Edgar Bodenheimer: Conservator of Civilized Legal Culture

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INTRODUCTION

With the death of Edgar Bodenheimer on May 30, 1991, one more of the great emigre voices that have done so much for the law and for civilization was taken from us. As I attempt to characterize the role that Bodenheimer played, the phrase that comes to mind is "conservator of civilized legal culture." Those who knew him best speak of him as "the living embodiment of the scholarly ideal." In detailing what this means, they stress not only the breadth of his knowledge but more importantly, his kindness, his gentleness, his commitment to reason, and his civility.[1]

This scholarly ideal permeated Bodenheimer's personal life and is suffused throughout his work. At all levels, he exuded a kind of steadiness that flowed from his encyclopedic knowledge of legal traditions and philosophies of the world. His grip on the past provided him with an anchor against trendy shifts of philosophical fashion. It enabled him to sense stability and order where so many others in our century could only see shifting seas of power and ultimately, chaotic relativity.

In what follows, I will attempt to give some sense of the nature of Bodenheimer's "conservatorship." I will begin with a number of passages in which he outlines his ideals of civilization and culture, implicitly articulating his own aspirations as a legal thinker (Part I). I will then suggest, on the basis of selected writings, some of the ways his work fulfilled those aspirations. Among other things, I will argue that Bodenheimer was at his best when using a continental style of reasoning I shall refer to as "architectonic argumentation" (Part II). Bodenheimer's work exemplifies this style of thought in a variety of contexts and in several slightly

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[1] *See, e.g.*, John B. Oakley, *Remarks in Honor of Edgar Bodenheimer*, 26 U.C. DAVIS L. REV. 503, 504 (1993).

different ways. Of these, I will only be able to select a few examples. I will pay particular attention to his attitude toward natural law and in particular to his writings on philosophical anthropology (Part III). Among other things, his position in this area constitutes a type of "architectonic argument" against various forms of legal nihilism. I will also address his contributions in the field of legal reasoning and rhetoric (Part IV). What emerges from this brief sketch of his work is a sense for the significance of coming to terms with the deep topography of legal thought (Part V). This in turn serves as a reminder of what Bodenheimer was (and what legal philosophy ought to be) about: the cultivation of the legal dimensions of wisdom, civilization and culture.

I. BODENHEIMER AND LEGAL CIVILITY

The ideal of civilization is the motivating force running throughout Bodenheimer's work. For him, advancing this ideal was among the most fundamental of human moral obligations. This is particularly clear in his 1980 book, *Philosophy of Responsibility*.[2] Unlike more conventional approaches that think of responsibility primarily in terms of individual accountability, Bodenheimer stressed that there is a social as well as an individual aspect to responsibility.[3] Indeed, besides treating issues about the nature of human accountability in criminal law[4] and normal social duties to others,[5] Bodenheimer described what he called "transpersonal responsibility." He defined "transpersonal responsibility" as "an individual's obligation to promote the values of human civilization in its technological and cultural aspects."[6] Much of his work can be understood as a dedicated personal effort to carry out that mandate.

The idea of civilization played a central role in Bodenheimer's conception of justice. In his view, the demands of justice for freedom, equality and security must be subjected to certain outer limits in the interest of the "common good." He believed that this notion, in turn, depends on the idea of civilization. The linkage, together with Bodenheimer's explanation of what he means by

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[2] EDGAR BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY (1980) [hereafter BODENHEIMER, RESPONSIBILITY].

[3] *See id.* at 13.

[4] *See id.* at 14-49.

[5] *See id.* at 67-119.

[6] *Id.* at 13.

civilization, is set forth as follows in his most important book, *Jurisprudence*:

> A general determination of the content and scope of the common good must start from the insight that an individual can have a full and satisfying life only if he makes a contribution in some measure to that great enterprise called "the building of civilizations." The erection of stately and livable cities, the cultivation of the soil in order to secure the means for sustaining life, the production of goods designed to reduce the hardships or increase the amenities of life, the invention of devices for transportation and communication in order to promote traffic and intercourse between men and to give men access to the beauties of nature, the search for knowledge and the fostering of the spiritual powers of men, the creation of great works of literature, art, and music—these endeavors have through the centuries aroused the admiration of men and harnessed their energies at the highest level. As Gustav Radbruch has wisely observed, history has always judged nations and peoples by the contributions they have made to culture and civilization.[7]

Civilization, for Bodenheimer, is not limited to "the material, technological, intellectual and artistic elements of human culture. It must also be held to include the ethical aspects of human social life, whether they manifest themselves in religious or secular form."[8] Further,

> A materially and intellectually advanced civilization will be unable to guarantee the "good life" unless it has also taught men to temper self-interest by self-restriction in the interest of others, to respect the dignity of fellow men, and to devise proper rules for coexistence and cooperation in the various levels of group life, including the international community.[9]

Like his notion of the common good, Bodenheimer's vision of the rule of law is critically tied to the notion of civilization. In a nutshell, his view is that the rule of law is necessary to channel and free up the energies necessary for building civilization.[10] What is interesting in this regard is not so much the description of how the rule of law has this effect, but that the justification of the rule of law is linked directly to advancing the ideal of civilization.

