

Legalism and Modernity

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It is often remarked that the central problem of modern political theory concerns the possibility of legal order and political stability in a morally divided world. For if law is necessary to protect and nurture the freedoms by which individuals are able to formulate and pursue independent ideas about what is good or valuable in life, it is nevertheless also an impediment to independent action: in comprising a body of imposed rules, the law limits many moral choices whilst permitting others. But juridical concepts and obligations which exist to regulate individual conceptions of the good that are in competition with one another cannot be thought of as grounded in a shared understanding of the human good. How, then, is legal order possible in a world where no other values are shared? In as much as the law structures moral choices, its ability to stabilize the social world would seem to be at odds with the supposition of conditions of discordance which require stabilization.

The basic problem sufficiently appears in the political thought of Hobbes: Where men stand outside the social bonds imposed by law, Hobbes argued, they stand before one another as free and equal agents. The conditions which characterise unlimited freedom and rough equality between persons would be marked by continuous warfare of each against all; for, lacking any common rule of good and evil, each person will deem to be 'good' that which accords with his appetites or desires, so that life becomes a permanent struggle to assert one's will over those of others. In reaching this conclusion, Hobbes reversed the intellectual priorities that had in various ways informed both ancient and medieval conceptions of legality. The classical jurists had supposed there to be an object of the understanding, 'the good life', which it is the purpose of ethics and philosophy to uncover. Political institutions, including the law, would then play a role in fostering conditions in which such excellent lives might be pursued. The view to be encountered in Hobbes, by contrast, denies any independent existence to notions of good or evil, for they are to be regarded rather as constructions *of law*:

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‘there being nothing [that is good or evil] simply and absolutely so; nor any common rule of good and evil, to be taken from the objects themselves, but from the person of the man (where there is no commonwealth) or, (in a commonwealth) from the person that representeth it; or from an arbitrator or judge whom men disagreeing shall by consent set up; and make his sentence the rule thereof.’¹

In this passage we find a different and recognisably modern point of view: law appears not simply as an instrument wherein some agreed conception of the human good is amplified and protected, but as a means of regulating and containing forces of opposition and disagreement. It is here also that we discover the basic problem of modernity, however. Law emerges as a necessary means of establishing common rules or standards of right and wrong (or preventing the loss of them); but law can only appear if those subject to it *already* share values in common: for if the existence of law depends upon a form of collective recognition or consensus on the part of the governed, upon what basis is such consent founded? And, if consensus be sufficiently achieved to allow for the development of common political institutions, in what sense is law *necessary* for the establishment of common rules and standards?

I have elsewhere characterised this problem as that of explaining how law can be both *reflective* and at the same time *constitutive* of social order.² Two sets of ideas emerged in response to these problems, and would come to dominate jurisprudential speculation about the nature of law. On the one hand were the legal positivist theories, which emphasised the necessity of a body of deliberately formulated standards in order to regulate the competing actions and desires of individuals. Understanding being (as Hobbes supposed) rooted in desire, a set of common rules was needed to define the conditions in which opposing desires could be peacefully pursued. Such conditions might then be thought to lie in various points of convergence or overlap between the competing conceptions of ‘the good’, to which the rules give authoritative expression. In this way, legal rules could be held as being simultaneously grounded in shared values but also as offering further refinement and extension of those values. On the other hand were theories which sought a more rational basis for legal obligations, located in permanent features of the person or of the human condition. Viewing the human being as a locus, not of fleeting whims and shifting desires, but of a more stable bedrock of interests, such theories attempted to identify general principles of morality and political association that could

¹ Hobbes (R. Tuck ed.), *Leviathan* (1996), ch 13.

² See S. Coyle, ‘Positivism, Idealism and the Rule of Law’ (1996) 26 *Oxford Journal of Legal Studies* 257.

inform the understanding and interpretation of legal doctrine.³ Because theories of this kind regarded law not merely as a necessary instrument for addressing situations of conflict and contingency, but as a means of transforming the present form of society into a more proximate expression of certain moral values (themselves grounded already to a degree in human characteristics), we may refer to such endeavours as ‘idealism’.

Though obviously distinctive these two traditions of thought, in virtue of being creatures of a ‘modern’ political context, are at a basic level dependent on one another. For if the idealist’s transformative ideal depends upon the identification of abstract ideas of equality and general norms of justice, possessing an identity beyond the textual confines of the written rule, it is nevertheless also animated by a constant drive to clarify and solidify present arrangements in a way which reveals and perfects those norms and ideals. The ability of the law to identify or reflect interests and moral values thus depends upon the availability of detailed rules and procedures of the kind celebrated by the classical positivist: our ability to understand and to know such ideas as they appear in their social functioning is (it seems) tied to the expression of those ideas in explicitly formulated, authoritative propositions. Yet at the same time, general rules are inevitably fairly blunt instruments which possess a kind of incompleteness when applied to specific situations. Rules, then, require to be interpreted against a background of broader ideas; and since a shared body of rules requires a common interpretation, the ultimate mental framework for the interpretative enterprise must be understood as terminating not in variable and transient desires, but in fixed and commonly shared *interests*. The ideas at the heart of positivism and idealism are thus mutually reliant: posited rules seemingly embodying fragments of more general moral ideas, but such ideas existing merely as abstract wishes when viewed apart from their concrete expression in the rules. A ‘modern’ political society may accordingly be expected to oscillate between these two perspectives, giving emphasis at different stages now to the need for explicit and precisely formulated standards, and now to the broader ideas which inform the ‘spirit’ of the law.

I. Modernity and Individuality in Politics

The jurisprudence of the last hundred years or so has almost exclusively taken the form of attempts to defend (or refute) theories of one of these

³ Samantha Frost has argued that elements of this second view are also to be found in Hobbes, betraying ‘a thinker whose appreciation of our embodiedness or materiality issues in a complex portrayal of our profound interdependence and a compelling account of the ways and means to peace.’ See S. Frost, *Lessons from a Materialist Thinker: Hobbesian Reflections on Ethics and Politics* (2008), 2.

general kinds over those of the other. My own belief, in view of the above observations, is that such efforts are in the main fruitless and unilluminating. In this essay I therefore venture to suggest an alternative way of looking at the problem of modern politics. On the view I shall defend, 'modernity' is not simply a relevant intellectual context (that is, a context of ideas) for the contemplation of a set of problems, to which the theoretical traditions of positivism and idealism are responses. Rather, modernity should be viewed instead as *the problem which requires investigation*. Only then can we hope to illuminate the political landscape sufficiently to admit of progression beyond the recent limited conflicts which have defined jurisprudential argument.

An immediate difficulty nevertheless presents itself, in that 'modernity', understood in the context I wish to address, does not admit of easy definition. The attempt to define that which separates the 'modern' age from those preceding it is, at the same time, the attempt to specify the present set of cultural ideas that comprise our self-understanding of the human condition. Such a project consists not in the identification of the present, but rather of human attempts to attribute to or discover in their present experience a certain meaning. The resulting body of propositions does not therefore amount to a history (for, as Kolakowski pointed out, no age, and no civilisation, is capable of conceptually identifying itself finally or universally),⁴ but instead embodies an abstraction. Thus to give to such an ephemeral idea as 'modernity' sufficient shape to enable discussion of it, is already to invite certain distortions. With this in mind, I do not offer the following remarks as the final words to be said on the subject, nor yet as a 'foundation' upon which to build, but merely as an indicative beginning, a set of disposable assumptions for the stimulation of further inquiry.

The chief of these assumptions, then, is the predominance, within the modern imagination, of legalism as a means of comprehending the predicament and actions of the individual. The 'modern' age, in this sense was not the first to conceive of human beings as independent centres of thought and activity, but it was the first to regard such individuality as the defining and central characteristic of the human condition. To regard 'the individual' as the prime locus of moral concern in this way, is to view the human condition, at a basic level, as one of freedom. Indeed, it is possible to regard the history of modern legal and political thought as the transformation of the idea of freedom from a condition into an ideal; and it is the recognition of freedom as an idealised state (one which, of necessity, *in fact* obtains, but only imperfectly) that gives rise to the problem of modernity. In order to understand the significance of this transformation,

⁴ L. Kolakowski, *Modernity on Endless Trial* (1990), 3.

and the centrality of legalism to its success, it is necessary to know something of its genesis.

