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Adjudication and the Rule of Law
- 'Power of Logic' v. 'Logic of Power' -
- 'Rule of Law' v. 'Law and Order' -

Boštjan M. Zupan.i..[*]

Discovery is nothing.
The difficulty is to acquire what we discover.

Paul Valéry[1]

Summary

Adjudication is paradigmatic of law: as the medium for the resolution of all kinds of individual and collective conflicts, it godfathers everything legal. Adjudication is exemplary of law as a complex logical ratiocination process. At the outset, it was the surrogate for Hobbes's 'Warre of everybody against everybody' and was *autonomous*, i.e. without predetermined outcome. Only later, especially in the inquisitorial context, criminal procedure becomes *ancillary* (adjective) to substantive law and its 'truth-finding:' the more so the more authoritarian the socio-political context. This has led to the negative inquisitorial features, of which the historically recent constitutional aspirations for a 'fair trial' are the inverse, i.e. the positive mirror image. In the resolution of conflicts between private individuals, the 'power of logic' prevails naturally due to their natural 'equality of arms.' In the administration of criminal justice, the powerless individual faces the all-powerful 'law and order.' Here, moral and logical integrity – the 'power of logic' and the 'rule of law' – remain an unattained goal. The divergence persists between the ideal of pure adversariness ('fair trial') on the one hand and the surviving repressive ('inquisitorial') tendencies

[*] Dipl. iur. (Ljubljana), LL.M., S.J.D. (Harvard), Professor of Law (U.S. and Slovenia), former Vice-Chairman, U.N. Committee against Torture, former Justice of the Constitutional Court of Slovenia; since 1998, Judge of the European Court of Human Rights in Strasbourg. Views expressed herein are strictly the author's own and do not reflect, in whole or in part, the opinions of any of the above institutions.

[1] Paul Valéry (1871-1945), *An Evening with M. Teste*, in Jackson Mathews (transl.), *Selected Writings of Paul Valéry*, New Directions, New York 1964, p. 237. However, see also Paul Valéry, *Introduction to the Method of Leonardo da Vinci,* Thomas McGreevy (transl.), J. Rodker, London 1929: 'The folly of mistaking a paradox for a *discovery*, a metaphor for a proof, a torrent of verbiage for a spring of capital truths and oneself for an orator [scit: genius?] is inborn in us.'

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('truth-finding'). In the end, this 'truth' is an emanation of the power of the state; hence, the enforcement of criminal law is in the end self-referential. Because it is essentially a self-fulfilling prophecy, it is liable, depending on the socio-political context, to turn into the collective madness of the witch-hunt – the more so, the less the relativity of punitive 'truth' and its 'finding' is politically appreciated and legally acknowledged. The 'rule of law' is meant to replace the arbitrary abuse of power, i.e. to safeguard human and constitutional rights. If in the end it is the 'logic of power,' which determines the outcome of adjudication, e.g. in violation of the privilege against self-incrimination, this may amount to a complete subversion of the 'rule of law.'

A. Part One

I. The Premises

The purpose of this essay is to *deconstruct* certain aspects of adjudication. In academic legal circles, especially in the United States, the word 'deconstruction' has acquired a semantic overload of ideological proportions.[2] Still, we use the word; thus engaging this ambiguous surplus in order to make the reader aware of the risks involved. We cannot understand the aspects of adjudication we wish to submit to a fundamental critique without first unmasking the premises in which they are entailed. These premises are indistinct and obscure. The unconscious presuppositions usually surface when, often for its rhetorical effect, we use the so-called *argumentum ad absurdum*. Yet, when three of the nine judges of the most powerful Supreme Court insist that mentally retarded convicts should be executed, this in itself *is* the absurd.[3]

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2 Originally, the concept of 'deconstruction' is philosophical and derives from Heidegger's concept of 'destruction' and secondarily from Derrida's general theory of textuality and meaning. See, Ur Carlshamre, *Language and Time*, Göteborg 1987, available at http://www.philosophy.su.se/kurser/Fakultetskurs/ fktexter/intro3.pdf.

3 > 'Recently, in *Atkins v Virginia*, the United States Supreme Court decided that mentally retarded criminals could not be executed because that would amount to cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution. Justice Scalia dissented, complaining that "seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members." The majority judgment was "embarrassingly feeble," involving "an arrogant assumption of power" that treated the issues as "a game." [...] Justice Scalia awarded this reference [to world opinion contrary to death penalty] his "Prize for the Court's most Feeble Effort" and observed that the standards of justice in other countries "are thankfully not always those of our people." Chief Justice Rehnquist also dissented, stating that "the viewpoints of other countries simply are not relevant to determining the standards to be applied in the United States."'

David Panick, QC, *Legal Ideas do not Stop at Passport Control*, The Times, 9 July

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Almost thirty years ago, the path to this absurd commenced with the insistent emphasis on 'truth-finding' as the essential aspect of criminal procedure. There was insistent language about 'marginal utility' of the preventative effect of the constitutional rule that excluded evidence obtained by police through violations of procedural, constitutional and human rights of criminal suspects and defendants. In the process, the exclusionary rule was reduced to an instrumental rule. I have, however, logically proven previously that the exclusionary rule is consubstantial with the constitutional privilege against self-incrimination.[4]

This was all done in the name of 'truth.' In the process, it also became obvious that this 'truth,' in turn, is consubstantial with 'law and order,' repression and the unmistakable authoritarian attitudes of the protagonists.[5] In the meanwhile and especially in the wake of September 11, 2001 events, to deconstruct this idea of 'truth' in criminal law – before it leads again into the collective madness of burning the witches – has grown to be an urgent legal and ideological matter. The aspects of adjudication that we shall 'deconstruct,' *are* ideological, i.e. their ideological impact is the one to be deconstructed. These aspects of adjudication have to do with the arbitrary exercise of state power.

The adherents of the so-called Critical Legal Studies Movement have been using the word 'deconstruction,' to mean 'pointing to internal contradictions' in particular legal doctrines. All along, their ambition has been, according to a programme specified by Unger in his 1975 book *Knowledge and Politics*,[6] to subvert bit by bit and as a whole 'liberalism, which must be seen all of apiece, not just as a set of

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2002. See also Linda Greenhouse, *William Rehnquist, Moving the Court, Triumphal Year for Chief Justice*, Herald Tribune, 4 July 2002.

4 See, *People v. Briggs*, Colorado Supreme Court 1985, 709 P.2d 911, n. 559, quoting from Zupan. i., *The Privilege Against Self-Incrimination*, Ariz. St. L.J 1981, pp. 1-25, at p. 19, where this is specifically acknowledged: 'The Privilege against self-incrimination simply is the exclusion of such evidence: without exclusion there is no privilege. This point cannot be over-emphasized. The substantive (criminal law) sanctions that violate the privilege are simply not adequate. This is not a question of deterring police from future misconduct' Mr. Rehnquist's reiterated references to 'the marginal utility' of the deterring effect of the exclusionary rule went in the opposite direction. His purpose was to reduce the exclusionary rule from being an alter ego of the privilege against self-incrimination, i.e. a prescriptive rule to an instrumental rule status. The latter was then subject to teleological (policy) interpretation. That this was part of an overall calculated pattern is obvious: such is the path from a principled position to (seemingly!) pragmatic policy considerations. See, Greenhouse, supra n. 3. If the 'government of the judges' were to rest on the latter, there would be no justification for it. For the distinction between the primary 'prescriptive' and the secondary 'instrumental' rules see H.L.A. Hart, *The Concept of Law*, Oxford University Press, Oxford, New York 1994 (2nd ed.), at p. 79 and at http://www.csu.edu.au/faculty/arts/cappe/ PDFFiles/Campbell2.pdf.

5 Infra, n. 87.

6 Roberto Mangabeira Unger, *Knowledge and Politics*, Free Press, New York 1975, at pp. 5-7.

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doctrines about the disposition of power and wealth, but as a metaphysical conception of the mind and society.'[7]

The distancing from the 'metaphysical conception of the mind and society' does require a psychological dissociation from the social reality running on a series of powerful myths. The dominant social consciousness together with its myths – today we would perhaps call them 'virtual realities' – are true self-fulfilling prophecies. They are not only statically circular and self-referential; often, they are dynamic, positive-feedback spirals capable of evolving into a collective *folie à million*. It is true that consciousness, individual or collective, of self, of others and of the world as a whole, is a 'construction' in both the sense that it 'construes' ('interprets') the world as well as in the sense that it is a complex system ('structure') of these interpretations. One does not have to be a Kantian to understand that objective 'reality' is not directly accessible to us, i.e. that from the inception, we 'construe' it – more or less arbitrarily.[8]

Moreover, law is *par excellence* what Wittgenstein would have called a 'language game' – a central idea in his *Philosophical Investigations*:

> 'Our clear and simple language-games are not preparatory studies for a future regularization of language – as it were first approximations, ignoring friction and air-resistance. The language-games are rather set up as "objects of comparison" which are meant to throw light on the facts of our language by way not only of similarities, but also of dissimilarities.'[9]

From the point of view of analytical philosophy, the legal process represents a complex and differentiated set of interactions between different legal principles, doctrines and rules emanating from them. Legal discourse is indeed a distinct and separate 'language.' However, it also is a 'game' with a distinct virtual aspect to it, which one must learn. This complex pattern stands or falls as a whole, i.e. it stands if the 'law and order' supports the 'rule of law,' and it falls if this power is removed. It follows logically that law as a 'language game' may be in more or less unadulterated and functionally adequate contact with the social reality it deals with: the reality of real, not virtual conflicts. It is not particularly original to assume the fictitious and value-laden nature of the legal process, since virtually every outsider

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7 Unger, supra n. 6, at p. 6.

8 This view is no longer exclusive to the 'soft' Hegelian branch of modern philosophy where it is taken for granted. (Hegel's experience of *'Selbstbewustsein'* on the occasion of the battle of Jena on 14 October 1806, represents a radical break with the 'reality as usual.' It was an equivalent of 'satori' that commences to be described scientifically. See, James H. Austin, M.D., *Zen and the Brain*, The MIT Press, Cambridge 2001.) With Wittgenstein's *On Certainty* (1951), the 'hard' analytical branch of philosophy, too, arrived close to this realization: 'At certain periods men find reasonable what at other periods they found unreasonable. And vice versa.' Ibidem, p. 336, available at http://budni.by.ru/oncertainty.html. For an introduction to this topic, see YUSU Essay Bank, available at http://www. york.ac.uk/student/su/ essaybank/philosophy/wittgenstein_and_absolute_truth.html.

9 Wittgenstein, *Philosophical Investigations*, Sec. 130.

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to this legal language game – as *von Ihering* has noted[10] – will have this insight. Legal doctrines with their innumerable, complex and often tacit assumptions, thus easily lend themselves to all kinds of construction[11] and deconstruction. The outsider's view, we might add, is in itself a holistic deconstruction of legal virtual reality.

However, to 'deconstruct' them from inside requires more than a dissociated existentialist attitude with a sceptical distance to what others take for real and for granted. To deconstruct the antinomies inherent in these spirals requires both scholarship as well as penetrating logical critique.[12] *Kafka*, for instance, in his *The Trial* succeeded in inducing the recognition of the absurd because as a lawyer he had noted – this is the essence of its absurdity! – the self-referential certainty of the inquisitorial 'truth.' *Camus*, on the other hand, who in *The Stranger* tried his hand at the same issue, did not accomplish the same recognition. He failed to appreciate the specifics of the underlying illogicality.

Here, we shall tackle the same quandary. Yet for several reasons we lay no *general* claim to 'deconstruction.' *First*, we are not preoccupied with the dissociated 'existentialist' apprehension about the unreality of 'truth.' In this respect, our realism, *si licet exemplis in parvo grandibus uti*, would be similar to the one characteristic of Hobbes. We believe the above preoccupation is due to an objective *alienation*, in the classical Feuerbachian sense of the word. The American legal existentialists, in their rather typical silly style, failed to take distance to their own pretentious distancing. The salaried middle classes, be it in thought or in action, have never carried out revolutions.[13]

Second, we do believe Unger's purportedly subversive philosophical and political programme is naïve and impracticable. It is naive because it is itself subverted by the conformism objectively inherent in the situations of salaried professors sitting in bastions of liberalism, such as Harvard, and pretending to sabotage the liberal philosophy while simultaneously seeking middle-class security. It is impracticable because 'deconstruction' perhaps unmasks the *logical* contradictions whereas the actual problem exists in the contradictions *of real interests*. For example, it was the *real* interests of the Catholic Church, which had godfathered the birth and all the consequent deformations, torture among them, of the inquisitorial criminal procedure.[14] The way to change this is through changing the realities of power, not through euphemistic references to 'political events.'[15]

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[10] See von Ihering, infra n. 50.

[11] For an interesting (Brazilian) 'construction' attempt see, for example Alchourron and Bulyigin, *Normative Systems*, Springer Verlag, Wien 1971 and J. Horowitz, *Law and Logic,* Springer Verlag, Wien 1972, both discussed in Zupan.i.,*On Legal Formalism: The Principle of Legality in Criminal Law*, 27 Loyola Law Review 1981, pp. 356-369, at nn. 4 and 5.

[12] 'An antinomy is a contradiction among conclusions derived from the same or from equally plausible premises.' Unger, supra n. 6.

[13] See, Ranulf, infra n. 205.

[14] See, Bayer, infra n. 91.

[15] See, Unger, infra n. 26 *in fine*.

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Most importantly, *third*, our own views are sufficiently 'deterministic' for us to expect that the historical realities must run their course. In this course, Unger's antinomies are no real obstacle.[16]

> '"The developments of a hundred past generations," combined in their totality with the "changes of recent times" in their totality, lead inevitably to certain conditions. This is the principle of historical necessity. On the other hand, we cannot postulate with assurance that any one specific condition is the cause of any other specific condition. This is the principle of "self transformation." This point of view is very similar to the materialistic concept of history. The Russian Revolution, for example, was, according to this concept the inevitable result of the total objective environment of its time; it was not caused by Lenin or any other particular individual. The statement […] that things, "though mutually opposed, at the same time are mutually indispensable," may also be interpreted as an illustration of Hegelian dialectic, if one likes to read it into the *Chuang-tzu Commentary*.'[17]

The Hegelian dialectic regards the 'internal contradictions' to be the vehicle of development and the locomotive of progress. The incongruity between *conflict-resolution* and *truth-finding* in criminal adjudication, as we shall endeavour to demonstrate, is an example of such a dynamic-and-guiding internal contradiction.

True, this antinomy between 'law and order' on the one hand and the 'rule of law' on the other has not led, say in the last fifteen years, to any particularly obvious 'progress.' In our post-ideological and seemingly pragmatic world, the unresolved antagonism between the inquisitorial and the adversarial types of adjudication – the matter of intense debate in the nineteen-sixties and seventies – no longer even receives much theoretical attention. Yet the preponderantly inquisitorial, the so-called 'mixed' Continental procedure continues to violate the human and constitutional rights of criminal suspects and defendants,[18] whereas the inefficiency

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[16] It is true, however, that these 'internal contradictions' – or sociologically speaking *anomie* – do get psychologically introjected and internalized. Then they lead to existentialist-schizoid state of mind, i.e. alienation. See R.D. Laing, *The Divided Self*, Pelican Books 1965. They produce the kind of metaphysical proletariat of which Unger was the ideological principal. For the question of the internalization of *anomie*, see Merton, infra nn. 54 and 174.

[17] Fung-Youlan, *A History of Chinese Philosophy*, in Derk Bodde (Transl.), *The Period of Classical Learning*, Princeton University Press 1983, at p. 212. Note the definition of an antimony in the last sentence!

[18] One fractional and minimalist legislative attempt to correct the inquisitorial undertow of the so-called 'mixed' criminal procedure was the French Law No. 2000-516 of 15 June 2000. See, especially art. 1(I): 'La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties. Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement.' Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes (1), available at http://www.adminet.com/jo/20000616/ JUSX9800048L.html.

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of Anglo-Saxon adversary procedure still yields the moral ludicrousness of plea-bargaining. Criminal procedure continues what it has been for centuries: an abnormal mutant of the *private* law adversary adjudication, which performs naturally in both Anglo-Saxon and Continental legal systems.

There is the need for repressive containment of crime as an individual occurrence (special prevention) where the direct deterrence has an immediate effect. But when it comes to general prevention and when one deals with the crime as a statistical phenomenon,[19] this illogical hybrid of criminal procedure continues to induce the impression of Kafkaesque absurdity, i.e. the contradictions Kafka pointed out in his *The Trial* are, quite simply, still there.[20] In other words, while conflict resolution is necessary at the individual and short-term level, general prevention of crime does require substantive criteria. This is intolerable. It is unacceptable, not for literary, but for purely ethical, moral, cultural, as well as for down-to-earth criminological reasons.

Thus, to recognize the causes of the problem one must go back to the fallacy's hidden primary premises. In the first part of this essay, we shall look at the

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The very legislative wish to emphasize the 'equality of arms' and the separation of executive branch from the judicial one reveals the underlying problem. In view of the political changes in 2002, however, some of these changes are likely to be abolished. Typically, this will be done under the political euphemism of 'securité' – in fact standing for the rising immigrant crime rate in France. In the nineteen eighties and nineties, the corresponding code word employed by the United States Supreme Court under Rehnquist was 'truth finding.'

19 By 'crime as a statistical phenomenon' we are referring to stable crime rates and to Quételet's law of great numbers. *Sur l'homme et le développement de ses facultés, essai d'une physique sociale* (1835). The Belgian mathematician Quételet (1796 -1874) made it clear that in large numbers, such as dealt with by statistics, universal regularities will surface because the particular accidentalities will cancel out one another. Because crime rates are statistically stable, the inference is that there are underlying 'regularities' pointing to social, i.e. not individual (!), causes of crime. The latter is, in that case, a *social* phenomenon. In criminology, these causes are attributed to *anomie*. See, infra n. 54.

20 Franz Kafka, *The Trial*, Willa, Edmund Muir and E.M. Butler (Transl.), Schocken Books, New York 1969. To men of literature, such as André Gide, Albert Camus, Hermann Hesse, etc., Kafka's text 'states the problem of the absurd in its entirety' (Camus). However, Kafka was also a jurist. He immediately recognized, as many a law student today still do, the obvious contradictions in the inquisitorial administration of criminal justice. Incidentally, the relative backwardness of the Austrian setting is revealed by *Constitutio Criminalis Theresiana* (1769) – the only code illustrated with the implements of torture. *Theresiana* was the last thoroughly inquisitorial code of criminal procedure. Eighteen years later, under the influence of her minister of justice, Maria Theresa abolished torture in 1787. The fact that Kafka chose criminal process in the Austro-Hungarian cultural environment as the ground on which vividly to demonstrate the existentialist 'absurd in its entirety' could not have been an accident. Kafka must have deemed the procedural absurdities sufficiently plain even for a layman. Jurists may thus admire *The Trial* as an *in cameo* 'deconstruction' of inquisitorial criminal procedure.

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roots of adjudication as an indispensable complement to likewise requisite societal 'law and order.' A historical view of the evolution of the systems of adversarial adjudication and of inquisitional truth finding, of substantive justice and of procedural law will lead to an understanding of contradictions inherent in legal adjudication. The central question guiding this part will be whether the role of adjudication is conflict-resolution or a more transcendental function of establishing and maintaining morality. In other words, the intention of this part is to explore, more or less completely, the inherent limits of adjudication and of the legal administration of justice. In the second part, we shall explore the specific incongruities of criminal procedure and deal more specifically with criminal procedure as the most problematic aspect of adjudication. As a rule, the critical examination of the weakest link generates the best insights about the chain as a whole. Since we live in a post-ideological world and since Hegel's owl of wisdom sets off only after the onset of darkness, this is perhaps the historically propitious moment for the re-examination of some basic and mostly hidden premises underlying what we tend to take for granted, i.e. of adjudication as an essential social process.

If in the end I shall not be able suggest any clear-cut solution, this is because the predicament is culturally rooted, ideologically without opposition and politically ensconced. Such contradictions are inherent in the given social structure and cannot be simply 'resolved.' The extensive changes materialize if we prepare them through small contributions. By unmasking the root causes of the dilemma, we hope to contribute to the progress of the advanced 'power of logic' over the primitive 'logic of power.'

As pointed out, the internal contradictions of the kind we shall describe, here I think Hegel is quite right, never get straightforwardly sorted out. If the absurdities of criminal adjudication were only a matter of logic, they would have been resolved long ago. Besides, political lip service concerning human rights is habitually just a disguise for the lack of political will to do away with the real causes of their violations.[21] It is true that the 'political will' may be relevant only to the extent the

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[21] As a member of the U.N. Committee against Torture, I had the occasion over a period of several years to monitor this discrepancy between formalistic 'lip service' and the largely absent 'political will.' The legalistic smokescreens presented by practically all State Parties to the U.N. Convention against Torture reveal the bureaucratic lack of understanding of the structural causes of torture. The latter, in turn, derive from the implicit political instructions under which these bureaucracies, mostly the ministries of foreign affairs, actually function. Their task is to defend the *status quo*, i.e. precisely the kind of administration of criminal justice which in the end degenerates into torture. The structural cause of torture resides in the conception of 'truth' and in the consequently obsessive approach to its 'finding.' The key test of the discrepancy between lip service and political will is thus the State's attitude towards exclusionary rule mandated by Article 15 of the Convention. It stipulates: 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.' The problem, in other words, is not so much the willingness to prevent and prohibit only torture *per se.* The problem lies in the authoritarian *attitude* built into the administration of the criminal justice system as a

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determining forces of entrenched social structure will even permit the social protagonists – judges of the courts of last resort among them – to introduce far-reaching improvements. Yet, the sweeping revolution *did* take place in criminal procedure in the nineteen sixties and seventies when the series of cases culminating with *Miranda v. Arizona* in 1968 and eclipsing with *Leon v. U.S.* in 1986 resolved many legal and moral contradictions. This proves that 'rule of law' is the luxury the social order may afford.

> 'The vitality of procedure [i.e. adjudication] as a historical phenomenon lies less in its relative stability of form than in its *responsiveness to change in respect of function.* Its most significant problems are consequently not the tracing of the outward history of particular devices, the cumulating of dated technical detail, but the explanation of *functional mutations in relation to social or political changes*, which induce new uses in despite of ancient "certainty." […] Otherwise, the history of procedure becomes a meaningless record of events and its connection to life indecipherable.'[22]

At the time when Goebel wrote this, it was not yet apparent that the function of procedure and of adjudication is constant because its genuine purpose always lies in the resolution of conflicts.[23] Yet even in 1937, it was clear that 'functional mutations' of adjudication *are* related to 'social and political changes,' as if Goebel had anticipated the great procedural 'mutations' to appear twenty to thirty years later. How-

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whole. Torture and other abuses are simply one of the by-products of this authoritarian attitude. Here it is impossible to distinguish between the lack of self-critical distance (of understanding of the problem) and the lack of political will. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987.

22 Julius Goebel, Jr., *Felony and Misdemeanor: A Study in the History of Criminal Law*, University of Pennsylvania Press 1976, at p. 1 (emphasis added). The influence of the German Historical School and von Savigny's reference to 'the umbilical cord between the law and the life of the nation' is apparent in the last sentence. See, von Savigny, infra n. 74, Ch. VI and pp. 27-31.

23 See, for example, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1960, pp. 1149-1199, who seems to believe that the intent of criminal procedure is to resolve the 'dispute before the court.' But see Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1976, pp. 1281-1316, at p. 1281. It is clear that Chayes assumes the private litigation to be the only true litigation. When speaking of public law litigation he says: 'The proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called "judge."' *Id*. at 1302. In his seminal article, Chayes enumerates the following key criteria of *private, i.e*. genuine litigation:

> The lawsuit is *bipolar*.
> Litigation is *retrospective*.
> *Right and remedy are interdependent.*
> The lawsuit is a *self-contained* episode.
> The process is *party-initiated and party-controlled.*

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ever, while these changes were by all means a radical triumph of the 'rule of law' and the 'power of logic,' the inescapable 'law and order' *function* caused the backlash of 'law and order' in the last twenty years.

In the short term and narrow perspective, then, the introduction of human rights and 'the rule of law' into criminal process appears impracticable. It hampers the immediate need for the direct repression of crime. That the escalating crime rates are in themselves a symptom of the deeper malaise of *anomie* is an issue, since the social structure precludes it beyond the purview of those deciding on it.[24]

Thus, the real 'surpassing of internal contradictions' is usually just a side effect of much broader, in our case socio-political, developments. For example, Pashukanis – the only serious Communist legal ideologist, true to the old Marxist formula according to which 'the philosophers have attempted to explain the world, the question however being how to change it'[25] – imagined that the October Revolution will have provided a universal solution.[26] What Unger later called 'the changes

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[24] Robert K. Merton, infra n. 174. Marxist conventional wisdom claims that in its final stages the capitalist social structure will be forced to renounce all pretense of the 'rule of law,' constitutional and human rights, etc. The social contradictions (between classes) would exacerbate to the point where the 'rule of law' could no longer afford the above concessions. This, of course, implies the notion of law as an epiphenomenon and of adjudication – 'the vitality of procedure' in Goebel's language, see supra n. 22 – as pure artificiality. Merton's theory, however, is free of that fundamental Marxist cynicism. It makes it clear, in my opinion, that what seems in the short run a contradiction between the ethical 'rule of law' and the pragmatic 'law and order,' is in the long run simply the difference between the sophisticated and the unsophisticated assessment of the legal process.

[25] Cf. Roberto Mangabeira Unger, *Knowledge and Politics*, The Free Press, New York 1975, at p. 257:

> 'But as theory and prudence reach their most powerful point in philosophy and politics, they make unlimited demands upon the time of their followers. Though philosophy and politics depend on each other, they resist combination in a single life. Those who act must depend on those who chiefly theorize to help them understand the truth and the good. Those who theorize must rely on those who act to complete and to criticize their theoretical work in the realm of concrete judgment. But all such collaboration is cursed with the risks of misunderstanding and betrayal.'

[26] He was not alone. The line of leading intellectuals adhering to this view goes all the way up to the Stalinist views of Jean-Paul Sartre and, today, the distant echoes in Jameson, infra. n.. 93 *in fine*. See Michel-Antoine Burnier, *L'Adieu A Sartre*, Plon, Paris 2000. For an attempt to integrate Pashukanis into modern legal thinking, see Letwin, *Law and Liberty*, The Fourth Annual John Bonython Lecture, Victorian Arts Centre, Melbourne,11 August 1987, at http://www.cis.org.au/Events/JBL/JBL87%20-%20 text.htm.

By contrast, Unger is wary not to betray his crypto-Marxist views: '*The political event* [necessary for the conception of shared values to solve the problems of freedom and order] would be the transformation of the conditions of social life, particularly the circumstances of domination, that produce the contingency and arbitrariness

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in the reality of domination' were supposed to make the society rise above the 'internal contradictions of bourgeois law.'[27] In fact, the law and the deep-rooted need for adjudication have not simply 'withered away.' The problems – and their solutions – have turned out to be more complex than expected.

Despite valiant efforts by brilliant and courageous judicial giants such as Justices Douglas and Brennan of the United States Supreme Court and the enormous impact of the series of cases culminating with *Miranda v. Arizona* (1966),[28] glaring inconsistencies and functional incongruities in both predominant types of criminal procedure persist. The *Miranda* series of cases, as we shall see, shows how much *can* be done. However, the backlash in the last twenty years also shows that to maintain law and order in an antagonistic society *objectively* obliges the courts to strike a different balance between human rights on the one hand and the repressive containment of crime on the other.[29] Yet, the ensuing contradictions in the adjudication detract from the legitimacy and credibility of the legal process.

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of values. […] It appears that to escape from the premise of subjective value *one must already have changed the reality of domination.*' (Emphasis added.) Since 'the reality of domination' in Unger's own context – see his 'theory of organic groups' *op cit.* pp. 236-295, is clearly the 'private ownership of the means of production,' in turn 'the political event' must obviously be the 'revolution.' Intellectually, Sartre's frank Stalinism is perhaps preferable to Unger's crypto-Marxism. In the end, Unger's followers in the so-called 'Critical Legal Studies' movement succeeded only in immunizing the political right against *any* change 'in the reality of domination.' Still, theoretically, Unger is right in maintaining that the change in the *reality* of domination precedes the concrete understanding of the new values *in action*. Unfortunately, his appreciation of the profundity of the difference remained distant and abstract : *idem*, his reference to 'workers councils,' on p. 272 and n. 8 on p. 232. In the end, this illustrates the objective limits of an outsider social theorist's political imagination. For an insider's view, see for example Rudolph Bahro, *The Alternative in Eastern Europe*, Verso 1981 at http://www.psa.ac.uk/cps/1998/grifiths.pdf.

27 Pashukanis, infra n. 69. 'In what is arguably its most sophisticated expression in the writings of the post-revolutionary Russian jurist Pashukanis, law was to be understood as a direct expression of the commodity form of production and the legal subject was no more than the fictively free and equal subject who would come to market and buy and sell. The legal relation was thus exemplified by contract and by the unequal economic conditions within which goods were exchanged. For Pashukanis, the legal form was thus a bourgeois species of human relation, and law would come to an end with the demise of the economic system upon which it was based.' Peter Goodrich, *The Oxford Companion to Philosophy*, Oxford University Press 1995, s.v. 'skepticism about law,' at xrefer, http://www.xrefer.com/entry/552582.

28 *Miranda v. Arizona*, 384 U.S. 436 (1966).

29 The implication is clear. The root causes of crime and disorder in society are not eliminated by repression. They derive from conflicts built into the very social structure, i.e. from what the Marxists called the conflicts of classes and what Durkheim would have called the lack of organic solidarity. The striking of a repressive balance by the courts is a palliative measure and a sign of capitulation vis-à-vis the real problem of *anomie*. Moreover, as Merton has shown, this only exacerbates *anomie*, the latter being a socio-psychological expression of the unresolved conflicts in the social structure. See, infra nn. 54 and 174.

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This may not be critical for the short-term crime-repressive effects of criminal procedure. From the point of view of human rights, on the other hand, the unresolved problems result in continuous violations of human dignity. This devalues the critical *moral* impact of the administration of justice; that is to say, it aggravates the anomic processes that are at the root of public disorder and crime.

The long-term moral impact of fair administration of justice derives from the substitution of the notion of arbitrary power with the notion of logical consistency (justice). The resort to the use of power, e.g. in violation of the privilege against self-incrimination in criminal procedure, thus ends up in the moral subversion not only of criminal process but also of the whole perception of the rule of law and justice in society. Mutatis mutandis, the same holds true for private litigation. The ordinary first-instance judges are often morally disoriented and lacking in conceptual legal ability – as if they were also lacking in pure common sense. True, legal education and especially, good admission criteria can offset many of these difficulties as can the general respect for the judicial branch in a particular legal culture. In spite of that, the real cause of the problem lies in the fact that, today, there is little basic agreement on what is right or wrong. The judges, just as the parties to adjudication, have internalized this anomic disorientation. In turn, the more subtle, organic, and long-term consequences of this moral inconsistency are a catalyzing factor in the general destabilization of society.

