

The cover features a solid blue background. A large white L-shaped graphic is positioned on the left side, extending from the top to the bottom. The text is centered in the upper right quadrant. The title 'Journal of' is in a smaller serif font, while 'POLITICAL' and 'THOUGHT' are in a larger, all-caps serif font, enclosed within a white rectangular border that is open on the left and bottom sides.

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## [LETTER FROM THE EDITORS]

Dear Reader,

We are proud to present the Winter issue of the *Journal of Political Thought* and welcome you into its pages.

The *Journal* is committed to political thinking in all its dimensions: from normative examinations of political institutions and ethical challenges, to historical explorations of the fundamental categories and thinkers in the history of political thought, to integrated treatments of normative, historical, and empirical questions. The best way to showcase this diversity is to turn to the articles themselves.

In our first piece, Christopher McGill examines arguments in environmental ethics that pertain to weighing current lives against future lives. Through a series of stylized thought experiments in the tradition of analytic philosophy, he interrogates various candidate moral propositions to argue that current people's rights narrowly assume priority over those of future people.

In our second piece, Aaron Greenberg explores the politics of history through a critical comparison of Michel Foucault's "Nietzsche, Genealogy, and History," and Walter Benjamin's "Theses on the Philosophy of History." Both deeply wary of the dangers of received universalizing progressive narratives of history, these two thinkers differ importantly on the role history can play in a politics of emancipation and revolution.

In our third piece, J.A. Rudinsky delves into Michael Oakeshott's legal theory of adjudication. Situating Oakeshott between legal realism and formalism, Rudinsky argues that Oakeshott makes a unique contribution to the common law tradition. Integrating his theory of law with broader themes in Oakeshott's political philosophy, Rudinsky nuances our understanding of both Oakeshott and the common law more generally.

In our interview feature, Bruce Ackerman reflects on his career as both a legal scholar and political theorist—a background that provides unique insight into the relationship between constitutionalism and political philosophy. Our wide-ranging conversation touches upon enduring tensions among liberalism, republicanism, and cosmopolitanism, and the ways in which these traditions inform conceptions of citizenship for the twenty first century.

We hope you enjoy.

Sincerely,  
The Editorial Board

# Environmental Ethics: Balancing the Values of Current Lives, Future Lives, and Quality of Life

Christopher McGill

*Yale University*

Environmental ethics literature often argues that we should conserve the environment in order to (1) preserve the lives of future people and (2) provide future people with a basic level of quality of life. (For instance, see the writings of Barry, Bayet, and Naess.) But what must we give up in exchange? Garrett Hardin's argument for lifeboat ethics implies that we should conserve the environment even if it requires sacrificing the lives of current people (see section 2). Should we sacrifice current lives in order to save future lives? Should we sacrifice current lives in order to provide a certain level of quality of life for future people? Should we regard current people's quality of life interests as equally valuable to future people's quality of life interests? This paper examines these moral concerns within the context of environmental ethics.

## I. Hardin's Lifeboat Ethics

Hardin confronts us with an ethical scenario that puts (1) future lives and (2) future people's quality of life squarely at odds with (3) the lives of current people. The scenario, and Hardin's proposed solution to it, proceed as follows. Hardin asks us to imagine the nations of the Earth as lifeboats with limited carrying capacities (as an analogy to the limited carrying capacity of each nation's land).<sup>1</sup> Rich nations are lifeboats filled with relatively wealthy people; poor nations are lifeboats crowded with relatively poor people. Suppose our lifeboat has 50 people with space for 10 more (although, by adding 10 more, we eliminate our safety buffer which protects against the possibility that an unforeseen future event diminishes the 60-person carrying capacity of our boat).<sup>2</sup> Hardin argues that, supposing that we observe 100 people swimming outside of our boat asking to join us, we should *not* add further people to our boat. (If someone onboard feels this is unjust, that person may give up their seat to someone outside of the boat.) Citing that

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1 Hardin, Garrett. "Living on a Lifeboat." *BioScience* (1974): 2.

2 *Ibid.*, p. 2.

unchecked reproduction rates in poor nations are much higher than those in rich nations, Hardin worries that by giving foreign aid, establishing world food banks, and allowing unrestricted immigration,<sup>3</sup> rich nations are (metaphorically) adding more people to the water outside of our boat and overcrowding the rich boats. This inevitably results in global overpopulation which can only end with the “total collapse of the whole system, producing a catastrophe of scarcely imaginable proportions.” Through so-called charitable efforts the rich nations are in fact incentivizing poor nations to irresponsibly increase the world population to a point that eclipses the world’s carrying capacity.<sup>4</sup> Until there is some sort of sovereign world power that can set reproduction limits, each nation is a sovereign lifeboat<sup>5</sup> that has an ethical duty to differentiate between being “generous” with its own “possessions” and being “generous” with posterity’s<sup>6</sup> “possessions.”<sup>7</sup> In effect, by allowing unchecked reproduction rates to threaten nations’ and the Earth’s carrying capacity, current people are depleting something that does not belong to them—the quality of life on earth in the future (which ostensibly belongs to future people). Hardin sums up the sentiment in this way: “*Every life saved this year in a poor country diminishes the quality of life for subsequent generations.*”<sup>8</sup> Hardin ultimately concludes, “For the foreseeable future survival demands that we govern our actions by the ethics of a lifeboat. Posterity will be ill served if we do not.”<sup>9</sup>

One very probable consequence of Hardin’s lifeboat ethics is that in order to (1) preserve the quality of life for future generations and (2) ensure that future people or entire future generations exist, we may need to allow current people to die.<sup>10</sup> Thus, there are three different factors at stake: (1) the lives of current people, (2) the lives of future people, and (3) the quality of life of future people. We are confronted with two ethical dilemmas. First, should we sacrifice the lives of current people in order to protect the lives of future people? I consider this question below, in sections 3, 4, and 5. Second, should we sacrifice the lives of current people to preserve the quality of life for future people? I consider this question in section 6.

## II. The Case for Prioritizing a Current Life over a Future Life

Given that we must choose, should we prioritize the lives of current

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<sup>3</sup> *Ibid.*, p. 11.

<sup>4</sup> *Ibid.*, p. 7.

<sup>5</sup> *Ibid.*, p. 13.

<sup>6</sup> “Posterity” is used throughout this paper to mean all future generations of people.

<sup>7</sup> *Ibid.*, p. 11

<sup>8</sup> *Ibid.*, p. 9.

<sup>9</sup> *Ibid.*, p. 13.

<sup>10</sup> Carter, Alan. “Saving Nature and Feeding People.” *Environmental Ethics* 26 (2004): 343.

people or future people? The question is vague in that it fails to specify how many current and future lives are at stake. My analysis begins by narrowing the question to: Should we prioritize the life of one current person over one future person? I argue that, in the absence of knowledge of the particular features of the current person and future person (except that we know that they belong to either the current generation or a future generation), we should prioritize the life of the current person. There are three reasons why: (1) a current person's existence is more likely than a future person's, (2) we know with greater certainty that a current person desires to live than that a future person desires to live and (3) we can more efficaciously design policies to protect the life of a current person than to protect the life of a future person.

First, the existence of a current person is more probable than the existence of a future person. This is because, by definition, a current person exists, whereas a future person does not (yet) exist. There is a probability, though it is extremely remote, that there will be no future people. The probability of the non-existence of future people increases the farther we look into the future. For the more time that passes, the more opportunities arise for the occurrence of a catastrophic event, such as a nuclear war that kills everyone. As the number of these opportunities increases, the probabilities of such disasters grow. Of course, such disasters are still highly unlikely. The important point is that when we must decide between saving the life of a current person and saving the life of a future person, such probabilities are morally relevant factors. That is, although John O'Neill points out that given the proper level of precaution we may safely assume future people will exist,<sup>11</sup> this is different from saying that the existence of a future person is equal to that of a current person. In situations where we must choose to save one life or another, the small chance that future people will not exist is one of the few impartial distinguishing characteristics we have access to.<sup>12</sup>

Second, we cannot know the preferences of a future person to the same extent that we can know the preferences of a current person. Current people can demonstrate their preferences through actions (e.g., voting, purchasing goods, or spending time in specific ways). We can also ask current people what their preferences are. Future people are neither able to act nor state their preferences. O'Neill rightly asserts that there are certain preferences that we can assume with a high level of confidence are

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11 O'Neill, John. "The Constituency of Environmental Policy." *Ecology, Policy, and Politics: Human Well-being and the Natural World*. London: Routledge, 1993: 50.

12 I call this fact impartial because it holds true for all people equally and I call it a distinguishing characteristic because it does not apply to current people but does apply to all future people.

true for both current and future people, such as preferring to have food, energy sources, and basic materials. But when we assume that future people's preferences will include food, energy sources, and basic materials, we tacitly assume that future people will desire to live and that they will pursue their life projects. Yet, there is a very remote possibility that these assumptions are false. Suppose that, in the future, there is a widespread incurable disease which causes people intolerable pain. It may be the case that many of the future people afflicted with this disease will prefer to die rather than live. Though the possibility of this scenario is overwhelmingly unlikely, this sliver of uncertainty about the preferences of future people turns out to be a significant morally relevant difference. The fact that there is a very small possibility that a future person might choose to die, whereas a current person has stated or demonstrated their preference to live, gives us a second reason to prioritize saving a current life over a future life.

Third, there is a fundamental problem implied by our inability to fully understand and predict the effects of our actions. This problem becomes more pronounced the farther we look into the future. For example, suppose that the U.N. is evaluating whether or not a developing nation should continue industrializing. The benefit of industrializing consists in allowing its citizens to have jobs that provide sufficient money to buy food and obtain health care, thereby saving thousands of lives that otherwise might be lost due to starvation and disease.<sup>13</sup> The cost is pollution, which contributes to the eventual death, several decades down the line, of future people in various ways, including by: (1) creating massive destructive storms, (2) causing sea levels to rise which in turn floods coastal cities and (3) producing contaminated air that causes lung cancer and other potentially fatal diseases. The choice comes down to (1) save current lives and sacrifice future lives by allowing industrialization or (2) save future lives and sacrifice current lives by preventing industrialization.<sup>14</sup> A policy aimed

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13 It may be objected that wealthy nations, which industrialized earlier than developing nations, and which therefore have already contributed significantly more pollution to the environment than developing nations, have a moral obligation to share their resultant economic benefits from industrialization with developing nations. This would help provide food and health care to the citizens of developing nations and avoid the environmental consequences that would result if developing nations continue industrializing (and thus contributing more pollution). While this is a powerful moral argument, presently it seems politically unachievable. For one, many industrialized nations already overspend their budgets. It would be difficult to convince them to allocate a significant amount of money to this cause. Secondly, the amount of resources necessary to offset the potential current and future benefits to developing nations from industrializing is large. This makes it increasingly unlikely that industrialized nations will contribute the requisite amount of funds to compensate for economic losses absorbed by developing nations due to halting industrialization.

14 For the purposes of this particular thought experiment, which aims to discover how we should weigh the life of a current person against the life of a future person, let us assume that



at saving current lives by allowing industrialization has a better chance of being actualized than a policy aimed at saving future lives by disallowing industrialization. This is because, typically, we can more accurately predict a policy's near-term consequences than long-term consequences, since there is less of an opportunity in the short term for an unexpected factor to cause a deviation from our predicted outcome. For instance, the effects of allowing industrialization will very likely continue saving current lives, and disallowing industrialization will very likely sacrifice current lives. We have very little reason to expect any unforeseen or unlikely circumstance to occur and alter that outcome (e.g., despite allowing industrialization, the price of food and health care abruptly skyrockets, causing people to starve from inability to buy food or die from the inability to afford to see a doctor). And if it does, resulting in its expected consequences failing to materialize, we will know right away, and we can modify the policy if need be (e.g., find a way to drive prices down or stop industrialization until prices go down, since, if food and health care are unaffordable even with industrialization, current people will lose their lives either way). On the other hand, it is relatively less certain that allowing industrialization will cost future lives, and that disallowing industrialization will save future lives. For we are less certain of the effects of a policy that is experienced in the future since, during the time between its implementation and the realization of its *long*-term goals (which, in this case, could be decades), there is a relatively higher likelihood that there might be an intervening factor that influences the outcome in unanticipated ways, since there is a relatively larger period of time between the enactment of the policy and the realization of its goals. For example, suppose that, in the interim, an unexpected method for artificially cleaning the air is invented and implemented over the next few decades, resulting in less future lives lost than originally anticipated. Or suppose that, in response to climate scientists' increasingly accurate predictions of the precise geographic locations of the impacts of pollution, the U.N. helps climate refugees relocate to other nations before they can be killed, again resulting in less future lives lost than originally predicted. On the other hand, suppose that unanticipated new sources of pollution emerge from other nations, increasing the amount of pollution above what was originally expected and

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(1) the amount of lives saved and sacrificed in either case are equal and (2) the very likely quality of life reduction experienced by future people, above and beyond the loss of life, stemming from the pollution of this particular developing nation, is offset by the increase in quality of life experienced by current people who consume the cheap goods that it produces. This second assumption may be objected to on a number of levels, but I will not take them up here. In order to give the concept of quality of life the proper attention and space, I will defer discussing it until later in the paper. By making these two assumptions, I can focus the discussion on a one-to-one comparison of the life of a current person against the life of a future person.

exacerbating its effects on the climate, yielding the loss of more future lives than predicted. In any of these scenarios, we will have already experienced the cost of sacrificing current lives (or the benefit of saving current lives) while waiting to see if future lives are saved (or if future lives are lost) in an amount consistent with our original prediction. Yet, if the first two scenarios materialized, those current lives would not have needed to be sacrificed, or fewer should have been sacrificed, in light of the lower than expected quantity of future lives lost. On the other hand, in the third scenario, it would turn out that more should have been done to prevent pollution, perhaps even at the cost of sacrificing more current lives than originally intended, in order to avoid the unexpected increase in loss of future lives. My point here is that the short term outcomes of a policy are more certain than its long term outcomes. This gives us a third reason to prioritize a current life over a future life, for it is more certain that we can design a policy that saves a current life than that we can design a policy that will save a future life.

### III. Age and Other Morally Relevant Factors

The fact that a current person exists, whereas a future person will probably exist, is a morally relevant consideration in a variety of contexts. Consider, for example, its impact on the ethics of embryo research. Bonnie Steinbock writes, “If a fire broke out in a fertility lab and there was only time to save a two-month-old baby there in a bassinet or a rack with seven embryos, most would save the baby without hesitation. Yet carrying out the test-tube rack instead could have saved seven people, if indeed each embryo was a person.”<sup>15</sup> We are inclined to save the life of the baby because the baby is a person already, whereas all seven embryos might fail to become people. For the same reason, it is argued, we should allow medical researchers to conduct experiments on embryos, which have only a 1 in 3 chance of becoming people, in order to further research that could save current people.<sup>16</sup> To a certain extent, then, our analysis reflects the same moral intuition contained in this thought experiment: The epistemic uncertainty of future people means that we should prioritize the lives of current people.

The fertility lab thought experiment indirectly raises an important point. It mentions the age of the current person in question (a two-month-old baby), which, within the scope of our broader discussion about prioritizing a current life or a future life, brings to the fore that, if we can know certain features about the current person and future person whose lives are at stake, such as their age, this is morally relevant. Age matters because

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<sup>15</sup> Steinbock, Bonnie. *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses*. Oxford University Press, 196: 215.

<sup>16</sup> Shaw, D.M. “Moral Qualms, Future Persons, and Embryo Research.” *Bioethics* (2008): 223.

whereas a two-month-old baby probably has a full life ahead of it, a ninety-year-old person, for example, very likely has relatively less life ahead of them. For example, to return to the developing nation thought experiment: If we expect that the current person whose life is at stake is twenty-five years old, and the age at which the future person who will be killed by pollution will be fifty years old, then we have another reason to preserve the life of the current person, for they probably have relatively more life ahead of them.<sup>17</sup> By the same token, if the ages are reversed, then, assuming a high probability of existence of a future person who would be affected by this particular pollution, we have a reason to preserve the life of the future person.

Beyond age, another morally relevant factor is one's personal interest in the existence of a current person or a future person. For example, suppose that the current person whose life is at stake is one's sibling. Or, suppose that the future person in question is one's grandchild, and there is reason to believe that if pollution continues being emitted at current levels, then by the time that they are born the air will be filled with smog that will cause health complications, such as lung disease and asthma, that will probably kill them by age sixty. All of the known morally relevant factors, such as era,<sup>18</sup> age, and personal relationship to the current or future person at risk, will likely be weighed together when we make a moral decision about whether to prioritize a particular current life over a specific future life. It is possible that, given knowledge of the particular features of the current life and future life at stake, we will have stronger reasons to save the future life.

#### IV. Asteroid Thought Experiment

If we arrive at a situation in which we should prioritize a current life over a future life, this does not mean that the lives of a relatively small set of current people should outrank the lives of a sufficiently large group of future people. It seems that there are instances in which it is morally correct to favor a large group of future lives over a small group of current lives. The three reasons given above for prioritizing current lives provide only slight reasons to prioritize a current life over a future life. A large enough number of future lives at risk relative to a small enough number of current lives at risk can provide sufficient reason to prioritize the future lives, even if we agree that one current life trumps one future life. Suppose that there is an asteroid headed for impact with the Earth and it must be destroyed right away if we are to avoid a future collision. It is 500 years away and all current

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<sup>17</sup> Assuming that the current person and future person have similar life expectancies, and not taking into account quality of life considerations (quality of life is taken up below).

<sup>18</sup> By era I mean the generation that one is born into (e.g., the current generation, or 50 years from now, or 500 years from now).

people will be dead by the time it arrives. If it reaches the Earth it will destroy all human life. In order to avoid this catastrophe, current people must send 1,000 people to blow up the asteroid and prevent it from colliding with the Earth (killing 1,000 current people in the process). As a result, all future generations will have been saved. This asteroid thought experiment provides an instance where moral intuition suggests that it would be ethically correct to sacrifice the lives of 1,000 current people to preserve posterity. Still, there are difficult ethical problems inherent in sacrificing current people for the sake of future people. *How many* future lives outweigh the value of one current life? How do we decide which particular current people should be sacrificed? It is unclear how to best answer these questions.

There is at least one plausible scenario in which we avoid both of these problems. A group of 1,000 people may individually volunteer to sacrifice themselves and blow up the asteroid. In such an instance we have not concluded that posterity is more valuable than 1,000 current lives nor have we chosen and forced any specific people to sacrifice their lives.

