for directly expressing "the general will" in a Rousseau-like manner and it did establish a social compact between the freemen and their ruling caste. This compact is something Mesopotamian rulership did not have.

A noteworthy contrast to how lawmaking developed in Europe is found in North America in the example of the Haudenosaunee Confederacy (figure 2). The French called them the Iroquois Confederacy while British colonists called them the Five (later, Six) Nations. The Haudenosaunee were composed of five Native American nations: the Mohawk; the Onondaga; the Oneida; the Cayuga; and the Seneca. A sixth nation, the Tuscarora, joined the Confederacy in 1722. Archaeologists date the formation of the Confederacy to sometime between 1450 and 1660 although Haudenosaunee oral tradition holds that it dates back to 1142. Oral tradition also holds that the Confederacy was founded by Deganawidah the Great Peacemaker, Hiawatha, and Jigonsaseh the Mother of Nations. It is based on a compact called The Great Law of Peace[7].

Each of the six nations is composed of extended matrilineal family groups called clans. Each clan is headed by a clan mother, selected by the clan, who is a kind of chief executive for the clan and performs various duties [Smithsonian National Museum (2009)]. Among these is the duty to nominate the clan's *hoyaneh* or "Caretaker of the Peace," who is the clan's male representative to the confederal Grand

[7] The Haudenosaunee still exist today, in Canada and the northeastern United States. They regard themselves as an independent sovereign nation and do not accept the U.S. citizenship bill passed by Congress in 1924, seeing this bill as a not-very-subtle unilateral attempt by Congress to abolish their sovereignty. The U.S. government regards them as a "domestic dependent nation" (i.e., a subjugated people) having a status somewhat like, but different from, the states of the United States with local sovereignty similar to, but again different from, the states. To this day there are lawsuits being brought forward by the Haudenosaunee contesting what they see as Congressional efforts to abolish their sovereignty [Heath (2018)]. It is correct to regard them as comprising a Toynbee proletariat in both the United States and in Canada. Like U.S. territories, they have no voting representation in the U.S. Congress.

Council. She also has the power to remove him from this office if he does not represent the nation well.

The Grand Council is the oldest institution of government still maintaining its original form in North America. Originally it was comprised of the fifty clan leaders (*hoyaneh*); after the Tuscarora Nation joined the confederacy, this number was expanded to fifty-six members. All decisions made and all laws passed by the Grand Council must be by unanimous consent. This is *governance by consensus* - the only example of this form of governance in North America and found only in some Native American nations. In others, e.g. the Aztecs, rulership was, at least in part, instituted in the government. For example,

> The Aztecs . . . were divided into twenty clans . . ., each of which elected officials roughly corresponding to our county clerk, treasurer, sheriff, and so on, although the correspondence is pretty rough since the same person might hold widely varying posts at the same time. Each clan also elected a *tlatoani*, or "speaker," for membership in the top state council. This council in turn chose four executives for the four corners of the state, into which the twenty clans were organized. In Tlaxcala this council of four seemed to rule jointly . . . In Tenochtitlan a supreme ruler, *tlacatecuhtli*, chief-of-persons . . . was chosen by the supreme council from among these four executives. The top job was for life, and was always filled from the same family, which accounts for the Spaniards referring to such rulers as kings. . . .
>
> The nub of the Spanish error was not in calling the elected tlacatecuhtli a king . . . but in assuming the existence of hereditary castes and private ownership of property, particularly land.
>
> With a few exceptions land belonged to the clan, which apportioned its use to clan families. The same fundamental situation existed among the Incas, and, in fact, was as universal throughout all the New World as the concepts of private property in the Old. [Brandon (1999), pp. 97-99]

While differences in Haudenosaunee political traditions and practices exist from nation to nation, by and large the Haudenosaunee governance structure can be regarded as an example of extending *Gemeinschaft* methods of governance to governance of a republic too large for *Gemeinschaft* governance to work. It extends it into the deeper levels of the inverted pyramid schema discussed in earlier chapters. I will return to the idea of this schema of governance in relationship to the idea of justice later. Some scholars make the hypothesis that the Haudenosaunee provided a model for the eventual form of the U.S. government, and the 100th Congress has even legitimized this view in House Concurrent Resolution 331 of 1988.[8] There are some points of similarity between them, and it is true that such notables as Benjamin Franklin admired the Haudenosaunee for the military power of their Confederacy and its longevity. However, this similarity is superficial. Cultural differences between the two people were too great and the Americans missed the most vital elements of the social contract established by The Great Law of Peace.[9] The most fundamental difference is that the Americans instituted a system of *majority rule* instead of the consensus principle instituted by the Haudenosaunee.

In Europe there was a slow and uneven evolution in lawmaking from king's councils to the institution of parliamentary legislatures as they are known today. The earliest councils developed out of royal "courts," which bore no significant resemblance to modern law courts. A royal court was basically the extended household of a king and contained many people whose roles had nothing to do with lawmaking. Royal courts were a common feature of monarchies worldwide. Councils were originally merely nobles, clergy and trusted others from whom the king sought advice on matters such as taxation, war, religion, and the routine administration of his realm. The petty Scandinavian kingdoms of Denmark, Norway and other Germanic nations also had their extended royal households of relatives, bodyguards, and advisors but the lawmaking power of these "courts," like that of the king himself, was limited by the requirement for the king to obtain ratification by the Thing for his major policies, taxes, and decisions. The Thing did not lose this democracy-like power until the late eleventh century.

[8] https://www.senate.gov/reference/resources/pdf/hconres331.pdf
[9] https://archive.org/details/cu31924101928012/page/n3/mode/1up?view=theater

There is some debate over when and where lawmaking by a legislative body, to which the king was bound by oath to respect and obey, first appeared in Europe. UNESCO argues the birth of parliamentary government in Europe occurred in the year 1188 at the Cortes of León during the first year of the reign of seventeen-years-old King Alfonso IX of León in Spain[10]. Others traditionally regard parliamentary government as "descending" from the Great Council established in England by the Magna Carta in 1215. But, if so, this "descendant" doesn't recognizably appear until the so-called "Model Parliament" convened in 1285 by England's King Edward I. Present day Iceland regards its Althing (*Alþing*), first held in the year 930 and modeled after the Scandinavian Thing, as the world's oldest parliament.

Regardless of where one stands on this, there are some particular features that distinguish these early parliaments from a king's council. The first is the inclusion of selected representatives from the most numerous "free" caste in the social hierarchy (the so-called "commoners") along with members of the clergy and nobility in the role of lawmakers. Another is a pledge by the king to recognize and guarantee "civil rights" (more accurately, civil liberties) to the people in exchange for their support and allegiance. A third is the placement of limitations and restrictions on the king's ability to unilaterally rule without securing approval from the lawmaking body. The system of governance is said "to place the power of the law above the power of the king." It cannot be regarded as a "democracy" because the distinction between a "citizen" and a "resident" was ambiguous and "political power" in Weber's connotation [Bealey (1999), pg. 255] was unevenly distributed. It does, however, take a step towards fitting Madison's criteria for a republic [Hamilton *et al*. (1787-8), no. 39, pg. 210].

In colonial America, colonial assemblies were established by copying the model provided by the British 17th century Parliament-and-Crown institution of government and Britain's non-codified constitution. In the post-Revolutionary United States, these evolved into state legislatures and the U.S. Congress. Indeed, the American Revolution was largely a revolution against the British Parliament's power to legislate local American affairs. There are important differences between American legislative bodies and parliaments. Among the most obvious of these are the absence of a prime minister, abolition of monarchy, absence of a recognized class of aristocratic nobility, and explicit declaration of the sovereignty of the people in the American system [Hamilton *et al*. (1787-8), no. 37-39]. Americans for the most part regard these factors as refined improvements over European parliamentary schemas. A shortcoming of the American schema was and is neglect of the sort of thoughtful codification of a social contract comparable to the efforts that went into the French Declaration of the Rights of Man and the Citizen. This last is a legacy of the original British model.

## 3. The Legislative Function

To most Americans, the words "legislator" and "lawmaker" are regarded as synonymous terms. Indeed, *Black's Law Dictionary* defines them to be synonyms [Garner (2019)]. To legislate, it tells us, is "to make or enact laws." But what is the difference between "making" a law and "enacting" a law? It seems obvious that "to make" something implies this something did not exist before it was "made." It seems equally obvious that you cannot "enact" something that does not exist. Do legislators both *create* (design and craft) a given law *and* bring it into action (enact) it? Or are these two functions separable and, if so, *should* they be separated with the *authority* to design and craft laws entrusted to one group of authority figures and the *authority* to enact them entrusted to a different group of authority figures?

History tells us the lawmaking function and the law enacting function are certainly separable. Whether and to what extent they are separated, however, has seen considerable diversity. Bealey writes,

> Legislatures represent people in two different ways. First, the representative can transmit the hopes and fears of the area they represent to the other members of the legislature and to the executive. To what degree they are ruled by the opinions of their constituents is a matter of opinion. The

[10] https://web.archive.org/web/20160304070224/http://www.interun.ru/ss/interun/u/files/charterv_e.pdf

> representative who expressly obeys the instructions of the majority [of his constituents] is a delegate, while one who behaves in the opposite way is a 'trustee'. (These are the ideal type; in the real world representatives will be somewhere between these extremes.) Second, legislatures can represent a cross-section of the nation. They can be a 'mirror image' of their society. This ideal has never even been approximated to. . . .
>
> Legislatures still spend the bulk of their time dealing with proposals for laws. Yet the US Congress is exceptional in that it frequently draws up and passes proposals it has initiated. In most countries the proposals have been drafted by the executive and the parliament is a mere formalizing agent. For example, in Britain it has been calculated that 82 percent of all bills begin in government committees and 95 percent of these end up in the statute book. France is close to that position. Consequently one can assume that many democratic legislatures do not have much power. . . .
>
> Finally, parliaments are supposed to be national forums where a continuous debate about national issues takes place. Since the advent of television the whole nation can sometimes get a glimpse of them. Liberals at one time believed they would educate the public about the chief issues of the day. This ideal has not been realized. Democratic publics as a whole have little interest in the discussion, though much in the outcomes. [Bealey (1999), "legislatures"]

Mill was harshly critical of the legislative process in Britain's House of Commons as it was in his day:

> But it is equally true, though only of late slowly and barely beginning to be acknowledged, that a numerous assembly is as little fitted for the direct business of legislation as [it is] for administration. There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they [laws] can never be well made but by a committee of very few persons. A reason no less conclusive is, that every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law when made should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly. The incongruity of such a mode of legislating would strike all minds, were it not that our laws are already, as to form and construction, such a chaos that the confusion and contradiction seem incapable of being made greater by any addition to the mess.
>
> Yet even now, the utter confusion of our legislative machinery for its purpose is making itself practically felt every year more and more. The mere time necessarily occupied in getting through Bills renders Parliament more and more incapable of passing any except on detached and narrow points. If a Bill is prepared which even attempts to deal with the whole of any subject (and it is impossible to legislate properly on any part without having the whole present to the mind), it hangs over from session to session through sheer impossibility of finding time to dispose of it. . . .
>
> If that as yet considerable majority of the House of Commons who never desire to move an amendment or make a speech would no longer leave the whole regulation of business to those who do; if they would bethink themselves that better qualifications for legislation exist, and may be found if sought for, than a fluent tongue and the faculty of getting elected by a constituency; it would soon be recognized that, in legislation as well as administration, the only task to which a representative assembly can possibly be competent is not that of doing the work, but of causing it to be done; of determining to whom or to what sort of people it shall be confided, and giving or withhold national sanction when performed. Any government fit for a high state of civilization would have as one of its fundamental elements a small body, not exceeding in number the members of a Cabinet, who should act as a Commission of legislation, having for its appointed office to make the laws. [Mill (1861), pp. 56-58]

Mill writes with such obvious passion here that you would be wise to parse his points carefully, and to be on your guard against over-enthusiasms and extravagances in his reasoning. This is so even if some of his characterizations of the mid-nineteenth century British House of Commons seem disturbingly like that of


**Figure 3:** July 23, 2023, Gallup poll findings of Americans' job approval rating of the U.S. Congress. Respondents with "no opinion" made up only a few percent of the total responses. The rest were "disapprove."

the present-day United States Congress. Figure 3 illustrates the deep level of dissatisfaction Americans are expressing about today's Congress and, as the figure shows, this dissatisfaction spans decades[11].

Mill himself is not regarded as a philosopher of jurisprudence by anyone. His moral philosophy was that of utilitarianism, which is an ontology-centered species of consequentialism. He did have experience serving in the British Parliament (from 1865 to 1868) but we can note that this experience came *after* he had written the words quoted above. These can, therefore, be regarded as the opinions of a man who had himself never crafted any legislation at the time it was written. Even so, it is instructive to examine some of the points he offered.