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7 EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 243-44 (rev. ed. 1974) [hereafter BODENHEIMER, JURISPRUDENCE].

8 *Id.* at 244.

9 *Id.*

10 *See id.* at 305-08.

Civilization for Bodenheimer is an open-ended ideal that is never fully attained but is gradually approached as a result of immense effort on the part of innumerable individuals. Ultimately, Bodenheimer thought of the drive for civilization as nothing short of the will to live and to live well.[11] He believed that "[m]an's whole life is a struggle to gain true existence, an effort to achieve substantiality so that he may not have lived in vain and vanish like a shadow."[12] "The truly great systems of law," he stated,

> are those which are characterized by a peculiar and paradoxical blending of rigidity and elasticity. . . . This creative combination is very difficult to achieve. It requires statesmanlike acumen on the part of the lawmakers, a sense of tradition as well as sagacious discernment of the trends and needs of the future, and a training of prospective judges and lawyers which accentuates the peculiar and enduring features of the technical juridical method without losing sight at the same time of the claims of social policy and justice. These qualities can be acquired and developed only in a slow and painful process through centuries of legal culture.[13]

For Bodenheimer, this "slow and painful process" was the central preoccupation of jurisprudence and the major commitment of his life.

At odds with a relativist age, Bodenheimer saw this gargantuan task as part of a personal quest for truth. In a revealing passage in a fairly early essay, he provided a description of a legal scholar that could easily apply to himself:

> If the author of [a] treatise on philosophical jurisprudence, on the basis of a painstaking sifting of historical evidence and a thorough study of individual and social psychology, comes to the conclusion that certain types of normative ordering are superior to other types, such an inquiry should not be denounced as being necessarily outside the realm of truth-seeking.[14]

Bodenheimer was deeply concerned by the tendency of legal philosophers to believe that the ultimate questions of justice and civilization dissolve under analysis into subjective matters of taste and personal background. It was important in his view to be open

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11 *See* EDGAR BODENHEIMER, TREATISE ON JUSTICE 66-75 (1967).

12 *Id.* at 70 (quoting ERICH FRANK, PHILOSOPHICAL UNDERSTANDING AND RELIGIOUS TRUTH 116 (1945)).

13 BODENHEIMER, JURISPRUDENCE, *supra* note 7, at 319.

14 Edgar Bodenheimer, *The Province of Jurisprudence*, 46 CORNELL L.Q. 1, 11-12 (1960).

and flexible. "Our value judgments," he maintained, "should never be proclaimed to be permanent and final; they should constantly be tested against the shifting and evolving teachings of experience. . . . [D]ogmatism, rigidity, and intolerance [must] be ostracized from scholarly enterprise."[15] But this did not warrant thinking of legal philosophies as "the subjective and irrational predilections of their authors."[16] Rather, Bodenheimer believed these philosophies should be viewed as

> valuable building stones in the total edifice of jurisprudence, even though each of these theories represents only a partial and limited truth. As the range of our knowledge increases, we must attempt to construct a synthetic jurisprudence which utilizes all of the numerous contributions of the past, even though we may find in the end that our picture of the institution of law in its totality must necessarily remain incomplete.[17]

In Bodenheimer's view, the need to take jurisprudence seriously in this way is critical if the ends of civilization are to be attained. In a passage that may seem overdrawn to some, he points out the risk of relativism:

> If the search for justice and reasonableness in law is abandoned by the best minds on the grounds that justice is a meaningless, chimerical, and irrational notion, then there is danger that the human race will fall back into a condition of barbarism and ignorance where unreason will prevail over rationality, and where the dark forces of prejudice may win the battle over humanitarian ideals and the forces of good will and benevolence.[18]

For Bodenheimer then, the ideal of civilization served as a guiding star, both for his scholarly works and for his life. He knew from first hand experience the challenge of grasping the achievement of the past in order to hand it on to the future. He also knew from personal experience (having to leave Hitler's Germany) and from his scholarship[19] that everything that has been achieved can slip all too easily into abeyance. Part of what we lose with the passing of the emigres is the moral authority with which they could speak about the costs of preserving civilization.

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[15] *Id.* at 14.