If institutionalized values are not logically consistent and fairly implemented, if they lack legitimacy and credibility, how can people internalize and respect them? One has to keep in mind that in the end it is the moral and not the immediate mechanical effect of the legal process, which is decisive. While the immediate purpose of adjudication is the consistent resolution of conflicts, it is clear that no judicial branch can ever cope with the explosion of disagreements that would result from the complete absence of shared values. The social purpose of adjudication is to instil enduring respect for institutionalized values, i.e. to promote and catalyze what sociologists call normative integration.

II. Social Stability Through Intercession of Legal Process

A historical overview shows that legal adjudication, this colossal process of application of substantive criteria for the resolution of all kinds of conflicts, has not arisen out of some abstract state-sponsored charitable concern for 'justice.' Conflicts are very disruptive of social stability; i.e. adjudication, as an institutionalized social process, is a *sine qua non* for social stability in the broadest sense of this term.

In the world of globally branched out and fully diversified division of labour, more than ever before, quick, legitimate and persuasive resolution of all types of conflicts – between private individuals, between different groups, between the individual and the state, between the states themselves – is a prerequisite for social, economic, political and international *stability*. Law as an art of conflict-resolution occupies itself with well-defined individual conflicts. It does so in private law, in conflicts between different social groups in constitutional law, in conflicts between

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the individual and the state in constitutional law as well as in the law of human rights, and with interstate conflicts in international law.

The ascendancy of international jurisdictions is therefore logical; it is symptomatic of the internationalization of conflicts and the consequent need for their international resolution. This ascendancy echoes the awareness of the global nature of issues such as environmental protection, [30] internationalization of crime, [31] and the internationalization of business transactions. [32] However, this international pre-eminence of the resort to the 'rule of (international) law,' praiseworthy as it is in itself, is by the nature of things limited. It is restricted precisely to the extent the nation-state is not willing to leave behind its 'sovereignty' and give international jurisdiction the enforcement power needed to give real bite to the rule of law. [33]

The two constituents of what can be labelled 'social stability' are the two elements at the other extreme of Durkheim's famous *disorganization* and *anomie*.[34]

The opposite of 'disorganization,' i.e. social entropy, are peace, rational and productive collaboration, interpersonal harmony, etc., in short everything practically synonymous with and conducive to economic and social progress. Since one cannot, even if we were to attain the utopian stage of total saturation of material needs, imagine a society entirely free of conflicts, there is an inherent, manifest, and unavoidable need to provide an effective *service* for their continued peaceful and bin-

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[30] See Kyoto Protocol to the UN Framework Convention on Climate Change at ENB Vol.12,No.76, 'Summary' COP-3, Kyoto, Japan available at http://www.iisd.ca/linkages/vol12/enb1276e.html#5.

[31] The latest development is the establishment of the International Criminal Court. See Web site of the Rome Statute of the International Criminal Court at http://www.un.org/law/icc/index.html.

[32] For the role of World Trade Organization see WTO Trade Negotiations Committee - Statement by the Chairman of the General Council at http://www.wto.org/english/tratop_e/dda_e/tnc_1_01feb02_e.htm.

[33] Article 41 of the European Convention on Human Rights was in this respect a painfully negotiated and compromised exception: 'Article 41 – Just Satisfaction: If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.' The original proposal of the wording was as follows:

> 'Article 24. The verdict of the Court shall order the State concerned:
> 1) to annul, suspend or amend the incriminating decision;
> 2) to make reparation for damage caused;
> 3) to require the appropriate penal, administrative or civil sanctions to be applied to the person or persons responsible.'

See Council of Europe (ed.), *Collected Edition of the 'Travaux Préparatoires' of the Convention on Human Rights,* Vol. I, Martinus Nijhoff, *The Hague* 1975, p. 212. See the cases and my separate opinions in *Case of Cable and Others v. United Kingdom*, Judgment of 18 February 1999, *Case of Scozzari and Guinta v. Italy*, Judgment of 13 July 2000, and *Case of Luca v. Italy*, Judgment of 27 February 2001.

[34] From *alpha derivative* and '*nomos*,' Greek for law: lawlessness, 'normlessness.'

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ding resolution.[35] The more 'disorganized' the society, the more profoundly disrupted the institutionalized as well as the organic relationships in it, and the greater the burden on the central power to continually re-establish 'justice' in a trustworthy process of conflict resolution.

The converse of *anomies* is the so-called 'shared values.' They provide the cement of human relationships, the stuff that constitutes the society. Without *internalized* common values, no social cooperation, according to Durkheim, is possible. The society disintegrates into the atomised dust of isolated individuals.[36]

Durkheim also has distinguished between *organic* and *mechanical* social solidarity. *Organic solidarity* between people, as the term almost anthropologically suggests, involves the spontaneous and natural cohabitation as well as undisturbed division of labour. This aspect of human collaboration is free of conflicts. The more values are shared, the more organic the solidarity. If most common values were genuinely shared, i.e. in total absence of *anomie*, one would have the kind of organic solidarity anthropologists used to describe as prevailing in primitive tribal communities.[37]

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[35] The Marxist – and more specifically Pashukanis's notion – that a litigious society is one in which there is scarcity of material goods, is of course, refuted by the now obvious inverse correlation between modern opulence and the rising litigiousness. While poverty and crime in fact remain in positive correlation in particular Western societies, inter-societal comparisons would show no such correlation. There are poor societies where both litigiousness and crime rates – because traditional values are intensely shared – remain low.

Yet the deeper question as to why values are or are not shared in a particular society cannot be entirely disconnected from the fact that some social structures are more conducive to antagonism. The differences in this respect between the litigiousness and high crime rates in the United States and the lower respective rates in the West European societies have to do with 'culture,' i.e. with the inhibiting effect of what Raymond Williams calls 'residual values.' History produces the 'residual culture' with its ingrained 'residual values' that continue to inhibit despite the fact that the values in question are no longer up to date. Raymond Williams, *Base and Superstructure in Marxist Critical Theory*, in *Problems in Marxism and Culture*, Schocken Books, New York 1981. Conversely, the lack of history, of residual culture and of residual values tend to reduce the personality, of which the internalized values are an integral part, to what Herbert Marcuse has called a 'one-dimensional man' and what Erich Fromm has called 'the prototypical character.' See, Marcuse, *The One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society,* Beacon Press, Boston 1964, and Erich Fromm, *Man For Himself: An Inquiry into the Psychology of Ethics,* Routledge, London 2003 (originally published 1947).

[36] For an excellent sociological presentation of the rising alienation and atomisation see Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 Journal of Democracy, no. 1, January 1995, pp. 65-78, and Putnam, *The Prosperous Community*, 4 *TAP* Spring 1993, no. 13. Robert D. Putnam, *The Strange Disappearance of Civic America*, 4 *TAP* no. 24, at http://www.prospect.org/print/V7/24/putnam-r.html.

[37] See, for example, Margaret Mead, *Coming of Age on Samoa: a Psychological Study of Primitive Youth for Western Civilisation,* P. Smith, Gloucester, Mass. 1973 (originally published 1928). See also her *Growing up in New Guinea: a Comparative Study of*

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Modern anthropology no longer hypothesizes this absolute sharing of values. In savage communities, the discords have to do with mundane delicts (murder, theft) as well as with archetypal taboos. This is how Bronislaw Malinowski, one of the most eminent anthropologists and the founder of 'functionalism' in social anthropology, describes the primitive blend of substantive and procedural means of conflict-resolution:

> '*Law and order* [in savage communities] *arise out of the very processes, which they govern.* But they are not rigid, nor due to any inertia or permanent mould. They obtain on the contrary as the result of a constant struggle not merely of human passions against the law, but of legal principles with one another. The struggle, however, is not a free fight: it is subject to definite conditions, can take place only within certain limits and only on the condition that it remains under the surface of publicity. Once an open challenge has been entered, the precedence of strict law over legalized usage or over an encroaching principle of law is established and the orthodox hierarchy of legal systems controls the issue.' [38]

Mechanical solidarity , while we cannot simply detach it from organic solidarity, is 'mechanically' enforced. It is practically synonymous with what we shall call 'law

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Primitive Education, Harper Collins, New York 2001 (originally published 1931). The myth of the idyllic coexistence ('organic solidarity,' pure and simple), however, is not a modern invention. The Roman poet Ovidius Naso (43 BC - 18 AD) begins his *Metamorphoseon Libri* with the famous hexameter praising the imaginary golden age in which there was no need for a judge (adjudication) and in which justice was cultivated without law and through 'bona fides:' 'Aurea prima sata est, aetas que vindice nullo, sponte sua sine lege fidem rectumque colebat…' Clearly, this is a myth, but an archetypal and a powerful one. Through assumption that it is the private property over the means of production, which caused the collapse of organic and the need for mechanical solidarity, the same myth inspired the whole ideology of Communism. For a naïve rendering of this, see Erich Fromm, *The Anatomy of Human Destructiveness*, Chapter I, Henry Holt and Company, Inc., New York 1973.

[38] Bronislaw Malinowski, *Crime and Custom in Savage Society*, Adams & Co., Littlefield, 1976, at p. 123. Emphasis added. As to the question concerning Malinowski's 'surface of publicity,' see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, in *Harmful Thoughts: Essays on Law, Self and Mortality*, Princeton University Press, 2002, at pp. 37-94. Dan-Cohen posits the same idea i.e. that equity and common sense may prevail over legal formalism on the condition that they are, as they are when the jury is sequestrated, 'acoustically separated' from the 'surface of publicity.' For the negative side of *that* issue, see *Furman v. Georgia*, 408 U.S. 238 (1972). Also, compare the wording of the oath taken by the judges of the European Court of Human Rights in Rule 3, of the Rules of Court: 'I swear' – or 'I solemnly declare' – 'that I will exercise my functions as a judge honourably, independently and impartially and that *I will keep secret all deliberations*.' Emphasis added.

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and order.'[39] Adjudication is a natural complement to law and order. It arises organically 'out of the very processes which it governs.' In a developed stage of social growth, organic social solidarity also refers to the harmony between institutionally promulgated values (the mechanically enforced legal norms) on the one hand and moral norms people have genuinely internalized on the other.

The moral values are the values people sincerely, almost instinctively and mostly unconsciously, share. As we have pointed out, without shared values, according to Durkheim, society becomes an 'atomised dust of individuals.' If it came to complete atomisation this would completely preclude the collaboration and division of labour.[40] Consequently, disorganization and *anomie* (the decline in shared values) imply the breakdown of the division of labour, the disintegration of social institutions and the general regression to disorder and anarchy.

Generally, the geometrically rising curve of litigation in all Western as well as in former Communist societies evinces the geometrically dropping curve of the intensity of the values shared by all members of society. A litigious society is the one in which the resort to *legal* resolution of conflicts is the surrogate of the *moral* agreement as to what is right or wrong. If the difference between right and wrong in antagonistic inter-personal situations were clear, the party admonishing what is wrong would morally – not legally – prevail over the party acknowledging that it is in the wrong. This is not an intellectual exercise, alas, but requires the *feeling* of genuine identification with intimately shared values. This feeling makes one admit that one is wrong and to cede to him who is right. Only if the particular antagonism does not resolve itself in this informal manner, will there be resort to cumbersome transposition of the disagreement into the formal legal context of adjudication.

The shared values induced by social processes of *normative integration*, are the derivatives of extremely complex and long-term (generational) social and socio-psychological processes.[41] Ultimately, the integration of values depends on the

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39 This is not the same 'law and order' as the one posited by Malinowski. For him, 'law and order' is a composite term signifying social peace and stability. For us, the term will indicate the social discipline instilled by the fear of sanction. For Malinowski, insofar as social anthropology would deal with issues such as 'democracy,' the 'rule of law,' etc., there would be no contradiction with 'law and order.' We shall, on the contrary, juxtapose 'law and order' as mechanical means of maintaining social peace to the subtler (more 'democratic') apparatus of the 'rule of law.'

40 The 'complete atomisation' of any social community – a contradiction in terms! – is of course impossible, i.e. it is a hypothetical extreme point of *anomie*.

41 The psychological transmission of values is 'generational' because it occurs in transition from one generation to another. See, for example, Fromm, *The Sane Society*, Fawcet, Greenwich, Conn. 1955, at p. 79. 'The family […] may be considered to be the psychic agency of society, the institution which has the function of transmitting the requirements of society to the growing child. The family fulfils this function in two ways. First, […] by the character of the parents and […] in addition through the methods of childhood training, which are customary in a culture also have the function of moulding the character of the child in a socially desirable fashion.' (Emphasis added.)

The more a particular value, e.g. 'a conviction,' is psychologically adhered to,

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operative *adequacy* of the proclaimed, institutionalized, and enforced values. The greater the discrepancy between the institutionalized (legally maintained) values on the one hand and the values that *would be adequate* and socially functional, the less the institutionalized values would be intimately identified with and shared.

Anomie, due to the inevitable time lag of societal mores and morals, also results from the discrepancy and consequent friction between the given *current* hierarchy of values and the one that *would be* adequate to the present stage of development. On the one hand, this implies that the values necessarily change only in leaps and bounds and that the alternation between social evolution and revolution is inevitable. On the other hand, the progressive speed of technological and economic development implies that this time lag of social values and mores given that they are constrained to slow generational changes, is growing larger. One important question today is, whether – purely in the perspective of the passage of time – Western societies are not becoming more anomic, i.e. more amoral.[42]

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the more it is taken for granted, i.e. the less conscious is it. An individual is therefore not simply free to change his 'convictions,' the way he may for example change his 'opinions.' These changes of convictions can occur only with the change of generations. The possibility for the modification of societal mores and morals is consequently limited in time as well as in space. In terms of time, there is of necessity a delay of at least one generational phase between the objective needs of society and its current mores. In terms of space, the so-called 'cultural conflicts' within society (different social classes) and between different societies are inevitable. See, for example, Grace Goodell, *The Elementary Structures of Political Life: Rural Development in Pahlavi Iran,* Oxford University Press, Oxford 1986, and Huntington, infra n. 115. Goodell's work is especially interesting because she has shown that the developmental lag cannot be overcome by progressive legislation. The discrepancy between the actual (rural) values and the Shah's overly ambitious legislative attempts at reform had in the end caused his downfall.

42 In the wake of the September 11 attack, it is interesting to note the typical fundamentalist reproach concerning the purported amorality of Western societies. The fundamentalist attitude incapable of adaptation to the new demands for new social values (attitudes) represents a *regression* to entrenched values. Sociologically, this is *ritualization* as a response to *anomie*. See, infra n. 174. Huntington apparently foresaw these attitudes:

> 'Far more significant than economics and demography are problems of moral decline, cultural suicide, and political disunity in the West. Oft-pointed-to manifestations of moral decline include: 1. increases in antisocial behavior, such as *crime, drug use, and violence generally; 2. family decay, including increased rates of divorce, illegitimacy,* teen-age pregnancy, and *single-parent families;* 3. at least in the United States, a decline in 'social capital,' that is, membership in voluntary associations and the interpersonal trust associated with such membership; 4. general weakening of the "work ethic" and rise of a cult of personal indulgence; 5. decreasing commitment to learning and intellectual activity, manifested in the United States in lower levels of scholastic achievement. The future health of the West and its influence on other societies depends in considerable

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Despite the common feedback lag between the changes in the society's infrastructure and the ensuing changes in the cultural supra-structure, the institutionalized values being an integral part of it, if this delay is too long and the disagreement too large, *anomie* and disorganization will of necessity result. The absence of socially adequate – intimately identified with and widely shared – institutionalized values, or to be precise, their *dysfunctional inadequacy* , is an impediment to peaceful and beneficial social evolution. There is then probability of disorganization, *anomie* or, to put it in terms of the third law of thermodynamics, of social entropy. On the other hand, the more the traditionalist, conservative and entrenched values are cemented, the more their change is inhibited and postponed, the greater the probability, indeed the need, for revolution or revolt. [43] The latter may then result in the collapse of the state and of its 'law and order.'

It is not our task here to answer the broader question, i.e.*which* social values would in general today be adequate. Suffice it to say, that the implications of Durkheim's theory continue to provide fuel for avant-garde political scientists, sociologists and legal philosophers from Immanuel Wallerstein, Zaki Laïdi, Frederic Jameson, Robert K. Merton to Roberto Mangabeira Unger and others. [44]

It would be for sociologists to assess to what extent this process of institutionalizing new values, after World War II and up to today, has in fact reduced the *anomie*-generating discrepancy between the old institutionalized and the actually required value hierarchies. Legal retrospective reveals that profound changes in the philosophy of adjudication were the major ingredients of this process of institutionalizing new values. In the first half of the 20 th century, most jurists had still perceived legal procedure in general and adjudication in particular as something 'adjective' or 'ancillary' to the enforcement of *substantive* law. Thereafter, in the second half of the 20th century we have witnessed the critical change in this attitude: the ideal of 'fair trial' has imperceptibly merged with larger ideals such as the 'rule of law' and

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> measure on its success in coping with those trends, which, of course, give rise to the assertions of moral superiority by Muslims and Asians.'

Huntington, infra n. 115, p. 304 (emphasis added).The problems emphasized lend themselves directly to adjudication.

43 For an outstanding literary essay and illustration of this need, see Camus, *L'homme révolté*, 1951.

44 See, especially, Wallerstein, *After Liberalism*, The New Press, New York, 1995; and Wallerstein, *The Critical Issues of the Coming Decades*, Fernand Braudel Center, Binghamton University, at http://fbc.binghamton.edu/commentr.htm.

Zaki Laïdi's works include *Le Sacre Du Present*, Flammarion, 2000, *Un Monde Prive De Sens*, Librairie Artheme Fayard, 1994, *Geopolitique Du Sense*, Desclee de Brouwer, 1998. The English translation of *Un Monde Prive De Sens* is available under the title of *A World Without Meaning*, Burnham and Coulon, (Transl.), Routledge, London 1998. Other works of other social theorists are cited in other respective references.

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'human rights.'[45] Similarly, the ideological aspect of human rights also is an integral part of the typically Western attempt to introduce and to institutionalize new values. That in the present day, we take many of these *values*, e.g. those concerning 'fair trial,' for granted testify to the colossal success of the previous generations, and to their historical battles for the initial institutionalization of these same values.

The legal system functions as an integrated whole. The system will interject its 'institutionalized values' from the very moment the factual pattern in question becomes subject to legal definition. In turn, this means, for example, that the top echelons of judiciary may restructure their value hierarchies as much as the system will permit them – for they, too, are determined by the past – but that it takes much time for these new values to trickle down to the bottom of the judicial pyramid. Even the hierarchically structured system of procedural appeals is therefore cumbersome due to the complexity of systemic changes the introduction of new values will require. Again, however, the *Miranda* series of cases testifies to the fact that this *is* – and *how* it is – possible.

The result of the changes – there can be no doubt about it, since it reduces the discrepancy between the actually needed and the obsolete ethics – contributes resolutely to social stability. The imposition of progressive norms through 'fair trial,' for example, will enhance the integration of moral norms. It will further the normative integration in society. Conversely, the trial that is seen as substantively and procedurally unfair will foster *negative* identification with formally institutionalized moral norms (*anomie*). Consequently, in certain societies saying that somebody is a 'law abiding citizen' is a compliment. In other cynically deformed (*anomic*) societies, the attribute smacks of naiveté.[46]

The delay in 'shared values' also implies that adjudication, cannot, if it would be socially relevant, remain formalistic, 'value neutral,' politically and ideologically static. Old hierarchies of values need to be changed and new moral principles introduced. While this may be happening everywhere in the judicial system, this is especially true on the top, constitutional plane of adjudication. This level cannot linger and remain bound by the formalism of strict legality, which is always static and morally retrospective. The role of the supreme, the constitutional or the international court is to provide 'moral leadership,' i.e. we judge the quality of its judgments by the ethical adequacy of the new legal criteria it introduces. This 'ethical adequacy' usually stands for the introduction of the hitherto uncharacteristic and even entirely new legal criteria concerning burning social issues such as bioethics,

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45 In United States, the Supreme Court introduced these revolutionary changes. In Europe, many of these procedural innovations occurred under the auspices of the European Court of Human Rights (ECHR) in Strasbourg. It is fair to say that it was the former, which provided the radical leadership in the field, and it was the latter, which followed suit. To prove this is easy. Compare, for example, *Katz v. United States* (1967) and *Hallford v. U.K.* (1997). The former had introduced the principle of the 'legitimate expectation of privacy' in 1967, which was appropriated by the ECHR thirty years later. Yet while *Katz* was followed-up by a whole series of cases further differentiating the doctrine, not an iota followed *Hallford v. U.K*. This also says something about the difference in the dynamics of constitutional and international law.

46 This would most certainly be true of 'post-Communist' societies.

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environmental protection, euthanasia, abortion, race relations, the balance of power in criminal process, and equality of marginal social groups. [47]

In the process of deciding a concrete case, these high instances of adjudication translate new values into new legal standards. They 'institutionalize' these new values. In turn, through consistent application by lower instances of adjudication, these values if adequate, quickly take root and become assimilated. As Paul Valéry would have said, nothing is more powerful than the idea whose time has come.

Because these values, whose time has come, are not a fancy figment of imagination – and one hopes not of judicial arbitrariness – but are socially *indispensable* at a given stage of development, their introduction brings about social appeasement and reconciliation. The United States' Supreme Court in the nineteen-sixties, under Chief Justice Warren and especially in the field of revolutionary changes it had introduced in criminal procedure, is an excellent example of the kind of socially progressive contribution constitutional adjudication can make to social

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[47] Especially to the French juridical ears, this sounds sacrilegious. But, see Pradel & Corstens, *Droit penal europeen*, Dalloz 1999, para. 7, at p. 13:

> 'La Convention affirme l'existence de droits. Ceux-ci ne sont pas créés par la Convention, mais seulement reconnus par elle: en effet selon l'article 1er de la Convention, "Les Hautes Parties contractantes *reconnaissent* à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention." Ce qui signifie que les droits sont *protolegal, ont une valeur permanente et antérieure à la Convention qui a un effet déclaratif et non constitutif.*' (Emphasis added.)

The question is, of course, declaratory of what and who is empowered to discover these anterior and permanent values? The judges? Does this mean they are the embodiment, the personification of these values? The separation of powers then means that the legislative branch electing them personally, in addition 'elects' certain values? While most of this is certainly true and realistic, why is it that the political and the legal system is 'acoustically separated' from these realities? See, supra n. 38. Seemingly, the system is obliged to pretend that it is bound only by the impersonal formal logic. In the end, of course, we speak of Ciceronian distrust – *non sub hominem sed sub deo et lege* – but trust, in turn is again a matter of shared values. See, for example, Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, 1995. In the end we are again circularly entangled in Unger's antinomy of rules and values. If values are not shared, we need rules. But clearly, the rules cannot not perform, unless underlying values determine their interpretations and their application. One can unmask this contradiction, but the real question is how to transcend it. Cf. Unger, supra n. 6, pp. 88-100.

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stability.[48] More timidly and more incrementally, the European Court of Human Rights in Strasbourg, too, has lived up to its post World War II mandate.

The critical importance of persuasive and credible, i.e. of objectively legitimate and subjectively honest, solution of all kinds of social as well as individual conflicts for instituting social stability is intuitively obvious. [49]

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[48] Politically, cases such as *Brown v. Board of Education* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, dealing with racial discrimination are of course the most obvious examples. In constitutional criminal procedure, however, the progression from *Massiah v. United States,* 377 U.S. 201 (1964) to *Spano v. New York*, 360 U.S. 315 (1959), 79 S. Ct. 1202, 3 L. Ed. 2nd 1265 to *Escobedo v. Illinois*, 387 U.S. 478 (1964) 84 S.Ct. 1758, 12 L. Ed. 2nd 977 to *Miranda v. Arizona,* 384 U.S. 436 (1964), 86 S.Ct. 1602, 16 L.Ed. 2nd 694 and finally to *Brewer v. Williams*, 430 U.S. 387 (1977), 97 S.Ct. 1232, 51 L.Ed. 2nd 424 – is also quite clear. In Europe the privilege against self-incrimination was affirmed only thirty-two years later in *Saunders v. U.K.*, Eur. Court H.R., 17.12 1996, Reports 1996-VI and in *John Murray v. United Kingdom*, Eur. Court H.R., 8. 2. 196, Reports 1996-I. For a clear succession of relevant cases see Zupan.i..et al., *Constitutional Criminal Procedure [Ustavno kazensko procesno pravo]*, Pasadena Publishing, Ljubljana 2000, pp. 587-784.

This evolution, however, was, due to nominations of conservative judges by conservative presidents, callously discontinued approximately at the time of *Leon v. United States*, 468 U.S. 897 (1984). The ‘moral leadership’ of the United States’ Supreme Court has under Chief Justice Rehnquist not only come to nothing, it has regressed and has fallen so low as to consider seriously (Justices Rehnquist, Scalia and Thomas) the execution of mentally retarded convicts. Supra n. 3. For a detailed analysis of this see Zupan.i.,.infra n. 69.

[49] Especially in the Continental cultural context, the objection to this complete line of reasoning will be that it is not for the judicial, but for the legislative (electorally responsible) branch of power to make these general value determinations. Two kinds of responses to this objection are in place here.

First, it is empirically clear that the ‘electorally responsible’ politicians, made to surface by the democratic majority, are *in fact not* providing answers to many burning social issues, dilemmas, etc. If they were, they would pre-empt adjudicatory solutions. The burning social issues would then never float up to the top constitutional instances of adjudication in the first place. Clearly, the mainstream-majority logic of the democratic process, for example, in unlikely to turn out justice for the particular social minorities.

Second, when a provocative question does reach the top level of adjudication, it is usually because the hitherto given legal criteria had not been providing clear answers to it. This is why the top level of adjudication a priori cannot resolve the issue with reference to simple formal logic. The supreme or constitutional court cannot simply subsume the facts of the case to the previously given major premise of the established legal norm. No, the courts of last instance are in fact asked, while deciding the case, to *create* a new major premise. In order to do this, they cannot refer to positive rules, except to the abstract and laconic language of constitutions or international conventions. These then figure as the tip of the vast hermeneutic pyramid subject to historical, teleological and other open-ended kinds of interpretation. See more specifically, Zupan.i.,.infra n. 135.

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III. Formal and Substantive Justice

> 'For the kingdom of heaven is like a landowner who went out early in the morning to hire men to work in his vineyard. He agreed to pay them a denarius for the day and sent them into the vineyard. About the third hour he went out and saw others standing in the market-place doing nothing.
>
> He told them, *"You also go and work in my vineyard, and I will pay you whatever is right."* So they went. He went out again about the sixth hour and the ninth hour and did the same thing. About the eleventh hour he went out and found still others standing around. He asked them, *"Why have you been standing here all day long doing nothing?" "Because no one has hired us,"* they answered. He said to them, *"You also go and work in my vineyard."* When evening came, the owner of the vineyard said to his foreman, *"Call the workers and pay them their wages, beginning with the last ones hired and going on to the first."* The workers who were hired about the eleventh hour came and each received a denarius.
>
> So when those came who were hired first, they expected to receive more. But each one of them also received a denarius. When they received it, they began to grumble against the landowner. *"These men who were hired last worked only one hour,"* they said, *"and you have made them equal to us who have borne the burden of the work and the heat of the day."*
>
> But he answered one of them, *"Friend, I am not being unfair to you. Didn't you agree to work for a denarius? Take your pay and go. I want to give the man who was hired last the same as I gave you. Don't I have the right to do what I want with my own money? Or are you envious because I am generous?"* So the last will be first, and the first will be last.' [Matthew 20]

The Parable of the Workers in the Vineyard does not stand for the distinction between justice and equity – for both are based on logical ratiocination. The evocations of equity and justice bring to mind the legitimate and honest resolution of conflicts – resolution so persuasive that it would not even necessitate coercive enforcement. Similarly, the axiom of 'justice' naturally suggests a broad substantive overtone, which brings expressions such as 'equal protection of the laws,' 'substantive equality,' 'social solidarity,' 'social harmony' to mind. In other words, justice and equity evoke certain transcendental connotations. Unfortunately, even though based on reason, the province of legal adjudication has never extended *that* far.

Legal justice – even one regarding human rights – has always been, if not formalistic, then at least formal and built on *formal* logic.[50] Legal adjudication, as we

50 'The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but … a clear derangement of the relationship between

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saw in the previous section, is central to Durkheim's *mechanical* solidarity and to the systematic imposition of institutionalized values. In adjudication and generally in the administration of justice, the judge interjects – cogently – the legalized values. These legalized values thus constitute the substantive criteria (the logical major premises) for the enforceable resolution of the legally defined subject matter.

Already, the legal definition of the subject matter – what the French call *la qualification du cas* – implies the transposition of the natural facts into the complex legal scheme of the matter. This conversion from the 'common sense' perception into the formal logical legal context is determinative. Legally, it is determinative of the outcome of the case, of course, but this is not what I have in mind. The mere translation of an event into legal language implies its potential estrangement from the common sense and from its natural social context. Cicero's dictum *'summum ius, summa iniuria'* testifies to this very old problem. [51] This is what *Max Weber* has to say on the matter:

> '[T]he expectations of parties will often be disappointed by the results of a strictly professional legal logic. Such disappointments are inevitable indeed, where the facts of life are juridically "construed" in order to make them fit the abstract propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be "conceived" by the jurist in conformity with those "principles" which are revealed to him by juristic science. The expectations of the parties are oriented toward the economic and utilitarian meaning of a legal proposition. However, from the point of view of legal logic, this meaning is an "irrational" one. For example, the layman will never understand why it should be impossible under the traditional definition of larceny to commit a larceny of electric power.' [52]

> form and content. Precisely because his vision is directed to the core of things, […] this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that inspires the whole institution of form and results therefrom – all this, I say, must make a disagreeable and repugnant impression on him. […] Yet we are here concerned with a manifestation which, just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples.'

R. von Ihering, *Der Geist des Römischen Rechts*, 1883, at pp. 478-479 (Von Mehren, trans., as cited in Kennedy, *Legal Formality*, 2 J. Legal Studies 1973 at p. 351).