Mill's first claim: *Lawmaking is a technical art and should be practiced only by technically skilled craftsmen specifically trained for it*. Certainly entrusting the practice of lawmaking to people specifically trained in such an art has not been the experience or approach of mankind for as far back as history and archaeology takes us. The Romans did undertake to develop a "legal science" and, while the personal metaphysics of the scholars engaged in this development necessarily enters into and influences their methods and findings, this does not mean that the Romans, or anyone else, developed a "philosophy of lawmaking." Blackburn tells us,

> The philosophy of law concerns itself with questions about the nature of law and the concepts that structure the practice of law. Its topics will include the definition of law, or, if strict definition proves unfruitful, descriptions or models of law that throw light on difficult and marginal cases, such as international law, primitive law, and immoral or unjust law. Concepts that require understanding include those of a legal right or duty, of legal action and the place of concepts such as intention or responsibility, and the nature of legal reasoning and adjudication. [Blackburn (1996), "law, philosophy of"]

The Stanford Encyclopedia of Philosophy tells us,

> Lawyers are typically interested in the question: What is *the law* on a particular issue? This is always a local question and answers to it are bound to differ according to the specific jurisdiction in which they are asked. In contrast, philosophy of law is interested in the general question: What is Law? This

[11] https://news.gallup.com/poll/1600/congress-public.aspx

> general question about the nature of law presupposes that law is a unique social-political phenomenon, with more or less universal characteristics that can be discerned through philosophical analysis. General jurisprudence, as this philosophical inquiry about the nature of law is called, is meant to be universal. It assumes that law possesses certain features, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist. However, even if there are such universal characteristics of law—which is controversial, as we will later discuss—the reasons for a philosophical interest in elucidating them remain to be explained. ["The Nature of Law", Aug. 22, 2019][12]

Does understanding "the nature of Law" equip a person to then *design* laws? One would like to think it might. But, on the other hand, this is also somewhat like asking "does understanding biology equip a person to practice medicine?" Knowledge of biology is certainly fundamental to practicing medicine but knowing the first is not the same as being able to practice the second. The first formal law school was established in Bologna in the 11th century for teaching canon and civil law, and the studies there were aimed at practicing law. But educating a lawyer and educating a "law engineer" are not at all the same thing. The former is trained and skilled in arguing *law as it is* but not in crafting *laws to be*. The latter does not seem to exist at all other than occasionally and by circumstances of accidental personal development. (When such a person is discovered he is sometimes acclaimed a "statesman.") Today there are general opinions about what characterizes a "good and effective" law, e.g.,

1. It must be known and understood by the people;
2. It must be stable and consistent;
3. It must fairly balance individual rights with community good;
4. It should apply equally to all;
5. It should be capable of being enforced;
6. It should be clear; and,
7. It must be able to adapt to change,

but these are merely empirical descriptions and moral opinions. They don't tell us *how* to make such laws. If you knew all seven by heart, do you think *you* would be ready to design laws to govern your city, state, or nation that your *neighbors* would all accept and follow?

As the nature of the legal profession adequately testifies, even what seems at first encounter to be a "simple" law can and does quickly become quite technically complex. For example, *Black's Law Dictionary* lists eleven different types of "murder" and fifteen different kinds of "homicide." It also lists nine kinds of "theft," five kinds of "robbery" and fourteen kinds of "larceny" - and these are the "simplest" and oldest types of crimes known to mankind. Other kinds of laws, dealing with taxes, civil matters, procedures, licensing, administrative matters, and so on, can be and often are even more complicated. A successful lawyer will typically agree that "the law is all technicalities." It is very difficult to seriously argue that lawmaking is *not* a technical art.

But should laws be crafted and written only by "law engineers"? It would seem to be common sense that if laws tend to be or become complicated and technical then perhaps there is a great amount of merit in this idea. It would seem to be at least desirable that "every provision of a law . . . be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law when made should be capable of fitting into a consistent whole with the previously existing laws". After all, you likely would not hire a plumber to fix the roofing of your house or a barber to remove your appendix. Does it then not make good sense to employ trained and skilled specialists to design and craft laws *if* there were a labor pool of artisans of this craft available for a Society to employ? That there is not isn't a

[12] https://plato.stanford.edu/entries/lawphil-nature/

sound argument against the merits of the idea; once there were no skilled auto mechanics either. When a trade has sufficient demand for its services, mankind has a way of coming up with the tradesmen.

Nonetheless, this is an idea that can be carried too far. There is a wise old saying that "a specialist is someone who knows more and more about less and less until eventually he knows everything about nothing." Similarly, "a generalist is someone who knows less and less about more and more until eventually he knows nothing about anything." The merit in having a separation between "lawmakers" and "law enactors" lies somewhere between these two extremes. Where this mean lies is something we have not yet sought, much less found.

Mill's second claim: *being elected to office does not necessarily mean the person elected is qualified to do the job*. It seems difficult to argue against this claim. Very few voters actually know the persons they vote for and know nothing about his or her work habits, whether or not he or she exhibits civic virtues, or in what topics the person is knowledgeable or ignorant. They vote instead for a stereotype and, if political parties are involved in the election process, this stereotype is heavily influenced by party propaganda. As Adams said,

> There is no individual personally known to an hundredth part of the nation. The voters, then, must be exposed to deception, from intrigues and maneuvers without number, that is to say, to all the chicanery, impostures, and falsehoods imaginable, with scarce a possibility of preferring real merit. [Adams (1790), pg. 357]

In representative government, every agency position - including those occupied by elected legislators - is a position of *public service*. The jobs exist to advance and serve the public's interests, not to provide a well-paying sinecure for the public *servants*. At the 1787 Constitutional Convention, as many delegates argued strongly *against* the idea that members of the U.S. House of Representatives be elected by popular vote as argued for it. They did so precisely on the grounds that the people wouldn't know the character or merits of those they were voting for [Farrand (1911), vol. I, pp. 48-50]. In the end, six states voted "aye" on popular election, two voted "nay" and two states were divided (neither aye nor nay) on the question. Delegate George Mason of Virginia gave what seems to have been the argument that carried the day for popular election of the House:

> Mr. Mason argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle in government. It was, so to speak, to be our House of Commons -- It ought to know and sympathize with every part of the community; and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it, which had in several instances, particularly in Virginia, different interests and views arising from difference in produce, of habits, etc. He admitted that we had been too democratic but was afraid we should run incautiously into the opposite extreme. We ought to attend to the rights of every class of the people. [*ibid*., pg. 49]

This principle of "knowing and sympathizing with every part of the community" is precisely what is lost when legislators owe their seats more to a political party than to their fidelity to serving the public, whose *local* interests they are supposed to be representing, and employ party propaganda to dupe voters into voting against their own interests. Against such machinations, "frequent elections" is a feeble shield.

As one can see, the legislative function has three principal elements: 1) recognizing the need for and purpose of new law; 2) designing and crafting new law; and 3) approval of new law. I use "law" here in a generalized connotation that includes the making of regulations by designated regulatory agencies. In all three elements, it is a *sine qua non* that the agents tasked with carrying them out possess the *Kraft* (that is, be competent) to *do* them in ways that serve the social compact with fidelity.

In a heterarchical organization of government functions, there would, of course, be more than one agency charged with legislation functions. As discussed earlier in this treatise, these would be distributed

among the Society's various chartered mini-Communities, and the scope and authority of each would be determined by the legitimate interests (under social contracts) of these mini-Communities. Mini-Community *special* interests would, of course, be under the jurisdiction of the mini-Community. *Broader* interests, which are those common among two or more mini-Communities, would fall under the jurisdiction of the civil association of those mini-Communities (the larger and composite mini-Community). *General* common interests - those pertaining to the entirely of the civil Community at large - would be under the jurisdiction of the Society's general government.

### 4. Prescriptive, Proscriptive, and Exculpatory Laws

Laws can be generally said to either identify a civic Duty of a member or members of the civil Community or else to require the members of that Community to alienate specific natural liberties. An example of the first kind of law in the United States is provided by 10 U.S. Code Chapter 12 § 246:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 42, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> (b) The classes of the militia are --
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia. [10 USC Ch. 12 §246]

This law requires every adult male citizen of the U.S. who is physically and mentally capable of serving in the U.S. Armed Forces to commit himself (as part of the *quid pro quo* of U.S. citizenship) to agreeing to so serve if the general government of the United States calls upon him to do so. That calling is called "selective service" or "conscription" or, more informally, "the draft." The term "unorganized militia" merely means those male citizens who are not *presently* serving in the Armed Forces or enlisted in the National Guard or the Naval Militia. At times when "the draft" is not active, many young American males are not even aware of the existence of the unorganized militia and learn about it when they are required to register for selective service upon turning 18 years of age [50 USC Ch. 49 §3802]. But every adult male American citizen is, or was at one time, a member of the unorganized militia. It is part of the U.S. social contract[13]. I call laws such as this example, which specify particular civic Duties as part of a social contract, *prescriptive laws*.

One important subclass of prescriptive laws is the subclass of laws that lay down procedures, standards and administrative processes organizations must follow and meet in carrying out their operations and functions. Some of these may be mandated by government legislation, others by "company procedures" in, e.g., a private mini-Community such as a commercial business Enterprise. Often these go by such names as procedures, rules, guidelines or policies. For example, the FBI has an "FBI Ethics and Integrity Program Policy Directive Policy Guide" that describes the FBI ethics and integrity program and the standards that Bureau employees are expected to meet.

The second kind of laws, which I call *proscriptive law*, is the kind most people most often think about when they think about "laws." These are the kind that prohibit specific actions and make individuals culpable if they commit them. Examples run the gamut from parking restrictions and speed limits to serious felonies such as murder. Laws of this kind place restrictions upon, or outright prohibition of, natural liberties people are capable of exercising but are proscribed from actually doing. They require individuals to alienate these natural liberties and confine their actions to unalienated civil liberties.

[13] There are a number of private anti-government paramilitary groups in the U.S. who call themselves "militias" but these groups are not part of the unorganized militia of the United States and, deontologically, constitute criminal or outlaw Toynbee proletariats within the American body politic.

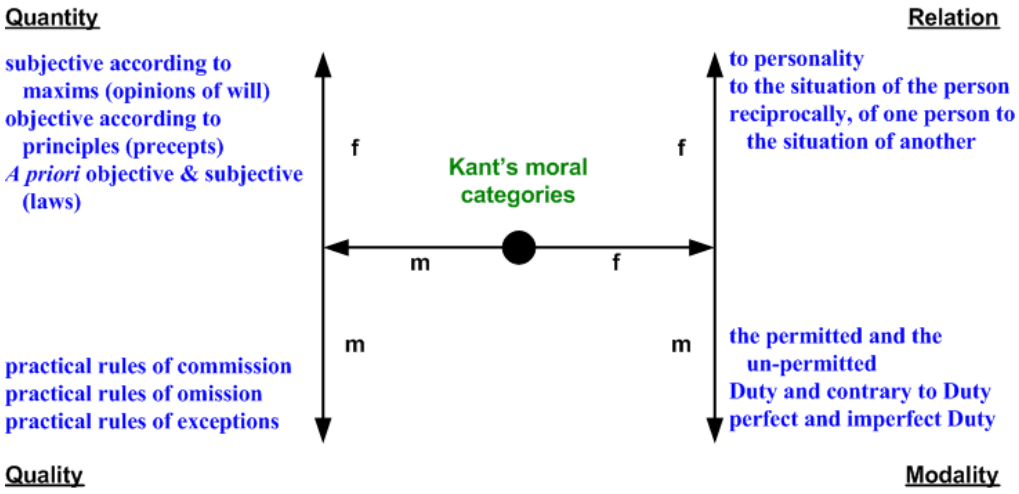


**Figure 4:** Kant's moral categories.

The terms prescriptive and proscriptive laws divide the characterization of laws into logical opposites. However, synthesis of laws requires a third type of law function from their synthesis, i.e., prescriptive law regarded as proscriptive law, e.g., (do *x*) + (do-not *x*) → (do not-*x*=*y*). I call this kind of law *exculpatory law*. This third kind of law makes what would normally be an unlawful action (do-not *x*) into a lawful action (do not-*x*) under some specified circumstances. For example, *Black's Law Dictionary* defines "homicide" as the killing of one person by another person. However, it draws a distinction between "criminal homicide" (homicide prohibited and punishable by law) and "justifiable homicide" (the killing of another in self-defense when faced with the danger of death or serious bodily injury). 10 USC Ch. 12 §246 subtly includes a clause, "able-bodied males at least 17 years of age and . . . under 45 years of age," that is an exculpatory clause excusing men who are physically or mentally disabled, or outside of the age range, from being called upon to fulfill the civic Duty of serving in the Armed Forces of the United States during times when the draft is activated[14]. The proscription in this case is a proscription on what the U.S. government is allowed to do in conscripting citizens for the armed forces. Exculpatory law is one of the factors making "lawmaking" a technical and challenging craft. (See footnote 14 below).