[16] BODENHEIMER, JURISPRUDENCE, *supra* note 7, at 162-63.

[17] *Id.* at 163.

[18] *Id.* at 168.

[19] *See generally* Edgar Bodenheimer, *The Impasse of Soviet Legal Philosophy*, 38 CORNELL L.Q. 51 (1953) (tracing development of Soviet legal philosophy and criticizing its sudden shifts).

II. ARCHITECTONIC ARGUMENTATION

At one level, Bodenheimer's work can be viewed as primarily descriptive. One aspect of the life of a conservator of legal culture is to gather and summarize ideas and materials. In this regard, Bodenheimer is one of the unsung craftsmen of the narrative of jurisprudence. His best known work, *Jurisprudence*, is the ultimate condensed repository of his life's thinking on the issues of law and justice. The first version of this book was published in 1940, only a few years after his arrival in the United States. A second, much revised edition appeared in 1962, and still another revised version appeared in 1974. The first portion of the book contains an overview of the major figures in philosophy. The remaining parts deal with what Bodenheimer calls "The Nature and Functions of the Law" and "The Sources and Techniques of the Law." My sense is that the book grew with Bodenheimer. As his thought matured in various areas, he worked the results of new research and thought into the text. Thus, in a very literal way, the *Jurisprudence* book was his ongoing effort to provide a summation of the jurisprudential tradition.

At another level, *Jurisprudence* was Bodenheimer's effort to provide an American equivalent for what might be characterized as the German Einführung (introduction) tradition—the traditional works that for generations have helped provide German students with an overview of legal philosophy and an introduction to *Methodenlehre*.[20] The book's structure derives more from German tradition than from the excessive preoccupation of American legal philosophy with topics such as the legitimacy of judicial review and the nature of the judicial role. Partly for this reason, but more significantly because legal philosophy is almost always taught as an upper level course in American law schools, Bodenheimer's *Jurisprudence* could never play exactly the same role in the American setting that similar works play in Germany. The difficulty is that the first year of legal training has an impact that resembles biological bonding in the early stages of life: the structures and categories through which the student sees the world are implicitly molded by the first-year experience. As a

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[20] Bodenheimer was also a co-author of a more standard Anglo-American introduction. EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM: READINGS AND CASES (2d ed. 1988). Since cross-cultural influence is less readily apparent in this work, I have left this book aside for purposes of this Essay.

result, most American students experience Bodenheimer's ideas as frills to add to their legal knowledge, rather than as an elaboration of the fundamental questions of justice within which the rest of their legal education unfolds.

At a still deeper level, however, neither the "summarizer" interpretation nor the "Einführung" interpretation does complete justice to Bodenheimer. I suspect most Americans read his work in one of the foregoing ways, and as a result, miss the full impact of his writing. What is involved is not merely a partial blindness to Bodenheimer, but a deeper disjunction of cultural instincts that often separates continental and Anglo-American scholarship and complicates theoretical discourse between the civilian and common law traditions.

Let me first describe the deeper phenomenon, which I call "architectonic argumentation," and then come back and show how sensitivity to this phenomenon deepens one's appreciation of Bodenheimer. The easiest way to proceed is to describe anecdotally some of the experiences that first made me sensitive to the phenomenon.

In 1980, as a young professor engaged in advanced studies in Germany, I attended the weekly "joint seminar" of the criminal law faculty in Frankfurt. For me, this was an exhilarating experience. I had the sense I was listening to at least five rival philosophical traditions (a Kantian, a Hegelian, a hermeneuticist, a social scientist, and a Marxist) commenting, week after week, on the meaning of and solution to a succession of concrete issues in criminal law. Discussion at the seminar might be launched with presentation of a brief paper on sentencing, or on theories of culpability, or on a range of other practical or theoretical topics. It would then proceed with various professors taking stands that were clearly and explicitly rooted in the diverging philosophical traditions to which the respective faculty members were drawn. Comparable discussions are difficult to imagine in America, in part because placing arguments in their philosophical context tends to be perceived as mere pedantry, rather than as a critical step in coming to terms with the ultimate meaning of a concrete argument. But there was no sense in the discussions that I attended that mere pedantic "cataloging" of ideas was going on. The force of argumentation was deepened by making explicit the philosophical implications of various practical responses to problems.

In 1984, I took part in a workshop on criminal theory at the

Max Planck Institute in Freiburg. A group of twelve leading American criminal theorists were matched with counterparts from Germany in a discussion that focussed on questions about justification and excuse.[21] Outside of the sessions, I spent a good deal of time talking to both the American and the German participants. Each group had a different perception of the discussion. Many of the Germans expressed dismay at the extent to which the Americans got lost in arguments about details, and seemed not to pay adequate attention to the big picture. The Americans, on the other hand, were impatient with the German tendency to "fail to get to the point" or to be excessively concerned with doctrinal structure.