The character of 'the individual', as an object of political concern, did not of course emerge suddenly, as a pure and complete creation of thought, and was not therefore without antecedents. Both Aristotle and Plato had considered the properties of the individual soul; and Western Christianity added to this a tradition of reflection upon individual salvation and personal responsibility which was embodied not only in its doctrines, but also in its art, its sermons and sacraments. If the 'sinner' was a type, nevertheless it was the individual who lost her soul or daily confronted the peril of its loss.⁵ But if man, contemplated as an object of religious salvation, possessed such traits of individuality, nevertheless he did not possess them when viewed as a political figure; that is, from the perspective of his place within civil society (as a worker, criminal, illiterate etc.)

As with most of the central concepts of Western political thought, the notion of the individual as a political rather than a religious figure did not arise as the product of philosophical assertion or the conscious enumeration of necessary truths, but as a series of retrospective modifications to the structure and conditions of medieval thought. Medieval society in Europe was of a kind that did not permit the conscious expression of human individuality, for the conditions of life and practice were of a nature that emphasised the inherently communal character of human endeavour, and thus of human nature. 'The individual' of later philosophical thought could not emerge with sufficient consistency within such conditions of life to form a basis for self-conscious understanding: instead, the human personality was by and large submerged beneath the recognition of human *types* as they appeared within the various social and familial contexts that represented the circumstantially possible limits of human experience.⁶ To possess self-knowledge was, in the main, to understand oneself as a member of a class (the feudal overlord, the vassal, the member of a church, a family, poet, preacher etc); but the idea of a uniquely differentiated 'individual', merely *participating* in various communal activities in a manner and under conditions distinct from his neighbours, was not significantly identifiable.

The emergence of 'the individual' represented, then, not the practical advancement of a bold philosophical thesis, but rather the gradual

⁵ Aquinas, contemplating Boethius' definition of the person ('an individual substance of a rational nature') complains of its inadequacy precisely because it lacks the necessary singularity of a 'person.' See Aquinas, *Summa Theologica*, I. Q.27 ob. 1.

⁶ See Oakeshott, *Rationalism in Politics* (revised ed. 1991), Essay 11.

abatement of communal ties and the corresponding emergence of opportunities for new and distinctive forms of personal engagement with the social world. Freedom represented not the ideal form of human engagement, but the generation of an alternative means of intellectualising the sum of human experience. Within the new idiom, the human condition no longer appeared (as in the Aristotelian and Scholastic traditions) as a progressive journey towards some common end or higher plane of existence, but as an unfortunate predicament in which individuals relate to one another as separate and autonomous centres of activity.

Within this changed understanding of the human situation, the absence of any shared end or mode of being meant that the unifying forces which make peaceful social coexistence possible were not to be found in the process of pursuing a common condition, recognised as good for all, but in a legal order that could define a stable set of circumstances in which each person can choose their own method of determining and pursuing their preferred mode of existence. In the absence of law, the condition of humanity was perceived to be one of turmoil, a relentless attempt of each person to deal with others on terms which promote his position and interests over that of others.⁷ Law, in this way, represented the sole means by which the activities of individuals could be regulated sufficiently so as to allow the human condition to subsist; and it was in defining the circumstances of permissible choice and action, and corresponding areas of duty or obligation, that law came to occupy a central position in the development of the modern political idiom.

Several important consequences can be detected in this movement towards modernity. For the assumption that law represents an attempt to impose rationality upon an otherwise chaotic situation (for example) encouraged a tendency within both academic law and philosophy to devalue the ideas of tradition, history and practice, that continues to influence jurisprudential reflection to this day. But more important for present purposes is the shift in moral thinking that led to the idea that human beings not only possess freedom (as a necessary consequence of being alive), but that human thriving requires the enjoyment and exercise of freedom, and that freedom therefore represents not simply an extant condition to be

⁷ See Hobbes, *Leviathan*, ch 13. Not everyone agreed with the grim picture of humankind's natural state to be found in Hobbes's writings: Grotius and, later, Locke, for example, viewed that condition as one governed already by natural laws or shared precepts of reason. But almost all writers within the Western philosophical tradition viewed life in the absence of declared and organised laws as one of inconvenience and misfortune in which the threat of conflict is ever present: see e.g. Locke, *Two Treatises of Government* (1988 [1689]), ch 2-3.

analysed and understood, but also a condition of moral welfare to be protected and advanced. Law thus became central to political theory not only in virtue of forming an integral element of the analysis of the human condition, but also as a central means of more fully realising an imperfectly established ideal.

The means by which legalism came to occupy a central position were again more the product of accumulated social change than as the outcome of applying a philosophical theory to the real world of politics. For the emergence of 'the individual', and thus of the idea of freedom, encouraged an altered view of the social conditions which had predominated during the medieval period. The matrix of social institutions, such as the church, the family, conditions of tenure and employment and so on, which had previously been thought of as providing the terms in which personal identities are interpreted and constituted, came to be regarded as pressures or hindrances from which the individual must escape if he is to have latitude in which to develop his own character. A world in which political power is distributed throughout society (that is, a world of variously intersecting and overlapping communal ties, each of which in some way determines the form of social interaction or the direction of activity), is one that inhibits self-direction: either through the suppression of choice, or by proscribing the form of available choices.

A world made up of 'individuals', on the other hand, requires a concentration of political power in one place, for it is only through the existence of a single, unified centre of authority that each person can come to enjoy that freedom from the will of others that is a precondition of autonomous decision. Independence of the will requires some level of control of other wills that are external to one's own, and thus a social condition wherein the individualist disposition is strong is most naturally interpreted as one structured by firmly fixed areas of right and duty. The establishment of such domains depends upon the existence and effectiveness of a centralised source of authority: it requires legal order. Hence, the disposition towards individual thought and decision (if this be taken as the central characteristic of 'modern' man) both depends upon and promotes the value of legalism.⁸

This account of the emergence of legalism is, of course, merely a schematic and exceedingly rough abridgement of a mass of historical

⁸ At the same time, ironically, legalism can be seen to *subvert* individuality: the concentration of power at the centre operating precisely to suppress the functioning or the existence of mediating institutions which might otherwise provide a buffer between the individual and governmental powers of direction and control.

experience. In common with any attempt to impose a degree of coherence upon a disparate reality of reversals, dead ends and unexpected turnings, it amounts to an abstraction. But I hope it is sufficiently intelligible and familiar to be taken as a recognisable approximation to a distinctively 'modern' way of thinking. If this is granted, the following observations may be thought to cast some light on the nature of modernity, and in consequence upon the various problems associated with that condition of life.

II. The Centrality of Legalism to Modern Politics

Legalism in this context does not simply denote the existence within society of a body of laws; it rather refers to the presence of a specifically juridical conception of the human person, interpreted as the bearer of rights and duties. To characterise legalism in this way is thus to attribute to law a particular *raison d'être* in the socio-political world, which is best explained by contrasting this conception with what went before.⁹ Medieval political thought had followed Aristotle in regarding social institutions and arrangements as constituent factors in the realisation of the human good. The moral character of man (that which made him virtuous or civilised, and capable of progress) was thus thought to be reflected in the arrangements he had created for the furtherance of peaceful cooperation and human endeavour, and for the general alleviation of the human condition. Thus social arrangements were not to be viewed merely as furnishing the external context in which each person pursues the good; they were instead part of the good that is being pursued. Such a notion of the human good was of a complex ethical object that is realisable only through joint endeavour. In modern political thought however, social institutions did not present themselves as enshrinements of a common good, but as necessary evils whose encroachments upon an individual's capacity for self-expression through choice must be limited as far as possible. For if the unique value of a person consists in what differentiates him from other people rather than in his approximation to some common ideal, then the imposition of desired conditions upon the person does not promote his wellbeing, but merely destroys his individuality, and thus his means of discovering and realising the good that is appropriate to his own conceptions and circumstances.