## 5. Concordances with Moral Categories

Prescriptive, proscriptive, and exculpatory laws mesh well with the three functions of Quality in Kant's moral categories (figure 4). The concordances are, I think, clear enough to convey these ideas. This being so, it is interesting to ask if there are other concordances between the remaining three heads of figure 4 and characterizations of laws. One that can be considered is a concordance between Kant's first function of Quantity ("opinions of will") and what Thoreau called "the rule of expediency":

> But a government in which the majority rule in all cases cannot be based on justice, even so far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong but conscience? - in which majorities decide only those questions to which the rule of expediency is applicable? [Thoreau (1849), pg. 2]

[14] Interestingly, 10 USC §904a - Art. 104a makes it unlawful ("fraud"), and punishable by court martial, for an underage person to lie about his age in order to enlist in the armed forces. The two laws placed in juxtaposition have the interesting effect of excusing a person from what is a civic Duty for most other people *and*, at the same time, *requiring* him to alienate his natural liberty to serve his country (at least until he reaches 18 years of age). This example recalls Mill's point about laws being framed "with the most accurate and long-sighted perception of its effect on all the other provisions." Is it really any wonder why general agreement on "what makes good and effective law?" is so elusive?

For example, does it really matter if automobiles are driven on the right side of the road rather than on the left side so long as everyone drives on the *same* side? The choice is one of expedience and no one really cares if the law says "right" or "left" so long as *everyone* conforms to the same convention for the sake of public safety. I offer for your consideration the following: the only practical reason Societies with highly complicated legal codes function successfully is because *most of its citizens don't care about most of its laws and so experience no feeling of injustice when they submit to those laws.* Consensus does not require active agreement; it only requires active non-disagreement. A concordance with Kant's first moral category of Quantity is appropriately called a *law of expedience*.

What about Kant's second function of Quantity ("precepts")? In Kant's deontological theory, a precept is a theoretically-hypothetical imperative a person holds-to-be-binding for *every* person according to his situation or condition. The imperative has an "if *this* then *that*" form and an individual human being's precepts (in the person's manifold of concepts) are products of that person's judgments of taste[15]. Obviously however, a body politic has no inner faculty for judgments of taste because it is a mathematical Object with epistemological significance but no ontological significance. In what way, then, can we speak of a concordance between "precepts" in Kant's moral categories and "laws" in a social or legal context?

This question is one dealt with at some length in Wells (2012), chap. 12, pp. 433-445. The discussion there gets rather technical and delves deeply into Kant's theory of anthropology [Kant (*c*. 1773-79)] but its outcome is summarized (in part) by saying that human beings exhibit in their behaviors a capacity for connecting themselves with the rest of the world through a power of bringing order to their minds by means of judgments of taste. This power is called his *Anordnungskräfte* [*op cit*., Wells (2012)]. He not only "makes himself fit into the world around him" but, also, tries to "make that world fit in with him" in regard to judgments of "right vs. wrong" and "good vs. evil" as much as possible. Societies as such could not exist without this power to accommodate one's Self to the world and assimilate the world to oneself. This power is the source of those objective hypothetical imperatives Kant calls precepts. In a technical sense, all *just* codified laws in legal and social contexts are recordings at a point in time of an equilibrium reached by a consensus of a civil association of people. Recalling Piaget's stages of rule development (figure 5), the concordance between Kant's moral category of precepts and laws can be called *codified legal precepts*.

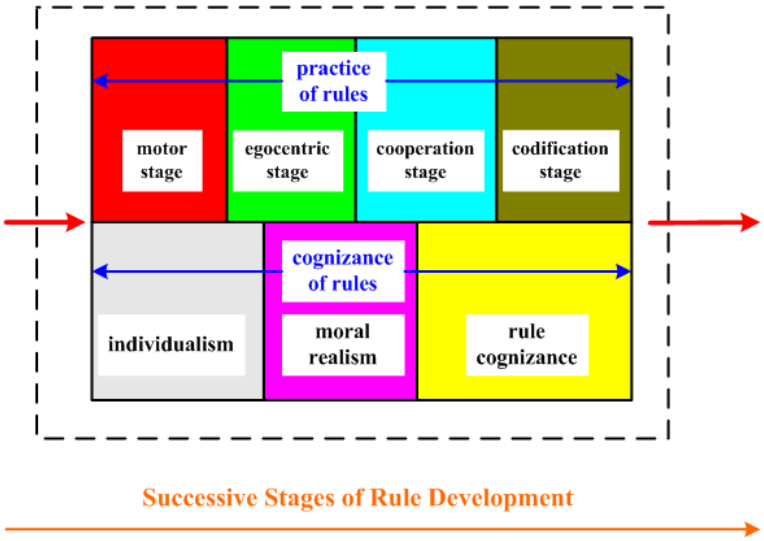


**Figure 5:** Piaget's stages of rule development [Piaget (1932)].

[15] In Critical terminology, taste is the aesthetical capacity for judgmentation of an object or mode of representation through a subjective satisfaction or dissatisfaction in which there is no objective interest. Taste is a selection of that which is generally engaging according to the laws of sensibility.

But no legal code is static and eternal. This brings us to Kant's third category of Quantity. He called this one "*a priori* objective as well as subjective principles of freedom (laws)" [Kant (1788), 5: 66]. He uses the word "laws" (*Gesetze*) here in a connotation more alike to the notion of deity-mandated "natural laws" than to the more mundane idea of manmade legislation[16]. This function of Quantity refers to theoretically categorical imperatives that a person holds-to-be-binding on everyone *unconditionally* and independently of actual experience. The person has a subjectively sufficient *feeling* a "law" seems "right" and regards the concept with a Modality of "knowing" it is "right" (the apodictic logical function of judgment). However, as Kant says elsewhere, the universality of this kind of judgment can only be attributed to what he called its "law-giving form" - in other words, these *Gesetze* are always and only *noumenal* Ideas, i.e., they all represent *mathematical*, not real, Objects having epistemological significance but lacking ontological significance.

There has perhaps never been a manmade law that has been universally approved by everyone. One might think a law prohibiting one human being from killing another could aspire to this stature if any law could. But even a casual browse through *Black's Law Dictionary* turns up so many conditions and nuances that go into determining "what is murder?" and what is-not that it quickly demonstrates "murder" does not meet the factor of being *unconditional* Kant places on *Gesetze*. *Theoretical* categorical imperatives are concepts, placed and connected in the manifold of concepts by acts of cognizance that owe their point of origin to practical *hypothetical* imperatives in the manifold of rules.

What concordance, then, could there be between the third moral category of Quantity and lawmaking? To figure out this puzzle, let us dissect Kant's lengthy name for this function. First, we can note that his Objects here are not laws in any legal sense but, rather, are *principles* (of human freedom). Manmade laws are all based on principles of some kind such as, e.g., "you should not murder", "you should not steal", "you should not tell lies" and so on. These are principles human beings discover that make civil Communities possible, inhibit the formation of Toynbee proletariats, and, generally, make tranquil co-*Existenz* with other human beings possible. Such principles are the starting points for ideas of civil rights. Santayana wrote,

> Free society differs from that which is natural and legal precisely in this, that it does not cultivate relations which in the last analysis are experienced and material, but turns exclusively to unanimities in meanings, to collaborations in an ideal world. [Santayana (1905 b), pg. 146]

Historically, ideas of, and controversies over, "rights" have often arisen when some significantly large fraction of a Society has risen up in protest over actions taken by its authority figures (e.g., by a king) that the protesting faction feels "wrongs" them in some way. "Rights" are recognized and codified if and when their grievances are redressed *ad hoc* to their satisfaction. Not-infrequently such "rights" might be expanded by non-rigorous arguments to claim some broader or more generalized scope than an original grievance by itself might have called for - an example of extravagance in reasoning. "Civil rights" were an important topic of discussion and theorizing during the European Enlightenment. These debates led to the view that "rights" are fundamental normative rules about what is allowed of people or owed to people according to some legal system, social convention, or ethical theory. Western Societies tend to take this point of view for "what 'rights' are."

On the other hand, some philosophers (such as Thomas Hobbes) saw "rights" in terms of a person's ability to do something. Stripped down to its foundation, Hobbes' view can, somewhat unkindly, be described as "if you *can* do something then you have the *right* to do it." Not surprisingly, such a view leads by a rather direct path to the thesis "might makes right." Rousseau rather vehemently took exception

[16] The idea of deity-decreed "natural law" was widespread and very popular among the 18th century Enlightenment philosophers. It was, of course, always extremely popular with the Christian churchmen and is not-unpopular among them today. Kant stopped short of endorsing this popular idea in *Critique of Practical Judgment* but, given his over-all theocentric orientation noted by Palmquist [Palmquist (2000), pp. 7-13], it seems likely he had it in mind here.

to this notion:

> Suppose for a moment that this so-called "*right*" exists. I maintain that the sole result is a mass of inexplicable nonsense. For, if force creates right, the effect changes with the cause; every force that is greater than the first succeeds to its right. As soon as it is possible to disobey with impunity, disobedience is legitimate; and, the strongest always being in the right, the only thing that matters is to act so as to become the strongest. But what kind of right is that which perishes when force fails? If we must obey perforce, there is no need to obey because we ought; and if we are not forced to obey, we are under no obligation to do so. Clearly the word "right" adds nothing to force; in this connection, it means absolutely nothing. [Rousseau (1762), pg. 5]

Let us take a closer look at the notion that "rights" are "what is allowed of people or owed to people." The first question that comes to mind here is, "allowed by who?" This question refrains the last line of verse in the Sandburg poem quoted above at the end of section 1. In the United States, it has come about that the "who" here are "the people's representatives" - i.e., Congress and the state legislatures. Such is the presupposition on which the Supreme Court's majority members subtly grounded the *Dobbs* decision. This, however, is a principle of *rulership* that easily perverts the fundamental principle of the Sovereignty of the U.S. body politic. At the same time, this presupposition also answers the second question, "owed *by who* to the people?" and the answer here is "the lawmakers." Historically, parliaments have been quick to demand "rights" *for parliament* which limit the "rights" of kings, less quick to do so when members of the public voice grievances over acts of parliaments[17]. Rulership would seem to be an addiction to which many authority figures in government are susceptible.

There is in all this a basic contradiction with the fundamental condition that grounds *every* social compact. A person seeks membership in a civil association on the condition and understanding that the association will "defend and protect with the whole common force the person and goods of each associate" in such a way that each associate "while uniting himself with all may still obey himself alone and remain as free" as he was prior to joining it. The association, in its turn, requires of each member that he "put his person and all his power in common under the supreme direction of the general will." Observe keenly that each citizen alienates *only* those liberties, and therefore surrenders his *right* to exercise them, as the "general will" of the association decides.

This, of course, raises the problem of how decisions of "the general will" are *instituted* to the highest level of importance in a civil Community. But nothing in the fundamental condition or the fundamental terms of a social contract automatically surrenders *any* specific nature liberty or "right" to the Community's authority figures. A civil right is an intangible something *possessed by* every citizen of that Community and the starting point for any *just* Constitution of government lies not with that government's *granting* of civil rights to the citizens but, rather, only empowers government *to petition the citizens* to alienate particular and specific natural liberties. Civil rights are not what is specifically "allowed of citizens." They are what is "owed to each citizen" by all other citizens. Civil liberties are all liberties *not withdrawn by acts of just determinations of the general will*. The deontologically correct question is *never* "do the people have this or that civil right?"; it is "has this or that specific claim of a liberty *been lawfully alienated* by a just act of determination of the general will?".

Concordance with the theoretically categorical imperative function in Kant's moral categories is found only in explicit codifications of justly *alienated* claims to liberties (codified non-liberties) that have been sanctioned by means of obtaining the *consensus* of the citizens. Interestingly, this is the same conclusion of reasoning reached by Hobbes:

> And therefore, so long as this natural Right of every man to every thing endures, there can be no security to any man (how strong or wise he may be) of living out the time which Nature ordinarily allows men to live. And, consequently, it is a precept, or general rule of Reason, *That every man*

[17] For an example, see the British Bill of Rights of 1689.