As I have reflected on these and similar experiences, I sense a difference in relative receptivity to "architectonic argumentation." By this I mean a style of argument that derives normative force from referencing a concrete argument to a tradition or a system of thought. Sometimes architectonic argument invokes a tradition or a system as added authority. Other times the way an idea is interpreted or characterized reveals something about the position of the arguer.[22] For American lawyers and law professors, the fact that a particular argument or solution to a legal

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[21] Papers by 10 of the German participants in this workshop were published in Symposium, *Basic Problems in Criminal Theory*, 1986 B.Y.U. L. REV. 523. Papers from American participants included: George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS., Summer 1986, at 89; Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985). The entire set of papers from the workshop was published in RECHTFERTIGUNG UND ENTSCHULDIGUNG: RECHTSVERGLEICHENDE PERSPEKTIVEN [JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES] (Albin Eser & George P. Fletcher eds., vols. 1 & 2, 1987, 1988).

[22] An interesting example of the latter drawn from a historical context is suggested by the following passage:

> The final form of the Primary Chronicle [a classic early historical account of medieval Russia], compiled early in the twelfth century, was probably based on the work of many hands during the preceding century; and it became, in turn, the starting point for innumerable subsequent chronicles of even greater length and detail. The reverence with which these sacred histories were regarded soon made slight changes in narration or genealogy an effective form of political and ideological warfare among fractious princes and monasteries. Variations in the phraseology of the chronicles remain one of the best guides to the internecine

problem has Kantian or utilitarian overtones may be an interesting fact, or it may provide a convenient shorthand description of the kind of argument being made, but it has little argumentative force per se. In contrast, what appears to be going on among the Germans is a much higher degree of tradition- or system-referencing. In part, this may be an instinct cultivated by code interpretation within the civilian tradition. At a deeper level, it parallels and is undoubtedly related to what, until recently, has amounted to a mutual allergic reaction between Anglo-American (analytic) and continental (systematic) philosophical styles.

Returning to Bodenheimer, his work takes on added force once one recognizes the extent to which it is not merely a summary or an introduction to legal philosophy, but an example of architectonic argument. Different arguments and differing schools of thought come from different places in the overall topography of legal culture. Those differences have meaning with respect to argumentative force. Stated somewhat more grandly, different viewpoints need to be understood by reference to their place in the unfolding (and open-ended) narrative of civilization. It is not the individual arguments themselves but their connection with the deeper process of civilization that is critical to understand.

Some small-scale examples of architectonic argument are evident in Bodenheimer's highly condensed and selective summaries of the legal philosophies of the West. Consider, for example, his treatment of archaic Greek legal philosophy, which is accorded only one paragraph, which I quote almost entirely:

> Law at that time was regarded as issuing from the gods and known to mankind through revelation of the divine will. Hesiod pointed out that wild animals, fish, and birds devoured each other because law was unknown to them: but Zeus, the chief of the Olympian gods, gave law to mankind as his greatest present. Hesiod thus contrasted the *nomos* (ordering principle) of nonrational nature with that of the rational (or at least potentially

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political struggles of medieval Russia for those able to master this esoteric form of communication.

JAMES H. BILLINGTON, THE ICON AND THE AXE: AN INTERPRETIVE HISTORY OF RUSSIAN CULTURE 10 (1966). Kremlinologists over the past few decades were apparently able to make similar types of inferences by reading what was said and not said in the pages of Pravda.

The point is that one facet of architectonic argument is a style of doing philosophy that argues or intimates by reference to classic sources. Key issues are argued not so much by arguing them directly, in their own right, but by implicitly interpreting traditions.

> rational) world of human beings. Foreign to his thought was the skepticism of some of the Sophists of a later age, who sought to derive a right of the strong to oppress the weak from the fact that in nature the big fish eat the little ones. To him law was an order of peace founded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter.[23]

One may read this passage as an innocuous summary of early Greek thought—a brief paragraph dashed off before getting to the Sophists, Plato and Aristotle. Viewed in the overall context of Bodenheimer's thought, however, this passage manages to capture with extraordinary force many of his most basic positions. The ideas of order (*nomos*) and rationality are central to Bodenheimer's conception of law. The sophistry of law as mere arbitrary power was the idea that he most passionately opposed. Too often, in our post-Darwinian world, the example of big fish eating little fish has been used as an excuse for robber barrons, imperialism, and various other "might makes right" philosophies. Bodenheimer, in contrast, crafts this ancient example into a plea for civilization. In his view, what reason infers from such natural phenomena is not a justification for brutality but a justification of the need for law. For Bodenheimer, as for Bodenheimer's Hesiod, law was precisely and emphatically "an order of peace founded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter."[24]

This type of example could easily be multiplied, but one suffices to suggest a recurring point: what at first blush appears to be bland summary or pithy introduction turns out on reflection to be forceful argumentation. As will become evident in what follows, Bodenheimer's approach to dealing with a host of matters, including many of his most central philosophical concerns, exhibited various types of architectonic argument. Viewed in this light, much of what one initially reads in Bodenheimer as dispassionate description of legal ideas turns out on reflection to constitute powerful architectonic argumentation for the values of civilization.