## V. Current Lives and the Quality of Life of Future People

Suppose that allowing some current people to live means sacrificing the quality of life for a huge number of future people. For instance, returning to the developing nation thought experiment, suppose that the costs of the developing nation's industrialization (beyond the loss of some future lives) include that (1) many future generations will have less clean air, (2) some endangered animal species and forests will be destroyed, (3) there will be more dangerous extreme weather events and (4) people living in coastal areas will need to relocate due to flooding caused by rising sea levels. How should we weigh the loss of current lives against quality of life costs to future generations? It seems morally problematic that potentially billions of future people should experience substantial losses in quality of life due to environmental degradation in exchange for preserving a relatively small amount of current lives. Yet, it is unclear how many current lives should be sacrificed in exchange for the quality of life interests of future people. It is also unclear how severe those losses of quality of life must be, and how many future people must experience them, in order to justify sacrificing current lives. This is partly because it is unclear how to value a current *life* relative to the *quality of life* of other people, current or future. Furthermore, it is unclear how to value a future *life* relative to the *quality of life* of other people, current or future. Put more generally, it is unclear how to value one person's *life* relative to the *quality of life* of other people.

One possible solution that avoids this problem consists in increasing the level of moral concern of developed nations regarding (1) preserving

the lives of current people across the world and (2) increasing the welfare of future people, such that they make greater strides towards addressing both issues. Consider that we currently have the ability to provide sufficient food to ten billion people.<sup>19</sup> It is possible to increase our efforts towards providing access to food and healthcare for all current people while simultaneously reducing the level of global pollution so that future people can have a cleaner environment. At the same time, this might yield a decrease in the quality of life for current people. It will likely entail consuming much less oil and experiencing an increase in the cost of basic goods, among other sacrifices. Yet, perhaps by increasing moral concern about preserving the lives of current people and improving environmental conditions for future people, the pleasure derived from creating solutions to these issues can offset the loss of quality of life for current people. Or, perhaps an increase in moral concern will cause current people to voluntarily sacrifice some of their quality of life. It is plausible that through increased public awareness of (1) the suffering of many current people across the world and (2) the impending environmental degradation due to pollution, that developed nations will take greater steps towards avoiding having to choose between saving a current life and sacrificing the quality of life of future people. This is an optimistic expectation, given that tremendous effort has already been invested into increasing public awareness of these realities. But without a significant increase in the level of moral concern, it seems that we cannot avoid having to make difficult decisions between prioritizing current lives and the quality of life of future people. It is unclear by what metric, if any, we can objectively compare life and quality of life, for they seem to be two separate and irreconcilable moral categories.

## VI. Discounting

I have defined “quality of life” to include things like having relatively clean air, enjoying the existence of currently endangered animal species and forests, and living near coasts. To the extent that access to a basic level of quality of life, consisting of these conveniences and others, is a right, there are two opposing ways to address how we should value current people’s quality of life against future people’s quality of life: (1) All people, current and future, should have equal rights (and, therefore, access to equal qualities of life) and (2) Future people’s rights should be discounted (thus, future people are not entitled to access to an equal quality of life).<sup>20</sup>

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<sup>19</sup> Sagoff, Mark. “Do We Consume Too Much?” *The Economy of the Earth*. Second Edition. Cambridge University Press, 2008: 119.

<sup>20</sup> I focus here on these two arguments as a way to understand how to compare the quality of life interests of current people against the quality of life interests of future people. This

I begin by exploring what is meant by “equal rights” for future people and “discounted rights” for future people. The former entails that certain rights of future people and current people should be weighed equally. The obligations that current people have to respect each other’s rights extend to all future people as well. Though there is great dispute about the content of the rights of current people, as evidenced in part by observing that rights across the world can vary, it seems one can say, at a minimum, that a belief in equal rights for future people implies consistency across time. Whatever rights governments delineate for their current citizens should also apply to all future citizens. Opposing this view is the position that the rights of future people should be “discounted.” Discounting the rights of future people implies that, in cases of conflict, preference is given to the rights of current people over the rights of future people. This is vague, since we have not clarified to what extent we should diminish the rights of future people nor have we stated whether *all* future people’s rights should be equally reduced (for instance, we might reduce the rights of very distant future people more than we reduce the rights of temporally nearer future people). I will focus here on the general question of whether or not we should discount future rights.

This discussion focuses on the *rights* of future and current people. This is an implication of discussions about determining the future value of goods. In such discussions a monetary value is assigned to all goods and it is assumed that all goods are, in principle, able to be compensated for.<sup>21</sup> By “goods” I mean virtually anything that humans value: e.g., a clean environment, health care, education, peace of mind, and so on. Hence, for the purposes of this discussion, quality of life is conceived of as a bundle of goods. Discussions of the future value of goods take place within the context of cost-benefit analyses. Such analyses might ask: How does the *future* benefit of having a clean environment compare to the *current* cost of reducing greenhouse emissions? This is where discounting comes into play. If we discount the value of future goods at a compounding annual rate,

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assumes that quality of life is a right. However, there are other ways to approach the quality of life problem. For one, we might believe that access to a basic level of quality of life (at least insofar as I have described it) is not a right. Secondly, we might hold that all current people should not have equal rights, nor should all future people. Thirdly, we might believe that future people do not have any rights. Each of these viewpoints implies wrestling with the quality of life problem from a different set of premises. However, each can still benefit from our discussion about whether or not future quality of life can be discounted, assuming that there is still some desire to find an ethical way to balance the quality of life interests of current people and future people.

21 O’Neill, John. “The Constituency of Environmental Policy.” *Ecology, Policy, and Politics: Human Well-being and the Natural World*. London: Routledge, 1993: 58. Web. 16 June 2014.

then the farther we look into the future, the less valuable a future good is.<sup>22</sup> Consider that Stern argues for a 1.4% discount rate while Nordhaus argues for a 6% discount rate.<sup>23</sup> By Stern's discount rate, having \$247 billion today is equally valuable to having \$1 trillion one hundred years from now; by Nordhaus's discount rate, having \$2.5 billion today is equally valuable to having \$1 trillion one hundred years from now. Stern concludes that \$500 billion should be invested today (and 1% of total world production should be invested in perpetuity) in order to reduce greenhouse emissions. Nordhaus, by comparison, reasons that we are not compelled to incur such large costs to reduce greenhouse gases. Thus, we might say that Stern thinks that the well-being of future people is more valuable to us than does Nordhaus.<sup>24</sup> If we consider goods like having clean air, health care, education, peace of mind, and so on, to be rights, as at least some countries have, then discounting them is in effect discounting the rights of future people. Hence, in many cases discussions about discounting the value of future goods are *de facto* discussions about the rights of future people.

Arguments for equal rights of future citizens must therefore show that the value of future goods should not be discounted. In total, they must show more than this—they must also show why future citizens should have the same rights as current citizens. But if they can show that future goods should not be discounted then they have fended off a serious threat to their argument. I will now take up several reasons given for why future goods should not be discounted.

To start, a basic problem with discounting future goods is that not all goods are interchangeable.<sup>25</sup> If a good cannot be compensated for then there is no way to measure (nor discount) its value. For instance, there does not

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22 It may be objected that plenty of goods (e.g., antiques, artwork, gems and artifacts) may rise in value over time, which would seemingly contradict the assumption that "the farther we look into the future, the less valuable a future good is." But any particular good that *changes* in value over time is a *different* good at various points in time. For instance, suppose that the value of a Michael Jordan rookie basketball card *during his rookie year* was \$5. Now, *several decades later*, after Jordan solidified his reputation as a great basketball player, it is worth, say, \$500. This is two different goods. It is (1) a rookie basketball player's trading card (from the perspective of people existing during his rookie year) and (2) a vintage basketball card portraying the rookie season of one of the greatest basketball players of all time (from the perspective of current people). In this paper, I assume that we are comparing *qualitatively identical* goods from the unique perspectives of current people and future people. E.g., we would compare the value of a rookie basketball player's trading card in the present and in the future. Similarly, when we conceive of access to clean air as a good, we mean that current people and future people should expect to enjoy equal access to the same quality of clean air.

23 Broome, John. "The Ethics of Climate Change." *Scientific American* (2008): 70. Web. 16 June 2014.

24 *Ibid.*, p. 70.

25 O'Neill, John. "The Constituency of Environmental Policy." *Ecology, Policy, and Politics: Human Well-being and the Natural World*. London: Routledge, 1993: 58.

seem to be a substitute for clean air. It may be objected that a substitute will likely be invented if we run out of clean air, but this assumption speculates that there *will be* a substitute, not that there currently is one. Until that substitute exists, there is nothing that can compensate for the loss of clean air, and therefore the value of clean air cannot be discounted. Other human values, like freedom from being enslaved, also seem to be incommensurable with other goods. This means that there are at least some future goods that are not discountable since their value cannot be quantified in terms of other goods. So, at a minimum, goods that do not have substitutes cannot have their future value discounted.

Moreover, arguments for discounting make several problematic assumptions. First, it is assumed that future people will be wealthier than current people.<sup>26</sup> This implies, using a utilitarian calculus with diminishing marginal returns,<sup>27</sup> that the marginal utility derived from an identical unit of wealth is relatively smaller for future people than it is for current people.<sup>28</sup> This assumption may prove faulty if we run out of non-renewable resources or if climate change results in catastrophe.<sup>29</sup> There are plausible future scenarios in which future people are much poorer than current people. If this is so then future people will derive *greater* marginal utility from an identical unit of wealth than current people. If such conditions were to materialize, they would undermine one of the main justifications for discounting.<sup>30</sup>

Second, it is assumed that people always prefer current benefits to future benefits (the argument from pure time preference).<sup>31</sup> Yet, there are instances in which this is not true. Consider my brief and incomplete recapitulation of O'Neill's honeymoon thought experiment.<sup>32</sup> Imagine that a couple is taking a two week honeymoon. The honeymoon can go two different ways: (A) The couple is miserable at first as they discover many undesirable qualities in each other. They resolve their differences by day nine, develop an appreciation for each other, and the honeymoon ends happily. On the return flight home their plane crashes and they die. Or: (B) They have an excellent initial twelve days of their honeymoon. On the thirteenth day their relationship completely falls apart and they find many qualities in themselves and their spouse that they resent. They end the honeymoon in spiteful conflict. On the return flight home their plane crashes and they die. It is not

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26 *Ibid.*, p. 52.

27 Broome, John. "The Ethics of Climate Change." *Scientific American* (2008): 71.

28 O'Neill, John. "The Constituency of Environmental Policy." *Ecology, Policy, and Politics: Human Well-being and the Natural World*. London: Routledge, 1993: 51.

29 *Ibid.*, p. 52.

30 Broome, John. "The Ethics of Climate Change." *Scientific American* (2008): 71.

31 O'Neill, John. "The Constituency of Environmental Policy." *Ecology, Policy, and Politics: Human Well-being and the Natural World*. London: Routledge, 1993: 52.

32 *Ibid.*, p. 54.



obvious that (B) is what people would choose, although proponents of pure time preference seem obligated to say that it is the preferable outcome. In fact, it seems that many people would prefer scenario (A) in which benefits are deferred into the future. Thus, the first takeaway from O'Neill's thought experiment is that since there are scenarios in which we do not prefer present benefits to future benefits, we cannot automatically discount future benefits. The larger takeaway is that, without knowing the "narrative order" of the events of our lives, we cannot ascertain whether we prefer benefits in the present or in the future. Since we cannot know this narrative order beforehand, this is problematic for attempts to discount future benefits.

Third, it is assumed that there is some epistemic uncertainty about the existence of future people and the preferences of future people. Proponents of discounting reason that future people's goods should be discounted because we are sure that current people exist while there are possible scenarios in which future people will not exist. Yet, it seems highly plausible that if current people act as they always have, then future people will exist. Furthermore, while it is true that we cannot know all of the preferences of future people, there are preferences of future people that we do know. For instance, "one can assume that toxic materials will be harmful and that they will need sources of energy, food and basic raw materials."<sup>33</sup> Yet, it is morally relevant that (1) current people exist and (2) it is highly probable that future people will exist. It is reasonable to assume that there is a very slight possibility that future people will not exist and that we might not know what their preferences are.<sup>34</sup> However, the slightness of this possibility does not give strong reason to discount the goods of future people, since, first, if we act properly, we can ensure that future people do exist, and, second, there are specific interests of future people that we are capable of accurately predicting.

Though these critiques of discounting are cogent and pose problems for it, they do not amount to a logical framework sufficient to displace it. They only indicate that if discounting's assumptions are false then it does not apply. Since there are plausible scenarios in which the premises of discounting can turn out to be correct—instances where (1) the good in question is interchangeable (e.g., a substitute for having access clean air is invented), (2) future people prove to be wealthier than current people (e.g., they do not run out of non-renewable resources, or there are substitutes invented that replace the non-renewable resources, and there is not a catastrophic event), and (3) current people, upon later reflection, will have preferred current benefits to future benefits—there are plausible scenarios

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<sup>33</sup> *Ibid.*, p. 50.

<sup>34</sup> See section 3 for a fuller discussion of the epistemic uncertainty of the existence of future people and of our ability to accurately predict their preferences.

in which discounting may be cogently employed. Though these scenarios involve some conditions that cannot be known until after the fact, such as that future people will have proven to be wealthier than current people and that current benefits will have proven to be preferable to future benefits, we can assign probabilities to these outcomes. Furthermore, if the good in question (such as having access to clean air) is not presently interchangeable, but, in principle, a substitute could be invented for it, and therefore could become interchangeable in the future, we can also assign a probability to the likelihood that a substitute will be invented. Thus, in many possible scenarios, discounting has at least a probability of being correct, since its assumptions have a probability of being correct. Identifying the potentially flawed assumptions of discounting is a worthwhile effort. It suggests that there are some goods that cannot be discounted (goods that have no possibility of being interchangeable, such as freedom from slavery) and that, for goods that probably can be discounted, we should factor into our analysis the probability that the assumptions of discounting are false. But this is not enough to establish that future people have equal rights. Even if a good (that is considered a right) cannot be discounted, we still must show that future people's rights are equal to current people's rights.

Thus, in an effort to construct a theory of "intergenerational justice" in which future people have equal rights, Brian Barry understands fundamental equality of humans across time to be "*prima facie* valid." Barry writes, "I do not know of any way of providing a justification for the premise of fundamental equality; its status is that of an axiom."<sup>35</sup> But this overlooks the case that John Rawls makes for fundamental equality. If, as Rawls argues, it is true that from behind the veil of ignorance it is rational for hypothetical impartial parties to agree that all current people deserve certain basic equal rights, then we have offered at least some justification for a minimal level of fundamental equality.<sup>36</sup> The problem is with justifying fundamental equality *for posterity*. For it is not obviously rational for current people, from behind the veil of ignorance, to hold that future people have *any* rights. Rawls sums up this worry in this way: "Since the persons in the original position know that they are contemporaries...they can favor their generation by refusing to make any sacrifices at all for their successors; they simply acknowledge the principle that no one has a duty to save for posterity."<sup>37</sup> In an attempt to work around this problem, Rawls offers the following way to justify obligations to future generations: "We can adopt a motivation assumption and think of the parties as representing a continuing line of claims. For example, we can

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35 Barry, Brian. "Sustainability and Intergenerational Justice." *Environmental Ethics: An Anthology*: 489.

36 Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 1999: 118-139

37 *Ibid.*, p. 121.

assume they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants.”<sup>38</sup> However, though it is true that the egoistic interests of current people (such as an interest in legacy) might cause current people to act in accordance with specific interests of future people, this fails to provide an argument that future people should have equal rights. On the contrary, this supports the notion that current people’s rights are primary and that the preservation of the interests of future people are contingent upon their concurrence with the interests of current people.

Barry aims to incorporate rationality into intergenerational justice in a different way, asserting, “I believe that the core idea of universalism—that place and time do not provide a morally relevant basis on which to differentiate the weight to be given to the interests of different people—has an immense rational appeal. Its corollaries—the illegitimacy of slavery and the impermissibility of assigning women an inferior legal status, for example—have been acted on for the past two centuries in a significant part of the world.”<sup>39</sup> But the wrongness of slavery and sexism also follow from the more basic idea that *current* people are fundamentally equal, which only requires universalism across space. If our reason for accepting universalism is that we agree with these corollaries, we are inclined to accept only the more basic and agreeable tenet that current people are fundamentally equal and avoid inheriting the problems attendant to a belief in intergenerational equality. Put another way, if we remove the reference to “time” from Barry’s statement it retains the exact same moral force. In short: It seems that claims that posterity has equal rights are more difficult to justify than claims that only current people have equal rights and therefore are probably too strong.

If future people do not have equal rights, we still might have reason to strongly value at least some of their rights. For instance, suppose that having access to clean air is a right. Since there are, in principle, ways to substitute for clean air, such as by artificially cleaning the air, we can discount having access to clean air. Our level of optimism that we will invent a way to substitute for clean air will affect how much we discount having access to clean air. If we think there is a low probability that a substitute for clean air will be invented soon, then at most we should only slightly discount the right of temporally proximate future generations to have access to clean air. Of course, there are other factors that will impact our discounting procedure as well, such as how optimistic we are that future people will be wealthier than current people and how much wealthier we think that they will be. The point is that future people do not need to have equal rights in order for

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38 *Ibid.*, p. 111.

39 Barry, Brian. “Sustainability and Intergenerational Justice.” *Environmental Ethics: An Anthology*: 490.

us to strongly respect at least some of their rights. This seems to be a more reasonable approach than assuming that equal rights exist across current and future generations, while still giving substantial weight to at least some of the rights of future generations.

## VII. Closing: Terrorism and Oil Fields Thought Experiment

Concerns over preserving the environment often involve balancing each of the four following values: (1) saving a current life, (2) saving a future life, (3) preserving the quality of life of current people, and (4) providing some basic level of quality of life of future people. In this paper, I have attempted to flesh out some important moral concerns arising from the interplay of these four categories. First, I have argued that in situations where we must choose to save (1) a current life or (2) a future life, the current life should be prioritized. When we know additional morally relevant facts about the current life and/or future life beyond era, such as age and our personal relationship to the lives at stake, weighing all of these factors together could produce strong reasons to prioritize either the current life or the future life. When there is a sufficiently large number of future lives at stake, moral intuition suggests that they should be prioritized over a sufficiently small number of current lives at stake, though it is unclear at what precise quantities of future lives and current lives this becomes true and how to determine which particular current lives should be sacrificed. Second, I have observed that there seems to be something fundamentally problematic about comparing the value of a life, whether (1) current or (2) future, against quality of life, whether (3) current or (4) future, on the grounds that one person's life seemingly belongs to a separate and irreconcilable moral category than another person's quality of life. Still, moral intuition suggests that there is a point at which a severe enough decrease in the quality of life of future people outweighs the value of saving the lives of a sufficiently small number of current people. Third, I have attempted to show that, when (3) the quality of life of current people conflicts with (4) the quality of life of future people, in many cases we have reasons to discount the quality of life of future people. However, there are plausible scenarios in which we should only discount the quality of life of future people very slightly.