> *ought to endeavor peace as far as he has hope of obtaining it, and when he cannot obtain it, that he seek and use all helps and advantages of war*. . . . From this Fundamental Law of Nature, by which men are commanded to endeavor Peace, is derived this second Law: *That a man be willing, when others are so too, as far-forth, as for Peace and defense of himself he shall think it necessary, to lay down this right to all things and be content with so much Liberty against other men as he would allow other men against himself*. [Hobbes (1651), pg. 80]

There is, of course, a fundamental challenge inherent to this. What happens when (not if) people cannot come to agreement with one another to either "lay down" or retain some liberty in particular? The issue is one of deciding what is or is-not a *civil* liberty. Here we find all the key ingredients for what Kant called an antinomy of Reason. However, the *statement* of the issue also contains, albeit subtly, the principle for its just resolution, namely *limitation of the scope of a liberty* rather than an absolute retention of it or an absolute alienation of it. There are always three *momenta* of Quality in making categorical logical propositions: (1) *x* is *y*; (2) *x* is-not *y*; and (3) *x* is not-*y*. The third is the *momentum* of limitation *on the scope of the predicate y*. The first two are affirmations about the *Existenz* of the predication's subject, *x*.

A fit current example in U.S. political controversy is the issue of "gun control." We find three "camps" here: those who demand total and unlimited liberty to "keep and bear arms"; those who demand total alienation of any civil liberty to keep and carry a gun; and those who approve of a *limited* civil liberty to "keep and bear arms". There is no just reconciliation between camps (1) and (2); this means that if neither will lay down its claim, then the civil Community of the United States is fractured and the consequence is *civil war* over the issue. With the position taken by camp (3) the civil union can be maintained, and civil war averted, by the crafting of well-designed laws of the exculpatory type. What the first two parties must decide is: Are their interests better served by the absolute but contradictory positions both take, or are their interests better served by adopting the position of camp (3)? What *price* are the antagonists willing pay to remain U.S. *citizens* rather than to *make themselves* outlaws *with no just claims to* ***any*** *civil rights at all*?

Figure 6 provides the mathematical summary of these six basic synthetical functions in the composition of laws, i.e., for lawmaking. The matter terms (m) pertain to the composition of laws themselves. The form terms (f) pertain to relationships between the lawmaking *process* and human nature of civic morality in lawmaking. Here the word "morality" is to be taken in its deontological context, i.e., morality is the concept of a *system* of moral laws inasmuch as "morality" pertains to reciprocal Duties between members of a civil Community under the convention of a social compact. From the practical Standpoint of Critical Epistemology, "morals" (*Sitten*) means "a person's use of his freedom according to constituted laws of Reason" and this idea is grounded solely in social compacts rather than by religion in any way.

Once there was a time in the United States where a person's "moral character" was as or even more important than his technical skills as a qualification for holding any office of public trust. Discovery of morally scandalous behavior on the part of a politician or even of an officer of a commercial corporation was regarded as a sufficient ground for disqualifying him and removing him from his office. It was enough to get a student expelled from college or a judge removed from the bench.

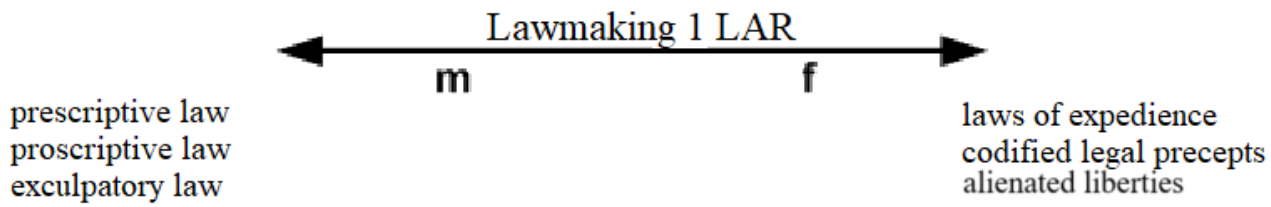


**Figure 6:** Mathematical functions of synthesis for the composition of laws (lawmaking).

Unfortunately, the public moral codes of those times were ontology-centered and predicated on different standards (the principal division being along the line of consequentialist ethics vs. virtue ethics). All of them were also so closely identified with various religious sects that people came to think the very idea of "moral conduct" was too much of an issue between clashing religious faiths to be allowed to play any part in matters of law or public stewardship. As Santayana observed,

> The moment, however, that society emerges from the early pressure of the environment and is tolerably secure against primary evils, morality grows lax. The forms that life will farther assume are not to be imposed by moral authority, but are determined by the genius of the race, the opportunities of the moment, and the tastes and resources of individual minds. The reign of duty gives place to the reign of freedom, and the law and the covenant to the dispensation of grace. [Santayana (1896), pg. 17]

Understand that he is not *endorsing* this development; Santayana is merely noting that this phenomenon of human nature does happen and that it has happened quite often.

It is more than adequately documented by history that religion and churches have played important roles in teaching and promoting civic morality for millennia and, to some extent, still do so today. It is also a documented fact that, like other human institutions, they have occasionally, through extravagances in religious reasoning, taught or promoted immoral lessons; the Salem witchcraft trials of the 17th century were an example of the latter. But, again, the fact is that deontological morality is not grounded in religious faith and, indeed, religious morality has its original source from the human nature of deontological morality [Wells (2012), chap. 6].

People tend to forget the millennia of good examples provided by religious institutions and authority figures; but they remember like elephants bad examples taught by religious pogroms, persecutions, and intolerances. The latter chip away at the moral authority of religious leaders and teachers, whose frequent resorts to threats of divine retribution do nothing to prevent this gradual loss of authority and, indeed, can accelerate it. If I follow their teachings because I don't want to go to hell then I am acting out of a private Duty-to-myself, not a reciprocal Duty to others, and my action is merely an act of prudence and therefore contains no trace of civic morality. "If we must obey perforce, then there is no need to obey because we ought."

Civic morality and justice are so closely intertwined that I am sometimes amazed when I meet or interact with people who seem to not understand this relationship is inseverable or who seem to see no harm to Society if occasionally morality and justice are ignored in favor of immediate impulse or ambition. Do we live in a time of moral decline or is such an impression a subjective illusion that the past was better than the present? A recent (7 June, 2023) study by Mastroianni & Gilbert concludes that the latter is the case. I personally think their conclusion is plausible although I am not completely convinced it is established beyond reasonable doubt. Certainly there has been rising academic interest in the topic of moral leadership in the past few decades. Noted jurist and scholar Deborah Rhode wrote,

> Moral leadership has always been with us, but only recently has the concept attracted systematic attention. . . . However, not until the latter half of the twentieth century did leadership or business ethics emerge as distinct fields of study, and attention to their overlap has been intermittent and incomplete. In the United States, it took a succession of scandals to launch moral leadership as an area of research in its own right. Price fixing in the 1950s, defense contracting in the 1960s, Watergate and securities fraud in the 1970s, savings and loans and political abuses in the 1980s, and massive moral meltdown in the corporate sector in the late 1990s and early 2000s underscored the need for greater attention to ethics. [Rhode (2006), pg. 1]

To Rhode's recitation I will add the shocking disintegration of civic morality and abandonment of all pretenses of ethics in the Republican Party since the year 2016. Yet even this is not new; the same thing happened in Germany's Weimar Republic in 1933 [Shirer (1960), pp. 150-187].

To again quote Rousseau,

> 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. [Rousseau (1762), pg. 19]

## 6. Concordances with the Moral Categories of Relation

In section 5 we examined concordances between lawmaking and Kant's moral categories with respect to Quality and Quantity. What about the other two headings, Relation and Modality, in Kant's 2LAR? Here we do not find concordances between them and *lawmaking*; rather, as I am about to discuss, concordance is found with respect to justice *institution*. More specifically, we look for it in functions serving to govern a system of justice.

Let us begin with Kant's moral categories of Relation. The moral category of Relation to personality, in the context of an individual, is the *nexus* of tenets of action (in his manifold of rules) pertaining to his categorical interest in perfecting this manifold in absolute coherence with the practical categorical imperative to seek and maintain a mental state of equilibrium. This interest is what Critical theory calls Self-respect. In the context of civil associations, this becomes the tenets of the body politic's terms and conditions for social contracting to form the association. The concordance follows immediately from this: ***social contract mandates***. These are the categorical propositions without which no civil association can survive. In any institution of a *justice system*, a required part of its governmental function is a function for examining and evaluating laws with respect to and in compliance with the Community's social contract mandates.

This function directly pertains to maintaining domestic tranquility. It requires the establishment of mechanisms for constant surveillance, assessment, and updating of the effects of existing laws and policies, and for assessing and understanding evolving needs for new policies and laws. Typically in most representative governments, this task is implicitly left to its parliament, congress, or legislatures; however this "branch" of government has historically demonstrated wholly inadequate attention to this function. They tend to rely almost entirely on the activities of lobbyists or mass mob demonstrations and protests before they will undertake any assessment or updating of laws, regulations, or policies. Put another way, the traditional approach ignores inadequacies and perpetrations of injustice until government agents are in some way *forced* to deal with them. This is a wholly reactionary character of representative government.

In *The Idea of the American Republic* I proposed two mechanisms that, taken jointly, are aimed at the institution of the social contract mandate [Wells (2010), chap. 6]. The first effects a process called the Petition of Right; the second establishes a system of Boards of Right to receive and judge the legitimacy and merit of Petitions of Right. The inspiration for this reform, and its naming, comes from English law's "petition of right," but what was proposed in Wells (2010) is not the same as this English law. The purpose of these mechanisms is to insure that governing agencies, and their agents, heed the grievances of citizens and act to redress those found to be legitimate (under the social contract) with both swiftness and justice (the negating of anything that is unjust). Thoreau asked,

> Why is [government] not more apt to anticipate and provide for reform? Why does it not cherish its wise minority? Why does it cry and resist before it is hurt? Why does it not encourage its citizens to be on the alert to point out its faults and *do* better than it would have them? [Thoreau (1849), pg. 7]

Good government must be capable of self-improvement, and these mechanisms aim at proactively providing the capability for it to do so. To do this, Boards of Right must be made superior in authority to legislatures (and regulatory agencies). The latter are, or are intended to be at any rate, representatives of

"the people" *but so are Boards of Right* in matters of legitimate grievances and moral transgressions of the social contract. Note, too, that Boards is deliberately expressed in the plural; they must be part of the governance of every chartered mini-Community in a heterarchical organization of Society. For fuller discussion of the details in the ideas of Petitions of Right and Boards of Right, I refer you to the treatment provided in Wells (2010), chap. 6.

The second moral category of Relation is Relation to the situation of the person. This one pertains to tenets of action by which a person deals with external contingencies that affect his personal wellbeing. In the context of a body politic in a civil Community with a clear understanding of its social contract, the concordance we seek seems not too difficult to find. If the laws are just then they correspond to tenets of action and the governmental function is then the function of ***law enforcement***. A just law is one that is not-incongruent with the social contract *as the members of the civil Community understand it*.

But from this caveat that the laws being enforced must be just - which means they have the consensus of the civil Community's deontological citizens - we also get a major social challenge brought about by the phenomenon of mini-Communities. From the time as a child when each of us acquired extrafamilial play-mates, every person is a member of *more than one* mini-Community. Most of these are not definable in geographic terms but, rather, nucleate around interests common to the members but not in common with members of other mini-Communities. Figure 7 illustrates some different kinds of mini-Communities in which an individual might hold membership. A mini-Community is practically defined by who its members are and what their set of congruent common interests may be.

Mini-Communities do not live in isolation from one another for the simple reason that their members all belong to multiple different mini-Communities. Their lack of isolation from one another can and does lead to a host of social issues and problems [Wells (2014)]. These challenges have gone unrecognized by theorists although, of course, tyrants and autocrats have instinctively been aware of them and, usually, deal with these challenges through the simple expedient of subjugation by force. I will say, additionally, that popular representative governments usually behave in similar ways by the tyranny of rulership.