⁹ I specifically avoid the word 'purpose' here, for even highly articulate social institutions can rarely claim to have a single, overarching purpose that is transparently evident to those caught up in its operation. Attributions of purpose are necessarily retrospective, and partial. The notion of a *raison d'être* is not much better in this regard, but it serves to draw attention to my concern. (See Hayek, *Law, Legislation & Liberty*, vol.1)

The impulse to what I have termed ‘legalism’ (even if it is a derivative impulse), then, naturally leads to a specific conception of the contribution of law to the general shape of society: that of the translation of traditional and informal modes of association into a system of rights and duties determined at some level of abstraction from, and independence of, the detailed actuality of social practice. Law emerges as not just one among many determinants of social concourse, but the pre-eminent means of regulating the activities and interrelationships of various social units. In a world where no common condition of human flourishing unites all persons, legal order represents the only means of securing any degree of mutual accommodation. It follows that law does not exist to unite all of society in the pursuit of a single, common endeavour, but rather to devise and maintain a set of standards by which individuals are able to pursue their own activities, and to reconcile those activities with the conflicting actions of others as far as is possible.

Underlying this conception of law and society is a view of the human condition that is at odds with the understanding to be found in the ancient and medieval writers. The classical philosophers saw human life as being directed towards a specific end (the development of a noble and virtuous disposition), and society as the necessary medium in which noble and virtuous characteristics could be exercised and developed.¹⁰ Human life was therefore structured by an ideal that is both external to the person (being a possible occasion of legal enforcement) and realised within the inner life of each person. The medieval writers worked around this ideal a theological framework, whereby the direction of human activity was conceived as determined by external moral *laws*, and the goal of the moral life not the pursuit of a state of perfection within the world, but salvation beyond the circles of mortality. In both cases, however, human life is interpreted according to its perceived place within a larger metaphysical order which indicates its ultimate direction.

What I have called the ‘modern’ view of the person, by contrast, depends upon an altered view of the world as something metaphysically inert, providing no external forces for the direction of human conduct, but instead mere *possibilities* for self-directed action. Here, no moral ideal is indicated by the range of possibilities available, unless it be imposed upon the world by human will and thought: ‘It is as impossible for nature to discover any morality in the actions of a man without reference to a *law*’, wrote Pufendorf, ‘as it is for a man born blind to choose between colours.’¹¹ The trajectory of human life does not signal movement in any particular direction, therefore, but merely movement as opposed to its cessation; and

¹⁰ See Aristotle, *Politics*, Book 1.

¹¹ Pufendorf, *De Iure Naturae et Gentium*, 1.2.6.

that which causes or motivates movement, in the absence of a governing ideal or *telos*, must spring (in this philosophy) from the agent himself, in the form of desires, wants or interests. In the absence of any fixed direction to human endeavour, then, such desires and wants have no terminus, because no condition of being exists that could act as the end in which they are all fulfilled.

The character of this individual first appears consciously in the pages of Hobbes:

Continual success in obtaining those things which a man from time to time desireth, that is to say, continual prospering, is that men call Felicity; I mean the felicity of this life. For there is no such thing as perpetual tranquillity of mind while we live here; because life itself is but motion, and can never be without desire, nor without fear, no more than without sense.¹²

Several important consequences might be observed in this understanding of the individual, all of which combine to promote the value of legalism as a central determinant of modern politics. The first of these is that the men of Hobbes's world do not require the society of others for their completion (each person being a *separate* locus of desires and abilities), but require it merely to facilitate the pursuit of their wants and interests. The individual stands as a naturally complete entity apart from society, but requires a common basis of social order to ensure his continued survival and a degree of protection from the aggressive pursuit by others of their own designs and priorities.¹³ Common rules are likewise important for the creation of mutual understandings and the pursuit of mutual advantage, for in the absence of such rules individuals remain fundamentally opaque to one another: 'Whatsoever is the object of any man's appetite or desire', writes Hobbes, 'that is it which he for his part calleth Good: And the object of his hate and aversion, Evil ... For these words of Good, Evil and Contemtable are ever used with relation to the person that useth them...'¹⁴ Law is thus given a central place in the construction of social meanings and the creation of stable practices (such as trade) for the alleviation of the human condition.

¹² Hobbes, *Leviathan* ch 6. The modern-day 'consumer' might be said to be the heir to this conception of the individual, though other guises (such as the existential self) bear its mark also.

¹³ The 'modern' individual is thus the antithesis of the human character as presented by Donne's famous sermon: 'No man is an island entire of itself; every man is a piece of the continent, a part of the main ... Any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.' Donne, *Devotions Upon Emergent Occasions* [1624], Meditation 17, in E.M. Simpson (ed.), *John Donne's Sermons On the Psalms and Gospels* (1963), 243.

¹⁴ Hobbes, (above n 10).

It is worth pausing here, however, to reflect on the fact that the politics of individualism (and thus of legality) do not point in a single direction, but in at least two incompatible directions. On the one hand, it is possible to emphasise (as Hobbes does) the essentially limited character of government that is implied by this notion of the individual: law, on this view, exists not for the promotion of the human good, but merely for that of social order. It is an aspect of the individual thus conceived, that the good of each person is something that can be formulated and realised only through individual endeavour, and cannot be *imposed* upon the person from outside. (This would be the case, moreover, even where two or more individuals happened to agree upon the character of the good life, for on this conception mere 'happiness' falls short of the good precisely insofar as freedom is lacking.) To seek to promote another's good is, in effect, not to furnish them with *opportunities* for self-improvement, but to determine in some measure the future direction of their action. Thus, inasmuch as the political process lends itself to just such well-meaning attempts to improve the lives of its subjects, the rule of law serves, on this conception of politics, to insulate the individual from external interference as far as possible, by separating the world of politics from that of private life. Now, on the other hand, legalism might be interpreted as seeking, not simply the emancipation of the individual from the tyranny of other wills, but to *impose* freedom upon the subject *as a condition* of the worthwhile life. Here, freedom is viewed as something possessed of a distinctive moral structure, rather than the absence of all structure.

At the root of modern politics therefore is a notion of freedom which itself exhibits bipolarity. First, freedom is understood as an extant condition that is fully available (though fatally compromised) only in the *absence* of law, legal order then appearing as an unfortunately necessary means for creating conditions in which freedom can be meaningfully exercised. Second, freedom is understood as a condition which obtains only *through* law, and is susceptible of degrees dependent upon the extent to which the legal order approaches the perfection of its moral form. Here, the structure of freedom is thought to depend not only upon security, but upon the imposition of various equalities (of opportunity, education, perhaps resources and so on). One will struggle to find examples of the appearance of either conception in its pure form in the political writings of modernity (although Humboldt comes very close to the notion of freedom as absence of any externally imposed conditions); and this is no doubt in part the result of the essential instability of the respective poles. But it is not difficult to observe more or less pronounced tendencies towards these poles in the political texts that have defined our modern political understandings. Typically, indeed, (even in Hobbes) one encounters a view that consists of an ambiguous mixture of the two tendencies, and it is this ambiguity (or,

where it is exposed to argument, this tension) that in my view defines the problem of modern politics.

The political thought of 'modernity' is therefore rooted in a conception of 'the individual' that both depends upon and promotes the value of legalism. Yet the essential condition of the individual, thought to be guaranteed by law, is ambiguous in nature, capable of being interpreted both as an extant condition that requires *protection* through legal order, or as an idealised state which is *promoted* by law and which therefore exists imperfectly and by degrees. The theoretical traditions of positivism and idealism might be seen, in the light of these assertions, not as inherently *flawed* conceptions of the modern political world, but as the inevitable symptoms of the structural conditions of modernity itself. Springing from the tensions contained within modernity, they cannot be expected to overcome or otherwise finally dispose of those tensions, but can instead merely reflect them in different ways.

In the remainder of this essay I shall develop a line of argument that indicates a standpoint from which the existence of the dynamic tensions of modernity can be to some extent mitigated (though not dissolved or altogether avoided). To establish such a position requires an intellectual framework that is broader than that of 'modernity' as understood above. This intellectual framework must of necessity stand in opposition to many of the most intimate touchstones of 'modern' political and jurisprudential thought, but it must also possess its own historical pedigree if it is to be serviceable as an interpretation of current political circumstances. It is, fortunately, capable of being briefly described.