We should expect to experience situations that require us to make these types of moral judgements and to have to weigh their consequences together. For instance, consider the following thought experiment. Suppose: (1) A terrorist organization derives its wealth primarily from its control over oil fields. (2) It uses this wealth to buy weapons. (3) It has utilized and depleted its current stash of weapons. (4) There is reliable intelligence suggesting that it is planning to kill several hundred current people as soon

as it obtains more funds to buy the weapons necessary to carry out the attack. (5) The U.S. and several of its allies would like to prevent this attack. (6) The surest way to stop the attack is to prevent the terrorist group from obtaining weapons, and the only way to prevent it from obtaining weapons is to eliminate its primary sources of wealth, which means destroying the oil fields it controls.<sup>40</sup> (7) Climate scientists have predicted that destroying these oil fields would generate significant pollution that would eventually result in several hundred temporally proximate future people dying, as well cause minor decreases in the quality of life of current people and slightly larger decreases in the quality of life of future people. (8) We have good reason to believe that destroying these oil fields will not generate any *additional* blowback. I.e., destroying these oil fields will not contribute to the creation of new terrorist groups nor will it inspire new terrorist activities that otherwise would not have happened. (9) Current people are aware of this looming terrorist attack, creating psychological stress and anxiety, which negatively impacts their quality of life.

In such a situation, current lives, future lives, the quality of life for current people, and the quality of life for future people are all at stake. Should we destroy the oil fields? The benefits include (1) saving several hundred current lives and (2) improving the quality of life of current people by alleviating their fear of a terrorist attack. The costs include (1) sacrificing several hundred future lives, (2) incurring quality of life losses for future people due to pollution, and (3) incurring quality of life losses for current people due to pollution. On the other hand, should we not destroy the oil fields? The benefits include (1) saving several hundred future lives, (2) sparing quality of life losses for future people due to pollution, and (3) sparing quality of life losses for current people due to pollution. The costs include (1) sacrificing several hundred current lives and (2) incurring quality of life losses for current people due to their fear of a terrorist attack.

Suppose that the only things we know about the current and future

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<sup>40</sup> This assumption can be objected to in a number of ways. For example, we can imagine scenarios in which it would not be necessary to destroy the terrorist group's oil fields. The U.S. and its allies could impose economic sanctions against anyone who trades with the terrorist group. If these economic sanctions prevent anyone from trading with it, then it will not obtain wealth from its oil fields. However, it is not clear that economic sanctions would prove efficacious. For one, oil is an important commodity for many nations. If the terrorist organization is selling oil at a competitive price, groups might find ways to covertly buy its oil. They also they might be willing to endure economic sanctions, depending on their severity. Furthermore, it is not clear that the enactment of sufficiently severe economic sanctions is possible, since this would likely require a level of agreement among powerful nations with competing interests that may not be politically achievable. For the immediate purposes of this thought experiment, let us assume that we must destroy the oil fields in order to stop the terrorist group from obtaining wealth.

lives at stake are (1) the era to which they belong and (2) that there are as many current lives as future lives at risk. This factor suggests, if considered in isolation, that we should prioritize saving the current lives, and therefore that we should destroy the oil fields. However, this factor must be weighted together with quality of life considerations. Suppose that whether or not we destroy the oil fields, current people's quality of life remains relatively constant (either they suffer from the pollution resulting from destroying the oil fields or they suffer from living in fear of the impending terrorist attack). By contrast, if we destroy the oil fields, future people's quality of life will suffer more than if we do not. Supposing that future people's quality of life considerations at stake here can be discounted, even after discounting them, this is a substantive factor. Since current people's quality of life remains constant no matter which option we choose, this factor suggests that we should prioritize preserving the discounted quality of future lives and that we should not destroy the oil fields.

We must therefore weigh (1) prioritizing the lives of current people over the lives of future people against (2) protecting future people's quality of life. Problematically, these categories seem to be morally irreconcilable. There is no uncontroversial answer. I suggest that, in this particular case, because the isolated act of destroying these oil fields will cause only relatively minor decreases to future people's quality of life, we should weigh (1) more strongly than (2). Therefore we should destroy the oil fields. But it is conceivable that in a different scenario, which is identical in every aspect except that now there will be an enormous amount of damage done to the quality of future lives, we should not destroy the fields.

Of course, in reality, there are many more complicating factors. For example, choosing to not destroy the oil fields does not preclude us from other courses of action to prevent the terrorist attack, such as attempting to cut off funds generated by the oil fields through economic sanctions or temporarily increasing security measures to protect current people. Even if these preventative methods are less likely to succeed than destroying the oil fields, their probability of success still matters, and factors into the decision. Furthermore, in reality, the details of any given scenario will probably not be as concrete. For example, we would probably have only rough estimates of how many current people would die from the terrorist attack and how many future people would die from the pollution that results from this particular act of destroying the oil fields. It is also unlikely that these estimates would amount to a one-to-one tradeoff of current lives and future lives. Nonetheless, it is still worthwhile to try to understand and develop our moral reasoning through these sorts of oversimplified thought experiments in order to ensure that we have not overlooked important ethical considerations and to test the logical strength of our currently held moral beliefs.

# Making Way for Tomorrow: Benjamin and Foucault on History and Freedom

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In the wake of the terrorist attacks in San Bernardino, California, President Obama called a rare Oval Office press conference. He described renewed efforts to battle the Islamic State organization in Iraq and Syria while ensuring that American policy, abroad and domestically, remained pluralistic and tolerant. The December 6, 2015 speech came with a familiar refrain: “I am confident we will succeed in this mission because we are on the right side of history.” What does he mean? That future generations will judge him wise? That history itself has sides and that the winds of change and progress are at his back? Appeals to historical judgment often share both qualities. And President Obama is not alone in considering his actions and options historically.<sup>1</sup> Six months earlier when the LGBTQ movement welcomed the *Obergefell v. Hodges* decision that made gay marriage the law of the land many pronounced that opponents now clearly occupied the “wrong side” of history.<sup>2</sup> Rev. Martin Luther King famously said that, “The arc of the moral universe is long but it bends toward justice,” speaking to the idea, familiar since at least Immanuel Kant, that history has a progressive direction and it is up to us to hasten its movement on the way to peace and prosperity.

But while the experience of the twentieth century has called such confidence into doubt for some, political actors (including, of course, President Obama) continue to call on “history” as a guide or even a ledger for political action. In the absence of metaphysical and moral certainties, what makes history such an appealing measure of progress? And how should those seeking to transform social relations and economic distribution think about their place in history? In short, how can we make history useful “without banisters”<sup>3</sup> to underwrite our sense that it moves in the right direction

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1 President Obama has used the phrase often. In his First Inaugural Address he said “To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history, but that we will extend a hand if you are willing to unclench your fist.”

2 *The Economist*, “Stuck on the Wrong Side,” July 3, 2015

3 Tracy B. Strong, “Politics without Vision: Thinking without a Banister in the Twentieth Cen-

– or any direction at all? This paper explores that question with reference to two essays by very different authors: Walter Benjamin’s “Theses on the Philosophy of History” (1940) and Michel Foucault’s “Nietzsche, Genealogy, History” (1971).<sup>4</sup>

While they were composed at different times and in different philosophical traditions, both consider how a philosophy of history might motivate emancipatory politics absent any guarantees that human activity moves in some single, progressive direction. Though Benjamin and Foucault answer differently, they both assign the historian a central role in identifying potential sources of political change. Given their philosophical influence and common concerns, it is surprising that so few scholars have undertaken a comparative study.<sup>5</sup>

This paper aims to pursue that comparison by arguing that their normative accounts of political liberation are motivated by distinctive theoretical perspectives on history and on the historian’s task to *recover* (Benjamin) or *uncover* (Foucault) catastrophe and possibility, oppression and resistance. While Benjamin and Foucault advance divergent political programs, they share certain emphases that I bring out in my conclusion: the dangers of received, universalizing history; the political redemption of the suppressed past; the role of experience in understanding history; and the relationship between historical interpretation and assessments of political possibility. I begin by exploring their philosophies of history, with an eye to establishing points of contact and contrast.

I. Benjamin’s posthumously published “theses” have long been a source of fascination for philosophers and social theorists. The theses, like much of Benjamin’s writing, are infamously elusive and aphoristic. Richard Wolin has described their “magical quality” and the “hermetic and forbidding mode” characteristic of Benjamin’s “a-systematic” thought.<sup>6</sup> Grounded in cultural criticism and Jewish intellectual traditions, Benjamin forged a heterodox

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ture” (Chicago: University of Chicago Press, 2012).

4 Walter Benjamin, “On the Concept of History,” in *Walter Benjamin: Selected Writings, Volume 4: 1938-1940*, ed. Howard Eiland and Michael W. Jennings (Cambridge: Harvard University Press, 2006); Michel Foucault, “Nietzsche, Genealogy, History,” in *The Foucault Reader* ed. Paul Rabinow (New York: Pantheon Books, 1984).

5 Comparisons typically come in fleeting reference. In his *Michel Foucault and the Politics of Freedom*, for instance, Thomas Dumm footnotes a sentence (“This radical alterity of the present is always available to us as a practical alternative to being as we are.”) this way: “One other thinker who is evocative of Foucault on this matter is Walter Benjamin.” Thomas Dumm. *Michel Foucault and the Politics of Freedom* (New York: Rowman & Littlefield, 1995), 27.

6 Richard Wolin. *Walter Benjamin: An Aesthetic of Redemption* (New York: Columbia University Press, 1982), x-xi, xii.



Marxism that his friend Hannah Arendt called “most peculiar.”<sup>7</sup> Understanding the theses requires sensitivity to their especially literary, fragmentary, and poetic qualities.

One of the best ways into Benjamin’s own theory is to understand “social Democratic theory,” the dominant alternative he attacks as a “false picture” of history. In Thesis XIII, Benjamin names the theory’s first-order implications: that, (to recall King’s refrain) “the long arc of history bends towards *progress*” in universal, infinitely perfecting, and morally irresistible ways. On the one hand there’s nothing especially original about this critique. Marxists have long claimed that progressive and universalizing histories are ideological cover, complicit and coterminous with the cultural logics of capitalism. What makes Benjamin’s attack surprising and significant is the depth of his claims about the conceptual architecture that supports progressive history, with implications extending beyond the theory at hand: “The concept of the historical progress of mankind cannot be sundered from the concept of its progression through a homogeneous, empty time. A critique of the concept of such a progression must be the basis of any criticism of the concept of progress itself” (Thesis XIII).

The social democratic theory of human progress assumes something about time itself: that it is “homogenous, empty,” unshaped by contents and tending inevitably towards the perfection of human subjects and human institutions. Benjamin seems to draw parallels to Leopold van Ranke, the *urtext* narrative historian, who claimed to tell things “the way they really are,” (Thesis VI), tread lightly, and renounce any philosophy of history. While it appears to be theoretically restrained, this style may still carry assumptions about the way history moves and feels – assumptions Benjamin captures in the phrase “homogenous, empty time,” thrice repeated in the essay. What does it mean for time to be “homogenous” or “empty”?

First, dominant modes of history claim false universality. They assume that time moves continuously (“[telling] the sequence of events like the beads of a rosary”) and that the past consists of static data, static text awaiting a neutral discoverer to decode “causal nexus[es]” (Thesis A). Second, dominant modes naturalize the experience of time under capitalism as regular, predictable, and, indeed, clock-like.<sup>8</sup> The phenomenology of homogenous time points to its deeper and more politically sinister consequences.

To Benjamin, by contrast, lived experience (like the disillusioning Hitler-Stalin pact that incited him to write the theses) argues against the directed, flat, and homogenous movement of time. Time is erratic: jolting and zigzagging in fits and starts. The “emptiness” of time reappears in Thesis

<sup>7</sup> Hannah Arendt. *Men in Dark Times* (New York: Harcourt, Brace & World, 1968), 163.

<sup>8</sup> See, for example: E.P. Thompson, “Time, Work-Discipline, and Industrial Capitalism,” in *Past & Present*, No. 38 (Dec. 1967), pp. 56-97.

XVII, when Benjamin connects progressive, universal history to historicism, which radically particularizes and divides with “no theoretical armature,” and an “additive” method that “musters a mass of data to fill the homogenous, empty time.”

The “false picture” of history is not simply wrong; it actively instantiates and even advances class oppression and violence. The historian who seeks scientific accuracy by imagining herself into the past and shedding “presentist” bias, will inevitably repackage ruling class *doxa*. Benjamin describes the “historicist” attempt to (lazily, formally) empathize with the past as inevitably empathizing with the *ruling* class that has invariably won and produced the cultural spoils and received narratives that embody and repackage a cruel and bloody victory. Extending and contemporizing the saying “history is written by the winners,” Benjamin ventures: “Whoever has emerged victorious participates to this day in the triumphal procession in which current rulers step over those who are lying prostrate” (Thesis VII).

The claim does not seem very different from what a conventional Marxist might say about historicism (i.e. it is pure ideology), but Benjamin shows an unusual sensitivity to how that ideology might actually feel.

Progressive history assumes that an arc underwrites eras of triumph and failure. Progressive history professes confidence in waves, tides, and energies (Thesis XI) – a confidence that has often provided a warrant for insurgent working class and subaltern movements, supported by slogans looking to the “right side of history.” While this kind of confidence can seem to be politically useful, Benjamin also points out its dangers. His argument takes some work to reconstruct but is vital to understanding Benjamin’s alternative.

Given that history can seem to be a collection of ruling class victories, telling stories about “how far we’ve come” even when including caveats about “how far we have to go” can be dispiriting while also hardening past political defeats. Progressive narratives assume that some pitched battles have been (or will be) won and some victories have been (or will be) achieved, making it difficult in a “progressed” present so saturated with injustices of all scales to imagine radical improvement. Progress narratives can read transitions or reforms as directed by some centripetal force pushing history two steps forward for every one step back, inculcating mystifying gratitude in those who should be grappling for a new fight. Even worse, historians of this kind are complicit in the continuous project of misremembering or covering over the dead, treating the defeated as missteps or necessary sacrifices on the way to the right side of history.

Benjamin develops his positive theory against a number of other ways of reading history: “Whig” history<sup>9</sup> and historicism. “Whig” histories

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<sup>9</sup> Herbert Butterfield. *The Whig Interpretation of History* (New York: W. W. Norton & Company, 1965).

read events as retrospectively inevitable and tending towards progress and Enlightenment; historicism, on the other hand, seems to do the opposite, characterizing all historical events as local, specific, and disconnected. While historical materialists also criticize these modes, following Ronald Beiner's description, Benjamin advances a "theological-materialist theory"<sup>10</sup> that shares important roots but also breaks with Marx.

Conventional Marxism understands class struggle as the source of historical change and the working class as its agent. Change happens dialectically: oppression and liberation travel together. Greater possibilities for improvement, achievement, and emancipation arrive alongside greater potentials for debasement, exploitation, and unfreedom. Nevertheless, history moves inexorably towards a political and economic crisis that can only end in the repossession and universalization of the means of production.

Unlike many of the forms of history that Benjamin criticizes, historical materialism reads definitive patterns and dynamics into human action. It envisions a future beyond those patterns and dynamics without class struggle or human bondage. The political task of historical materialism is, in some ways, to put historical materialism out of business as such. Historical movement registers dialectical progress towards more revolutionary conditions and can be read as ledger for contemporary action. History becomes strategic: contemporaries can learn from the mistakes and defeats of their ancestors while remaining confident that ultimate victory sits beyond the horizon.

In his reflections in the *Eighteenth Brumaire of Louis Bonaparte*, Marx makes this point explicitly:

The social revolution of the nineteenth century cannot draw its poetry from the past, but only from the future... Earlier revolutions required recollections of past world history in order to drug themselves concerning their own content. In order to arrive at its own content the revolution of the nineteenth century must let the dead bury their dead.<sup>11</sup>

Like progressive history, historical materialism claims that there is a direction to human action. But where progressive history has some lightly guiding principles, historical materialism assumes a cumulative or repetitive movement on the way to the other side. The positions nevertheless share a sense that the main role of the past is to be a tactical resource for the future or to demonstrate progress. In either case history (to paraphrase the title of a ne-

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<sup>10</sup> Ronald Beiner, "Walter Benjamin's Philosophy of History," in *Political Theory*, Vol. 12, No. 3 (Aug. 1984), 424

<sup>11</sup> Beiner, 426

glected melodrama<sup>12</sup>) “makes way for tomorrow.” In both progressive history and historical materialism Benjamin sees an impulse to suppress or just instrumentalize the past. He challenges that impulse to suppress or instrumentalize in his positive account.

II. Some scholars argue that by the time he wrote the “Theses” Benjamin had drifted from Marxism. Gershom Scholem writes that the “Theses” constitute a “decisive break with historical materialism and a return to the metaphysical-theological concerns of [Benjamin’s] early thought.”<sup>13</sup> I disagree. Benjamin is a Marxist chastened by disappointment and frustration. He replaces metaphysical guarantees with theological foundations<sup>14</sup> but nevertheless preserves the centrality of class conflict to the course of human action and classless society as a regulative ideal. Throughout his account, Benjamin balances a view that the historian should record and recover historical catastrophe while at the same time being responsible for “fanning the spark of hope in the past” (Thesis VI) and, perhaps, in the present, too.

The “false picture” of history that Benjamin challenges is characterized by dead, disenthralled, and linear narration, treating time as regularly marching towards universal peace and prosperity. This history violently suppresses its dead and defeated. The historian deploying Benjamin’s “materialist historiography” (Thesis XVII), on the other hand, understands history as alive, enthralled, and non-linear, hurling in fits and starts towards catastrophe, but also (dialectically) loaded with “messianic” potential to (quite literally) break that direction. Thesis IX famously captures the strange and mystical qualities of this account:

There is a picture by Klee called *Angelus Novus*. It shows an angel who seems about to move away from something he stares at. His eyes are wide, his mouth is open, his wings are spread. This is how the angel of history must look. His face is turned towards the past. Where a chain of events appears before *us*, *he* sees one single catastrophe, which keeps piling wreckage upon wreckage and hurls it at his feet. The angel would like to say, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise and has got caught in his wings; it is so strong that the angel can no longer close them. This storm drives him irresistibly into the future, to which his back is turned, while the pile of debris before him grows toward the

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<sup>12</sup> *Make Way for Tomorrow*, dir. Leo McCarey (Paramount Pictures, 1937).

<sup>13</sup> Beiner, 423

<sup>14</sup> In his addenda to the essay, “Paralipomena to “On the Concept of History,” Benjamin makes this rather Schmittian point explicit: “In the idea of classless society, Marx secularized the idea of messianic time” (Thesis XVIIa). In Eiland and Jennings, ed., 401.

sky. What we call progress is *this* storm. (Thesis IX)

The angel sees human time in “tremendous abbreviation” (Thesis XVIII), propelled towards devolution, decline, and disaster by a storm (“progress”). Were the angel exclusively forward-looking (perhaps occasionally craning his neck to study the past, instead of facing it directly), he could come to believe that the current winds blow towards salvation. (This might be what ruling class histories in fact do.) But from his vantage point, with “wreckage upon wreckage” collecting at his feet and “debris” pelting his open wings, the resting order offers no guarantee of improvement. Indeed, the only hope of “[making] whole what has been smashed” lies in “awaken[ing] the dead,” which the angel cannot reach in the storm.