51 Cicero, *De officiis* I, 10, 33, or in free translation: 'The most accurate attainment of what is right according to law may be in reality the highest injustice.' Even worse, see Terencius Heautontimorumenos 796: *'Ius summum saepe summa est malitia!'*

52 Rheinstein (ed.), *Max Weber on Law and Economy in Society*, Simon and Schuster, 1967, at p. 307. For a 'deconstructive' jurisprudential view see, Unger, supra n. 25, p. 91:

> [F]ormal and substantive justice cannot be reconciled. Thus, there is no coherent solution to the problem of adjudication as it is defined by liberal

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When the matters from the real world are put in the legal context, legal justice is derived based on legal principles and not on transcendental values. Moreover, especially on the Continent, people have never appreciated the judges as inherently wise. Even in the Anglo-Saxon world, where justice and equity have a much stronger *moral* appeal, their administration largely is perceived as a reactive vindication of something – rather than an ethical inspiration or moral leadership. [53]

Law and morality, therefore, are two only partially overlapping circles. Social and psychological mechanisms through which law enhances or diminishes the social (dis)integration of moral norms are complex indeed. [54] Besides, if the difference between right and wrong were ethically and morally completely clear, there would be no need either for law or for adjudication according to law. [55] As we shall see, the morally limited scope of the legal administration of justice was caused by, and is still rooted in, the sequence of development that is the precise inversion of the kind one would expect.

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thought; we cannot dispose of the difficulties with which that problem confronts liberal political doctrine by embracing either substantive or formal justice. *A system of rules (legal justice) can neither dispense with a consideration of values in the process of adjudication, nor be made consistent with such a consideration.* Moreover, *judgments about how to further general values in particular situations (substantive justice) can neither do without rules, nor be made compatible with them.* This is the **antinomy of rules and values.** (Emphasis added.)

[53] See, R Martin Shapiro, *The Prototype of Courts*, Ch. 1, Courts: A Comparative and Political Analysis, University of Chicago 1981, pp. 1-64. Shapiro is probably the best know critic of the 'government by the judges.'

[54] See generally, Robert K. Merton, *Anomie*, in Radzinowicz and Wolfgang (eds.), *Crime and Justice*, Vol. I, Basic Books, London and New York 1977. Merton is considered as the best author in the field. For an overview, see Zupan.i.,.*Criminal Law and its Influence upon Normative Integration*, 7 Acta Criminologica January 1974, pp. 53-105.

[55] This pregnant scholastic formulation we may translate into modern sociological language. If all the values were totally shared, conflicts could not arise. In every conflict-ridden situation the two parties would a priori, by definition, have to agree on who is in the right and who is wrong. Thus, even the talionic formula anticipates adjudication only in case where the two parties in conflict fail to stipulate a *compromissum: Si membrum rupsit, ni cum eo pacit, talio esto!* See, infra n. 64. One of the modern proponents of retributivism is Igor Primorac, *Is Retributivism Analytic?,* available at http://www.royalinstitutephilosophy.org/articles/primorac_punish.htm

The scholastic formula implies that all conflicts derive from moral divergences whereas, sociologically, the reverse is true: the more conflict-ridden the society the more anomic (valueless) it becomes. Hence the famous Chinese proverb: 'The society about to fall apart will have a thousand rules.'

If modern societies have become litigious, of which the progressively rising case load of courts in most countries is a clear warning sign, this means that the proportion of genuinely shared values is becoming smaller and less significant. (In Durkheim's manner of speaking: mechanical solidarity is replacing the organic solidarity.) This is the sociological background of the notorious judicial delays. See infra n. 119.

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Ethically, one would expect *substantive* justice as the first and the foremost leading principle whereas the *procedural* need for its enforcement as something secondary, subsequent and surrogate. In fact, however, precisely the opposite is historically accurate. As writers from Hobbes to Nietzsche and Kelsen have demonstrated, at the inception of state's 'law and order,' the procedural need for overpowering enforcement came first. The notions of substantive justice and even of morality were in every respect a secondary, a subsequent and a surrogate by-product. The maintenance of 'law and order,' of peace and of social, political stability keeps a tight and morally constraining rein on the legal administration of justice. The original *raison d'être* of this inversion continues to hold true. While there is no lack of *substantive* ethical, moral and legal criteria, the world is completely at a loss concerning the primary *procedural* requirement, i.e. not so much regarding its capability logically to process these ethical criteria, but in its power to *enforce* them.[56] In the modern version of events, this tends to show again, paradoxical as this may seem, that enforcement comes first and the criteria of justice is secondary. This historical evolution of legal criteria and procedure is dealt with in detail in the next section.

It is not, however, this – it might be called the 'original sin of the state' – that is in our day, the main dilemma and predicament. Although it is true that the moral limitations of legal adjudication arise due to the sequence of evolution of substantive criteria and procedure, in our day this is also due to the circumscribed scope of the power (jurisdiction) of the judicial branch. Ideologically, politically and constitutionally the tectonic boundary – the division of labour and the separation of powers along with the doctrine of checks and balances – runs along the Cartesian distinction between the abstract (legislation) and the concrete (judiciary).

The 'government of the judges' is not answerable to the electorate and is therefore an anathema; it is perceived as incompatible with the idea of democracy. However, as any constitutional court judge will recognize, the immediate impediment to the greater social authority of the judicial branch does not lie in the abstract democratic aspirations be it of the dynamic political system or of the given social structure. The concrete impediment lies – to put it directly and bluntly – in the covetousness of the 'most dangerous' executive branch of power. For the most part, the direct social power and prestige lie in the domain of the executive branch as is, for example, evident when one deals with the power struggle between police and the courts in criminal procedure. Judicial power is mostly indirect and based on reason. It is continuously reasoned out and justified in minute detail. It is the executive not the judicial power, which is prone to all sorts of corruption, arbitrariness, *abus de pouvoir* etc. It is in the executive, not in the judicial or the legislative department, that we mostly deal with the implications of Abraham Lincoln's aphorism *'power corrupts and absolute power corrupts absolutely.'* The triangle of constitutional checks and balances is plainly not an equidistant and equalized sociogram: the relatively feeble and reasoned out *de jure* attempts of the judicial branch to check the

[56] In Nietzschean language we would say that this and many other situations in the present day, such as for example the protection of environment, call once more for a new increase in the 'aggregation of power,' i.e. aggregation of power greater than the current nation-state.

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executive are clearly no match to the latter's *de facto* and sweeping supremacy. The 'rule of law' has great difficulties in inhibiting the 'law and order' – with the proviso that the executive is prone to corruption far more than committed to providing genuine law or order. Judge Sirica's role in the 1974 Watergate trial (and tribulation) is a good illustration of that.

Yet it is precisely the judicial Siricas, through making use of their inhibitory negative controls, who give veracity to the doctrine of checks and balances and the true separation of powers. The political system, in other words, which permits this kind of judicial feedback, attains an incomparably higher level of social, political and – more genuinely democratic – legitimacy. [57] In the big picture, it is plainly obvious that whole political systems, those that grant greater overall power to the judiciary, benefit from greater objective legitimacy as well as from superior subjective credibility. Social structures, on the other hand, which restrict adjudication only to petty personal conflicts or confine the criminal justice system to a repressive role, i.e. to the pretence of adjudication, are both less legitimate and less credible. Parenthetically, the latter was the role of the judiciary in former Communist countries and there is a clear lesson to be drawn from that.

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[57] Compare this to what happened, a quarter century later, in 2001 and 2002 in France, when Judge Halphen tried to make President Chirac testify under the probable cause that he had been involved in corrupt use of the so-called slush funds. In the end, Judge Halphen – having been for years on the receiving end of all kinds of 'blocks and imbalances' from the French executive branch of power – bowed out and stepped down. See Eric Halphen, *Sept ans de solitude*, Paris, 2002.

Consider how circumspectly the classical international law advances in the construction of its delicate international jurisdiction.

> 'The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions in the exercise of some of its powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.'

Prosecutor v. Dusko Tadic a/k/a 'Dule,' Desision on the defense motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 34-36.

See generally, Ignacio Ramonet, *Geopolitique du chaos*, Gallimard 1997. International law – in essence international contract law – derives from reasonable and voluntary cooperation between states. Considerable discrepancies in held values call for supra-national and compelling enforcement irrespective of prior consent. The story of passage from feudal particularism to nation state is being retold on a more universal plane. See, Perry Anderson's brilliant *Passages from Antiquity to Feudalism* and his *Lineages of Absolutist State*, both Verso Editions, 1978 and 1979.

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A further step in this line of reasoning is to contrast the government of those who are 'electorally responsible' to the hypothetical 'government of the judges.' Plato's 'philosopher-king' quandary has apparently not been resolved. The democratic electoral process, sometimes akin to a beauty contest, floats up a recognizable profile of a modern politician. Due to the lesser format of his narcissistic and manipulative personality – both are characteristics practically prerequisite for his election in the first place – he is, unless he is constantly checked, actually likely to accept as true that he is invested with the historical democratic mandate. He is dismissive both of legislative and of judiciary powers. His 'leadership' on the other hand does not amount to much, because he is constrained by the progressive proliferation of regulatory details, which in reality determine his power. Accordingly, he is 'pragmatic,' which means manipulative, accommodating and adaptable. Consequently, we are left with the kind of personality who only has *opinions* that are more 'flexible.' Purely from the meritocratic point of view, needless to say, an intelligent personality disinclined to cognitive dissonance, will simply not surface in this so-called democratic process. The judicial branch is supposed to check these kinds of people and maintain a balance against them. Moreover, they are likely – through the process of appointment of judges – to corrupt the selection of judges in the first place. One has fully to comprehend the disastrous metamorphosis of the United States Supreme Court from the Warren Court to the Reagan appointed Rehnquist Court, to understand how in the end, this aspect of executive power is the most pernicious and destructive.

How to stop this descending positive feedback spiral? Do the legal process in general and especially the process of (constitutional) adjudication have a significant role to play here?

In the last decades, the so-called negative judicial review has taken root even in the Continental constitutional practice and has come to be recognized as a functional counterbalance to the political excesses of the democratic process. Moreover, it is fair to say that e.g. the establishment of the European Court of Human rights in Strasbourg – in itself a rejoinder to the excesses of World War II – was in this sense a clear victory of reason over political passions. The 'government of the judges' – we consciously use this pejorative term because it must be incessantly reasoned out according to at least some kind of logic and justified – is to a greater extent consubstantial with the balanced voice of reason. True, this voice of reason is 'inflexible' and even formalistically predetermined by the determinants of the legal system as a whole. Despite the antinomy of rules and values, nevertheless, it still *is* the voice of *reason*. It is this countervailing *hope for reason,* incidentally, which the European Convention on Human Rights and the European Court of Human Rights originally derive from. The history of the latter proves that this hope – experimental at its inception – was thoroughly, and *historically* so, justified.[58] There is a lesson to be

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[58] Necessity is the mother of invention i.e. when considering this farsighted *political* hope for reason, one must keep in mind that these were the war-time politicians emerging from a very different 'democratic process,' i.e. one marked by the 'state of emergency' caused by World War II.

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drawn from this, too, although the current 'democratic process' is not – also due to the above executive jealousy – inclined to do so.

IV. Adjudication

1. Historical Perspective

As pointed out in the earlier section, in spite of the transcendental and moralistic overtones of 'justice,' legal justice is usually based on formal logic. This 'moralistically' limited scope of adjudication can be traced back to the sequence of the evolution of substantive criteria and procedural law, which is the inverse of the common assumption that procedural law is 'ancillary' to substantive law. Historically, substantive law in fact followed procedural law.

Etymologically, too, adjudication refers to a decision-making process based on certain logically derived rules. The word 'adjudication' derives from (a) the Latin noun '*jus*' – law, collection of customs, laws, edicts in the positive sense of the word and at the same time something that is just ('*aequitas*:' to decide '*ex bono et aequo*'); (b) the verb '*dicere*' (sometimes '*reddere*') means to say, to pronounce and derivatively to 'render justice,' to 'do justice.' The idiom *'aliqum ad judicium adducere, deducere, vocare'* meant 'to lead, to draw or to call somebody into the court of law' – *'de aliqua re*,' i.e. because of a particular thing. The predicate '*adjudico'* implied something definite, whereby the decision was finally pronounced in somebody's favour as in '*alicui causam adjudicare*.' Etymologically, the word adjudication derives from '*jus dicere*,' where '*dicere'* meant to make a decision. In the Latin language, verbs such as '*dicere*,' '*reddere*,' '*loquor'* – and especially in legal and political matters as in '*Roma locuta, causa finita*' – meant that something was *finally* decided. In turn, the word 'decide' obtains from Latin verb '*decido*,' which meant to 'cut off' as in '*decidere caput'* (to cut off the head); derivatively, in Latin too, 'decido' meant to decide.

We may suppose that in Roman law the verbs '*jus dicere*' and derivatively '*adjudicare*' implied (a) a decision-making process where (b) the decision was arrived at through reasoning (ratiocination, logic, common sense) and was (c) based logically and reasonably i.e. *mutatis mutandis*, on custom, *stare decisis* and positive laws and edicts.[59]

When one speaks of judging, of deciding a legally defined conflict, one immediately thinks of the logical syllogism and the substantive *criteria* for making a judgment. One supposes that there can be no judgment proper (the logical conclusion) unless it is *logically* entailed in these criteria (in the major premise of the logical syllogism). One then projects this *logical* procedure onto adjudication as a *social* process for the resolution of conflicts and comes to a completely wrong impression that adjudication as a social process, too, must have begun with pre-existent substantive criteria (legal rules). One is not aware of the false hidden premise about

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[59] See infra, n. 67.

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the *historically* initial, primary and principal nature of substantive law (criteria for judgment) and about the secondary, derivative and applicatory nature of procedure or the so-called 'adjective' law (concretization of these criteria in time and in space).

In terms of historical evolution, as we shall see, precisely the opposite was true. Law as a social process had started with the need for adjudication as a conflict-resolution context and procedure. The accumulation of substantive criteria, the predecessor of today's substantive law, was an evolutionary spin-off of this basic social need for adjudication. Politically, ideologically and in terms of constitutional law – if one is not aware of the above hidden premises – one is, like Montesquieu, Beccaria and other Enlightenment writers, seduced to make a further fundamental mistake and another Cartesian deduction.

The assumption in the time of Enlightenment was that there *can* and that therefore there should be a clear division of labour (separation of powers) between the legislative and the judicial branches of power along the seemingly clear line distinguishing between what is abstract and what concrete.[60] The legislative branch of power is entrusted with the exclusive power to create substantive *abstract* legal criteria for judging (law). Judges, on the other hand, are left with the mere '*concretizing'* task of applying these abstract criteria in concrete circumstances of specific cases. The consequences of this ideology, for it is in essence an ideologically rigid position to maintain this abstract-concrete distinction, were profound. The process of law-creation was separated from adjudication as its empirical source. It became theoretically deductive instead of being practically inductive. The mania of abstract-deductive codification, so typical of Enlightened despots may have been a restatement in its initial phase.[61] Later it meant that codes were written and rewritten by

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60 Montesquieu, *The Spirit of the Laws*, Thomas Nugent (Transl.), Hafner, New York and London 1949, Book XII, title 4, at p. 185. Engisch and André-Vincent, however, argue that the process of *'Konkretisierung*,' in which the abstract command is translated into concrete reality, *is* law, because law lives in its concrete decisions, not in general and abstract norms. See André-Vincent, *L'abstrait et le concrète dans l'interprétation (en lisant Engisch)*, Les archives de philosophie de droit 1972, at p. 135, and my discussion in *On Legal Formalism: The Principle of Legality in Criminal Law*, 27 Loyola Law Review 1981, pp. 356-369, at n.10.

Yet this is not simply a philosophical problem. The constitutional provisions, for example, determining jurisdiction of constitutional courts are still based on the untenable distinction between 'abstract' and 'concrete' judicial review along with 'concrete' jurisdiction in cases of constitutional complaints (*amparo*, *Verfassungsbeschwerde*, *certiorari*). In many legal cases, this distinction turns out to be completely *forcé.* Philosophically, the distinction is perhaps Cartesian, but the true reasons for its maintenance are, especially in France, cultural and ideological.

61 The legislative activity of The Enlightened Despots: Leopold of Tuscany promulgated his rather disorganized Criminal Code in 1786; Austria promulgated its new (eighteen years after *Constitutio Criminalis Theresiana,* 1769) code in 1787. This code, called *Josephine,* an integral part of sweeping reforms of Joseph II, son of Maria Theresa, was already a very well organized code. It was the first to have incorporated the principle of legality and to have completely secularized its incriminations. The only exception there was blasphemy which even an atheist such as Joseph II felt obliged to incriminate. But a way around that was found just as well: there was a presumption of insanity valid

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legal academics while the myth was and still is maintained that the code contains the determinate answers to all questions that might be raised by specific cases. Since 'judicial practice,' according to this ideology could not figure as a valid source of law and was *de jure* not even binding on the lower courts, there is little empirical feedback between the reality of conflicts and deductive law -making. To the extent the decisions of the courts are nonetheless creative, practical and just solutions of problems raised by particular cases – often *despite* the rigidity and inadequacy of codified norms – the legal system ignores them, does not store them in its memory and does not learn from them. Characteristically, even the European Convention on Human Rights in its art. 46, par. 1, mandates that the decision of the European Court be binding only *inter partes,* between the parties concerned. If truth be told, the *de facto erga omnes* effect of the Court's decisions is contrary to the letter although perhaps not to the ambiguous spirit of the Convention.[62] Strictly speaking, then, even *stare decisis* would be only an internal concern of the Court. Fortunately, the 'law in action' went in the opposite direction. If the ideological intentions of the fathers of the Convention were strictly adhered to the *acquis*, the jurisprudence of the European Court would not even exist. All we would perhaps have would be an atomised series of materially unrelated decisions.

Purely in terms of formal logic and legal syllogism, it seems absurd to speak of judging (minor premise) as primary and criteria for judgment (major premise) as secondary and derivative. Yet, historically and developmentally, this is precisely what happened since adjudication emerged as a necessary complement to mechanically imposed law and order, i.e. it was not invented for reasons having to do with

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for anyone who committed blasphemy: the language of Josephine is already very clear and concise and the reason for that too can be traced back to Beccaria and even Montesquieu who postulated that people have to understand what is prohibited, if they are to be punished after they have committed a wrong. Prussia's Frederick II promulgated the Criminal Code in 1794. This Code is typical of the attitudes of the enlightened despots: it is a catechism of right and wrong and its first article says that every authority – parents, teachers, etc. are obliged to fight against vice and crime. France's Code pénal of 1810 already knew the principle *nullum crimen nulla poena sine lege praevia*… from art. 8 of the 1789 *Declaration of the Rights of Man and Citizen*, yet it still punished the crime of *laesio majestatis* by cutting off a hand. Typically this was the punishment also provided for *parricidium*, i.e. *parricidium* and *laesio majestatis* were regarded as analogous. See, generally, Peter Gay, *The Enlightenment: An Interpretation: The Science of Freedom,* Vol. II, W.W. Norton, 1996.

62 See Zupan.i.,*Le droit constitutionnel et la jurisprudence de la Cour Européenne des droits de l'homme,* introductory *étude* in Louis Favoreu (ed.), XIV Annuaire de droit constitutionnel 14, Economica, Paris 2001. Essentially, I maintain that the European Court of Human Right is evolving into a European Constitutional Court. Cf. J.-F. Flauss, *La Cour européenne des droits de l'homme est-elle une Cour constitutionnelle?*, in Revue française de droit constitutionnel, 36, 1998, p. 728: 'Sauf à retenir une conception fortement élastique des définitions préétablis et reconnues, force est de conclure qu'en l'état actuel, la Cour européenne des droits de l'homme n'est pas, d'un point de vue technique, vraiment assimilable à une Cour constitutionnelle. Mais il n'est pas totalement inconcevable qu'à l'avenir, elle puisse encore se rapprocher davantage de cette variété de juridiction constitutionnelle.'

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logic. Adjudication materialized as a natural instrument of social peace and stability before there was any notion of 'justice.'

> 'One can refute a judgment by proving its conditionality: the need to retain it is not thereby removed. False values cannot be eradicated by reasons any more than astigmatism in the eyes of an invalid. One must grasp the need for their existence: they are a consequence of causes which have nothing to do with reasons.'[63]

Indeed, justice as an idea, too, is secondary. The abstract idea of objective justice begins to evolve once the 'personal justice' obtained through physical retaliation (combat) is outlawed.[64] Once 'law and order' is imposed through usurpation of power by a particular organized group, once there is thus the initial aggregation of organized power, alternative conflict-resolution becomes an immediate practical requirement – irrespective of the obvious fact that there are no pre-existent – apart from common sense – criteria for arbitrating the conflicts.[65] Only then, as the development

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63 Friedrich Nietzsche, *The Will to Power*, Vintage 1968, Sec. 123.

64 The so-called talionic principle: *'Si membrum rupsit, ni cum eo pacit, talio esto!'* (If he breaks his limb and does not make peace with him, let *the same* happen to him!) Leges XII Tabularum, Tabula II, Fragmentum 2. In his *Genealogy of Morals*, Nietzsche insists that this talionic cruelty, ratified in the Law of Twelve Tables of Rome – 'si plus minusve secuerunt, ne fraude esto' (if they secured more or less, let that be no crime) – is at the very origin of debtor-creditor relationship and as such at the origin of the genesis of law. *Second Essay*, section 5, *infra* n. 98.

65 'Common sense' meaning, of course, an intelligent, critical, informed – in short in the original sense 'commonsensical' – approach in perceptive contact with practical realities. In this context, Berkeley's *A Treatise Concerning the Principles of Human Knowledge* – since it was largely a reaction to scholastic abstractions, could easily be subtitled 'A Return to Common Sense.' Modern legal and especially bureaucratic reasoning often attains a 'scholastic' level of alienation from reality and common sense. See, for example, Phillip K. Howard, *The Death of Common Sense: How Law is Suffocating America*, Random House, New York 1994. In line with the same tradition, see Maguire, *Evidence, Common Sense and Common Law* , The Foundation Press, Chicago 1947. Maguire was a professor of law at Harvard Law School and a leading authority on the law of evidence.

Nevertheless, one must watch here for another possible connotation of 'common sense:' In French *'le bon sens'* may have an unintelligent, nay, positively stupid and detrimental aspect: *Le constat bourgeois, c'est le bon sens, c'est a dire une vérité qui s'arrête sur l'ordre arbitraire de celui qui parle* , says Roland Barth in his *Mythologies,* Seuil, 1970. This 'truth, which stops at the level arbitrarily chosen by the one who speaks,' is nothing but an unintelligent superficiality, i.e. the exact opposite of Paul Valery's 'thinking as the negation of what is immediately before us.' Barth's emphasis on arbitrariness is certainly disconcerting when *'he who speaks'* happens to be the judge. See, for example, Martin Shapiro's critique of the American constitutional equal protection doctrine, in which common-sense 'reasonableness' is a key criterion, and my critique of Rehnquist's 'marginal utility' scheme for deconstructing the privilege against self-incrimination and the exclusionary rule, supra n. 4 *in fine*. For a good example of *'le bon sense,'* see infra n. 85, *in fine*. In such matters it is difficult to

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of Roman law amply illustrates, these substantive standards begin to multiply and diversify in and through this process of continuing adjudication. In Roman, as later at Common Law, this had revealed itself as customary law:

> 'Ingrained custom is not unreasonably maintained as good as law; this is what is known as the law based on men's habits. For since actual legislation is only binding because it is accepted by the judgment of the people, those things of which the people have approved without any writing at all will justly be binding on everyone. And therefore the following principle is also quite rightly accepted, that legislation can be abrogated not only by the vote of the legislator but also by desuetude, with the tacit agreement of all men.'[66]

Later, the above 'substantive standards' come to represent the judicial experience accumulated through generations of judges and jurists.[67] The comeback, in the 20th century, of the criteria-producing (precedent-producing) constitutional and international adjudication is no accident. The period in Continental law, between the 1789 French Revolution and the ensuing restatement of theretofore accumulated judicial (adjudicatory, 'Common Law') experience, i.e. codification, represents a blunder of historical proportions. Gnoseologically, this mistake originates in the confusion, created by the Enlightenment writers and later by Jeremy Bentham in his influential *Theory of Legislation*, of judging as a logical procedure and adjudication as a social process.[68]

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distinguish between arbitrariness of the speaker and his sheer inanity, the latter being implied in Roland Barth's adjective 'the bourgeois.' In this sense, Karl Marx's *epitheton ornans* for Jeremy Bentham, because of his 'common sense' utilitarianism, was 'the genius of bourgeois stupidity.'

66 D. I. 3. 32. I. They attribute this famous passage from *Digestae* to Salvius Julianus. Cited from Crook, infra n. 119 *in fine*, at p. 28, n. 71.

67 The classical passage to this effect is Cicero's treatise, Auctor ad herrenium, II, 19, where he describes the Roman version of *stare decisis*. For a more skeptical interpretation see, Crook, infra n. 119 *in fine.*

68 Jeremy Bentham, *Theory of Legislation*, French text by E. Dumont, R. Hildreth (transl.), London, 1864.

It is interesting to note that even modern jurists and even judges themselves often make a similar logical mistake when they confuse the true reasons (motives, ideas etc.) for a particular judgment with the ex post ratiocination offered as the official reasoning-out of the judgment. Bishop George Berkeley (1685 – 1753) first drew attention to this possible error, i.e. to the frequent confusion between the real and the justificatory reasons for a particular judgment, opinion, view, conclusion etc. See, Berkeley, *A Discourse Addressed to Magistrates*, Dublin 1744 and generally, *A Treatise Concerning the Principles of Human Knowledge*, e.g. pp. 65 and 66. This mistake is especially pernicious in a system, such as Common Law, where the official justification of the judgment later figures as a major premise (precedent) for subsequent cases.

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The first commandment of the early Roman *Leges Duodecim Tabularum*[69] was *Si in ius vocat, ito!* that is*, if you are called into the court of law, you must go!* This implies that the public adjudication of private conflicts was *ab initio* obligatory, before there even existed a notion of 'right' calling for its 'remedy.' The concern at that stage, in other words, was not primarily 'to do justice' in substantive terms but to provide for a compulsory *procedure* of adjudication. The intent was to displace private aggression into a public forum.

Among other things, this implies that the origins of what we now call 'law,' are completely procedural. At the same time, these mandatory and primary procedures, in which private conflicts submitted to binding resolution by way of adjudication (rather than by means of combat), created the need for substantive criteria (principles, doctrines, rules). Thus, the concept of a 'subjective right' (*Recht, droit, diritto, pravo, pravica* etc.) is entirely secondary. In turn, the general idea of 'justice' is tertiary that is to say, by and large derivative.

> 'To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice.'[70]

Today, we take the notions such as 'justice,' 'law,' 'right,' etc. for granted and we may even imbue them with a certain transcendental connotation.[71] It is well to remember, however, that the *real* origins of this accepted wisdom develop first – via

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69 *'Si in ius uocat, ito. Ni it, antestamino. Igitur em capito.'* Leges XII Tabularum, the Laws of XII Tables, were the primary source (…*fons omnis publici privatique juris*…) and the only codification of Roman law. They date to ca. 450 B.C. The very first rule *'Si in ius vocat, ito!'* was cited by Cicero. Another rendition of this rule, presumably from the same source is: *'Si in ius vocat, ni it, antestamino igitur in capito!'* See also Tabularum XII Relicta at http://users.ipa.net/~tanker/tables.htm. Cf. Pashukanis, *Law and Marxism*, Ink Links, London 1978, at p. 166. For an interpretation of this, see Zupan.i.,.*The Crown and the Criminal: The Privilege Against Self-Incrimination (Towards the General Principles of Criminal Procedure)*, 5 Nottingham Law Journal 32, at p. 35, n. 11. As far as I am aware, nobody has ever raised the question why this *procedural* requirement should be the first and foremost of all the rules in the XII Tables. In our context, however, it makes perfect sense that this resort to judicial resolution of the conflict should be the most fundamental requirement!

70 Hobbes, ibidem, supra n. 96, par. 3, marginal rubric 'In such a Warre, nothing is unjust.'

71 For a superb historical rendering of the metaphysical notion of justice (righteousness) see Jan Assmann, *Maât, l'égypte pharaonique et l'idée de justice sociale*, La maison de vie, 1999, and his *Moses the Egyptian*: *The Memory of Egypt and Western Monotheism*, Cambridge, Mass., 1997. Assman is currently without any doubt the leading theorist in this field. However, to understand the non-metaphysical and modern import of these works, I suggest that they must be read in conjunction with Kohlberg's and Kegan's work on moral development and with e.g. Abraham Maslow, *The Farther Reaches of Human Nature* , the Viking Press, New York 1973; Robert Kegan, *The Evolving Self*, Cambridge, Mass. 1982; the works of Lawrence Kohlberg and his followers. Still, all this goes back to Plotinus's and Aristotle's notion of *spoudaios*, e.g. Plotinus 14[46].

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the procedure of adjudication – out of the utterly practical need to maintain peace and harmony within *any* socially ordered group of people. Even the most basic division of labour requires no less than this minimum of interpersonal stability.

In jurisprudential and even ideological terms, the idea of procedural, i.e. adjudicatory origins of law has profound implications. To say that law is essentially a procedural phenomenon implies for example, that the notion of 'judge made law' is something natural and *au contraire* that Bentham's ranting against it was largely unfounded:

> '[Private] individuals [too,] make the law, insofar as they make successful claims. They not only make previsions and predictions, but try to have these predictions succeed by their own intervention in the process. Judges, jurisconsults, and, above all, legislators are just individuals who find themselves in a particular position to influence the whole process through their own intervention.'[72]

With the progression of the division of labour in society the nature of disagreements and conflicts, changes, too. Successive generations of judges formulate ever-new principles, doctrines, and rules in order to resolve them. Von Savigny, a vocal opponent of Napoleon's codification who refused the example of Codex Justinianus,[73] very adequately speaks of 'the umbilical cord connecting the law to the life of the nation.' Indeed, in the 19th century – before Napoleonic codification – this empirical perception of law was still very much present in the minds of legal thinkers and writers.[74] In his famous *Landesgericht* however, under the penalty of forfeiture of

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72 Bruno Leoni, *The Law as Individual Claim* (1961), as re-published in B. Leoni, *Freedom and the Law*, 3rd ed., Liberty Fund, Indianapolis 1991, at p. 202.

73 Justinian (527 – 565) proclaimed his *Codex* with constitutio *Summa rei publicae* on 27 April 529. *Vacatio legis* was only eight days, i.e. it went into power on 16 April 528. The Codex itself has not survived but it was followed by the immense work comprising *Digestae, Quinquaginta Decisiones, Codex repetitiate praelectionis, Institutiones* and *Novelae Leges*. The result was an immense *Corpus Juris*, the main antique source of the Western legal tradition.

The anecdotic background of Napoleon's own idea to codify is quite interesting. Apparently, at some point in his youth he had been imprisoned somewhere in Italy and he had the time to read the whole *Corpus Juris*. Later, when he was an Emperor, Talleyrand gave him to read Jeremy Bentham's *Principles of Legislation*. (They had appeared, characteristically, in French translation before they were published in England.) He had read the book in one night and in the morning, he reportedly exclaimed *'Voila, un ouvrage de génie…!'* Thereafter, like Justinian, who had nominated a nine member commission (seven officials, two practising lawyers and a professor Teophilus from Constantinople Law Faculty) to carry out the *Codex* restatement, Napoleon also nominated a commission to write his *Code Civil* (Code Napoléon) . From time to time he participated in its work. See Korošec, *Rimsko pravo [Roman Law],* Univerza v Ljubljani, 1967, p. 32.