III. Habit, Tradition and Rule

The tensions which define the condition of modernity are produced by the character of 'the individual'. Once this character has become accepted as the central category through which political ideals must be channelled, it will seem that the realm of politics is one in which internally generated impulses and motivations constantly confront external forces which must be tamed. But each individual, moving within the social world, is not only a source of internal impulses but is *itself* an external force acting upon others, and therefore demands regulation and limitation. The realm of politics is of course inevitably one of complex tensions (for without the tensions there would be no need for a system of politics); but any attempt to comprehend those tensions in a way that reduces the appearance of an obviously paradoxical character will need to start by challenging this picture of the individual.

The dichotomy between ‘internal’ and ‘external’ centres of motion is one which does not appear as a purely abstract metaphysical supposition, but functions inexorably as a means of demarcating relations: each centre of motion is related to others distinguished as ‘external’ to the motivating impulse. It follows that human relationships are never contemplated as totalities, but are always viewed from a perspective informed by particular interests or concerns. We confront one another in society not as people, but in a series of *personas*: as shopkeeper, litigant, mother, fellow-Catholic, etc. The degree to which we are known by another person will therefore depend upon the range of *personas* through which we are related, this range being capable of brief description in the arc from ‘stranger’ to ‘friend’.¹⁵ Now, some of these *personas* (e.g. ‘taxpayer’) are *imposed by* the social conditions in which we move, whereas others are produced organically *within* the conditions of association which make up the world of our experience. Yet others are constituted by a mixture of these origins; and indeed it is difficult to find pure instances of either kind. Thus, for example, if the role of a teacher is normally voluntarily adopted, and one’s style and method of teaching is largely one’s own, there is nevertheless usually a specific curriculum to be taught (often set out by government or by professional bodies), and there are inevitably certain rules to be followed and standards to be adopted in the course of professional teaching that spring from both formal governmental and social sources. An alternative example is provided by the persona of a ‘neighbour’: the meaning of this term is partly a matter of established social usage and conventional understandings (not to mention physical circumstance); but it is also partially determined by the presence and operation of complex laws of property. Again, and in the same way, the role of a parent is formed by a mixture of social expectations and legal responsibilities.

The dichotomy of ‘internal’ versus ‘external’ conditions of action is rather a blunt instrument for the description of these relationships, for the obvious reason that the *personas* which constitute the *relata* under consideration are not themselves the product of purely ‘internal’ or ‘external’ determination. There are not two separate stages involved in an

¹⁵ There is nothing new about the observation that ‘the whole person’ never fully appears in social life. The fact that each person has impulses or thoughts which are reserved from public exposure is reflected in Jacques’s lines in *As You Like It*: ‘All the world’s a stage,/ And all the men and women merely players;/ They have their exits and their entrances,/ And one man in his time plays many parts...’ (Act II sc. 7). A different dimension is revealed in Sterne’s *Tristram Shandy*, viz. the limits to the communication of experience, which demonstrate those ‘parts’ to be, not the inevitable outcome of a universal intent to deceive, but something in fact necessarily intimated in the human condition.

individual's engagement with the social world – first the adoption of an abstract persona *and then* an exploration of limitless possibilities for engagement with other personas. Rather, we might say that the various personas adopted by 'the individual' in all areas of life that matter to politics simultaneously constitute *and are constituted by* the relations in which they figure. The character of 'the individual', then, is not to be thought of as a fully self-determining and limitless centre of potentialities, related to others (and thereby conditioned) only by virtue of legal rules; rather, this character takes shape from within the matrix of connections and historic modes of engagement in which it is enmeshed from the start. It is this fact that the myth of modernity, with its focus on legalism, serves to obscure. Once this fact is grasped, the distinction between internal and external determinants on conduct is seen to be wholly inappropriate and misleading as a means of understanding social relationships, and the vision of law as a set of 'external' rules within which individuals freely move can be seen as illusory.

From this, it follows that most aspects of social life are grounded more in habit and tradition than in rule. To bring social relationships within the scope of formal rules, the law must perform its reflective function, seeking to give more precision and stability to those modes of interaction which exist socially and independently of it. But in carrying out this important function, the law also gives definite expression and authoritative shape to those modes of interaction. In imposing a fixed (or relatively fixed) form upon the conditions of social engagement, then, the law inevitably supplants and modifies what it attempts to pin down.¹⁶ Viewed in this way, the question of how law can be both reflective *and* constitutive of social order becomes more clear: reflection, creation and modification are not *separate* processes undertaken by the legal order, but aspects of *the same* process.

The neglect of tradition and habit within the political thought of modernity, and the concomitant promotion of the value of legalism, has had (not unpredictably) profound effects upon our understanding of the relationship between law and morality. In examining this question, jurisprudential writing has mainly focused upon the presence or absence of supposed 'necessary' or 'conceptual' connections between the two terms of

¹⁶ I say 'relatively' fixed here, because of course neither statutory rules nor (especially) those of the common law can claim to be fully determined and incapable of further refinement. Indeed, what we see in the judicial application of law is the symbiosis that exists between the legally determined meaning and its wider social meaning, which can be said to exist as mutual influences. My discussion in the main text will however pass over this additional complexity.

the relationship. But this is in fact a classic piece of misdirection, and it is not hard to trace its origins to a concern to investigate the extent to which law ought to occupy a morally neutral position as between opposing conceptions of the good (thereby promoting the value of individual autonomy to formulate and pursue independently chosen projects), and to what extent the law is to be interpreted as a directive force aiming at the improvement of the human social condition understood as a collective achievement. We can refer to these conceptions respectively as the morality of individualism and the morality of collectivism; and the context of modernity misleadingly suggests that the central question of politics concerns the degree to which the one should be favoured over the other. The important fact is thus obscured from view: that *both* moralities are merely alternative projections of the value of legalism, and as such are mutually dependent. Both conceptions, that is, depend upon essentially the same understanding of 'the society under law', as an association of individuals loosely related through controlling rules. Such rules both facilitate and curb the scope given to individuals to pursue courses of action that are potentially destabilising and destructive of social harmony; and the values of individualism and collectivism simply refer to the position on a continuum of possibilities, defined by approximation to maximal and minimal attachment to facilitation or control, that the 'ideal' form of society is thought to be realised.¹⁷

We are thus encouraged to think of political morality in terms of the extent to which law should embody and promote a single, unified conception of justice. But can the value of justice be applied to the matrix of social relationships in the way this image of legal society suggests? Justice, as a moral idea, implies *control*, that is, the power to alter or manipulate the situations to which it applies as a value. For what lies beyond human control must (like a natural disaster or personal disability) be borne, either with fortitude or resentment, but accepted for what it is beyond the limit to which human action can alleviate the condition endured. (It is telling that the idiom in which we occasionally speak of life being unfair or unjust is one in which we invoke the notion of being in the play of animate forces lying beyond the scope of human determination, whether this be ascribed to God, Fate, or Nature.) Now, it is clearly possible, through the human action of crafting deliberate rules, to make alterations and revisions to virtually *any* aspect of social relationships and personas. Indeed, technological advances have enabled governments in recent times to exercise an almost omniscient level of control over the societies over which they preside. But what technological advances have *not* produced,

¹⁷ For a detailed and incisive investigation of the relationship between these opposing conceptions, see Oakeshott, *The Politics of Faith and the Politics of Scepticism* (1996).

and could never produce, is the power to exert control over *all* aspects of society simultaneously.¹⁸ It follows that whilst particular relationships and circumstances are always amenable to assessment as just or unjust, ‘justice’ and ‘injustice’ are *not* qualities that can be ascribed to ‘society’ taken as a whole.

If this is correct, then the ideal at which a ruling class should aim is not one of *just* government, but *wise* government.¹⁹ Wisdom, in this context, refers to the understanding that society is shaped and directed not only according to deliberate rule, but also by habit and tradition which exceed the power of government fully to control. Government, then, is an inherently limited enterprise; and it is my purpose in the following section to give some rough indication of what the character of ‘wise’ government might be, and of how this understanding of government differs from that implied in jurisprudential and political thought pursued within the idiom of ‘modernism’.

