

Individualistic and Communitarian Theories of Justice: An Historical Approach

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I.

Whether justice rests primarily on individualistic or primarily on communitarian foundations is a question that has exercised the minds of moral and political philosophers in the United States in recent decades. It is, of course, an age-old question; indeed, the main purpose of this Article is to show that only by seeing it as such, that is, only by seeing the question in historical terms can we resolve the question satisfactorily. Nevertheless, I start with the contemporary formulation of the question in the well-known debate between the moral philosopher John Rawls and the political philosopher Michael Sandel.

In his 1971 book *A Theory of Justice* Rawls based his moral theory of justice on a concept of the primacy of individual rights, which, in his view, are derived ultimately from individual liberty.¹ Rawls defined justice as a product of the rational choice of individuals in giving up to society only so much of their liberty and equality as is necessary to prevent arbitrary interference in the liberty and equality of others. Replying to Rawls in his 1982 book *Liberalism and the Limits of Justice*,

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¹ Rawls states that when people engage each other in a social contract (or “mutually advantageous cooperative venture”), each possesses the same liberty as every other and none may be required to sacrifice more than any other. J. RAWLS, *A THEORY OF JUSTICE* 11 (1971). From the postulate of equal liberty, Rawls draws a definition of “justice as fairness.” *Id.* at 60. The first principle of justice, he writes, is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” *Id.* at 112. “The principles of justice” are those that “free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.” *Id.* at 150-51.

Sandel contended that any theory of justice must be based primarily on public rather than private ends, and that once the primacy of the community is recognized, then justice itself is seen as only an intermediate and not, as in Rawls's theory, a final goal.² Although a number of legal scholars have found this debate to have relevance to jurisprudence,³ the main participants themselves have avoided reference to law and legal institutions and have confined themselves almost exclusively to philosophical argument of a moral and a political character.⁴

The terms of the debate have been sharply criticized from the standpoint of both moral philosophy and political philosophy. From the former standpoint, Edgar Bodenheimer has shown that human nature contains both individual and social characteristics and that injustice results unless a symbiosis of these two conflicting sets of characteristics is achieved.⁵ From the standpoint of political philosophy, Richard Rorty

² Contesting Rawls's statement that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought," Sandel argues that "justice can be primary only for those societies beset by sufficient discord to make the accommodation of conflicting interests and claims the overriding moral and political consideration. . . ." M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 15 (1982). Thus, Sandel sees justice as arising not from an abstract initial position of the equal liberty of all individuals in society but rather from specific social circumstances of discord and conflict within a community. *Id.* at 31.

³ An impression of the intense interest and raging controversies which Rawls's work elicited may be gained from *JOHN RAWLS AND HIS CRITICS: AN ANNOTATED BIBLIOGRAPHY* (J. Wellbank, D. Snook & D. Mason eds. 1982). Citations to writings of legal scholars include items B8-B12 (Ackerman), B208 (Bickel), B348-B350 (Calabresi), B384 (Cavers), B481 (D'Amato), B607-B612 (R. Dworkin), B1496-B1503 (Michelman), B2215-B2217 (Stone), and many others.

⁴ Rawls devotes some pages to a discussion of law, which he views as a system of restrictions of liberty necessary for the maximization of liberty. See J. RAWLS, *supra* note 1, at 235-53. Sandel addresses law in a footnote which refers to Alexander Bickel's designation of law as "the value of values," that is, "the principle institution through which society can assert its values." Sandel adopts Bickel's phrase "value of values" to define not law, but justice. M. SANDEL, *supra* note 2, at 16 n.1.

⁵ See Bodenheimer, *Individual and Organized Society from the Perspective of a Philosophical Anthropology*, 9 J. OF SOC. & BIOLOGICAL STRUCTURES 207 (1986). Bodenheimer lists in some detail affirmative aspects of both the individual and social interpretations of human nature. He states: "The concept of justice prevailing in a symbiotic society would require that individual rights (especially the rights of liberty, equality, and security) be recognized to the greatest extent compatible with the common good." He defines the common good not in Benthamite terms of the sum total of private goods but in terms of "the highest material and cultural development of society." *Id.* at 224.

Defending Rawls against Sandel, C. Edwin Baker argues, in effect, that Rawls has undertaken a fundamentally different enterprise from the one that Sandel attacks.

has shown that Rawls's concepts of individual rights and individual liberty are not based on a theory of human nature (as they seem to be at first reading) but rather (as Rawls himself has admitted in later writings) on the specific twentieth-century American experience of democratic individualism.⁶ Rorty nevertheless defends Rawls' "American" definition of justice and challenges Sandel and others who espouse communitarian values to defend them in political terms and not to disguise them in arguments based on metaphysics or on philosophical anthropology.⁷ Rorty, in short, proposes that the philosophers should turn from the search for a definition of justice based on universal moral values and a universal human nature and should confront the essentially political question whether in the United States today individual rights or community values should be treated as the ultimate foundation of justice.⁸

Rawls, according to Baker, "emphasizes people as rational and autonomous agents concerned with advancing their individual interests" *not* because he considers that "this conception of the person is empirically or historically accurate, or even that it is a relevant conception of the person for other purposes," but only because it is useful to view them as such in order to construct a theory of justice. Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895, 901 (1985). If that is so, one might ask, "What kind of theory of justice can be constructed on the basis of so abstract a theory of the person?" The answer must be, "A very abstract theory of justice." One might also ask, "Could we not construct a different theory of justice, equally valid, and equally abstract, by emphasizing the nonrational and communitarian aspects of human nature?"

⁶ R. RORTY, *THE PRIORITY OF DEMOCRATIC POLITICS TO PHILOSOPHY* 12 (1988) (unpublished manuscript on file with *U.C. Davis Law Review*) to be published in *THE VIRGINIA STATUTE OF RELIGIOUS FREEDOM* (M. Peterson & R. Vaughan eds. 1988).

⁷ *Id.* at 38-40. Rorty writes:

I would urge that the communitarian make his or her point against the liberal on the liberal's own ground: in terms of history and sociology rather than philosophy What [communitarian critics of liberalism] propound is the *need* for . . . a theory [of the nature of the self]: something philosophical, we know not what, to set over against the Enlightenment vision of the self. We are told that "individualism is bankrupt" and that we need something to put in its place — something more like what the Greeks or the medievals had — but nobody claims to know what that might look like I think that communitarian critics might avoid this tone of wistfulness, and make their arguments more relevant to our current problems, if they stuck to the political question "How might we combine democratic institutions with some of the advantages in respect to a sense of common purposes which pre-democratic societies enjoyed?" and dropped the philosophical question "What is wrong with the Enlightenment concept of the self?"

Id.

⁸ *Id.* at 44-45. Rorty writes:

Although the main protagonists have almost totally neglected the legal aspects of the question, the debate between philosophical liberalism and its opponents has strong overtones of the ancient jurisprudential argument between natural law theory and legal positivism. Classical natural law theory, as Lloyd Weinreb has recently shown, is based ultimately on a concept of either fate or providence; it presupposes that the universe itself, including human life, is not only existential but also normative and that it contains an objective standard by which the legality of positive laws are to be judged.⁹ Classical legal positivism, in turn, rests ultimately on a concept of the absolute lawmaking power of government; like natural law theory, however, it presupposes the legitimacy of the state and, in addition, the fundamental objectivity and consistency of the body of laws through which the state exercises its authority.¹⁰ Prior to the twentieth century, the conflict between these two classical schools of legal theory turned on the question of the ultimate source and the ultimate sanction of law: whether, in the last anal-

Communitarian critics tend to agree with Sandel that "the deontological vision is flawed, both within its own terms and more generally as an account of our moral experience." I have been arguing that it is not, as Sandel thinks, flawed in its own terms. It will seem that way only if one attributes to it a philosophical project which it self-consciously eschews. The question of whether it is flawed as an account of "our moral experience" depends upon whether "our" means "human moral experience in general" or "the moral experience of the Americans." I have been arguing that there is no such thing as the former. The price for systemizing our own moral intuitions is to give up the universalism of Enlightenment, to drop the idea that human beings as such share some single "moral experience," along with the idea that they share a single "moral sense." If one settles for a self-consciously ethnocentric sense of "our moral experience," then I think the account Rawls provides is the best we have had so far.