III. The Defense of Natural Law

Whatever Bodenheimer's attitude toward natural law may have been before Hitler's rise to power, he has been a dedicated devo-

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[23] Bodenheimer, Jurisprudence, *supra* note 7, at 4 (footnotes omitted).
[24] *Id.*

tee of the doctrine ever since. As an analytical matter, it has been clear at least since H.L.A. Hart's famous essay on the separation of law and morals[25] that there is no necessarily logical tie between the acceptance of positivism as a legal theory and the emergence of totalitarian regimes.[26] But in Bodenheimer's mind, there was a natural link between the positivist denial that values could be the subject of rational discourse and the risk that "the human race will fall back into a condition of barbarism and ignorance where unreason will prevail over rationality, and where the dark forces of prejudice may win the battle over humanitarian ideals and the forces of good will and benevolence."[27]

Bodenheimer developed his position on natural law very early in his career and it remained consistent throughout his life. As early as 1950, he published a defense of natural law against Hans Kelsen's critique.[28] Bodenheimer's position is also apparent in successive editions of *Jurisprudence* and in his *Treatise on Justice*. His belief that certain uniformities in human nature provide an ontological foundation for law was reaffirmed in his Preface to the Chinese translation of *Jurisprudence* in 1988. One of Bodenheimer's contributions, then, was to provide fairly early support in post-World War II America for the resurgence of natural law thought that has emerged in recent years. My sense is that in this regard, Bodenheimer provided a sympathetic voice, though his particular arguments in favor of a natural law outlook tend not to be the ones that have been most influential.

Bodenheimer's natural law theory is reminiscent of pre-Humean quasi-empiricist positions, which assumed that legal postulates could be inferred from universal features of human nature. While his views are augmented by more contemporary social science, they share with the older theories a rejection of a thoroughgoing is-ought, fact-value dichotomy.[29] While acknowledging openness and fluidity in human affairs, Bodenheimer firmly believed that there are fundamental aspects of human

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[25] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[26] *See id.* at 615-21.

[27] BODENHEIMER, JURISPRUDENCE, *supra* note 7, at 168.

[28] *See* Edgar Bodenheimer, *The Natural-Law Doctrine Before the Tribunal of Science: A Reply to Hans Kelsen*, 3 W. POL. Q. 335 (1950).

[29] *See* Edgar Bodenheimer, *Individual and Organized Society from the Perspective of a Philosophical Anthropology*, 9 J. SOC. & BIOLOGICAL STRUCTURES 207, 208 (1986).

nature that have normative implications for legal systems. He viewed the Golden Rule, for example, as "a moral principle of almost universal recognition"[30] that had found recognition in a broad range of religious and cultural traditions.[31] He rejected claims that law is inherently subjective, relative, and totally culturally dependent, (an outlook which he at one point characterized as the "cult of irrationality"[32]) and he believed that there was good scientific evidence for his conclusion. He asserted, for example, that "[s]ince the beginning of the twentieth century, . . . many advances have been made in sociology and cultural anthropology, and in the light of the new findings the doctrine of ethical and legal relativity has lost much of its force."[33]

Bodenheimer sought grounding for his notion that men and women do have common traits in a variety of modern social sciences. In some works the emphasis is on Freud and psychoanalytic explanations of basic human drives. In one more recent article, he paid considerable attention to the emerging field of sociobiology, although he ultimately rejected leading versions of that view because of its failure to give sufficient recognition to man's higher cultural potential.[34] Interestingly, given all the recent attention to law and economics, Bodenheimer paid relatively little attention to that field.

His own description of his version of natural law theory was "philosophical anthropology." First articulated in a law review article in 1971,[35] this "discipline" came to be the key embodiment of his position. For purposes of brevity, I will simply quote a brief summary of the main conclusions of this discipline:

> (1) . . . theories of human nature have a significant impact on the way an organized society will regulate relations with its members.
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> (2) The leading theories of human nature in the past have stressed either the individual or social predispositions of human beings. Both theories evidence merits as well as demerits as foundations for a suitable organization of social life.

