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The Great Alliance: History, Reason, and Will in Modern Law

Note to my colleagues at Osgoode Hall:

Thank you so much for your interest in this draft. An earlier version was first presented this summer at the IGLP pro-Seminar on Contemporary Legal Thought at HLS. The work needs all sorts of help, and I very much hope that you will help rescuing if from me as I have the honor of presenting it as a Nathanson Lecture at Osgoode Hall on September 13. It is forthcoming in *Law & Cotemporary Problems*.

THE GREAT ALLIANCE: HISTORY, REASON, AND WILL IN MODERN LAW

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Abstract

This article offers an interpretation of the intellectual and political nineteenth-century origins of modern law. Social theoretical analyses of law and legal thought tend to emphasize rupture and change. Histories of legal thought tend to draw a picture of conflagration between different schools of jurisprudence. Those analyses and histories fail to account for how much of present law and jurisprudence is the continuation of a jurisprudential settlement that occurred in the nineteenth century. The settlement brought the *will* of the masses under the control of authoritative legal thought, conceptions of political morality, and a general sense of social evolution. The principal mechanism of the settlement was a compact between legal *rationalism* and *historicism* to which *will* acceded. After a period of polarization around the time of the American and French revolutions, nineteenth century rationalism came to see historical events as the outcome of the cunning operation of reason in the world, and historicism came to appeal to the rationalizations of legal reasoning in order to endow historical matter with both conceptual stability and intellectual authority. Popular will bought into both. Modern law and the main schools of jurisprudence have remained, ever since, bound to this convergence of reason and history in the face of will. Modern law is therefore as much about preservation as it is about rupture; as much about unity as it is about conflagration.

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Introduction: Order, Freedom, and Moral Imagination in Modern Law

Modern revolutions remind observers of social and political phenomena that power ultimately rests with political masses. The stability of legal and political orders therefore depends on a sufficient level of consent on the part of the governed.[1] Absent the will of the governed, mechanisms that make destabilizing collective action on their part too cumbersome may delay instability, but not indefinitely. A gifted historian, David Hume had that in mind when he wrote that:

> "NOTHING appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as FORCE is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular."[2]

The political masses-legal order relationship is not unidirectional though. Since Hume's time, the complexities of modern society have grown exponentially, and legal ideas and institutions occupy a central and still expanding role in the formation and operation of mass opinion in such societies.[3] Put simply, law provides significantly provides the content, the incentives, and the fore for popular will formation, and at the end carries out its mandates. And it does all that in several complementary ways. This article is about the way modern law does that at the level of the principles and presuppositions that characterize the will of modern political masses.

A warning to the reader. The argument of this article moves several notches up the ladder of theoretical abstraction, seeking to offer both a phenomenological account of the structure of modern legal thought and experience and a normative vista from which to criticize and change it. The risk of operating at this level of abstraction is well known, namely that the argument may fail to be sufficiently accurate in its descriptions and irrelevant in its normative views. The possible rewards are worth the risk though.

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[1] For the distinction between obligation and legitimacy and a lucid, comprehensive, and elegant analysis of the different theories of legal obligation, see Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988).
[2] David Hume, "Of the First Principles of Government", in *Essays Moral, Political, and Literary* (Indianapolis, IN: Liberty Fund, 1987).
[3] On this point see, among others and from different contemporary orientations, Michel Foucault, *Discipline and Punish: The Birth of Prison*, Transl. by Alan Sheridan (London, Vintage Books, 1995), Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Transl. by William Rehg (Cambridge, MA: The MIT Press, 1998), Niklas Luhmann, *Law as a Social System*, Transl. by Klaus A. Ziegert (Oxford, Oxford University Press, 2004), and Roberto Unger, *Law in Modern Society* (New York, NY: Free Press, 1977).

The first transnational political masses belong to the nineteenth century. They were the first to see social and economic problems as essentially cross-borders political ones.[4] Urban and rural workers on both sides of the Atlantic embraced class identities, adopted diagnoses of their predicament, and confidently ceased to doubt their ability to solve the causal puzzle behind it. This newly discovered class-consciousness was anchored in a sense of shared destiny which refused to explain away economic misery, political oppression, and social subjection as natural phenomena. The nineteenth century masses interpreted these instantiations of personal and collective vulnerability as products of human will, which they could galvanize, transform, own, and exercise in favor of the downtrodden. Workers and aligned intellectuals believed that their destiny was in their hands and history on their side.

In the wake of their coming onto the world stage, these political masses denounced and often violently challenged the restoration and post-restoration constitutional settlements of the northwestern nation-states and subnational political units. Simultaneously, economic, military, and social crises everywhere compounded and developed into political crises, further weakening the perception of the stability of social orders. In that context, ruling elites could not help but feel that they were glancing over the precipice of chaos, and blamed the unbridled and uneducated popular will for that. To the waves of democratic expansions, social unrest, political revolutions, economic debacle, geopolitical uncertainty, and war, important intellectual elites of the Victorian Age responded with an appeal to a deep and sweeping new legal settlement: a *Great Alliance* between historicism, rationalism, and popular will.[5] This alliance turned out to be a highly adaptive, resilient, and attractive settlement process in the form of an intellectually and legally authoritative cognitive-normative-practical project. This article lays open its terms.

In its most general terms, the nineteenth century rapprochement of legal rationalism and historicism started in the first half of the nineteenth century, and assumed features attractive simultaneously to common prudential understandings and high jurisprudence.[6] During that time, rationalism became increasingly committed to inherited legal frameworks and values as manifestations of reason's cunning operation in the world, which lead to causally makeshift constitutional arrangements to be enshrined as ontologically essential.

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[4] The literature usually refers to the occupation of the "political" by the "social". See, among many, Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1998) and *On Revolution* (Penguin Classics, 2006) and Jacques Donzelot, *L'Invention du Social: Essai Sur le Déclin des Passions Politiques* (Éditions du Seuil, 1994). However, the opposite is as much true: the politicization of the social.

[5] Important definitions: in this article *will* means popular will. In legal doctrine and thought, it is expressed as deference to democracy, to the elected branches of government, to public opinion, to evolving cultural standards, to trends in legislative production, to social movements, to current common knowledge, etc. *History* stands for historical events (such as war as justification for extreme measures), historical tradition (such as legal precedents or, more broadly, legal/political/moral traditions), and historical meaning (such as the original meaning of the constitution, etc). In legal doctrine and thought, it is expressed as a form of argument that appeals to the past in order to legally regulate the present and the future. *Reason* includes instrumental reason (concerns with consequences, expediency, cost-benefit analysis), cognitive reason (science, expertise), and idealist reason (revelation of the true meaning and legitimate forms of social manifestation of values such as freedom, equality, justice, and dignity). In legal doctrine and thought, it is expressed as a form of argument that appeals to the faculty of reason in order to reveal that which law can best be.

[6] Legal rationalism and historicism were unusually polarized in the Eighteenth Century. For respective examples see the jurisprudence of Rousseau and Hume.

Moving from the opposite camp, historicism appealed to the rationalization of legal reasoning in order to conceptually tame, systematize, and bestow endurance and adaptability on historically contingent contents, leading in the first moment to a formalist jurisprudence of concepts and later to all sorts of deradicalization-through-rationalization processes. However, even more consequential was that the will of the masses acceded to the ratio-historicist rapprochement. To miss this last piece of the sociological and philosophical puzzle of modern law is to be condemned to always seeing it through distorting lenses.

The great alliance in law between reason, history, and the political will of the masses has since provided the conceptual as well as the ideological conditions for the many ups and downs in the history of legal positivisms, pragmatisms, and reflective equilibrium idealisms. That analytical and decisionist positivism, realist and critical pragmatisms, and reflective equilibrium idealisms declared war against classical legal thought[7] – as the first generation of the Great Alliance jurisprudence is now known – should not distract us. They all still operate within the confines of the Great Alliance.

The Great Alliance encompasses apologetic as well as critical legal thought. In our days, positivism as philosophy of language and meta-jurisprudence, positivistic decisionism as existential and artifactual modes to achieve choice closure, reflective equilibrium rationalizations of public and private law, cost-benefit analysis, performative critique, and kinetic experimentalism all play in the Great Alliance sandbox.

More generally, legal rationalism now survives as punctuated reformism, consequentialism, and a norm of performative critical discourse. Legal historicism survives as traditionalism, xenophobia, and precautionary prudence. The present circumstance is, therefore, that of a multiplication of strands of legal thought within the paradigm of the Great Alliance. This post-settlement period has been a fertile ecosystem for legal theories. This is, furthermore, the circumstance for both the traditional and the new left and right of the legal ideological spectrum, which share an impulse toward under-reflective adaptability and theoretical self-referentiality.

The influence of the Great Alliance is indeed everywhere. First, it is found in intellectual and political projects in and through law, where standing structural components of public life are justified as having passed the test of institutional evolution by carrying an intrinsic rational core. Second (and here the influence flows in the opposite direction), it is found in the demystifying effect that positivisms and pragmatisms once exerted upon enchanted versions of the nature of law, therefore preparing the terrain for a view of standing social arrangements as expressions of evolutionary accommodations that ought to be respected at their core and experimented with at their margins.[8] Third, it is found in the

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[7] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (privately published, 1975).

[8] Doing justice to the topic of legal evolution is not an easy task. I hope to add a section on the topic in the final version of this article. Among contemporary authors, I find the following to be among the best writings on the subject, from plural perspectives: Allan Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005). Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg (Cambridge: The MIT Press, 1998), Niklas Luhmann, *Law as a Social System*. Translated by Klaus Ziegert (New York: Oxford University Press, 2004), and Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: The Free Press, 1976).

control exerted over democracy or, more broadly, over broader institutionalized and non-institutionalized ways in which the will of the masses comes onto the stage of history. Fourth, the influence of the Great Alliance is found in the way theories of social justice (speaking from the vantage point of impartiality) and constitutional theories of law's integrity (charting the development of the doctrines of a living constitution) freshen up and repackage standing structural components of public life as outcomes produced both rationally and historically. Fifth, the Great Alliance influences how the legal ideals of freedom,[9] authenticity[10] and democratic control respectively map onto persuasion, tradition, and political power, and further back onto reason, history and will. The internal discursive economy of these triads constitutes different sub-groups of views about law within the Great Alliance, including distinct ideas about legal causation and types of legal arguments. Finally, the Great Alliance's predominant approach (pragmatic policy), technique (conceptual analysis and synthesis), and form of justification (reflective equilibrium, democratic deference and traditionalism) remain dominant in law.[11]

All of this can be good or bad, or good and bad. The Great Alliance thesis of this article has therefore two sides, one historical and the other normative. Historically, it advances the idea that contemporary legal thought and culture are best understood in light of three experiences: the will of the masses emerging on the political stage of Western nations via institutionalized (primarily through the expansion of franchise and relaxation of eligibility requirements to hold office) and non-institutionalized (often revolutionary) processes; rationalist and historicist legal philosophies re-converging after two generations of considerable polarization; and finally, positivisms, pragmatisms and reflective equilibrium idealisms in law gaining momentum from the previous two experiences. The normative argument, which will receive much less attention, is about what became of rationalism, historicism and popular will under the Great Alliance, and why we might wish to loosen its grip in the name of a better alliance between reason, history, and will in law and legal thought.