Id.

⁹ Weinreb traces shifts in natural law theory from Homer to the present. He shows that for the Greeks, natural law rested on a belief in a normative order in nature, and that today, as well, "[t]he vitality of contemporary natural law theories is due to their insistence on an objectively valid moral order." See L. WEINREB, *NATURAL LAW AND JUSTICE* 12 (1987).

¹⁰ Current expositions of positivism assimilate the concept of the state's legitimacy ("sovereignty") to the habit of rule and obedience and reduce the concept of the consistency of rules to the formalism of a closed system. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 49 (1961) ("in every human society, where there is law, there is . . . to be found . . . this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one."); *id.* at 253 (the term "legal positivism" designates the contention "that a legal system is a 'closed logical system' in which correct decisions can be deduced from the predetermined rules by logical means alone").

ysis, they are to be found in morality ("justice") or in politics ("order"). In recent generations, however, this issue has been reduced to much narrower terms. Contemporary legal theorists have divided over the question whether, as natural law theorists assert, a law that contravenes fundamental morality lacks the character of legality and is therefore not binding as law, or whether, as positivists assert, it remains a law, since it expresses the will of the sovereign.¹¹ To the credit of moral and political philosophers such as Rawls and Sandel, it may be said that they have revived larger questions concerning the nature and inter-relationship of liberty and equality, of remedial and distributive justice, and of what they call "the right" and "the good." Yet they, too, have narrowed the focus of the classical inquiry into these aspects of justice by reducing it largely to a debate concerning priorities among competing values.

Moreover, by omitting law from their inquiry into the nature of justice, philosophers such as Rawls and Sandel tacitly accept a positivist definition of law. That is, they assume that justice is essentially a moral category, to be defined by reason alone, and that the definition of justice which is provided by law itself, whether explicitly or implicitly, is immaterial and perhaps irrelevant to the definition offered by reason. This assumption carries a strong negative implication that law is, as the positivists say, a body of rules laid down by the lawmaker, to be judged solely by a morality derived from outside itself; that it is essentially a product of will; and that reason is to be introduced from outside the law as a criterion by which to evaluate it. To this the natural law theorist would respond that law also consists of standards and purposes, that is, it has its own internal morality,¹² a meta-law,¹³ and that legal

¹¹ L. WEINREB, *supra* note 9, at 4, criticizes the reduction of the debate to a question of the source of the obligation to obey the law. In an earlier Article, Weinreb stated that at the merely ethical level "it is very hard indeed to explain the fuss that is made in legal philosophy about the debate between natural law and legal positivism." See Weinreb, *The Natural Law Tradition: Comments on Finnis*, 36 J. LEGAL EDUC. 501 (1986). Of particular relevance to the present article is a penetrating essay by Frank S. Alexander in which he criticizes both legal positivists and natural law theorists for failing to deal with ontological questions concerning the purposes of law in the fulfillment of both individuality and community. See Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1090 (1986).

¹² This was the argument of Lon L. Fuller in *The Morality of Law* (2d ed. 1969). Fuller, who died in 1978, did not regard himself as an adherent of a "system of natural law" but rather as a critic of legal positivism who used "the natural-law method." Letter from L. Fuller to T.R. Powell (undated), reprinted in L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 296 (K. Winston ed. 1981). Fuller wrote the letter in response to Powell's review of Fuller's 1940 book, *The Law in Quest of Itself*. Fuller contended

justice — justice based on law — is entitled to at least equal weight in determining the meaning of justice as that which the philosophers attach to such universal concepts as human nature, the social contract, and the interrelationship of the individual and the community. The natural law theorist acknowledges that different legal systems contain different concepts of justice, but insists that nevertheless they all share certain common moral features.

It is doubtful that the debate concerning the nature of justice, whether in its classical or in its contemporary forms, can be resolved, or can even make sense, without reference to the historical context, including especially the legal historical context, in which justice and rights, individual and community, occur. The answer to the question, “Which comes first, the individual or the community?” does indeed have a moral dimension (although Professor Bodenheimer is surely right in stressing that the fundamental moral problem is to maintain the proper balance between the two). It also has a political dimension (although Professor Rorty is surely right in stressing that the political answer

that laws must be understood in terms of their purposes, and also in terms of the purposes of the legal enterprise as a whole, and that those purposes include moral, and not only political, purposes. Thus, a law or legal rule is to be interpreted in such a way as to fulfill its legitimate purposes. Conversely, a retroactive penal law or a law or procedure which condemns a person without a hearing may be said to lack inherent qualities of legality.

Perhaps partly because Fuller insisted on combining analytically what law (or a law) is with what it ought to be, and partly because he wrote in a style generally accessible to all persons educated in law, and not in the polemic style of contemporary professional legal philosophers, his writings have not been sufficiently understood or appreciated by those philosophers. Several recent articles have remedied this situation to some extent. See Moffatt, *Lon Fuller: Natural Lawyer After All*, 26 AM. J. JUR. 190 (1981); D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JUR. 202 (1981); MacNeil, *Lon Fuller: Nexusist*, 26 AM. J. JUR. 219 (1981); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986) [hereafter Teachout, *The Soul*]; Alexander, *supra* note 11, at 1113-22, 1124-26; see also, R. SUMMERS, *LON L. FULLER* (1984), an important book which, however, in my view has not done justice to Fuller's thought. Cf. Teachout, *The Soul, supra*. John Noonan has referred to Fuller as “probably the most creative mind in modern American jurisprudence.” Noonan, *Hercules and the Snail Darter*, N.Y. Times Book Rev., May 25, 1986, at 12, col. 3 (reviewing R. DWORKIN, *LAW'S EMPIRE* (1986)).

¹³ Cf. H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 8 (1983) (“The law contains within itself a legal science, a meta-law, by which it can be both analyzed and evaluated.”). This book develops the point that the law consists not only of legal institutions, legal rules, legal decisions, and the like, but also of legal science, that is, the legal scholarship of professors, judges, and others whose conceptualization and systematization of those institutions, rules, and decisions are often incorporated into the law and help to give it direction. *Id.* at 120-64.

depends on which type of polity is presupposed).¹⁴ But it also has an historical dimension. A good deal depends on which did actually “come first,” as well as on what happened thereafter and on what is anticipated for the future — since history includes not only material facts but also the hopes and fears that surround those facts. Both the moral need to strike the right balance between individualism and communitarianism and the political need to strike that balance in light of the prevailing institutions of a particular polity must be judged in the light of the long-range historical development of the society in which such moral and political questions arise. The introduction of a long-range time perspective into both the philosophical and the political arguments substantially changes their character.