This account can seem changeless, hopeless. Indeed it is not hard to imagine this passage supporting the sense that a utopian project aimed at radical political transfiguration must be resigned to rearguard marginality, valuable mainly in ensuring that its adherents keep their hands clean and their minds pure. The passage suggests that while history might move definitively against human emancipation it is also more than a repository of strategic defeats or political failures. Instead, in order to win, revolutionaries (and historians) must remember the past better.

Early in the academic consideration of the “Theses,” the political theorist Ronald Beiner described Benjaminian history as both pessimistic and “throbbing with revolutionary possibilities.”<sup>15</sup> The description evokes a familiar dilemma: How can we be realistic about the state of the world while working for its revolutionary transformation? Benjamin’s theory of history seems to supply an answer: revolution does not depend on reading the historical tealeaves or lining up in history’s direction. Instead it demands breaking with the “empty, homogenous time” in order to “explode” the “continuum of history,” attempting to wake from what James Joyce might call the “nightmare” of history. That can seem abstract. But Benjamin makes the point in a more specific and historical way:

What characterizes revolutionary classes at their moment of action is the awareness that they are about to make the continuum of history explode. The Great Revolution introduced a new calendar. The initial day of a calendar presents history in time-lapse mode... Calendars do not measure time the way clocks do; they are monuments of a historical consciousness... (Thesis XV)

Calendars, unlike clocks, cover vast amounts of unrepeatable time. Revo-

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15 Beiner, 427

lutionary transformation does not merely change time (as the French attempted after the Revolution) but also discloses the “true picture” of history: the pitched and dialectical battle between its oppressive direction and its life, loaded with possibilities.

History is the subject of a construction whose site is not homogenous, empty time, but time filled by now-time [*Jetztzeit*]. Thus, to Robespierre ancient Rome was a past charged with now-time, a past which he blasted out of the continuum of history. (Thesis XIV)

For Benjamin, true historical materialists can “brush history against the grain” (Thesis VII) and true revolutions enact a “messianic arrest of happening” – to survey oppression and, possessed of “*weak* messianic power,” say, decisively, *no*. This productive, sabotaging, no-saying of revolutionary action is only possible, however, once the revolutionary starts looking at history differently and identifies the continuity between the historical past and the unfolding present: to invite the “return of the oppressed,” redeem their silent suffering and “save the dead from oblivion” (Thesis VI) through a radical rupture with precisely the conditions, patterns, and dynamics and that buried and defeated them in the first place.

[The historical materialist] recognizes the sign of a messianic arrest of happening, or (to put it differently) a revolutionary chance in the fight for the oppressed past. He takes cognizance of it in order to blast a specific era out of the homogenous course of history; thus, he blasts a specific life out of the era, a specific work out of the lifework. (Thesis XVII)

Historical materialism, unmodified by Benjamin’s theological supplement, assumes that a revolution will arrive at the end of history. Given that history has been propelled by class conflict, Benjamin shares the desire to break with it but he thinks that break can happen in different ways. First, we cannot count on any preordained, progressive trajectory to reach a desirable end state. Indeed, as he wrote in the unpublished “Theological-Political Fragment,” freedom is not internal to history; it will not await those who merely, barely survive historical catastrophe: “...the Kingdom of God is not the telos of the historical dynamic; it cannot be established as a goal. From the standpoint of history, it is not the *goal* but the *terminus*” (my emphasis).<sup>16</sup> We may end up in Heaven at the end of history but this will not be by design.

Second, history can be jolted or stopped *in motion*. In the fragments

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<sup>16</sup> Eiland and Jennings ed., 305.

posthumously published as “Paralipomena to “On the Concept of History,” Benjamin writes:

Marx says that revolutions are the locomotive of world history. But perhaps it is quite otherwise. Perhaps revolutions are an attempt by the passengers on this train – namely, the human race – to activate the emergency break. (Thesis XVIIa)<sup>17</sup>

History, properly understood, then, endows those who want to change the world with the power to genuinely transform it – to decisively break with and put a break *on* the traditions and transmissions that characterize accumulating oppression. The historian’s role, properly understood, demands an active recovery of what ruling class history has paved over: to arrest the cycle of decay and, like a “pearl diver,” rescue, collect, and polish the debris that has crystallized at the ocean floor.<sup>18</sup> This historian might resemble the revisionist in search of lost causes as well as the struggles that, while suppressed by official histories, actually transformed political and social conditions.

In summary, Benjamin calls upon the historian to (a) recover experiences, events, and possibilities drowned by the persistent ideological barbarism of ruling class victory; (b) upend the appearance of linear historical progress and insist on a reality of linear historical catastrophe; and (c) insist, nevertheless, that “messianic splinters” (Thesis A) can emerge to halt or change the course of history.

**III.** Although extraordinarily prodigious, Benjamin wrote in elusive fragments, publishing only two books in his lifetime. He withheld his “Theses” for fear of “opening up the floodgates to enthusiastic misinterpretation”<sup>19</sup> – the text survived as a loose-leaf draft, carried on Benjamin’s ill-fated attempt to escape Nazi-occupied France. Any theory building from those fragments requires some hermeneutical finessing; developing a legible methodology for radical revolutionary historiography means wrestling with Ben-

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<sup>17</sup> Ibid., 402.

<sup>18</sup> “What guides this thinking is the conviction that although the living is subject to the ruin of time, the process of decay is at the same time a process of crystallization, that in the depth of the sea, into which sinks and is dissolved what once was alive, some things “suffer a sea-change” and survive in new crystallized forms and shapes that remain immune to the elements, as though they waited only for the pearl diver who one day will come down to them and bring them up in the world of the living – as “thought fragments,” as something “rich” and “strange,” and perhaps even as everlasting *Urphanomene*.” Arendt, 206

<sup>19</sup> “I don’t need to inform you that I have not the least intention of publishing these notes (and certainly not in the form in which they have been presented to you). They would open up the floodgates to enthusiastic misinterpretation.” Walter Benjamin to Gretel Adorno (April 1940). Esther Leslie. *Walter Benjamin: Overpowering Conformism* (London: Pluto Press, 2000), p. 207

jamin's entire corpus. Indeed, Benjamin is best remembered as a philosopher of mass culture, not history. Before exploring Foucault's account of history, I would like to signal some important contrasts between the thinkers.

Unlike Benjamin, Michel Foucault was more prolific as a writer and somewhat less elusive as a thinker. He remained self-conscious about his theoretical activity as well, which can make reconstructing his theories somewhat less demanding. I read Foucault's 1971 essay "Nietzsche, Genealogy, History" as a key to understanding his theory of history. Before attending to his positive account I will briefly canvass the kinds of history he sets out to challenge.

Foucault sets himself against three dominant historical tendencies. First, like Benjamin, Foucault worries about historical modes that sell their local, limited perspective as universal. Second, like Benjamin, Foucault is critical of historical narratives that seem to stack the deck at some finite endpoint and decisive origin, containing the full truth of an event, practice or institution. As he writes, "[Genealogy] opposes itself to the search for 'origins.'"<sup>20</sup> Third, while Benjamin objects to the "radical particularization" entailed by historicism, Foucault embraces some version of historicism full stop, emphasizing that institutions and practices understood to be natural have a history. He further connects their naturalization to a process of philosophical and political preservation underwritten by a Western metaphysics that establishes some realms as *outside* history, *terra firma* considered inappropriate for analysis or critique. As examples he offers "sentiments, love, conscience, instincts" and the body itself. Indeed, "...the task [of genealogy] is to expose a body totally imprinted by history and the process of history's destruction of the body."<sup>21</sup>

According to Foucault, dominant history has shaped our sense of what humans have done (what has changed and stayed in the same) as well as what can change or must stay the same. By delimiting where change happens, these modes of history also depress any sense of where conflicts can transform relationships, habits or practices. Foucault develops his genealogical method to battle historical *doxa* and change minds (and hearts): to uncover and interpret contemporary institutions and practices as the result of non-linear and contingent bursts of relationships, contests, and discourses, and, in so doing, inject the present with the uncertainty, precarity, and potential political mobility that *also*, on his account, characterize the past.

Benjamin left few clues about how to do (or think about) history his way. Many scholars have looked to the Paris "Arcades Project" to which the "Theses" were a postscript for an example of the cultural critique and aesthet-

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20 Rabinow (1984), 77.

21 *Ibid.*, 76, 83.



ic collection supported by Benjamin's political-historical work.<sup>22</sup> But for the working historian, the "Theses" can be vexing, with only very general methodological guides: to tell history from below; to revisit paths that we imagine to be lost; and to reject progressive narratives or assumptions.

Foucault, on the other hand, seemed to employ his theory of history in a number of texts.<sup>23</sup> He was also quite specific in "Nietzsche, Genealogy, History" about historical and archival practice. He begins the essay: "Genealogy is gray, meticulous, and patiently documentary." He continues by describing the way that the genealogist must resist the temptation to interpret historical events captured in "entangled and confused parchments" as contributing to "any monotonous finality." In addition, the detailed work must be attuned to the details of experience often overlooked by historians: "sentiments, love, conscience, instincts..."<sup>24</sup>

While Foucaultian historians work to understand familiar experiences, their practices are grounded in unfamiliar or obscure documents (or unfamiliar interpretations of familiar documents). They should read sensitively and attempt to see past intellectual habits that might lead them to otherwise ignore important evidence of both continuity and change.<sup>25</sup> Like Benjamin's historian, Foucault's genealogist attends to the strange, the defeated, the subaltern, and the oppositional: "[Genealogy] is... a reactivation of local knowledge – or minor knowledges... in opposition to the scientific hierarchies of knowledges and the effects intrinsic to their power: this, then, is the project of these disordered and fragmentary genealogies."<sup>26</sup>

In some ways this can sound like shotgun revisionism, or an order to explode the historical record, displace old, bad facts and old, bad, archives with new ones. In so doing, we might think of the historian as speaking hard-won truths to establishment power. While Foucault shares the revision-

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22 Susan Buck-Morss. *The Dialectics of Seeing: Walter Benjamin and the Arcades Project* (Cambridge: MIT Press, 1991); Michael Lowy. *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History'* (New York: Verso, 2006).

23 Michel Foucault, *The History of Sexuality, Vol. 1*, trans. Robert Hurly (New York: Vintage, 1990); Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1977); Michel Foucault. *Madness & Civilization: A History of Insanity in the Age of Reason* (New York: Vintage, 1988); Michel Foucault. *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage, 1994).

24 Rabinow (1984), 76-7.

25 In a late interview Foucault puts the methodological point even more clearly, establishing a relationship between his "archaeological" work and genealogy: "If we were to characterize it in two terms, then 'archaeology' would be the appropriate methodology of this analysis of local discursivities, and 'genealogy' would be the tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledges which were thus released would be brought into play" (85).

26 Paul Rabinow, ed. *Power: The Essential Works of Michel Foucault, 1954-1983, Vol. 3* (New York: The New Press, 2001), 85.

ist's insurgent impulse (once describing his work as "a challenge directed to what is"<sup>27</sup>), he also wants history to do more than demystify "reality" or just correct and replace old stories. These replacements are vital. But they are insufficient: Foucault seems to also argue that some of these stories are powerfully ingrained enough that their displacement (or replacement) might challenge some fundamental parts of our self-conception and expand our sense of where politics even happens. Thus Foucault's genealogical critique promises to change our understanding of history and experience of the world in ways that may transform the historian and offer new ways to be free.

IV. While genealogists live in the archives they do far more than retell the facts. According to Foucault genealogists should interpret history as a collection of accidents which, through technologies of power and discourses of truth, impress themselves as necessary and attach themselves to subjects as natural. A historian who is "effective" in her practice will "dismantle" (or dislodge) all the aspects of human experience that appear necessary; instead of studying "human identity" as history changes around her, the genealogist will "commit [herself] to [identity's] dissipation." As a critical exercise, the genealogist does not just seek new data but the transformation of the theoretical and cultural armature that underwrite all data: introducing contingency where there was necessity, perspective where there was objectivity, arbitrariness where there was *telos*, and dissolution where there was immutability. This kind of history is fundamentally disruptive and unsettling. In a 1978 interview, he reflected on the project:

If I had wanted...to do a history of psychiatric institutions in Europe between the seventeenth and eighteenth centuries, obviously I wouldn't have written a book like *Madness and Civilization*. But my problem is not to satisfy professional historians; my problem is to construct myself, and to invite others to share an experience of what we are, not only our past but also our present, an experience of our modernity in such a way that we might come out of it transformed. Which means that at the end of a book we would establish new relationships with the subject at issue.<sup>28</sup>

*Madness and Civilization* sought to reinterpret psychiatry and mental healthcare by understanding how many of its central assumptions were fabricated within Western modernity, historically. The thesis challenged received opinion, and as a book of history (like any book of history) it attracted significant criticism about source and interpretation – but also, particularly about its

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<sup>27</sup> Rabinow (2001), 236.

<sup>28</sup> *Ibid.*, 242.

respect for the historical *truth* of (to recall Ranke) “what really happened.” Foucault pushed back in another late interview, drawing attention to how he meant the book to be read, received and, even, felt:

[*Madness and Civilization* is] a book that functions as an experience, for its writer and reader alike, much more than as the establishment of a historical truth. For one to be able to have that experience through the book, what it says does need to be true in terms of academic, historically verifiable truth. It can't exactly be a novel. Yet the essential thing is not in the series of those true or historically verifiable findings but, rather, in the experience that the book makes possible. Now, the fact is, this experience is neither true nor false. An experience is always a fiction: it's something that one fabricates oneself, that doesn't exist before and will exist after.<sup>29</sup>

Foucault cites to “experience” throughout his late interviews. He describes *Discipline and Punish* as “an experience book, as opposed to a truth book or a demonstration book.”<sup>30</sup> He recasts *Madness and Civilization* as a book that, philosophically, was concerned with the ways in which “madness... [became] an understandable and determinable object.” About science itself he posited: “Might not science be analyzed or conceived of basically as an experience, that is, as a relationship in which the subject is modified by that experience?”<sup>31</sup> But Foucault was long concerned about experience. In “Nietzsche, Genealogy, History” he argues for an essential relationship between knowledge (once understood to be abstract and disembodied) and practices that involve forms of power and resistance, that are “inscribed” on the body itself. The body might not just be another or unexpectedly historical surface; for Foucault it could well be what history *does* and *produces*.

For someone so interested in the conditions for freedom in a world of unfreedom, Foucault, read this way, can seem like a Marxist missing the second half of the dialectic: dramatizing the shape-shifting powers that live above and act on human beings. These powers might lack a linear historical trajectory but they are consistent in their application. If Benjamin can make us depressed about history's catastrophic direction, Foucault can leave us feeling rudderless or paralyzed, not knowing what to do, and forcing an uncomfortable readjustment to a new normal that feels both overdetermined and vertiginous.<sup>32</sup>

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29 Ibid., 244.

30 Ibid., 246.

31 Ibid., 254.

32 The political theorist Wendy Brown has described the vertigo of genealogy as “...a loss of ground, as particular narrative and presumptions are upended and scrutinized for the inter-

On the one hand, historicizing experience can threaten ideas of self-ownership, agency, and efficacy, leaving nothing insulated from the political transformations going on without. But Foucault also wants to give lived experience creative, political potential. It is, we might say, the missing side of the dialectic: “Men,” he writes, “are perpetually engaged in a process that, in constituting objects, at the same displaces man, deforms, transforms, and transfigures him as a subject.”<sup>33</sup>

The human form and, therefore, human freedom are works in progress. Foucault reads Marxism (even the Western Marxism of the Frankfurt School which he greatly admired<sup>34</sup>) as anchoring human freedom to either a stable or unfolding conception of human form. Foucault finds this stiff and inadequate. As an account it occludes the conditions for re-creation and self-creation, as well as the open-endedness of history: “What ought to be produced is not man as nature supposedly designed him, or as his essence ordains him to be – we need to produce something that doesn’t exist yet, without being able to know what it will be.”<sup>35</sup>

Both Benjamin and Foucault approach history as a resource for emancipatory politics while denying that it makes sense to talk about being on its “right side.” For Benjamin we can have a theory of history based in class struggle that is alive to defeat and even tragedy. Redemption, however, comes through recognizing that transformations often have a messianic character – something that studying catastrophic eruptions in the past can help us understand. He invokes the eighteenth century French physician François-Joseph-Victor Broussais to understand what’s “irritating” about critique, writing that: “...[critical] historians seemed to me more to be “anaesthetized,” “irritated” (in Broussais’s sense of the term, of course)”<sup>36</sup>:

I have the impression of having had an irritant rather than an anesthetic effect on a good many people. The epidermises bristle with a constancy I find encouraging.<sup>37</sup>

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ests they serve and the comfort they offer.” Wendy Brown, *Politics Out of History* (Princeton: Princeton University Press, 2001), 9.

33 Rabinow (2001), 276.

34 “When I acknowledge the merits of the Frankfurt School philosophers, I do so with the bad conscience of someone who should have read them long before, who should have understood them much earlier. Had I read these works, there are many things I wouldn’t have needed to say, and I would have avoided some mistakes.” Rabinow (2001), 274.

35 Ibid., 275.

36 Ibid., 236-7.

37 Ibid., 235.

Perhaps the reason my work irritates people is precisely the fact that I'm not interested in constructing a new schema or in validating one that already exists. Perhaps it's because my objective isn't to propose a global principle for analyzing society... My general theme isn't society but the discourse of true and false, which I mean the correlative formation of domains and objects and of the verifiable, falsifiable discourses that bear on them; and it's not just their formation that interest me, but the effects in the real to which they are linked.<sup>38</sup>

Foucault seems to borrow Broussais's theory of irritation, connecting external stimulus to permanent, internal transformation. Broussais's conception of "sensibility," in particular, recalls the transformative implications of genealogical critique: not just to prod, dismantle or dislodge, but to reach some new vista and new experience of the world.

A part affected by a foreign body, may be excited to motion without the individual being conscious of it. In this case, there is nothing but irritability; but if the individual experiences that kind of modification which induces the man to say, "I feel, I perceive," there is both irritability and sensibility. Sensibility, then, is the consequence of irritability, and not irritability of sensibility; in other words, we must be irritable, before we are sensible.<sup>39</sup>

Genealogical critique is an irritant deployed to aggravate and then reshape sensibilities. "The permanent critique of ourselves" that it propels begins a long road to self-transformation, and serves as a necessary condition for the practice of freedom in the present.<sup>40</sup>

V. Although Benjamin and Foucault share some critical impulses, their theories of historical movement and human freedom are significantly different. To reiterate, briefly: While he rejects a progressive reading of history, Benjamin nevertheless retains (and even intensifies) the historical materialist promise of human salvation through revolution as politically desirable. Unlike most Marxists, however, he claims that such revolution might have a messianic character. Foucault, meanwhile, calls on genealogical critique to agitate subjects into new relationships with institutions and practices thought to be immobile and ahistorical. This process, he thinks, might allow people

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38 Ibid., 237.