IV. Direction and Purpose

Where the central question of governance is thought to concern the promotion of an ideal of justice, political theory is naturally interpreted as being directed towards the analysis of a form of association; and jurisprudence then explores the role and position of law within a political society aiming at this ideal. Among the key terms in Western thought that have been used in the description of this form of association are those of ‘liberalism’ and ‘democracy’. These terms are both intended to be descriptive of a modern society, but at the same time they are indicative of an ideal of justice, and are hence thought to invite description in terms of a theory of justice which embodies the abstract perfection of this form of

¹⁸ I assume this point does not need arguing, but for an effective criticism of the possibility of minute and total governmental control, see Simmonds, ‘Law as a Moral Idea’, (2005) 55 *University of Toronto Law Journal* 61. Of course, even if benign tyrannies were possible to this extent, they would instantly prove themselves incompatible with the value of individualism and would thus lie outside the bounds of modernity.

¹⁹ It is now fashionable to refer to ‘governance’ rather than ‘government’, so as to distinguish the activity or concept of governing from those involved in carrying it out. I use the term ‘government’ here in its traditional, wider sense, in which it is interchangeable with ‘governance’, in order to avoid the possible implication that my discussion applies also to other forms of organised managerial interference which increasingly come under the banner of ‘governance’.

society.²⁰ As we have seen, the context of modernism consists of a particular mixture of forces which conspire to place law at the centre: and thus, through a series of suggestive intellectual transformations, law is understood to articulate an as-yet-imperfectly-realised liberal democratic theory of justice, and thus itself to possess a liberal democratic character.

Within this intellectual scheme, democracy is thought to concern closely the basis of authority, for if some of the social conditions to which the individual is subject are externally imposed through rules (and all such conditions are in principle capable of variation through rules), and imposed rules flow from the exercise of power, then some explanation is required as to the basis and justification of this power. It is not difficult to discern in all of this the pervasive influence of the modernist idiom: the question of authority arises (in this form) as a result of the conception of the individual as an otherwise free agent subject to a set of unfortunately necessary yet externally imposed constraints. Impressed by the power of government to revise a wide variety of social conditions, habit and tradition are conceived as everywhere subordinate to rule. Thus in order to secure the 'liberal' character of society, it is thought that the mandate to exercise power must be somehow traceable back to the individuals upon whom it is subjected. (Indeed, in the less sophisticated versions of contractarian philosophy, the exercise of the vote is seen as a means of donating power from the individual to the government.)

All of this assumes, however, that power *needs* a basis and a justification; and it is my contention that the conception of political philosophy as the search for such intellectual foundations is to gaze through the wrong end of the telescope. A search for foundations or ultimate justifications presupposes an identifiable starting-point. But political power is not an artificial creation, and thus has no conceptual beginning; nor does it possess an identifiable 'natural' starting-point. Power, rather, is inherently presupposed in all forms of human association (being present in the very idea of 'association') and does not intrude upon association, either naturally or through deliberate effort, after it is 'under way'. This can be easily seen in that where the power to determine conditions of interaction lies *wholly* within the individuals concerned, we would have the antithesis of society and only the hypothetical possibility of engagement. For such a condition of abstract equality would amount to the possession by each individual of a 'right of nature' in Hobbes's sense, each man being conceived as an *ens completum* whose every interaction is an occasion of conflict rather than of association. Within society, therefore, man is partly determined by external

²⁰ The basic direction of thought here should be sufficiently evident in the work of John Rawls, but is present also, in various guises, in much modern writing on jurisprudence, political equality and human rights.

conditions (such as those of language) and partly by the ability to move voluntarily within the opportunities presented by those conditions. Thus, also, all forms of association contain loci of power that are external to individuals and which lie outside their control.

Insofar as the notion of authority is parasitic upon that of power (and that of a *basis* of power), the conception of democracy as an analysis or recommendation of the bases of authority of offices of power is misconceived; for centres of power *have* no identifiable basis in that sense. Given the inevitable presence of concentrations of power within a form of association, democracy is better interpreted as an understanding of the *manner*, rather than the basis, of government; that is, the means by which power is controlled.²¹ The basic direction of my argument will probably already be clear in what has been said so far: by a too-ready identification of 'external' reserves of power with the scope and activities of government (or, equivalently, the tendency to exaggerate the centrality of rule to the detriment of tradition and habit), we are lulled into the error of elevating democracy to the level of an integral element of a general theory of justice. In a process so seamless that it is easily ignored, the concept of 'democracy' ceases to be the name of a set of concrete arrangements that have grown up in a particular locale, and develops into a classifiable style of government (so that we may seek to compare, say, Westminster democracy with Athenian democracy), eventually to transform into the name of a substantive credo or dogma: that is, a value-system to be exported to those who 'lack' it.²² This confusion of a manner of government with a substantive moral theory not only reinforces the tendency towards legalism, but also distorts that value by amplifying its innate characteristics.

Legalism is identified with a moral theory which sees law as central to the balancing of individual freedoms with the collective control required for a stable and peaceful society in which those freedoms can be meaningfully exercised. As we have seen, the values of individualism and collectivism represent the polarities that inform attempts to establish and justify this balance. Because they constitute the mutually defined antitheses of the notion of legalism, rather than fully independent visions of politics,

²¹ That democracy does not, strictly speaking, concern the *distribution* of power throughout society is reflected in the numerous forms democratic rule can take: from an elected monarchy invested with unfettered power, to a democratically established government backed up by a vast, but unelected, bureaucracy and judiciary, to the various levels of inclusiveness (or sphere of operation) that can be associated with the franchise (to name but a few).

²² As has been many times observed (and equally many times ignored), all such attempts at exportation inevitably begin with a military, that is to say invasiory, character.

all but the most eccentric political writings will exhibit the pull of both dispositions in the particular balance struck. Now, where democracy is mistaken for a value-system rather than a mode of governance, this leads to a mischaracterisation of the collectivist elements that are inevitably present in a legalist (that is to say, 'modern') vision of politics. For those elements will present themselves, not merely as of a *directive* character, necessary in order to keep the ship of state afloat, but of a *purposive* character: and this is subversive of the very intellectual underpinnings of individualism that gave rise to these developments.

The emergence of 'the individual' as the central character in the field of morality and politics signals the appearance of a non-purposive form of association, in which the function of law is to facilitate human endeavour rather than direct society as a unit towards a common goal. For the recognition of the individual as an *ens completum*, deriving its character from the will rather than from external social forces, brought an effective end to the idea that the human condition could be described in terms of a moral, rather than a merely biological or historical, nexus. Whatever moral properties could be deduced from this condition were then thought to spring precisely from the *absence* of any unifying features of 'moral man': that is to say, from a supposed basic condition of *freedom*. The absence of a common condition of human flourishing intimated a style of politics in which the endeavour was not to seek the alignment of all individuals in a single direction, understood as improving the human lot (or, equivalently, as the perfection of the human social character), but rather the maximisation of opportunities for personal development along numerous and opposing trajectories. This style of politics is uniquely appropriate to the human condition as understood by Hobbes: that of human life itself as ceaseless motion, and offering no possibility of tranquillity of mind in a static condition of being-in-the-world. In the absence of a *summum bonum*, the recognition of 'progress' appears not as the manifestation of united movement in any one direction, but rather constant movement in many different directions simultaneously.