It was precisely this point which in 1814 led the great German jurist Friedrich Carl von Savigny, inspired in part by the writings of Edmund Burke, to found a third school of legal theory, the historical school, in opposition to both natural-law theory and legal positivism.¹⁵ Unfortunately, the historical school has been greatly misunderstood and ultimately almost abandoned by almost all American legal theorists — though not by American courts — in the twentieth century. I have argued elsewhere that it is necessary to restore and revitalize the historical school and to combine it with natural law theory and with legal positivism in a new “integrative” jurisprudence, in which the virtues of each approach — the moral, the political, and the historical — would be maintained and its vices corrected.¹⁶ In the present Article, dedicated to Professor Bodenheimer on his eightieth birthday, I shall not repeat that argument but shall attempt to apply an historical method to the debate between adherents of an individualistic and a communitarian theory of justice.

II.

To apply an historical method requires that a choice be made: whose history? what history? May one answer the question, “What is jus-

¹⁴ This is implicit in the title of Rorty’s essay, see R. RORTY, *supra* note 6.

¹⁵ See F.C. VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (A. Hayward trans. 2d ed. 1840); F.C. VON SAVIGNY, *ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (A. Hayward trans. 1831). For a discussion of Savigny’s contribution and the fate of historical jurisprudence in America in the 19th and 20th centuries, see Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, to be published in June 1988 in the *California Law Review*.

¹⁶ Berman, *supra* note 15.

tice?" by reference to the history of China? And if so, would one choose the Ming dynasty? the Cultural Revolution? Undoubtedly, the many ambiguities that lie in the term "history" contribute to the philosophers' inclination to reject it as a criterion of justice. Reason and/or power seem to them to be more certain criteria.

It should be noted that Western philosophers have their own history, namely, the history of ideas, and they commonly analyze the meaning of justice by tracing similarities and differences among the various philosophical schools that have analyzed the meaning of justice in the past, starting with Plato and Aristotle. Although they might occasionally discuss concepts of justice found in the writings of Chinese or other non-Western philosophers, they basically write in a tradition which traces its lineage from ancient Greece across the "Middle Ages" to Spinoza, Hobbes, Locke, Hume, Kant, Hegel, and ultimately into the philosophical morass of twentieth-century Europe and America. That is *their* history.

Even from the viewpoint of intellectual history, this genealogy is far too limited. Western theories of justice must be traced not only to ancient Greek philosophy but also to ancient Hebrew moral and religious thought and ancient Roman law. It was the remarkable achievement of the European schoolmen of the late eleventh and twelfth centuries to have combined, for the first time, these three diverse and even mutually antagonistic outlooks — the Hebrew, the Greek, and the Roman — and to have founded on that combination the modern Western disciplines of theology, philosophy, jurisprudence, and political science.¹⁷ Only in the seventeenth century did the latter three disciplines break off from theology, and only in the nineteenth and twentieth centuries did they break off from each other. To this day the concept of justice is a primary concern of each of them and although each attempts to impose its concept of justice on the other, each by the same token must reckon with the others.

At the same time they all must reckon with the fact that justice is not just a matter of intellectual inquiry. It is not an abstract concept, like beauty, which exists solely in the mind; it is also a profession, or call-

¹⁷ The pioneers in theology include Anselm of Canterbury (1033-1109) and Peter Lombard (1100-1160); in philosophy, Abelard (1079-1142); in jurisprudence, Irnerius (about 1060-1125) and Gratian (dates unknown; his great treatise is usually dated 1140); in political science, John of Salisbury (1115-1180). Of these, the only controversial person is John of Salisbury, since contemporary scholarship in the history of political science prefers to trace the modern discipline to Machiavelli (1469-1527) or possibly Marsilius of Padua (c.1280-c.1343). On John of Salisbury and his significance to the history of political science, see H. BERMAN, *supra* note 13, at 276-88.

ing, something which is practised, like art. Our Western concept of justice is ultimately derived less from the several scholarly disciplines which claim it, than from the history of our political and legal and other social institutions.

The history that we must study then, in order to find answers to the question, "What are the interrelationships between individual rights and community interests in a definition of justice?" — is *our* history, that is, Western history, since it is out of that history that the question has arisen among us. But it must be our entire history, and not only our intellectual history; and more particularly, it must include the history of those political and legal institutions which have purported to attempt to put justice into practise.

The particular parts of our history that we must study are those parts which are most relevant to the question. In a multi-volume historical study we would want to examine various periods in which critical conflicts arose between an individualistic and a communitarian concept of justice. In a short article such as this, a beginning might be made to such a multi-volume study, first, by focusing on a time when the peoples of Europe did not distinguish between a justice based on individual rights and a justice based on community interests; second, by focusing on the conditions and circumstances that eventually gave rise to that distinction; and third, by considering what light those conditions and circumstances shed upon the nature of the distinction.

More specifically, I propose to approach the question, "What is justice?" by asking the question, "What *was* justice in Europe in the year 1000 and how had it changed by the year 1200?" This more specific question is relevant because in Europe prior to the year 1000 a wholly communitarian conception of justice prevailed, whereas by the late eleventh and twelfth centuries the concept of individual rights was articulated for the first time and a legal order was developed in which individual rights were protected as essential parts of the system of community interests.

III.

The best evidence of what justice *was* in Europe in the year 1000 is to be found in the type of law that prevailed at that time among the numerous tribal groups ("stems") which inhabited that continent.¹⁸ De-

¹⁸ Cf. *id.* at 49-84, *The Background of the Western Legal Tradition: The Folklaw*, from which the following pages are adapted and in which citations to sources may be found. At page 81 a map illustrates the areas of Europe inhabited by the various tribes, of which the Germanic tribes were the most numerous. In this Article, reference is

spite their independence from each other, and indeed, the hostility which often existed among them, these Germanic, Celtic, Romance, and other peoples lived under legal institutions that were remarkably uniform. Moreover, European legal institutions in the year 1000 corresponded in many respects to those of other cultures in which tribal organization has prevailed. Thus, legal historians have classified the European folklaw of the sixth to tenth centuries as a type of "archaic

made to the Germanic folklaw and the European folklaw, more or less interchangeably.

Several reviewers of *Law and Revolution* have not dealt kindly with my treatment of the European folklaw, and although this is not the place for a detailed refutation of their comments, it may nevertheless be appropriate to note several points that bear on an understanding of the following pages of this Article. Four main criticisms have been made: (1) It has been claimed that I underestimated the sophistication of the Germanic folklaw and depicted Germanic society in a condescending or patronizing way. I leave it to the reader of this Article to judge whether the stress placed on the communitarianism of the Germanic peoples is condescending or patronizing. As far as the formalism of the Germanic folklaw is concerned, and especially of such features as trial by ordeal and by compurgation, these are explained in the book (as in this Article) partly as a reflection of a belief system based on fate and honor and partly as an effective means, within that system, of peaceful settlement of conflict. (2) It has been asserted that the Germanic peoples are erroneously treated in the book as homogeneous. In fact, at least two references are made in the book to the diversity and independence of the various tribes. *Id.* at 52, 61. It is true, however, as stated in those pages, that their laws were "nevertheless remarkably similar," and that there was among them "a common legal style." (3) It has been said that the book presents the history of the Germanic peoples over five centuries as static. In fact, a whole section of the chapter in question is devoted to "dynamic elements in Germanic law." *Id.* at 62-68. To be sure, the dynamic elements affected chiefly the official law and only gradually and slightly the main features of the folklaw. SIR FRANK STENTON'S *ANGLO-SAXON LAW* (3d ed. 1981) has been cited in opposition to this view. Yet Stenton states: "In most of its details, the law observed by the Englishmen in 1087 was . . . the law of Cnut and Aethelred II [almost a century earlier]," and his treatment of "the laws observed by the Englishmen" under those kings does not show marked differences in general nature and style from the laws of the prior two or three centuries. H. BERMAN, *supra* note 13, at 68. (4) The thesis that Germanic folklaw was diffused in the entire political, economic, and social life of the community also has been criticized, and reference has been made to an article by Reynolds, *Law and Communities in Western Christendom, c. 900-1140*, 25 *AMER. J. LEGAL HIST.* 205 (1981). Yet that article supports, rather than negates, my point. It states that only in the 12th century did the law become "more differentiated, less diffused," with the rise of a new legal learning which "threatened the old supremacy of unlearned, collective judgement." *Id.* at 223. In her 1984 book, Reynolds does indeed attack those who treat the law of the 10th and 11th centuries as "rigid, formalist, and essentially irrational." S. REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE, 900-1300* at 13-14 (1984). However, that does not challenge the fact that 12th and 13th century jurists criticized the rigid, formalist, and irrational features of the earlier law.

law," bearing some strong similarities to what cultural anthropologists have called "primitive law."