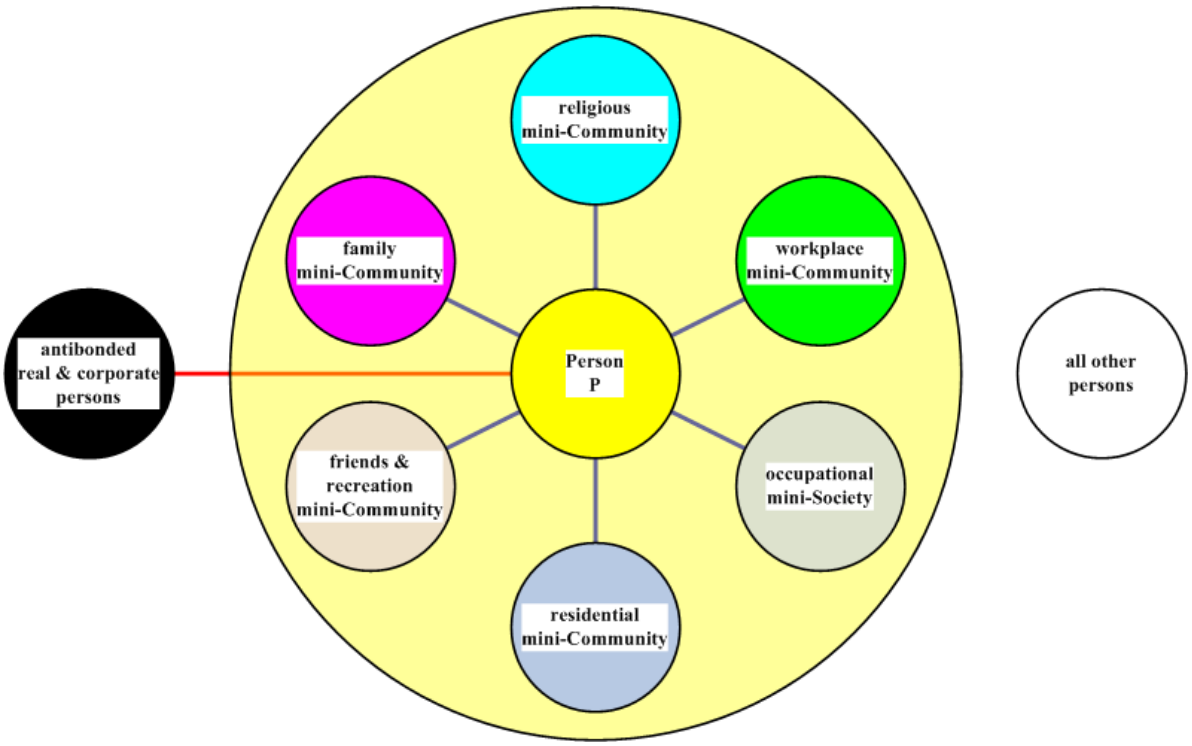


**Figure 7:** An example of some of the kinds of mini-Communities a person P might have civil membership in.

Some mini-Communities have or establish special interests that conflict with the special interests of other mini-Communities. Differences in special interests between mini-Communities do not create a problem or issue when the members of one mini-Community, A, are indifferent to a special interest of a second mini-Community, B. To use a somewhat whimsical example, the commissioners of Ada County, Idaho, recently passed a county ordinance that, among other things, makes it unlawful "for any person to harbor, keep, maintain or possess" an elephant[18]. So far, no one in Ada County and no mini-Community group inside or outside of Ada County has protested this ordinance as an unjust restriction of civil liberty. The only times I've heard anyone even bring it up have been in ironic political jokes about the county commissioners such as, "Darn! And I was going to get my kid an elephant for his birthday!"

Now for the sake of argument, let us suppose that the Florida Legislature for some quirky reason of its own were to pass a law stating "the right of the people to keep elephants shall not be infringed." Let us further suppose that some special interest mini-Community - let us call this fictitious group "Citizens for Elephant Freedom" - wanted to make this a national law, as a means of restoring the world's elephant population, and decided to press for Ada County to repeal its "anti-elephant" ordinance. I think my neighbors' reaction to them would likely be, "Mind your own business" (possibly phrased less politely than this). I doubt if the commissioners of Ada County would give them the time of day (although the Idaho Legislature might) and, if they pursued the issue, it would end up in court. Lawyers for Ada County would argue that private elephant ownership creates a nuisance for neighbors, poses risks to the public safety and, therefore, the ordinance should be allowed to stand.

A silly example? Perhaps. It is less silly when special interest mini-Communities argue municipalities, local counties, and private business establishments should be prohibited from passing and enforcing ordinances restricting possession and ownership of firearms or restricting where and when firearms are allowed. It doesn't surprise anyone that firearms manufacturers and dealers have a special interest in firearms ownership in as large a segment of the population of the United States as possible. But I will also note that the unorganized militia of the United States is no longer expected to bring its own muskets when it is called upon to defend the country. How much at ease would you be if your next door neighbor felt it was "his right" to play Wyatt Earp whenever he wanted to? How much confidence would you have in your elected state legislators to pass only just laws if the gallery of the statehouse is packed with gun-toting members of some special interest group?

This brings us to the third governmental function of concordance with Kant's third moral category of Relation: Relation reciprocally of one person to the situation of another. This moral category pertains to tenets held-to-be-binding as matters of *obligatione externa* (external legal liability) in the Critical context of *obligatione*. Such tenets pertain *especially* to those mores, folkways, and laws arising immediately from terms and conditions of a social contract [Wells (2012), chap. 6, pg. 182]. This is a deeper foundation of *obligatione* than found in most manmade acts of legislation (e.g., "it is unlawful to keep an elephant"). Most ordinary laws are *derived from* terms and conditions of the social contract; but the contract itself, as I said earlier, stands as a "meta-law" superior to all these derivative manmade laws.

As has likely become apparent by now, the issues and challenges embedded in the complex situations of civic morality tend not to be simple, easy to understand or judge, and require competent adjudication and, not-infrequently, reevaluation as knowledge grows and circumstances change. The concordance function tied to the third moral category of Relation can be properly called ***justice administration***. I do not mean, by this terminology, "administration" in the direct context of its use in *Black's Law Dictionary* [Garner (2019)], where it is used to denote executive functions of government. I use it instead in the broader connotation of "the act or process of administering," and understand the verb *to administer* in the connotation of "to manage or supervise the execution, use, or conduct of" in a manner congruent with the second definition of "administer" in *Black's*, i.e., "to provide or arrange something officially."

[18] I'm not making this up. It is Ada County ordinance no. 945, sec. 5-7-4. The ordinance provides an exemption for the Boise Zoo, which is within Ada County, although the Zoo presently does not have any elephants.

This "something provided" is *Sovereignty by consent of the citizens* and *the proscription of rulership in government*. Here it must be noted that "citizen sovereignty" is not at all the same thing as "direct democracy" in, e.g., the Athenian context of "democracy" because democracy's fundamental premise is "majority rule" in contradiction with proscription of rulership[19]. Rousseau's concept of "the Sovereign" is the idea of a *noumenal* Object and, in fact, *The Social Contract* was vague in its explanation of the term:

> The public person so formed by the union of all other persons formerly took the name of *city*, and now takes that of *Republic* or *body politic*; it is called by its members *State* when passive, *Sovereign* when active, and *Power* when compared with others like itself. Those who are associated in it take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign power, and *subjects* as being under the laws of the State. But these terms are often confused and taken for one another; it is enough to know how to distinguish them when they are being used with precision. [Rousseau (1762), pp. 14-15]

Rousseau never did clearly explain "how to know how to distinguish them when they are being used with precision." Bealey describes "sovereignty" as "a claim to authority" but does not provide an adequate description of how he defines "authority" in this context [Bealey (1999), "sovereignty"]. Of "sovereignty of the people" he says:

> The intellectual origins of popular sovereignty are derived from the French Declaration of the Rights of Man, 1789, Clause III: 'the nation is essentially the source of all sovereignty'. This was soon changed by the Revolution to 'the people . . .'. In view of the juristic and political conceptions of sovereignty it can only have validity if the emphasis is put on 'source'. Then it has a strong emotive appeal, though what sovereignty the people want expressed in their name will always be a problem for politicians. [Bealey (1999), "sovereignty of the people"]

With the American Revolution coming as it did before the French Revolution (and with Rousseau being relatively little known compared to Montesquieu in America), American political writings and thought laid no stress on "sovereignty" - to them "the sovereign" was King George - and instead wrote and spoke of "the consent of the governed" [Declaration of Independence (1776)]. It is *this* context by which the phrase "Sovereignty by consent of the citizens" is meant here and, in *practical* terms, means demanding that all acts and actions by government authority figures be congruent with the social contracts in effect in their spheres of jurisdiction and expectations for authority.

The governmental function of justice administration is a function that includes agents and agencies for the aforementioned and discussed functions for Petitions of Right and Boards of Right. It also takes in the functions of courts of law and *supervises the conduct of* agents and agencies of lawmaking and enforcement so far as that conduct pertains to their fidelity to congruence with those social compacts that are within their jurisdictional sphere[20]. Its function also encompasses Boards of Merit and writs of mandamus (both of which will be discussed later in this treatise).

I mentioned previously the delegates to the 1787 Constitutional Convention in Philadelphia exhibited a degree of confusion between the idea of agents of government and that of rulers. This is reflected to a degree in the U.S. Constitution by their ambivalence over the judiciary branch's ability to overturn acts of legislation by Congress. Hamilton seems to make it almost a point of reassurance, if not pride, that the Supreme Court would be "the weakest of the three branches" of the general government. The concern was centered, more or less, on the concept of Congress as "the people's representatives" and apprehension about Supreme Court Justices having the power to gainsay the acts of these "people's representatives." He

[19] And, as Mill pointed out, "democracy" does not even achieve rule by the majority. Instead, it achieves rulership by "a majority of a majority, who may be and often are a minority of the whole" [Mill (1861), pp. 76-77]. That his analysis of this is correct is amply demonstrated by the current U.S. 118th Congress (1st session).

[20] By "jurisdictional sphere" I mean the regulatory or adjudicative power of a government administrative agency over a subject matter or matters [Garner (2019), "agency jurisdiction"].

wrote,

> It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature must now and then happen; but they can never be so extensive as to amount to an inconvenience or in any sensible degree to effect the order of the political system. This may be conferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. [Hamilton *et al*. (1787-8), no. 81, pg. 447]

If "usurpation" of "legislative authority" is such a primal concern, why have a judiciary branch at all? The answer Hamilton gave was,

> By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. [*ibid*., no. 78, pg. 429]

This way of defining the court's role in government is where the idea comes from that courts should judge the *letter* of the law and leave interpreting the *spirit* of the law to the legislators. If government was a basketball game, the courts were to be the referees who cried "Foul!" when legislators violated specific proscriptions placed upon their lawmaking power. That which was not a specific proscription was to be allowed. The result is, as Hamilton said, a judiciary deliberately made the least powerful of the three branches of government. This weakness made impotency of the Supreme Court its principal feature until *Marbury v. Madison* established the Court's power of judicial review in 1803 and weakened, slightly, Congress's power of rulership [Walker & Epstein (1993), pp. 15-17].

The fallacy in this line of reasoning is twofold. First, it presumes it is possible for a constitution to foresee and forestall *every* enormity and unjust action cunning minds are capable of inventing and putting into effect through the power to legislate. Second, it ignores the living and evolving character of people's understanding of their social contracts and what these demand. At root, the problem is the old Roman issue of *quis custodiet ipso custodes?* The framers' answer was "the people themselves" by "frequent elections" enabling them to throw the rascals out for legislated transgressions of justice. Unelected judges with lifetime appointments "during good behavior" clearly would be immune to being voted out of office. But if factions of legislators have the power to set the rules for how elections are to be carried out, who can vote, and who counts those votes - and if the court is prohibited from considering the "spirit" of the laws - then it is equally clear that "frequent elections" is no sure remedy for legislative or executive rulership. It might well be the case that the Roman question has no foolproof answer; but we know that there are serious flaws in Hamilton's arguments. The governmental function of justice administration is proposed in this treatise as a treatment mechanism for addressing these shortcomings.

## 7. Concordances with Kant's Moral Categories of Modality

In Critical Epistemology, functions of Quantity, Quality, and Relation pertain to an Object regarded as not-the-same-as the person who perceives, thinks, and acts upon that Object. Functions of Modality, on the other hand, do not pertain to the Object but, rather, to its connection with the person's state-of-mind (the Object's "metaphysical *nexus*" with the person). Judgments of Modality are judgments of judgments and not judgments of the Object being judged.

A Society and its institutions have no collective "mind" and no "state-of-mind to-be-set." While Kant's moral categories of Modality represent relationships to Duty and Obligation in an individual's freedom of

action, ideas of concordances between governmental functions of Modality and Kant's moral categories of Modality are of a much more abstract and mathematical character. The *purpose* of instituting these governmental functions is to establish Justice in the civil Community, and so these functions are *made* purposive to this end. All prescriptions and proscriptions of justifiable laws find their purpose in the prevention, or correction of the effects, of actions (or inactions) that perpetrate transgressions of a Community's social contract. Such transgressions, when unintentional, are called moral faults; when intentional they are called crimes. A transgression is any deed contrary to a reciprocal Duty of one person (or group of persons) to the situation of another person (or group of persons). An action is unjust if it breaches or contradicts the condition of a social contract; justice is the negating of anything that is unjust.