The thesis that historicism and rationalism combine in new ways in modern law is not new though. Roberto Unger speaks of "the campaign," in contemporary law, "to split the difference between rationalism and historicism by deflating rationalism and inflating historicism." He presents his alternative future for "legal analysis" in part as a reorientation of ratio-historicism. As "a special case of a more general alternative to rationalism and historicism," reoriented, legal analysis becomes an instrument of democracy in the work of institutional imagination.[12] Unger's work needs both complementation and rectification.

It was not any type of rationalism and historicism that merged in the Great Alliance. I will explain below [the first section is omitted in this draft] which types [they were what I call "utopian rationalism" and "consequentialist traditionalism"] did, and show how they merged. The Great Alliance did not simply split the difference between rationalism and

[9] As defined by G. W. F. Hegel.
[10] As defined by F. K. von Savigny.
[11] J. Austin, O. W. Holmes Jr., R. von Jhering, F. Gény, K. N Llewellyn, W. N. Hohfeld, H. Kelsen, H. L. A. Hart, J. Rawls and R. Dworkin provide illustrations of these.
[12] Roberto Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996), 171.

historicism. I will explain the terms of their coming together. Once explained, it will turn out that the images of inflation and deflation are insufficient at best and often inaccurate. Of even greater import, standing theories about Classical Legal Thought fatally fail to integrate the will into the alliance. Even those who conceive popular will as daring democracy tend to see the will as an entity standing outside the mechanisms of the Great Alliance, thus failing to appreciate how much of a party to the compact it was from its beginning in the nineteenth century. It is in the symbiosis of the three – history, reason, and will – that the Great Alliance finds its impressive strength and adaptability. Until the Great Alliance is well understood, any reorientation of jurisprudence proposed by the twentieth century schools will tend to further the alliance at the practical level, while remaining insufficiently persuasive at the theoretical one. For example, such reorientation misses the historicist dimension of law reaching into the future only because it reaches from the past, and it misses the potential of critical idealism in the making of law as an exercise in moral and sociological rational imagination.

To prescribe – as Roberto Unger or Jeremy Waldron do –[13] that law assist in and reflect the democratic winds of a citizenry embarked in institutional experimentation as antidote to the preservationist view of law as immanent moral order is to incompletely understand what it requires to escape, to the extent we ought to wish to do so, the grip of the Great Alliance. Rational critical imagination is needed, and institutional imagination is only desirable as an ancillary aspect of it. In cotemporary law and legal culture, there is an ever-present, if often unarticulated, reliance on the belief that the legal and institutional edifices of society rest on a morally defensible (on deontic or evolutionary terms) foundation. This belief is a spell cast on moral and sociological imagination, and it is hard to see how, except by chance, law as institutional imagination can break free from it.

Reason and the task of rationality should be more than critique and opportunistic exploitation of the cracks that smart criticism is able to open in the consciousness of the time. Reason and the task of rationality should be more than a vulture circling reflective equilibrium waiting for any mishaps. In the end, then, I propose that the way out of the cognitive, imaginative, and practical grip of the Great Alliance is not through the institutional imagination of democratic experimentalism or performative criticism, both of which play into the hands of Great Alliance, but through critical sociological and moral rational imagination. To do so without falling prey to the traps of reason[14] or becoming oblivious to the need for a theory of social change is a tall order and the odds against success stack higher at every step. But what else should one do? There certainly is no place outside language, culture, power, and history from which to speak with immaculate reason. But there is no

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[13] See Roberto Unger, *op. cit.* and Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 2001). Also, Allan Hutchinson, *The Province of Jurisprudence Democratized* (Oxford: Oxford University Press, 2008); Michael Dorf and Cahrles Sabel, "A Constitution of Democratic Experimentalism," Vol. 98. *Columbia Law Review* No. 2, March 1998; and Haunke Brunkhorst, *Demokratischer Experimentalismus : Politik in der komplexen Gesellschaft* (Frankfurt: Suhrkamp Verlag, 1998).

[14] See Friedrich Nietzsche, *On The Genealogy of Morality* (Cambridge: Cambridge University Press, 2000); Max Weber, "Science as a Vocation", in *From Max Weber: Essays in* Sociology, trans. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958); Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment*, trans. By Edmund Jephcott (Stanford: Stanford University Press, 2007); Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage, 1994) and *The Archeology of Knowledge* (Vintage, 1982), and Pierre Schlag, *The Enchantment of Reason* (Durham: Duke University Press, 1998).

other game in town either. Evolution, it is worth remembering, is not something that happened once upon a distant past. The struggle over the quality, breadth, depth, and contours of the horizon of human capabilities has always been the real struggle. All others are rarely more than skirmishes.

The institutional imagination of democratic experimentalism cannot hope to serve the expansion and deepening of the human capacities to learn, create, judge, invent, connect, and act to the extent that it continues to refuse to ask why and in which direction to experiment. "No wind," Montaigne reminds us, "serves him who addresses his voyage to no certain port."[15] Unless preceded and accompanied by rational imagination, democratic experimentalism risks remaining just yet another version of the pragmatic offshoot of the Great Alliance. It is certainly not easy to find a formula to rekindle and transform the utopian rationalism that once voiced our best hopes while, at the same time, appreciating the role of law as a broker between the past and the future of social orders and the social functions of legal doctrine.

Duncan Kennedy has argued that modern law and jurisprudence inhabited and travelled in three types of legal consciousness. Those were Classical Legal Thought, The Social, and what I prefer to call Idealizing Reflective-Equilibrium.[16] Kennedy's globalization thesis seems right to me. However, the understanding of the typology and its globalization waves as adaptive phenomena within the confines of the Great Alliance complement and rectify Kennedy's argument in important ways.

Kennedy times the rise of Classical Legal Thought between 1850 and 1914, and of The Social between 1900 and 1968. Idealizing Reflective Equilibrium is a post-World War II phenomenon. As forms of legal consciousness, each casts its own cognitive-normative-practical plan onto the world. CLT's was a liberal one centered on the aspiration of science and on the ideas of rights holding legal subjects and insulated spheres of will autonomy within which private and public actors could operate in socially unconditioned ways. Against this backdrop The Social's legal consciousness reinserted sociological sensibility into legal thought. Its aim was to facilitate the operation of social-economic systems through the deployment of instrumentally expedient policies "from the family to the world of nations."[17] The Social recognized the interdependence of social spheres and actors, to which it reacted with a mosaic of interests securing policies. Unsurprisingly, this mosaic created a world of distributive and regulatory conflicts the resolution of which could be only achieved at a higher level of rationalizing abstraction. Idealizing Reflective Equilibrium climbed all the way up there on the back of American post-war constitutional law. The ever eluding but permanently reassured equilibrium to be achieved was that between socio-economic expediencies and the idea of individual rights.

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[15] Michel de Montaigne, *The Complete Essays*, bk. 1, trans. M. A.. Screech (London: Penguin, 1991).

[16] See Duncan Kennedy, "Two Globalizations of Law & Legal Thought: 1850-1968," 36 *Suffolk University Law Review* 3 (2003) and Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," *in* David Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006). In this section I freely borrow ideas from both works to reconstruct what I think are Kennedy's most relevant arguments for this article.

[17] Kennedy, "The Globalizations of Law and Legal Thought: 1850-2000," 22.

The three types of legal consciousness were, Kennedy points out, essenceless, ideologically plurivalent vessels.

> The "thing" that globalized was not, in any of the three periods, the view of law of a particular political ideology. Classical Legal Thought was liberal in either a conservative or progressive way, according to how it balanced public and private in market and household. The social could be socialist or social democratic or catholic or social Christian or fascist (but not communist or classical liberal). Modern legal consciousness [my Idealizing Reflective Equilibrium] is the common property of right wing and left wing rights theorists, and right wing and left wing policy analysts.[…] Nor was it a philosophy of law in the usual sense: in each period there was positivism and natural law within the mode of thought, various theories of rights, and , as time went on, varieties of pragmatism, all comfortably within the Big Tent."[18]

Indeed, but Kennedy's story is incomplete. This article's Great Alliance thesis envelopes the Big Tent and provides a firm point from which to explain the internal processes within each type of legal consciousness and their cross-types continuity. The article also suggests causal and correlational hypotheses for the Great Alliance, further explaining what in it appeals not only to elites but to popular will everywhere.

It was language and the capacity to speak that made politics possible.[19] Because of its discriminating and normative capacities, language transcends fact into value, matter into meaning, and nature into politics. Because of language, social coordination mechanisms and institutions such as the family or the state become the contested arena of conceptions of the good life.[20] Hobbes did not dispute the centrality of language, but he deeply lamented its consequences. In the meaningdom inhabited by the Aristotelian Politikon Zoon, Thomas Hobbes saw social order constantly on the verge of chaos and violence, and life "solitary, poore, nasty, brutish, and short."[21]

With the exhaustion of the medieval regimes of intellectual discipline and social order in Western Europe and the cultural changes associated with the Renaissance, the unfolding scene was characterized by Hobbes and many of his contemporaries as a general state of fear and latent or manifest state of strife. The imprecision and malleability of

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[18] Kennedy, *op. cit.*, 22

[19] "[T]hat man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals […], the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state." "Politics," in *The Complete Works of Aristotle,* trans. B. Jowett, ed. J. Barnes (Princeton: Princeton University Press, 1984), 1988.

[20] "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life." *Complete Work of Aristotle,* 1987.