The European folklaw had the following features in common with other systems of archaic and primitive law:

(1) It was largely tribal and local.

(2) It was largely customary; that is, it was largely unenacted and unwritten. There were no professional lawyers or judges or other law enforcement officials. There were no legal scholars and no law books. Very rarely a strong king might issue a collection of laws, but such collections (of which there were perhaps a score or more throughout Europe in the course of five centuries) usually consisted chiefly of re-statements of those customs that needed clarification or reinforcement.

(3) The community itself administered and enforced the law. Characteristic means of law enforcement were the judicial outcry which summoned the local community to pursue a criminal, collective group responsibility for offenses committed by a member, public assemblies in which the great people met to hear grievances and to administer the affairs of the tribe or region, and the ultimate sanction of outlawry. These elements of the folklaw were diffused in the entire political, economic, social, and religious life of the community.

(4) The folklaw was greatly concerned with controlling violence between households. Such violence often took the form of a blood feud, which was controlled in part by a system of fixed tariffs (*wergeld*, *bot*) payable by the kin of the offender to the kin of the victim. The system aimed at the negotiation of a peaceful settlement among the feuding parties.

(5) Control of deviance also took the form of community judgments and community sanctions of a formalistic and ritual character appealing to a supernatural authority. Characteristic procedures for determining liability were the ordeals of fire and water and proof by formal oaths recited by supporters of the opposing parties (compurgation).

(6) The folklaw had a sacred character. Especially among the Germanic peoples, who were the most numerous in Europe, a high value was placed upon honor, in the sense of getting even, as a means of winning glory in a world dominated by warring gods and by a generally hostile and arbitrary fate. The belief in fate underlay not only the ordeals but also compurgation, in which the oaths had to be repeated flawlessly, "without slip or trip," as well as noxal surrender, that is, the forfeiture of the instrument that caused an unlawful injury (for example, an offending beast), and even the trials that took place before public assemblies, in which the parties hurled oaths at each other instead of blows. The same word, "doom," meaning judgment, was used to refer to a decree of fate and to the outcome of a trial. In the words of

Beowulf, "Often Fate saves an undoomed man, if his courage is good."¹⁹

(7) At the same time, Germanic law emphasized comradeship and trust, especially (but not only) within the extended household. Collective protection of the members of a household, in Anglo-Saxon law called *mund*, and preservation of the peace of the group, called *frith*, were highly valued. Also justice, called *riht* (Right), was highly valued, and was associated with comradeship and trust.

In addition to features characteristic of archaic or primitive law, the law of the European peoples of the sixth to the eleventh centuries contained certain unique features. Many of these were attributable to the introduction of Christianity. Others were attributable to the strengthening — partly under the influence of Christianity — of kingship, especially among the Franks and the Anglo-Saxons. These factors — the religious and the royal — introduced a dynamic element into the tribal and local folklaw.

Features of early European law attributable at least in part to the spread of Christianity include the following:

(1) In adopting Christianity, rulers were transformed from tribal chiefs into kings, whose authority could extend to many tribes. Although they were no longer treated as descendants of gods, the kings nevertheless remained sacral figures. They were the supreme religious leaders of the peoples under their rule, appointing bishops and dictating liturgical and other ecclesiastical matters.

(2) Conversion to Christianity gave an impetus to the writing down of the tribal customs in primitive collections such as the Salic Law of Clovis, the first Christian king of the Franks, and the Laws of Ethelbert, ruler of Kent, the first Christian king in England.²⁰ Writing, generally introduced by Christian missionaries, strengthened the incipient jurisdiction of public authorities to punish the most serious forms of crime. Also, the writing down of customs gave authorities an opportunity to make changes in them. The Christian clergy, who became the king's advisers, wanted protection. For example, the Laws of Ethelbert begin: "Theft of God's property and the Church's to be compensated

¹⁹ *Beowulf*, lines 2140-41; see also THE ICELANDIC SAGA: THE STORY OF BURNT NJAL (Sir G.W. Dasent trans. 1957), in which the spirit of heroism and vengeance is exemplified in dramatic proceedings before the tribal judicial assembly.

²⁰ Clovis issued the Salic Law shortly after his conversion to Christianity in 496. The *Laws of Ethelbert* were issued about 600, a few years after Ethelbert's conversion. These are discussed in H. BERMAN, *supra* note 13, at 53-54, 64-65, 565-66, 568-69.

twelvefold."²¹

(3) Christianity introduced a new moral element into the folklaw. The laws of King Alfred begin with the Ten Commandments, and contain references to the monastic rules on penances for sins. They include such striking provisions as: "Doom very evenly; doom not one doom to the rich another to the poor, nor doom one to your friend another to your foe."²² Gradually, between the sixth and the eleventh centuries, the European folklaw, with its overwhelming biases of sex, class, race, and age, was affected, if only slightly, by the Christian doctrine of the fundamental equality of all persons before God: woman and man, slave and free, poor and rich, child and adult. The Church also added to the system of oaths and oath-helping the doctrine that perjury was a sin and that one who perjured himself had the duty to confess the sin to his priest and be subjected to penitential discipline. Other obstructions of justice were also considered to be sins — for example, persistence in a blood feud after a reasonable offer of satisfaction.

(4) Beginning in the sixth century there developed alongside tribal folklaw a system of private penance with secret confession by each individual to a priest and secret imposition of the duty to perform penitential acts. An elaborate system of penances was introduced for particular types of sins or crimes (the two terms were used interchangeably). These were embodied in written codes, called "penitentials," which varied among the different monasteries and bishoprics.²³ The usual sanction was expressed in terms of a certain number of days, months, or years of fasting, but there were also many alternative types of atonement, including prayers and vigils, reading of psalms, and pilgrimages as well as compensation of victims and assistance of their relatives. The idea of punishment was subordinated to the idea of the cure of souls. All major secular offenses, such as homicide and robbery, were also sins to be atoned for by penance; and all major ecclesiastical offenses, such as sexual and marital sins, witchcraft, and breaking of vows by monks, were also crimes prohibited by the folklaw and subject to secular sanctioning. Thus, the folklaw and the penitential law covered the same

²¹ *Laws of Ethelbert* § 1, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 4 (F.L. Attenborough trans. 1963).

²² The *Laws of Alfred* are translated in *id.* at 62-93. The *Laws of Alfred* begins with the Ten Commandments, and includes the golden rule, "do unto other as you would have them do unto you," followed by the statement, "From this one doom a man may remember that he judge everyone righteously; he need heed no other doom book." *Id.* Alfred ruled from 871 to 900.