74 Friedrich Karl von Savigny (1779-1861), *Of the Vocation of Our Age for Legislation and Jurisprudence [Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft]*, Abraham Hayward (Transl.), Littlewood & Co. Old Bailey, reprinted in 1975 by Arno Press.

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goods, Frederick the Great banned all commentary to the Code,[75] characteristically assuming that his *Landesgericht* had finally settled criteria of justice. In a modern constitutional manner of speaking, we would likely say that Fredrick the Great as an 'Enlightened' personification of the executive branch simply refused to share power with the judicial branch. (He hated all lawyers anyway.) The French post-revolutionary retort against the arbitrariness of aristocratic justice under the *ancien régime* had similar legal consequences. Napoleon, too, hated all lawyers.[76] Typical even before the codification is the insistent fictional separation of powers strictly along the line of 'Cartesian dualism with its emphasis on thought and logic and de-emphasis of matter and sensations.' This rigid distinction in the division of labour between the abstract (intended for the legislature) and the concrete (intended for the judges) still pervades both principal legal systems.[77]

By contrast, the English legal tradition, up until the Glorious Revolution of 1688 and again after it, maintained 'Coke's ideas regarding the subordination of Crown and Parliament to higher law and a judiciary accustomed to interpreting and at times ignoring legislative acts violating higher principles.'[78]

> 'Prior to the 17th century […] the English judicial tradition had often tended to assign a subordinate role to the legislative function of King and Parliament, holding that law was not created but ascertained or declared. Common Law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him; hence law was largely withdrawn from arbitrary interventions of King and parliament. […] "It appears in our books," stated Cook in the famous Bonham's Case of 1610, "that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void."'[79]

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75 …as did in fact Justinian for his *Digestae*, but not for *Institutiones* and the *Codex*: Justinian knew that the proscription would not be effective. Korošec, *op.cit. supra* n. 73, at p. 38.

76 *Napoléon n'aimait guère les juristes et s'en méfiait. Lorsque Maleville, l'un des quatre rédacteurs, publia un Commentaire raisonné du Code Civil, l'Empereur s'écria " Mon Code est perdu!" Au moment de la réouverture des écoles de droit, un décret du 21 septembre 1804 interdit aux professeurs le moindre commentaire personnel pendant les 'cours de Code.'* at http://www.ac-dijon.fr/pedago/ecogest/Ressources/Bibliodroit/port_r2.htm.

77 Mini, Piero V., *Philosophy and Economics*, U. Press of Florida 1974, p. 25. See also, Mauro Cappelletti and William Cohen, *From Political to Judicial Control: The Example of France*, Ch. 3, Comparative Constitutional Law, Cases and Materials, The Bobbs-Merrill Co., Indianapolis, New York, Charlottesville 1979, pp. 25-72.

78 Cappelletti and Cohen, supra n. 77, p. 9.

79 Cappelletti and Cohen, supra n. 77, pp. 8 and 9.

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Max Weber explained this fundamental contrast with the power the English landed gentry – historically related to the legal profession – had retained vis-à-vis the King.[80]

For our purposes, however, it suffices to establish the fundamental difference between the two legal traditions. Even today, it can clearly be seen that the Common Law tradition is in the broadest sense of the word 'procedural,' whereas the Continental tradition is analogously 'substantive.' The distinction – for all its historical, political explanations – has in the last analysis everything to do respectively with either the autonomous or the ancillary place of adjudication in the general legal process. The famous 'convergence of the two legal traditions' thus largely boils down to natural reaffirmation of the procedural and adjudicatory characteristics in the Continental legal systems.[81]

Nevertheless, we might add that the hidden premise in the Anglo-American tradition that law is a procedural phenomenon is typically practical and down to earth. It implies that law is nothing more than conflict-resolution method and device. There is no reference here to 'justice' that would transcend the specific issues presented for adjudication. In criminal procedure, as we shall see, this is especially striking because the so-called truth finding remains a mere instrument of conflict-resolution. Procedure *qua* conflict-resolution is in this sense autonomous since it does not pretend to serve any 'higher purpose.'

By contrast, Continental criminal procedure insists on the ancillary, 'adjective,'[82] role of procedure because the truth about a past allegedly criminal event is somehow confluent with the transcendental issue of sin and guilt: the crime is seen as a hybrid of tort and sin.[83] One is not far from the truth, if one suspects here the historical influence of the inquisitorial tradition, but the problem goes deeper than that. The central truth finding to which Continental criminal procedure is instrumental (ancillary) is, of course, the truth as circumscribed by substantive criminal law. Hobbes' formula 'civil laws ceasing crimes also cease' is an early recognition of the hollow nature of this 'truth.'

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80 Max Weber, *On Law and Economy in Society*, Simon and Schuster, New York 1967, at pp. 267 et seq.

81 The best evidence of this is the abundant case law of the European Court of Human Rights in Strasbourg regarding art. 6 (fair trial) provisions of the European Convention on Human Rights. The Court, however, has not yet reached the stage where it would clearly pronounce that a substantive legal decision could not be legitimate unless it is the outcome of a fair procedure.

82 Even Hans Kelsen used the term 'adjective law.' Kelsen, *Pure Theory of Law*, Max Knight (Transl.), University of California Press, Berkeley, Los Angeles and London 1978.

83 The trial and the acquittal of O.J. Simpson was an excellent demonstration of the conflict-resolution approach in American criminal procedure. The outcome was a shock to Continental lawyers because they conceive of criminal process purely as a truth-finding instrument that goes far beyond the mere resolution of the conflict between the government (the prosecution) and the criminal suspect/defendant.

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2. 'Truth' as an Emanation of the Power of the State

In other words, the facts making up the truth of a criminal law syllogism are legally relevant – think, for example of the offence of tax evasion – only due to the enforcement *power* of the state. Evidently, these 'facts' (the elements of the crime) are not independently existing objective facts whose existence could be empirically tested the way scientific facts are tried out in an experiment. At a minimum, one can say that their legal relevance depends on the power of the law; i.e. that their existence – among the countless other facts – is perceived only because law makes them relevant. The moment this law is not there, they sink back into the multitude of other unperceived, legally irrelevant particulars.

The error here is comparable to the common mistake in the interpretation of the legal doctrine of causality. What Bacon's famous formula *'In iure non remota, sed proxima causa spectator'* ('in law we regard proximate but not remote causes') in fact means is that law and the judges freely choose, *which* among the innumerable necessary conditions for the occurrence of an event they will consider as legally relevant, i.e. as 'causes.' This is why the *sine qua non* causation doctrine, quite appropriately, boils down to the negation of legal causation.[84]

In a more sophisticated language of philosophy, they speak of the *antinomy of theory and facts*, i.e. of the paradox in which the theories are invented to explain facts and be, therefore, something different from them, since how could the scientific theories explain empirical facts unless they were something mentally contrasted to something factual. This view, however, is naïve because mathematical hypotheses, as in physics, actually expose entirely new facts, which would without them never even become apparent. In this sense, theories, supposedly different from facts, actually 'produce' new facts, i.e. they merge with them.[85] Thus, what is mental in effect produces what is factual and vice versa.

Of course, legal norms – say in a criminal code – are not in the above sense theories based on objective reality. Ultimately, the reality on which these 'theories' are based is the reality of the power of the state. They are thus even less distinguishable from facts. A different way of pointing this out is to say that in law what is prescriptive (rules) amalgamates with what is descriptive (values and facts), i.e.

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[84] The fact that judges may not be fully aware, *what* are the criteria by which they choose one of the literally thousands of the necessary conditions for the incriminated consequence as legally relevant, is disconcerting. It is disturbing because it means that arbitrary value judgments may collide with the principle of legality and thus with the rule of law. For the intelligent solution of this problem see Secs. 2 (causation) of the Model Penal Code, American Law Institute, Philadelphia, 1962.

[85] See Unger, *Knowledge and Politics*, Free Press 1974, at pp. 31-36. Unger spells out three of these antinomies: *theories and facts*, *rules and values* along with the antinomy of *reason and desire*. To say, in response to this quandary – as some legal theorists do – that 'it is a fact that Elvis Presley is dead' is not only foolish. Such an attitude condemns law and legal theory to the kind of obtuse matter-of-factness and superficial persuasiveness, which prevents the evolution of understanding: as if legal process was incapable of moving beyond the jury's lowest mental common denominator. See, supra n. 65.

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mechanically enforced formal law augments the organic integration of norms. This implies that it is indeed the purpose of the consistent enforcement of law to impact social consciousness to the extent of being converted into a 'self-fulfilling prophecy.' In turn, this is then labelled *the antinomy of rules and values*.[86]

In this sense, the 'truth' here is part of the 'virtual reality' wholly dependent on the organized power of the state: should the latter cease, crimes will also cease to exist. To make the finding of this 'truth' an overriding concern of criminal procedure, an end that justifies violations of various human rights – think of inquisitorial resort to torture! – is an integral part of the general authoritarian attitude. It is characteristic of this attitude that its subject uncritically identifies with the existing power and authority.[87] Certain legal theorists in fact maintain that the differences between the Continental and the Anglo-Saxon Criminal procedures derive from the different attitudes, in respective legal cultures, *vis-à-vis* authority.[88] In this sense to say that the truth in criminal procedure is sufficiently virtual, i.e. *relative*, to permit the exclusion of tainted evidence despite the risk that a guilty defendant will in the end be acquitted, is clearly less authoritarian and more democratic than to insist that a guilty defendant *absolutely* must be convicted and punished despite the violations of constitutional (human) rights committed in the name of 'truth-finding.'

Interestingly enough, the relative dispensability of truth in criminal trial, is now an internationally established legal requirement. The United Nations Convention against Torture[89] in its article 15 mandates the exclusion of all tainted evidence directly or indirectly[90] acquired through torture. The goal of truth finding is not absolute, i.e. that when it comes into collision with certain human rights, the latter prevail over the former. That which is 'relative' here, of course, is not the sheer facts

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86 Unger, supra n. 85.

87 See generally T. W. Adorno et al., *The Authoritarian Personality*, Harper & Brothers 1950. The authoritarian attitude is psychologically measurable on the so-called F Scale.

88 Damaška, infra n. 190.

89 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46 [Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987. To date (July 2002), 130 States have ratified the UN Convention. It is of concern that despite widespread acceptance of the prohibition of torture under international law, the Convention against Torture remains the least ratified of the six main UN human rights treaties (as a point of comparison, the Convention on the Rights of the Child has been ratified by 191 States). In international law the prohibition of tortures contained in CAT is considered *ius cogens*, *Al Adsani v. U.K.*, ECHR, judgment of 21 November 2001. Consequently, the exclusion of tainted evidence ('the exclusionary rule') and therefore the above relativity of truth is no longer a peculiarity of American criminal procedure and something arrived at through 'judicial implication.'

90 'Indirectly' here, means that the tainted piece of evidence would not have been acquired *were it not* (the *sine qua non* logical requirement) for the previously obtained piece of evidence acquired through torture. This doctrine originates in the case of *Wong Sun v. United States*, 317 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2nd 441 (1963), a case in which the prosecution attempted to use derivative evidence it would not have obtained *were it not* for the illegal arrest. See Zupan.i..et al, *Constitutional Criminal Procedure (Ustavno kazensko procesno pravo)*, Pasadena Publishing 2000, pp. 818-822.

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of a past (allegedly criminal) event. The evidentiary suppression of these facts, today an established requirement of fair trial, testifies to the relativity of legal *importance* of these facts. In turn, this relativity of importance nevertheless implies that the 'rule of law' interdicts the abuse of power (by police), i.e. that the power which may be used to obtain the truth has its limits and is not absolute.

Nevertheless, it would be unreal to insist on the above distinction between 'sheer facts' on the one hand and the 'legal importance' of these facts. It is obvious that the *selected* 'sheer facts,' too, are among millions of other facts legally relevant (important) *only because* the legislation endowed with power has chosen to make them relevant.[91] The *quid pro quo*, therefore, is only between two different aspects

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[91] A more sophisticated way of saying this would be to distinguish between perception and apperception. We may perceive an event by our senses and *in toto* yet not interpret it at all. In this case all the 'facts' are equally (ir)relevant, i.e. the event does not 'make sense.' When we perceive this same event selectively – through the lenses of a particular concept or theory – we recognize it as e.g. 'a criminal offence.' This is then *apperception*.

It is clear that what we call the *meaning* of an event is lent to it by the concept or theory, which informs the unselective pure perception. The truth of the matter consequently lies in the adequacy – St. Thomas Aquinas called it *adequatio intellectus et rei* – between theory and facts.

In turn, if this 'theory' is only a norm of substantive criminal law emanating from the power of the state, this means that the 'truth' here is really *nothing but* the power of the state. To employ torture, for example, in order to arrive at that truth simply means to employ one feature of the power of the state to reinforce another aspect of the same power. This also means that the 'truth' here is circular, self-validating and in some circumstances difficult to disprove. In medieval witch trials, for example, the above epistemological circularity escalated into the collective frenzy of 'witch hunt.'

In epistemology, it is axiomatic that a theory should not be circular (self-referential) and that it be capable of being disproved. This is the test of its authentic scientific nature. See, Karl Popper, *The Logic of Scientific Discovery*, Routledge, 14th Printing, 1977. First English ed., Hutchinson, 1959. First published as *Logik der Forschung* in Vienna: Springer 1934: 'Falsificationism is the idea that science advances by unjustified, exaggerated guesses followed by unstinting criticism. Only hypotheses capable of clashing with observation reports are allowed to count as scientific. "Gold is soluble in hydrochloric acid" is scientific (though false); "Some homeopathic medicine does work" is, taken on its own, unscientific (though possibly true). The first is scientific because we can eliminate it if it is false; the second is unscientific because even if it were false we could not get rid of it by confronting it with an observation report that contradicted it. Unfalsifiable theories are like the computer programs with no uninstall option that just clog up the computers' precious storage space. Falsifiable theories, on the other hand, enhance our control over error while expanding the richness of what we can say about the world.' Karl Popper's *Main Works in English*, http://www.eeng.dcu.ie/~tkpw/intro_reading/Introductory_Reading.html# The%20Logic%20of%20 Scientific%20Discovery.

For procedural implications of the above circularity in 17th century witch trials see Vladimir Bayer, *Ugovor s ðavlom (The Contract with the Devil)*, Zagreb, 1953: Ugovor s ðavlom:procesi protiv èarobnjaka u Evropi a napose u Hrvatskoj / *uvodne studije napisao, dokumente priredio i tumaèenjima popratio*. (Professor Bayer was the

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of power: on the one hand the legislative power to make 'facts' relevant in terms of substantive criminal law and on the other hand the power of the executive branch (the police) to extract these 'facts' in violation of the privilege against self-incrimination and other constitutional and human rights.

3. Adjudication – the Surrogate of Force and Violence

Adjudication is the quintessence of law. When one goes to the very heart of law as the business of state and of governing and as a complex, diversified, culturally imbued and socio-political phenomenon, we find that it springs from one rudimentary need. This most basic social need and the process of fulfilling it may be called in the fundamental sense of the word and without any exaggeration, the civilization.

The natural prerequisite in any interpersonal matrix, however small, is first to establish and then to maintain harmony and freedom from strife.[92] Even in the most primitive tribal community, if it were a community with a most basic division of labour, the inevitable conflicts, disagreements and discords between its members simply cannot be permitted to relapse into physical contests and combat. This is true even of groups of non-human primates and of lower animal species where the dominant males by maintaining their power through 'pecking order' maintain subordination and peace. In the history of human societies this simple and primitive 'pecking

leading criminal procedure theorist in former Yugoslavia.).

See specific minutes of inqusition at Vještice i vještièarenje u Hrvatskoj (in Croatian), at http://www.zinfo.hr/hrvatski/stranice/izdavastvo/kruhiruze/kir11/11vjesticeuhrvata.htm.

92 In modern and complex societies this 'harmony and freedom from strife' grows to be, of course, a complex anthropological, psychological, sociological, ideological and political issue. Durkheim, for example, as a leading social theorist dedicated most of his work to 'division of labour in society' and to contrary concepts such as social dissolution, *anomie*, etc. See, Emile Durkheim, *Les formes élementaires de la vie religieuse*, Paris, Presses universitaires francaises, 1968, pp. 593-638, and the critique of his positivist position in Jameson, infra n .93, at p. 292, n. 11. On division of labour generally, see Durkheim, *The Division of Labor in Society*, G. Simpson (Transl.), The MacMillan Co., New York 1933, and my discussion of it in Zupan .i.,.*Criminal Law and Its Influence upon Normative Integration*, 7 Acta Criminologica 53, January 1974, at pp. 83-91.

For our purposes, however, it suffices to appreciate – in a purely functionalist fashion – the fact that the simple cooperation in an elemental human gathering requires a simple establishment of 'law and order.' The progressive complexity of the nature of social divergences and individual conflicts finds its complement in ever more complex forms of adjudication. In modern socio-political context, for example, the complex forms of constitutional and international adjudication ('judicial review') *mutatis mutandis* provide for resolution of social conflicts and the consequent appeasement, for social and political stability, etc. The core form of adjudication, however, remains the same throughout human history.

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order'[93] gradually, incrementally, but progressively develops into ever larger agglomerations of power, that is to say the states (governments) covering ever larger, today, global division of labour. The needs which dictate this gradual enlargement of the 'law and order' are purely practical. The current nation-state, territorially limited as it is, for example, is incapable of regimenting the problem of global environmental protection. The same holds true for terrorism: 'Only when the state has become a world state and its peace a world peace can the good become as fully present to us as the limitations of politics allow.'[94]

At the core of this evolution spanning through at least thirty millennia lies the need to guard against the constant threat of regression to what Hobbes in his *Leviathan* called the war of everyone against everyone (*bellum omnium contra omnes),* and what the Chinese call '*luan*:' chaos, anarchy, bedlam, pandemonium, disorder.[95]

> 'Hereby it is manifest that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. For Warre consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of *Time,* is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in the showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actuall fighting; but in the

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[93] 'Pecking order' is, of course, merely a metaphor. Hegel, on the other hand, based much of his *Phenomenology of Spirit* on the 'battle for power and prestige' between 'master and slave.' The classical treatise on this is by Hyppolite, *Genèse et structure de la Phenomenologie de l'ésprit de Hegel*, Aubier, Editions Montaigne, Paris 1946. For an easier interpretation see Alexandre Kojève, *Introduction to the Reading of Hegel,* J.H. Nichols, Jr. (Transl.), Cornell University Press, Ithaca and London, 1980, and the original *Introduction à la lecture de Hegel*, Paris, Gallimard, 1947. (Francis Fukuyama's *The End of History*, Free Press, 1992, is a popular version of this serious work.) For a sophisticated extrapolation of this political philosophy, see Frederic Jameson, *The Political Unconscious*, Routledge, London and New York 1981.

[94] Unger, supra n. 6, p. 284. The idea about the necessary correspondence between the attained stage of division of labour in society and the needed extension of the agglomeration of the state's 'law and order' and power is originally Nietzsche's. Marx later expounded on it more in terms of 'political economy.' Alexandre Kojève, one of the originators of the European Union, supported the proposal on the same basis. The opponents of 'globalization' seem to ignore this logic due to their cultural aversion vis-à-vis the United States.

[95] I have dealt with this more extensively in *Criminal Law, The Critique of the Ideology of Punishment* (in Chinese, Wang Zhen, Transl.), Beijing 2001.

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> known disposition thereto, during all the time there is no assurance to the contrary. All other time is Peace.'[96]

With Hobbes, we start from the premise that this 'Warre of every one against every one' is a natural (instinctive) condition.[97] Compare this to Nietzsche's account of the initial formation of the 'state' and its 'law and order:'

> '[T]he welding of a hitherto unchecked and shapeless populace into a firm form was not only instituted by an act of violence but also carried to its conclusion by nothing but act of violence – […] the oldest "state" thus appeared as a fearful tyranny, as an oppressive and remorseless machine, and went on working until this raw material of people and semi-animals was at last not only thoroughly kneaded and pliant but also *formed*. I employed the word "state": it is obvious what I meant – some pack of blond beasts of prey, a conqueror and master race which, organized for war and with **the ability to organize,** unhesitatingly lays its terrible claws upon **a populace perhaps tremendously superior in numbers** but still formless and nomad.'[98]

After World War II and after the tragic events at the end of 20th Century we know how readily this 'this raw material of people and semi-animals' tends to resurface. It reappears spontaneously the moment the power of state comes into wrong hands or if it entirely disintegrates. Thus, both Nietzsche and Freud – writing as they were before World War I, were mistaken in assuming that the 'raw material of people and semi-animals' was irrevocably 'formed.' The instruments of international surveillance of human rights – the European Convention on Human Rights and the Euro-

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96 Thomas Hobbes (1588 – 1679), *Leviathan* (first published in 1651), XII, 62, 2nd par., marginal rubric 'Out of Civil States, there is always Warre of every one against every one.'

97 By 'instinctive' we mean to imply that an aggressive reaction to frustration is biologically (genetically) programmed, inbred and part of our animal inheritance. Lorenz, infra, n. 118. The cultural inhibitions of this programmed reaction are what Freud called 'civilization,' the blockage of aggression having for its consequence the 'civilizational neurosis.' See generally, Sigmund Freud, *Civilisation and its Discontents*, J. Strashey (Transl.), New York 1961 and his *Totem and Taboo* (originally published 1913) A.A. Brill (Transl.), New York, 1962.

98 Nietzsche, *Genealogy of Morals*, Second Essay, Walter Kaufmann (Transl.), Random House, New York 1969, Sec. 17, par. 1 and 2, at p. 86. Bold emphasis added. Nietzsche, in the continuation of his Second Essay, then develops a theory regarding the origins of 'bad conscience.' Cf. Freud's 'civilisational neurosis,' supra, n. 97. Foucault's protest against the violence of the state seem to derive from the same source, infra n. 134. Note also that Nietzsche emphasized 'the ability to organize,' which makes the state capable of imposing its power 'upon a populace perhaps tremendously superior in numbers.' In modern political science this 'organization' is considered to be the crucial characteristic of the power of the state. Karl Deutsch, *Academic Lectures*, Kennedy School of Government, Harvard University, 1974-75.

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pean Court of Human Rights in Strasbourg among them – were established in the wake of World War II precisely to prevent this regression.

This 'raw' condition tends to spontaneously resurface the moment the 'law and order,' enforced by the organized power of the state, vanishes due to revolution or war.[99] Without delay, the culturally 'formed' inhibitions give way to the biologically inherited animal instincts[100] and there is an indiscriminate regression to generalized combat. In this sense, every civil or international war is a regression to barbarity. Legally speaking, it reveals the dearth of 'law and order' and it points to the practical need to establish it. Should the war be civil, the need to establish 'law and order' is in the frame of nation-state; should the war be international, it indicates the need for cogent international 'law and order.'

The regression to generalized combat, however, may be only a temporary deterioration to the initial stage of the normal progression of agglomeration of power, i.e. to the 'biological' situation in which the power and influence over others depends strictly on brutal physical prevalence. If these developments, say in modern situations once the state falls to pieces, are permitted to continue unchecked, they usually lead to the establishment of a primitive dictatorship.[101] The latter may bring on 'law and order' but no 'rule of law.'[102] Subsequently, one witnesses the correlative regression of all other aspects of division of labour, civilization, and culture

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99 Psychologically, there is in such situations usually a general regression to what Karl Jung described as 'the collective unconscious.' Jung's collective unconscious – somewhat analogous to Durkheim's notion of 'collective consciousness,' which appeared about the same time i.e. in the 1930s – is a primitive archetypal reference to Nietzsche's 'semi-animal raw material.' See, Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, Little, Brown and Company, 1996.

It usually takes a psychopath to 'activate' this collective subconscious. See A. Harrington, *Psychopaths*, St. Albans, England 1974 and Cleckley, *The Mask of Sanity*, 1988, available at http://www.casiopaea.org/cass/sanity_1.PDF. Hilter, Mussolini, Stalin, Miloshevich, etc. are typical examples. In applying his theory, Jung had in fact predicted in 1933, the consequences of Hitler's rise to power, i.e. the activation of the German collective unconscious. See generally, Karl Jung, *Analytical Psychology*, Binswanger (Transl.) Zurich, 1935. Due to this activation of collective unconscious such leaders may be democratically (re)elected, usually by a landslide, which then raises the question of the relationship between democracy and the rule of law. See Zakaria, infra n. 102.

100 See Lorenz, *On Aggression*, infra n. 118.

101 Any 'mafia' (organized crime) state-within-the-state may be seen as a paradigm of such primitive and brutal governance. Its danger to the rule of law lies in organization because the legitimate government's power, too, lies in the organizational superiority of its 'forces of order.' Supra n. 98. It is for this reason that the inchoate crime of conspiracy at Common Law is consummated the moment there is mere agreement between two co-conspirators to commit an illegal (and not necessarily criminal) act.

102 See, Fareed Zakaria, *The Rise of Illiberal Democracy*, Foreign Affairs, November/December 1997.

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as well.[103] Seen from the point of view of international relations and international law, it is in fact this regressive aspect which is most repulsive, being as it must be, fundamentally incongruent with the general accomplishments of civilization, ethos and culture preserved in other intact agglomerations of power.[104]

This regression, alas, as history and current events amply illustrate, is in any human society an ever present probability. Every collapse of state's 'law and order' – this is almost a tautology – has for its direct consequence the general regression to anarchy. The collapse of Soviet Union, for example, occasioned the collapses of many other state powers in Eastern Europe. One had hitherto many opportunities to observe various degrees of regression both of law and order as well as of the rule of law – from Albania to Moldova, Georgia, Kazakhstan, Serbia, etc. It, therefore, is not an accident that we intimately associate the idiom 'law and order' with the founding and upholding of state power: *ex factis ius oritur!*

Historically, different societies have attempted different alternative ways in finding a solution to this fundamental need of replacing anarchy with order. The Chinese society, for example, resorted to '*li*' (courtesy, politeness, friendly conflict-resolution by mutual appeasement); their '*fâ*' (legal logic similar to our rule of law) was secondary and the Chinese used it only as an ultimum remedium. One of the archetypal fears of the Chinese society is '*luan*,' anarchy. As anthropology will confirm, even the most primitive societies must offer the process of adjudication in order to settle the private conflicts, which would otherwise degenerate into anarchy.[105] Depending on the socio-biological *fact* of greater or smaller measure of aggression natural to the population to be administered, greater or smaller countervailing fear must be instilled through 'law and order.' Oriental societies are perhaps manageable with less 'law and order,' i.e. 'li' is more likely to exert sufficient pressure to guarantee peace.[106] Still, this tends to influence the mode of arbitrage rather, as Malinowski has shown the need for it. The reading of ancient Chinese judicial records indicates that this mode of arbitrage – what we would call 'the rule of law' – is based more on interpersonal feeling and less, as is the case in the West, on cold reason alone.[107]

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[103] Any state maintained purely through physical threat and the ensuing paranoia – rather than democracy and the rule of law – is in that sense regressive and deeply detrimental to all productive social processes. For an excellent analysis of the destructive impact of the absence of democracy, see Maurice Duverger, *De la dictature*, Paris 1961, and *La démocratie sans le peuple*, Paris 1974.

[104] See, for example, the reference to 'general principles of law recognized by civilized nations' in art. 7(2) of the European Convention on Human Rights. See also *Kessler, Streletz and Krentz v. Germany*, ECHR, judgment of 22 March 2001 (and my separate opinion).

[105] Malinowski, supra nn. 38 and 39.

[106] Taoism and Confucianism seem to indicate that. But see Sima Qian (145?-90? BC) (sometimes spelled Shuma Chien), *History of China*, Beijing 1986.

[107] I owe the confirmation of this notion to Professor He Weifang of Beijing University, Faculty of Law. In our conversations in 1997 we discussed the idea and its consequences i.e. the obvious fact that historically and culturally the Chinese society is not inclined to accept the Western 'power of logic' as the essence of the 'rule of law.' The best way to understand this is to distinguish psychologically between what Jung calls

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Accordingly, the binding nature of the decision derives less from the fear of the direct threat of physical sanction and more from immediate social pressure.[108]

Moreover, the tragic events of September 11, 2001, have demonstrated how *very* vulnerable the most sophisticated stage of civilization has turned out to be to the most primitive interference. This predictable vulnerability – a direct consequence of the progressive differentiation in the global division of labour producing a high level of entropy and thus requiring a progressively more sophisticated level of minute management and organization – derives from the excessive divergence in development between different 'civilizations.' The highly differentiated and thus ordered systems are in themselves subject to intense entropy, i.e. even simply to maintain their ordered functioning they necessitate ever more sophisticated organizational input. Highly ordered closed systems, in other words, are highly vulnerable to disorder. Lack of maintenance, let alone a direct attack on their 'virtual reality,' may result in their complete collapse. Illustrations of this exposure range from instability of the computer systems to the virtual reality of stock exchange.[109]

It is thus intuitively obvious that such susceptible sophisticated systems are adapted to the environment of Durkheim's organic solidarity. Durkheim in fact postulated the reverse logic maintaining that it will be the high level of division of labour, which will not only necessitate, but also directly generate organic solidarity. It could not have occurred to him that the solidarity in question will be restricted to the environment of the Western civilization and that outside that space, too great a divergence with other cultures will call for violent dealing with the antagonisms inherent in this excessive discrepancy in development. The clear answer to this excessive discrepancy predicament is to co-opt productively the hitherto excluded

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the *thinking* function i.e. 'the power of logic' synonymous with 'justice' in the West, from the *feeling* function based on consideration of human relationships. It would be characteristic of our Western arrogance to assume that the feeling function is irrational. It is not. It only refers to a different kind of rationality. See, Karl Jung, supra n. 99.

108 This 'social pressure,' however, derives from the so-called *interpersonal matrix* (of relationships) in which the subject finds himself. The fact that such 'social pressure' succeeds in (psychologically) forcing the subject to submit to the decision is due to the very low, in fact the lowest, level of autonomy of normal moral development. On this primitive level the difference between right and wrong is delineated by what other people say is right or wrong. See, Robert Kegan, supra n. 71. This throws a less idyllic light on some anthropological conclusions, such as Malinowski's. The interesting question to explore would be to compare Kohlberg's and Kegan's teaching (derived from Piaget) and emphasizing the growth in moral autochthony – with Durkheim's concern over the atomisation characteristic of anomie. Where does the autonomy of individual moral judgment become simply a lack of participation in 'shared values?' Similarly, the collectivistic pressure of the militant egalitarianism in former socialist states – mostly just the classical peasant values such as authoritarianism, patriarchy, insularity and inertia – ran into the individualism of the former 'bourgeois classes.' It would be difficult to say that the former was positive and the latter negative. See Unger's critique, supra n. 6, pp. 250-253 and especially p. 272.