The difficulty with this style of politics, however, is its self-transformative character. For we cannot avoid (except by a constant and determined act of will which has been conspicuously lacking in Western politics) the impulse to move from what might be termed a politics of 'minimum duty' to a politics of 'aspiration'.²³ A politics of minimum duty seeks to institute conditions in which individuals can formulate and pursue radically opposing projects without thereby assuring their descent into

²³ The contrast I have in mind corresponds roughly, though not exactly, to Lon Fuller's distinction between a 'morality of duty' and a 'morality of aspiration': see Fuller, *The Morality of Law* (1964), ch 1.

anarchy and mutual self-destruction. It is a central theme of this style of politics (too familiar to warrant tedious rehearsal) that the life of total freedom without law is the life 'solitary, poor, nasty, brutish and short,' and the freedom of unrestrained competition nothing but the slavery of the individual to the play of circumstance. But in this case, the irresistible conclusion is that the life of the *Rechtsstaat* is the realisation of an improved condition of humanity and not merely a random alternative to the 'state of nature.' Thus, a purposive element is reintroduced into politics: for the recognition will gradually dawn on the collective political consciousness that this improvement is realised never absolutely, but is present only by degrees. A directive concern with further refinement, perhaps unavoidably expressed in terms of 'equality' and 'justice', will then reassert itself within the political imagination.

To clarify, my argument is not that this movement towards an aspirational style of politics is a *logical* consequence of the morality of individualism, but that the moral idiom of modernity (finding clearest expression in the value of legalism) lends itself to a series of subtle transformations which make this development seem both possible and desirable. Given this propensity to self-transformation, in what form is the character of wise government revealed?

At its most basic, governance consists in the purposive (as opposed to random) variation of circumstances that affect the person. The intelligibility of those 'external' phenomena, and consequently the understanding of the scope and possibilities for purposive modification, depend in turn upon the interpretation that is given to the character of the human person. The roots of our understanding of government, then, are to be found in a metaphysics of the human person. Except in times of civil crisis, this metaphysical interpretation of human nature will be largely inherited, its basis and particulars buried deep and forgotten in the accumulated strata of social practice. But it is from this understanding that our notions of governance are formed, and from which emerges what will seem to be its inevitable character. For the underpinning beliefs which shape 'the person' as a distinct centre of motion, capable of being identified apart from the external conditions in which it moves, supply our understanding of the motivations and needs of this character, its limitations, the nature of its reaction to external stimuli, its 'normal' condition of existence and the things with which it must be supplied if it is to subsist. From this follows our beliefs regarding the aspects of the life of the person (in terms of the external forces acting upon it) that are properly subject to governmental control.

Modernity (I have argued) begins with the identification of 'the person' with the character of the 'individual'. The methods and style of

governance appropriate to this character are clearly different from those which would appear in the context of, say, 'social man', or of the 'religious exile' whose character is completed in its journey towards Heaven, and the governance of which would seem to demand the creation of opportunities for grace rather than the accumulation of material wealth. In these latter two cases, appropriate limitations on governance remain difficult to trace precisely insofar as the character of 'the person' cannot be sharply delineated from the social circumstances in which it moves. The metaphysical image associated with these anti-modern characters is not that of a distinct and unified centre of motivations that is complete (that is, intelligible on its own terms) prior to its engagement with the social world; it consists, rather, in the enumeration of different personas, identified in relation to the contexts of their emergence, and instantiated in 'the human person' the unity of which is present in its logical identity over time.²⁴ Being completed only *in* society, and not in abstraction from it, this idea of the person is not straightforwardly compatible with a bounded conception of governance as the variation of a particular range of external conditions that are external to it: for unlike the character of the 'individual', or the 'moral agent', there is not the uniformity or equality of distribution of personas (or of the capacity for their adoption) among 'persons' requisite to the identification of fixed limits.

I do not mean to suggest, however, that *fewer* limits on governance exist in relation to these anti-modern characters: indeed, insofar as the various personas are constituted and determined by the contexts of their emergence, it is likely that the sphere of government will be greatly diminished and that of 'natural necessity' correspondingly amplified. The question of 'limitation' is rather modulated into one concerning the *province* of government in relation to other elements of the social fabric (such as ecclesiastical polity as a spiritual 'estate' rather than arm of 'the state') through which the human character is nurtured and developed. In this can be observed the irony of the morality of individualism: the existence of a sharp distinction between what is internal to the individual will (as the centre of agency) and the external (social) conditions that act upon it, supplies the ideological basis for the imposition of a single condition of circumstance upon all persons. Every distinct centre of agency constituting a force 'external' to others, the identification of the limits of the range of conditions which it is proper for government to regulate is simultaneously an assertion of a power to determine a form of life that is to be common for all individuals. Nor is this an incidental feature of the practice of moral

²⁴ This identity, or temporal sameness, is capable of interpretation variously as one of material substance (understood, perhaps, biologically), or spiritually, as in the idea of the soul, or will, psyche, ego etc.

individualism, for the possibility of central control can be realised only in relation to that which is fixed and uniform.

The distinction between the mode of existence experienced by ‘the individual’ and those of other possible characters that might be placed at the centre of politics is not merely a semantic one. For that distinction (to repeat) is not a question of the *degree* to which the human person is subject to or determined by external social forces. It is, rather, a question of the direction in which those forces are mustered, and the ends they might be thought to serve. Wisdom in government is then a matter of sensitivity to, and tolerance of, the directive qualities of social forces. Legalism, as we have seen, is subject to an inevitable tendency to consolidate social conditions in a form that favours collectivism, even at the same time as it emphasises the value of individualism. This is true both at the abstract level, where the centrality and emancipatory intent of law promote the coherence of a single system of governance and exhibit intolerance of the diversity of direction associated with the existence of relatively independent centres of power (such as churches, guilds, etc) distributed throughout society; and it is true also at the concrete level. At the level of concrete engagement, the emergence of ‘the individual’ was accompanied by the recognition of a body of human rights that are appropriate to its character.²⁵ The delineation of these rights involved, simultaneously, the delineation also of areas of responsibility, duty, unfreedom etc that correspond to the right when the external conditions of association are contemplated from the internal perspective of the will. Thus, legalism invites a notion of the morality of social engagement as a matter for government (hence the emergence of the idea of ‘political morality’) rather than for individuals or for organised communities of individuals.

Such a morality is naturally interpreted as serving one unified end rather than a multiplicity of ends. By contrast, narrower communities which serve to specify a particular mode of social engagement will not in general share the aims and ambitions for the government of the individual even if they are largely ‘external’ to that character. The moral contexts supplied by interpersonal communities, such as congregations, professional bodies, workers’ unions etc, are generally better given to understanding in terms of the development of that range of personas with which they are concerned, rather than the manipulation of subordinates as pawns sacrificed to some

²⁵ These ‘human’ rights, though conceived in the character of universals, are of course a reflection of ‘the human person’ as presented in the moral idiom of the individual, rather than of the manifold other guises in which it appears throughout the world. See Oakeshott, ‘The Masses in Representative Democracy’ in *Rationalism in Politics*, (above n 4), and R. Geuss, *History and Illusion in Politics* (2001), ch 3.

external end. Of course, modern history (conditioned by the appearance of the individual) discloses the propensity of such communities to embrace just such movements towards tyranny, and the incipient dangers they present of sublimating and finally overwhelming the individual identity. Perhaps the clearest intimation of this can be found in Marxism:

Only when real, individual man reabsorbs into himself the abstract citizen and becomes a species-being, in his everyday life, in his individual work, and in his individual relationships; only when man recognises and organises his '*forces propres*', his own powers, as social powers, and consequently no longer separates from himself social force in the shape of political force: only then will human emancipation be accomplished.²⁶

The moral idiom of 'social man', therefore, might be thought to display subjection to an internal tension of its own, readily lapsing into an antithetical state in which the character of the human person finally loses its identity except as a vehicle for the advancement of the collective existence. There may be truth in this (but, if so, it is a truth that requires skilful application to its historic contexts, such as that of feudalism); yet I believe that it is in this mode of moral thinking, rather than that of legalism, that the character of wisdom in government is finally revealed.

The character of 'wise government' emerges when contemplated in the context of its opposite. The style of government which is associated with a legalist understanding of politics is one that is concerned not, as in the ancient (and to a lesser extent, medieval) world, with the perfection of the human character, its habits, inner attitudes and temperaments; but with the perfectibility of the external circumstances in which this character can pursue its own conception of human flourishing. Here, a collective, political concern with an ideal of human perfection has not disappeared, but has been mutated into the pursuit of social utopias. Even where the reality or value of utopias for the guidance of political decision is doubted, the notion of improvement of the human lot (which gives politics its purposive, non-random character: its *raison d'être* and justification) partakes of essentially the same understanding of the condition of human perfection: one that is not dependent on the cultivation of a particular persona or inward state of grace, but is both concrete and of the here-and-now.