²³ The penitentials are analyzed in some detail in H. BERMAN, *supra* note 13, at 68-75.

ground but in different ways. The writings of the period from the sixth to the eleventh centuries referred to the two ways as worldly law, or man's law, on the one hand, and God's law, on the other. Yet what are called today the state and the church were both equally concerned with each kind of law. For example, emissaries (*missi dominici*) sent by Charlemagne to check on local administration addressed his subjects as follows: "We have been sent here by our Lord, the Emperor Charles, for your eternal salvation, and we charge you to live virtuously according to the law of God, and justly according to the law of the world."²⁴ It was only through virtuous living according to the law of God that the Christian was to avoid eternal punishment in the world to come.

(5) Beginning in the eighth century, kings extended their household law (their "peace") beyond their own families, friends, servants, and messengers. More offenses became triable before the king. Treason, intentional homicide, and adultery were made capital offenses. In 973 King Edgar, in a coronation oath composed by Archbishop Dunstan of Canterbury, swore that "true peace" should be assured to all "Christian people" in his kingdom, that robberies and "all unrighteous deeds" should be forbidden, and that "justice and mercy" should govern all judgments.²⁵ The Frankish emperors had for some time sworn similar oaths. Eventually, royal officials were appointed to supervise local assemblies and other administrative devices were used to maintain royal influence over the tribes and the localities. Royal delegates summoned inquests and interrogated witnesses. An official law grew up alongside the folklaw. The official law drew on some of the rules and some of the terminology that had survived from the Roman law as it had existed in the territories conquered by the invading Germanic people. There was, in effect, a reception, and at the same time a vulgarization, of Roman law.²⁶ Yet the official law was extremely weak, if only because prior to

²⁴ Quoted in C. DAWSON, *THE MAKING OF EUROPE* 218 (1932). Charlemagne reigned from 768 to 814. He had himself crowned emperor by the pope in 800. His authority as ruler was derived partly from his military leadership of the various peoples over whom he reigned, whose armies he mobilized to resist invasions from Arabs, Saxons, Danes, and Slavs, and partly from his religious role as head of the church and deputy of Christ. As Dawson writes, "Charles regarded the Pope as his chaplain, and plainly tells Leo III that it is the King's business to govern and defend the Church and that it is the Pope's duty to pray for it." See H. BERMAN, *supra* note 13, at 66-67.

²⁵ 8 Aethelred 2, in *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I* 119 (A. Robertson ed. 1925).

²⁶ Several reviewers of *Law and Revolution*, H. BERMAN, *supra* note 13, from which the present section of this Article is adapted, criticized the book for failing to emphasize that Roman law survived in the West after the fall of the Western Roman Empire. In fact, the survival of some of the terminology and concepts and many of the

the late eleventh century the European economy was almost entirely local and the monarch had to travel with his household continually throughout his realm to hold court. Royal delegates tended to be swallowed up by the localities which they were supposed to administer in the king's behalf or else they became their own masters. There was virtually no royal law of contract, or of property, or of landlord and tenant, and very little royal law of crime and tort. The written collections of laws which kings occasionally promulgated, setting forth customs that needed to be better known or more firmly established, were not legislation in the modern sense but were rather exhortations to keep the peace and do justice and desist from crime. The king had to beg and pray, as Maitland put it, for he could not command and punish. Indeed, Germanic laws contain provisions stating that when a person has exhausted his opportunities in the local courts, he should *not* go to the king for a remedy.

(6) Christianity attacked the pagan myths, with their emphasis on honor and fate. It brought to Germanic man a positive attitude toward life and toward death, a larger purpose into which to fit the tragedies and mysteries of his existence. In the "Addition" to his translation of the sixth-century Roman philosopher Boethius, King Alfred wrote, "I say, as do all Christian men, that it is a divine purpose that rules, and not fate." But Germanic Christianity did not openly challenge Germanic social institutions. Its message was otherworldly. It was concerned above all with preparation for the life to come — heaven and hell — through prayer, personal humility, and obedience. Its ideals were symbolized above all in the lives of holy men and in monasticism, with its emphasis on spiritual withdrawal from the temporal world. It did not oppose ordeals, compurgation, *wergeld*, and other features of the European folklaw; it only said that they could not bring salvation. Outside the monastic orders, the majority of bishops and priests of the church became, in fact, wholly involved in the corruption and violence

rules of Roman law, both in the canons of the church and in the folklaw and official law of some of the Germanic peoples, is fully acknowledged and discussed in various parts of the book. *See id.* at 3, 67-68, 122, 471, 565. Nevertheless, the point is also stressed that Roman law did not survive as a living body of law by which the peoples of Western Europe were governed. It survived, so to speak, in bits and pieces. If that fact is not accepted, it is foolish to attach to the work of the glossators and canonists of the 12th century the great importance that everyone agrees it had in the development of new legal systems. One cannot have it both ways: either the "vulgar" Roman law of the 6th to 11th centuries was of much less importance than some scholars suppose, or the revival of Roman law in the 12th century was much less important than those same scholars acknowledge.

that characterized the age; this was inevitable because they were generally appointed by leading politicians from among their friends and relatives. Christianity was Germanized at the same time that the Germanic peoples were Christianized.

In summary, we may say that in the year 1000 all of the peoples of Europe had similar legal orders, each with its own customary rules and procedures for governing, for punishing offenses, for compensating for harm, for enforcing agreements, for distributing property on death, and for dealing with many other problems related to justice. But none had a consciously articulated and systematized structure of legal institutions clearly differentiated from other social institutions and cultivated by a corps of persons specially trained for that task. As in many non-Western cultures, the European folklaw was not a body of rules imposed from on high but was rather an integral part of the common consciousness of the community. The people themselves, in their public assemblies, legislated and judged; and when kings asserted their authority over the law it was chiefly to guide the custom and the legal consciousness of the people, not to remake it. The bonds of kinship, of lordship units, and of territorial communities were the law. If those bonds were violated, the initial response was to seek vengeance, but vengeance was supposed to give way — and usually did — to negotiation for pecuniary sanctions and to reconciliation. Adjudication was often a stage in the reconciliation process. And so peace, once disrupted, was to be restored ultimately by diplomacy. Beyond the question of right and wrong was the question of reconciliation of the warring factions. The same can be said also of the law of many contemporary so-called primitive societies of Africa, Asia, and South America, as well as of many ancient civilizations of both the past and the present.

Before the professionalization and systematization of law, more allowance was given for people's attitudes and beliefs and for their unconscious ideas, their processes of mythical thought. This gave rise to legal procedures which depended heavily on ritual and symbol and which in that sense were highly technical, but by the same token the substantive law was plastic and largely nontechnical. Rights and duties were not bound to the letter of legal texts but instead were a direct manifestation of community values. These characterizations, too, are applicable to the legal concepts and processes of many contemporary nonliterate cultures of Africa, Asia, and South America, as well as to complex, literate, ancient civilizations such as those of China, Japan, and India.

If a single designation can be used to characterize these various legal orders, it is customary law. In Sophocles' words, "these laws are not for

now or for yesterday, they are alive forever; and no one knows when they were shown to us first."²⁷ In this type of legal order, law is not something that is consciously and continuously made and remade by central authorities; there may be occasional legislation, but for the most part law is something that grows out of the patterns and norms of behavior, the folkways and the mores of the community. Moreover, in this type of legal order, custom is not subjected to conscious and systematic and continuous rational scrutiny by jurists. It is simply unquestioningly and unquestionably respected.