109 The Second law of Thermodynamics: 'The entropy of a closed system shall never decrease, and shall increase whenever possible.' Available at http://www.svsu.edu/~slaven/Entropy6.html.

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cultural and economic environments into the 'global' division of labour. The developed nations should offer economic and other forms of aid to those lagging behind in their facility to participate, which would from this farsighted point of view, be in the West's own short and especially long-term best interest.[110]

In other words, the 'clash of civilizations' is synonymous to an inter-national conflict-ridden environment where the antagonisms are increasingly ignored.[111] They are ignored because these deep-seated structural conflicts derive from real incompatibilities of short-term economic interests. If, in the perception of these antagonistic situations the political and economic protagonists would refer to more universal values, if in other words they were less egoistic and short-sighted, there would be a common denominator based on which these conflicts would be longitudinally resolved.[112]

Moreover, this inevitable and discrepant delay in progress would in itself not be fatal if members of non-Western 'civilizations' felt that there dwells in the West

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[110] As Lester Thurow has pointed out in his *Future of Capitalism: How Today's Economic Forces Shape Tomorrow's World,* Morrow & Co., New York 1996, the inherent problem of liberal capitalism is that it cannot project beyond a five year 'return on the investment' period. The 'profit motive' as the driving force of liberal capitalism is inherently incapable of long-term (and therefore great) projects. The initiative thus falls into the lap of the State i.e. if the democratic process did in fact breed leaders with creative initiatives and novel ideas. Thurow's position is that it does not. We are, according to him, inexorably regressing into another Dark Ages period. Thurow suffers from the simplistic economic determinism, the latter presumably evincing his realism, as many of the modern false prophets. Unger's *Knowledge and Politics*, for example, is infinitely more *realistic* precisely because it is *not* deterministic. Supra n. 6. See also Unger, *False Necessity: Antinecessitarian Social Theory in the Service of Radical Democracy*, Verso Editions 2002, originally published by Cambridge University Press in 1987: 'We do have the elements for a fundamental reconstruction of our ways of thinking about society. Such a reconstruction can liberate us from the illusions of fatalism while advancing the cause of democracy.' See http://www.law.harvard.edu/unger/english/pdfs/fnintro2.pdf.

[111] Michael Hirsh, *The Need for a New Wilsonianism*, Foreign Affairs, September/October 2002. This is a thoughtful critique of American 'isolationism.' Hirsch, however, does not explain wherefrom this irrational reaction arises. In the background of his writing, it seems to be the clear realization that (a) the global aggregation of power is needed and the assumption (b) that the United States are predestined for 'taking the reins.' The critique can in fact be seen as the assessment of the American clumsiness in the latter respect. It never occurs to either Hirsch or Huntington, however, that the problems the United States has in attracting others under its leadership may have something to do with the moral unattractiveness of the liberal ideology. See Foreign Affairs Magazine at http://www.foreignaffairs.org/articles/hirsh0902.html.

[112] This reference to 'more universal values,' as the reader might have observed, brings the discussion close to adjudication. Adjudication is a process in which the conflict is resolved by reference to values more universal than the particular values that the parties to the conflict, because over determined by their conflicting interests, in fact adhere to. Imagine there is a supreme and global judicial authority charged with resolving the 'clash of civilizations.' What specific values would it refer to in order to resolve this enmity?

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a deeply legitimate *moral* preference with which they could identify positively – rather than negatively.[113] This is what Huntington does not understand. Despite all his disclaimers, he proceeds upon a deeply deterministic – and curiously Marxist – assumption that the West's economic supremacy is proof of its being preferred, at last in this stage, by history itself. This supercilious lack of distance, this semi-conscious and all-encompassing self-righteousness bordering on collective narcissism is what Spengler would perhaps characterize as the root cause of his prophesied 'decline of the West.'[114]

Absent the above-mentioned moral legitimacy and leadership, the only alternative is war, presumably leading, as usual to greater, this time to global aggregation of power. In Durkheim's language, mechanical solidarity would prevail over the organic solidarity, 'law and order' over the global 'rule of law,' the 'logic of force' over the moral and ethical 'force of logic.'

Like all other resorting to violence, the September 11 attack, too, derives from – however misguided that perception might be – a perceived and unresolved conflict: the clash between different values, cultures, religions and at the root of it all, the different levels of attained economic development. Whether or not one endorses Huntington's theory as a whole is a different question.[115] The fact is that the attack itself was a manifestation of perceived and unresolved *conflict*. This perception may be a manifestation of the divergence in intimately assumed values, e.g. Islamic versus Western, but the regression to Islamic fundamentalism is clearly the consequence of *real* economic and developmental disparity. If the West will prove unable to reduce this disparity 'organically' – through morally motivated economic mutuality and by international economic and social cooperation – the discrepancy in development will then call for a 'mechanical' enforcement.

The reason, for which adjudication is impossible in like situations, is clear as well: there is no overriding aggregation of power (global state) to enforce it.[116]

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113 I owe this idea to Karl Deutsch of Harvard's Kennedy School of Government. He once told me that the real power of a particular culture can only be measured through the extent to which affiliates of *other* cultures *positively* identify with it. This obviously depends on what here we call 'moral leadership,' 'deep legitimacy,' etc. Since the so-called 'democratic political process' clearly does not produce this kind of progressive moral meaning and since the 'voice of reason' characteristic of adjudication sometimes does (see supra n. 48), the question for us is whether the judicial input in the West could at least partly compensate for this moral insufficiency.

114 Spengler, infra n. 136. In terms of systems theory, too, the self-centered closing of any system upon itself is a sign of its defensive weakness. See generally, Ludwig von Bertalanffy, *General Systems Theory*, especially Chapter VIII, pp. 186-204 and Karl Deutsch, infra n. 162, *in fine.*

115 Huntington, *The Clash of Civilisations*, Simon and Schuster, London 1998, esp. Ch. 12, pp. 301-321.

116 As for resistance to this inevitable trend, see for example G. Abi-Saab, *A 'New World Order?' Some Preliminary Reflections*, 7 Hague Yearbook of International Law 1994, p. 89 and p. 91:

> 'For with this new hope, new dangers arise, not of "inactivity" but of "excessive activity" on the part of the United Nations; of what I

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Paradoxically, we conclude again that the 'rule of law' *depends* on the pre-existent 'law and order.' Antinomically, they both exclude and require one another. Adjudication as a mode of conflict-resolution based on reason and on law is only obtainable under condition that there be a sufficiently broad aggregation of power to back up its eventual enforcement. Since today we lack a global government, the resort to violence in international relations is still a regular occurrence.

Adjudication, therefore, testifies to the complete *échec* of the attempt at transcending the elemental volte-face from compulsion by combat to logical compulsion,[117] from physical fight to verbal argument. Adjudication is at the centre of this conversion from unrestrained natural aggression to 'law and order' and in turn to 'the rule of law.' Adjudication is the inverse mirror image of blocked violence. By the enforced fiat of the state's 'law and order,' adjudication takes the place of the natural belligerent, aggressive, in short combative conflict resolution.[118] Adjudi

> can only describe in French, for want of an English equivalent, as dangers of *"détournement"* and of *"excès de pouvoir,"* in other words of using or high jacking UN collective decision-making and "collective legitimization" mechanisms, to serve individual ends and legitimize new hegemonies; of which we have already had a foretaste not only in the handling of the second Gulf crisis, but also in the *Lockerbie Case* and its implications as to the respective roles and relationships between the Security Council and the International Court of Justice, the highest existing judicial organ. […] Is the Security Council becoming *legibus solutus* (unbound by law)? Or, even more serious, is it becoming a totalitarian instance, concentrating in its hands all that can be marshalled on the international level in terms of legislative, judicial and executive functions and powers, at the expense of the other principal organs of the United Nations and in total disregard of the Charter?'

117 On 'logical compulsion' see Barry Stroud's brilliant essay *'Wittgenstein and Logical Necessity'* in Pitcher (ed.), *Wittgenstein's Philosophical Investigations*, Doubleday, Garden City, New York 1966, pp. 477- 496. Reprinted in Barry Stroud, Chapter I, in his *Meaning, Understanding and Practice*, Oxford University Press 2000, pp. 1-16.

Stroud's own comments and his interpretation of Wittgenstein's are probably the best formal-logical demonstrations of the processes of argumentation and proof, or as he calls it, of 'logical compulsion.' It has important ramifications both for epistemology as well as for evidence as a branch of law. One has to keep in mind that in adjudication it is *logical* compulsion, which replaces the previous non-adjudicatory (before the establishment of the state and its 'law and order') *physical* compulsion.

My own shorthand formula for adjudication – 'from the logic of power to the power of logic' – is owed indirectly to Stroud and to Wittgenstein.

See also Pitkin, *Wittgenstein and Justice*, University of California Press, Berkeley, Los Angeles and London 1972. Pitkin's book, although philosophically interesting, was a disappointment because she is not sufficiently sensitized to tangible legal issues. Her 'justice' remains philosophically abstract.

118 See Konrad Lorenz, *On Aggression* (1963), Bantam Books, New York, 1971; Edward Q. Wilson, *Sociobiology*, Belknap, Harvard, 1975; B.F. Skinner, *Science and Human Behavior*, Simon and Schuster, 1953. Generally speaking, the empirical and in this sense scientific question is whether the genetic endowment of the human species

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cation as the cogent legal and public conflict-resolution method is a *service* rendered by the state. The state must offer this service immediately[119] once it succeeds in putting a stop to the Hobbesian 'war of everyone against everyone.' This becomes more apparent when we say that the state is *de facto* established only once it establishes 'law and order.' The first act, with which the state (public government) sets itself up, is to absorb all private violence and to make itself a monopolist of violence. In other words, the 'rule of law' will operate and serve only under the compulsive auspices of the monopoly of the state's 'law and order.' This constant threat of *greater* violence is the indispensable sanction without which any legal norm (disposition) remains a mere recommendation. *Kelsen* has a more ambiguous view of the matter:

predisposes it to react aggressively to frustration (conflict). The behaviourists openly insist that this is so and that what we call 'culture' is but a thin layer of varnish on the genetically programmed aggression. Freud then simply maintained, inspired in fact by Nietzsche that the blockage of aggression forces this energy to sublimate into culture or to become displaced. In this sense, the legal process of adjudication is both displacement of aggression and conversion (sublimation) from physical to verbal.

However, because adjudication transfers the aggression into the 'deep structure' of language, it then becomes 'logical' rather than brutal. Still, the metamorphosis from the logic of power to the power of logic is superficial and consequently subject to constant danger of regression. Foucault's protest against the inherent violence of the state is thus naïve: without the constant threat of *greater* violence, people would not submit to adjudication as a 'peaceful' conflict-resolution. For the 'deep structure' argument, see Chomsky, *Cartesian Linguistics*, Harper & Row, New York and London 1966.

119 This emphasis on 'without delay' – because conflicts now prevented from being resolved naturally through physical combat must have an alternative (adjudicatory, logical) mode of resolution – is important. The need for *immediate* submission of conflicts to alternative resolution implies that the judicial power is a necessary complement of executive power and that it must be set in motion *at the very inception* of the state. This, in turn, has profound constitutional implications for the political neglect and indeed condescension – most by the representatives of the executive branch – with which, in Continental law and especially in the French constitutional context, the judicial branch is constantly being dealt with.

On the other hand, the emphasis on 'without delay,' in an entirely different framework, also implies the centrality of the formula 'justice delayed is justice denied.' The 'reasonable time' in which the conflict must be resolved, i.e. the swiftness with which the judicial branch must react – for example, as per art. 6 of the European Convention on Human Rights – is therefore a fundamental human right. Judicial delay in resolving the conflict means that the law-abiding party to the conflict often remains at the mercy of the violator of the law. The implications of judicial delays for the *Rechtsstaat, l'état de droit*, the rule of law, etc., are obvious and disturbing. One has to admit, however, together with Roman poet Juvenal that judicial delays are a perennial problem: 'a thousand vexations, a thousand hold-ups.' Juvenal, *Satires*, XVI, 36-47, as cited by J.A. Crook, Law and Life of Rome 90 B.C. - A.D. 212, Cornell Univ. Press, Ithaca 1984.

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> 'The development of the law from primitive beginnings to its present stage in the modern state displays, concerning the legal value to be realized, a tendency that is common to all legal orders. It is the tendency gradually and increasingly to prohibit the use of physical force from man to man. Use of force is prohibited by making it the condition for a sanction. But the sanction itself is a use of force. Therefore, the prohibition of the use of force can only be a limited one; one must distinguish between a permitted and prohibited use of force. It is permitted as a reaction against a socially undesirable fact, especially against a socially detrimental human behaviour, as a sanction, that is, as an authorized use of force attributable to the legal community.'[120]

Except in terms of pure legal positivism, the point however is not that the private use of force is a logical or moral precondition for a legal sanction. This is the case only in the universal criminal offence of 'self-help' in which the private actor uses his physical force in order to defend his purported right: *'Live by the gun or die by the law'* is the folkloric aphorism to the point. Perhaps in international law, too, it is relevant that the authorized use of force be attributable to the legal (i.e. civilized international) community.

Within the confines of normal state sovereignty, however, the operative and the enforceable ban on private use of force is a *factual* – rather than logical or moral – precondition for 'law and order.' Only once this *fact* is successfully enforced, the question arises as to the alternative to the 'living by the gun.' The state that has successfully banned private violence, must next offer an alternative public (verbal, logical, non-violent) mode of conflict-resolution in which the state-empowered third participant (the adjudicator) *bindingly* resolves the private conflict before him. Only on the condition of previously established 'law and order' do the issues of justice, fairness, fair trial, in other words the 'rule of law,' even arise.

Without efficient adjudication, the 'law and order' is undermined not only through the resulting havoc, but, if such prevalence by brutal physical dominance is permitted to continue, through the progressive establishment of some brand of the state-within-the-state. The systemic impunity of the private resort to the use of force leads to the formations – such as we see in organized crime – of independent agglomerations of power. Through corruption and other kinds of osmosis, even in the normal 'law and order' conditions, these illegitimate agglomerations of autonomous power tend to fuse with the legitimate state. The latter then degenerates into the so-called 'mafia state.'

However, even in the absence of these violent perversions of 'law and order,' social stability may be fatally undermined by more subtle shortcomings of trustworthy and legitimate adjudication and its 'rule of law.' If the violation of the law by one party to the conflict, presumably the defendant in the judicial process, lingers without fair legal sanction and its quick enforcement, this means that the legal system implicitly accepted the impunity of unlawful action. This undermines

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[120] Kelsen, supra n. 82, p. 36.

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the authority of the state and the credibility of the legal order. Legal order, both in terms of 'law and order' as well as in terms of the 'rule of law' must therefore react quickly, consistently and systematically.

The entire legal process, therefore, is both historically and functionally the secondary substitute for the instinctive primary violence. If the rule of law prevails functionally, i.e. if it performs *'until this raw material of people and semi-animals [is] at last not only thoroughly kneaded and pliant but also formed,'* it then stands symbolically for the replacement of the logic of power by the power of logic.[121] In this, the 'rule of law' indicates the prevalence of culture over barbarism, peace over violence, collaboration over anarchy, order over disorder, security over chaos etc.

Karl Marx in his *Critique of the Gotha Programme* (1875) proposed the only truly radical – albeit utopian – departure from this inherent proto-legal theme, first described by Hobbes in *Leviathan*. The idea was simple, but legally and economically reductivistic. It postulated that formally 'equal rights' for unequally endowed individuals signify meritocratic discrimination and ultimate substantive inequality. It then postulated the goal of substantive equality. It also hypothesized that most private conflicts derive from non-inherent scarcity of economic goods. The elimi-

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[121] Nietzsche, idem supra at n. 98. This 'formation' of social character – *'Bildung'* in the original German – may be seen as a definitively achieved cultural formation of the social character, i.e. as a 'virtual reality' *established* in the dominant social consciousness. Nevertheless, while the original Nietzsche would have doubts about this definiteness, the follower, Freud, seems tacitly to have taken it for granted. (Holocaust must have been a complete surprise to him, much more so, for example, than to Karl Jung.) The behaviourist branch of psychology, on the other hand, would interpret this 'formation' of the character simply as a series of random and 'intermittent positive reinforces' of socially desirable behaviour. See B.F. Skinner, *Science and Human Behavior*, Free Press, New York 1953 and Skinner, *Beyond Freedom and Dignity*, Knopf, New York 1971. 'Basing his arguments on the massive results of the experimental analysis of behavior he pioneered, Skinner rejects traditional explanations of behavior in terms of states of mind, feelings, and other mental attributes in favor of explanations to be sought in the interaction between genetic endowment and personal history. He argues that instead of promoting freedom and dignity as personal attributes, we should direct our attention to the physical and social environments in which people live,' at http://www. bfskinner.org/BookDetail.asp?sku=4. In this context, specific short term policies and politics, e.g. repressive, acquire stronger and more direct connotation. Still, it is a basic tenet of behaviorist school that awards truly reinforce target behavior, whereas punishments only temporarily suppress the undesirable pieces of behavior. If Skinner lays emphasis on rewards, the fundamental question arises as how to reward being a 'law abiding citizen.' Fuller, for example, would seem to assume that legal sanctioning is limited to 'morality of duty.' 'Morality of aspiration' is by implication excluded from the purview of legal process: '[T]he morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible. [...] It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.' Lon L. Fuller, *The Morality of Law*, Yale University Press, New Haven and London 1969, pp. 5-6.

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nation of economic scarcity – 'to each according to his needs' – would therefore do away with all private conflicts. Consequently, there would be no need for legal conflict resolution and the inherently discriminatory bourgeois law would simply 'wither away:'

> 'In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor, has vanished; after labor has become not only a means of life but life's prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly – only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!'[122]

Since the grand bankruptcy of the communist social experiment in 1988, the ideology of substantive equality and saturation of material needs has virtually collapsed. The social design to eliminate all conflicts in society has clearly aborted. The attempt to replace the 'formal equality' by the 'substantive equality' transcending the need for both 'law and order' as well as the 'rule of law,' has in fact eliminated the contradiction, the antinomy between the two. Alas, we cannot conclude that the 'dictatorship of the proletariat,' far from it, has 'transcended the contradiction' in Hegelian terms. The social order in Eastern Europe completely *regressed* to an already 'transcended' historical stage in which the antinomy between the 'rule of law' and the 'law and order' had not even existed. Nietzsche's 'raw material' resurfaced and in the process, Marx's 'dictatorship of the proletariat' degenerated into the systemic violations of human rights. Only the tip of this immense iceberg has recently surfaced in the Western jurisprudence e.g. in the case of *Kessler, Streletz and Krentz v. Germany*.[123]

Practically speaking, the established precondition of the 'law and order' simply *necessitates* the binding submission of all private conflicts to legal adjudication. What this means is apparent in the above dilemma 'live by the gun or die by the

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[122] Karl Marx, *The Critique of the Gotha Programme*, Part I, 1875. See generally Pashukanis, *Law and Marxism*, supra n. 69. As to the state's 'law and order' (and by implication about 'the rule of law') Marx continues: 'Even vulgar democracy, which sees the millennium in the democratic republic, and has no suspicion that it is precisely in this last form of state of bourgeois society that the class struggle has to be fought out to a conclusion – even it towers mountains above this kind of democratism, which keeps within the limits of what is permitted by the police and not permitted by logic.' Marx, ibidem, Part IV. The solution of this was to be the 'dictatorship of the proletariat,' i.e. the abolition of the 'rule of law' and the 'power of logic.' They would be replaced by pure 'law and order' administered in the proletariat's interest. The historical consequence of this colossal blunder was a total collapse of the rule of law with unprecedented human, societal, cultural damage extending over the period of fifty to eighty years over the whole Eastern Europe, China, etc.

[123] Supra, n. 104.

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law.' The law-abiding individual would remain unprotected, i.e. vulnerable to the attacks of non-law-abiding individuals. He would have no way to defend his interests. He would inhabit the no man's land between law and order and the rule of law. The adage *'justice delayed is justice denied'* partly describes what this means. It would no longer pay to be law-abiding. It would pay, on the other hand, to violate brutally other persons' legitimate interests. In order to defend them, the normal member of the society in such a predicament would be virtually forced to turn to 'live by the gun.' Once this attitude is generalized, once it no longer pays to be law-abiding, private conflicts again degenerate into private fights thus undermining the 'law and order.' Even in the short run, 'law and order' – while dynamically contradicting it – emphatically requires 'the rule of law' as its inexorable complement.

4. 'Law and Order' Necessitates the 'Rule of Law'

At the very outset of establishing 'law and order,' already, there is necessarily a dialectical reversal from the antagonizing *logic of power* to the righteousness of the *power of logic*.[124] In the general context of legal process and especially in the context of adjudication, the 'power of logic' comes to be called 'justice.' Justice, consequently, replaces dominance by sheer power. In simplest possible terms, 'law and order' necessitates 'the rule of law' because lacking the latter conflicts would remain unresolved and would continue to destabilize the matrix of human relationships. Thus, without 'law and order,' the 'rule of law' would not be enforceable whereas without the 'rule of law,' i.e. adjudication, the 'law and order' would not achieve its main purpose of social stability.

In 1918, sociologist George Herbert Mead identified an analogous dialectic within the much narrower scope of criminal procedure. He juxtaposed 'the hostile attitude' and 'the friendly attitude.' He hypothesized that there was no need to subject the criminal offenders to the hostile attitude evinced by the normal adversarial procedure, i.e. that the criminal justice system could revert to the 'friendly attitude.' We could say that he ventured beyond the 'power of logic,' i.e. to the power of 'organic solidarity.'

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124 George Herbert Mead, *The Psychology of Punitive Justice,* 23 American Journal of Sociology 1918, pp. 577-602, at p. 602. See also, Ferri, *Criminal Sociology*, 1884; Ancel, *La défense sociale*, Presses Universitaires de France, Paris 1985.

For the constitutional undoing of the 'parens patriae' doctrine, see *In re Gault*, 387 U.S. 1 (1967), where it finally started to became clear that the juvenile delinquent in the *parens patriae* context winds up in the worst of both worlds. He did not have the constitutional rights, whereas the 'friendly attitude' of the *parens patriae* has not lived up to its promise: 'There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.' *Kent v. United States*, 383 U.S. 541, 549 (1966). See, especially *Scozzari and Giunta v. Italy*, ECHR, 7 July 2001, and my concurring opinion.

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> '[T]he interest shifts from the enemy [scit: the criminal offender] to the reconstruction of social conditions. The self-assertion of the soldier and conqueror becomes that of the competitor in industry or business or politics, of the reformer, the administrator, of the physician or other social functionary. The test of success of this [different] self lies in the change and construction of the social conditions, which make the self possible, not in the conquest and elimination of other selves. His emotions are not those of mass consciousness dependent upon suppressed individualities, but arise out of the cumulative interests of varied undertakings converging upon a common problem of social reconstruction. This individual and his social organization are more difficult of accomplishment and subject to vastly greater friction than those, which spring out of war [scit: the hostile treatment of criminal offenders]. Their emotional content may not be so vivid, but they are the only remedy for war, and they meet the challenge, which the continued existence of war in human society has thrown down to human intelligence.'[125]

The influence of Durkheim's ideas upon Mead is obvious and the aspect of 'social reconstruction' shows similarity with the radical Marxist ideas. However, Mead focused simply on the psychology of criminal justice postulating that the 'hostile attitude' could be dealt within the narrow confines of the replacement of the retribution and the general preventive intentions of punishment with what later came to be called 'treatment.' At the time, it could not have occurred to him that the *statistically stable social* phenomenon of crime might be, though this is another unconfirmed idea, a consequence of *anomie* as construed by Robert K. Merton.[126]

Nevertheless, this endeavour at transcending of the antagonistic dilemma, i.e. of the dilemma of 'law and order' v. 'the rule of law,' continued as trend between the two World Wars and even after World War II. In Europe, Enrico Ferri (before World War II) and later Marc Ancel (after World War II) with their *Scuola di difesa sociale* and *Ecole nouvelle de défense sociale,* respectively, stood for similar ideas. The durable effect of these ideas was a considerable alleviation of the harsh punitive reaction due to the realization that a criminal offence is sooner a particular outcome of universal anomic pressures exerted upon the criminal offender than, as previously, a hybrid between tort and sin. The ambitious scheme collapsed in the 1960s when it became clear that the 'friendly attitude' – e.g. in cases of juvenile delinquents and concerning the civil commitment (involuntary hospitalization) of dangerous mental patients where the 'friendly attitude' had been particularly called for – naively ignored the elements of the remaining and very real conflict between the 'law and order' on the one and the individual offender on the other hand. Through application of the treatment idea, the latter had been reduced to the position of an object of manipulation.

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[125] Mead, ibidem, supra n. 124.
[126] Merton, infra n. 174.

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> 'There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.'[127]

The anti-psychiatric movement in the1970s, too, was part of this recoil.

This, in turn called all over again for impartial adjudication and for authoritative involvement of the 'rule of law' and the judiciary branch. In the European Court of Human Rights there has been, under article 8 of the Convention, a series of cases testifying to the well-placed mistrust of the *parens patriae*.

The logic of power is a precondition to the power of logic. The 'law and order' is a precondition to the 'rule of law.' Subsequently, the rule of law will cancel out certain unrestrained aspects of the 'law and order,' i.e. its tendency to use state power arbitrarily. In this sense, the 'rule of law' is a negation of the 'law and order.' The relationship between the 'law and order' and the 'rule of law' is therefore a relationship between two forces which 'though mutually opposed, at the same time are mutually indispensable.'[128] It is beside the point whether we call this a 'dialectical relationship' or an 'antinomy.' Unger's 'antinomy of rules and values' is clearly off center, i.e. here there is nothing to 'deconstruct.' Besides, given the ancient Chinese *Chuang-tzu Commentary* (3rd century A.D.), the appreciation of this kind of mutually exclusive as well as mutually dependent relationship is nothing new. Hegel, however, is right in pointing out that these kinds of contradictions represent a dynamic force of progress. This constant contest between the 'law and order' and the 'rule of law' and its progressive impact is obvious to every practicing lawyer. The field of constitutional and human rights is clearly the battlefield of these contradictions.

Legal order, i.e. 'law and order' in dynamic combination with the 'rule of law' is the immune system defending the body politic. To extend the metaphor, if this immune system does not react, various opportunistic bacteria will pester and undermine the health (the stability) of the entire state.[129] Here, one has to understand that 'law and order' on the one hand, and 'the rule of law' on the other, are two sides of the same coin.

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127 *Kent v. U.S.*, 383 U.S. 541 at n. 23.

128 See, Fung Yu-lan, supra n. 17, pp. 205 and 212; Unger, supra n. 6, pp. 88-100.

129 In the French 2002 political campaign, Jean-Marie Le Pen's extreme right's sudden political ascension and the ultimate prevalence of President Chirac's centre-right political force was practically due to the neglect with which the previous socialist M. Jospin's government treated the basic social issue of *'securité'* – i.e. of the crimes committed by Arab immigrants in the so-called 'sensitive' suburban areas *('banlieus')*. Immediately in August 2002, the French National Assembly adopted the first three repressive legislative measures (suspension of family allocations to parents of juvenile delinquents place in closed educational centres, the extension of the procedural possibilities to rely on anonymous witnesses testimony and the sanction of six-month imprisonment for an assault upon schoolteacher). Le Monde, 7 August 2002, pp. 1, 5 and 10.

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The truly dynamic view of adjudication[130] would therefore imply, that it is the legal process per se which yields certain solutions – although 'governance by judges' may have its arbitrary side effects. The dynamic whole, here, is more than the sum of its parts. This implies that von Savigny was right in saying that codification would cut the umbilical cord between the 'life of the nation' and the law.[131] It implies that the modern routine of creating substantive rules by legislative fiat – here we speak of the predominance of the legislature over the judicial branch, the latter having been reduced to the Montesquieu's *la bouche de la loi* – is by far not as self-evident as we came to believe after the French Revolution. Among other things, it also implies that the 'comeback' of judge-made law – through judicial review, through constitutional and through international courts – is something natural, organic and genuine. Quite metaphorically, we might add that Roscoe Pound and legal realists would be happy to agree with the idea that adjudication represents law's genuine contact with 'the life of the nation,' i.e. with the *empirical* social reality. Finally, yet importantly, this 'contact with reality' has proven to be a remarkable contributor to social and political stability everywhere – recently both in Eastern and Western Europe, too – where the judicial review by constitutional (or supreme) courts provides a powerful judicial feedback to legislative fiat and checks the arbitrary abuse of power by the executive.[132] The moral dilemma, however, remains real and true. The contradiction be

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[130] See generally, *Logique du sens*, Collection 'Critique,' Les éditions de Minuit, Paris, 1969. Deleuze develops upon the Bergsonian distinction between two opposed modes of cognition: sub specie aeternitatis (static) and sub specie durationis (dynamic). While already Bergson maintained that life (in our case 'legal process') cannot be understood if dissected and statically viewed, Deleuze evolved this notion into maintaining that the 21st century will realize Bergson's prediction.

[131] Von Savigny, supra n. 74, Ch. VII, pp. 69-130.

[132] I have had the opportunity to experience the unconstitutional excesses of both the executive as well as the legislative branches first hand as a judge of the Constitutional Court of the Republic of Slovenia between 1993 and 1995. It then became pragmatically clear to me that the judicial review – sometimes called 'the negative legislation' – is truly an indispensable 'rule of law' check on what would otherwise be an unchecked abuse of power by all three branches. The chief offender was the executive branch. The politicians in the tripartite structure of power are apparently nevertheless led to believe – the more so the less of traditional separation of power there is – that they are the highest personification of the nation's sovereignty. (This is how power corrupts.) Their immoderation was sometimes surreal. (Moreover, it became clear to me – on the occasion of constitutional examination of unjustifiable referenda – that the constitutive 'social contract' must bind 'the people' too.) There were continuous and unscrupulous attempts by the leading politicians, most often via the slavishly subordinate and orchestrated Slovenian post-Communist media – so much for the freedom of the press in particular social environments! – to discredit the Constitutional Court. Still, the latter enjoyed the highest credibility ratings by far of all the state institutions. The general public understood it better than the politicians that the justice to be found in this court of last resort was essential to political and social stability. In the end however, the 'checks and balances' doctrine enabled the politicians cunningly to defuse, since the mandate of the nine judges was limited to nine years, the autonomous judicial team with the 'politically correct' appointment of much more pliant judges. See Zupan.i.,*From*

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tween the 'rule of law' and 'law and order' has not been resolved.

In the meanwhile, the ideology has fallen back onto the traditional rule-of-law solution, which in the last analysis is still based on the constant threat of state violence. Despite everything, the 'rule of law' still means nothing unless it is sustained by this threat. State sponsored adjudication as a non-violent alternative to generalized combat and anarchy are still binding only if the 'law and order' enforces the 'rule of law' decisions by means of constant menace of violent implementation. The so-called forces of order are the guarantor of the rule of law.[133] Violence continues as a sponsor of non-violence.