It is worth pursuing some of the ideological consequences of this style of politics. Improvement of the human situation is here understood as a worldly rather than a spiritual condition, roughly to be equated with the degree of independence of each individual will to pursue its own trajectory,

²⁶ Marx, 'On the Jewish Question' in *Early Writings* (1992).

and to achieve a level of mastery over its own situation. Law is then a tool of government central to the creation of this external condition of things. This process of creation is, as we have seen, typically advanced through the rubric of freedom and right, but in practice it requires the bestowal of specific measures of equality where a diversity of conditions would otherwise exist. The character of this politics is thus a reinvention of the Pelagian heresy: an ethical vision in which human perfectibility is realisable by solely human means, and the possibility of which entails the imperative of its pursuit above all other goals. 'The fully autonomous individual' may be the final condition of being associated with the state of perfection, but the pursuit of this ideal must involve the sacrifice of all particular individuals, and their divergent interests, to the final goal.²⁷

The illusion of there being no limits to the sphere in which human powers can meet with potential success in identifying and attaining ends, and the lack of any limitation to the notion of human perfection, naturally invites the accumulation of, and justification for, limitless power at the centre as a means of organising human effort towards the final goal. But it is not the falsity of this vision that is of concern here, but its unwisdom. A society governed along these lines forever trades current effort and hardship for an indefinitely postponed good. Consideration of the deeper implications of this approach shows why this is so.

The politics of modernity contain a vision of human perfection as a profane condition of things, not in the sense of a preferred mode of life but rather the equal value of all possible modes of life consonant with the character of 'the individual'. But this itself is to sanctify a certain set of worldly values, in the form of the mode of life which emerges as dominant given a starting-point from which all things are valued equally. By denying a spiritual dimension to the idea of perfection, no additional meaning can be found in external reality beyond the value that is placed upon it by individual predilection or desire. Thus the spiritual significance of things becomes the equal significance (and thus insignificance) of all things: for, on this political understanding, the goodness or otherwise of a given set of

²⁷ As Kolakowski has noted, there is therefore an affinity between Pelagian thought and the Marxist ideal of the sublimation of the individual to the collective identity: see *Modernity on Endless Trial*, ch 7. See also St Augustine, *Four Anti-Pelagian Writings* (1992). For an alternative understanding of the consequences of Pelagian thought in modern politics see Oakeshott, *The Politics of Faith and the Politics of Scepticism*, ch 2. I do not claim any especial originality for my argument here, but I think it is of sufficient importance to bear another repetition. The terms in which I advance it do, however, differ slightly from those encountered in the sources I have read (being particular to the concerns with which I have chosen to engage).

circumstances from the human point of view depends upon the ascription of meaning to things, not the discovery of meaning within them. But this was always going to be subject to a narrowing of the social meanings of human circumstances, for there are no perfect moral democracies, just as there are no perfect social democracies; merely popular rule and common understanding. From a supposed (though never in fact real) initial position of equality, inevitably comes a narrowing of shared conceptions of the form of life that is possible and desirable.

It was, more than anything, a shared notion of the sacred that gave pre-modern society its stability and coherence by constantly reaffirming in practice its underpinning values. Coherence was largely a cultural phenomenon, whereas the condition of modernity is one in which coherence and stability are seen rather as the function of politics. Modernity brings with it, then, the idea of the 'political culture' of a society as supplying the unity of the state, and thus it incorporates a denial of the separation of politics from culture that is essential to the recognition of the sacred in a form of life. (All political ideologies are, in the end, mutable and subject to revision or abandonment.) The endless pursuit of a postponed good (our conception of which is itself endlessly changing) has led to the neglect of the *logos* as the situation which ought to be contemplated, and thus central to the political system. In this way, the value of the present is subordinated to that of the future, and possibilities for exploring the manifold facets of one's present situation are thereby reduced: for the exercise of 'choice' that is promoted by the value of legalism is related to the pursuit of opportunities which exist *within* a politically agreed mode of existence. But the 'open society' is not finally one in which each person strives to carve out a position according to a single conception of external perfection, but one in which it is possible to explore the *logos* in all of its potential manifestations.²⁸

The manner of governance appropriate to the exploration of the *logos* is that of *laissez-faire*. If we think of governance as imbuing diverse areas of life with clear purpose and direction, then it is clear that the bulk of human activity in society must be mobilised in the direction of collective goals, or else (perhaps, simultaneously) the accumulation of wealth, influence, power etc within the opportunities generated in the pursuit of those goals. Now, if we think of the *logos* as involving the pursuit of a mode of existence, and of its meaning, of which the ends are not grasped except in the activity of pursuing them; and if we regard the final meaning of this mode of life (that is, the values which give it direction) as being only

²⁸ Modernity, accordingly, might be viewed as a denial of the relevance of eschatology to political understanding; but in fact 'the individual' is itself ultimately revealed as an eschatological character.

ever incompletely revealed, and unintelligible apart from the specific activities valued in the context of its pursuit, then it becomes clear that the centralisation of directive forces is likely to lead to cultural and spiritual impoverishment. For the ability to interpret one's situation as of *present* value and significance depends upon the extent to which it is not being directed towards a clearly defined 'end', the desirability of which is in some degree independent of the means of its realisation.

The character of 'wise government' is revealed in its understanding of law. Law, properly understood, is not a means by which government can exercise comprehensive power to vary the conditions of social engagement, but is rather an independent locus of power deriving much of its character from the matrix of existing social institutions which it strives to maintain. Law, then, is the essence of *laissez-faire*, in that it operates to protect the fabric of tradition and habit from the forces of modification and rule: it is an important though derivative element in society not (as it appears in legalism) a determinant of the character of the human person as an 'individual', but rather a reflection of the substance of the various personas through which the human character is illuminated.

The tendency of modernism to denigrate the value of habit and tradition, and its promotion of the value of deliberate rule, is the result of its un wisdom. Its suspicion of conservatism stems from the hatred of hierarchy, inequality and the structures of privilege that habit and tradition serve to entrench. But the zeal to reform these structures, and the ambition which motivates it, are the misguided products of the Pelagian view of the social world. For Pelagianism, beginning from a belief in the possibility of human redemption within history (that is, the ability of humans to bring about a state of earthly perfection through their own collective effort), is subject to a fatal misconception regarding the limits within which human endeavour can bring about a collective improvement of the human lot.²⁹ It is the beguiling vision of a society from which all tensions and injustices have been eradicated that justifies the centralised politics of legalism: not as a finally achievable state, but as an intelligible and coherent ideal. Yet this is not the vision intimated within the view of the *logos* inherited from Christian theology: here, original sin, or the exile from Paradise, denote a form of existence defined by the constant presence of suffering and strife, from which human action cannot release us. By contrast, the politics of modernity presents an alternative (but no less metaphysically derived) understanding of human existence in which the notional recovery of an ideal state is capable of directing political activity. In the grip of this ideal, we oscillate between two incorrect views of the human condition: one in

²⁹ See Kolakowski, 'Can the Devil Be Saved?' in *Modernity on Endless Trial*, 82.

which society is no more than an association between optimally free 'individuals', complete in themselves and related only through law; and the other in which each person is a subordinate part of a collective effort to bring about improvement for all.