By habit of tradition, most people would likely say this real-explanation of "justice" sounds like what is called "social justice" (a term coined in American law in 1902) and distinguish it from "other kinds of justice" such as constitutive justice, distributive justice, personal justice, popular justice, positive justice, or substantial justice [Garner (2019), entries under "justice"]. All these "other kinds of justice" are much older terms and most of them are centuries older than the term "social justice." *Black's Law Dictionary* gives the primary definition of "social justice" as "justice that conforms to a moral principle" and a secondary definition as "one or more equitable resolutions on behalf of individuals and communities . . . with the ultimate goal of removing barriers to participation and effecting social change." But *Black's* also defines "justice" as "the fair and proper administration of laws" and this treatise has already found *that* definition of "justice" is fallacious and circular. The idea of justice has no meaning outside the context of a civil Community, and inside that context *all* justice is deontological "social" justice. In relationship to it, law is only a memorandum.

As for *Black's* definition of "social justice" as "justice that conforms to a moral principle," this definition seems to refer to what *Black's* calls "public morality." It defines the latter as "1. The ideals or general moral beliefs of a society; 2. The ideals or actions of an individual to the extent that they affect others" [Garner (2019), entry under "morality"]. *Perhaps* this explanation might work in a homogeneous Society where one common set of such "moral beliefs" is understood by all. But in the non-homogeneous Societies that make up the vast majority of all nations, such uniform conformity is generally not to be found beyond the extent of some form of social compact, such as the French Declaration, and is not sustained unless that Society explicitly *teaches it* anew to every generation so all its citizens "know what the rules are." Even then, sustainability is not guaranteed, as history illustrates with the breakdown and disintegration of Puritan Society and its subsequent replacement by "Yankee Society" in colonial America [Wells (2013), chap. 2]. It is not puzzling why the American legal system tries very hard to separate itself from "morality" considerations (in *Black's* connotation) in its legal and legislative processes. And perhaps that distancing accounts for the popularity of Clarence Darrow's well-known quote, "There is no such thing as justice - inside or outside of court." But would you want to have a legal system without justice?

**First Modal Function:** Kant's first moral category of Modality is "the permitted and the unpermitted." He explained what he meant by this term as,

> An act is *permitted* which is not contrary to Obligation; and this freedom, which is not restricted by being set against any opposing imperative, is called an authorization . . . From this it is obvious what *forbidden* is. . . . An act that is neither required nor prohibited is merely *permitted* because there is absolutely no restraining law restricting one's freedom (authorization) with regard to it and, so too, no Duty. Such an act is called morally-indifferent [Kant (1797), 6: 222-223].

The scope of this category is very broad in Kant's theory because the "law" he refers to springs from practical imperatives in a person's manifold of rules. They take in Duties-to-Self as well as reciprocal Duties and Obligations as a member of a civil association under a social contract.

Now, an ill-founded understanding of a social compact can lead to conflicts of interest between people because of misunderstandings of its terms and conditions. Such a misunderstanding can *unintentionally*

pit a person's Duty-to-himself (either in regard to his personality or in Relation to his situation) against reciprocal Duties in Relation to the situation of another. Moral faults tend to be transgressions of this sort. It must also be considered that some individuals make false pledges of *obligatio externa* to secure their own private advantages at the expense of others and without ever intending to honor Duties and Obligations that come with the making of this pledge. Here moral transgressions are intentional and are called deontological *crimes*. Furthermore, *new* situations arise from what Jefferson called "the progress of the human mind" as it "becomes more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances" [Jefferson (1816), pg. 559]. New inventions and technologies tend to be drivers of such social changes, but there are many others also. New inventions and technologies are contributors to Progress, but every new invention or technology or discovery can also be misused and harmfully applied. One cannot, as the Luddites tried to do in 19th century England, put a stop to new invention and freeze a Society in what Toynbee called an "arrested" state [Toynbee (1946), pp. 164-186]. *No social contract is immutable and forever unchanging*, and a Society's institutions, again as Jefferson put it, "must advance also and keep pace with the times."[21]

It is in this context that a concordance of governmental function with the first moral category of Modality is made necessary. The stipulation of the *fundamental* condition of social compacting requires a civil association be such that a member can "unite himself" with the other associates "while still obeying himself alone." Change might require new alienations of natural liberties; it almost certainly requires new laws and some evolutions in some existing ones. The great challenge is in discovering what these are. Addressing this challenge is the purpose of the first concordance function of Modality.

Most natural liberties a social compact requires a person to voluntarily alienate do not extend to natural liberties not involving actual harm, or a likelihood of actual harm, to other associates. As Mill put it,

> [The] principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so might be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to do evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In that which merely concerns himself, his independence is, of right, absolute. Over his own body and mind, the individual is sovereign. [Mill (1859), pg. 8]

But there is an extravagance of reasoning in Mill's "principle" as he states it. We see it in his "must be *calculated* to do evil to someone else" clause. An intoxicated automobile driver does not "calculate" or "have a design to" cause an accident that kills or injures someone, yet there is a significant possibility of him doing so and a civil Community is completely warranted in making drunk driving an alienated liberty and its commission a criminal action. A babysitter or daycare worker who deliberately terrorizes a small child might not intend to severely traumatize that child psychologically, but there is a significant possibility of doing so and the Community is warranted to call that behavior "child abuse" and agreeing to make that action criminal. There are many types of reckless conduct that, likewise, might not intend harm to others but nonetheless can cause it, and a civil Community is warranted in making that conduct criminal. According to the U.S. Center for Disease Control, 1,137,752 Americans have died from Covid-19 as of August 12, 2023, and at least part of this death toll is the result of licentious behaviors in ignoring mask mandates by people who either did not want to be "inconvenienced" by wearing masks or chose to ignore scientific medical findings for measures that would have moderated the spread of the pandemic in

[21] Failure to account for this is the most seriously antisocial error in the U.S. Supreme Court's *Dobbs* decision.

the U.S. The civil Community would have been warranted in declaring this licentious behavior criminal, although it did not do so. In some cases, state legislatures or governors intervened to *prevent* local Communities from enacting or enforcing their own local measures for moderating the spread of the disease; civil Communities would have been warranted in declaring these politicians' actions criminal had not rulership at the statehouse unjustly and by force prohibited them from doing so[22].

However, Mill's main point - prevention of harm to others - is well taken. Protection from actual harm *is* the most fundamental element of the condition of all social contracts. There are many obvious situations where this "protection clause" clearly comes to bear - murder, robbery, perjury, &etc. There are also many others where this is not so clearcut, where what is required by fundamental terms and conditions of a social compact is non-obvious. The first governmental function of Modality arises out of this. I call this the function of *investigative action*. Its purpose is to study and analyze situations in order to evaluate if a particular situation is one of socially permitted liberty, an unpermitted action, criminal transgression, or unintentional transgression of the body of detailed or implied terms and conditions of a civil Community's social compact. Further, this purpose encompasses investigations of the continued suitability of laws in the face of changing social circumstances and forces.

The label chosen for this function, investigative actions, rather obviously implies that such well-known activities as police and law enforcement agency investigations, official prosecutors, and grand juries are parts of the institution of this governmental function. However, in its broader scope, especially in review of legal codes for their continuing suitability, the function includes new institutions. These are of a kind reminiscent of the idea of inquisitorial systems used in continental Europe, Latin America, most of East Asia, parts of Africa, Indochina, Thailand, and Indonesia. However, the *proactive* intent of the function just stated in the preceding paragraph calls for investigative activities that do not necessarily wait upon lawsuits or indictments to bring issues to the attention of the justice system. Rather, designated agencies and agents are implied whose primary activities are of a *reviewing*, not *prosecuting*, character. The work these agencies are tasked to perform is of such a nature to require the agency to have or call upon divers professional specialists to supply it with needed expertise across a broad scope of knowledge.

As a current illustration, at the time of this writing there is a level of concern in the United States about implications of new so-called Artificial Intelligence technology and its potential threats to the integrity of elections, of disseminations of false information, and to the "cybersecurity" of the Internet. Another current concern pertains to the protection of personal privacy from unauthorized Internet surveillance by so-called "social media" private sector companies or by overreaching actions of national security agencies who compile data on individuals' Internet activities without a warrant or probable cause. While the latter concern has somewhat faded from public attention in recent years, it was a matter of considerably greater concern in the years of the Bush and Obama administrations after the passage of the U.S. antiterrorism measure called the USA PATRIOT Act. While this Act has undeniable importance for U.S. national security, any compilation of large data bases of information about ordinary private citizens raises concerns about the potential for misuse of this data by government authority figures. While the public is largely unaware of it, there is ongoing technology research and development in computer science that makes it increasingly easy to search and winnow through incredibly large databases - a capability with enormous scientific benefits but one that is, like all technologies, capable of misuse and abuse. This field of research and development is called "informatics" by the computer science profession. These are two of many scientific developments about which congressmen and state legislators are too ignorant to be capable of crafting competent and effective laws addressing the concerns and potential threats; and these bodies are too slow to act on them. New agencies and institutions are therefore needed.

**Second Modal Function:** Kant's second moral category of Modality is contextual *determination* of what

[22] These prohibitions by state governments are unjust because they violated the fundamental term of the social contract requiring the civil Association "to protect with its whole common force the person and goods of each associate." The prohibitionary actions of these statehouse politicians were deontological crimes.

a Duty asserts and does not assert in actions expressing its meaning implications. He called this category *Duty and contrary to Duty*. In regard to Duty, he said,

> *Duty* is that action to which someone is bound. It is therefore the matter of Obligation, and it can be one and the same Duty although we can be bound to it in different ways. [Kant (1797), 6: 222]

Note that it is an *action* of some kind to which a person is self-bound by a Duty. This is to say Duty *predicates* self-necessitation for a person to express some action (rule of commission) or forebear expressing some action (rule of omission). Necessitation means the action is *made necessary* by the person himself. When a person pledges *obligatio externa* to alienate some natural liberty he is saying that he commits himself *as an Obligation* to *voluntarily and willingly* forego the exercise or expression of that liberty. It is in this way that social compacts become possible, i.e., that a person can "unite himself" with the other members of a civil association while "remaining as free as he was" before committing himself to their union. He remains free because *he himself* freely chose to alienate that particular natural liberty.

Herein can be seen the fundamentally crucial importance of pledges in any Society. When an official takes an oath of office, he is *not* making a pledge to God; he is making a promise to his fellow citizens, one that he cannot unilaterally break without committing a serious and fundamental crime against *all* of his fellow citizens. The same is true when any person takes an oath of citizenship (pledge of allegiance) to a civil mini-Community (or to the general civil Community); that oath is *obligatio externa*, and a person who unilaterally breaks it betrays (commits treason against) the civil Community. By doing so, he releases that mini-Community from all Obligations to protect and aid him, i.e., he forfeits *all* civil rights that come with membership in that mini-Community.[23,24]

That a Duty is the *matter* of an Obligation means this self-necessitation originates in a practical imperative in his manifold of rules and *not* from some merely pragmatic or technical rule of behavior. A person who makes a false expression of *obligatio externa* is not committing himself to any Obligation to anyone else; such an action does originate in some pragmatic and private practical maxim of his own. If his subsequent action then contradicts the expressed *obligatio* his action is *licentious* and the civil Community is justly warranted to hold him liable for the transgression.

The moral category of determination categorizes what is assertoric within the *context* of Duty-concepts such that the person's concept of a Duty and of an Obligation speaks to *how he is self-bound* by his own concepts of Duty and Obligation. However, a concept in the manifold of concepts lacks the compelling force of a practical imperative in the manifold of rules. A Duty *concept* expresses merely an "I ought to" and the individual is capable of ignoring it in the face of other subjective and objective factors. He might "feel guilty" about doing so, but that feeling of *Unlust* was not sufficient to overcome his other feelings and perceptions that culminated in the determination of his appetite for the action (or inaction) he actually expressed. Indeed, he might not even be able to verbalize or explain why he did what he did. Did you ever hear a child respond to his mother's exasperated "Why did you do that?" with "I don't know"? It is not-

[23] It is a different matter in the case of moral secession. In this case, the Community has perpetuated violations of its *obligatio externa* to the individual and *it*, the Community as a body politic, has committed the moral transgression. The moral secessionist commits no deontological crime in withdrawing his allegiance to it and returning to an outlaw (state of nature) relationship with respect to his former Community.