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30 BODENHEIMER, RESPONSIBILITY, *supra* note 2, at 11.

31 *See id.* at 11-12.

32 *See* Bodenheimer, *supra* note 29, at 222.

33 Edgar Bodenheimer, *The Case Against Natural Law Reassessed*, 17 STAN. L. REV. 39, 41 (1964).

34 *See* Bodenheimer, *supra* note 29, at 210-22.

35 Edgar Bodenheimer, *Philosophical Anthropology and the Law*, 59 CAL. L. REV. 653 (1971).

> (3) Man normally has a dual nature that blends self-regarding with other-regarding motivations. The relative strength of these motivations can be influenced by environmental conditions.
> (4) The ultimate purpose of social organization is not the pursuit of purely self-centered gratification (especially not in its hedonistic and narcissistic forms) but the achievement of the highest possible level of material civilization and cultural bloom.
> (5) . . . There exists credible (though not conclusive) evidence that reason and the human spirit have greater potency in carrying out blueprints for the 'good' society . . . .[36]

Bodenheimer's philosophical anthropology has some commonalities with Kant's notion of the "asocial sociability" of man.[37] What is significant in both conceptions is the need to pay attention to the positive and negative dimensions of the social and the antisocial elements in man's nature.

Bodenheimer works out the implications of this philosophical anthropology in slightly different ways in his various works. The main point in each setting is that what we know about human nature is sufficient to yield a fairly rich set of premises from which necessary features of a good society and its laws can be deduced. Rather than describe the vision of civilization and culture that is derived in more detail, I want to take one example and show how what could be perceived as a mere description of a kind of neo-empiricist natural law becomes in Bodenheimer's hand a more general architectonic critique of twentieth century legal philosophy.

This example comes from the beginning of Bodenheimer's *Power, Law and Society*,[38] which I think is one of his most interesting works. I have the sense that Bodenheimer's strength is sometimes linked to the power of the figures that he is interpreting, and in the passage I have in mind, Bodenheimer takes on nothing less than an analysis of Nietzsche's will to power. The book begins with a chapter on "The Spectre of Legal Nihilism," which suggests the thrust of his architectonic argument. The structure of the argument is to associate critical elements of contemporary

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[36] Bodenheimer, *supra* note 29, at 222-23.

[37] IMMANUAL KANT, *Idea for a Universal History with Cosmopolitan Intent*, *in* THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS 116, 120 (Carl J. Friedrich ed., 1949).

[38] EDGAR BODENHEIMER, POWER, LAW AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW (1972).

thought with Nietzsche, and by attacking him to attack a much broader intellectual mindset.

The fact that Bodenheimer has more in mind in this chapter than an analysis of Nietzsche is suggested by the opening paragraph, which notes that

> there are many today, especially in the rising generation that will shape the future of this planet, who view the norms and restraints of the law as undue fetters upon human self-realization. Such discontent with legal limit-setting is sometimes fed by a deep-seated conviction that no group in society has any legitimate authority to make binding rules for any other group of human beings.[39]

This passage could easily be taken as a thumbnail sketch of the then-incipient Critical Legal Studies movement, with all its concern about impermissible hierarchy and domination. I suspect that the intended target was much broader: a whole range of theories that suggest that in the last analysis, law is nothing but a patina covering the facts of power.

Bodenheimer's argument unfolds in a manner that is not at all surprising for one who holds a neo-empiricist natural law theory. He first contends that "[s]ince man is a product of nature, the totality of our picture of nature as a whole tends to make an imprint on our conception of man's own peculiar constitution and the activities which flow from it."[40] Working from this premise, he sets forth Nietzsche's philosophy of nature, in order to display its defects. Essentially, Bodenheimer thinks that Nietzsche exaggerates the dynamic and destabilizing in nature. For Nietzsche, the cosmos is a vast and stormy sea, characterized by the ceaseless turbulence of waves. The doctrine of eternal recurrence is interpreted simply as Nietzsche's version of 19th century understandings of the conservation of matter and energy. If time is infinite, and everything is in infinite flux, everything will recur.[41]

For Bodenheimer, Nietzsche's "picture of nature as a whirlpool of chaotic power pressures is highly overdrawn."[42] His basic point is that Nietzsche underestimates the stabilizing forces in the world. While it is true that even granite mountains are not absolutely stable, they are relatively stable, and it is this relative stability that accommodates our sense of stability and order. Just as

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39 *Id.* at 1.
40 *Id.* at 14.
41 *See id.* at 16-17.
42 *Id.* at 19.

nature is not as chaotic as Nietzsche's metaphors suggest, so his sense for the chaos in man's will for power is exaggerated. Bodenheimer believes that there is a "will to law" in man's nature that is as deeply anchored as the will to power.[43]