39 Joseph-Victor Broussais. *On Irritation and Insanity*, trans. Thomas Cooper (Columbia: S.J. M'Morris, 1831), 23-4.

40 Michel Foucault, *The Politics of Truth*, ed. Sylvère Lotringer (Los Angeles, CA: Seimotext(e), 1997), 121.

to begin to change themselves in order to rearrange the world around them. While Benjamin and Foucault both reject any traditional theory of history as progressive or even linear, their theories generate different implications for political struggle. In particular, they differ in important ways about the possibility and desirability of emancipation<sup>41</sup>

That said, there are a few promising points of contact that may be helpful for those seeking to understand and develop these theories: first, both share an attention to history as a lived experience; second, both emphasize how the historian recovers (and redeems) or uncovers (and broadcasts) what has been traditionally suppressed; third, both locate untapped possibilities or unexplored paths in the past as potentially generative for the political imagination of the present.

First, Benjamin and Foucault feel history in their bones. Benjamin does not reject “empty, homogenous time” for merely philosophical reasons. He also theorizes that treating history this way mistakes how it actually feels, its phenomenology in the buzzing of bursts, busts, eruptions, and catastrophes that actually characterize its tragic unfolding. Progressive history gets the experience and texture wrong and so teaches bad feelings about where we are and where we are headed. Foucault, meanwhile, understands the body and corporeal experience as shaped by historical transformations inside and outside, as “modernity” comprises the tension (even dialectic) between knowledge/power and subjective resistance and refashioning. A historian or philosopher synthesizing both accounts might thus pay attention to what ideological abstractions about time do to the bodies and minds of those living under the clock.

Second, Benjamin and Foucault look for history in unfamiliar, unusual places. Official, received histories, according to both, have been written from positions of false universality. Official, received histories have suppressed, silenced, and covered over. Benjamin maintains a heroic, romantic attitude to the oppressed past (and passed), and to those who cannot speak for themselves (and their descendants who continue to struggle). Foucault looks for histories in the cracks and crevices, in silences and beyond the framings transmitted by traditional channels. The Foucaultian historian discovers contingencies and tendencies in exotic, avant-garde, marginal ar-

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41 “I have always been somewhat suspicious of the notion of liberation, because if it is not treated with precautions and within certain limits, one runs the risk of falling back on the idea that there exists a human nature or base that, as a consequence of certain historical, economic, and social processes, has been concealed, alienated, or imprisoned in and by mechanisms of repression...I am not trying to say that liberation as such, or this or that form of liberation, does not exist...[but] I emphasize practices of freedom over processes of liberation; again, the latter indeed have their place, but they do not seem to me to be capable by themselves of defining all the practical forms of freedom.” Paul Rabinow, ed. *Michel Foucault: Ethics, Subjectivity and Truth* (New York: The New Press, 1994), 282-3.

chives. Together, Benjamin and Foucault focus on the overlooked and (quite literally) historically under-served to revitalize an insurgent counter-memory.

Finally, Benjamin and Foucault dislodge historical necessities to introduce political mobility into the present. Although they do this in different ways, the effects are similar: hope instead of despair and slivers of possibility instead of the certainty of defeat. For Benjamin that means thoroughly eviscerating a progressive theory of history that lends any support to the idea that its direction bends inevitably towards emancipation. In so doing, he interprets those who have fought for justice and salvation as doing so against history, not with it, and that contemporary revolution will require the same kinds of explosive, oppositional moments. Foucault, meanwhile, draws on historical interpretation as a disruptive counterexample to a resting state sold as inevitable, necessary, and natural. By reviving the memory of a time when things were different and telling a story about the circumstances surrounding their transformation, more potential for rearrangement of our habits, institutions, and subjectivities begins to emerge in entirely new places, in entirely new ways. Unfastening the past from a set of conditions sold as necessary and natural begins to make the present look more permeable and more dangerous on the way to a different tomorrow.





# Michael Oakeshott's Declaratory Theory of Adjudication

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In this essay I consider a portion of Chapter Two of Michael Oakeshott's book, *On Human Conduct*, in which Oakeshott pursues an understanding of civil association in terms of its conditions or assumptions.<sup>1</sup> These postulates include free agents, civil law, adjudication, authority and obligation, legislation, and politics. The portion I consider treats one of these postulates, adjudication. Oakeshott's legal theory in general has received little attention – his theory of adjudication in particular has received next to none. In fairness, the adjudication section fills only seven of the more than 300 pages in *On Human Conduct*, but this small section contains much more than either its length or the size of the existing literature on it suggests. For in this section Oakeshott elaborates a novel theory of adjudication that reveals him to be a significant part of a tradition not typically associated with him: the common law tradition. This puts him in company with such jurists as Coke and Hale, Blackstone and Bentham.<sup>2</sup>

Oakeshott presents his theory as a conceptual description “in new terms” of adjudication, though at least two of its features can be understood in familiar terms. These are: the role of prior judicial decisions in adjudication and the act of reaching a judicial decision in adjudication. These features' analogues in the common law tradition are the doctrine of *stare decisis*, and the declaratory theory of law, according to which adjudication is not the process of making law, but of declaring what the law already is, respectively. By pointing out these connections I mean to suggest that Oakeshott should be understood as a common law theorist. But by exploring the nuances of his versions of *stare decisis* and the declaratory theory I present Oakeshott's reflections upon common law as a contribution

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1 Following Oakeshott, I use the term “civil association” interchangeably with “civil condition.”

2 The questions which these thinkers address in different places—and which, in joining them, Oakeshott addresses also—concern the relation of common law to legislation and the power of Parliament, and the nature of the unwritten common law, Coke arguing for the limitation of monarchical power by common law and the courts, Blackstone arguing for Parliament's supreme law making supremacy over common law and the courts, and Bentham's eventual rejection of the possibility of an unwritten common law. Oakeshott contributes to the debate over the relation of the decisions of courts and legislation, and to the nature of the unwritten common law.

to and development of this tradition. Specifically, he delineates a moderate declaratory theory. He concedes, on the one hand, legal realism's critique of declaratory theory—that it misconstrues law as a “science” in which adjudication is a process of logical deduction from fixed rules. However, he denies the realist thesis that adjudication is an arbitrary process of creating law, instead arguing that adjudication requires an exercise of discretion only upon a given and authoritative law. Whether in the end we may call this law “natural” is, I suggest, dubious.

Identifying Oakeshott's theory of adjudication is not as simple as it may sound, mainly because Oakeshott does not explicitly expound his theory in terms of any current discourse, either in the section on adjudication or, for that matter, in any other part of *On Human Conduct*. Yet attentive readers familiar with the discourse cannot miss that this is what he is doing—that the debate over declaratory theory in adjudication is the context in which he understands his concept of law to have any meaning and importance. Accordingly, in order to identify Oakeshott's declaratory theory and situate it in the context of debates in legal theory, I draw heavily from recent work on declaratory theory by Alan Beever. Beever elaborates the theory and some of its common critiques, suggesting that the critics tend to target a caricature and not the real theory. His situation of declaratory theory somewhere between the caricature and the critics' alternative is helpfully similar to Oakeshott's moderate formulation.

### **I. Oakeshott on the Common Law in *On Human Conduct*, The Role of *Stare Decisis* and Declaratory Law**

Oakeshott's description of the role of prior judicial decisions in adjudication can be understood in terms of *stare decisis*. Midway through his discussion of adjudication Oakeshott writes, “civil association is necessarily relationship in terms of the accumulated meanings of *lex* which emerge in the adjudication of disputes” (137). Earlier, Oakeshott stated that the conclusions of courts must “enjoy a high degree of immunity from subsequent disturbance” (131). The “accumulated meanings” that “emerge” over time can only refer to a body of case law, or precedents. And it is the authority of these accumulated meanings to inform adjudication in subsequent cases that essentially amounts to *stare decisis*, which literally means “to stand by that which has been decided.” Furthermore, this “immunity” Oakeshott insists upon serves to contribute to one of the essential purposes he attributes to courts: to make known to citizens the rules of their associations with each other, without which knowledge they could not be expected to abide by the terms as closely. Without immunity from

disturbance the accumulated meanings of the law can change rapidly. Such immunity allows this knowledge to solidify in the minds of the citizens. So far as the English common law system of adjudication is distinguished by a high degree of “immunity” from disturbance for past decisions, therefore, it is that system for which Oakeshott here provides a conceptual account, and that account can be understood in terms of *stare decisis*.

Oakeshott does not simply restate the conventional common law understanding of *stare decisis*. Rather, he revises it so as to account for common criticisms. For instance, Oakeshott distances himself from the conventional notion of *stare decisis* according to which past decisions form authoritative precedents, “case-law,” which judges simply reapply in subsequent cases. On this view, a judge simply determines which precedent best corresponds to the case he is to decide. Oakeshott writes that the need to consider earlier judicial decisions is “a condition not merely imposed upon *lex* (in, for example, rules relating to the recognition and authority of ‘precedents’), it is a condition upon which the systematic character of *lex* depends” (136). Consulting past decisions, in other words, is not merely a policy a judge may or may not subscribe to when adjudicating disputes but is an inherent part of his task to clarify what the law, as an independent entity, means in relation to the given circumstances.

Elaborating the distinction between his *stare decisis* and conventional *stare decisis*, Oakeshott continues,

An adjudicative procedure cannot properly be said to be ‘arguing from case to case’ in terms of the likeness or unlikeness of the contingent situations concerned: no ‘case’ can be a condition or a precedent for reaching an adjudicative conclusion in another ‘case.’ The reasoning is analogical; it is not concerned ultimately with the similarities of ‘cases’ but with what can be abstracted from a judicial conclusion, namely, the amplification of the meaning of *lex* (136).

In contrast to conventional *stare decisis*, legal questions are not answered by the correct specification of precedent. If they were, judging would be mainly concerned with cases as opposed to law. On this view, finding the correct case provides one with the correct decision, the decisive act in determining what the law is. Rather, Oakeshott means to suggest that adjudication is mainly concerned with law. On his view, specifying the correct case is just the beginning, for cases do not answer the question “what is the law?” but give past answers in the context of different circumstances. These past answers can be used by the judge as analogies for deciding what meaning the law will “tolerate” in his case. Consideration of precedent thus acquaints a judge’s mind with the sort of meanings law can tolerate and enables him

to decide what amplification of the law's meaning to make in his case. Oakeshott's implication seems to be that no two cases are alike and thus a judge exercises some degree of arbitrary discretion in each case no matter how closely he tries to adhere to precedent. So, for example, while Judge Smith may have "the shoulders of giants" to stand on in precedent, those giants are dead; they do not know this case at all, let alone as well as Judge Smith does (or should).

The two important points from the foregoing discussion should be evident. First, this is in fact a very old common law theme: although Oakeshott does not use the term *stare decisis* and distances himself from the conventional understanding, this attention to past "amplifications of meaning" held to be "tolerated" by law is in fact *stare decisis*. And second, Oakeshott's is a novel conception of the role of precedent in the process of adjudication that emphasizes its importance while at the same time emphasizing that precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. Judges must align their decisions not only with precedent but also with something else. To what? This question brings us to the second common law feature of Oakeshott's theory of adjudication.

The declaratory theory of law attempts to describe the activity of adjudication and the nature of law as a part of that process. Despite its name it should be understood more specifically not as a theory of law but as a theory of adjudication. It holds that in the act of adjudication judges do not create or change the law but declare what it is and always has been. Eighteenth-century jurist William Blackstone, author of the *Commentaries on the Laws of England* and early exponent of the declaratory theory, expressed it thus: The judge "is not delegated to pronounce a new law, but to maintain and expound the old one."<sup>3</sup> And another century later Lord Esher MR wrote, "There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."<sup>4</sup>

Criticism of the declaratory theory centers on the observation that judges do in fact make law and thus law changes. Because law changes it is naïve to say judges "declare" what the law is. Possibly the earliest critic, Jeremy Bentham, wrote, "It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him off, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and

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<sup>3</sup> William Blackstone, *Commentaries on the Laws of England*, vol 1 (Cavendish 1766), 69.

<sup>4</sup> *Willis v. Baddeley* [1892] 2 Q.B. 324, at 326. At the time of this decision Lord Esher was Master of the Rolls, the presiding judge of the Civil Division of England's Court of Appeal.

me.”<sup>5</sup> John Austin later called the theory a “childish fiction.”<sup>6</sup> Criticism has come from across the Atlantic as well. In a 1917 opinion Oliver Wendell Holmes quipped that it cast law as “a brooding omnipresence in the sky.”<sup>7</sup>

Despite these criticisms, the declaratory theory has not fallen out of favor entirely. There are still a few who suggest that critics of the theory fundamentally misunderstand it, and I suggest their clarification of the theory helps us understand Oakeshott’s discussion of adjudication. In a recent essay, Allan Beever advanced the argument that “the declaratory theory of law does not deserve the invective heaped upon it. This is not because modern lawyers are wrong to reject the theory they criticize. It is because the theory criticized by modern lawyers is not the declaratory theory. The theory ridiculed today is no more than a caricature of the real one.”<sup>8</sup> In what follows I present Beever’s clarification of the declaratory theory, and then use it as a framework for interpreting Oakeshott’s discussion of adjudication in *On Human Conduct*.

## II. The Declaratory Theory Reconsidered

The critics’ main mistake, Beever writes, is to say the declaratory theory holds that common law does not change. Because common law so evidently does change, they observe, the theory must be false. But, as Beever points out, this disagreement flows from differing uses of the word “law” by the theory’s critics and adherents; once these differences are sorted out it becomes clear that while the critics deride their caricature of the declaratory theory, they actually (and unknowingly) adhere to the real one.

First, the differing uses of the word “law.” In brief, critics of the theory assume a positivistic view of “law.” Criticism of declaratory theory thus flows from critics’ prior assumption that positive law (i.e. statutes, court decisions, constitutions, regulations, and the like) exhausts “law.” On the other hand, adherents of the theory going all the way back to medieval courts assume a different, twofold conception of law—a conception represented by, for example, natural law theory. On their view, law comprises both positive law and some sort of higher or general law. One practical example of this twofold conception, Beever points out, is equity in medieval common law. The law of equity was enforced by the Court of Chancery, which in some sense contravened common law and in another sense fulfilled it, depending on which “law” in the twofold conception is the point of reference. The

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<sup>5</sup> Jeremy Bentham, *The Works of Jeremy Bentham, now first collected; under the supervision of his executor, John Bowring*. Part V (Edinburgh: Tait, 1838), pg. 235.

<sup>6</sup> John Austin, *Lectures on Jurisprudence, or, the Philosophy of Law* (J Murray 1895), 321.

<sup>7</sup> *Southern Pacific Co. v. Jensen* 244 U.S. 205, 222 (1917).

<sup>8</sup> Beever, 422-3.

Court of Chancery issued decisions the common law courts could not have issued. For instance, in the case of a debtor who gave his creditor a sealed bond, later repaid the money, but did not ensure the bond was canceled, the common law would rule the debt unpaid. Yet if the debtor were to take his case to the Court of Chancery, his debt would be canceled. Here, in one sense, law conflicts. But, as J.H. Baker points out,

In making such decrees, medieval councilors or chancellors did not regard themselves as administering a system of law different from the law of England. They were reinforcing the law by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfill it.<sup>9</sup>

Thus court A can reach different legal conclusions, and thus create different positive law, from court B while at the same time serving the same law as court B. As Beever explains, “equity fulfilled the common law by producing the result that the common law would have produced were its rules of evidence less pedantic.”<sup>10</sup>

The same seeming contradiction does not occur only between equity and common law courts but also within common law courts, and its resolution likewise involves the twofold conception of law. As the substance of common law slowly changes over time as circumstances and technology change, it can still be understood to declare the same law and to serve the ends of the same law. Beever provides two examples. The first is seventeenth-century jurist Matthew Hale’s expression of declaratory theory by way of a metaphor from classical myth:

Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho’ not now extant, might introduce some New Laws, and alter some Old, which we now take to be the very Common Law itself, tho’ the Times and precise Periods of such Alterations are not explicately or clearly known: But tho’ those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that Long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho’ Physicians

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<sup>9</sup> Baker, 102, as quoted by Beever at 425n21.

<sup>10</sup> Beever, 427.

tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.<sup>11</sup>

Although “particular variations” change the laws, “in the general” law remains the same. For Hale, “particular variations” do not comprise the whole law. Second is the reasoning of Lord Atkin’s decision in *Donoghue v. Stevenson* (1932), which involves the duty of care in negligence. Finding in the common law a collection of different and conflicting rules, he insists that “the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist,” and therefore “in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.”<sup>12</sup> Here Lord Atkin posits a “general conception of relations giving rise to a duty,” understands it to be “in English law,” and distinguishes it from “the particular cases found in the books.” By attributing his decision to this general conception he presents himself as “declaring” the general law as applied to the contingent circumstances. In both examples the point is this: declaratory theory postulates a twofold conception of law.

Although declaratory theory requires a twofold conception of law, there are different ways to refine such a conception. In any of them, positive law remains the same—statutes, regulations, case-law, executive orders, and the like. The tricky question is rather how to conceptualize the second, more general sense of law. For instance, in the two examples cited in the previous paragraph, though they are both consistent with declaratory theory, each implies a different notion of what the general law is. Hale seems to understand general law as a very basic sense of “form” as opposed to substance: though the substance of law may change, what does not change is that it remains law—it retains the form of law in how we treat it. A ship is still a ship with different planks just as Law is still Law if the laws change. Now, this metaphor implies several things Hale likely would not have endorsed. For one, it would accommodate any laws. If form is all that matters, for instance, there is no reason a particular law banning the sale of wood could not be Law. So this may have been a sloppy metaphor used to make a point. Nevertheless, it still coheres with declaratory theory. A judge can plausibly be said to declare with each particular law what the Law is. On the other hand, in the second example, Lord Atkin understands the general sense of law as a general legal principle common to all the otherwise divergent precedents; he called it “the neighbour principle.”

Another alternative way to conceptualize the more general sense of

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<sup>11</sup> *Ibid.*, 427.

<sup>12</sup> [1932] AC 562 (HL Sc), 580, as cited by Beever at 423n12.

law is found in the tradition of most medieval jurists: in the terms of natural law. And even today there is no shortage of thinkers making the same argument, both from the academy and from the bench itself.<sup>13</sup> The common law has an historical association with natural law theory, by virtue of its roots in medieval Christian England in an academic environment dominated by scholastic theology.<sup>14</sup> But the common law does not, as a philosophical matter, require natural law. Something else besides natural law can play the part of general or higher law required by declaratory theory, and therefore declaratory theory does not rely on natural law. Though Beever does not assert this conclusion, he implies it where he does mention natural law:

The connection between the declaratory theory of law and natural law theory is very important and exploring it is sure to be illuminating. But I will not do that here. A defence of the declaratory theory based on that strategy would need to take on the rejection of that theory and legal positivism at once; but one heresy is enough for now. Instead, I focus on a closely related though separable aspect of the declaratory theory: the connection between that theory and the recognition of legal principles.

Here, Beever does not expressly say that declaratory theory does not require natural law theory. However, that he feels he can make a defense of declaratory theory without defending natural law theory shows he assumes declaratory theory can get by just fine without it. Moreover, throughout the article he argues for the premise: namely, that something else, specifically “general legal principles,” can, and in fact do play the part of general law.