[24] For example, a church might excommunicate one of its members for apostasy. Some churches practice shunning. But in most nations it is no longer permitted to burn an apostate at the stake or stone him to death. A commercial Enterprise might terminate the person's employment and exile him from its premises. Nations and armies not-infrequently inflict the death penalty for the crime of lending aid and comfort to the enemy. The severity and scope of the liability mini-Communities are warranted in exacting depends upon its common-interests relationships with any larger (more extensive) civil Community in which it (the mini-Community) is a member association. For example, the Ford Motor Company cannot exact the death penalty on an employee caught stealing parts; it has alienated this natural liberty. It is permitted to fire that employee, report the situation to its local municipal police and turn the entire matter over to them for further action.

unlikely that a four-year-old is telling the truth when he says that. In the terminology of Critical Epistemology, **intent** is the determination of an action expression according to a rule or maxim of practical Reason. But a rule or maxim of practical Reason belongs to a person's manifold of rules and its representation in that manifold *is never a conscious* representation. Concepts can only attempt to understand them *empirically*. Santayana wrote,

> Intent is one of many evidences that the intellect's essence is practical. Intent is action in the sphere of thought; it corresponds to a transition and derivation in the natural world. Analytic psychology is obliged to ignore intent, for it is obliged to regard it as merely a feeling; but while the feeling of intent is a fact like any other, intent itself is an aspiration, a passage, the recognition of an object which not only is not a part of the feeling given but is often incapable of being a feeling or a fact at all. . . . Feelings and ideas, when plucked and separately considered, do not retain the intent that made them cognitive or living; yet in their native medium they certainly lived and knew. If this ideality or transcendence seems a mystery, it is only in the sense that every initial or typical fact is mysterious. [Santayana (1906), pp. 172-173]

What has any of this to do with justice? To grasp this, consider how central "intent" is to lawmaking and to legal proceedings in courts. *Black's Law Dictionary* provides two definitions of "intent" with the first one having 15 "species" of "intent" listed under it and the second having two "species" under it. *Black's* definitions are:

> **intent:** 1. The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial;
>
> 2. A lawmaker's state of mind and purpose in drafting or voting for a measure. [Garner (2019), "intent"]

"Intent" in the connotation of *Black's* first definition can be very difficult - and is sometimes impossible - to determine and prove in court. This is why "motive" often plays such an important role in court trials. It is otherwise - or, at least, is reasonable to demand that it should be - in the second connotation. Laws are, in a practical sense, codifications of social contract requirements and constraints. A legal code is, in a manner of speaking, like an encyclopedia of memoranda documenting and detailing specific terms and conditions a civil Society accepts as constituting its social contracts. "Legislative intent" is sometimes a very crucial factor in court cases.

Once I attended the trial of a person I knew that grew out of a domestic dispute. During this dispute, the police arrived at his apartment and - to make a long story short - arrested him on a simple misdemeanor battery charge. Bail for this charge was relatively modest, he paid it, and was released pending his court appearance. However, the next day the county assistant prosecutor decided to charge him with a more serious felony charge that carried a penalty of two years in the state prison. He was re-arrested and could not raise the significantly higher bail accompanying this charge. He telephoned me and asked if I would post bail for him. (Which I did; hence my personal interest in attending his trial). During his trial, the prosecutor read to the court some language that was in the original bill but was dropped before the bill was passed by the legislature. I don't know why she chose to do that, but it was a serious mistake on her part. The presiding judge ruled that the language's omission from the final bill demonstrated that it was not the intent of the legislature that this law should apply in this case. He dismissed the felony charge, reinstated the original misdemeanor charge, and the defendant ended up spending about a week in the county jail as punishment for the crime. Clearly there is a great difference between a week in the county jail vs. two years in the penitentiary. In my opinion, justice was done in this case.

Sometimes it is unclear whether or not some specific law should be applied in a situation. Sometimes, often in very old laws, no one seems to know why a law exists, what its intended purpose is, or if it is still even relevant today. For example, Idaho Code Title 18 Chapter 58 statute 18-5810 states, "No person,

except those wholly or partially blind, shall carry or use on any street, highway, or in any other public place a cane or walking stick which is white in color, or white tipped with red." This law was passed in 1972 as a public health and safety statute. No one today seems to know why this law exists. Certainly it is not obvious why Idaho citizens should alienate their natural liberty to carry and use a white cane. Most Idahoans do not even know this law exists. Idaho Code Title 49 Section 706 does require drivers of vehicles to yield the right-of-way to anyone carrying "a clearly visible white cane"; however, that law was passed in 1988, and so prohibiting sighted people from "stealing the right-of-way" from the driver of a vehicle does not seem to be a reason for why the legislature might have thought the 1972 law was needed.

These considerations bring us to the second Modality concordance function. I call this the function of *determination of intent*. Being a mathematical entity, a body politic has no "mind" and so no "state of mind." Nonetheless, the notion of "intent" has great significance for codifying and for judging specific civil liberties and alienated natural liberties in civil Communities. In significant degree, the determination of intent function does subsist (mathematically) in common law rulings of judges, the principle of *stare decisis* (the principle that cases should be decided according to consistent principled rules so that similar facts will yield similar results), and in resolutions of cases *primae impressionis* (cases of first impression - i.e., issues where the parties disagree on what the applicable law is when there is no clear precedent and statute law is ambiguous or vague). It tends to come into clearer focus in the principle of *ratio decidendi* (the rationale for a court's decision) and, to a lesser degree, in *obiter dictum* ("other things said"; remarks, observations, illustrations, and analogies that are included in the body of a court's opinion but do not necessarily constitute parts of the court's decision).

Yet, in context with ideas of civic Duties, intent has something less *ad hoc* in it than is often the case in reactive reasoning. This "aspiration, passage, recognition" (as Santayana put it) inheres[25] in the purposiveness of government and the objectives citizens demand and expect their civil government to actualize and perfect. The U.S. Constitution explicitly recognizes six such government objectives:

1. To form a more perfect union;
2. To establish justice;
3. To insure domestic tranquility;
4. To provide for the common defense;
5. To promote the general welfare; and
6. To secure the blessings of liberty.

Possibly the most crucial task of the second governmental function of Modality is that of keeping these objectives clearly in the focus and attention of agents of government. As Santayana said, "Fanaticism consists in redoubling your effort when you have forgotten your aim" [Santayana (1905 a), pg. 13]. The primary vulnerability of representative government is the perennial tendency for its officials to forget that they are *only* representatives and *not* rulers. The second Modality governmental function includes that of holding lawmakers to the intent of their offices and of reminding or even educating government's lawmakers (including those of regulatory agencies) of *why their offices exist*.

One of the powers *not* vested in the U.S. Supreme Court by the Constitution is the power of judicial *preview* of laws, i.e., the power of vetoing a proposed law prior to it going into effect. The power of judicial *review* of laws - after they are enacted and a dispute brings them to the attention of the courts - was not strongly contested or opposed at the Constitutional Convention and seems to have been taken more or less for granted [Hamilton *et al*. (1787-8), no. 78], although judicial review was not definitively established until the case of *Marbury v. Madison* in 1803. Judicial *preview*, on the other hand, tends to be strongly opposed by legislatures, who tend to be jealous of their prerogative to *dictate* laws. There was a brief debate over this very question on August 15th, 1787, at the Constitutional Convention:

[25] In Critical Epistemology, inherence is the determination in an internal Relation as the representation of a context with respect to the notion of a determinable substance. [Kant (1794-95), 29: 1002-1003]

> Mr. Madison moved that all acts before they become laws should be submitted to both the Executive and Supreme Judiciary Departments, that if either of these should object two-thirds of each House [of Congress], if both should object three-fourths of each House, should be necessary to override the objections and give to the acts the force of law. . . .
>
> Mr. Pinkney opposed the interference of the Judges in the Legislative business: it will involve them in parties and give a previous tincture to their opinions.
>
> Mr. Mercer heartily approved of the motion. . . . He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought that laws ought to be well and cautiously made and then to be uncontrollable. [Farrand (1911), vol. II, pg. 298]

Madison's motion failed by a vote of three ayes to eight nays. Pinkney's concern about involving judges in political parties is very well-placed - and can be seen as a reason for establishing previews of laws by qualified and experts agents - much as qualified experts are presently used in the process of approving drugs by the FDA. Mercer's belief that "laws ought to be well and cautiously made" is also so sound that it would seem absurd to deny it. The question and problem is: What mechanisms must there be to maximize the likelihood that laws *are* "well and cautiously made"? One can question if the Idaho statute 18-5810 above belongs to the species of laws "well and cautiously made." The governmental function in concordance with Kant's second moral category of Modality *is*, in part, aimed at establishing a process of judicial *preview*.

Acton famously said, "Power tends to corrupt, and absolute power corrupts absolutely." Although one might earnestly wish this was not so, history tends to validate Acton's empirical observation and teach us that Mankind has yet to find a sustainable answer to the old Roman question: *Quis custodiet ipsos custodes?* That issue will be receiving more examination in this treatise. It must be enough, for the present moment, to have identified this function in a *justice system*.

**Third Modal Function:** Kant's third moral category of Modality is *perfect and imperfect Duty*. Kant tells us,

> Our Obligations are of two kinds: (1) those to whose observance we may justly be compelled; (2) those to which we should not be compelled externally. The first are legal Duties (culpable Duties), the other Duties of virtue. The first are also called, in a strict sense, perfect, the latter, imperfect Duties. [Kant (1785), 29: 617]

Perfect Duties are those involving a *just* legal, and therefore social, Obligation. Imperfect Duties are those involving a private Obligation-to-oneself. This explanation directly suggests the name for the corresponding function of concordance: *compulsory-noncompulsory conditions*.

Compulsion is an old and familiar concept in law and law enforcement. In Critical Epistemology, compulsion is an effect wherein a person determines himself to do something he would not otherwise do in the absence of some external circumstance. If a police officer orders a citizen to halt, the citizen is under a social contract Obligation to halt. If he does then he is said to act "under compulsion." If he is placed under arrest by a police officer, a citizen has an Obligation to submit and come along without any resistance. On the other hand, he does not have any Obligation to submit to arrest by someone who is not an agent of law enforcement except under predefined particular conditions ("citizen's arrest")[26]. If he does submit in the absence of any of these conditions, this submission is noncompulsory.

To compel in a manner that does not contradict or violate the social contract binding he who compels, and he who is compelled, is *to justly compel*. To compel in a manner contradicting or violating the social contract binding he who compels, and he who is compelled, is *to unjustly compel*. Legal systems in every

[26] What these conditions are vary from place to place according to local laws. In some places "citizen's arrest" is unlawful. In 2021 the state of Georgia became the first state in the United States to make citizen's arrest unlawful.

nation contain mechanisms for just compulsion of individuals. A person so compelled is said to be under an *obligatione* ("legal liability"). A subpoena is one familiar example of a compulsory mechanism. An official order authorizing an act of compulsion by a designated law enforcement agent is called a warrant. In general, a warrant is legal permission to carry out some action. Other less generally familiar examples include writs of mandamus, prerogative writs, and show cause orders. Over the course of time, legal systems all over the world have invented many mechanisms for legal compulsion, and most of these are also just compulsions under the particular social contracts of those Societies. Some, however, practice unjust compulsions (e.g., interrogation under torture); and some just compulsions inherently demanded under the terms and conditions of a social contract are omitted from legal codes. It is this omission of justice that is the primary topic of this section.

What happens when an agency of government, or its agents, refuse to carry out the work expected of that agency? If the collective body of citizens, acting as a body politic, really is sovereign in fact rather than only in theory, it follows from this premise that there should be means and mechanisms by which citizens can justly compel an agency to carry out its work (or to forego actions it is not authorized to do).

One example of such a mechanism is a writ of mandamus. This mechanism is used in Great Britain (where it is today called a "mandatory order"). Conditions under which it is used are limited: it can normally only be used when an officer or authority fails to carry out a public duty it is justly compelled to carry out by statute. The petitioner must satisfy a court that he has the legal right to the performance of a legal duty. It does not apply to discretionary actions of the non-performing authority. In the United States, even this modest and limited mechanism does not exist at the federal level and only some states have it at the state level. The mechanism also exists, again in limited form with particular restrictions, in Australia and India.