At one level, the foregoing is simply a more general version of the "asocial sociability" argument. In the Kantian version, the notion is that the counterbalanced human drives toward social chaos and social order generate dialectical forces that drive mankind toward enlightenment and civilization.[44] Bodenheimer's version of the argument is interesting, however, because of the way it argues by reference to major figures and traditions in the philosophy of the West. At issue is the claim that law is nothing more than the facts of power. With respect to this question, Nietzsche is singled out as the archetypal figure making the claim that civilization in general and law in particular is merely an expression of the will to power. The presuppositions of Nietzsche's position are then explored by probing his conception of nature. When this conception turns out to be deficient, a more adequate conception of nature is sought. But that conception suggests a more balanced conception of the social order, in which the will to power is balanced by a will to law. Once the significance of the will to law is recognized as a natural counterweight to the will to power, Bodenheimer has the foundation he needs to reject legal nihilism in all its forms and to advance his argument for law as part of the moral obligation for advancing civilization.

For an Anglo-American analytic philosopher, this mode of argumentation leaves many questions unanswered. But as an architectonic argument, it is a forceful way of showing how philosophical anthropology and Bodenheimer's brand of natural law have the potential to counter all that followed in (or has been perceived to follow in) Nietzsche's train.

IV. The Rhetorical Turn

After all that has been said about Bodenheimer's affinity for natural law and antipathy to relativism, there is something superficially paradoxical about his interest in rhetoric. After all, the picture of rhetoricians that has come down to us ever since Plato is one of shady relativist types who teach students (for money) how to make weak arguments appear stronger, even though these

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[43] *See id.* at 23.

[44] *See* Kant, *supra* note 37, at 120-31.

pandering individuals really don't know what they're talking about when asked probing questions. Why should a neo-naturalist like Bodenheimer take an interest in them?

The paradox dissipates as soon as one turns to Bodenheimer's essays on this theme. Beginning with his 1969 essay on *A Neglected Theory of Legal Reasoning*,[45] Bodenheimer began to work out the significance of classical Aristotelian rhetoric, as well as the "new" rhetoric of Chaim Perelman, for law. The value Bodenheimer saw in this approach is perhaps best articulated in his essay on *Perelman's Contribution to Legal Methodology*.[46] There Bodenheimer displayed the significance of Perelman's work by describing the philosophical background and showing the problem Perelman helped solve. The analysis proceeds by showing how Descartes' excessive demand for certain knowledge resulted in distortions in canons of rational discourse, both in the empiricist tradition west of the English Channel and in the more rationalist tradition on the continent.[47] The ultimate consequence was that justice and the realm of value came to be seen by many leading thinkers as standing outside the realm of rational discourse. Perelman's contribution lay in pointing out that there is a vast middle ground between Cartesian certainty and irrational discourse in which reasoning (though not demonstration or deduction) is possible. For Bodenheimer this suggested another approach, harmonious with his philosophical anthropology, to the methodological problem of how to reason about values.

Notice in the foregoing that we again have a kind of architectonic argument. This time the argument shows how a new contribution can be fit into the general topography of discourse, rectifying a problem that traces back to the influence of a major thinker of the past. In effect, Bodenheimer invokes the rhetorical tradition of antiquity (and more particularly, Aristotle's notion of dialectical reasoning) against post-Cartesian modernity. This resolves the apparent paradox noted at the outset of this Part, because to Bodenheimer, rhetoric expands the domain of reason and helps limit the inroads of relativism.

Yet at another level, this solution merely supplants one para-

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[45] Edgar Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL EDUC. 373 (1969).

[46] Edgar Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L. REV. 391 (1985).

[47] *See id.* at 392-98.

dox with another. An architectonic argument invokes an essentially non-architectonic tradition (rhetoric) in support of a fundamentally architectonic mode of thought (the German ideal of legal science). In *Jurisprudence*, the ultimate repository of Bodenheimer's thought, the discussion of "dialectical reasoning" occurs in the context of a chapter on "Law and Scientific Method."[48] For Aristotle, in contrast, dialectic dealt with the realm of opinion and the probable, and was distinct from science. The puzzle is why Bodenheimer was so anxious to treat rhetorical reason as science.

I think the answer to that question is connected with the motivation for his neo-empiricist approach to natural law. For Bodenheimer, despite his awareness of developments in the philosophy of science showing that science is more subjective and intuition laden than classical theory supposed, science had a kind of authority that he wanted to claim for law. Accordingly, he was inclined to make the leap from the rhetorical contribution that law is indeed a species of reasoning, to the further conclusion that law is a species of science. He was, in effect, invoking the idea of science itself as a type of architectonic argument—a move that is at the core of German notions of "legal science."