Once we understand this, it becomes apparent that the cultural and ideological superiority of the rule of law is somewhat schizophrenic, i.e. its power of logic ('reason' in Enlightenment terms) is proximally founded upon the logic of power (violence). Social critics such as Foucault[134] have focused upon this noticeable contradiction. It is true that social evolution is – by virtue of the constant need for a shortcut to violent enforcement – prevented from transcending the 'law-and-order-cum-rule-of-law' ideology to something that would be qualitatively different, i.e. clearly transcending the danger of regression to the basic barbarism of violent anarchy. That is to say, potential regression to anarchy is constantly present.[135]

Initially, these ideological questions may have seemed beyond the scope of adjudication. I hope, nevertheless, to have demonstrated how inevitably the described dilemma manifests itself as the lowest common denominator of everything connected to adjudication. At the very least, it was necessary to point these contra-

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Combat to Contract: What Does the Constitution Constitute?, 1 European Journal of Law Reform 1999, pp. 59-95, in Czech-language journal Pravnik, 1997, and, more specifically, my *Le droit constitutionnel et la jurisprudence de la Cour Européenne des droits de l'homme,* introductory *étude* in XIV Annuaire de droit Constitutionnel 14 (2000), Louis Favoreu (ed.), Economica, Paris 2001. This also explains why legal theorists see the judicial branch of power as the least violent. See, for example, Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, New Haven 1986.

133 For a Marxist critique of the 'forces of order' see Angelo d'Orsi, *Le forze de l'ordine Italiano*, Torino 1970.

134 '[T]he problems to which the theory of sovereignty were addressed were in effect confined to the general mechanisms of power, to the way in which its forms of existence at the higher level of society influenced its exercise at the lowest levels. In effect, the mode in which power was exercised could be defined in its essentials in terms of the relationship sovereign-subject.' Foucalt then refers to 'disciplinary power' which lies outside 'the form of sovereignty.' Michael Foucault, *Two Lectures*, in Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, 1972-1977, Colin Gordon (ed). & Colin Gordon et al. (Trans.), 1980, pp. 78 and 104. See a good synopsis of Foucault's 'non-theory' of power at Michael Foucault's *Interpretive Analytics*, available at http://www.horuspublications.com/guide/cm108.html#f3. As to Foucault's 'unswerving opposition to violence,' see Bernier, supra n. 26, p.147: '[M]ichel Foucalt qui fit l'éloge des massacres de Septembre et de la 'justice populaire' Chinoise à la fin de la Grande Révolution culturelle…'

135 See Zupan.i., *From Combat to Contract: What does the Constitution Constitute?*, supra n. 132*, in fine*.

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dictions out in order to situate both the idea of adjudication and the ideal of rule of law in a larger context.[136]

V. Epistemological Aspect: 'Truth Finding' Concerning Historical Events

Since adjudication implies the substitution of violent conflict with non-violent negotiation to resolve conflicts, it necessitates the precondition of 'equality of arms' between the parties concerned. A 'political solution,' i.e. negotiation and other non-violent means of conflict-resolution, only become attractive once the parties to the conflict begin to appreciate that they are *approximately equal in power*. Consequently, adjudication is turned to when it is recognized by both parties that only Pyrrhic victory or even no prevalence by sheer force can in fact be achieved and that the blood would be shed in vain.

> 'Origin of Justice. – Justice (fairness) originates among those who are approximately equally powerful [...]: where there is no clearly recognizable predominance and a fight would mean inconclusive mutual damage, there the idea originates that one might come to an understanding and negotiate one's claims: the initial character of justice is the character of trade. Each satisfies the other inasmuch as each receives what he esteems more than the other does. One gives

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136 See generally, the excellent politico-sociological analysis of the present historical situation in Immanuel Wallerstein, *After Liberalism*, The New Press, New York 1995. His conclusions, not surprisingly, overlap entirely with Lester Thurow's economic examination in his *Future of Capitalism*, Penguin Books 1996. In place of Wallerstein's 'absence of ideology,' Thurow speaks of the 'absence of great [state-sponsored] projects.' As an M.I.T. economist, Thurow is more fatalistic in arguing that the West is sliding back into the new 'middle ages,' whereas Wallerstein, in my opinion more prudently, maintains that the West now finds itself at the asymptotic tail of the 50-year economic Kondratieff cycle. Because all three reactive ideologies (restoration, liberal ideology, and Communist ideology) have collapsed (the latter two in 1968 and in 1988 respectively), he projects that for a period of thirty to forty years, history will be 'idling.' For him, it follows that this is the moment of historical truth, the period of true ideological freedom, i.e. of the freedom to invent fundamentally new solutions. Far-reaching political *imagination* is therefore called for. Cf. Unger's language concerning the needed 'political event,' supra n 26. (Of course, this dark tradition goes back to the epochal Spengler's *Decline of the West*, originally published in 1911. See Oswald Spengler, *The Decline of the West*, Charles F. Atkinson (Transl), Knopf, New York 1983).

For the purposes of our own argument, however, it suffices to understand, that (a) the rule of law, too, is part of liberal ideology, and (b) that liberal ideology, too, has eroded. Today, since the liberal myth is no longer fully effective, the 'rule of law' is gradually being reduced to a mechanical, purely operative solution of fundamental social concerns. It is devoid of moral impact and ideological appeal. In this sense it has, historically speaking, become an interim solution.

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> another what he wants, so that it becomes his, and in return one receives what one wants. Thus justice is repayment and exchange on the assumption of an approximately equal power position; revenge originally belongs in the domain of justice, being an exchange. Gratitude, too.'[137]

If one, in this fashion, looks at the historical origins of Magna Carta, one begins to understand how negotiation leads to law and how, subsequently, such law is a basis for adjudication. [138]

Justice, then, is a straightforward surrogate of power in the resolution of private conflicts where the state's 'law and order' assures the enforceability of 'the rule of law.' Things become more complicated when the controversy arises between the private individual and the state itself. 'Law and order' deprives private individuals of their use of power. Consequently, since their 'equality of arms' is the natural consequence of their powerlessness, the conflict between private individuals, without further ado, lends itself to adjudication.

Civil procedure is thus the true model of adjudication where the (a) lawsuit is bipolar, (b) litigation is retrospective, (c) right and remedy are interdependent, (d) the lawsuit is a self-contained episode, and (e) the process is party-initiated and party-controlled.[139]

Not a single one of these elemental preconditions exists in case of criminal procedure. Criminal justice adjudication is (a) not a monocentric but a polycentric situation,[140] at least insofar as it goes beyond mere finding of guilt or innocence. The

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137 Nietzsche, *Human, Human, All-Too-Human*, Sec. 92, in Kaufmann (ed. and transl.), *One the Genealogy of Morals*,Vintage Books, Random House, New York 1969, p. 168.

138 The Magna Carta of 1215 was a truce between King John the Weak and the Barons. The two warring sides negotiated this model contract of 'social peace' in view of their practical realization that continuing hostilities would serve no further purpose. The Magna Carta is without doubt the first constitution, i.e. a 'social contract' binding on everyone. See, The Avalon Project: Magna Carta, available at http://www.yale.edu/lawweb/avalon/medieval/magframe.htm; and my *From Combat to Contract: What does the Constitution Constitute?*, supra n.132, *in fine.*

139 Chayes, supra n. 23.

140 Chayes' 'bipolarity' – although he does not cite him – derives from Lon L. Fuller's theory concerning monocentric v. polycentric decision-making situations.

In *monocentric* situations, the decision is limited to 'yes-or-no' choices (*aut-aut,* as for example in the jury's choice of verdicts: 'guilty' or 'innocent'). In *polycentric* decision-making situations, the palette of choices is wide open and there is no such limitation. Typically, the *polycentric* (policy-oriented) decision-making is preserved for the legislative branch whereas the *monocentric* decision making is typical of genuine adjudication. This is inherent in the bipolar nature of the conflict per se, i.e. in the end every conflict (combat, war, sporting event, legalized conflict, etc.) has a winner and a loser.

The constitutional type of adjudication – in international, supreme and constitutional courts – in principle trespasses on legislative grounds when its 'autonomous legal reasoning' putrefies – sit venia verbo! – and becomes an unscrupulous 'policy choice.' Mr. Rehnquist's 'marginal utility' considerations in reducing the exclusionary

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choice of criminal sanction, for example, involves a polycentric decision, which also implies that the 'the right and remedy' (b) are never simply interdependent. We cannot even posit that criminal sanction should figure as a 'remedy' or, additionally, that a criminal offence intrudes on the state's 'right.' Since the interests involved are 'society's general interests,' the 'lawsuit' in criminal procedure is clearly not a (c) 'self-contained' episode. Even in the most adversarial model, criminal procedure is never (d) 'party-initiated,' insofar as the prosecutor does not have absolute discretion whether to press the charges or not. Neither is criminal procedure, even if it collapses into a plea bargain, 'party controlled.' Criminal procedure, (e) inasmuch as it involves 'prediction and prevention of harmful conduct' of every criminal defendant is never 'retrospective,' not to mention specific instances of pure prospectivity, such as decision-making concerning preventive detention, probation, conditional release (parole) etc.[141]

As already discussed, 'adjudication signifies (a) that there is a conflict to be resolved and (b) that a third party is appointed to decide which one of the two disagreeing parties ('in conflict' with one another) is entitled to a favourable judgment. The *differentia specifica* of criminal procedure is, however, that the element of conflict is here secondary to the somewhat artificial desire of deciding the subject matter through an adversary process.

In other words, criminal procedure is clearly not the model 'rule of law' adjudication. The mere fact that many constitutions and international instruments postulate the 'equality of arms' in criminal procedure should make us suspicious because what is naturally given, as the 'equality of arms' is in private litigation, needs not to be postulated. We cannot say that criminal procedure deals with a conflict to be resolved, unless we first posit the 'equality of arms,' which is, when it comes to the relationship between a criminal defendant and the state, almost surrealistically artificial. Obviously, the need to *postulate* equality in terms of a conflict between equals, derives precisely from the fact that in reality there is no equality because the plaintiff in criminal procedure is the formidable state, i.e. its executive branch (the police, the prosecution) whereas the defendant is a powerless subject of that state. Most of the big guns of the constitutional artillery, therefore, i.e. the so-called

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rule from a prescriptive to an instrumental status are in this respect sadly typical. See supra n. 4. This – and for this specific reason – then, is the proper ground for raising the objections to the 'government of the judges.' When they make 'policy choices' and value judgments, by definition arbitrary, which go beyond the established doctrines of autonomous legal reasoning, the judges no longer act as judges. On the constitutional level the distinction between the legitimate 'autonomous legal reasoning' and the illegitimate valuations, 'policy decisions' etc., however, would often *seem* difficult to maintain. The terse language of constitutions and international instruments such as ECHR is the tip of the vast hermeneutic pyramid.

141 In a very characteristic case of *N.C. v. Italy,* ECHR 2002, the issue was, since in the end he was acquitted, whether the Brindisi court in Italy correctly speculated about the defendant's 'social dangerousness.' *Mastromatteo v. Italy*, ECHR 2002 concerned a post-conviction decision of the *'judice delle penne*.' She goofed in speculating whether the convict would commit a violent crime if accorded a three-day temporary release from prison. Upon release, the hardened criminal shot point blank Antonio Mastromatteo, the applicant's son.

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constitutional guarantees in criminal procedure, are aimed at the inherent *inequality* between the suspected or accused individual and the state's powerful criminal justice machinery.

Given the fundamental inequality between the state and the individual who is attacking its law and order and given the centrality of the law and order issue, the *prima vista* judgment would be that there should be an unyielding unilateral state investigation – by the executive branch – of the 'probable cause' ('reasonable suspicion') with ultimate punishment as its logical consequence. The question here is, why would one want artificially to create the 'equality of arms' in order to create the conditions for a conflict, the latter requiring as Nietzsche put it, an 'approximate equality,' when there would otherwise be no conflict to resolve.[142]

There is no inherent need here to resolve any conflict whatsoever, for the simple reason that, *there is* no conflict. The conflict, *nota bene*, presupposes approximate equality in power (or powerlessness), and the state power – unless *artificially* restrained by 'the rule of law' – simply cannot be 'in conflict' with the powerless private individual. The 'equality of arms' in criminal procedure would thus appear simulated – and a rather unreasonable, somewhat irresponsible or even perverse self-castration of the state.[143]

The central preliminary question of any criminal procedure is therefore why artificially subordinate the *public* goal of maintaining the law and order in society to the kind of legal procedure, which has historically evolved for the purposes of entirely *private* conflict-resolution?

On the other hand, in terms of human rights, one speaks of the 'equality of arms' as a precondition to a 'fair trial.' But, while this is clearly a tongue-in-cheek introduction to the problem, disregarding everything from constitutional and human rights perspective to the historical evolution of the respective law, this reversal of perspective nevertheless tells us something about the uphill struggles with which constitutional and human rights of criminal defendants had been legally established. And about their precarious nature.

On the other hand, it is impossible to reduce criminal procedure to a mere truth-finding instrument and method. For that purpose, a simple and efficient investigation *(inquisitio)* would suffice. Would that be rational, i.e. would it be acceptable to have the police themselves deal with crime and the criminals? Assume for a moment that the human subjectivity of the suspect-defendant, i.e. his constitutional and human rights and his dignity, is of no concern.

Would such a system be efficient?

The clear answer is that such a system would be supremely efficient. One only has to read one of Solzhenitsyn's novels and combine this reading with the realization that the crime rates in the former Soviet Union were, at any rate in compa-

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[142] Nietzsche, supra n. 137.

[143] In the 2002 electoral campaign in France the central issue was *'securité,'* i.e. the French state's apparent ability to maintain law and order in the so-called 'sensitive' suburban areas ('*banlieus*') populated by unruly Arab immigrants. The rise of M. Le Pen and the extreme right in this campaign was wholly a consequence of M. Jospin 's socialist government's inability to resolve the problem. The question is thus far from being merely 'jurisprudential.'

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rison with today's, extremely low. One then immediately understands that everything depends on how narrow is one's definition of 'efficiency' and how strict is one's characterization of 'law and order.'

Unfortunately, the above perception of 'efficiency' and 'law and order' is not as outlandish as it seems. One has to look at the reports the United Nations Committee against Torture makes to the General Assembly or cases such as *Selmouni v. France* to comprehend the universal tendency to indiscriminate abuse of human rights. This tendency occurs everywhere where the executive branch and its police are not – via structured scenario of adversary criminal procedure – under constant supervision of the judicial branch.[144]

Let us regress further and assume that human dignity is only a 'value judgment' and that the 'rule of law' is a mere academic castle in the air, both incompatible with Roland Barth's 'le bon sens,' *c'est a dire [avec] une vérité qui s'arrête sur l'ordre arbitraire de celui qui parle.*[145] Would it then be possible to say – in distilled Weberian terms of *rational* law -making and law applying – that such a pure inquisitorial system is acceptable?

Two hesitations come to mind even in this limited perspective of sheer efficiency of crime-repression. The *first* objection is strictly epistemological. The purpose of any *rational* truth finding is accurately to identify the true positives and the true negatives, in our case the truly guilty and the truly innocent suspects. In purely empirical, scientific environment, the objective verification of a hypothesis is accomplished with the aid of the scientific experiment, in which all variables, except for the one tested, are kept constant. The event tested is repeatedly subjected to this experiment. The underlying hypothesis is thus verified vis-à-vis objective reality. However, this procedure is workable only if the event so tested lends itself to innumerable replications.

The so-called 'legally relevant' events, in our case 'crimes,' are not repeatable. The process of adjudication deals with unique events, or epistemologically speaking, with 'historical events.' We cannot submit the hypothesis of a historical event to an experiment. Historians, for example, may describe the event and depict all kinds of indirect proofs for its existence but they cannot in real time – for the historical event is consigned to the past and cannot be replicated – demonstrate its *continuous* existence. The universal laws of physics, chemistry, etc, however, subsist in time. Through their particular manifestations, they lend themselves to continuous verification vis-à-vis objective reality.

The arbitrary human laws are not necessarily ephemeral, but while they may last, they do not express an objective reality.[146] The purpose of a scientific experiment is to demonstrate the existence of a *universally* valid objective law through a *particular* event. The purpose of legal truth finding, since the existence of human laws needs no proof, is to demonstrate that there has occurred a particular event whose characteristics correspond to the law. This is very similar – and appropriately

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[144] *Selmouni v. France*, ECHR, judgment of 28 July 1999.

[145] See, supra n. 65, *in fine.*

[146] On the contrary, they endeavour to change the reality of human action and conduct. The natural laws discovered by empirical sciences are descriptive and 'ontological' whereas human laws are both descriptive *and* prescriptive and are therefore 'deontological.'

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misleading – to the scientific *adequatio intellectus et rei*, where the posited hypothesis figures as *intellectus* and where the experiment verifies whether the *res* ('the thing') is adequate to it. But, while the major premise ('intellectus') in science at least attempts to reflect and describe the objective reality, i.e. is ontological, the major premise in law is deontological. The intent of the legal norm is not descriptive. It is prescriptive; it is the intent of the legislator. What this prescriptive aspect describes – jurists deal with it only partly through teleological interpretation – however, is not something which could be called entirely 'real' in the usual sense of the word.

Lawyers, moreover, deal only with the intent *per se*, which is the least 'real' aspect of the legal major premises. The tacit major premise preceding the intent of the legislator, on the other hand, the one which jurists take for granted, is the real question whether and to what extent the lawgiver obtains and maintains the *power*, which makes its intent relevant in the first place. When we say *ex factis iur oritur,* then this power figures as the only 'fact' from which the law derives.

Incidentally, the normative major premises of law – the dispositions of the legal norms – are of necessity both descriptive and prescriptive. An entirely prescriptive norm, such as *thou shalt not breathe!* would not be enforceable and thus makes no sense because the power of the legislator does not extend that far. Moreover, an entirely descriptive norm such as *thou shalt breathe!* makes no sense because it is redundant. It follows that all legal norms are both descriptive and prescriptive – inasmuch as the reality of social relationship does not comport with the intent of the legislator.

Thus, while in physics we concern ourselves with the proof of objective and universal laws, legal truth finding preoccupies itself with the proof that a particular event happens to correspond to the intent of the legislator expressed in the legal norm. However, while to demonstrate this 'correspondence' between the universal (law) and the particular (event) is critical in both cases, the purpose of the endeavour and its result are vastly different.

In science, the above 'correspondence' proves the validity of a scientific theory. In law, it proves merely that there is a virtual *adequatio intellectus et rei*: perhaps an entirely absurd 'validity.' For example, when the Roman emperor Augustus, the self-proclaimed 'divus Augustus,' decided that spitting in front of a statue depicting his person amounts to the crime of *'laesio majestatis,'* the correspondence between an event and the law, objectively speaking, proves nothing about the law. If anything, it 'objectively' only proves that the Emperor has the real power to sanction it. Since the purpose of truth finding is not to prove the validity of Augustus's edict, someone's act of spitting in front of his statue is relevant only *per se*, as a unique historical event.

Epistemologically, like all legally relevant events, the historical event somehow 'hangs in the air' and must be shown to have occurred 'on its own terms.' It is not, as in science, a particular expression of a universal law. If it happens to correspond to the normative major premise, this is scientifically speaking, an arbitrary coincidence. The evidence of the legally relevant event, in other words, does not draw on, nor does it evince, an empirically established objective and universal law. The proofs of the event's correspondence with the norm (and the sanction) come

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wholly *ex post facto*.[147] They are extrinsic to all empirical reality except to the one deriving from the power of the state.

Since legally relevant events matter only as unique events and not as manifestations of universal laws subsisting in time, they vanish and are lost in the past. Because an experiment can address only something that 'is valid' here and now, legally relevant events do not lend themselves to scientific proof by experiment.[148]

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147 This is not to say that legal proofs have no connection to human laws. Quite the contrary is true. However, this does not change the fact that the legally relevant event in question is not a dependent variable of a universal law subsisting in time. The legally relevant event matters only *as such*, only as a particular occurrence.

In a series of extremely interesting cases – from *In Re Winship,* 397 US 358 (1970)*, Mullaney v. Wilbur,* 421 US 684 (1975) and *Patterson v. New York* 432 U.S. 197 (1977) – the U.S. Supreme Court had established a doctrine, according to which the prosecution must prove every element of the crime charged. Absent proof for a single element, the presumption of innocence prevails and the defendant is acquitted. The problem posed had to do with the fact that the 'elements of crime' are not necessarily located in the *special* part of the criminal code's definition of the criminal offence. Issues such as partial insanity ('extreme emotional disturbance or distress') may be located as generally valid extenuating or mitigating circumstances in the *general* part of the code, far from the definition of the particular crime. Such issues are, as it were, 'exposed before the bracket.'

After the principled position taken in *In Re Winship,* the issue then arose again in *Mullaney* and in *Patterson*. In a normal adversary process where there is a clear distribution of the burden of proof, this is easy to resolve. The defendant carries the burden of allegation (*onus proferrendi*) or the greater burden of persuasion, but then the burden is transferred to prosecution as a burden of proof beyond reasonable doubt, e.g. that there was no 'extreme emotional disturbance or distress.'

148 In 1215 – the same year as Magna Carta was negotiated – Pope Innocent III and his Fourth Lateran Council's Canon 19 forbade the Catholic priests to bless the water and the hot irons until then used in the so-called ordeals (*ordalia*). (The Council was also attended by envoys from Emperor Frederick II, from Henry Latin Emperor of Constantinople, from the Kings of France, England, Aragon, Hungary, Cyprus, and Jerusalem.) In pre-inquisitorial ordeals, they tested the guilt or innocence of the suspect by flotation in water and by the touching with hot iron and other similar 'experiments.' The water and the hot iron had to be blessed by the priest in order to invoke God's participation in this experiment. This method would, of course, be rational only on the assumption that there is God's *continuing* willingness to help in screening the *continuing* guilt or innocence of the suspects. The supposed continuity of 'transcendental guilt' here is similar to the *continued* validity and demonstrability of natural laws.

Once the 'experimental method' was no longer available (and with the coming problem of heresy) it was only a matter of time before inquisition and torture would appear. Sixteen years later, in 1231, Pope Gregory IX instituted the papal inquisition for the apprehension and trial of heretics. However, in England, the truth finding was to be done through the trial of one's peers (jury trial and the principle of legality anticipated in Magna Carta, Sec. 39: 'No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.') – except for

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In empirical science, even though endowed with the reliability of scientific experiment, any doubt whatsoever concerning the employed *methodology* of truth finding fatally detracts from the validity of the arrived at results, i.e. of the proof. The scientific researcher must minutely describe the methodology he had employed. He thus enables other researchers to *replicate* the procedure and arrive at identical results. Otherwise, the proof is not valid.

It follows logically, that the 'methodology employed' is *a fortiori* critical where the proof by experiment is wholly unavailable. Whereas in empirical science the methodology affects only the legitimacy of the concrete experimental procedure, in legal truth finding the result depends wholly, only, and finally on the methodology (procedure) employed. This means that in science, an error in methodology is corrigible and consequently that despite incorrect experimentation, the result may nevertheless be correct.

In law, we would never know.[149] In law, we cannot separate the epistemological legitimacy of 'truth' from the legitimacy of the procedure employed to discover it.[150] Consequently, there are several reasons for which the bilateral adversary procedure, rather than the unilateral inquisitorial approach, is more trustworthy.

First, in adversary environment the prosecution's hypothesis of guilt is exposed to ardent critique by the defence. The defects in the prosecution's 'methodology' are laid bare as are the weak points in the defence. *Second*, the adjudicator, is free to choose whom to believe. He is not required to form his own hypothesis concerning the subject matter of the dispute before him, at least not before the final stages of adjudication. The *de facto* shifting of the burden of proof is the mirror image of the respective persuasiveness of the two parties before him. *Third*, while this shifting of the respective persuasiveness is taking place before him, he may remain impassive, hesitant, undecided, and ambivalent. As we shall see later, impartiality is nothing but the mental state of being undecided. Impartiality is a natural by-product of antagonistic altercation.

In the unilateral investigating approach, efficient as it may initially appear, the same individual (the police officer, the inquisitorial *inquirens*, the investigating judge etc.) adhering to the initial hypothesis of guilt is also the one who verifies it. By the nature of things he is required to hold on to the hypothesis of guilt otherwise he has no reason to investigate in the first place. The more he is committed to the presumption of guilt the greater the likelihood of the final 'false positive' conviction. From Dostoyevsky to Kafka, from Camus to Solzhenitsyn, literary giants have written about this absurdity, yet the legal profession, especially on the Continent,

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the Star Chamber period (1487-1641).

149 This is the key argument against the irreversibility of capital punishment. The fact is that this argument stands and has been proven repeatedly to be valid, most recently by adducing DNA scientific proofs *excluding* the condemned person from the circle of suspects.

150 Most Continental criminal procedures distinguished between 'absolutely essential procedural errors,' the consequence of which was the annulment of the judgment and the trial de novo. However, the 'relatively essential procedural errors' only had that effect if they were deemed to affect the veracity of truth finding. Typically, the constitutional, human, or procedural rights of the defendant played no role: even truth arrived at via torture was in principle acceptable.

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refuses to understand how bizarre and how intellectually dishonest is the inquisitorial approach to truth finding.[151]

The balanced truth-verification is an integral part of most natural conflict resolution. Truth finding has always been an incidental method and a secondary vehicle for conflict resolution.[152] However, this does not imply that it is *the purpose* of adjudication to find the truth. We can see this in private law adjudication. The plaintiff and the defendant may choose to negotiate and settle their conflict irrespective of the stage in which the particular adjudication process finds itself. At that moment the case becomes 'moot,' inapposite, '*sans object.'* That the plaintiff and the defendant may have negotiated their *compromissum*, their settlement, without considering or even completely contrary to the legally relevant 'truth of the matter,' turns out to be quite irrelevant.

It follows logically, *first*, that the primary purpose of adjudication is to resolve the conflict and, *second*, that truth finding comes into play only if the parties cannot settle or otherwise resolve their disagreement. It cannot be otherwise in the administration of criminal justice. Here, the truth-finding goals implicitly postulated by the substantive criminal law are morally and socially paramount; the general and the special prevention of crime require it. The truth, therefore, is not simply dispensable.

Is legal process, then, a pragmatic conflict resolution device or is it a vehicle of moral enforcement?

In view of our preliminary exploration of the pragmatic origins of justice, we can now comfortably maintain that the European notion of crime as hybrid of practical tort and moral sin derives from the historical imposition of Catholic inquisitorial way of thinking. The latter warped the notion of *procedural* adjudication as a normal adversarial conflict-resolution and transformed it into an inquisitorial trial ending logically in torture, as well as deformed the *substantive* notion of crime as a private and social tort that had previously been compensable by *vergeld*.[153] The moralistic impetus is innately authoritarian and is *a priori* alien to the legal process as an intrinsically democratic confrontation of two equal parties.

It is at the same time still true that adjudication, i.e. impartial decision-making as to the question of guilt or innocence, is criminal procedure's central

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[151] Of course, the self-referential nature of legal 'truth' compounds this absurdity to an nth degree. See, supra n. 91.

[152] Maât, the Egyptian goddess of righteousness (justice), although her import goes far beyond simple conflict resolution, was always portrayed with feathers on her head. In Egyptian imagery feathers signified truth. See, Jan Assmann, *Maât, L'Égypte pharaonique et l'idee de justice sociale*, La maison de vie 1999, and supra n. 71.

Yet here one has to be careful to distinguish between 'truth' as revelation, which the Greeks called *alithia*, and the narrow and deterministic notion of truth as *adequatio intellectus et rei*. The latter was defined by Isaac Israeli (845-940), the neo-Platonist Jewish philosopher from Egypt. The designation was later resuscitated by Thomas Aquinas in *De Veritate*, q. I, a I. Tomo Vereš, *Toma Akvinski, Izabrano djelo (Thomas Aquinas, Selected Writings),* Globus, Zagreb and Delo, Ljubljana, 1981, pp. 61-63 and n. 8.

[153] Hobbes, supra n. 96; Nietzsche, supra nn. 56, 63, 137 and infra n. 171. See also Berman, infra n. 160 *in fine* and n. 201; as well as Bayer, supra n. 91.

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feature. Adversary procedure is to some extent at odds with these goals. The preliminary question therefore remains as to what is the valid purpose of the criminal process.

B. Part II

I. The Role of Criminal Procedure

In 1532 when *Constitutio Criminalis Carolina* was enacted in Germany, criminal procedure was seen as a set of instructions to judges as to how to arrive at a proper conclusion in criminal cases. The role of procedure at this stage of development, i.e. before the bourgeois revolution, was clearly ancillary to the ascertainment of the truth defined by the substantive criminal law.

Nevertheless, judging as a process clearly existed before there were any instructions as to how to conduct it. These instructions are not even necessary for the process of arriving at a judgment as such. If it were merely the question of instructing the judges on the matter of proper bureaucratic handling of criminal cases, there would be no need for the complex criminal procedure, as we now know it.

We can compare this inference to the one we can make in the subject matter of substantive criminal law: in order to punish the criminals one really does not need criminal law at all. Criminal law only becomes necessary when the central question becomes – in 18th century after Beccaria,[154] for example – whom *not* to punish. In criminal procedure, one can say that the truth can be arrived at without any legally structured procedure at all. Just as a scientist does not need any protocol of regulations to proceed from the formation of a hypothesis to its final testing and conclusion,[155] so the investigator in criminal cases could find out the truth about a past criminal event without any procedural instructions and barriers. Without a doubt, such unhindered truth finding would be much easier for him and more efficient. Likewise, in purely empirical terms, it is not possible *a priori* to argue that such an epistemologically unhampered investigative modus operandi would yield more false

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154 Cézare Beccaria, *Dei delitti e delle pene (On Crimes and Punishments),* Venice 1764.

155 See Karl Raimund Popper, *The Logic of Scientific Discovery*, Harper, New York 1965, at p. 27:

> ‘A scientist, whether theorist or experimenter, puts forward statements, or systems of statements, and tests them step by step; in the field of the empirical sciences, most particularly, he constructs hypothesis, or systems of theories, and tests them against experience by observation and experiment. I suggest that it is the task of the logic of scientific discovery, or the logic of knowledge, to give a logical analysis of these procedures; that is to analyze the method of the empirical sciences.’

It can be observed in this statement that the scientific method comes first – it can be seen as intuitive. Its description and logical analysis is really *ex post facto*.

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positives (innocents being convicted) and false negatives (the guilty ones being acquitted) than the present dual investigation-adjudication process.