[21] Thomas Hobbes, *Leviathan, The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (Cambridge: Cambridge University Press, 1991), 89.

language was, according to Hobbes, to be blamed in large part for fear and war.[22] Except when in the service of official science or the politics of the sovereign, language was more a burden than an asset. Hobbes' proposed solution is well known: the instauration of a supreme nominalist arbiter who was to bring unison to meaningdom and, consequently, order to social life.[23] The trade-off was clear: freedom for order. Its mechanism:

Hobbes' solution to the problems of social order caused by the struggle for meaning was the therapeutic operation of an authoritarian institutional framework. The sovereign was to use its awesome powers to forge habits of mind among its subjects conducive to intellectual pacification and social stasis. Under the application of these institutional and mental apparatuses of intellectual and social order, the expansion of creative, practical and moral faculties was to be abandoned and freedom relinquished.

This solution was never feasible in the long term and, since at least the American and French revolutions, has become unacceptable even where it survives. All the same, the challenges of cognitive discipline, social cohesion, and cultural reproduction – the challenge of order, taken as a whole – are still very real. In modern times, cultural uprootedness, economic vulnerability, constant – if sometimes only epithelial – social change, and the ever-present possibility of political turmoil have made the difficulty of achieving order greater rather than smaller.[24] One lesson though remained from Hobbes' solution: the real action is in how to cover historical matter with meaning. The real action lies in the carving the worldview lenses through which the world is made sense of.

To understand how, through the good offices of the moral imaginary of the Great Alliance, thought has safeguarded selected aspects of culture, economy, society and politics from change is to understand how in the nineteenth century a powerful legal worldview was forged. The preservationist bias of this worldview is the price that the Great Alliance exacts to placate the status quo anxieties caused by the arrival of will of the masses on the stage of history. This price has been faithfully paid.

Nonetheless, we seem unprepared to accept the full price that the Great Alliance still exacts to avoid the Hobbesian trade-off of freedom for order. If anything, the idea of

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[22] "To these Uses [of speech], there are also foure correspondent Abuses. First, when men register their thoughts wrong, by the inconstancy of the signification of their words; by which they register for their conceptions, that which they never conceived; and so deceive themselves. Secondly, when they use words metaphorically; that is, in other sense than that they are ordained for; and thereby deceive others. Thirdly, when by words they declare that to be their will, which is not. Fourthly, when they use them to grieve one another: for seeing nature hath armed living creatures, some with teeth, some with horns, and some with hands, to grieve an enemy, it is but an abuse of Speech, to grieve him with the tongue, unlesse it be one whom wee are obliged to govern; and then it is not to grieve, but to correct and amend." Hobbes, *Leviathan,* 25-6.

[23] "To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law; where no Law, no Injustice. […] Justice, and Injustice are none of the faculties neither of Body, nor Mind. […] They are Qualities, that relate to men in Society, not in Solitude." Hobbes, *Leviathan,* 90.

[24] Émile Durkheim saw centripetal mechanism of cohesion (forms of collective consciousness) evolving as centrifugal mechanism of destabilization emerged (for instance, transformations on productive structures). That modern organic solidarity can be more efficient at the task of forging social cohesion than was the mechanical solidarity of previous eras does not belie the claim that the social cohesion challenge increased from the pre-modern to the modern type of society. More on social integration follows below.

freedom has become more demanding. It is now insufficient to grant freedom of conscience and expression. Freedom as autonomy demands that the content of conscience be, in matters of the greatest import, experienced as authored or at least willingly and consciously accepted by the self. Only then, the self means what it says, creates, feels and does. Autonomy is freedom qualified by authenticity. Freedom as dignity demands recognition by others and responsiveness on the part of institutions of governance.[25] To the extent that the Great Alliance in on the way of what autonomy and recognition now demand, its spell should be broken.

I. Will on the World Stage

Popular *will* came onto the world stage, and the nineteenth century masses set the world alight from Tucson and Recife to Budapest and Prague.

In 1863 Ferdinand Lassale brought to the attention of workers the Prussian statistics on income distribution, which placed over 72% of the tax-paying population under the low amount of $100 thalers. But when he then called on the workers "to constitute itself an independent political party," they were not the only ones listening.[26] When Eduard Bernstein and Rosa Luxemburg debated about which route to power – economic and democratic reform or revolution – the proletariat should take, neither the debate, nor a vision of its end result, escaped those with vested interests in the status quo. A specter was stalking and haunting the elites everywhere, threatening to melt in the air all that had seemed solid after the great European Restoration.[27]

On the institutional front, voting reforms were spreading across continental Europe. In Britain, a constitutional settlement favoring the parliament was achieved. That made the political system at once more adaptable to, and more vulnerable to, mass politics. The Whig-introduced Reform Act of 1832 extended the franchise to 1 in 7 adult males by lowering the property requirement to a lower minimum value, including rented land. Then, the Reform Act of 1867 increased the electorate by 88% by expanding the franchise to the working class (all urban male householders, regardless of property value) for the first time. In 1884, the year the Fabian Society was founded, the Representation of the People Act amended the Reform Act of 1867 to incorporate the countryside, increasing the voting population to over 5,000,000, which amounted to about 60% of the adult male population. As a percentage of the total population, the electorate increased from 1.8% in 1831 to over 12% in 1886. By 1883, apportionment designed to align distribution of seats and population had been

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[25] See on recognition and responsiveness Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: The MIT Press, 1996) and Vlad Perju, "Cosmopolitanism and Constitutional Self-Government" *International Journal of Constitutional Law (I-Con)* 8, no.3 (2010): 326-353.

[26] Ferdinand Lassale, "Open Letter to the National Labor Association of Germany;" Eduard Berstein, "The Most Pressing Problems of Social Democracy;" Rosa Luxemburg, "Reform or Revolution?" in *German Essays on Socialism in the Nineteenth Century: Theory, History, and Political organization, 1844-1914,* ed. Frank Mecklenburg and Manfred Stassen (New York: Continuum, 1990).

[27] To paraphrase the *Manifesto of the Communist Party* published in Europe in the most revolutionary year of all time: 1848. Karl Marx and Friedrich Engels, *Manifesto of the Communist Party,* ed. And trans. Terrell Carver (Cambridge, Cambridge University Press, 1996), 1-30.

adopted. All the while, the Chartist Movement (founded in and taking the name from the People's Charter of 1838), culminating in the meeting on 10 April 1848 (the 1848 Petition to Parliament) in London that attracted hundreds of thousands of people, kept within sight the specter of spontaneous revolutionary eruption.

In France, indirect elections for the national assembly had been established as early as 1789, and elections became direct in 1817. From 1831 to 1848 the single-member constituencies system was changed to allow candidates to stand for election in more than one district, and in 1848 universal male suffrage for assembly elections was adopted. From 1852 until the Franco-Prussian War of 1870 and the establishment of the Third Republic, the government defrauded and variously manipulated elections so as to elect friendly representatives. In Italy, during this period, the wars of independence were waged from 1848 to 1866, and in 1861, shortly after the 1860 *Risorgimento* (unification of the country), the Piedmont constitution of 1848 was adopted nationwide. The electoral system was characterized by male franchise based on a minimum age (25 years), literacy, and property requirement, which amounted to the extension of suffrage to about 2% of the total population. In 1882, reforms, which included reduction of the age requirement to 21 years, lowering of the property requirement, as well as granting the franchise based on educational attainments, increased the electorate from 2% to 7% of the total population.[28] In Germany, universal, direct, and secret suffrage was adopted for the North German Confederation in 1867 and for the Imperial Parliament in 1871.[29]

European society was, at the same time, in ebullition. Declining economic security caused by the motion from agrarian toward industrial production, internal migration to cities, and the immiserating effects of unregulated market economies resulted in significant mass dissatisfaction. At the same time cultural changes took place, including the expansion of the press[30] and the dispersion of socialism, liberalism, and nationalism. These economic and cultural trends came to a head-on collision with the political institutions of absolute monarchy or, in the few countries where that was not the system of government, with the democratic limits of constitutional monarchies *cum* representative parliaments.

This collision deeply shook the European social order and led to experiments with leftist democracy and nationalist movements almost everywhere on the continent. In 1848, a revolution of Italian states broke out in January; France was afire in February; and Germany followed in March. From March to July of that year, demonstrations, riots, and uprisings of both rural and urban populations spread throughout the continent in the form of strikes, occupations of land, boycotts of feudal and seigneurial duties, as well as attacks on industrialists, landowners, financiers and creditors, the aristocrats and public officials.

In France, beginning from the 1847 *Campagne des Banquets* (banquet campaigns) in favor of franchise expansion, Paris was in continual foment until 1951. Suppression of the

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[28] In Italy, in 1894, a stricter educational requirement reduced the electorate from about 9% to 6% of the population. Only in 1912 was universal male suffrage introduced.

[29] See, for the history of franchise in the US and Europe, Andrew M. Carstairs, *A Short History of Electoral Systems in Western Europe,* (Boston: George Allen and Unwin 1980), and Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

[30] On its history and signification see Habermas, *Structural Transformation.*

banquets by the army and police ended in street uprisings and led to the fleeing of Louis-Philippe and the proclamation of the Second Republic. A commission (the Luxembourg Commission) was created to investigate and reform the living and working conditions of the lower classes. National Workshops offering jobs to the unemployed and workers' political associations followed. Disagreement over the timing of the election for a constituent assembly turned violent. When the results of the election produced a monarchist majority, the populace attempted to invade and overthrow the constituent assembly. The National Guard intervened to secure the assembly and arrested political and workers' leaders. With the government taking a conservative turn, the Luxembourg Commission was dissolved and the National Workshops closed. This only spurred greater inter-class hostility. Three days of conflict in the barricaded streets left whole neighborhoods of Paris covered in blood and debris. With the victory of the government's forces, leftist ministers were forced into resignation and oppositional political clubs and trade associations were closed. The constituent assembly concluded its work and called for a presidential election the following month, in which Louis-Napoleon was selected. In the meantime, the left was reorganizing around the contested issue of the invasion of the Italian Republic by French troops, which ended with French victory and the order to restore Papal authority. Left representatives in the National Assembly called for the impeachment of Louis-Napoleon. Street demonstrations in Paris and barricades on the streets of Lyon were subdued by government forces. Despite the apparent victory of the conservative forces, radical secret societies were growing everywhere in France, including the rural areas and small towns. On December 2, 1851, after seeing his aspirations to re-election quashed by monarchists in the National Assembly, Louis-Napoleon propelled the country into almost two decades of authoritarian rule with himself as the emperor. His rule ended only with his capture in 1870 during the Franco-Prussian War.