This notion that declaratory theory’s higher sense of law is best conceptualized as general legal principles needs brief elaboration, for it clarifies how declaratory theory does not assume natural law as the latter is conventionally understood.<sup>15</sup> In brief, these general legal principles are

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13 Cf. the work of Professor James Stoner, especially his *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003), and the 2004 commencement speech at Notre Dame Law School, delivered by Judge Diarmuid O’Scannlain of the U.S. Court of Appeals for the Ninth Circuit and published in *Notre Dame Law Review* as “Rediscovering the Common Law” in Volume 79, Issue 2. Judge John Noonan, also of the Ninth Circuit, endorses this view as well.

14 The precise nature of this association is not important. It could be that the institutions of the common law were the product of a natural law theorist aiming to embody his natural law theory, but that is unlikely. What is more likely is that natural law theorists used the concept of natural law to help them make sense of an institution that already existed and which had more practical origins. Even if it is the former, it still is not necessarily the case that common law theoretically requires natural law.

15 It must be acknowledged that this conception of general legal principles may well conform to a more refined understanding of natural law as some have attempted. I am not familiar



not outside and independent of us, as some heteronomous “brooding omnipresence in the sky” to which we must submit. Rather, they are found within existing law and must therefore be understood as inherent parts of the legal reasoning process. Consider two examples from Beever’s discussion, the first of which we have considered already. When Lord Atkin searched for an authority to guide his decision in *Donoghue v. Stevenson*, he found it in the “general conception of relations giving rise to a duty of care” which he called “the neighbour principle.” This principle appeared as the common foundation of numerous otherwise divergent precedents. Likewise, in *Willis v. Baddeley* the presiding judge, Lord Esher, ruled that “if a claimant qua agent of a principal sues a defendant then the defendant is entitled to discovery against the principal, even though the principal is not a party to the action.”<sup>16</sup> There was no precedent that promulgated this rule. Rather, the relevant precedent, *Republic of Costa Rica v. Erlanger*, said that a defendant is entitled to discovery from a claimant. On what basis, then, did Lord Esher expand the rule as he did? He claimed to have taken his cue from the general principle expressed in *Costa Rica v. Erlanger*: “We are acting, in making this order, on an appreciation of the rule laid down in the case of *Republic of Costa Rica v. Erlanger*... The principle which was there enunciated should govern the present case.”<sup>17</sup> Thus, although Lord Esher could find in precedent no direct analogy to apply to his case, he was not therefore without guidance in law. He did not have to consult natural law (whether by examining his conscience or St. Thomas’s *Summa*), nor was he left with only his subjective preference or public opinion. He took his cue from the principle that seemed to be embedded in the common law.<sup>18</sup>

The distinction from natural law is in some sense epistemological: it lies in how these general principles are discerned. Whereas natural law is found in our conscience, in moral philosophy, in revealed religion, or some combination thereof, general principles of common law emerge as we gather together each particular judgment as to proper conduct in contingent circumstances and examine them at a distance, so to speak. This examination reveals the general principles at work in each case, which we may call general or abstract principles of human practical reasoning in law, distinct from the written, positive law on its face but also embedded in it. General law is thus no “brooding omnipresence in the sky.” It is in fact quite immanent. It is not “up there” somewhere waiting to be consulted, but only

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enough with these attempts to say anything more than the relationship between the two would make an interesting subject of future inquiry.

16 Beever, 427.

17 *Willis v. Baddeley*, 326n4, as cited by Beever at 427n27.

18 For a concrete example of this method applied in a comprehensive analysis of common law in a particular area, see Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007).

emerges in the unfolding of judicial decisions over time. Recall Lord Atkin's method in *Donoghue v. Stevenson*, considered above. He identified the neighbor principle only by considering from a distance several cases side by side. His opinion is worth quoting at length:

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.<sup>19</sup>

It is out of this mess of “English authorities” that Lord Atkin abstracted the “neighbour principle.” He did so by identifying the element common to the many cases involving various sorts of relationships. This is a prime example of a general principle of common law being found in the aggregation of common law itself and declared by a judge in subsequent cases.

The theory is still susceptible to the following objection from its critics: the general principles underlying the common law change just like positive law changes. That may be true, but what is important is not that the principles do not change but that judges search for these principles and decide in accordance with them as best they can. Declaratory theory is foremost a theory not of law but of the activity of judging. In the version of it I have suggested here, it says that judging must consult not just positive law but the general principles underlying common law. Otherwise, in the absence of clear guidance from a statute or precedent, judges assume they have nothing to guide them but their subjective preference, or popular opinion. The declaratory theory tells them there is more guidance to be found in the general principles of common law. That these may change over time does not mean they are not present in common law and therefore

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19 [1932] AC 562 (HL Sc), 579-80.

of possible assistance to judges. Furthermore, that judges may disagree about what these principles are does not invalidate the theory. The theory suggests that judicial development of law should happen in just this manner: by focusing the debate on the general principles themselves. That these principles are not perspicuous suggests that they are something like what Oakeshott calls practical or traditional knowledge, an affinity I consider below.

So much for Beever's theory of general law and declaratory theory. It is distinct from positive law and more fundamental and enduring, yet it is to be found in the reasoning process employed in existing judicial decisions. As I discuss below, this view is helpful in understanding Oakeshott's discussion of adjudication in *On Human Conduct*. Regardless of how one fleshes out general law, the declaratory theory's critics and adherents both agree that positive law changes. The critics cannot charge the adherents with ignoring this fact if the declaratory theory is properly understood. The disagreement rather surrounds the conception of law. Because the critics deny the theory's premise—namely, that general law exists—they therefore deny its conclusion: that judges declare what the law is. But, as Beever demonstrates, this denial of general law is often duplicitous. The critics in fact at times make use of the concept of general law and thus adhere to the theory themselves, though they do not realize it. In addition, the specific form of the concept of general law that they use is the same form Beever suggests: general legal principles.

One clear example of this is found in Lord Reid's speech, "The Judge as Law Maker" (1972). In the same speech Lord Reid both ridiculed the declaratory theory and suggested we need it. First he said,

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.<sup>20</sup>

Yet later he says,

We must get rid of the idea which still seems to animate some of our pedestrian confreres, that law is a congerie [sic] of unrelated rules. That results in the dreary argument that the case is similar to A. v.

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<sup>20</sup> Lord Reid, "The Judge as Lawmaker" (1972) 12 J Soc Public Teachers L 22, 22, as cited by Beever at 422n8.

B. and C. v. D. but is distinguishable from X. v. Y. and In re Z. That way lies confusion and uncertainty. We must try to see what was the principle or reason why A. v. B. should go one way and X. v. Y. the other.<sup>21</sup>

Not knowing that what he ridiculed was only a caricature, Lord Reid “unconsciously reinvented” declaratory theory and acknowledged the judiciary’s need of it. Beaver goes on to argue that in two more ways Lord Reid relies upon declaratory theory: by denouncing politics in adjudication and by affirming retrospectivity in adjudication. ‘Thus despite the critics’ disavowal of the theory, they often end up recognizing its necessity, revealing the object of their disavowal to be a caricature of the real declaratory theory.

Our discussion of Oakeshott’s version of *stare decisis* ended with Oakeshott’s recognition that precedent only goes so far. When it is not conclusive, judges must consider something else. We now know that that blank space can be filled with general legal principles which emerge over time. Indeed, the same is true in Oakeshott’s theory of adjudication: general legal principles may be understood as Oakeshott’s concept of law, as I will now explore. I will begin by giving the basics of Oakeshott’s theory in his own words, then I will illustrate how Oakeshott’s theory conforms to the terms of declaratory theory as expounded by Beaver.

### III. The Declaratory Theory in *On Human Conduct*

Let us begin by observing the basic building blocks of Oakeshott’s theory of civil association under the rule of law—the following fundamental concepts: *cives*, *civitas*, *lex*, and *respublica*. *Cives* are the individual persons in a given civil association. *Civitas* is their “entire civil condition.” *Lex* comprises the terms of their condition. And *respublica* comprises the “comprehensive conditions” of their association.<sup>22</sup> Oakeshott gives each of these a modern phrasing: “citizen,” “state,” “law,” and “public concern,” respectively (109). Using terms from Chapter One of *On Human Conduct*, Oakeshott specifies the civil condition (*civitas*) as an “ideal character:” namely, the identity that the theorist seeks to understand in terms of its conditions, and *lex* is one such condition:

What have to be identified and understood are the theoretical conditions of a durable and diurnal association *inter homines* ... The first of these conditions is, then, rules of a certain kind ... Such rules I shall call ‘law’; and, so that they may not be confused ... I shall call

<sup>21</sup> *Ibid.*, 26n8, as cited by Beaver at 430n38.

<sup>22</sup> For each of these see the beginning of Chapter II at 108.

them *lex*: rules which prescribe the common responsibilities (and the counterpart 'rights' to have these responsibilities fulfilled) of agents (128).

Thus *lex* is a condition or postulate of civil association. It is one of the conditions in terms of which the theorist must understand the civil condition.

In addition to *lex*, a process of adjudication is also a postulate of the civil condition. Given that "All modes of human relationship are conditional upon their terms being recognized and understood by the associates," and that "general abstract considerations [*lex*] cannot themselves be the terms of any association," civil association therefore postulates "a procedure in which general considerations are related to contingent circumstances" (130). Adjudication, in other words, must exist to clarify what is and is not permissible in civil society under the rule of law.

Now, what makes Oakeshott's theory declaratory? It is clear that Oakeshott adopts a twofold conception of law, and he makes a point of criticizing legal realism. We see his twofold conception of law, for example, where he distinguishes his idea of adjudication from arbitration. The outcome of arbitration "is a resolution of the conflict whose virtue is that the disputants have been persuaded to accept it" (132).<sup>23</sup> Here, judges are guided not by some general, abstract sense of law but by what the disputants will suffer. By contrast, in a court of law the judge is "the custodian of the norms of *lex*. And the conclusion reached does not represent the relative bargaining strengths of the disputants but the relative strengths of their claims measured on the independent scale of these norms of conduct" (133). This should settle our question as to whether Oakeshott's is a declaratory theory, but Oakeshott's elaboration of this position, which covers the rest of page 133, is worth reviewing. He writes, "the notion that there is no *lex* in advance of adjudication and that adjudicating creates it, is absurd." "Therefore," he continues a few lines below, "adjudication cannot be understood as the arbitrary exercise of the so-called 'subjective will' of the judge." This is because judicial decisions "must refer to *lex* and they must stand seized of the authority of *lex*." By this Oakeshott means that a judge must "connect [his decision] with the known system of *lex* and purport to exhibit the manner in which it shelters under the authority of the system." Such a decision is thus an "amplification of the meaning of *lex*." The meanings of law, distinct from law itself, comprise positive law. In this way judges neither create law nor

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<sup>23</sup> This may sound confusing to us, since arbitration in the current American legal system is something different than what Oakeshott describes here, which is more like our procedure of mediation. I am not sure if arbitration was of this sort in Oakeshott's England, but even if it was, his point is not thereby invalidated.

declare what their subjective preference or the public's opinion is. Rather, they declare what law is—in Oakeshott's more precise formulation, what the meaning of law is in the circumstances of their case.

So Oakeshott employs declaratory theory's twofold conception of law, but in what terms does he understand the law being declared? What is its shape? Would it be wrong to characterize it as the general law of declaratory theory? It could simply be precedent. But we know from our earlier consideration of *stare decisis* that precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. Someone of a more democratic stripe could plausibly think law refers to legislation. The courts thus simply apply and enforce the laws the people enact. Oakeshott mentions legislation in his section on adjudication, but he distinguishes it from *lex* as he has been using *lex* throughout the preceding pages. "Further, where *lex* is recognized to have been expressly enacted and there is an authentic text," judges must limit their consideration to the text of the legislation, excluding the intention of the legislator (134). Oakeshott here adopts statutory textualism for his theory of adjudication. But this by no means entails that legislatively enacted law comprises the entirety of *lex*. Furthermore, in the next section of this part of *On Human Conduct*, where Oakeshott discusses legislation, he makes clear that in his theory legislation does not exhaust law in civil association.<sup>24</sup> There he writes,

How much use may be made of [legislation] is a matter of circumstance. But in the civil condition a too ready resort to it may be recognized as a somewhat clumsy and hazardous invasion of adjudicative procedure which may imperil the system of *lex* by abrupt alteration, or as a fruitless attempt to spell out what cannot be spelled out in advance of the event (138).

This shows that Oakeshott by no means sees legislation as filling the "legal gap" significantly let alone completely. What is left is *lex* itself: general law.

But the question remains. How does Oakeshott mean for us to understand this general law? Is it the form of Law in the manner of Matthew Hale's metaphor of the Argonauts? Is it a set of clear principles from which to deduce judicial decisions? Is it natural law? First, it is not Hale's form because, as is clear throughout the section, *lex* gives substantive guidance as to what rules to apply. It is not simply the form of Law that may house any law. Then what about clear principles, in keeping with the theory of

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<sup>24</sup> Somehow Steven Gerencser reads these two sections of *On Human Conduct* to avow just this sort of legislative supremacy. See Gerencser, "Oakeshott on Law," in Paul Franco and Leslie Marsh, eds., *A Companion to Michael Oakeshott* (University Park, PA: The Pennsylvania State University Press, 2012), pp. 312-336.

strict formalism?<sup>25</sup> He rejects strict formalism, writing, “in no case can [the meaning of *lex*] be concluded without reflection. There is no ‘plain case’ in the sense of a dispute which settles itself or one which can be settled in a merely ‘administrative’ act. This uncertainty is intrinsic to *lex* as the terms of human association” (133). Because of this uncertainty judges exercise substantial discretion with each decision: specifically, they “declare a conclusion which is not, and could never be given in *lex*” (133). This is to “amplify the meaning of *lex*.”

The preceding evidence comes from page 133, but the bulk of Oakeshott’s rejection of strict formalism is found after page 134. At the bottom of that page, he begins a paragraph, “On the other hand, adjudication cannot be a deductive procedure.” *Lex*, Oakeshott writes, “is a system of descriptively identified general conditions to be subscribed to in choosing actions from which no conclusions about adequate subscription in contingent situations can possibly be deduced” (134). He goes on to dismiss the “unfortunate metaphor” involved when adjudication is characterized as “finding” law, and one might conclude from this that Oakeshott hereby dismisses the declaratory theory as such. For does it not posit that judges do not make law but indeed find it and declare it? Yet that would be to fall prey to the same error as the critics of declaratory theory in Beever’s essay: it is to misunderstand declaratory theory as though it posited that judges find their answers in precedent. They do not find their answers but rather the principles that can guide their answers. As Oakeshott writes,

And to speak of the procedure of adjudication as that of ‘finding’ what is latent in *lex* is to resort to unfortunate metaphor. Even if it is codified, *lex* is neither a catalogue of possible contingent circumstances, each with its prescribed conditions of response, in which an adjudicator might hope to identify the situation with which he has to deal and from which he may ‘read off’ the required conditional response, nor is it a storehouse of minutely distinguished conditions to be subscribed to in choosing actions in which a ‘judge’ may hope to discover that which exactly fits the contingencies of his problem situation. Such notions are, perhaps, genuine attempts to convey the closeness of the relationship between adjudicative conclusion and *lex*, but they go astray in failing to recognize that adjudication is concerned with the meaning of *lex* in a contingent

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<sup>25</sup> Clear principles such as these are to be distinguished from Beever’s general legal principles. Though Beever’s declaratory theory is a species of formalism, it should not be confused with the strict formalism that Oakeshott here rejects and that Beever himself rejected: strict formalism corresponds with the caricature of declaratory theory denounced by the critics we considered above. I return to the question of formalism in the conclusion.

situation, that meanings are never deduced or found but are always attributed or given, and that what has to be understood here are the conditions to which this attribution must subscribe (135).

Adjudication is thus not a science. If this dismissal of strict formalism is “the other hand,” what was the first hand? The first hand began three paragraphs above “the other hand” at the beginning of Oakeshott’s last point, where he dismissed positivism as “absurd.” With legal realism on the one hand and strict formalism “on the other,” Oakeshott seems to be situating his theory of adjudication right between legal realism and strict (conventional) formalism, which is precisely where Beaver situated his, as we saw (strict formalism being equivalent to the caricature of declaratory theory). Again, though, the question still stands. What for Oakeshott is general law?

Let us examine how Oakeshott presents *lex*. First, the content of *lex* is the rules of civil conduct. *Lex* is comprised of the rules the “common appreciation” of which forms the only basis of civil association (128). It is comprised of “the terms of the relationship” between *cives* in civil association: that is, the “rules of a practice which may concern any and every transaction between agents and is indifferent to the outcome of any such transaction: the practice of being ‘just’ to one another” (128). In other words, to repeat what was quoted above, *lex* is comprised of “rules which prescribe the common responsibilities (and the counterpart ‘rights’ to have these responsibilities fulfilled)” (128). Oakeshott characterizes these as “general, abstract considerations” (130), as general “legal norms” (133), and as “descriptively identified general conditions” (134). Second, *lex* as a whole is more than just the sum of these rules. *Lex* is “not a mere collection of rules but a system of rules and self-sufficient” (129).

The systematic character of *lex* is a relationship between the prescribed conditions of conduct themselves, in virtue of which they continuously interpret, confirm, and accommodate themselves to one another, and thus compose a self-sufficient (although not self-explanatory) system (129).<sup>26</sup>

For Oakeshott, then, the law underlying common law has some sort of internal logic and consistency. *Lex* is a body of rules that guide civil conduct

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<sup>26</sup> Immediately prior to this sentence Oakeshott wrote something irrelevant to our consideration of *lex* as such but intriguing enough that I decided to include it. “These laws are the sole terms in which *cives* are related. And in constituting this relationship they create and delineate a *persona civica* which wholly depends for its identity and coherence upon their symmetry.” This seems like it could open up a whole discussion on political psychology and political identity, but Oakeshott nowhere seems to enter that discussion.



and that fit together somehow in some sort of self-reinforcing relationship.

With this clarified, Oakeshott's distinctive way of characterizing the act of judging should make sense. Judges attribute meaning to the law. A judicial decision, for Oakeshott, is not a mere "application" of precedent but rather an "amplification of the meaning" of *lex*. Judges are concerned with the question, "What meaning may this rule of law justifiably and appropriately be made to tolerate here?" (136). Regarding this concept of meaning, Oakeshott is careful to specify that "meanings are never deduced or found but are always attributed or given" (135). This is a tricky sentence. Is Oakeshott saying that the source of positive law (for the meanings of *lex* are what comprise precedent) is purely in the judge and not in the law? That would conflict with his clear denunciation of legal realism, which we explored. But it seems to be the distinction in this sentence. Deduction or discovery of meaning imagines meaning sourced in something external, while attributing or giving meaning imagines it coming from within the adjudicator. It might be unfair to scrutinize the metaphor this closely. And at any rate, one ambiguous metaphor notwithstanding, the whole of this section makes clear that positive common law is comprised of the accumulated meanings of *lex* which emerge in the adjudication of disputes but which are necessarily related to the external "independent scale" of general norms that Oakeshott calls *lex*.