In modern dual-structured criminal procedures, the adjudication phase follows the investigative phase. The latter is simply the testing of the hypothesis (of guilt, never of innocence) formed in the former. An acquittal, when pronounced on the factual merits of the case, is presumably an elimination of a false negative hypothesis. Adjudication, too, can confirm investigation's false positives but cannot produce new ones. It can produce false negatives (acquit the guilty) on factual or procedural grounds, which is what the detractors of adversarial adjudication find most objectionable. In the end, therefore, the empirical usefulness of adjudication is at best an elimination of a few false positives, while perhaps generating many more false negatives. The only valid epistemological rationale for superimposing adjudication phase to investigation is precisely the elimination of false positives. The underlying assumption is that he who forms the hypothesis (the investigator[156]) cannot be impartial and that, therefore, the verification (testing) of the hypothesis must be entrusted to a different, more-impartial body (the court, the jury). Still, one must keep in mind that the empirical corroboration of *this* epistemological premise lies purely in the elimination of false negatives.

Criminal procedure comes into existence once the question arises as to what the State is *not* allowed to do in order to discover the truth in criminal cases. Thus, both criminal law and criminal procedure are in essence *inhibitions* of the Government's power. Politically, they are a product of the reaction of the bourgeoisies against the arbitrary use of the power of the aristocratic state.

Of course, one may say that this is an overstatement, because is criminal procedure after all not about catching and punishing the criminals? It is obvious, one could say, that the courts punish the criminals, rather than 'inhibit' the State.[157] To

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156 The most interesting case in this respect is *Spano v. New York* 360 US 315 (1959) in which the idea of 'focussed investigation' was first introduced.

157 This basic dilemma, namely, whether criminal law and criminal procedure are supposed to further the punishment policies or instead inhibit the government's exercise of power and authority run as a basic theme through most recent and less recent Supreme Court cases in the United States. It is instructive and illustrative to see the essentially antithetical attitudes of the Warren Court and the Burger Court. It is almost amusing to see how the present Burger court tries to effectuate a policy which is antithetical to the previous Warren Court policy – and all that by means of reinterpretations of the cases-precedents handed down by the Warren majority. An excellent example of such incompatibility can be obtained by comparing the case of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed.2d 685 (1969) with *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed.2d 427. Both cases concern searches incident to arrest and yet in Chimel, the Court relied on *Terry v. Ohio*, 88 S.Ct. at 1879 where the Court said that '[T]he scope of a search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible, whereas that precise link between the reason for arrest and the scope of the search incident to arrest is simply severed in Robinson where Justice Rehnquist declares by judicial fiat that a search incident to the arrest requires no additional justification.'

However, our concern here is not the scope of the search incident to arrest but rather the two antithetical philosophies concerning the rule of criminal law and criminal

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this, there are two answers. First, it is true that criminal law is about punishment and criminal procedure about handling of criminal cases, but as we said above, this is possible even without either criminal law or procedure. Second, it is true that the central dialectic in both criminal law and procedure is the oscillation of the power of the State as against the power of the citizens, and individual against an organization. This includes the power of the state, of course, but by the same token, it includes a limitation on it.

Applied to criminal process this simply means that adjudication is not merely about truth finding, or not even primarily about truth finding. The fact that the relevant truth is pursued by the State implies that this pursuit will be checked upon by the Courts and will therefore be inhibited simply because it is a powerful state that has to be checked in its power.

As we shall see, the impartiality of adjudication carries the notion to its full flowering in criminal adjudication.

II. Criminal Procedure as a Mutant of Adjudication

Adjudication is a form of conflict resolution. Criminal adjudication is not the best example of this because the conflict there is somewhat contrived and artificial. In its origin, the idea of judging implies a standing in between two quarrelling parties. Without quarrel, one might say, there is no judge.[158]

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procedure. For illustrations, however, one can regress to such cases as *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L. Ed. 1782 (1949) where Justice Frankfurter discusses the conflict between the idea of excluding evidence for the purpose of procedural sanctioning and the primary truth-finding intention of criminal procedure. The question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of *logically irrelevant evidence* obtained by an unreasonable search and seizure. The exclusionary rule, of course, epitomizes that same conflict because by adopting exclusionary rule as a form of procedural sanctioning, one implicitly admits that the truth-finding function of criminal procedure is secondary to the procedural propriety. Were criminal procedure a mere *ancilla* to the goals of substantive criminal law and it is obvious that the goals of substantive criminal law are defined in terms of truth about a past criminal event, then exclusionary rule would not be possible. On the other hand, however, a proper balance of forces and, therefore, strict obedience to the procedural rules is necessary in criminal procedure, not only because of the substantive constitutional rights of the defendants involved, but also because criminal procedure must necessarily be adversarial and monocentrically organized, if there is to be proper impartial adjudication.

[158] It cannot be overemphasized that the very concept of adjudication of a conflict implies a very definite philosophy about society. In a hypothetical Hobbesian society, where war of everybody against everybody is the rule (presupposing that every society implies structured conflicts of interest), there is no adjudication. Adjudication of a conflict is a replacement of the actual physical fight between the parties. If both parties submit themselves to the process of adjudication, they have implicitly admitted that there exist criteria and systems of reference for deciding the conflict between them that are superior to the use of force. This is sometimes called ‘justice.’ This implicit admission that the very submission to adjudication is a replacement of the use of force or any other

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Not all conflicts are brought before a third party to be adjudicated. Some are peacefully resolved between the parties themselves, some are fought by direct and empirical matching of power, and some are resolved through a compromise. A compromise (from *com-promittere*, *Latin* – to promise to one another) is a result either of approximate equality of forces or of the lack of will on the part of the potential combatants to actually 'fight it out.' A compromise in Roman law meant that both parties were willing to back down a little – thereby actually relinquishing their absolute and principled positions for the sake of ending the conflict to which none of the two foresaw a clear-cut outcome. A compromise as a solution, then, is essentially incompatible with the idea, first, of right-or-wrong monocentric substantive distinction, and second, with the idea of adjudication.[159]

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form of power is essential for our whole argument here. It is essential because it implies that *within the structure of normative impartial adjudication, there can be no exercise of power or force.* In other words, if the conflict is submitted to adjudication, the fact that one party is physically, economically or in any other sense more powerful than the other party, is simply extrinsic to the issue to be decided in that adjudication. If the fact that one party is more powerful does influence the resolution of the conflict, then this particular adjudication has not actually played its intended role. In that sense it was redundant, because the more powerful party would have won the conflict without any adjudication in the first place. In a society where being just would be perfectly correlated to being powerful, there would be no need for adjudication because the more just would of necessity always win any conflict in any way. The principle that the exercise of power and force is incompatible with the idea of adjudication, we shall call the *principle of disjunction*. I call it the principle of disjunction for the simple reason that the parties in adjudication must be disjoined in the sense that any conflict between them, and this is especially true in criminal procedure, will imply this subversion of the idea of adjudication.

In that sense, see *Brewer v. Williams,* U.S , 97 S.Ct. 1232, 51 L. Ed. 2d 424 (1977). In Brewer, the suspect in a murder case was transported incommunicado by the police. Even though he was perfectly aware of his Miranda rights and he, in that sense, 'voluntarily' gave the self-incriminating information to the police, the Court rules that the evidence so obtained against the defendant must be excluded, because the police have used psychological manipulation to achieve the confession by the defendant. What is interesting for us in that case, however, is not the explicit rationale for the Court's decision. It is interesting to observe that there was absolutely no coercion, physical or psychological or of any other kind in this particular case, the worst possible interpretation being one of persuasion or psychological manipulation. Nevertheless, the Court found it intuitively unacceptable to allow the defendant to incriminate himself in such a situation. Apropos, it could be said that the very privilege against self-incrimination, irrespective of its foundation in the 5th Amendment to the Constitution of the United States, is a structural necessity in what aspires to be an impartial adversarial adjudication. Self-incrimination, of course, is not forbidden when volunteered; it is forbidden when obtained against the consent of the defendant. That means that we are really talking about the violation of the defendant's will – by force or by guile – rather than the principled unacceptability of testimonial self-incriminating information.

159 For an extensive explication on the distinction between monocentric and polycentric decision-making, see Fuller, *Adjudication and the Rule Law*, 54 Proceedings of the American Society of International Law, 1960, pp. 1-8. Fuller argues that in adjudication-proper, the issues have to be monocentrically organized. That means that the

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A compromise is incompatible with substantive justice because here the conflict is *not* decided by reference to legally relevant substantive criteria, e.g., 'He was mistaken and is therefore not responsible.' The conflict is rather resolved on non-principles and extrinsic grounds, e.g., 'Is it possible that I may win this case and what may I gain if I negotiate?'

A compromise is incompatible with the idea of adjudication because adjudication is an alternative to power matching, whereas a compromise is usually the result of a simulated combat where parties negotiate on the grounds of their estimate of their would-be positions if a combat (or adjudication) were actually to take place. Negotiations practically always involve simulation of (bargaining) power. Consequently, the difference between the *de facto* matching of forces and negotiation is the difference between the actual and the simulated use of force. In both cases, *force* is the essential ingredient in deciding which party will win.

III. Adjudication and the Use of Force

Adjudication, as a form of conflict resolution, is an attempt at decision-making by reference to criteria *other than force*: *non sub hominen sed subdeoet lege*. If in a society, people were 'just' in exact proportion to their economic, physical, organizational, institutional power, there would be no need for adjudication. Might would *de facto* and *de jure* be the right. Every outcome of every conflict would be just.

The very fact that in legal adjudication the more powerful party may end up as a loser proves that there is a plane of reference other than power. It is usually called justice. This other plane of reference is the subject matter of the substantive law. Here it suffices to say that this plane of reference is *something* else than power.

In a Nietzschean society hypothesized above where the more powerful superman is necessarily more just, and where the powerless underdog's reference to

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decision-maker, the adjudicator, must not be required to provide his own solution to the problem (he is not asked 'What shall we do?') rather he is asked merely to decide that one or the other party wins. Thus, there is one centre to the problem as presented to the adjudicator. The adjudicator merely says yes or no. In polycentric decision-making (such as juvenile proceedings, sentencing proceedings, civil commitment proceedings, etc.) the decision-maker is required to be creative, to find his own solutions to the problem. This is not proper adjudication anymore for the simple reason that in such polycentric situations the adjudicator is required to become *actively involved* with the problem and can, therefore, not be impartial anymore.

This, of course, implies that active involvement with the problem to be decided is incompatible with impartiality, whereas passive-monocentric decision-making implicitly be impartial. Incidentally, this also implies that no investigation, where the investigator must actively find out what happened and therefore get actively involved with the problem solving in what is essentially a polycentric problem-solving situation, can ever be impartial. If in principle every investigation is partial and biased – and we shall later show why this is so – then the idea of 'investigating magistrate' or 'a judicial investigator' is essentially a contradiction in terms. A person is either impartial or he investigates, never both. Contra Weinreb, *Denial of Justice: Criminal Process in the United States*, Free Press, New York 1977, especially pp. 14-43 and 117-146.

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justice is labelled as mere 'resentment,' there need be no judge and no judging. Adjudication, thus, is an alternative to the use of force between the people.

Incidentally, force itself is not totally alien to the idea of adjudication: first, to make adjudication a general and viable alternative to force, it must be its *mandatory* surrogate;[160] second, to make the result of adjudicatory decision-making meaningful, it must be sanctioned, otherwise it is a mere recommendation. Consequently, adjudication is a forceful alternative to the general use of force: it presupposes the concentrated organized force of the State.

Nevertheless, the very reference to 'justice' makes the use of showing of force extrinsic to the proposed mode of conflict resolution. This can be proven purely on procedural grounds, without reference to any definition of substantive justice. Namely, it follows inexorably from the very institution of adjudication that it is a force surrogate because if conflicts were allowed to be fought out, the reference to a third party judging would simply be otiose.

In a sense, adjudication of conflicts is the essence of civilization and organized society: the only other alternative is a Hobbesian *bellum omnium contra omnes*.

IV. Impartiality

In adjudication, the potential use of force is transferred to the adjudicator. Adjudication may be submitted to voluntarily, however, most of the conflict resolution is usurped by the State, i.e. adjudication is mandatory and 'self-help' prohibited. The State takes over the adjudication in order to prevent the use of force between its citizens. Paradoxically, this is achieved by the threat of force even in private (civil) disputes: the State threatens to punish criminally those who are not willing to submit to its civil adjudication. Substantive law would make little sense, if the State did not have the monopoly over adjudication. All this is postulated on the premise that the use of force is prohibited between the citizens. Therefore, the threat of greater force (by the State) prevents the use of smaller force (between citizens).[161]

In order to imbue this usurpation of adjudication with some legitimate purpose, the State refers to justice, or procedurally speaking, to *impartiality*. The case is not decided, purportedly, by the arbitrary use of power. It is decided by reference

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[160] The first command of the Roman Code of Twelve Tables (451-449 A.C.) was, according to Cicero: 'Si in jus vocat, ito!' (If you are called before the judge, go!) Thus, if a Roman citizen wanted to begin an action against another Roman citizen he could be called to follow him *in ius*, i.e., before a council and later praetor. According to the Laws of Twelve Tables, the person against whom the action was begun *had to follow* the plaintiff. The sanction was that the plaintiff was allowed to use force against the inobedient defendant. Korosec, *Rimsko Pravo*, 1967, p. 11. See also Berman, *The Background of the Western Legal Tradition in the Folklore of the People of Europe*, 45 U. Chi. L. Rev. 1978, pp. 553-597, at p. 559.

[161] In such cases, however, no mandatory sanction can be applied by the adjudicator. Since without a sanction every substantive disposition in any rule remains mere recommendation, the modern system of law cannot possibly rely on voluntary submission to adjudication.

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to law (principle of legality), not power, and the law is promulgated in advance by a body that is representative of the populace (and therefore entitled to be arbitrary).

The parties present their conflict on whatever grounds they believe to be relevant. If force between the parties themselves were the criterion, they could simply fight it out themselves. By asking the matter to be adjudicated, therefore, they refer to a plane of reference other than force. However, except in purely spiritual matters where the sanction itself is spiritual, every adjudication must be backed by actual or potential power. The claims of the parties in conflict must be so structured that one is necessarily a winner and the other necessarily a loser. There is a good reason for such a monocentric organization of issues. Monocentric organization of issues, as we shall see, makes the passive ambivalence, and therefore impartiality of the adjudication, more probable.

Impartiality is the central question of adjudication.[162]

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[162] Impartiality could be defined as such an attitude of the adjudicator that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided on the basis of the information presented by the parties – information that is legally relevant – and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin or any other such extrinsic aspect of the case. Impartiality is, consequently, a question of specific psychological attitudes towards the problem confronting the adjudicator. This attitude could be seen on two levels. The first, namely, the willingness to decide the case on strictly intrinsic considerations can be seen as an absence of overt bias; the second is the ability of the decision-maker to take into consideration *all* the information presented by the parties. In the latter case, the requirement obviously is that the adjudicator *remains undecided* for as long as possible because to remain undecided is to remain receptive to all the information. In other words, since the decision can be defined as a refusal to consider any information contrary to the direction of the decision, the ability to continue to receive information is essentially the ability to remain undecided. That ability is definitely a part of what we call impartiality. Cf. Deutsch, *The Nerves of Government*, 1966, p. 105:

> 'At fundamental problem of "will" in any self-steering network seems to be that of carrying forward and translating into action various data from the net past, up to the instant that the "rule" is formed [the determination becomes "set" or the decision "hardens"], while *blocking all subsequent information* that might modify the "willed" decision. Rule resembles the "deadline" in the newspaper; it could be called the *internally labour preference for pre decision messages over post decision ones*. The "moment of decision" might then be seen as that threshold where the cumulative outcome of a combination of past information begins to inhibit effectively the transmission of contradictory data.'

The concept of decision-making in criminal procedure could in fact be broken down into two constitutive elements: *first*, there is the process of actual formation of opinion in the head of the adjudicator and, *second*, there is the 'will' to translate that 'opinion' into a decision-proper, i.e., into a *legal* decision with definite legal consequences in terms of conviction and sentence.

Since it is obvious that the concepts of impartiality and decision are mutually exclusive and incompatible, it is also obvious that in the last analysis, impartiality will

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be exchanged for a legal decision in any meaningful adjudication process. Therefore, we are talking about the *postponement* of the 'moment of decision' in order not to 'inhibit the transmission of contradictory data.' Cf. Lucien Sfez, *La décision*, Presses Universitaires de France, 3rd ed. 1984, p. 77: 'La décision moderne, c'est un processus d'engagement progressif, connecte a d'autres, marque par l'equi-finalité, c'est-à-dire par l'existence reconnue de plusieurs chemins pour parvenir au même et unique but.'

Also, the system of adversary impartial decision-making must strive towards the situation that will make the postponement of decision-formation in adjudication more probable.

Since the difference between the decision and an opinion is merely one of degree, so is the difference between the final partiality of a conviction and the intermediate partiality of a hypothesis which an investigator must commit himself to in order to be able to investigate in the first place.

Why must an investigator be committed to a hypothesis? Can there be investigation without hypothesis? I suggest that the distinction between perception and apperception is of essence in proving this assertion. For example, if one sees a man with a gun in his hand running away from a body that lies on the street, one initially adopts the hypothesis of 'murder.' This hypothesis is arrived at because, first, we assumed that the gun was the tool of the killing and, second, that the killing was by intent of the actor. Should we, however, come closer to the man lying on the street and see that he, too, has a gun in his hand, a new hypothesis of 'self defence' is added to our understanding of the situation. Thus, our *primary perception* of reality has changed into the *secondary apperception* of that same reality. It was Paul Valéry, who once said that thinking is the negation of what is immediately before us. Investigation is precisely that: to collect 'facts' in order to first create and then negate the initial hypothesis. Thus, investigation can be seen as a cascade of different levels of apperception, a process in which the same basic and raw 'facts' change their meaning. In our example, the person with a gun in his hand running away from the body on the street presented one fact, before we saw the gun in the hand of the victim, and quite another after we saw the gun in the hand of the victim. But imagine a person from a different planet who has never before heard of the concept of crime generally and especially murder, would he be able to investigate the present situation? He would not be able to investigate for the simple reason that he is unable to create the initial hypothesis about this being a murder. Indeed, for such a person even the need for investigation would never arise because criminal investigation is nothing but an attempt to squeeze the objective fact patterns into the pigeonholes of criminal law. A lawyer is not so much concerned with the blood and the guns and the whole drama of the situation in the above example, rather he tends to dissect the situation in terms of the concepts, rules, principles and doctrines that he learned in the law school. The policeman and the detective, too, must be given at least some legal education so that they, too, can create the initial hypothesis about live situations being either criminal or not – the initial hypothesis which is thereafter verified by the lawyers in different stages of accusation and adjudication. It follows logically that a criminal investigator will, first, only investigate if he is committed to a hypothesis of guilt. If he thinks there is no crime in an objective situation, he will simply not investigate; second, the criteria of what is essential and what is not in his investigation will, of necessity, be determined by his hypothetical apperception of the life situation. Moreover, while that does not mean that the data contradictory to his hypothesis are totally blocked – it definitely does mean that his receptivity for them is significantly reduced. In contrast, where a passive adjudicator observes the alternation of mutually incompatible hypotheses of prosecution and the defence, he may very well form one opinion during the

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Impartiality is a quality that the adjudicator must have in order to be an adjudicator. It refers to the absence of overt bias whereby the case would be decided in reference not to law but to criteria extrinsic to the legal definition of the issue to be adjudicated, e.g. in reference to the friendship between one of the litigants and the judge. Even assuming that the person deciding the case has the best possible intentions and intends to decide the case on purely intrinsic (substantive legal) grounds, there is still a great danger that he or she will not be impartial due to the procedural distribution of functions.

The basic requirement of impartiality is passivity of adjudication. Why is this so essential? Passivity of adjudication means that the judge must not be required to actively go about and find out the truth about the case. He must sit still and be passively open to allegations and counter-allegations. This is so because the moment we require the judge to find out what happened, to find this out on his own, he is of necessity required to form a hypothesis. Without a hypothesis, he cannot function as an investigator. An investigator must distinguish what is essential in a case from what is not and he must have some criteria for that.[163] These criteria are clearly

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presentation by the prosecution and the contrary opinion during the presentation by defence. And while his opinion goes one way, burden of proof effectively goes the other way. Every litigation lawyer, therefore, must know whether the particular move by the opposing party was effective in creating a certain opinion in the head of the adjudicator and he must attempt to neutralize and overcome that opinion by presenting a strong counter-argument, counter-interpretation or counter-fact. It must be admitted that this process of creating long term impartiality out of a series of mutually incompatible partialities, this process of a vacillating partiality, is also very close to the dialectical way of thinking by thesis and antithesis.

163 In *Spano v. New York,* 360 U.S. 315, 79 S.Ct. 12, 3 L. Ed.2d 1265 (1959), the Supreme Court tackled the distinction between investigation and adjudication. They talk about the situation where ‘police were not merely trying to solve a crime’ or ‘absolve a suspect’ as distinguished from those situations where the police were ‘concerned primarily with securing a statement from defendant on which they could convict him’ (at 323 and 324). This latter situation where police are already convinced of the correctness of their hypothesis about the identity of the perpetrator, comes to be called a focussed investigation in contradistinction to the situation where the police are not yet clear as to who is the definite suspect, which is called an unfocussed investigation. The real difference, of course, between a focussed and unfocused investigation is that in the latter situation the police are trying to inform themselves as to who is the prime suspect, whereas in the former situation, the police are already convinced that they have the right man and what remains is merely to convince the court that they were correct. In unfocussed situations, the police are therefore genuinely investigating, whereas in the focussed investigation they are merely collecting evidence in order not to persuade themselves, but to persuade the real decision-maker, the court. It is clear therefore that the focussed investigation is really not an investigation in the strict sense of the word, rather it becomes an investigation-in-anticipation-of-adjudication. In that sense, such an investigation really is already adjudication. The court in *Spano* understood the problems and, in fact, ruled in consistence with the assumption that such investigation is a sub-species of adjudication.

The ‘critical stage’ doctrine of *Powell v. Alabama*, 287 U.S. 45, in fact also

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related to substantive definition of some crime of which the suspect in a criminal case is accused of.[164] An investigator thus cannot assume that the suspect is innocent.[165] If that were the case, he could not treat him as a suspect. The very fact that a suspect is a suspect implies that there is a hypothesis as to the probability of his guilt. This hypothesis is then tested as against the suspect and the circumstances.

If the investigator has power over the defendant, this necessarily leads to torture-like situations of abuse, because the suspect is always the best source of information as to what happened, and the investigator is tempted to test and confirm his hypothesis on him. This is the natural line of the least resistance.

Whoever is charged with finding out the truth through his own investigation is in criminal cases contaminated with the hypothesis he must create in order to be able to investigate at all. If, however, he is allowed to remain a passive receptor of two opposing hypotheses (monocentricity)[166] as to the defendant's guilt or innocence respectively, then he does not have to be committed to any hypothesis. This helps to delay the hypothesis formation on his part and essentially improves the chances that he will see the case from at least two different sides. This is perhaps an analogy to the dialectical form of reasoning.

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declares these critical stages of investigation to already be anticipatory adjudicatory stages. The formalistic approach to the question of distinction between investigation and adjudication is, in fact, enunciated in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L. Ed.2d 246, where indictment is held to be the criterion for distinction between investigation and adjudication. What matters is not the artificial distinction per se. What matters is the fact that even the courts are willing to at least make practical distinction between investigation and adjudication and that they are, in fact, willing to allow certain things to happen in investigation that they are not willing to allow happen in adjudication. And while for them there is no theoretical explanation for this being so, it can be deduced from the theory or induced from the cases that one cannot expect from an investigator to be impartial, whereas impartiality is precisely what is expected of an adjudicator. In fact, we could go further and say that adjudication can be impartial only insofar as investigation is partial because, as we saw supra, the impartiality of adjudication is achieved by alternation of the partialities of two incompatible hypotheses held by the two parties in an adversary process.

[164] There are numerous problems connected with the definiteness of these 'criteria' and we shall deal with these problems in the section concerned with the principle of legality, infra.

[165] This is really an overstatement: as we emphasized before, the difference in (im) partiality between different levels of investigation and adjudication are really more one of degree than of absolutes. As to the distinction between monocentric and polycentric issues, see Fuller, *Adjudication and the Rule of Law*, 54 Proceedings of the American Society of International Law 1960, pp. 1-8.

[166] See Lon L. Fuller, *The Adversary System*, in Harold Berman (ed.), *Talks on American Law: a Series of Broadcasts to Foreign Audiences by Members of the Harvard Law School Faculty*, Vintage Books, New York 1961, pp. 30–43: 'An adversary presentation seems the only effective means for combatting this human natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, they stand to explore all its peculiarities and nuances.'

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Impartiality, consequently, is an attitude of conceptual non-committal, hypothesis-aloofness. Such an attitude can only be preserved in a procedural situation where two parties alternate before an inactive adjudicator, each one pressing its own hypothesis and by the same token trying to neutralize the opponent's one. The adjudicator's attention shifts from one side to another – the courtroom architecture manifests this arrangement – and the very committal to one hypothesis at one moment becomes its own negation at the next one. This is not to say that adversariness represents a sufficient condition for impartiality. It does mean that it is a *necessary* condition.

Some very important conclusions would follow, if we accept this doctrine. For one, the European investigating judge is a contradiction in terms: either he investigates, or he is a judge.[167] The idea of judicial investigation that finds adherents in this country is likewise unacceptable on theoretical grounds: it implies a wrong assumption that a judicially conducted investigation is any less partial because the police do not conduct it.

From a comparative procedural point of view, the cultural differences between the Continental system and the Anglo-Saxon system are relevant insofar as they clearly godfather the differences in the perception of criminal procedure. If the pursuit of truth is central, as it is on the Continent, then investigation must necessarily become more central than adjudication. Investigation is definitely the more active and the more exhaustive approach to truth finding in criminal procedure. Likewise in science: imagine a scientist who in his 'investigation' proceeds in an 'adversarial' manner. If he does it, this is done for dialectical reasons and only in his head.

If, however, adversarial adjudication is the prevalent mode in criminal procedure, it is clear that truth finding is secondary to the ideals of impartiality and conflict resolution.[168] The secondary nature of the truth-finding function in American

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[167] We assume here that the essential quality of judging is impartiality, moreover that it is this impartiality that distinguishes the judge from a bureaucrat. In the inquisitorial system, the investigator-inquisitor was precisely that, he was not presumed to be impartial and he was not a judge in terms of attaching the legal consequences to the decision of the case. This was done by a separate body of judges who were never involved in the actual investigation. See Esmein, *History of Continental Criminal Procedure, with special reference to France*, Simpson (Transl.), Rothman Reprints, South Hackensack, N.J. 1968, pp. 178-179.

Of course, this decision-making by less involved persons was not precisely impartial either, because after all, it was still an ex parte proceeding. If these 'Judges' were at least less partial than the actual inquisitor, this was only because they had less stake in the hypothesis of guilt. Compare this situation to the one where a magistrate issues a search or arrest warrant in the United States. Such a magistrate could not be seen as impartial since he, in fact, received the information only from the police.

[168] See Kamisar, *A Reply to Critics of the Exclusionary Rule*, 62 Judicature 2, pp. 55-84. A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected 'to believe that the Government meant to forbid the 14 (Cont.) conducts in the first place?' Paulson, *The Exclusionary Rule and Misconduct of the Police*, 52 J.Crim.L.C., pp. 255-265, at pp. 255 and 258. Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the 'flagrant' or 'willful' case does not allow the

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criminal procedure is apparent in its preference for the exclusionary rule, the consequence of which is that people truly found to be guilty will go unpunished in order that the ideals of impartiality and procedural fairness are preserved. Such an attitude necessarily implies that the procedure is not a mere means to truth finding[169] dictated by the substantive law. Procedure becomes a goal in itself in the sense that it protects different, procedural rights as independent entities and not merely supplements to the substantive questions of guilt and innocence.

This is a position one must agree with because criminal procedure is the Magna Carta to citizens suspected of crime. In that sense the Due Process doctrine acquires substantive connotations.

If adversarial adjudication prefers limitations on the state power to the truth-finding function (as in exclusionary rule), this necessarily means that criminal procedure from the policeman's point of view will be seen as somewhat dysfunctional. If a criminal is acquitted on a 'mere technicality' this is seen as abuse. However, if we see criminal procedure to have an independent function, the 'technicality' becomes its main purpose.

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court to do so? A court which admits the evidence in a case involving a 'run of the mill' Fourth Amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates 'the contrast between morality professed by society and immorality practised on its behalf.' Frankfurter, J., dissenting in *On Lee v. United States*, 343 U.S. 747, 759 (1952)1. It signifies that government officials need not always 'be subjected to the same rules of conduct that are commands to the citizens.' Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928)1. Once the court identifies the police action as unconstitutional, that ought to be the end of the matter. There should be no degrees of offensive among different varieties of unconstitutional police conduct. A violation of the constitution ought to be the bottom line. This is where the Weeks and Mapp Courts drew the line. This is where it ought to stay. Kamisar's article is in this respect perhaps typical. It deals with the question of exclusionary rule on the low conceptual level of the Supreme Court. The source and the bottom line of the exclusionary rule cannot be in the moral and value judgment whether something the police have done is right or wrong, or even legal or illegal. The source of exclusionary rule must be in the structural requirement of the adversary process of adjudication. If the exclusion of evidence in violation of the principle of disjunction cannot be proved inevitable and logically inescapable, then the exclusionary rule is in a very precarious position indeed. One of the purposes of this paper is precisely to show, that these need not be so.

169 The very concept of 'truth finding' implies that there is a certain 'truth' that the substantive and procedural law – in various degrees – are concerned with. Of course, the truth we are concerned with here is not some philosophical or scientific concordance between reality and consciousness, between the essential idea and the accidental existence. The concordance we speak of here is the simple syllogistic subsumption of the minor premise of the fact pattern under the major premise of the legal norm in substantive criminal law. It should not concern us here that this 'truth' of legal syllogism has little to do either with the whole truth as opposed to merely legally relevant truth, or with any other more profound epistemological approach to reality. In essence, the problem we are tackling here manifests itself in law as the question of legality. As we shall see, the question of legality really is a question of the extent to which the words can guarantee certain actions.

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V. Legitimacy

If adjudication is to work as a principal alternative to the use of power and force,[170] it must of necessity be distinct from the rest of the social processes. In almost all manifestations of different conflicts of incompatible interests, such as of power, force, prestige etc., are prevalent certain social modus operandi. Insofar as adjudication pretends *not* to be part of the prevalent social power game, it aspires to an almost transcendental status of the great corrective and of the great equaliser, i.e. of the lofty exception – usually referred to as 'justice' – among all other social processes.[171]

Although adjudication is elevated to a transcendental state, it apparently falls short of this status because substantive law's pretence of advance notice and guarantee do not fully materialize. This 'advance notice' is the professed principle of legality. The doctrine *presupposes* that single and simple legal norms, purportedly clear, will figure as straightforward major premises of legal syllogism in the forthcoming accusation and in the subsequent judgment. It is easy to show, however, that each major premise in any legal judgment is a *combination* of at least two other rules, e.g. in criminal law one rule from the general part of the criminal code (level of liability)

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170 This is essential. The very concept of adjudication of a conflict between two parties makes sense only as an alternative to the use of force, as we have explained above. If this assertion, namely, that adjudication makes sense only as an alternative to the use of force between the parties, which we call *the principle of disjunction*, is incorrect, then the rest of the conceptual structure elevated above collapses as well.