The revolutionary fire burned in Italy, too. In January of 1848, an insurrection began in Palermo, and then spread to the rest of Italy. The king of the Two Sicilies was coerced into granting his subjects a constitution. The governments of Piedmont-Savoy and Tuscany were also forced to grant constitutions. Uprisings in Venice and Milan (capital of Lombardy), both Habsburg territories at the time, installed in power provisional revolutionary governments. Upon the defeat of the intervening Austrian army, Carlo Alberto of Piedmont-Savoy declared war on Austria and sent his forces into Lombardy and Venetia. Pope Pius IX was moved to grant a constitution for the Papal States. Disputes between the Two Sicilies and Naples turned into armed conflict. A period of constantly changing alliances and armed conflicts among the different Italian provinces, the Pope and Austria ensued. In November, the constitutional-monarchist minister of the Papal States was assassinated and his government overthrown by a movement led by democratic clubs, after which the Pope fled to safety in the Kingdom of the Two Sicilies. Shortly thereafter, democrats in Florence called for a constituent assembly for the nation. Revolution, republican governments, and war spread across the peninsula. Louis-Napoleon's France intervened, sending forces to battle those of the Roman Republic. In August of 1849, the French occupied the Roman Republic and restored Papal authority. Venice, besieged by Austrian troops, surrendered.

As early as 1847, leftists and constitutional monarchists were pressing for national unification and a broad agenda of reforms in Germany. In March of the following year, fights erupted on the streets of Berlin, leading to the victory of the insurgents and the retreat of the army from the city. In consequence, the King of Prussia was forced to agree to a

constitution and announce support for national unification. Everywhere coerced, rulers appointed liberal and leftist ministers throughout the German states. In Frankfurt, elections for a German National Assembly were called. Simultaneously, armed conflict between Danish and Polish neighboring populations and the government escalated. By mid-year, German democratic and constitutional-monarchist clubs were busy at work. In Frankfurt, artisans and masters called their separate corporative congresses. Pressed by Russia and England, Prussia signed the Malmo armistice with Denmark and, without consulting the provisional central government, withdrew its military support from German nationalists in Schleswig-Holstein, the northernmost of the German states with a considerable ethnic German population, but then part of Denmark. After the National Assembly reversed its condemnation of the Malmo armistice, insurgents tried to overthrow it by force, but were defeated after a barricaded battle against Prussian forces. Republican forces rebelling in Baden were also defeated. Prussia's monarch appointed a conservative prime minister who staged a military occupation of Berlin and declared a state of siege in the capital. In response, the state's Constitutional Assembly called for a tax boycott. Although Berlin was quiet, revolt spread in the greater state. In Bavaria, the left obtained the majority in elections. In December, the Prussian government dissolved the Constitutional Assembly and decreed an authoritarian constitution. 1849 began with the National Assembly in Frankfurt issuing a Declaration of Basic Rights. Elections in Prussia were polarized between conservative and democratic forces. Liberals and socialists won elections in Saxony. Also in that spring the National Assembly in Frankfurt concluded the project of a national monarchic constitution for a unified Germany, which was approved by twenty eight states, and offered the crown to Fredrich Wihelm IV of Prussia. Wilhem IV rejected the constitution and threatened its supporters with military force. Democrats organized demonstrations in support of the national constitution, some of which led to street fighting. Revolutionary governments were instituted in Saxony, the Palatinate, and Baden. Prussian forces defeated revolutionaries in the Palatinate, and the National Assembly in Frankfurt fled to Stuttgart, only to be dissolved by the ruler of Wurttemberg. By that summer, Prussian forces had subdued revolutionary insurgents everywhere. By the end of 1850, the German Confederation was restored under Austria, which had itself witnessed street fighting beginning in Vienna in 1848 and culminating with Metternich fleeing. At about the same time, the revolutionary flames were spreading further east.[31]

The European revolutions and uprisings reached their climax in the years of 1848-1851, bringing millions onto the political stage: popular will broke out of the cage. Following the years of the European Restoration from 1814 onward, elites across Europe thought that they could still take the institutional path to concentrate and preserve their power. The revolutions of 1848 awoke those elites from their dreams of a partial modernity that would combine the social structure of the old political order with the profits of the new economic one. Even more so than the French revolution, the revolutions of the nineteenth century, and the transnational masses responsible for them, left indelible scars on the European consciousness.

Many European forty-eighters, as the immigrants who had been involved in the 1848 revolutions throughout Europe became known, migrated to the United States. Here,

[31] Helpful summary and lucid analysis of 1848-1851 in Europe can be found in Jonathan Sperber, *The European Revolutions, 1848-1851* (New York: Cambridge University Press, 1994).

industrialization and urbanization in the North, which created a modern working class, along with the powerful ideals of equality and democracy, furnished combustible material for the national drama that would unfold in war.[32] Many immigrants fought in the civil war, but their intellectual and political impact was greater. On the institutional front, war, emancipation, settlers' mobility, the consolidation of the two-party system, and grassroots mobilization of the disenfranchised all contributed to a convoluted electoral history in which many battles of the civil war period were re-fought. The Fourteenth and Fifteenth Amendments formally expanded the franchise to African Americans, but in the South and parts of the North they remained disenfranchised, as were immigrants, women, and many among the working classes. In fact, from 1850 to World War I, enfranchisement was *de facto* if not *de jure* restricted, by the eager support of the racist and economically insecure middle and upper economic classes. This was the case in spite of, or perhaps partially because of, the fact that the period before that, starting from about 1790, had brought a considerable expansion of suffrage with the abolishment of property, income (tax), and, occasionally, citizenship requirements. The literature speaks even of an "upsurge of democracy" by mid nineteenth-century America.

During the American Civil War of 1861-1865, 2% of the population of the United States at that time was killed, bringing about a profound change in the economy, demography, and the spirit of the nation.[33] In the Battle of Gettysburg alone, in early July 1863, over fifty thousand casualties colored Pennsylvania grounds red. The United States emerged from the Civil War into Reconstruction with a stronger federal government. It is also of no small consequence that the most prestigious American jurist of all time, Oliver Wendell Holmes Jr., almost died in the conflict and never throughout his life lost sight of its devastation.

Either by taking an institutionalized path marked by democratic reforms (including constitutional reform, complete with removal of voting requirements such as property, education, race, gender, and income), or a non-institutionalized path via civil wars, uprisings, strikes, and revolutions, the nineteenth-century masses arrived on the world stage. Their will would, one way or another, change the face of the old order: the wild horse of politics was unleashed. The march of equality and democracy proved to be just as unstoppable as de Tocqueville predicted.[34]

The reaction by entrenched-interest holders to the events of 1848 was heavy-handed and, in the short-term, successful. By the summer of 1849, open revolutionary conflict had already ended. Revolutionaries and their sympathizers were persecuted all across Europe. But historical time, as even then the conservatives knew all too well, is measured differently. To fetter the wild surges of mass politics once and for all would require a feat of thought: nothing less than the creation of a form of consciousness capable of limiting

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[32] See Keyssar, *Right to Vote.*

[33] See Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York,: Alfred A. Knoff, 2008).

[34] Alexis de Tocqueville, *Democracy in America,* translation and introduction by H. C. Mansfield and D. Winthrop (Chicago: The University of Chicago Press, 2000).

reform while speaking in the language of the revolutionary reformers. The *Great Alliance* of legal historicism and rationalism was the answer.

Benedetto Croce, the idealist liberal, regretted that the liberal and democratic fervor of the mid-nineteenth century and the corresponding acknowledgment that ethical ideals were the engines of society did not lead, in the latter part of the century, to a renewed philosophy. Instead of philosophical hope and political enthusiasm, a period of mysticism, empiricism, naturalism, positivism, irrationalism, and pragmatism ensued. Indeed, where one would expect greatness of ambition and imagination, thought was politically disciplined. The prosaic and narrow kinds of thought that developed in the decades following the uprising of popular will were not directly generated by the events of the revolutionary period, Croce submitted. Instead, "narrowness and prosaicness were the attributes of the intellect that considered [the uprisings of the age and their inspiring ideals] in its development, of the imagination that set it in a bad light, and of the spirit that instead of embracing it and lending it warmth left it on the outside or despised it." This predicament amounted, he thought, to a "mirage of false ideals" to be sooner or later overcome.[35] He was wrong. Croce and many like him greatly underestimated the pull and resilience of the type of thought the nineteenth century alliance of historicism and rationalism was in the process of weaving.

Such was also the case in law. In nineteenth century legal thought, reason and history were united in challenging the is/ought separation thesis. Both rationalism and historicism sought to derive a prescriptive view of law and of legal obligation from history. Both assigned tasks to reason, demanding that it capture the conceptual essence of law and seek its gradual implementation in reality,[36] or give reason-as-legal-science the responsibility for excavating legal history so as to uncover and conceptually elaborate its living elements, as determined by their organic connections with the spirit of a given people. It is true that rationalists and historicists meeting mid-way had important points of disagreement, especially relating to the ultimate test for the value of state-enacted and state-backed law. For those coming from the rationalist camp, such as Hegel, it was the extent and fidelity with which state-law mirrored the concept of law in all its departments, starting with the will theory, which secured legitimacy to law. For those approaching the mid-line from the historicist camp, such as Savigny, the extent to which posited and customary law mirrored, free from all elements of voluntarism, the legal dimension of the spirit of the people was the ultimate test of legitimacy for law. Those differences pale, however, when contrasted with the terms of the compromise achieved between reason and history.

Importantly, the Great Alliance split the difference between law's legitimacy (the legitimacy of legal systems to coerce compliance) and legal obligation (the political morality foundations of the obligation to obey the law. Analytically and sociologically separable, the Great Alliance offers an attractive model for the unification of legitimacy and obligation.

By the end of the century, Holmes in America, Jhering in Germany, and Dicey in England had cemented the fusion of reason and history. All three connected law to the

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[35] Benedetto Croce. *History of Europe in the Nineteenth Century,* trans. Henry Furst (New York: Harcourt, Brace and Company, 1933), 323.

[36] In Hegelian jargon, idea = concept + its actualizing determination.

character of the people, the exigencies of the time, and to reason. Material interests and ideals, existing constitutional essentials, and the expediency of legal policies and institutions as means to foster industrialism and other social ends were the relevant elements of law. This has not changed. Indeed, jurists are a class peculiarly sensitive to social change.[37] In the Western centers of production (principally France, Germany, Italy, and the United Kingdom) and reception (principally Argentina, Brazil, Colombia, Mexico, and the United States) of legal thought, jurists reacted to the threat of the will of the masses the way they knew best: with legal doctrines. As democratic franchise was being expanded, the legislative process was becoming increasingly prolific, and war and revolution were spreading, the intellectual energies of legal and social philosophy turned to the conceptual re-colonization of politics, inventing vistas from which a new discourse of authority would tame and once again ride the wild horse of politics.[38] In the eighteenth century, conquering law by reason or by history was thought possible by proponents of each side. Nineteenth century jurists knew better. Only the combined insights of historicism and rationalism could forge the kind of legal consciousness capable of reining in and binging into its fold modern popular *will*. History has thus far proved them right.