Finally, we may now consider whether Oakeshott fits the mold of declaratory theory cast by Beaver. First, do they imagine the act of adjudication in similar ways? As we have observed, Oakeshott positions his theory of adjudication somewhere between legal realism and strict formalism, just like Beaver. In this intermediate zone for both theorists the act of adjudicating is neither the mere application of precedent nor the creation of law. As we just explored, for Oakeshott it is the attribution of meaning to law made under the guidance of past meanings given to the particular rule in *lex*. In this process what the judge must consider is "this rule amplified by the meanings it has already been made to tolerate in earlier judicial decisions" (136). This consideration involves "analogical" reasoning. Oakeshott's description of adjudication as analogical reasoning in consideration of past meanings of a given rule sounds much like Beaver's description of Lord Esher's method in *Willis v. Baddeley*: "Accordingly, the decision in *Willis v. Baddeley* was no mere application of *Republic of Costa Rica v Erlanger*... He tells us that he is, not applying, but 'acting ... on an appreciation of the rule.'<sup>27</sup> Thus both theorists imagine that judges take real but not mechanical guidance from precedent.

But what about the nature of general law? We have seen that Beaver

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27 Beaver, 428.

characterizes general law as general legal principles embedded in common law, and that Oakeshott characterizes *lex* as rules of civil conduct that comprise a logical system of some sort. Would Oakeshott allow *lex* to be characterized as general legal principles identifiable within common law? In fact, there appears to be in Oakeshott's theory an analogue to Beever's general principles. The systematic character of *lex* is manifested in what Oakeshott calls "propensities."

Every system of law has propensities lodged in the meanings attributed to its more general and least fluctuating concepts which, although they are no more than propensities and are not immune from change, cannot be violated in an adjudicative conclusion without serious damage to the equilibrium of the system (136).

These propensities define "the limits of tolerance imposed by the system of *lex* itself" upon what can be an acceptable meaning of *lex* in a particular case. And they do not fall short of Beever's conception for being "not immune from change," for Beever acknowledges both that the principles can change over time and that "there will be cases about which reasonable people disagree" (442). Thus Oakeshott's "propensities" correspond to Beever's principles. However, the propensities are not themselves *lex*. They are found rather in positive law—"lodged in the meanings attributed to its more general and least fluctuating concepts." *Lex* has concepts which have attributed meanings which have propensities. It seems clear that Oakeshott's propensities or his "least fluctuating concepts" correspond with Beever's general legal principles. But whether *lex* so corresponds depends on how much you decide to emphasize the distinctions between all these. Oakeshott unfortunately leaves us with little guidance for making that decision.

This raises the question of natural law in Oakeshott's theory. For if you emphasize the distinction between, on the one hand, *lex* and, on the other hand, the concepts, meanings, and propensities, then *lex* seems something much higher than Beever's general principles, something that could plausibly be conceptualized in terms of natural law. In considering the possibility of natural law in Oakeshott, one must not forget his treatment of it in the essay, "On Being Conservative." There he writes, "[W]hat makes a conservative disposition in politics intelligible is nothing to do with a natural law or a providential order, nothing to do with morals or religion" (RP, 423f). Now, that Oakeshott does not think conservatism entails a natural law does not *prima facie* mean that he would not adopt a natural law concept in *On Human Conduct*. He could mean to say that one need not accept natural law in order to be conservative. But what he means by conservatism imbues his concept of civil association to such an extent that the conditions

of conservatism can find direct counterparts in the conditions of civil association. Conservatism includes

the belief... that governing is a specific and limited activity, namely the provision and custody of general rules of conduct, which are understood, not as plans for imposing substantive activities, but as instruments enabling people to pursue the activities of their own choice with the minimum frustration (RP, 424).

This echoes Oakeshott's distinction between civil and enterprise association in *On Human Conduct*. Civil association involves instrumental rules (*lex*) as opposed to the "managerial decisions" that guide conduct in enterprise association toward a common purpose.<sup>28</sup> Civil association is defined by these rules and the recognition of them. Therefore, to the extent his conception of civil association is intrinsically conservative, his system of *lex* does not necessarily involve a natural law. That much we may glean from "On Being Conservative." But this does not logically foreclose that *lex* may involve a natural law. Of course, the usefulness of "On Being Conservative" to our effort to understand *On Human Conduct* is not indisputable. Oakeshott was not always consistent with his use of words, and his epistemology changed significantly during his career. But if nothing else it serves to show explicitly that Oakeshott was not generally well-inclined toward natural law theory. Nevertheless, such an inclination would not have prevented Oakeshott from unintentionally aligning himself with natural law. Indeed, we are left where we began—facing the possibility that *lex* is something higher and more permanent than general legal principles of common law. On this premise, *lex* could well be some sort of natural law understood in a very basic sense, and not in the way history has delivered natural law to us—i.e. in terms of Thomist theology.

This possibility of natural law hangs on a strong distinction between *lex* and its "concepts" and "propensities." Some clarification may be found in his section on legislation, for his discussion of *lex* there implies that subjecting *lex* to legislative activity removes it from natural law. There is no way to determine if an enactment of *lex* is right or wrong. First, Oakeshott says that *lex* itself, not just the meanings of *lex*, is "alterable," for legislation actually alters the content of *lex* (139). For *cives* and adjudicators, *lex* is authoritative. But for legislators, "*lex* is an invitation to consider whether it should not be in some respect changed, extended, or contracted, and if so, then, precisely what change should be made" (139). "Legislative opinion cannot be demonstrably correct or incorrect; *lex* cannot be deduced from the

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<sup>28</sup> For the development of this distinction see *OHC*, 112-122.

so-called dictates of Reason” (139). Moreover, there is a “necessary absence of a ready and indisputable criterion for determining the desirability of a legislative proposal” (140). If *lex* holds no sway over a legislator’s enactment of it, it must not have the transcendent quality typically accorded the natural law. We may infer from this that *lex* is closer to *lex*’s “concepts” and “propensities” and thus to Beever’s general legal principles.<sup>29</sup>

Although I have suggested that general law in Oakeshott’s theory of adjudication can plausibly be understood in terms of Beever’s general legal principles, I wish to suggest in addition that Oakeshott provides a way of elaborating this conception of general law further, but not in *On Human Conduct*. This suggestion, which may not have occurred to Oakeshott, would enhance our understanding not only of his theory but also of declaratory theory more generally. It thus departs from the primarily historical aim of this paper and offers a contribution to current theory. My suggestion is that *lex*, as he describes it, seems to fit the bill of what Oakeshott in his essay “Rationalism in Politics” calls practical or traditional knowledge. One of the “two sorts” of knowledge that exist “in every practical activity,” practical knowledge “exists only in use and (unlike technique) cannot be formulated in rules” (RP, 12). Thus it is unable to be communicated through verbal instruction but must be learned by imitation. It contrasts with the other sort, technical knowledge, whose “chief characteristic is that it is susceptible of precise formulation” (12). Let us remember that *lex* involves a degree of uncertainty. Although *cives* “are aware of their responsibilities” in a general sense, they are uncertain about what specific conduct these responsibilities prescribe and proscribe in particular situations—i.e., about “how the norms of *lex* relate to contingent situations” (OHC, 131). Oakeshott writes, “In no case can [the meaning of *lex* in relation to the contingent situation] be concluded without reflection. There is no ‘plain case’ in the sense of a dispute which settles itself... This uncertainty is intrinsic to *lex* as the terms of human association” (133). *Lex* involves uncertainty, I suggest, because it cannot be set down in language in its entirety. Beever acknowledges that “there will be cases about which reasonable people disagree” even when reasoning in terms of general legal principles as he suggests.<sup>30</sup> Indeed, my suggestion that the general legal principles of common law are not susceptible to verbalization

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<sup>29</sup> Oakeshott does not in this section much discuss *lex* in terms of morality, with at least one exception: “And if the procedure invokes a general moral consideration it must be in respect of its antecedent recognition in *lex* and in terms of that recognition” (134). This connects *lex* with moral considerations, suggesting *lex* might be some sort of moral law. But Oakeshott has his own understanding of morality which he elaborates in Chapter One and which we would have to consider before making full sense of this sentence and how it bears on the natural law question. But that is not necessary, since our consideration of the legislation section showed that *lex* is not natural law.

<sup>30</sup> See Beever, 442.

finds resonance in other writings on the declaratory theory. Darryn Jensen writes,

The understanding of legal authority which is at the core of this view sees legal authority as something which exists independently of particular verbal propositions. The particular verbal propositions that exist are, rather, explications (however partial and approximate) of a larger body of principle which governs relations between participants in a legal community but which is open to further discovery and explication.<sup>31</sup>

Verbalization can “get at” *lex*, but it cannot capture it in its entirety. *Lex* is a form of practical, traditional knowledge.<sup>32</sup>

Not only is this twofold theory of knowledge helpful for understanding *lex*, but the correspondence extends to the second sort of law in Oakeshott’s twofold theory of law: particular adjudicatory conclusions are in fact formulated in propositions and communicable via language. In other words, as *lex* corresponds with practical knowledge, particular judicial conclusions correspond with technical knowledge. I advance this claim of correspondence hesitantly, for Oakeshott certainly does not make it explicit. And the fact that *lex* can be enacted through legislation may obviate a view of *lex* as practical knowledge. Other descriptions of *lex*, however, lend support to my claim. In the discussion of legislative process which follows that of adjudication, Oakeshott characterizes *lex* as a “vernacular language” (141). Earlier he had referred to it as “the language of civil association” (137). Language, of course, is associated with technical knowledge, but these characterizations do not mean that *lex* is a language; rather, like a language it must be learned by imitation. It is marked by such “complexity” that legislation and adjudicative conclusions can never capture the entirety of *lex* because *lex* eludes our delimitations of it in language. The constant flux and flow of circumstance, sentiment, and belief mean that *cives* will always be confronted with questions as to the meaning of *lex*. *Lex* only has meaning in positive law, but throughout the constant changes in positive law *lex* persists as independent. If nothing else, then, conceiving *lex* as practical knowledge is a useful heuristic tool for understanding *lex* and its place in the adjudicatory system.

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31 Darryn Jensen, “Theories, Principles, Policies, and Common Law Adjudication,” 36 *Austl. J. Leg. Phil.* 34 (2011), pg. 44.

32 This theory of knowledge is not unique to Oakeshott. For a similar theory but much more developed see the writings of Michael Polanyi, especially *The Tacit Dimension* (Garden City, NY: Doubleday & Company, 1966).

#### IV. CONCLUSION

It should now be clear that Oakeshott was no general theorist of law but a common law theorist with a substantial contribution to make to the common law tradition: namely, a refined declaratory theory of adjudication. In summation, Oakeshott's description of the role of prior judicial decisions in adjudication can be understood in terms of *stare decisis*. Oakeshott does not simply restate the conventional common law understanding of *stare decisis*. On his view precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. His theory of adjudication can be understood in terms of declaratory theory. Despite criticisms, the declaratory theory has not fallen out of favor entirely. There are still a few who suggest that critics of the theory fundamentally misunderstand it. The critics' main mistake is to say the declaratory theory holds that common law does not change. This disagreement flows from differing uses of the word "law" by the theory's critics and adherents. In brief, critics of the theory assume a realist view of "law." On the other hand, adherents of the theory going all the way back to medieval courts assume a different, twofold conception of law. There are different ways of conceptualizing general law in this twofold view. One way is Beever's legal principles. Though the critics disavow their caricature of the declaratory theory they actually (and unknowingly) adhere to the real one. Oakeshott's theory of adjudication can be understood in terms of declaratory theory. He adopts a twofold conception of law and positions it midway between legal realism and strict formalism. The propensities of law that guide adjudication can be understood in terms of Beever's general legal principles, but it is not entirely clear whether these propensities exhaust *lex* for Oakeshott. This leaves open the question whether *lex* approximates natural law. At any rate, *lex* can be understood in other Oakeshottian terms: namely, in terms of practical, traditional knowledge as laid out in "Rationalism in Politics."

What Oakeshott accomplishes with this theory is to show that the common law is not simply a historic artifact we have inherited and must use as we can but is actually possessed of a great deal of internal logic and coherence. In other words, he shows how someone could with good rational basis devise the common law if, say, charged with creating a new government among a people with no prior experience of organized government—how you might decide to govern, with a good deal of practical prudence, by starting at square one, so to speak. With this demonstration of internal coherence he brings his philosophical idealism to bear upon his common law analysis and thereby makes a novel contribution to common law theory. There are two ways of looking at Oakeshott's accomplishment. One way is to say Oakeshott's can be marshalled in support of declaratory theory. The

other way is to say the more empirically based reflections of Beever's defense of declaratory theory can be understood to support Oakeshott's more theoretical account of civil association under the rule of law.

In closing I must acknowledge that declaratory theory, as should now be clear, though it does not necessarily entail natural law, looks more like another legal theory that has fallen out of favor: formalism. We have already observed that declaratory theory is prone to be caricatured in terms of strict formalism. But the real declaratory theory is also a species of formalism. Formalism is considered to have been decisively refuted by legal realism. Oakeshott's declaratory theory, along with all declaratory theories, must be defended against legal realism. To the extent modern legal theory is hamstrung by varieties of legal realism, perhaps some sort of reinterpretation of formalism should be developed.<sup>33</sup> My task in this essay has been historical. I purport not to have made this defense or development. But I hope to have established that any attack on formalism must deal with Oakeshott's declaratory theory, any defense of formalism may draw on it, and any potential rapprochement must account for it.

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<sup>33</sup> Although Beever does not mention formalism in his essay, he defends it in law and music in "Formalism in Music and Law," *University of Toronto Law Journal*, Volume 61, Number 2, Spring 2011, pp. 213-239. One prominent attempt at reinvigorating some sort of legal formalism is found in Frederick Schauer, "Formalism," *Yale Law Journal*, Vol. 97, No. 4 (Mar., 1988), pp. 509-548.





# INTERVIEW

[with Bruce Ackerman]

*Bruce Ackerman is a prominent legal scholar and public intellectual. A Sterling Professor of Law and Political Science at Yale, Ackerman's work ranges from political theory and constitutional history to public policy. Ackerman develops a liberal theory of justice based on dialogue between citizens. His constitutional theory turns to the American civic-republican tradition and has shaped debates over the republican revival within the legal academy. Ackerman's books include *Social Justice and the Liberal State* (1980), *We the People* (1991, 1998, 2014), *The Stakeholder Society* (1999), *Deliberation Day* (2004) and *The Decline and Fall of the American Republic* (2010). We sat down with him in January for a wide-ranging conversation that touched upon the enduring tensions that seem to characterize liberalism and republicanism, political philosophy and constitutionalism, and citizenship and cosmopolitanism.*

JPT: Tell us about your background and how you first became interested in political theory.

BA: I went to Harvard College as an undergraduate, where I had a great deal of freedom to explore different subjects. I really liked Judith Shklar's course, which was called Introduction to Political Thought. Because I was an advanced placement sophomore, and maybe because I was verbally aggressive, she became my tutor in my junior year. She was a tremendous influence on me. Every week I read nearly 1,000 pages of some person in the history of political thought and had to write a 20 page paper on each work. Shklar would invariably

tell me, "Bruce, this is no good!" Though I was oblivious to this at the time, Shklar herself did not get tenure until the 80's, and this was certainly because she was a woman. All year, I did very little but read and write for Shklar, and have her condemn my work.

The next year, she passed me over to John Rawls, who had just arrived from Cornell. He was a completely different personality. He was extremely thoughtful and remarkably supportive. Here's an example: I was taking one of his courses and, as was my tendency, I ran up after class to ask a dozen questions. But others got there first, and I had to run to another commitment. That night, he

called me up on the phone to ask me if I had some questions for him. This would have been exceptional under any circumstances, but the fact was that he suffered from a terrible stutter, and it was very difficult for him to complete his sentences over the phone. Nevertheless, we had a lengthy conversation.

During my time as an undergraduate, the consensus view was that ideology, and normative political theory, were dead. But Rawls was thinking for himself, and he was almost single-handedly defining the terms of a tremendous philosophical revival. I ended up majoring in Government and Philosophy and I wrote a dissertation on the place of reason in the political thought of Hobbes and Rousseau. In some ways, this is the question I've been returning to throughout my life.

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“Today, a thousand derivative Rawlsians are asking derivative questions, like good graduate students who will get promoted and write nothing.”

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After Harvard, I went to Yale Law School. That was a place full of people who didn't know that “political philosophy was dead.” There was Robert Bork, Ronald Dworkin, Charles Reich, and Guido Calabrese. I then clerked for Henry Friendly and John Harlan, both leading conservatives. I was not a conservative then—or now, for that matter. From there I went to teach

at the University of Pennsylvania Law School. I had no idea how to do this and they said to just make it up. I taught property, although I didn't teach any of the standard stuff on property. I also taught Justice.

At that point, both my wife Susan and I had written a few papers. Susan was then writing about racism in housing markets and urban economics. Yale Law School hired me as a professor at the age of 28. Susan was hired in the Economics department as an assistant professor.

I have always done something philosophical and something of the practical sort. Early on, my wife and I wrote on environmental law. We were among the first to propose marketable permits. Once I had tenure at Yale Law School, I was able to dedicate more time to writing *Social Justice in the Liberal State*. What I was doing was not so remarkable in the Yale Law School, but it was remarkable in law-land in general.

Law has gotten much more interdisciplinary, much less specialized over this period. Back then, Yale and Chicago were the only law schools where people without law degrees could become professors. Today, the leading 40 law schools in the country are much more Yale-like than Harvard or Columbia was at that time. Most law schools back then just taught you what the law was, rather than putting legal questions in a critical multidisciplinary perspective.

JPT: Has there been a recent shift in the opposite direction? You recently

wrote a piece in the Washington Post defending the 3-year duration of law school and emphasizing how today's lawyers need to integrate a comprehensive understanding of statistics and economics into their legal work. In that article you described the importance of lawyers mediating between technocracy and the principles of the American legal tradition.

BA: There is a backlash going on. But this is because things are economically grim right now, so we will see what happens in the middle run. Here at Yale, Tony Kronman, Owen Fiss, and I were part of a conversation group that met once a month for 20 years with political philosophers like Judith Thomson, Robert Nozick, David Gauthier, and Michael Walzer. We were all in a conversation together. So I never thought of myself as exclusively a law person. This was a dynamic period of questioning, asking whether there is a place between John Locke and Karl Marx. My work, like that of many of my discussion partners, was trying to answer what society should look like if one rejects anarchy and economic determinism of the Marxist variety.

JPT: People often distinguish between analytic political philosophy a la Rawls and political theory a la Shklar and Walzer. Do you think one is more focused on philosophical argument and the other more focused on political significance? Do you see a distinction there?