Yet the European folklaw does not fit easily into the model or archetype of customary law — or, indeed, into any other model or archetype, including archaic law and primitive law — if only for the reason that it came under the influence of Christianity.²⁸ The emergence of Christianity and its spread across Europe was a unique event, which cannot be explained by any general social theory. By contradicting the Germanic world view and splitting life into two realms, Christianity challenged the ultimate sanctity of custom, including the ultimate sanctity of kinship, lordship, and kingship relations. It also challenged the ultimate sanctity of nature — of the water and fire of the ordeals, for example. It challenged their ultimate sanctity, however, without denying their sanctity altogether; on the contrary, the church actually supported the sacred institutions and values of the folk (including the ordeals). The church supported them and at the same time challenged them by setting up a higher alternative — the realm of God, God's law, the life of the world to come. When life was split into two realms, the eternal and the temporal, the temporal was thereby depreciated in value but not otherwise directly affected. The split took place not in the life of society but in the human soul. Yet social life was indirectly affected in important ways. The basic structure of the folklaw remained unaltered, but many of its particular features were strongly influenced by Christian beliefs.

If all traces of Christianity could be subtracted from the early European folklaw, it might well fall into one or more of the archetypes of legal orders which have been offered by social theorists. It would fall squarely into archaic law, together with the Roman law in the time of the Twelve Tables, early Hindu law, and ancient Greek law. It would fall less squarely into primitive law. It might be viewed as a type of law characteristic of an incipient feudalism. It would surely be an ex-

²⁷ Sophocles, *Antigone*.

²⁸ This and the following paragraph are taken from H. BERMAN, *supra* note 13, at 82-83.

ample of customary law. Such models as these, however, are only partly applicable to the legal institutions of the Frankish, Anglo-Saxon, and other peoples of Europe in the sixth to eleventh centuries. They make no place for the penitential law of the monasteries, or the religious and other laws occasionally issued by kings, or the central role of the clergy in all phases of government. Above all, Christianity attached a positive value to law which is in sharp contrast to attitudes toward law that are characteristic of religions or philosophies of other societies whose general institutional structure is comparable to that of the Christianized peoples of Europe. The Christian faith of that time accepted the world's law as just and even sacred. Yet the world's law had little value when compared with God's law, which alone could save the wicked from hellfire.

IV.

European concepts of justice changed dramatically in the late eleventh and twelfth centuries. At that time a great revolutionary upheaval took place in both the ecclesiastical and the secular spheres.²⁹ The Ro-

²⁹ Historians of the 11th and 12th centuries are virtually unanimous in saying that in the period roughly from 1050 to 1150, the papacy established for the first time its political and legal independence of emperors, kings, and other secular rulers as well as its supreme political and legal authority over bishops, priests, and other clergy. Also it is undisputed that secular royal power and secular royal legal institutions underwent substantial expansion in the 12th century, especially in the Norman Kingdom of Sicily, England, France, and the German principalities. Further, in that period thousands of cities and towns came into existence in Europe and the urban population increased from a tiny fraction of the total to a sizable percentage. What the book *Law and Revolution*, H. BERMAN, *supra* note 13, did that was new, was first, to show the interrelationships of these various phenomena as parts of a total revolutionary upheaval; second, to trace to that upheaval the origin of modern legal systems (especially canon law, royal law, urban law, and mercantile law); and third, to view the political and philosophical underpinnings of those systems as a source of the Western legal tradition.

The contention that from 1075 to 1122 a "revolution" occurred within the Roman Catholic Church ("the Papal Revolution") has met some resistance from reviewers of the book although it was endorsed by the two leading American scholars of church history during that period, Brian Tierney and George Williams. Recently, in opposition to my characterization of Pope Gregory VII as a "revolutionary," the author of an article discussing the same period quoted Walter Ullmann's characterization of Gregory as "a conservative." Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 THE AM. J. OF COMP. L. 653, 668-69 (1987). Ullmann's views are reported in *Law and Revolution*, H. BERMAN, *supra* note 13, at 575. I state that "[e]ven so strong a believer in the unbroken continuity of Roman Catholic history as Walter Ullmann, who wrote that Gregory VII was attempting 'the

man Catholic Church, under the papacy, established itself for the first time as a visible, corporate, legal entity, independent of imperial, royal, feudal, and urban authorities. It created the first modern legal system, the modern canon law, which had a wide jurisdiction not only over clergy but also over laity. Partly in rivalry with the canon law, partly in emulation of it, the secular polities began to introduce modern legal institutions. New legal systems were needed to maintain the cohesion of each polity, to achieve the reform of each, and to keep equilibrium among them all.

In sharp contrast with the earlier folklaw, the new law was not diffused in a more or less undifferentiated customary political, economic, and social order but formed a distinct and autonomous institutional structure. A class of professional jurists arose, many of them trained in the first European universities, founded in the late eleventh and twelfth centuries. Full-time professional judges appeared for the first time in Europe to staff newly established papal and royal courts. Statutes were enacted under papal and imperial or royal authority, and for the first time scholars produced a body of legal literature. The new systems of canon and royal law were analyzed and summarized in treatises such as Gratian's *Concordance of Discordant Canons* of 1140 and Glanvill's *Treatise on the Laws and Customs of England* of 1187.³⁰

Despite these radical changes, it should not be thought that the older law was simply abolished. On the contrary, it survived, but it was gradually reformed. The learned law taught in the universities was based chiefly on the *Digest of Justinian*, which was conveniently rediscovered in the late eleventh century after five centuries of oblivion in the West. But the law applied in day-to-day life as well as the law applied in the courts, although influenced by the revival of Roman law, necessarily built on the older law. At the same time it sought to overcome the essential formalism and conservatism of the older law. New

translation of abstract principles into concrete government actions,' nevertheless characterized the Gregorian Reform as 'the first concrete application of these principles.' " *Id.* Ullmann argues, in effect, that what the papacy did in the last half of the 11th century was to put into practice *for the first time* the "hierocratic tenets" (as he put it elsewhere) implicit in the foundation of the Church of Rome by Christ himself. See W. ULLMAN, *THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES* 262 (1955). This is to be a conservative in the same sense that Luther was a conservative in going back to Scripture as a basis for overthrowing Roman Catholicism and the 17th-century English Puritans were conservative in going back to the Magna Carta as a basis for overthrowing royal absolutism.

³⁰ On Gratian's treatise, see H. BERMAN, *supra* note 13, at 143-48. On Glanvill's treatise, see *id.* at 457-59.

“rational” modes of proof were gradually substituted for the ordeals and compurgation. Negotiation and composition of blood feud through *wergeld* and *bot* were replaced by criminal and civil adjudication. Custom was no longer treated as sacred but was subjected to tests of reasonableness. The canonists attacked the formalism of the penitentials; they also developed a completely new system of criminal law, applied in the church courts, requiring proof of a criminal act (and not only a sinful state of mind), and of a close causal connection between the act and the injury, and defining intent and negligence not only in subjective, but also in objective terms.³¹

It was in this period that the concept of individual rights was first developed. In the earlier Roman law the word “right” (*jus*) meant “law” — in a variety of senses, including the law as a whole, legal justice, and sometimes an individual legal doctrine or remedy. It did not refer to a *subjective* right, such as the right of a person to acquire or possess something or to require another person to do or refrain from doing something; but only to *objective* right, or law, *under* which acquisition or possession or some act was legally permitted or required.³² Roman law recognized subjective duties (obligations) but not subjective rights. The same was true, incidentally, of Greek law and of Jewish law. Like the ancient Latin, the ancient Greek and Hebrew languages did not have any word for a right or rights; but only a word for duty, or duties.

Jurists of the late eleventh and twelfth centuries, including both Romanists and canonists, developed not only the terminology of subjective rights — that *A has a right against B* (and not only that *under objective right, that is, law, B has a duty to A*) — but also introduced

³¹ See *id.* at 185-98.