III. THE STRUCTURE OF THE GREAT ALLIANCE

"And now this is 'an inheritance' –
Upright, rudimentary, unshiftable planked
In the long ago, yet willable forward
Again and again and again."
(Seamus Heaney)

This section presents the central elements of the Great Alliance, focusing on the exemplary and very influential way in which G. W. F. Hegel and F. K. von Savigny combined rationalism and historicism. In their works, the reciprocal movement of rationalism and historicism towards the center of the continuum that used to separate them in the eighteenth century appears in its fundamental elements. The influence of both authors went far beyond Germany to reach the whole of Europe and the Americas in the late nineteenth and early twentieth centuries.[39]

[37] Jurists tend to deradicalize all they touch. For an example in contemporary America, see Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," *Minnesota Law Review* 62 (1978): 265. The same tendency can be detected in all areas of social welfare and workers protection, from the New Deal to the Americans with Disabilities Act.

[38] I believe the argument of the article would equally hold as causal, correlational (elective affinity) or functionalist claims. Throughout, I make all three types of argument as seem most persuasive in the pertinent historical context.

[39] Autochthonous jurisprudence is a twentieth-century phenomenon in the United States. Up to the time of Llewellyn, for instance, American scholars were open to and largely dependent upon British, German and, to a lesser extent, French jurisprudence.

Eighteenth century elites – the century of the American and French revolutions – were shaken awake by revolutionary movements that took by assault the legal and political orders of the Ancien Régime and the reach of the British Empire. Overnight, the daily experientially corroborated perception of social order was rendered obsolete. However, social chaos was practically, cognitively, and emotionally unendurable. To counter it, those sympathetic to the new, port-revolutionary legal and political tendencies prescribed reason as an antidote for chaos; their opponents, craving restoration, recommended a return to tradition (as *nomos*). The will of the masses was not yielding much to either.

After the first quarter of the nineteenth century, democratic franchise was expanding in the West while the legislative process became increasingly more meticulous, prolific, and pervasive. Simultaneously, deep social, cultural, political, and economic transformations were hard at work breeding dissatisfaction, causing insecurity, and triggering war. It was not accidental that, during the same period in which the will of the transnational European and American masses came onto the stage of history, the most reputable and influential currents of thought were invested in finding the formula to tame a society in flux through the articulation of clusters of authoritative discourse, the effect of which was to over-legitimize and shield from challenge select constitutional essentials. Only when holding this backdrop in view can one properly understand and appreciate the breadth, depth, and reach of the Great Alliance. The mission assigned to (or function assumed by or the elective affinities of) legal thought in this context was to subdue popular will by a jurisprudence serving a preservationist ethos, while paying due homage to reason and incrementalist reforms – here lies the birth of the Great Alliance between historicism and rationalism and will.

This new strategy of relying on the Great Alliance to concede some political power to the masses through the mechanisms of democracy while retaining cultural authority proved to be more effective, subtle, palatable, and adaptable than overt efforts at conservative restoration or top-down rationalist social engineering. What is more, under the practical drive to re-conquer will by thought, formalist elements present in the rationalism and historicism of the eighteenth century were pragmatically co-opted, theoretically integrated, and finally intensified by nineteenth century ratio-historicism.

Certainly, any minimally sophisticated legal heuristic combines reason and history. From as early as Roman private law and Greek constitutionalism, it has been the province of law to act in the present as a broker between the past and future of social orders. This has to do not only with the culture of jurists, but also, at an even deeper level, with the functional need for impersonal mechanisms of social cohesion and cultural reproduction over time.

More generally, the impulse to weave together reason and history lies at the core of the human condition and at the foundation of thought. For example, the historicism in Hegel's rationalism can be traced all the way back to Plato. In the *Symposium*, in reaching the last stage of his quest for philosophical knowledge of the idea of beauty, the thinker "may be constrained to contemplate the beautiful as appearing in our observances and our laws, and

to behold it all bound together in kinship."[40] The philosophical *gravitas* and complexity of the Hegelian approach does justice to Plato, placing the historicization of rationalism into an evolutionary framework. In fact, what appeared as rationally putative and static in Plato, is presented as dynamic and necessary according to historical laws in Hegel. But the point is still the same: history and reason attract more than they repel each other.

The attraction between reason and history in law and philosophy differ only in relation to the specific institutional dimensions it gains in law. In the pragmatic, cognitive, and normative conventions forged by the Great Alliance, conservative and utopian elements of eighteenth-century historicism and rationalism converged to create powerful theoretical and institutional structures.[41] In Hegel's legal philosophy, rationalism came to see historical stages and institutional arrangements as the manifestation of reason's operational bite in the world. In Savigny's legal science, historicism came to appeal to the rationalizations of legal science in order to endow historical data with both conceptual stability and intellectual authority. The practical and theoretical implications of the approximation exemplified in the works of Hegel and Savigny cannot be overestimated.

As some of the main protagonists of the Great Alliance, Hegel and Savigny challenged the notion, as prestigious in their time as it still is now, of the absolute epistemological separation between is and ought. In their works, they derived both descriptive and normative conclusions from social *status quo* and historical data. They did so in the way each assigned tasks to reason: Hegel charged reason with extracting from the actual law and legal institutions of the time the idea and concept of law (in Hegelian vocabulary, the idea results from the concretization of a concept in its empirical determination); Savigny charged reason as legal science responsible for discovering, revealing, and systematizing the legal dimension of a living *Volksgeist*.

As mentioned above, an important difference between the two can be found in the final test of the value of legal systems and existing constitutional structures. For Hegel, the final test was the extent and fidelity with which historically given law and institutions reflect the concept of law stipulated by reason. For Savigny, on the other hand, the definitive proof of the value of existing legal and political institutions comprised the extent and fidelity with which these would reflect, once purified of a-historical (primarily legislative) voluntarism, legal and political principles rooted in the spirit of their hosting people.

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[40] Plato, *Symposium*, translated W. R. M. Lamb (Cambridge, Harvard University Press, 2001), 203.

[41] Works that proved helpful in understanding nineteenth-century legal thought include, among others cited elsewhere on these pages, the following: Morton J. Horwitz, *The Transformation of American Law: 1780-1860,* (Cambridge: Harvard University Press, 1977); Morton J. Horwitz, *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) Olivier Jouanjan, *Une Histoire de la Pensee Juridique en Allemagne (1800-1918)* (Paris, Presses Universitaires de France, 2005); Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Traditions* (Cambridge, MA: Harvard University Press, 1990); Karl Larenz, *Methodenlehre der Rechtswissenschaf.* (Berlin, Springer, 1991); Gustav Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin,* trans. Kurt Wilk (Cambridge: Harvard University Press, 1950) (Especially helpful to interpret the significance of Ihering); Catharine Wells, "Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holes, Jr.," *Northwestern University Law Review* (1987-1988); Grant Gilmore, *The Ages of America Law* (Hew Haven: Yale University Press, 1977); Franz Wieacker, *A History of Private Law in Europe,* trans. by Tony Weir (Oxford: Oxford University Press, 2003).

In the Germany of their time, Hegel and Savigny were regarded as titans of high culture and depositories of authority and prestige. As is well known, they viewed themselves as irreconcilable intellectual rivals.[42] It is a legitimate question that of whether it makes sense to present them as allies in what is arguably the most consequential change in modern legal thought. By way of response, consider how, when viewed from the vantage point of the early twenty-first century, the opposition between them pales in comparison to the hegemony of the worldview they helped create.

Hegel's reaction to utopian rationalism was complex, and included criticism of what he considered its "one-sidedness", especially in the strain coming out of German idealism.[43] An important provocation came from Kant. Postulating the final alliance between nature and reason in the eighth and ninth propositions for the formulation of an all-encompassing universal history of nature and humanity, Kant suggested that "the history of the human race as a whole can be regarded as the realization of a hidden plan of nature to bring about an internally […] perfect political constitution as the only possible state within which all natural capacities of mankind can be delivered completely." He intimated further that "a philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind, must be regarded as possible and even as capable of furthering the purpose of nature itself."[44] And as to the future author of such a history, Kant expected that nature, just as she produced a Kepler and a Newton, would create "someone capable of writing it along the lines suggested."[45] Hegel volunteered. His thought is preoccupied with the odyssey of the human spirit towards the highest point of reflective historical self-consciousness. His jurisprudence claims to demonstrate how, within this larger philosophical horizon, rationalism and historicism converge, at the point of fusion, to authorize the postulate that the empirical particulars of law and the state in every case must necessarily reflect the universal element of the concepts of law and of state as a "fact of reason".

To be sure, Hegel distinguished conceptual from historical explanation. For Hegel, the understanding (*Verstehen*) that historical sciences promise is insufficient and nearly always deceptive. For the jurist, true discourse about mundane events must necessarily emerge on the conceptual plane in order to cast nets over the world that would capture, in the form of ideas, the empirical and singular cases of the manifestation of corresponding universal rational constructs.[46] Hegel's rationalism thus ratifies the archetypal rationalist thesis of the

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[42]For a comparative study of their legal thought, see Luc Ferry, "Droit, Coutume et Histoire: Remarques sur Hegel et Savigny," In *La Coutume et la Loi: Etudes d'un Conflit,* Ed. Claude Journes (Lyon: Presses Universitaires de Lyon, 1986).

[43]For a learned history of the German idealism before Hegel (that of Kant, Fichte, Schelling, and the young romantics) see Frederick C. Beiser, *German Idealism: The Struggle Against Subjectivism 1781-1801* (Cambridge: Harvard University Press, 2002).

[44]"Idea for a Universal History," in *Kant: Political Writings,* 50-51.

[45]"Idea for a Universal History," in *Kant: Political Writings,* 42.