In the United States at most levels of government, agencies are given the liberty to set their own rules and procedures. In the U.S. Congress, for example, this is called "regular order." It can be described as the strict or semi-strict application of committee and subcommittee processes that include opportunities for debate, discussions, and multiple votes. Some widely regard it as the engine of bipartisanship and as a strong protection for the views of the minority. However, Congressional leaders (who are more ruler than leader) have for many years now abandoned regular order. The result has been so-called "omnibus packages" (thousands of pages long that no member of congress has time to read or understand), partisan standoffs between the two major political parties, failure to accomplish even the most fundamental tasks of Congress (such as appropriations), and has caused complete shutdowns of the general government [Hanson (2015)]. It is symptomatic of an entire branch of the U.S. government that no longer performs the tasks and services the citizens of the United States elect its members to perform.

This is not only institutional incompetence; it is also one of the unmistakable signs of government agents (congressmen in this case) who regard themselves as *rulers* of the people rather than their servants. The job of congressman is not a sinecure nor are congressmen in any way superior to the citizens of the United States. The position certainly does not exist so the officeholder can dupe people into contributing their money to him or bribe him to legislate to their advantage. However, in America there is no lawful way to impeach and remove a U.S. congressman and very few ways by which Congress, or the state legislatures, can be lawfully compelled by the people to do their duty. Congress does have the power to impeach and remove judges and, in principle, the President of the United State, the Vice President, or members of the cabinet. I say "in principle" because the party system in the U.S. rules Congress so absolutely that it appears to be a political impossibility to actually remove a President from office.

The delegates at the Constitutional Convention in 1787 thought "frequent elections" would better serve as an "impeachment function"; they failed to foresee the rise of two dominant political parties whose "base" (or whose party bosses) select all the candidates for office, whose party machinery controls the election process itself for the benefit of the party, and implements through party propaganda what Adams called "all the chicaneries, impostures, and falsehoods imaginable." There is possibly no better example

of a corrupted agency of government necessitating institution of agencies of justice, beyond the control of legislatures and Congresses, for compulsory-noncompulsory functions in regard to government agencies than the present day Congress of the United States. Establishing Boards of Mandamus is a matter of justice - the negation of anything which is unjust - and it is a necessary part of any justice system in a Society that claims the people are Sovereign. Thoreau asked, "Why is [government] not more apt to anticipate and provide for reform? . . . Why does it not encourage its citizens to be on the alert to point out its faults, and *do* better than it would have them?" Is it not reasonable to propose that if a government does not do that of its own will, then in a Republic there should be means and mechanisms for citizens to compel it to do so?

The independency of agencies and agents of the compulsory-noncompulsory function from the control of other agencies of government is a necessity conforming to a long-recognized principle. Madison wrote

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably corrupt his integrity. With equal, nay, with greater reason, a body of men is unfit to be both judges and parties at the same time; yet, what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of any single person, but concerning the rights of large bodies of citizens? and what are the different classes of legislators but advocates and parties to the causes which they determine? [Hamilton *et al.* (1787-8), no. 10, pg. 54]

Above all else, these agencies' and agents' first Duty is not to a legal code or even a constitution but, rather is to the spirit and letter of the living social contract of the Community of mini-Communities that make up a civil Society. As Madison also wrote,

> 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 people; and in the next place oblige it to control itself. [*ibid.*, no. 51, pg. 288]

## 8. Governance, Lawmaking and Justice Systems

Liberty ***with*** justice *for all* citizens is the purpose, aim, foundation, and standard of measure in every civil

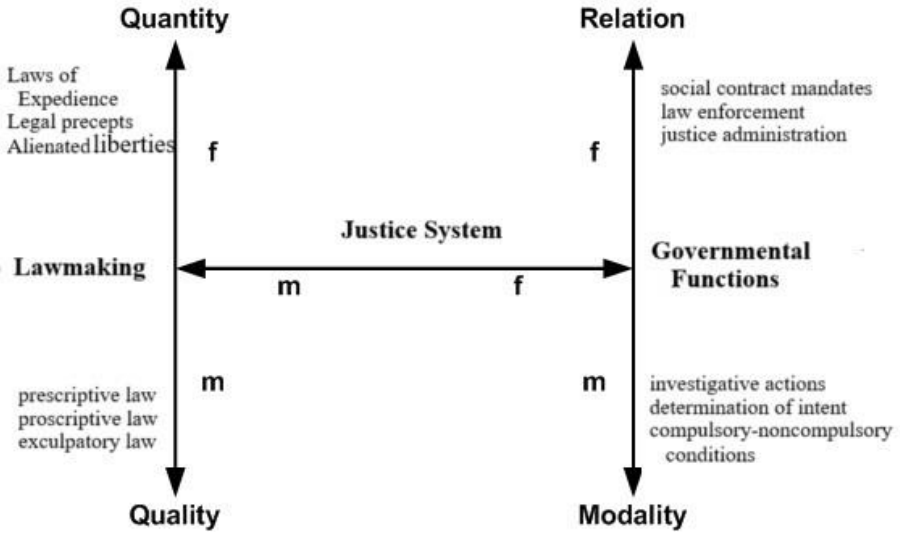


**Figure 8:** 2LAR of a justice system in terms of functional concordance with moral categories.

association in relationship to its governance. Civility is an idea that pertains to *collective* peaceful, cooperative, and orderly conduct and behaviors in the many and diverse person-to-person interactions that are the constant commerce of Community co-*Existenz* in any Society. Manners and customs are social norms of conduct and behavior and, in a sufficiently small population whose members all know each other directly and personally, these may be all that are needed for a condition of liberty with justice for all to thrive. But in larger populations, whose members do *not* know each other through direct personal experience, stereotyping is inevitable and brings with it conflicts among the incongruent special and personal interests different people hold dear-to-themselves.

Regarded practically, *laws* are specialized conventions of conduct and behavior made for the purpose of allowing these divers special interests to peacefully coexist - i.e., ways and means by which incongruent special interests can be transformed into congruent ones through alienation of *natural* liberties and willing adoption of *civil* liberties which, being understood and respected by the members, serve to reduce the number of occasions when individuals' subjective *sense of injustice* are provoked by the actions of others. Laws designed and crafted to gain the willing and willful *consensus* of people become socialization tools every bit as important for the adult members of a Society as the lessons of socialization taught to children are for their eventual successful assimilation into it. Santayana tells us,

> One of the great lessons, for example, which society has to teach its members is that society exists. The child, like the animal, is a colossal egoist, not from a want of sensibility, but through his deep transcendental isolation. The mind is naturally its own world and its solipsism needs to be broken down by social influence. The child must learn to sympathize intelligently, to be considerate rather than instinctively to love or hate; his imagination must become cognitive and dramatically just, instead of remaining, as it naturally is, sensitively, selfishly fanciful. [Santayana (1905 b), pg. 48]

Government *is*, as Mill said, "at once a great influence acting on the human mind and a set of organized arrangements for public business" [Mill (1861), pg. 21]. Designing and implementing it *so that it is just* is quite probably the most continually-challenging undertaking Mankind is made to face by our natural circumstances. *Perfecting* it is an ongoing and never-ending process. In this chapter we have looked at some examples of this challenge and how different Societies in the past have tried to address it. It is, I hope, clear that Justice is an idea that envelops *all* traditional branches of government.

To achieve liberty *with* justice *for all*, it is not enough to have merely a judiciary, lawmakers, and executives. Civil Society must, above all, have an effective justice *system*. Figure 8 illustrates the 2LAR organization of deontological justice functions an effective system of justice must have if it is to be loyal and dedicated to a socially contracted unity of its body politic.

## 9. Chapter Summary

**9.1** Constitutions do not "confer" civil rights. Rather, constitutions establish *the general form of a system of governance*, principles of its organization, general goals (expectations of authority) its sovereign citizens *assign to it*, and places restrictions on the natural liberties *of its agencies and agents*.

**9.2** Civil rights are Duties of the body politic. A civil right is an object defined by a civil convention (such as the French Declaration of the Rights of Man and the Citizen) that is regarded as an intangible property possessed by every member of the civil Community, as an expected benefit of citizenship in that Community, and owed by every citizen to every other citizen in their mutual relationships.

**9.3** Proscriptive laws identify and define those natural liberties a citizen is required to alienate by the general will of the civil Community. Those natural liberties not alienated by citizens are their **civil liberties**.

**9.4** Justice is the negation of anything that is unjust according to the social contract of a civil mini-Community or larger civil Communities in which mini-Communities are embedded. To establish justice

is to constitute and operate a justice system in which the matter of the system subsists in lawmaking and the form subsists in governmental functions that are in concordance with the form (Relation and Modality) of deontological moral categories.

**9.5** The establishment of justice in a Society requires agencies and agents of government rightfully possessing and tasked with authority to command other agencies and agents to carry out their Duties, and to be empowered to remove agents from their office who refuse to comply with these commands.

## 10. References

Adams, John (1790), *Discourses on Davila*, in *The Portable John Adams*, John Patrick Diggins (ed.), NY: Penguin Books, 2004.

Aristotle (date unknown), *Politics*, Cambridge, MA: Harvard University Press (Loeb Classical Library), 1944.

Bealey, Frank (1999), *The Blackwell Dictionary of Political Science*, Oxford, UK: The Blackwell Publishing Company.

Blackburn, Simon (1996), *The Oxford Dictionary of Philosophy*, Oxford, UK: Oxford University Press.

Brandon, William (1987), *Indians*, Boston, MA: Houghton-Mifflin Co.

Cicero (45 BC), *Tusculan Disputations*, in *Cicero: Tusculan Disputations*, J.E. King (tr.), Cambridge, MA: Harvard University Press, 1945.

Durant, Will (1935), *Our Oriental Heritage*, vol. I of *The Story of Civilization*, eighteenth printing, New York: Simon and Schuster, 1954.

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

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

Gurney, O.R. (1990), *The Hittites*, London: The Folio Society.

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

Hanson, Peter (2015), "Restoring regular order in congressional appropriations," Brookings Institute, Nov., 2015, https://www.brookings.edu/wp-content/uploads/2016/07/Download-the-paper-1.pdf .

Heath, Joseph (2018) https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/.

Hobbes, Thomas (1651), *Leviathan*, New Haven, CT: The Yale University Press, 2010.

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.

Jones, Gwynne (1968), *A History of the Vikings*, New York: Oxford University Press.

Kant, Immanuel (*c*. 1773-79), *Reflexionen zur Anthropologie*, in *Kant's gesammelte Schriften, Band XV*, pp. 55-654, Berlin: Walter de Gruyter & Co., 1928.

Kant, Immanuel (1785), *Moral Mrongovius II*, in *Kant's gesammelte Schriften, Band XXIX*, pp. 593-642, Berlin: Walter de Gruyter & Co., 1980.

Kant, Immanuel (1788), *Kritik der praktischen Vernunft*, in *Kant's gesammelte Schriften, Band V*, Berlin: Druck und Verlag von Georg Reimer, 1913.

Kant, Immanuel (1794-95), *Metaphysik Vigilantius ($K_3$)*, in *Kant's gesammelte Schriften, Band XXIX*, pp.

943-1040, Berlin: Walter de Gruyter & Co., 1983.

Mastroianni, Adam M. & Daniel T. Gilbert (2023), "The illusion of moral decline," *Nature* **618**, 782-789 (2023).

Mill, John Stuart (1859), *On Liberty*, Mineola, New York: Dover Publications, Inc.

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

Palmquist, Stephen R. (2000), *Kant's Critical Religion*, Aldershot, UK: Ashgate Publishing, Ltd.

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

Rhode, Deborah L. (2006), *Moral Leadership: The Theory and Practice of Power, Judgment, and Policy*, San Francisco, CA: Jossey-Bass, a Wiley imprint.

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

Sandburg, Carl (1936), *The People, Yes*, NY: Harcourt Brace & Co., 1990.

Santayana, George (1896), *The Sense of Beauty*, New York: Dover Publications.

Santayana, George (1905 a), *Reason in Common Sense*, vol. 1 of *The Life of Reason*, New York: Dover Publications.

Santayana, George (1905 b), *Reason in Society*, vol. 2 of *The Life of Reason*, New York: Dover Publications.

Santayana, George (1906), *Reason in Science*, vol. 5 of *The Life of Reason*, NY: Dover Publications, 1983.

Shirer, William L. (1960), *The Rise and Fall of the Third Reich*, NY: Simon & Schuster.

Smithsonian National Museum (2009), *Haudenosaunee Guide for Educators*, https://americanindian.si.edu/sites/1/files/pdf/education/HaudenosauneeGuide.pdf

Thoreau, Henry David (1849), *Civil Disobedience*, New York: Dover Publications, 1993.

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

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

Wells, Richard B. (2010), *The Idea of the American Republic*, 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. (2014), "The challenge of mini-Communities," available free of charge from the author's web site.

Wells, Richard B. (2019), *Faith and Critical Theology*, available free of charge from the author's website.