³² Cf. M. VILLEY, *LES ORIGINES DE LA NOTION DU DROIT SUBJECTIF*, LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT 221-50 (1962); M. Villey, *Le 'jus in re' du droit romain classique au droit moderne*, PUBLICATIONS DE L'INSTITUT DE DROIT ROMAIN DE L'UNIVERSITE DE PARIS, 6, 187-225 (1950); Coing, *Zur Geschichte des Begriffs 'subjektives Recht'*, in *GESAMMELTE AUFSATZE ZU RECHTSGESCHICHTE, RECHTSPHILOSOPHIE UND ZIVILRECHT* 245 (1982). Villey's insight that the concept of subjective rights did not exist in the Roman law of Justinian (or in other legal systems) but was first developed by the European Romanists and canonists of the late Middle Ages has been widely accepted. Cf. Coing, *supra*. However, Villey's attribution of the source of the concept to the nominalist philosophy of the 14th century has been refuted by Brian Tierney. Tierney shows that the concept of subjective rights was developed by the canonists of the 12th century and was reflected in the canon law of corporations and property. B. TIERNEY, *VILLEY, OCKHAM, AND THE ORIGIN OF INDIVIDUAL RIGHTS IN THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* 1, 23-25 (J. WITTE, JR. & F. ALEXANDER EDS. 1988).

into objective right the classification and analysis of subjective rights. Historians have discussed the effects of this shift in terminology, classification, and analysis upon the law of procedure, property, and obligations, and other branches of private law, but have not paid sufficient attention to its effects on public law and, eventually, political theory. In fact, the idea of subjective rights (or, in contemporary terminology, individual rights) was reflected in repeated demands made by groups of persons for protection of their rights and liberties against invasion by superior authorities, and in numerous charters of liberties and other compacts agreed upon between subordinates and superiors.

I shall give one example chosen from among hundreds. In Beauvais, in Picardy, the citizens (*bourgeois*) of the town assembled in the last years of the eleventh century, after four decades of sharp conflict between them and a succession of bishops, and instituted a sworn commune, that is, an autonomous city polity constituted by oath of the citizens. Eventually, King Louis VI of France (1108-1137) issued a charter recognizing the authority of the commune. The charter was confirmed in 1144 by Louis VII and (with some additions) in 1182 by King Philip Augustus. The seventeen articles of the charter included the following provisions:³³

all men within the walls of the city and in the suburb shall swear the commune;

each shall aid the other in the manner he thinks to be right;

if any man who has sworn the commune suffers a violation of rights, and a claim comes before the peers of the commune [in French, *pairs*, literally "equals," referring to leading citizens generally], they shall do justice against the person or property of the offender, unless he makes amends according to their judgment; and if the offender flees, the peers of the commune shall join in obtaining satisfaction from his property or person or from those to whom he has fled;

similarly, if a merchant comes to Beauvais to the market and someone within the city violates his rights, and a claim comes before the peers, they shall grant the merchant satisfaction;

no one who has violated the rights of a man of the commune shall be admitted to the city unless he makes amends according to the judgment of the peers; this rule may be waived, by advice of the peers, in the case of persons whom the Bishop of Beauvais has brought into the city;

no man of the commune shall extend credit to its enemies and no man shall speak with them except by permission of the peers;

³³ The 17 articles of the Charter, reproduced below, as well as the following discussion, are drawn from H. BERMAN, *supra* note 13, at 366-67; see also *id.* at 380-86, which analyzes the Charter of Ipswich and its adoption procedure. The population assembled in the town square for many days to hear the charter read to them as they held hands and swore oaths to approve and observe it. Talk about social contract!

the peers of the commune shall swear that they shall judge justly, and all others shall swear that they will observe and enforce the judgment of the peers.

Other provisions dealt with regulation of mills, collection of debts (no person was to be taken as security for a debt), communal protection of food, equal measures of cloth, and restrictions on various feudal labor services still owed to the bishop.

The charter did not specify the form of government of the commune but only provided that its peers were to render judgment and to secure the life and property of the members. Indeed, the charter added nothing to what had been established one or two decades before, except that its final provision stated that "we [the king] do concede and confirm the justice and judgment which the peers shall do." In short, the charter was a recognition of a *fait accompli*: the uprising — at the height of the Papal Revolution — of the bourgeois of Beauvais, the formation by them of a sworn commune, and the restriction of the political and economic power of the bishop, who had previously been not only the chief ecclesiastic but also the chief feudal lord of the city, wholly involved in local and interfamilial politics. Although the charter itself was laconic in the extreme, it clearly implied that seigniorial rights in the town of Beauvais were to be severely restricted.

The provision that "all men" were to swear the commune and be subject to its jurisdiction was not intended to include clergy or nobles, whether or not they lived within the walls. In fact, the new urban communities of Europe were in competition with clerical and feudal authorities. In the background, central royal and papal authorities helped to regulate this competition.

Western philosophers who define justice in terms of individual rights, and individual rights in terms of liberty and equality, and liberty and equality in terms of a fictitious social contract, should, at the very least, take note of the fact that in hundreds of cities of Europe, founded in the late eleventh and twelfth centuries, an actual compact was entered into among the citizens, and between them and superior authorities, providing for the individual rights of citizens, their liberties, and their equality. Similar compacts also were entered into between superiors and subordinates in the royal and feudal regimes of Europe from the twelfth century on.³⁴

In terms of the relationship between individualistic and communitar-

³⁴ Examples include the Magna Carta (1215) and the Hungarian Golden Bull (1222). See H. BERMAN, *supra* note 13, at 293-94.

ian concepts of justice, what is most striking about these compacts is the combination of the two concepts. But if one asks about the historical derivation of these compacts, that is, about the conditions and circumstances that produced them, one must start with their heritage in the European folklaw of the sixth to the eleventh centuries. The twelfth-century juxtaposition of individualistic and communitarian concepts arose on the wholly communitarian foundations laid in the earlier period. Indeed, the entire revolutionary upheaval that occurred throughout Europe beginning in the 1050s, reaching a climax in 1075, and culminating in 1122,³⁵ presupposed the previous existence of an integrated *populus christianus*, a Europe united by an otherworldly faith, in which there was neither a separation of church from state nor a separation of law from other modes of social control. From a sociological and historical point of view, the existence of such a universal faith, in a political and economic and social culture that was predominantly tribal and local, was a necessary basis for the subsequent creation of diverse, autonomous, competing systems of law, ecclesiastical and secular. The tension, introduced by Christianity, between God's law and worldly law was a factor of critical importance in the ultimate overthrow of Germanic legal institutions. Yet without the prior types of communitarian integration in both spheres, the new legal systems would have had no social or spiritual foundation and would have been incapable of achieving their ultimate purposes of cohesion, reform, and equilibrium.

V.

In arguing (like Sandel) for an essentially political resolution of the Rawls-Sandel debate, but (like Rawls) for one which favors the priority, in a democratic society, of individual rights over communitarian values, Richard Rorty has touched briefly on the historical dimension of the subject.³⁶ He found in Rawls's *A Theory of Justice* a passage in which the author purported to take a middle position between universal moral sentiments, on the one hand, and the existential situation in which people express their personal preferences, on the other. In that

³⁵ In 1058, the College of Cardinals was founded, thereby challenging for the first time the power of the emperor to name the pope. In 1075, Pope Gregory VII declared the *Dictates of the Pope*, announcing Papal legal supremacy over emperors and kings as well as over all bishops. In 1122, the Pope and emperor signed the *Concordat of Worms* dividing the power to invest bishops and priests between them. See H. BERMAN, *supra* note 13, at 94-99.