[46] "[U]nless […] development from historical grounds is confused with development from the concept, and the significance of historical explanation and justification is extended to include a justification which is valid in and for itself. [A] determination of right may be shown to be entirely grounded in and consistent with the prevailing circumstances and existing legal institutions, yet it may be contrary to right and irrational in and for itself [..]. But even if determinations of right are rightful and rational, it is one thing to demonstrate that this is so – and this cannot truly be done except by means of the concept – and another to depict their historical emergence

will under the orientation of reason, but here "the will is a particular way of thinking – thinking translating itself into existence, thinking as the drive to give itself existence."[47] While maintaining a long-term macro-strategic alliance with nature, the will is the citadel of free thought and expresses itself first as concept.[48] The concept is the product of the rational will and the form of expression of things-in-themselves. In the same way, the will necessarily contains within itself the concept of the thing-in-itself that it represents as object of volition in its mundane manifestations.

In these terms, the Hegelian "I" is initially pure intellectual volition, volition of thought or the idealization of volition. Only in the second moment the "I" comes out expediently, leaving upon the world its impressions according to historically given constraints and possibilities. Viewed collectively and diachronically, these impressions constitute the legacy of thinking volition. This legacy is nothing other than history, which thus ultimately springs from reason. So understood, history carries a conceptual core corresponding to the will that engendered and enacted concepts as historical stuff. He writes:

> To generalize something means to think it. 'I' is thought and likewise the universal. When I say 'I', I leave out of account every particularity such as my character, temperament, knowledge, and age. 'I' is totally empty; it is merely a point – simple, yet active in its simplicity. The colorful canvas of the world is before me; I stand opposed to it and in this [theoretical] attitude I overcome its opposition and make its content my own. 'I' is at home in the world when it knows it, and even more so when it has comprehended it. So much for the theoretical attitude. The practical attitude, on the other hand, begins with thought, with the 'I' itself, and seems at first to be opposed [to the world] because it immediately sets up a separation. In so far as I am practical or active, i. e. in so far as I act, I determine myself, and to determine myself means precisely to posit a difference. But these differences which I posited

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and the circumstances, eventualities, needs, and incidents which led to their introduction. This kind of demonstration and (pragmatic) cognition in terms of proximate or remote historical causes is often called 'explanation, or even more commonly 'comprehension', in the belief that this kind of historical demonstration is all – or rather, the one essential thing – that needs to be done in order to comprehend the law or a legal institution, whereas in fact the truly essential issue, the concept of the thing, has not even been mentioned. […] By disregarding the difference in question, it becomes possible to shift the point of view and to turn the request for a true justification into a justification by circumstances, a logical deduction from premises which may in themselves be as valueless as the conclusions derived from them, etc.; in short, the relative is put in place of the absolute, and the external appearance in place of the nature of the thing itself. When a historical justification confuses an origin in external factors with an origin in the concept, it unconsciously achieves the opposite of what it intends. If it can be shown that the origin of an institution was entirely expedient and necessary under the specific circumstances of the time, the requirements of the historical viewpoint are fulfilled. But if this is supposed to amount to a general justification of the right itself, the result is precisely the opposite; for since the original circumstances are no longer present, the institution has thereby lost its meaning and its right [to exist]." G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 2000), 29-30.

[47] Hegel, *Philosophy of Right,* 35.

[48] As a rationalist on the way to ratio-historicism, Hegel still subscribed to the authority of the rationalist absolute good described in the previous chapter. "The basis of the right is the realm of spirit in general and its precise location and point of departure is the will; the will is free, so that freedom constitutes its substance and destiny and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature." Hegel, *Philosophy of Right,* 35.

> are nevertheless also mine, the determinations apply to me, and the ends to which I am impelled belong to me. Now even if I let go of these determinations and differences, i. e. if I posit them in the so-called external world, they still remain mine: they are what I have done or made, and they bear the imprint of my mind. […] The theoretical is essentially contained within the practical; the idea that the two are separate must be rejected, for one cannot have a will without intelligence. On the contrary, the will contains the theoretical within itself. […] It is equally impossible to adopt a theoretical attitude or to think without a will, for in thinking we are necessarily active. The content of what is thought certainly takes on the form of being; but this being is something mediated, something posited by our activity. These distinct attitudes are therefore inseparable: they are one and the same thing, and both moments can be found in every activity, of thinking and willing alike.[49]

As nomothetic aspects of tradition as *nomos*, legal customs were, according to this view, worldly remnants of past volition; in some way, they too express the concepts of state, right, morality, and so on formulated by reason. There is, however, one important difference in degree of consciousness, volitional determination, and universality between, say, legal customs and positive laws. Because customs assume their content in a way less voluntary and conscious, their ontology is more precarious and their authority less determined and commanding. Positive laws, because proactive, require greater awareness and volitional determination. In the case of law, this not only implies a more precise connection with the concept of law, but also affords greater prospects for universalism.[50]

Another crucial point about the rationalist approach to historicism is the permanently open possibility of re-inoculating historical facticity with an ever purer version of the embryonic rational concept in a potential endless process of dynamic (reflective)

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[49] Hegel, *Philosophy of Right,* 35-6.

[50] "To posit something as universal – i.e. to bring it to the consciousness as a universal – is, as everyone knows, to think […]; when the content is reduced in this way to its simplest form, it is given in final determinacy. Only when it becomes law does what is right take on both the form of its universality and its true determinacy. Thus, the process of legislation should not be represented merely by that one of its moments whereby something is declared to be a rule of behaviour valid for everyone; more important than this is the inner and essential moment, namely cognition of the content in its determinate universality. Since only animals have their law as instinct, whereas only human beings have their as custom, customary rights contain the moment of being thoughts and of being known. The difference between these and laws consists simply in the fact that the former are known in a subjective and contingent manner, so that they are less determinate for themselves and the universality of thought is more obscure; and in addition, cognizance of this or that aspect of right, or of right in general, is the contingent property if only a few people. The view that such rights, since they take the form of customs, are privileged in having become part of life is an illusion, for the valid laws of the nation do not cease to be its customs merely because they have been written down and collected. […] When customary rights are eventually collected and put together […] this collection is a legal code; and since it is merely a collection, it will be characterized by formlessness, indeterminacy, and incompleteness. The main difference between this and a legal code in the proper sense is that in the latter, the principles of right in their universality, and hence in their determinacy, are apprehended and expressed in terms of thought. […]To deny a civilized nation, or the legal profession within it, the ability to draw up a legal code would be among the greatest insults one could offer to either; for this does not require that a system of laws with a new content should be created, but only that the present content of the laws should be recognized in its determinate universality – i. e. grasped by means of thought – and subsequently applied to particular cases." Hegel, *Philosophy of Right,* 241-3.

equilibrium between reason and history. Once inoculated with a better determined and more reflective version of the concept, historical processes deflect their course from the particular, precarious, and imperfect in the direction of the universal, stable, and true:

> One of the main sources of the complexity of legislation is that the rational, i. e. that which is rightful in and for itself, may gradually infiltrate primitive institutions which contain an unjust element and are therefore of merely historical significance. […] But it is essential to realize that the very nature of the finite material entails an infinite progression when determinations which are universal in themselves and rational in and for themselves are applied to it.[51]

The Hegelian philosophy of law and state operates with three normative orders in which functional complementarity and jurisdictional superimpositions create different spheres of the social order. The three normative orders of the modern constitutional "State" (with a capital "S") are those of law, morality, and ethical life (*Sittlichkeit*). The sphere of civil society – the pragmatic interests of social agents – is formed by the union of law with morality and must operate under their shared jurisdiction. Along with other sub-spheres of lesser relevance, the family and civil society form the contexts of ethical expression by way of the emotions. If family is considered to be connected to civil society and the constitutional and administrative structures of the modern state, the all-encompassing resulting sphere is that of the State as thick ethical life.

Every normative order is supposed to incorporate in its nucleus a corresponding universal content in the form of a concept revealed by reason. Because of that, every sphere of society regulated by the respective normative order necessarily carries inside it – though in different degrees – its rational formulation in concept. Social spheres and their normative orders are, as explained, always susceptible to inoculation by the virus of rationality, a fact which occurs systematically in modernity. Hence, one concludes that the modern human condition is such that "what is rational is actual; and what is actual is rational."[52] Coming from the rationalist end of the historicism-rationalism spectrum, Hegelian thought detected in the very heart of historical reality an element of rational legitimization, for reality is apprehended as an idea, as the actualization of a concept stipulated by reason, whose concreteness became necessitated, whatever the level of consciousness of social agents.

Through this movement in the direction of the center of the reason-history continuum, Hegel's views abandon in important ways the Socratic conception of thought as the means to hatch out of the hardened shell of one's own institutional and cultural contexts.[53] In eighteenth century utopian rationalism one could still encounter this Socratic conception of philosophy. In it, the tools of thought were still committed to slicing up and excavating the social world in search of arcane causal connections and esoteric historical or subjective processes.

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[51] Hegel, *Philosophy of Right,* 247-248.

[52] Hegel, *Philosophy of Right,*[Page no.]

[53]See Roberto Unger, *False Necessity,* vol. 1 of *Politics* (London: Verso, 2004) for contemporary reimagination of this Socratic spirit. On Socratic citizenship see Dana Villa, *Socratic Citizenship* (Princeton: Princeton University Press, 2001).

With Hegel, the Socratic conception of philosophy as cultural criticism is considerably abated. In his *Philosophy of Right*, Hegel is much more interested in the Herculean effort of trying to extract evidence of stability from contingency, to see an instance of the universal in the particular, to interpret the historical as a moment of the rational, and to see the perfection of the conceptual in the imperfection of the material.

Consider now the same movement toward the midline, but now coming from the opposite direction. Similar to D. Hume, Savigny envisioned law and customary institutions as spontaneous phenomena, at least at their best. For him, the customary law of the Romano-Germanic world was an impersonal, anonymous, and involuntary product of an organic cultural process. Product of the primitive operation of strategic reason and traditional beliefs in the world, customary law was much more a mosaic than a system of social ordering. And the normative force of the customary order was derived from the vital energy of a people manifested throughout its history. In contrast to Hegel's call for a progressive rationalization of experience via conceptually informed volition (or for that matter to contractualist natural law before them), Savigny refused to concede to law-making voluntarism any inch of the legitimacy of legal and political orders. But there was a twist in his argument. Now contrary to Hume, Savigny adjudicated to reason all the authority of science to discover, purify, clarify, organize, and disseminate the normative elements organically and spontaneously present in historical fact.