This excessive scientism took the form of disagreeing with Perelman about the respective ranges of analytical and dialectical reasoning. Bodenheimer thought that Perelman "allocated an exaggerated importance to the dialectical component"[49] and in particular that a larger portion of legal reasoning is analytical than Perelman would claim. For Bodenheimer, analytical reason embraced "deduction (sometimes supplemented by interpretation of an equivocal term), induction, and analogy in the solution of legal problems."[50] My sense is that Perelman was closer to classical rhetoric than Bodenheimer on this point.[51] Once one moves beyond pure deduction to interpretation, induction, and especially analogy, rhetorical method comes into play.

More than a mere terminological quibble is at stake here. For Aristotle and classical rhetoric, dialectical reason dealt with the

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48 *See* BODENHEIMER, JURISPRUDENCE, *supra* note 7, at 392-97.

49 Bodenheimer, *supra* note 46, at 413-14.

50 BODENHEIMER, JURISPRUDENCE, *supra* note 7, at 386.

51 For a more extensive discussion of the relationship of law and the rhetorical tradition, see generally THEODOR VIEHWEG, TOPICS AND LAW: A CONTRIBUTION TO BASIC RESEARCH IN LAW (W. Cole Durham, Jr. trans., 5th ed. 1993) and my Translator's Foreword, *id.* at xi-xxv, in that volume.

realm of opinion and not science.[52] The fact that dialectic deserved credence as a form of reason could not transform the realm of opinion in which it operated into the realm of science. As part of his "conservatorship," Bodenheimer wanted to bring as much of law as possible within the ambit of science to preserve it from the hazards of relativism and nihilism. But in this he perhaps went a step too far. The more modest claim that law is a species of reason should have sufficed. Inherent in architectonic argumentation is a risk of idolatry—the risk that particular traditions or intellectual achievements will be given more credit than they deserve. Excessive faith in science carries in itself a species of dogmatism about which reasoned opinions can diverge.

V. Architectonic Argument, Wisdom, and the Deep Topography of Legal Culture

As the previous Part has suggested, I believe that Bodenheimer attached exaggerated significance to the label "science." To speak somewhat paradoxically, he should have had more faith in reason. In his defense, perhaps he simply equated the realms of science and reason and should be allowed his terminological preferences. While I disagree with him on this point, I do think there is a sense in which Bodenheimer's achievement suggested a deep and lasting way in which the interests of science and the interests of rhetoric can be reconciled in furtherance of civilization.

The allure and achievement of science has been so great over the past few centuries that jurisprudence has constantly been tempted to remake itself in the image of the latest fashion in science. This impulse has been driven by a quest for firm foundations and ultimately, by fear of the consequences of subjectivity and relativism. But this worship at the altar of science makes the mistake of attempting to transform what is fundamentally a prudence (a species of practical reason) into a science (a species of speculative reason). What is too often lost in the process is a sense for the significance of wisdom. Indeed, as one reads much of the literature of contemporary legal theory, wisdom seems to be a forgotten category. It is too freighted with value for twentieth century thinkers to be comfortable in talking about it.

It is precisely in this area that we can learn from Bodenheimer's example. As one reads Bodenheimer's writings, one comes away with the sense that one has encountered an extraordinary (but not

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[52] *See id.* 19-25.

superhuman) person who was constantly at work studying the vast repository of human wisdom and who constantly asked the question, what does all this mean for how we should live and how civilization can be advanced? Bodenheimer invoked the traditions and the systems of the past—that is, he reasoned architectonically—in order to contribute to the cultivation of wisdom. For him, sound assessment of fashionable new doctrines could only occur by fitting new ideas into the vast edifice of past human achievement, and seeing them in comparison with the entire structure.

This explains Bodenheimer's motivation for engaging in architectonic argument and also suggests the profound way that his work aligns with the classical rhetorical tradition. At the beginning of Aristotle's *Topics*, the seminal work in classical rhetoric, the claim is made that the treatise "proposes to find a line of inquiry whereby we shall be able to reason from reputable opinions about any subject presented to us."[53] In antiquity, memory was thought of as a vast mansion within which ideas or arguments had specific places or locations.[54] Part of Bodenheimer's significance for us is that he helped give us an account of the design and arrangement of that collective edifice. Even more significantly, however, he showed how wisdom could be the fruit of weighing current problems against the accrued reasoning of the past.

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[53] ARISTOTLE, *The Topics*, Book I ch. 1, *in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 167 (Jonathan Barnes ed., W.A. Pickard trans., 1984).

[54] *See* FRANCES A. YATES, THE ART OF MEMORY 1-6 (1966).