³⁶ See R. RORTY, *supra* note 6, at 16.

passage Rawls acknowledged that the individual with whose rights and liberties he is concerned is a person living in the political culture of twentieth-century America, and that the justice which is based on those rights and liberties is not derived from an abstract theory of moral sentiments but rather on the moral sentiments of persons living in that culture.³⁷ Nevertheless, Rawls wrote, “[J]ustice as fairness is not at the mercy, so to speak, of existing wants and interests.”³⁸ Between universality and relativism, Rawls postulated “an Archimedean point” for judging conflicts between the existing social system and the existing preferences of individuals. “The long range aim of society,” he wrote, “is settled in its main lines irrespective of the particular desires and needs of its present members. And an ideal conception of justice is defined since institutions are to foster the virtue of justice and to discourage desires and aspirations incompatible with it.”³⁹ “The long range aim of society” and “institutions” are such, Rawls added, that no matter what, at a given time, men’s desires or perceptions might be, it would be a violation of justice to establish autocratic institutions or repress liberty of conscience.⁴⁰

Thus, Rorty has discovered in Rawls “an historical outlook,”⁴¹ which underlies the individualism and pluralism that he espouses. Although Rawls gives only the slightest hints of his own conception of that historical outlook (“the long range aim of society”), Rorty supplies some evidence of it: “The sixteenth and seventeenth centuries — the centuries in which religious toleration and constitutional democracy began to seem like live options for European society — were the times in which the Europeans developed a sense of themselves as plural.”⁴² Although Rorty acknowledges that this interpretation of the events of the sixteenth and seventeenth centuries “is a cliché of intellectual history,” he adds that “the tiresome familiarity of talk about the connection between Lutheran protest, Cartesian subjectivity, and the Rise of the Bourgeoisie should not blind us to the fact that something did happen in those centuries which opened up both political and philosophical options.”⁴³

In this passage Rorty has effectively exposed the historical perspective that underlies much of the contemporary debate — on both sides

³⁷ *Id.* at 13.

³⁸ *Id.* at 23.

³⁹ *Id.* at 23-24.

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 29.

⁴² *Id.*

⁴³ *Id.*

— between an individualistic and a communitarian theory of justice, and has thereby undermined the debaters' pretensions to philosophical universality. Let us "drop the idea," Rorty proposes, "that human beings share some single 'moral experience'. . . [or] 'moral sense.'" ⁴⁴ Instead, let us "settle for a self-consciously ethnocentric sense of 'our moral experience'. . ." ⁴⁵ This proposal has the merit that individualists and communitarians alike, in *our* "ethnocentric" tradition, have a common ancestry and a common tradition. In Rorty's view, that ancestry and tradition is found in the sixteenth-century struggle for religious toleration, the seventeenth-century scientific method, and eighteenth-to-twentieth-century democratic ideas. Thus, the debate as to the final end, the moral goal — is it individual liberty or is it community welfare? — can be resolved, and can only be resolved, on historical grounds. Either the individualists are right in saying that in our sixteenth-to-twentieth century tradition the advancement of community interests is essentially a means to the final end of enhancing individual rights, or the communitarians are right in saying that in the same tradition the enhancement of individual rights is essentially a means to the final end of advancing community interests. The debate is over the nature of the tradition, which includes its meaning for today.

Rorty's admittedly "clichéd" history has two major defects. First, it is basically intellectual history; despite his reference to Protestantism, constitutional democracy, and the "rise of the bourgeoisie," Rorty shows no interest in the context of political, economic, and social institutions, including legal institutions, which gave experiential content to what came to appear — only in the nineteenth century — as an individualistic concept of justice. In fact, Western society, until the twentieth century, was intensely communitarian in its practices and valued certain kinds of community as ends and not only as means to individual self-fulfillment. It is only in the twentieth century that Western society has begun to experience a kind of justice which exalts the individual over the family, the church, the local community, the guild, the profession, ethnic groups, and the nation. Legal justice, especially, has not traditionally treated community as a means of fostering individual rights, but on the contrary, when the two have conflicted, legal justice has usually treated individual rights as subordinate to community ends.

A second defect of the conventional historiography of contemporary philosophical discussions of justice is that they tend to neglect or else to disparage the roots of modern Western thought and Western institu-

⁴⁴ *Id.* at 45.

⁴⁵ *Id.*

tions in the so-called Middle Ages. I have tried to make a start toward correcting that defect.

It goes without saying that it is important for philosophers to know where their ideas have come from, including their sources in political, economic, and other social conditions and circumstances, both past and present. The relevant question, however, is whether such historical knowledge has philosophical meaning. If history were merely part of the factual experience about which philosophers are philosophizing, then their failure to take adequate account of it would be only a technical weakness, a weakness of erudition. But if the philosophical inquiry concerns a topic such as justice, which is itself defined by history, and in the case of Western justice by Western history, including the Western legal tradition — then the historical definition has philosophical meaning not only in the descriptive or logical sense but also in the prescriptive or normative sense.

Concerning the relationship between individualistic and communitarian concepts in a definition of justice, Western history tells us that historically the community came first and that the “discovery of the individual” (as it has been called) in the late eleventh and twelfth centuries,⁴⁶ and the appearance at that time of the concept of individual rights and liberties, were rooted in the coexistence and competition of a single corporate church and diverse secular communities with overlapping political and legal jurisdictions. The social contract securing individual rights originated at the same time as a political reality, and only centuries later was transformed by political philosophers into a theoretical construct.

Among the philosophical implications of that history, insofar as it concerns individualistic and communitarian concepts of justice, the following may be mentioned:

— that justice, in the Western tradition, is itself a shared concept, presupposing a community in which people not only wish to act justly toward each other but also wish to have common beliefs concerning what justice is;

— that in the Western tradition individual liberty and individual rights have always depended for their validity on community solidarity;

— that the widespread contemporary American view that individual liberty and individual rights are in some sense superior to social interests and social values is, from the perspective of the Western tradition of justice, an illusion and possibly itself a social myth whose primary

⁴⁶ Cf. C. MORRIS, *THE DISCOVERY OF THE INDIVIDUAL 1050-1200* (1972).

function it is to protect community interests;

— that justice, in the Western tradition, seeks a symbiosis (in Bodenheimer's phrase) of individual and community interests;

— that in the Western tradition theories of moral justice and political justice cannot legitimately be dissociated from concepts of legal justice;

— that theories of legal justice must take into account the fact that, in the Western tradition, law contains within itself its own theories of justice, its own meta-law, by which law itself is to be judged.

Of course, propositions concerning the nature of justice cannot be proved by history alone. In an integrative jurisprudence, history without philosophy is meaningless, and history and philosophy without politics are inconclusive. Together, however, history, philosophy, and politics are persuasive; when they come together there is no point in arguing which has primacy.

The chief normative significance of that part of the history of justice which is recounted in this Article derives from the implication, stated above, that justice, in the Western tradition, seeks a symbiosis of individual and community interests. This historical, political, and philosophical truth gives rise to a norm requiring that excessive protection of the community against the individual should be corrected, and that excessive protection of the individual against the community should be corrected. Such a norm is especially significant in a time, like our own, when Western societies are experiencing the fragmentation and uprooting of smaller communities such as the family, the local church, the neighborhood, and the workplace, and the subordination of larger religious, ethnic, and national loyalties to individual self-realization.

Professor Bodenheimer has defined the symbiotic society as one that "gives credit to the affirmative aspects of both the individual and social theory of human nature."⁴⁷ Symbiosis, as he points out, means the co-existence in close union of two dissimilar organisms. In this Article, I have sought to add a necessary historical dimension to his thesis.

⁴⁷ Bodenheimer, *supra* note 5, at 223.