If one considers the most influential of Savigny's writings, his *Of the Vocation of Our Time for Legislation and Legal Science*, five preeminent themes stand out: (i) the rejection of a conceptualist, deductive, and *a priori* approach to the contents of law and the character of legal orders; (ii) the analogy of law to a (natural) national language when considering its place among the intrinsic elements of the living spirit of a people, as opposed to a universal set of (artificial) principles; (iii) the destructive and meaningless artificiality of codifications, which lack the most important element of the normativity of law: its connection to the *Volksgeist*; (iv) seduced by codifications, jurists betray their responsibilities as authorized intermediaries between the legal elements of the *Volksgeist* and the people itself, responsibilities which stem from their being differentially epistemologically equipped (in asymmetry of rationality comparable to the one expressed by eighteenth century's utopian rationalism); finally, (v) the defense of a principle of institutional evolution based on legal science's constant discovery and articulation of the organic principle of the spirit of the people through the separation of what is still alive in it from that which retains only an antiquarian interest and can not rightfully belong to the people's tradition as *nomos*.[54] These themes, which anticipate how ratio-historicism wends its way from historicism to rationalism, come together in what Savigny called the political aspect of law. The technical element of law if found in the rejection of *a priori* critical and imaginative reason in favor of legal scientific reason as handmaid of spontaneously generated and organically bound-up historical contents. Attention to some of the details of this path is warranted.

[54] Friedrich Karl von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence,* trans. Abraham Hayward (Birmingham, Ala.: The Legal Classics Library, 1986). On the core elements of *Of the Vocation* see Ferry, "Droit, Coutume et Histoire," 83-94.

In line with the sensibilities of the Romantic movement – which included precursors such as Novalis, Schlegel, and Schleiermacher – Savigny reacted against the Enlightenment creeds of universalist reason and of the march of progress. He connected the codifying movement of his time to the rationalizing and cosmopolitan impetus and to the faith in progress of the rationalists of the previous century and its corresponding malaise:

> In the first place, it is connected with many plans and experiments of the kind since the middle of the eighteenth-century. During this period the whole of Europe was actuated by a blind rage for improvement. All sense and feeling of the greatness by which other times were characterized, as also of the natural development of communities and institutions, all, consequently, that is wholesome and profitable in history, was lost; it's place was supplied by the most extravagant anticipations of the present age, which was believed to be destined to nothing less than to being a picture of absolute perfection. This impulse manifested itself in all directions; what it has effected in religion and government, is known; and it is also evident how everywhere, by a natural reaction, it could not fail to pave the way for a new and more lively love for what is permanent. The law was likewise affected by it. Men longed for new codes, which, by their completeness, should ensure a mechanically precise administration of justice; insomuch that the judge, freed from the exercise of private opinion, should be confined to the mere literal application: at the same time, they were to be divested of all historical associations, and, in pure abstraction, be equally adapted to all nations and all times.[55]

Savigny reacted equally against both the view of law as a product of officialdom and the view of law as a product of ahistorical reason or the cosmic order of nature. For him, legal positivism and rational natural law were ultimately reconcilable, and false. Against both and their apogee in the Code Napoleon of 1804, Savigny reaffirmed the historicist theses of the anonymity and spontaneity of the origin of social order.[56] Hence, to implode the legal consensus and the patterns of legitimation of centralized social engineering exemplified by the Code Napoleon became an important mission of the Great Alliance. With one hand it gave and with the other it took away.

In Savigny's ratio-historicism, the objective of legal science ceases to be the conceptual elaboration and systematization of legislative emanations which, for him, should be reserved only to the solution of conflicts between customs or to the classification of legal customs of the Nation-State in the same way, for example, property is classified. Strategically, in the greater scheme of the Great Alliance, the proper object of reason in the

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[55]Savigny, *Vocation of our Age,* 20-1.

[56] "In the second place, those plans are connected with a general theory of the origin of all positive law, which was always prevalent with the great majority of German jurists. According to this theory, all law, in its concrete form, is founded upon the express enactments of the supreme power. Jurisprudence has only the contents of the enactments for its object. […] This theory is of much greater antiquity than the theory above-mentioned; both have come into hostile collision on many points, but have far oftener agreed very well. The conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances, which we have only to discover to bring positive law to permanent perfection, often served to reconcile them." Savigny, *Vocation of our Age,* 22-3.

form of legal science would be the normative customs that, organically emanating from the *Volksgeit*, contain in their tangle material ripe for *ex post* rationalization. In the hands of legal science, the imperfections, uncertainties, and conflicts of the real (historical) world were to be sublimated in thought. Thus, in his *System of Modern Roman Law*, Savigny insists not only upon the rational systematizing role of jurisprudence, but also upon its role as instrument of the scientific sublimation of the contingency of history and opinion.[57]

However, Savigny's refusal to accept legislation as the paramount object of legal science did not mean that its object should be only the nomothetical aspects of the spirit of the people. There was nonetheless an unmistakable preference on the part of legal science for this object. To justify this preference of legal science for historical contents, Savigny, faithful to the teachings of the Historical School, turned to a naturalization of law, the political constitution, and the idiosyncrasies of each people's language:

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.[58]

This naturalization, insofar as it inserted the law, the political constitution, and the language of a people into the all-encompassing natural way of things, allowed reentry through this side window of the universalism expelled through the front door along with the demiurgic pretensions of reason. Savigny's is a form of cultural naturalization in the sense that the branches of law, political institutions, and the maternal tongue are connected to the trunk of the *Volksgeist* according to a linkage experienced by members of the relevant people as compulsive as natural laws are in general. Thus, against the *a priori* rationalism of eighteenth century utopian rationalism, Savigny offered the inescapable historicity of each singular form of collective life; and against the more or less arbitrary cumulative sedimentation of historical fact dear to eighteenth century instrumental historicism, he submitted the internal necessity of its development and the inescapable finishing work of science. In the narrow gap left between these two positions, he advocated for reason a fiduciary, as opposed to a creative role, toward bestowed historical contents.

To comprehend historicism's concessions to rationalism it is helpful to further interrogate the dynamic nature of the institutional material of each people. In their essence, the institutions of the *Volksgeist* are in permanent organic development as long as the *Volksgeist* retains its identity and force. This organicity is, of course, very different from the

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[57] "[I]t is desirable that from time to time, the researches and gains of individuals should be summarized in a unifying consciousness. The holders of science, living at the same time, are often in sharp opposition to one another; but those contrasts come out still more strongly when we compare all ages. Here our business is not to choose the one and reject the other; the task consists rather in dissolving the perceived opposition in a higher unity which is the only way to a safe progress in the science." Friedrich Karl von Savigny, *System of the Modern Roman Law*, vol. 1, trans. W. Holloway (Westport, Conn.: Hyperion Press, 1993), I.

[58] Savigny, *Vocation of our Age,* 24.

view of progress as the result of rational programs. It also differs from the Hegelian conception of progress as the process of self-purification in history of the idea impregnated by the corresponding rational concept. Progress in the ratio-historicism of Savigny refers to internal evolution of a people's culture according to principles internal to it. It is here that the ratio-historicism of legal science meets the longing for authenticity of Rousseauian line in modern thought.[59]

Law as the object of reason as legal science is therefore thought to possess the attributes of historicity, organicity, necessity, scientific pliability, and constant self-generated development as long as the spirit of the people lives. However, Savigny is not oblivious of the complexities that inhere in the operation of legal science upon history. It is precisely in light of this scientific malleability of historical legal materials, implying the inherent technicality of law, that Savigny speaks of the two-fold nature of law as a type of specialized knowledge and as the object of this knowledge.

> Law is henceforth more artificial and complex, since it has a twofold life; first, as part of the aggregate existence of the community, which it does not cease to be; and, secondly, as a distinct branch of knowledge in the hands of the jurists. All the latter phenomena are explicable by the co-operation of those two principles of existence; and it may now be understood, how even the whole of that immense detail might arise from organic causes, without any exertion of arbitrary will or intention. For the sake of brevity, we call, technically speaking, the connection of law with the general existence of the people – the political element; and the distinct scientific existence of law – the technical element.[60]

To the complexity created by the double nature of law we must add the opacity with which, in conditions of modernity, the *Volksgeist* appears to its respective people. Indeed, the cultural dislocations caused by the transition into modernity adversely affected access to the terms of nomothetic traditions, or so Savigny as well as historicists in general believed. The ordinary person can simply not have an immediate and clear understanding of what tradition commands. How can a people be governed by a legal order that is at least partially elusive to the ordinary members of the order?

As the complexities of the attributes of law combine with the cognitive myopia imposed by the conditions of modern life, the jurist comes under high demand in his role as a privileged cognitive agent capable of deploying reason in the service of traditions as *nomos*. However, in contrast to the demiurgic mission associated with the cognitive asymmetry of the utopian rationalist agents, Savigny's legal scientist would carry on the limited mission of bringing to light the clauses of traditional law, of rationally organizing this material, and of standing guard as a fiduciary of the people.

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[59] "[T]his organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality." Friedrich Karl von Savigny, *Vocation of our Age,* 27.

[60] Savigny, *Vocation of our Age,* 28-29.

In this way, the jurist is elevated to the position of an all-powerful agent in charge of operating as the loyal medium of the *Volksgeist*. As such, the jurist is the ultimate agent of the Great Alliance, and his expert discourse speaks to the people in the name of its own true spirit. From the complexity of the object emerges the necessity of the progressive specialization of the jurists, who "now become more and more a distinct class of the kind." As "law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now develops upon the jurists, who thus, in this department, represent the community."[61] Hence, from the jurist's fidelity to his mission of custodian and mouthpiece of the *Volksgeist*, as *custus constitutiones* of the form of collective life, emerges the authority and mandate of his science.

When the attributes of the object of his science and his role as the medium between the *Volk* and its *Geist* are taken into account, a double set of skills are expected from jurists. First, he is to be a skilled historian; second, an undefeatable and indefatigable rationalizer of the living elements of his legal tradition.[62] Thus, reason and history converge in the very consciousness of the privileged cognitive agent. The mind of the jurist is thus the first locus of the fusion between historicism and rationalism, and where the possibility of a rationalizing, and therefore legitimizing, discourse of the social and cultural establishment comes to materialize. Despite all the fanfare that accompanied the rise of the will of the masses onto the world stage, it is to be brought in line with authentic constitutional essentials, protected as they were by a fortress erected in the mind of the jurist, and soon after to spread to the rest of culture.