BA: I don't think there is a real distinction there. The first footnote

of Walzer's *Spheres of Justice* is an effort to say people like Rawls and Ackerman are simply wrong. It doesn't say that one is doing one thing and one is doing another. Similarly, the distinction between analytic and continental philosophy is simply an excuse for thoughtlessness. One of the more amusing reviews of *Social Justice in the Liberal State* opens with a line about Bruce Ackerman as an English speaking Habermas, by which the author meant nothing complementary.

The critical question is whether you will think for yourself or will be a footnote to someone else. Rawls, Walzer and Shklar are not footnotes to someone else, although of course they are aware of what others said beforehand. A thousand derivative Rawlsians are asking derivative questions, like good graduate students who will get promoted and write nothing.

Rawls's principle of organizing the basic structure of society so as to maximize the position of the least advantaged is a point of political significance, not merely an argument. And Walzer's critique of simple equality in favor of complex equality is an argument, not merely a point.

In my own work, I don't try to "review the literature." I try to present ideas, rather than spend three hundred pages of historical and philosophical reflection on other people's work before I say a word of my own. That being said, my work is just as much shaped by Martin Heidegger, for instance, as it is by Willard Quine.

JPT: What is it about law or legal academia specifically that enables it to serve as a mediating ground for different perspectives?

BA: Well, look at how I got my job at the UPenn. I did well in law school, clerked for some judges and then was hired on the basis of their recommendation. That means that you didn't become an assistant professor by having mastered the literature on a very narrow topic. There are costs and benefits to legal academia. The benefit is that you're freer than professors in other fields, and the cost is that you didn't know what you're talking about.

Basically, the structure of scholarship in law at that time was people being selected on the basis of their general intelligence and having impressed a couple of judges. They then went on to a place where they could mouth off. So we have an infinite number of rediscoveries of the wheel and occasionally, someone will say something original and interesting.

At that time, the standard mode of publication was the Yale Law Journal or the Harvard Law Review. Neither are refereed journals. So you write something and then students, who are not experts, decide which of these thousands of articles is going to get published. The standard law review article is much longer than the standard academic journal article. Law review articles can run up to 30,000 words! Whereas when you try to publish an article for a philosophy journal, you have to get it down to twenty pages. In a twenty page paper, you have to presuppose

certain paradigms. You can't shape paradigms in twenty pages.

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“There are costs and benefits to legal academia. The benefit is that you're freer than professors in other fields, and the cost is that you didn't know what you're talking about.”

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Now, this is slowly being displaced by a more academic path to positions. That's why I am in favor of our new PhD program here. What we have now is philosophy PhDs teaching in law school as a platform for applied philosophy. They aren't taking law seriously and using whatever tools they find appropriate. So it's not quite a question about the intrinsic study of law as much as it's about the fact that legal education is, relatively speaking, a new institution. Contrast this with Europe, where the first law schools were established in Bologna in the 12th Century. In Europe, a person like me doesn't exist. You can't be a professor without having your first or second doctorate, and these doctorates must be in generally respected fields.

JPT: What effect do the different systems of legal education have on how people interpret the law in Europe versus how they interpret it here?

BA: There are several differences. To become a judge in France, Germany, or Italy, you take an exam at around

the age of 24 and then you get promoted over time. By contrast, in the U.S., as a friend of mine likes to say, “a federal judge is a lawyer who knows a Senator.” The judge is an experienced person of practical wisdom, rather than a legal specialist. This is a big difference in the structure and nature of judicial thought. The role of the academic in each respective system is very different. The academic in Europe, through writing commentaries, provides the foundation for law. The relationship between the professoriate in America (or in Britain) and the practitioners of law is somewhat more problematic. There is a great book along these lines by Mirjan Damaška called *The Faces of Justice and State Authority* that touches on these foundational differences.

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“ I do not think that constitutional law merges into political philosophy.”

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JPT: Today, lawyers are increasingly working on public policy using statistical models and methods. It reminds me of a line in Philip Pettit’s book when he says, “At some point, the philosophers have to make way for the lawyers,” and perhaps we might add that the lawyers have to make way for the technocrats. Could you talk a bit about that?

BA: Technocracy is certainly a big problem. Though it may be a great shame to think that cost and benefits measured by dollars is the best way

to proceed, the language of model building is essential for moving beyond 19th century classical liberalism. Classical liberalism takes the stage of social life as given and then talks about freedom on that stage. Today, the liberal activist state, through strategic intervention, can change that underlying social life. One cannot understand the problems facing our environmental integrity without creating and implementing mathematical models for air currents, water pollution, and global warming. Similarly, examining the strengths and weaknesses of mathematical models is essential in order to understand when markets generate externalities, or what the implications of the “theory of second best” are, or in order to actually answer the question of how should the state intervene strategically in the name of social justice and liberal ideas?

To bar ourselves from these questions is to limit ourselves in the pursuit of practical schemes for social justice and environmental integrity. On the other hand, leaving it all to model-builders and technocrats who do not understand themselves to be (and sometimes proudly) equipped to engage in “normative discussion” is equally blind.

One has to develop notions of legitimacy that are responsive to 21st century problems, to achieve social justice without the banalities of libertarianism on the one hand and Marxist determinism on the other.

JPT: On that note, what are your

thoughts on liberal neutrality in the state? Is it possible to have the kinds of “strategic interventions” that you mentioned without advancing a vision of the good?

BA: Well, the foundational notion that I talk about in my book on the liberal state is intersubjective recognition through justification and dialogue. The critical question citizens engage is “why is that jacket yours and not mine?”

My notion of neutrality is not that there ought to be a neutral outcome. Neutrality is a principle used to define a bad answer. It is, as it were, what we’d call a “conversational constraint.” So, liberalism for me is a form of constrained conversation. Habermas, in contrast, supposes that justification should be understood from the ideal state of affairs, where everybody can say anything.

A liberal political culture is emphatically and self-consciously partial. You and I have the right to go to hell in our own way. In the ideal speech situation, I don’t argue with you whether Islam is preferable atheism. However, we do need to resolve why that jacket isn’t actually mine. Neutrality dictates that I can’t answer that question by saying, “Because I’m just better than you are.”

So, is liberalism, as so conceived, bankrupt? The first aim of the foundational side of my work is to establish that there is a possible world in which we can order all fundamental power relationships within this liberal culture so that it

isn’t in principle bankrupt. This is the part that people like Walzer don’t like, but he’s wrong. It is important to know whether it is nonsense all the way down or not.

Of course, if it were nonsense all the way down, he’d have a better reason for dismissing the conversation. But, I humbly believe that the first half of *Social Justice and the Liberal State* establishes that it is possible to imagine a world in which the fundamental power relations are all compatible with this principle of mutual, dialogic, constrained recognition as common citizens of a liberal state.

What are these fundamental power relations? Here I borrow from Rawls in thinking that the basic problem of 21st century liberalism is the allocation of power so far as opportunities are concerned, rather than outcomes. There are four fundamental relations of power that are necessary conditions for acting in the world: birth, education, certain entitlement of property rights, and then making one’s way through a transactional structure.

This basic framework, and the implications of neutral dialogue within it, serve as a foundation for the policies I advocate. For example, one important dimension of my work is on the topic of genetic endowments. Until recently, we thought that we were in the state of nature, so far as genetic endowments were concerned. In the 21st century, this is no longer the case; we increasingly have the capacity to shape the genetic composition of the next generation.

This is already happening. Therapeutic abortion, for example, is one form of genetic manipulation. With regard to women's equality, more and more children will be born outside the womb.

How should all this be regulated? With a perfect technology of justice, we can imagine a world in which the genetic domain is regulated according to liberal principles. Many theorists can't deal with these questions because, by taking our genetic composition as given, they start the discussion too late.

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“ I am more of a liberal individualist than so called libertarians who are confusing the liberty of the parents with the liberty of the children.”

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JPT: When you speak about deliberation, are you making an epistemic argument about good decision-making or do you conceive of an intrinsic good to deliberation itself?

BA: Liberalism for me is about achieving an understanding of ourselves as individuals. I don't mean this in the sense of some Kantian transcendental deduction or a kind of state of nature individualism. After you are taught a language at the age of two, you are initiated into a culture of individualization or subordination. Liberal political culture is the foundation of your status as an "I" vis-à-vis "you." When we talk to one

another as liberal citizens, rather than trying to pursue our aims of personal fulfillment, we are engaging in the foundational conversational project of legitimation at the foundation of the liberal state.

That's different from a contractarian view based on will and it's different from Kantian reason. It's something like a Deweyite insistence on a form of intersubjective recognition through dialogue as the foundation of the political. That's why the idea of Deliberation Day--a day when citizens come together to participate in a communal discussion about elections--is attractive to me. But Deliberation Day is not the same thing as liberal conversation, because it isn't as exclusionary. On Deliberation Day, citizens of the United States can say things like "this is a great country, don't let other people come in." In a truly liberal state, made up of well-socialized liberal citizens, people would not make such arguments. Here in the United States we are republican first and liberal second. The Germans, by contrast, are more liberal on their foundations and secondarily republican.

I would say that there is a constitutive feature of deliberation – we are recognizing each other as citizens by engaging in this conversation. And the contexts in which we recognize each other as citizens are disappearing. The draft is gone, and that was once a way we recognized each other as citizens. The public school is being eroded. The most important way we recognize each other as citizens today is when we go to Kennedy Airport and present our

passports.

We need to construct new rituals of citizenship and that is what I was trying to do with Deliberation Day. Consider the fate of holidays – July 4th means practically nothing today and Martin Luther King Day will mean just as little in a few decades. The only holiday of a secularish kind that has any meaning in America is Thanksgiving. Why? Because people go home for the weekend; they have a ritual. I want Deliberation Day to constitute a new ritual of citizenship. These practical proposals come more out of my conception of the liberal state than my constitutional reflections.

JPT: So far your discussion has operated at the level of the state. How does your account of liberalism negotiate the boundaries between national constitutionalism and global justice?

BA: At the international level, I'm a world federalist and I still try to take liberal commitments seriously. So even if the proposal set forth in *The Stakeholder Society* were adopted and every American citizen is given a certain amount of money as a grant on their 21st birthday, we must still ask, what about people from other countries? Why should the mere fact that you're born in this particular place determine whether or not you receive this money? The reality is that there is no good reason.

The aim of my philosophical work was to take activist liberalism seriously and not accept the historical contingencies of our

particular moment. At the same time, I was grimly determined not to go down the path of John Rawls and defend myself for the next fifty years. I wanted to do something new, and so I made this turn to American Constitutionalism and comparative constitutionalism. This kind of work takes our historical situation more seriously.

Unlike Ronald Dworkin, I do not think that constitutional law merges into political philosophy. I think that constitutional law is a cultural discourse that emerges in a particular historical context. Now, this discourse can be pushed in various directions and political philosophy gives us the tools for thinking about what those directions might be. But in my mind, there is a difference between constitutionalism and political philosophy.

JPT: But isn't there a tension between the particular historical contexts that make us "citizens," and the moral arbitrariness of the situations in which we are born into?

BA: Well, I think we should have a North American Federation with Canada and Mexico. Insofar as ours was an Enlightenment revolution, these borders are a matter of accident. In principle, there aren't large differences between Mexico, the U.S., and Canada. By the way, the capital of the North American Federation should be San Francisco because it was once part of Mexico and it's the only part of America that the French Canadians would be willing to go to.

Of course, we also have cultural



nationalisms. In the 18th and 19th centuries, America was a cultural colony of Europe. Our great poets and thinkers were following London, Paris, and Berlin. But what does “American culture” really mean today? We mean something very superficial: Hollywood, McDonald’s, Harvard, and Yale. So we have these two identities: a cultural nationalism and an Enlightenment heritage.

The principles of Enlightenment cosmopolitanism are under threat in a very obvious way by cultural nationalisms from people like Donald Trump and Marine Le Pen. This war between cultural nationalism and the Enlightenment is one of the struggles of our time, especially now that we are after the Fukuyama triumphalist moment. On top of that, we have this new technocratic cosmopolitanism that some people call “neo-liberalism.” What they really mean is technocratic manipulation of markets and the depoliticization of the legitimation process. The problem with that form of legitimation via outcomes is that it’s hard to manage outcomes without foundational principles that are generally intelligible and meaningful to ordinary people.

One of the central aims of my work is to make liberal citizenship real. My “realistic utopian” proposals are an attempt to take my philosophical work on liberalism into the practical realm. Over the last several years, I have been trying to develop a thicker account of constitutionalism as a mechanism through which we legitimate power through

conversation. Power is legitimated not simply by votes but through substantive liberal principles. If you get a grant of \$80,000 like I propose in The Stakeholder Society you’ll have to ask “why did I get it?” These are efforts at constructing the foundations of cosmopolitan liberalism in ways that are meaningful to its participants.

JPT: But how does constructing a thicker vision of liberal citizenship as you propose strengthen these cosmopolitan foundations? Aren’t we still operating at the level of the nation-state where civic status is bound up with the state?

BA: This brings us to the distinction between cultural nationalism and civic nationalism. When the armies of the monarchies of Europe were about to invade France after Louis XVI was prevented from escaping, the French National Assembly debated not how to defend the country, but rather a list of people who should be named honorary citizens of France. George Washington, Jeremy Bentham, and James Madison were on the list. But after the defeat of the French Revolution, the Germans decided it had been a French revolution, not an Enlightenment liberation from feudalism that would sweep the world over the next two centuries in its liberal and communist varieties.

Into the present day, whether we will be cultural nationalists or civic republicans is very much a living question. It is easy to think of a dystopia in which Europe succumbs to xenophobic cultural nationalism and the U.S. succumbs to nationalist

militarism. The Danes are asking the Swedes to prove that they are Swedes before they can come into Denmark. And in the U.S. there is all this agitation over the right to bear arms and the right of the president to bomb anybody he likes.

I say that rather than getting sunk into the Middle East, the real challenge for the United States is to show that the Enlightenment works in its homeland. If we don't do that over the next twenty five years, we will be in a bad way.

JPT: How do you maintain civic nationalism with so much internal cultural diversity? The cultural sense of someone in Appalachia might be very different from that of New Englanders.

BA: Here I'm with Michael Walzer: through the concept of spheres, roles, and the differentiation of society. In the economic sphere, we have these Appalachians and these sons of Harlem and the Bronx all going and working for Google. This happens at the same time that people might have very different tastes when it comes to their music. This is an example of role differentiation.

The problem today is that the sphere of citizenship is disintegrating. The old parties are growing less meaningful—that's what people like Bernie Sanders, Donald Trump, and Marine Le Pen are all telling us. The 20th century parties are becoming more removed.

To borrow a concept from continental phenomenology, there

are different lifeworlds. When you go into a hospital you behave one way, and when you go into Deliberation Day you behave another way. James Fishkin and I organized Deliberation Polls in twenty places in the United States, one of which took place here at the Yale Law School. Everyone took it very seriously, all showing up in suits. There is a conversation which does unify people from California to Appalachia to Georgia. Just think about the presidential elections and conversations about candidates. This certainly does not constitute the whole of people's lives but nevertheless it is something significant.

JPT: Can role differentiation be taken too far? France's *laïcité* is a form of role differentiation. The idea that once you leave your home, you must leave all religious attachments behind--in schools you become a "child of the republic"--is used to justify Muslim headscarf bans in schools. Are the tensions in France in part due to this extreme case of role differentiation?

BA: This is a question about liberal education. How can we understand the legitimate use of power as children evolve from birth through maturity? Most liberal theorists do not deal with education. They speak about pursuing one's own idea of the good life but never explain how it is that people arrive at such conceptions. Rawls, for example, treats us as if we are created through *The Birth of Venus*, born already grown up. John Locke famously argues against Robert Filmer, saying that the model of the king should

not be the model of the family. My question is more radical: why should the model of the family be the model of the family? What is the justification for a very small number of adults to essentially brainwash children during primary education? I define primary education as the first mode of socialization, when the child has not yet mastered the skills necessary for posing questions concerning legitimacy. During primary education, I will concede that parents must teach the child some form of life. Some particular form of primary socialization and education is necessary for any subsequent pursuit of intersubjective recognition and the good life.

During secondary education, when the child begins to develop the capacity for liberal dialogue, other concerned citizens may object to certain parental activities. If parents order their child to go to bed, another equal citizen may legitimately object to what the parents are doing. Liberal education means that the more successful the parent is in primary education, the less right the parent has to control the subsequent secondary education. Of course, this is not to deny that parents generally know their children best, care the most, and that we therefore should typically defer to their judgement.

To the France case, I agree with your intuition about *laïcité*. My position is that there should be strong public education in the way I described, but it should not be uniform public education. The curriculum you receive will depend on where you are coming from. The atheist should

confront religion in the public school and the evangelical Christian should be forced to consider the possibility of atheism. I suppose that I am more radical on this than in the other dimensions of my thinking.

My wife and I sent our kids St. Thomas, an establishment Protestant kind of place, so that our children would have an idea that there are

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people who think there is such a thing as God. In a liberal culture, everyone enters society from one place due to varying experiences of primary education, and then should be exposed to non-threatening yet broadening possibilities. At the end of this process, the child can decide exactly what kind of life he or she wants to live.

For these reasons, I am certainly opposed to vouchers which allow parents to select the schools that will maximize brainwashing until the child is finished with education. I am more of a liberal individualist than so called neo-libertarians who are confusing the liberty of the parents with the liberty of the children.

JPT: In light of this discussion of students’ liberty and education, I’m curious to hear your thoughts on the

recent student protests at Yale and at other campuses.

BA: My basic attitude is that student mobilization on campus is a good thing. Given the alternative of simply focusing on grades, I am glad to see that students are engaging. My second basic thought is that the real challenge for Yale students is to organize for a national set of objectives rather than a curricular set of objectives. These are not mutually exclusive but it is a question of focus. The major question is, to what extent should we be moving to focus on class, rather than race and ethnicity. This is the Bernie Sanders question.

The second major question is about militarism. Militarism and justice are the two fundamental questions facing America. For me, these are

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the two key issues that students should be focusing on. I remember going to a teach-in in the aftermath of the invasion of Iraq. I don’t see much of this going on right now. Meanwhile, President Obama has basically confirmed and solidified

Bush’s war policy. It is striking to me how much this is not a campus issue. Similarly, if you would ask me what is the most pressing question on the cultural identity front at the moment, I would answer that it is Islam. This might lead us into a hundred years war, but it has not been the focus on campuses.

The concerns here have been much more parochial: “What should Yale’s curriculum look like?” and “Why isn’t faculty more diverse?” I am on the appointments committee at Yale Law School and we would love to have a more diverse faculty. I expect that it will be much better in fifteen years than it is now because more diverse people are getting first-rate educations.

The surprising thing to me is not that there are problems at Yale, but that the concerns are so Yale-centric. Only if we thought we reached the end of history, to cite Francis Fukuyama’s phrase, should we begin to think exclusively about micro problems.

But all this is secondary to the pressing national issues reshaping America. Of course, there are connections between what happens on campuses and what happens on the national level. But it is too much about Calhoun College and not enough about how we should mobilize and organize for reforming police practices in America, for example. I do not want to suggest it is an either/or, because it isn’t, but I would like to see more focus on the wider national issues.

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