Rejecting the modernist view, we are brought to an alternative view of the human condition: as one to which the presence of tensions, inequalities, hardships and hierarchies of privilege are both proper and permanent. It may, indeed, be said that the existence of the deplorable alongside the desirable is what gives the human condition its 'meaning'. This does not entail the sanctification of privilege or inequality, however, for it is probably true that no feature of society is immutable in the face of forces of deliberate revision. But it does throw an alternative light upon the scope and purpose of politics: here, the scope of collective human endeavour relates to the management of social tensions rather than the marshalling of forces for their eventual dissolution. For the dismantling of established hierarchies of position or privilege does not lead to the elimination of all social disparities, but merely the creation of others. It is possible, through organised effort, to effect movement and variation in the distribution of tensions throughout society, but not their disappearance. Understanding this, we may come to a more appropriate conception of the limits inherent in a system of politics, and of the necessity within any system of politics of recognising not only the forms of oppression perpetuated by the conservative elements of society, but also the need constantly to reaffirm and maintain those elements. To lose sight of this is to regard politics only in its transformative aspect; and the pursuit of a blueprint of 'the perfect society' or 'the just' or 'optimal' society is not to bring about a collective improvement to the human condition, but to express contempt for it.³⁰

V. From Here to Eternity

The purpose of the above discussion was not that of contrasting two different forms of society, but rather two different approaches to an understanding of the *same* society. 'Modern' society is not, as is frequently supposed, a form of association from which all eschatological understandings have receded; for (as we have seen) it incorporates a means

³⁰ Among jurisprudential writers it was Lon Fuller who most clearly perceived and articulated this insight: in his constant affirmation of the requirements of stability and continuity in law (see *The Morality of Law*, ch 2), and in his observation that 'the questions involved [in adjudication] are among the permanent problems of the human race' and will thus 'continue to [present men with live questions of choice] once our era has had its say about them.' See 'The Case of the Speluncean Explorers'.

of interpreting the social world in terms of its own vision of human perfectibility. It is a condition characterised, rather, by the reduction of all social understandings to a single eschatology (that of the autonomous individual). For in seeking to bring about measures of equality in social life, the purpose of much of modern politics is to effect the elimination of entrenched hierarchies; and the elimination of hierarchical divisions points to a belief in a single condition of life that is appropriate for all individuals. That this mode of life is understood in terms of 'freedom' is neither here nor there: it is the belief that all individuals should be presented with *the same* range of choices and opportunities which reduces all available modes of life to a single mode. (To learn the truth of this, one need only reflect upon the difficulty in carving out an existence that does not depend to a very great extent upon worldly measures of success, and of the many obstacles that exist in the way of adopting 'alternative lifestyles': consumerism is a condition that is literally irresistible for most people.)

If this is correct, two important points follow. The first is that wise government consists primarily in a search for means of removing obstacles to exploration of the endless possibilities of the *logos*. Perhaps appropriately, the term '*logos*' appears in numerous guises throughout philosophy: it variously appears as an idea of the will (and the world interpreted through the medium of will), as 'the moral law', and as the world as interpreted through the act of giving verbal expression to reality.³¹ Here, however, I use the term to refer to a mode of life interpreted as part of a cosmology, that is, the understanding of human life as one element of a wider metaphysical order, in which the ultimate significance of human actions (of and the human predicament) is apprehended through the experience of attempting to understand that order.³² Interpreted through the perspective of Christian theology (for example), the removal of obstacles appropriate to this condition implies the promotion of the values of 'love'

³¹ See e.g. A. Schopenhauer, *The World as Will and Idea* (new ed. 2004); H. Gadamer, *Truth and Method* (2004), esp. at 420. Other understandings of the idea of *logos* are also present in eastern and western philosophies.

³² My understanding of this term thus bears some resemblance to that recently articulated by Joseph, Cardinal Ratzinger shortly before his confirmation as Pope Benedict XVI: 'Christianity must always remember that it is the religion of the 'Logos.' It is faith in the 'Creator Spiritus,' in the Creator Spirit, from which proceeds everything that exists ... Only creative reason, which in the crucified God is manifested as love, can really show us the way. In the so necessary dialogue between secularists and Catholics, we Christians must be very careful to remain faithful to this fundamental line: to live a faith that comes from the 'Logos,' from creative reason, and that, because of this, is also open to all that is truly rational.' ('Lecture to the convent of Saint Scholastica', Subiaco, Italy, 1 April 2005. Text available at: <<http://www.catholiceducation.org/articles/politics/pg0143.html>>).

and 'charity' over the vices of 'hate' and 'intolerance'. Outside that idiom, it may be taken to refer to the instrumental role of law in nurturing a virtuous and noble disposition, or of encouraging (even embodying) toleration and *laissez-faire*.³³

The second point is that government must inevitably fail to remove *all* obstacles to exploration of the *logos*: that is, there is always the necessity for common rules which modify and restrict the behaviour of all persons as a precondition of social order, and which thus limit the possibilities for personal development. To suppose ultimate success in achieving the ends of government is, therefore, to indulge a variant of the Pelagian view of the world upon the rejection of which wisdom in government depends. 'Wise' government, then, does not entail adherence to any particular set of political standards; nor does it especially favour any particular credo: from this perspective, the substance of the laws of the polity is of less significance than their inspiration and direction. For if obstacles to open-ended human or spiritual development are a permanent feature of social life, the question of *which* obstacles are eliminated is second in importance to the determination of government to pursue a course of *laissez-faire* in place of the attempt to reduce all social hierarchies to specific equalities.

Given the inevitable failure even of wise government to eliminate all impediments to the full exploration of the human condition, what attitude is most fitting for the 'modern' citizen to adopt? The answer, I believe, is that of the detached participant. Just as one cannot avoid being fully immersed within society, neither does one feel entirely 'at home' in the presence of every facet of social practice, custom, rule and policy. This generalised attitude has been variously described in modern philosophy. Renaissance Italian philosophy studied the character of the 'exile', of whom Socrates was the prototype and Dante, perhaps, the epitome. This was a character condemned to live apart from fellow-citizens (whether literally or spiritually), cut off from what is familiar or comfortable and forced to speak (and think in) a different language, and follow foreign laws and customs. The darker tones of Germanic philosophy captured essentially the same attitude by the concept of *angst*. But it is in French existentialist philosophy that the most appropriate manifestation of this attitude is to be found: that of 'irony'. For in irony we find the same essential mixture of detachment-in-immersion present in all of these understandings, but the response, or

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In all such cases, the resulting political ethos can be distinguished from the idea of the 'night-watchman state', in that the overall purpose remains directive towards a specific end (e.g. that of removing prejudice) rather than one of simple withdrawal or minimalism. Likewise, the mode of life sought in the idea of Christian love, or of forbearance, is not primarily one of 'freedom' in the common political sense of that word.

coping mechanism, constituent in the attitude is the lighter one of gentle mockery or amusement; not the defeatism and despair of *angst* and exile. And it is also amusement, and perhaps satire, that more closely approximate to the required attributes of toleration, love and mercy which constitute the objects of wise governance; whereas the disposition of the man of *angst* or exile is seldom charitable or entirely well-meaning.

Fully to understand the relationship between politics and the universal, eternal human predicament, we must (I believe) return to Hobbes. For Hobbes was concerned precisely with the nature of the human character as it exists 'naturally' (in itself) and as it is modified endlessly through social engagement. This is not, of course, to recommend Hobbesian answers: indeed, the greater part of this essay has been concerned with their rebuttal. But it is to suggest a return to Hobbesian questions in place of the rather narrow questions that are pursued with increasingly tight focus in modern jurisprudence. The sentiments of this essay are perhaps best summed up by the remarks of the seventeenth century philosopher Comenius:

In the last place, they led me into still another very spacious lecture room where I saw a greater number of distinguished men than anywhere else. The walls around were painted with stone walls, barriers, picket-fences, plank-fences, bars, rails, and gate staves, interspersed at various intervals by gaps and holes, doors and gates, bolts and locks, and along with it larger and smaller keys and hooks. All this they pointed out to each other, measuring where and how one might or might not pass through. 'What are these people doing?' I inquired. I was told that they were searching for means how every man in the world might hold his own or might also peacefully obtain something from another's property without disturbing order and concord. 'That is a fine thing!' I remarked. But observing it a while, it grew disgusting to me.

... For, in the first place, I noticed that the barriers enclosed neither the soul, the mind, nor the body of man, but solely his property, which is of incidental importance to him; and it did not seem to me worthy of the extremely difficult toil that was, as I saw, expended upon it.³⁴

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J. A. Comenius, *The Labyrinth of the World and the Paradise of the Heart* (1998), ch 15: 'The Pilgrim Observes the Legal Profession'.