The role of legal science in the Great Alliance kept two aspirations characteristic of the high cognitive and practical confidence with which eighteenth century rationalism approached the problem of legitimate order. The first is the possibility of manipulating historical fact, whereby "[t]he historical matter of law, which now hems us in all sides, will then be brought under subjection, and constitute our wealth."[63] But this is not a deliberative and participatory method of control. Quite the opposite: the idea here is essentially a centralizing one, although with a conservative bent absent in the rationalism of the previous century. The second aspiration is to envision reason as the spokesperson and guardian of selective historical processes. The difference between Savigny's historical rationalism and utopian rationalism is subtle yet significant on this particular point. Through the controlled generation of a social order founded upon principles supposedly arrived at by unconditioned reason, utopian rationalism yearns to reinvent and rule over society. In contrast, Savigny's historical rationalism retro-projects itself upon the past to exercise a method of selective control that changes the normative and pragmatic impact that traditions (as *nomoi*) could otherwise be expected to have over *modi vivendi* were they unaided by legal science.

> The essence of [the view of the Historical School] rather consists in the

[61] Savigny, *Vocation of our Age,* 28.
[62] "A twofold spirit is indispensable to the jurist; the historical, to size with readiness the peculiarities of every age and every form of law; and the systematic, to view every notion and every rule in lively connection and co-operation with the whole, that is, in the only true and natural relation. This twofold scientific spirit is very rarely found amongst the jurists of the eighteenth-century; and, in particular, some superficial speculations in philosophy had an extremely unfavourable effect." Savigny, *Vocation of our Age,* Page 65.
[63] Savigny, *Vocation of our Age,* 154-155.

> uniform recognition of the value and independence of each age and it merely ascribes the greatest weight to the recognition of the living connexion which knits the present to the past, and without the recognition of which we recognize merely the external appearance, but do not grasp the inner nature, of the legal condition of the present. The view, in its special application to the Roman law, consists not, as is asserted by many, in assigning to it an improper mastery over us; it will rather first of all search out and establish in the whole mass of our legal condition what in fact is of Roman origin, in order that we may not be unconsciously governed by it: further however, in order that freer space may be gained for the development and healthy operation of the still living parts of that Roman element, it will, in the circle of those Roman elements of our legal consciousness, separate that part of it which is in fact dead and, merely through our misunderstanding, still drags on a perturbating show of life.[64]

Meeting midway from their respective poles, the great ratio-historicist alliance becomes trapped under demands which, if not entirely incompatible, are in tension with each other about how to safeguard the traditional while sublimating it; about affirming the profound historicity of core legal arrangements while rejecting their arbitrariness; about aspiring to the scientific appropriation of historical material while postulating its sacred nature; about relying on a selective rational filter for historical evolution while postulating the supreme authority of its organic development; about celebrating the impersonality of the collective spirit while subjecting it to the dominion and control of a class of social agents differentially epistemologically equipped; and, finally, about embracing simultaneously the fixation on the traditional and the dream of reason. In reading passages such as this one –

> By reason of the great and manifold legal material with which centuries have supplied us, our task is incomparably more difficult than that of the Romans; our aim thus stands higher and when it happens to us to reach it, we shall not merely have repeated in mere imitation the excellence of the Roman jurists, but have accomplished something much greater than they did. When we shall have been taught to handle the matter of law presented to us with the same freedom and mastery as astonishes us in the Romans, then we may dispense with them as models and hand them over to the grateful commemoration of history.[65]

– we may wrongly either take it for the spirit of the Great Alliance or to discount it altogether as insincere. To do so is to mistake the nature of the thought complex that came to dominate legal culture and practice and under whose mantle schools of jurisprudence as distinct as pragmatisms, positivisms, and reflective-equilibrium idealisms find shelter against implausibility. The Great Alliance has all the adaptability and incoherence required for the task of safeguarding constitutional essentials in democratic and revolutionary times. In its appeals to tradition, to expectations of rational efficiency and justifiability, and deference to

[64]Savigny, *System of the Modern Roman Law,* vol. 1, V.
[65]Savigny. *System of the Modern Roman Law,* vol. 1, XV.

democratic processes, the Great Alliance has thus far been successful. To escape its grip presents more than extraordinary practical challenges; it presents almost insurmountable cognitive and imaginative obstacles. The proof is that it not only survives but coopts left and right in contemporary legal thought.

In eighteenth century conservative historicism, a deep connection existed between the practical and cognitive advantages expected from the compliance with the norm commanding the preservation of a tradition. On the other side of the polarized divide, the same deep connection characterized contemporaneous progressive rationalism. In the Great Alliance, the ideational strategies of ratio-historicist jurisprudence shield background constitutional essentials from ultimate challenge while setting out a playground for consequentialist criticisms, positivistic fiats, and policy experimentations of all sorts.

In the inter-war period, contest over the content and meaning of historical experience and a sense of the limits of reason when facing the task of adjudicating between competing ultimate conceptions of the good life fostered a type of jurisprudence deeply aware of the predicament of a disenchanted worldview and an immanently ethically irrational world.[66] At the same time, the institutions and practices of democracy that should not touch the constitutional essentials were spreading around the western hemisphere and beyond. The experience of the acceleration and deepening of social change and of the ever-expanding potential for personal tragedy and collective catastrophe deeply undermined the plausibility of claims to authority based in history or reason alone – antinomianism and reinvented normativism reigned. Legal philosophy, by allocating decisive weight to historical experience encapsulated in particular cultural manifestations, by assigning legitimizing tasks to reason, and by showing sufficient deference to democracy, steered its course in this disenchanted and intrinsically irrational world in order to deliver modern society to next generations. This was by no means a small accomplishment – cognitive discipline and transgenerational social cohesion and cultural reproduction are serious and delicate businesses. But can we silence the longings for deeper and more universal emancipation in equality, freedom, dignity, and reason? Should we? I do not think we can or should.

Conclusion

For the present enshrines the past.
(Simone de Beauvoir)

This article reconstructed in very general terms some of the causes for the anxieties of the nineteenth century's elites and the principal theoretical and argumentative maneuvers whereby the Great Alliance addressed them. The Great Alliance created and set in motion a powerful preservationist ethos in legal and political thought. In the pragmatic, cognitive, and normative conventions created by nineteenth century ratio-historicism in its covenant with

[66] See Weber.

the will of the masses, the conservative elements of eighteenth century historicism and the utopian elements of its contemporary rationalism were combined to create a powerful and pervasive synergy.

I showed, using the example of Hegel, how rationalism came to decipher in social stages and arrangements the manifestation of the power of reason to work itself out as teleological history. According to this view, in history, reason operates homeward. Coming from the opposite extreme of the rationalism-historicism continuum, and using now the example of Savigny, I showed that historicism came to appeal to the rationalizations of legal science in order to endow historical data with both conceptual stability and intellectual authority. The momentum for this rapprochement, I argued, was provided by the extraordinary transnational turbulences and political reforms that marked the nineteenth century. The ultimate cunning of the rapprochement was to bring the will of the masses into its fold in a compelling tripod of mental and social order.

I have also argued that there is at least an elective affinity between, on one side, the cognitive-normative-practical plan onto the world of the Great Alliance and, on the other, positivisms, pragmatisms and reflexive equilibrium idealisms. Those legal theoretical positions have fit well within the normalizing purview of the Great Alliance, under which they find shelter from accusations of theoretical implausibility or of causing social upheavals. This is the story of the creation of a resilient, flexible, highly adaptive, inclusive, and attractive legal worldview, the complete escape from which has proved to elude even the best minds and most defiant spirits. The practical implications of the Great Alliance are equally significant and include the fact that the legal and institutional framework of contemporary western democracies is left over-legitimized and substantially shielded from deep-cutting challenge and re-imagination.

Under the Great Alliance, contemporary legal thought ultimately fails history, reason, and will. At this late moment in the trajectory of the Great Alliance, reason swings back and forth between cost-benefit rationalism and rationalizing reflective-equilibrium; history glorifies fables of foundation, founding personalities; and chosen peoples; popular will as democracy is spasmodic at worst and directionless experimentalist at best, only to see its work undone by courts operating under the Great Alliance.

In this context, constitutional stare decisis is not merely the "best hedge against reversal," [67] but one of the preeminent ratio-historicist instruments to bestow the stability of intellectual and institutional authority upon legal doctrine in democratic times. Around appellate decisions and the cult of appellate decision makers, an entire self-reinforcing edifice of legal education and scholarship is built. But in all that, law is and will always be the creation and the institutional expression of moral imagination. The dispute is for the type of moral imagination that will influence law and legal thought.

[67] Louis Menand, *The Metaphysical Club: A Story of Ideas in America,* (New York: Farrar, Straus, and Giroux, 2002), 341.

That law is moral imagination is visible from the vantage point of the problems of social integration. Modern individuals have a proclivity to see things, from astronomy to social organization, as parts of ordering mechanisms. From this angle, one central question stands out: what is the meaning and existential implication of our being parts of integration mechanisms? After all, mechanisms are, by definition, superordinate vis-à-vis and oblivious toward their parts. Hegel answered this question with a call for freedom and the promise of liberation in the evolving rationality of modi vivendi, through which one can be freely at home in modern society. Savigny answered with a longing for authenticity in social ordering, imagining the key for individual belonging in impersonal and organic cultural authorship overseen by science. The idea of democracy claims for the will of the masses the power to rule over social order, hoping that self-imposed coercion transmutes into freedom. These cries, longings and hopes have proved much harder to meet than once thought, but the social and moral landscape that they together created rules over modern law.

Granted, from the time of ancient Greek, Roman, and Judeo-Christian legal cultures, law has always been at the intersection of history, reason, and will. With one foot in the past and passing through some sort of positing will in the present, law with the other foot reaches into the future. Modern democracy is now the place-holder for will in this three-forked intersection. In thought and practice, law cannot escape passing through this crossroad. The question that lingers is how to imagine a new covenant between history, reason, and will in order to expand authentic and recognized freedom in evolving social orders without failing to provide for the functions of social integration and sufficient cultural reproduction.

The social integrative role of law is played out on two planes: the first and less important one is that of the rules and procedures that regulate status and relations. The second and more important level is that of legal worldviews: the particular way the social world is seen and interpreted through the lenses of law – lenses carved by prestigious legal theories and their presuppositions. This second level is the tangible site of public reason (even when only a ghost of what reason could be) in contemporary societies, and legal thought is at once the creator, medium, and manifestation of those legal worldviews. For almost two centuries now this legal worldview has been the Great Alliance.

However, and importantly, if one takes the long view of history, legal thought is never permanently satisfied in feeding out of social consensus. Legal thought recurrently comes back to the challenges of expanding the conditions for reason giving, coherence and integrity, and to the struggles over the moral reimagination of society and self. The Great Alliance may not last forever.