171 This idea was perhaps best understood by Nietzsche:

> '"Just" and "unjust" exist, accordingly, only after the institution of the law (and not as Dühring would have it, after the perpetration of the injury). To speak of just or unjust in itself is quite senseless; in itself, of course, no injury, assault, exploitation, destruction can be "unjust," since life operates essentially, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character. One must indeed grant something even more unpalatable: that, from the highest biological standpoint, legal conditions can never be other than exceptional conditions, since they constitute a partial restriction of the will of life, which is bent upon power, and are subordinate to its total goal as a single means: namely, as a means of creating greater units of power. A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general – perhaps after the communistic cliché of Dühring, that every will must consider every other will its equal – would be a principle hostile to life, an agent of the dissolution.'

Nietzsche, *On the Genealogy of Morals*, at 76. Supra n. 98.

One, of course, does not need to go into the deep philosophical waters to find out that rules – and consequently adjudication – must necessarily differ from life and indeed, be in this sense contrary to it, since for what is invariably and naturally done, no rules need exist.

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and another rule from the special part of the code (the definition of offence). In reality, of course, it is the *combinations* of rules, which are chosen and which then determine the outcome, because single rules are not what governs the application of criminal law – rather it is their combinations too numerous to be exhausted in advance. It is curious that legal theorists today entirely overlook this, although this had been entirely clear to the first framers of the (civil) codes:

> 'Dans cette immensité d'objets divers, qui composent les matières civiles, et dont le jugement, dans le plus grand nombre des cas, est moins l'application d'un texte précis que la combinaison de plusieurs textes qui conduisent a la décision bien plus qu'ils ne la renferment, on peut pas plus se passer de jurisprudence que des lois.'[172]

I have for my part drawn attention to this glaring rupture in the principle of legality more than twenty years ago.[173]

Aside from this, Unger's doctrine that formal justice is an antimony in itself because it mistakenly relies on the existence of intelligible essence of the words which could only exist in such conditions where complete value-sharing were possible – conditions that in themselves deny the need for just adjudication – makes the further belief in the principle of legality somewhat improbable.

If substantive law is not a fixed and almost transcendental series of precepts from which the purportedly impartial adjudicatory processes can derive their legitimacy, what then is the ground on which to build the belief that adjudication and its ritual nature are not mere form?

There are two levels of interpretation here. Sociologically, ritualization is in fact a direct response to anomic tendencies: it is a form that figures as a surrogate of the real belief.[174] Legally and logically, however, the fact that impartial adjudica

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172 Portalis, *Projet de code civil, Discours préliminaire*, 1804, p. xix as quoted and cited in von Savigny, supra n. 74, at p. 92 (in an unnumbered footnote).

173 Zupan.i.,*On Legal Formalism: The Principle of Legality in Criminal Law*, 27 Loyola Law Review 1981, 356-369, text accompanying footnotes 196-199.

174 See Merton, *Continuities in the Theory of Social Structure*, in Radzinowicz and Wolfgang (eds.), *Crime and Justice*, 1971, pp. 442-473. According to Merton, there are three basic responses (the three R's) to *anomie* in any particular society, whatever the reasons for which anomie itself develops. Normlessness can be attacked by *rebellion* whereby a particular group in society attacks the dominant social consciousness and its corresponding socio-political structure and tries to impose its own values on the rest of society. Such group will only succeed if its values are more functional, more appropriate and more adequate for that society at that particular stage of development. However, rebellion is not the prevalent mode of response to *anomie* simply because it is not the line of least resistance and besides, rebellion itself presupposes the model alternative of values which, in conditions of really acute *anomie*, it is impossible to have. The other two responses to an anomie are, on the one hand *resignation*, which is simply an escape mechanism whereby passivity prevails over active rebellion and the concomitant frustrations are rationalized and intellectualized in the best possible manner. The last response, the one that we actually mention in the above text, is the response called *ritualization*. Ritualization is a resort to ritual, to form, despite the belief

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tion is a pretence rather than reality matters little because the very fact that it exists and is taken for granted by most and seriously by some is indicative of the need and aspiration for transcendental reference diametrically opposed to the Hobbesian reality of the social processes.[175] Even though its existence is – sociologically speaking – an institutionalized lie because it is far from doing what it pretends to do,[176] that matters little because it gives basis for the deontological tension[177] between what is and what ought to be: a tension that without a false transcendental reference could not exist.

This deontological tension[178] created by the postulated purpose of adjudication being a truly just alternative to the use of force and power is immanent in the very existence and nature of judging. If judging is mere imitation of real life power relationships, why bother having it? If, on the other hand, it is something different ('we are all equal before the Law' – 'equal protection of the Laws') in the sense that before a judge, real life powers do not matter and a poor man is equal to the rich man, then adjudication embodies a promise of the heavenly kingdom on earth. Somehow, it does not matter that these promises never materialize.

VI. The Use of Force

It ineluctably follows that the use of force of any kind by either party is incompatible with the whole idea of adjudication. But, how extensively can we interpret the phrase 'use of force?' The adjudicator figuratively stands between the two parties in conflict who cannot communicate directly with each other without vitiating the adjudicatory process. This we shall call the principle of disjunction of the parties in conflict. The

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that there is no underlying substance. The less the individual or the society believes something is true, correct, adequate or appropriate, the more he iterates and reiterates the form that conceals that lack of substance. The ritual creates, even though its existence sociologically speaking 'a myth,' an institutionalized lie because it is far from doing what it pretends to do, a basis for the deontological tension between what is and what ought to be. This tension could, without a false transcendental reference, not exist. Various religions often not only manifest the beliefs, but also conceal the disbelief. Ritualization could be called an over-compensation of the lack of substance by the surplus of form. An individual, for example, who does not believe in what he does for his living, will, in order to maintain his ability to perform what he does, do it with compulsive punctuality. Anthropologist Dr. Grace Goodell, a Harvard anthropologist, once said that societies generally try to overcompensate in language and lip service what they lack in reality. This applies, mutatis mutandis, to normative hypertrophy in non-democratic legal systems where the regime tries to achieve on the virtual normative level what it cannot on the real one. Former Yugoslavia was a typical example of that.

[175] From the point of view of social stability, it matters little whether the values underlying adjudication are 'true' values or not. What matters is that those values be first socio-functional and second, appropriately reinforced by the process of adjudication. See generally, supra, n. 54.

[176] I.e., rendering 'true' substantive justice.

[177] Supra, n. 174.

[178] A good example of this problem is presented in *Brewer v. Williams*, U.S. , 97 S.Ct. 1232, 51 L. Ed.2d 424 (1977).

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parties are disjoined not only because the use of force is forbidden between them, but more generally, because communication between the parties has broken down already (the definition of conflict) *and* the parties have referred to an impartial adjudicator in lieu of direct negotiation.

There is, however, one basic difference between civil and criminal law conflicts. In civil law, both parties have an interest in resolving the conflict between them, and both are eager to have an impartial adjudicator make a final decision. In criminal law, however, the accused has no desire to have his case adjudicated and ordinarily must be apprehended and brought before the court. This difference is reflected in the quality (intensity) of the disjunction and the quantum of force that appear in both types of proceedings. Civil law conflicts are highly suitable for adjudication, since the principle of disjunction can generally be adhered to, and there is virtually no use of force because the parties more or less freely agree to impartial adjudication. Criminal law conflicts necessarily involve some use of force and some infringements on the principle of disjunction since most defendants do not want to have their cases adjudicated at all.

Even civil law, however, must sometimes deal with situations where one party refuses to submit to adjudication. Roman law is a good example: *Si in ius vocat ito!* (If you are called into court, you must go!). Thus, if a Roman citizen initiated an action against another citizen, the latter had to come into court before the magistrate, consul or praetor. The Law of XII Tables (451 to 449 B.C.) gave the plaintiff the right to use force against the defendant if the latter would not submit to the jurisdiction of the court. Thus, even when the parties did not freely come before the court, the principle of disjunction was inviolate and force was not used until unavoidable. In Roman law, the court sent three notices; if the defendant refused to appear, he was declared *contumax* (stubborn, disobedient). Until this declaration, no force could be used between the parties. Even today, civil litigants are usually willing to submit to adjudication because they will lose their cases automatically if they do not appear.[179]

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[179] This raises the fundamental question whether the fact that adjudication itself is possible only because behind it there stands the threat of power of the state which even according to the Law of Twelve Tables in the ancient Roman society did compel the defendant to appear in the court. It could be asked how it is then still possible to assert that adjudication is a surrogate of power and force, if the very process itself is superimposed at least on one party and at least in medieval procedure by the use or at least by the threat of the sheer physical power and force.

Of course, it is impossible to expect, no matter how elevated the ideal to which the process of adjudication refers as the relevant set of values that the use of power and force will be abstained from for the sake of spiritual values. From this realistic point of view, it is inevitable that even prevention of the use of power and force has to be attained by the threat of power and force. The state, for example, attempting to prevent the use of power by the aggrieved party itself will often have to do that by the threat of another power and force, namely its own. The question is, does this secondary power annul the validity of adjudication as a replacement of power and force in the first place. It could be said that one of the major purposes of the state qua organization of physical force is the prevention of use of force anyway. What is called 'law and order' usually means the prevention of war of everybody against everybody by the threat of physical coercion against all. Thus, it is not too paradoxical to say that peace is maintained by

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It is important to recognize that adjudication had developed in the civil law area and was transposed into criminal law, later. The transposition weakened the principle of disjunction because the accuser in criminal law must literally bring the accused into court.[180] The accuser must exercise power directly over the accused in apprehending him and bringing him before the court. Without first catching the criminal, there can be no adjudication in criminal matters. The principle of disjunction is vitiated from the beginning, even before the adjudication is started. The police are allowed to catch criminals, and it is all too easy for them to force the suspects to give self-incriminating information that will be used against them at trial.

This is the basic problem of criminal procedure. The suspect has no interest in having his guilt adjudicated until he is captured. Therefore, he must be apprehended and some strictures placed on his freedom to assure his participation in the adjudicative process. He may be freed on bail, or he may be detained. Detention may be necessary even though it violates the principle of disjunction. The principle of disjunction of the parties serves an ancillary function in the process of adjudication because when the choice between the subordinate principle of disjunction and the superordinate process of adjudication becomes inevitable, it is clear that adjudication will prevail over disjunction. That this is a crippled adjudication, however, is a

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war, that power and force are prevented by the use, or at least the threat of the use, of power and force.

180 Practically, the only partial solution to this is to shorten the time span during which the accuser (the police, the prosecution) exercises direct power over the defendant. In *McNabb v. U.S.*, 318 U.S. 332 (1943) and in *Mallory v. U.S.*, 354 U.S. 449 (1957), the Supreme Court developed the so-called McNabb Mallory Rule under which exclusionary rule applies to all statements made by the person arrested while he is being detained 'unnecessarily' before being taken to a magistrate for arraignment. A more mechanical rule was imposed by the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C., 3501(e). In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer of law-enforcement agency, shall not be inadmissible solely because of delay in bringing such a person before a magistrate or other officer empowered to commit persons charged with offences against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention, provided that the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be travelled to the nearest available such magistrate or other officer. Again what is interesting here is not so much the rule per se, but rather the intent it manifests, i.e. to maintain the initial contact between the accuser and the defendant, the contact that is in clear violation of the principle of disjunction.

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separate question. Once an adjudicative situation exists, there is no reason whatever to allow the accuser to exercise any further control over the accused.[181]

The Framers of the United States Constitution probably intuitively sensed this basic principle and verbalized it in the Fifth Amendment. They recognized that it is inherent in the structure of adjudication that the parties be separated from each other as much as possible.[182] Indeed, the courtroom's architecture reflects the reality that the prosecution is entrenched on one side, the defence on the other, and the judge above and between them in the position of impartial adjudicator.

The Constitutional provision that no person shall be compelled to be a witness against himself should be interpreted as a verbal formula for the principle of disjunction that mandates the accuser (the prosecutor and the police) to exercise as little control over the defendant as is structurally possible. That is, it should be extended into a broad principle against self-incrimination, both in court and out. Once the defendant is brought into the adjudicatory scheme, the use of inter-party force must be strictly proscribed. It is logically impossible to argue that the Framers did not see what was clear even in Roman law – force can be employed between the parties only where there is no adjudication; if force is used, it negates the very principle of adjudication of conflicts. The provision that one need not be a witness against himself in a criminal trial symbolically reflects this basic idea.

Justice Douglas' penumbric theory of law in *Griswold v. Connecticut*, 381 U.S. 479 (1965), reinforces the conclusion that the self-incrimination clause should be read broadly. Douglas says: '[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance [...] Various guarantees create zones of privacy [...] The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.' This is precisely what we have called the principle of disjunction; Douglas' interpretation of the particulars in the Bill of Rights as merely a para-tactical index to be used in a form more symbolic than exhaustive, allows us to support our theoretical conclusions with judicial opinion.

If the Fifth Amendment is read in isolation, apart from pre-trial proceedings and its theoretical underpinnings, the self-incrimination ban makes no sense. If it is read in conjunction with the requirements of due process of law as outlined in the 'penumbric theory,' and with the provision of the Ninth Amendment that enumerated rights shall not be construed to deny or disparage others retained by the People, then the principle of disjunction should delimit the fullest extension of the Fifth Amendment.

The Supreme Court held in *Crooker v. State of California*, 357 U.S. 433 (1958), that the bare fact of police detention and incommunicado examination does

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181 Here it is good to keep in mind that the problem is not inherent in the adjudication itself. The problem occurs in the transposition of the adjudication from genuine private disputes to less genuine, if not artificial, conflicts as known in criminal procedure.

182 The closest one can get to the principle of disjunction through constitutional interpretation of the Fifth Amendment is to interpret the word 'compelled' as concerning physical and psychological coercion as well as general lack of informed consent on the part of the defendant.

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not render a suspect's confession involuntary. This is precisely the theoretical question we want to address.

From our previous discussions of the Procrustean theory, it follows that a hypothesis of guilt is inherent in police investigatory work, (the police *must* presume guilt when they decide to contact or arrest a suspect) and it is clear that police hypothesization is directly antithetical to the presumption of innocence that ought to be the cornerstone of adjudication. Thus, from our principle of disjunction, the police cannot be allowed to extract evidence from the suspect without impairing the adjudicative process. The Supreme Court has extended the same theory and has declared repeatedly that the suspect cannot be the source of information for the police, nor can he be the object of interrogation; this is the thrust of the Miranda-related cases. As we have seen, the same intuition gives meaning to the self-incrimination ban in the Fifth Amendment.

When the *Crooker* Court enunciated its holding, it showed a fundamental misunderstanding of the underlying structural problem of criminal procedure – a pure adjudication situation is impossible because the police must use force to bring the suspect before the court, and exercising any additional force directly undermines the subsequent adjudication because force metamorphoses into 'torture,' as soon as it exceeds that necessary to arrest the suspect. The existence of torture makes any confession involuntary *per se*.

The word 'torture' derives from the Latin verb *torquor,* which means to twist and to turn. We are using the term 'torture' here in the broadest possible sense as a violation of the principle of disjunction. Thus, all the situations where the principle of disjunction is violated because the accuser is allowed to manipulate the accused, physically or psychically, are defined as 'torturous.'

We have defined torture broadly as the coupling of the accuser's formation of a guilt hypothesis and his exercising power over the accused. If the accuser can exercise physical or legal power over the defendant, it is inevitable that he will try to test his hypothesis on his experimental subject. The result is necessarily a clash between two opposing forces. The recalcitrant defendant resents playing the part of the laboratory rat in the accuser's experimental scenario, and the accuser insists that the defendant fit himself onto the Procrustean bed of his underlying hypothesis of guilt. The conflict invariably frustrates the accuser and produces selective and distorted perceptions that fit his preconceived ideas about the guilt of the accused. Selectivity and distortion are the by-products of every hypothesis-testing situation; the tester always tries to stretch the object of his testing on the skeleton of his basic hypothesis. When police sub-cultural characteristics, public pressure, and the moral indignation that insinuates itself into much police work are superimposed on the intrinsic problems – not easily avoided even in the serene conditions that accompany scientific experimentation – it is inevitable that some form of torture will emerge.

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VII. Procedural Rights as Substantive Rights

If the integrity of adjudication is to remain intact, if adjudication is to remain impartial, procedural rights must have an independent existence.[183] A procedural right can be seen from two basic points of view. First, it can be seen as a subjective right granted to the defendant in spite of the truth-finding interests of the criminal process. From this point of view, a procedural right is a political concession that runs against the basic purpose of crime repression. Insofar as these rights are derived directly from the Constitution, i.e. from a non-procedural source, this perspective seems to be valid. However, second, the privilege against self-incrimination, the right to counsel, the right to be protected against warrant-less searches and seizures, the right against double jeopardy, and so on, also can be seen as logical structural requirements without which a rational process of impartial adjudication is not possible. This less subjective perspective gives procedural rights an independent existence because it shows that the rights of the defendant exist not only to protect the defendant, but also because impartial adjudication is impossible in view of self-incrimination, the absence of counsel, as well as the use of force by the state to make the defendant an unwilling source of evidence against himself. Insofar as this is true, the procedural rights of a defendant are not concessional aberrations from the basic truth-finding function of criminal procedure: they are inevitable logical deductions from the basic requirement that adjudication be impartial.

It is possible to defend the independent existence of the procedural right on constitutional grounds. One can say that criminal procedure is not totally ancillary to the goals of the substantive criminal law (truth finding) but exists rather as an independent barrier that inhibits the direct imposition of the state's power over the defendant. Therefore, it is possible to assert the independent existence of procedural rights from the constitutional-political point of view, too.

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183 To say that a procedural right exists independently in this context simply means that it is seen as a substantive right of a person suspected or accused of a crime. This substantive aspect of criminal procedure – in this context criminal procedure could be seen as the Magna Carta of people suspected or accused of having committed a crime – exists not only independently but in clear opposition to the goals implicit in the substantive criminal law. If criminal procedure were totally procedural, i.e., ancillary to the goals of substantive criminal law, the finding of who is guilty and who is innocent would be the only goal of criminal procedure. It is clear that the substantive rights of suspects and defendants conflict with the goal of truth finding as it is evidenced clearly in the institution of the exclusionary rule. See *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L. Ed. 1782, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 and especially also *Boyd v. United States*, 1886, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L. Ed. 746.

Since a right or a sanction cannot really be procedural because the adjective procedural implies that a legal institution does not have an independent existence and that it serves a goal defined outside that particular institution, to say that a procedural right must have an independent existence is really a contradiction in terms. Instead, we should be talking about substantive rights that a defendant has in the context of criminal investigation, prosecution and adjudication. But since we are talking about procedural sanctioning, it is perhaps not too inappropriate to also call them procedural rights.

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Similarly, virtually the whole procedural aspect of the Bill of Rights can readily be subsumed to a logical-requirement analysis. The right to counsel, for example, is necessary not only because this is a political right of a defendant when faced with the almighty state, but also because the impartiality of the adjudicator (judge or jury) is impossible unless the conflicting theses of the defendant and the government are presented by approximately equal persuasiveness. If, for example, the government's case is stronger simply because it has good lawyers who prosecute the case, then the defendant's case might be lost simply because he had no lawyer. In the last analysis, therefore, it would be possible to show that he was convicted not because he was guilty, but because he had no lawyer. That is unacceptable, not only because it is manifestly unjust, but also because the issue of guilt and innocence was decided on grounds extrinsic to the issue (the guilt depends on the quality of defence).

The whole Fifth Amendment prohibition against self-incrimination, i.e. making the defendant an unwilling source of information against himself, is a manifestation of the disjunction requirement, which in turn is based on adjudication as a surrogate of force. Therefore, it is not only a question of giving the defendant the political right not to incriminate himself, but also a question of the rationality of adjudication itself. If the case can be indirectly influenced by the exercise of force of the more powerful party (state) on the less powerful party (the defendant) then the adjudication is not really an adjudication, because adjudication is by the nature of things a replacement of force in the resolution of conflicts. A similar analysis would apply to the right against unwarranted intrusions on the suspect's privacy. All this is based on the intuitive understanding that judging would be a mere farce if the more powerful party were always allowed to win merely because it is more powerful. Such judging would be a transparent attempt to legitimize the direct and partial use of power. Once, however, the concept of disjunction is introduced to the effect that the parties in conflict should strictly be kept separated, it becomes clear that the privilege against self-incrimination is not an easy-come-easy-go, protected and personal interest of the defendant, but something *without which adjudication ceases to be a meaningful replacement of force*.

Despite all the complexity of its procedural and evidentiary detail – the trees that obscure the nature of the forest – it is possible to say that the presumption of innocence is a logical necessity. Imagine a 'primal adjudicative scene:' A charges that B has done something forbidden and asks a judge to adjudicate. In such a situation the presumption of innocence is a logical necessity because it simply means that A cannot accuse without proof; if that were possible, then one quarrelsome A could bother a whole population of B, C, D, E, F ... without ever producing anything beyond mere abstract accusation. It would also be illogical to require B, C, D, E, F, I ... to produce evidence that they have done something in order to disprove A's accusations. (*Ei incubit probatio, qui dicit, non qui negat*.)

The double jeopardy proscription, likewise, can be logically deduced from the requirements mandated by the rational adjudication model. Legally, the double jeopardy doctrine derives from the Fifth Amendment of the U.S. Constitution, which provides that 'no person shall be ... subject, for the same offence, to be twice put in jeopardy.' To punish the same person for the same offence more than once would be manifestly unjust. This follows from the premise that the first punishment suited the

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crime and thus the second punishment must necessarily be superfluous. If the first punishment is just, then the second punishment is necessarily unjust.

The theoretical basis for not trying a person more than once for the same offence derives from the doctrine of the presumption of innocence. Presumption of innocence simply means, then, that one is held innocent unless found guilty by a competent court. From this point of view, the presumption is valid only insofar as it is true that in general, the people in any given society are innocent. In particular, however, an individual is either guilty or innocent. To say that he is presumed innocent until proven guilty, per se implies that he might not in fact be innocent; if it were so clear to us that he is innocent, there would be no need to presume that he is innocent.

Presumption of innocence is not a logical presumption.[184] It is a postulate: it is a principle that guides criminal procedure and criminal law and is not a statement of fact. If it were a statement of fact to say that 'all people are innocent,' there would be no need either for criminal law or for criminal procedure. On the other hand, it is also not logical to have a person indicted or perhaps even detained and at the same time to claim that that person is presumed innocent; if he or she is so

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184 But see, for example Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 U.C.L.A. L. Rev. 4, 1968, pp. 1203-1225 and by the same author, *Two Kinds of Judicial and Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L. J. 1968, pp. 880-935. In such writings, presumption of innocence is seen as a technical rule distributing the burden of proof. But before such technicalities can be understood, it must be established that the presumption of innocence is a necessary logical corollary of the accusation itself and it does not really matter whether that accusation occurs in the civil or criminal procedure. It is a corollary to the common sense conclusion that the person who comes forward to require adjudication must be able at least to carry the initial burden of proof. That 'presumption of innocence' is not necessary in civil procedure whereas it presents such a great problem in criminal procedure is simply due to the fact that there is an immanent conflict between presumption of innocence and truth finding. Since in civil procedure truth finding is not essential, the truth about the civil dispute does not have to be discovered because in civil disputes, truth serves as a means towards the resolution of the conflict and not vice versa; there need be no antidote to the presumption of 'guilt' of the defendant in civil cases. In civil cases, after all, nobody really cares whether the defendant is 'guilty.' The essence of the civil dispute does never have to be discovered, e.g., if the parties decide to settle the case before the end of adjudication. However, according to the criteria of substantive criminal law you are seen as guilty even though never really adjudicated as such. It is for that reason, that the Model Penal Code never talks of a 'defendant' but rather of an 'actor.' Substantive criminal law requires the truth about criminal guilt to be discovered and it exercises such moral pressure on all the parties involved in criminal procedure that the presumption of innocence represents an attempt to counter-balance this pressure of the presumption of guilt. Presumption of innocence is logical only insofar the adversary (not the inquisitional) procedure can afford to keep the parties in dispute apart. Such conclusion follows from the very nature of adjudication: the party, who raises the issue to be adjudicated, must have some evidence whereby he intends to persuade the adjudicator. The presumption holds valid only for the adjudicator; but not in the inquisitorial procedure where the judge and investigator – the latter of necessity presumes at least some guilt – are merged into one person.

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innocent, why then is he put in prison even before being found guilty by a competent court?

From that alone, however, it does not follow that a person is not to be put in double jeopardy. If he has been tried once and found innocent concerning a particular event, it does not necessarily follow that he must not be tried the second time for the same offence because exactly the same 'presumption of innocence' is going to be operative in the second trial. Thus, it seems that presumption of innocence in itself would not prevent the second trial for the same offence.

Let us examine now what must logically happen after a criminal trial is over. The scope of experiment lists the following possibilities:

1. The answer regarding guilt is either known or not known;
2. If the answer is known it is either
guilty or
not guilty

Given, however, the fact that the court cannot shrug its shoulders and pronounce the verdict of doubt, we are left with only two possibilities, namely, guilty and not guilty. But, is it really so self-evident that the court cannot pronounce a verdict of doubt in criminal cases? Roman law knew the verdict of *non liquet,*[185] but in practice that was an exception.

It is clear that a conflict is presented to an unbiased adjudicator in order to be resolved. The conflict is usually always presented in either-or form because in the last analysis, one of the two judicial combatants must win and the other must lose. Thus, anything short of such a resolution, which clearly redefines the social roles of the parties in conflict, is an adjudicative fiasco. Judges, in other words, must decide, not doubt. In many social conflicts, the decision, whatever it be, is more important than its substance or the criteria by which it is arrived at.[186] These are criteria valid in any monocentric adjudication. In criminal law trials, the issue is all the more delicate because a pronouncement of doubt after the first trial is concluded will, in effect, pronounce the defendant 'possibly innocent' and thus, also 'possibly guilty.' This 'possibility' is all the more real if a future retrial is probable. The pronouncement of doubt in criminal trials is, in a sense, a suspended pronouncement of guilt, because a person is either guilty or innocent. He certainly is not 'doubtful.'[187]

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[185] The *apud judicem* procedure. The judge, who declared insurmountable doubts regarding the matter before him, declared under oath that the matter is not clear to him (sibi non liquere). In such a case a new judge was appointed, except in cases where the matter was adjudicated by several judges and could be decided by majority in spite of the non-liquet of one judge. See Korošec, *Rimsko pravo*, Ljubljana, 1969, p. 504.

[186] Again in Roman law, the judge was not required to explain his decision. If it is true that the decision often matters more than its rational and/or intuitive basis, then the reasoning out of the judgment is superfluous and probably damaging. If a decision is handed down without any explanation, the parties are allowed to project their own explanations into it and are often more likely to be satisfied.

[187] The above explanation could have been given wholly on this level; the matter adjudicated is either as the prosecution asserts it to be, or it is as the defendant asserts it to be. The possibility of doubt does not exist insofar as the subject matter adjudicated is concerned. Doubt is solely a state of mind of the judge and without any connection to reality. It merely means that the reality has not been sufficiently reflected in the

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This is another reason for which the presumption of innocence has been invented. The trial must end in one of two possible ways – *tertium non datur* – because the third 'doubtful' way of adjudication is in effect an unfounded adjudication of guilt. To prevent this, the doubt is overpowered by the presumption, which effectively orders the adjudicator that, if in doubt, he must decide for the defendant: *in dubio pro reo*.

When the adjudication based on doubt is pronounced, it is not founded squarely on doubt, but *asserts* innocence positively. Were the judge allowed to say, 'I doubt that you are innocent but I rely on the presumption of innocence and therefore pronounce you acquitted,' he would effectively destroy the *raison d'être* of the presumption. This, then, is a problematic situation to which there are two possible solutions. The most obvious is that the judge should say nothing, but acquit the defendant under the heading of 'not guilty.' This is a lie, but then again it is not, because the law declares in advance that those who will not be persuasively prosecuted will be acquitted as if they were not guilty. If it is a lie and considered as such, it is still a very short one and does not require the judge to fabricate the nonexistent reasons for acquittal.

Another less pleasant and rational solution is that the judge should explain his reasoning concerning the doubt. Again, however, a dilemma arises: if he explains fully why he doubts the defendant's guilt, inevitably he will be explaining why he doubts his innocence, too. Thus, there is a schizophrenic duality to the judgment: the verdict is 'not guilty,' the explanation 'doubtful' and perhaps implying guilt. The solution is clearly unacceptable, yet most of European criminal procedures have not found the way out.

Anglo-Saxon criminal procedure has it the best way, because the jury is not required to explain its verdict. If it says 'not guilty,' the defendant is fully rehabilitated even though the prosecution, and perhaps the defendant himself, doubts the rationality of the verdict. Yet the absolute and unexplained nature of the verdict gives full force to the presumption of innocence.

We said in the beginning that it would be irrational, and patently so, if a person adjudicated guilty, sentenced and punished should have to go through a criminal trial again for the same offence. That would necessarily imply that the first trial was not enough, that it was wrong, etc. If the possibility of second trials of guilty persons were systematically allowed, it would clearly result in the destruction of the adjudication system, which would, by allowing this, implicitly declare itself untrustworthy. The distrust would be literally built into the system of adjudication. A system of adjudication, however, that does not evoke trust of those that subject themselves to it is at best a contradiction in terms and more likely a farce. The outcome would be a widespread paranoia. In a sense, criminal law is a guaranteeing response to precisely such a danger.

The above reasoning, however, extends beyond the verdict of 'guilty.' It applies to the 'non-guilty' verdict for the very same reasons. The only verdict (the verdict of doubt) logically consistent with a second trial of the same issue is pre-

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subjective consciousness of the adjudicator. Thus, 'not proven' is not a verdict in the strict sense of the word at all, because it is not related to the objective reality of the matter adjudicated, but only to the subjective (irrelevant) reality of the judge's mind.

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empted by the presumption of innocence and, therefore, second trials are logically impermissible. Presumption of innocence therefore, cannot exist without the privilege against double jeopardy.

Historically, there had usually been three possible outcomes of any single trial: 'guilty,' 'not guilty,' or as the Scottish Law puts it, 'not proven.' Medieval law called this last outcome *absolutio ab instantia*. Today, it is only known in the Italian and Scottish law and it is considered an anomaly because it patently contradicts the presumption of innocence. Why? Again, the 'not proven' verdict of Scottish law, for example, actually means that the whole proceeding against a particular defendant can be reinstated at any time. In effect, therefore, the person is under the Damoclean sword of a possible and perhaps probable new prosecution.

What happens to the presumption of innocence in such a situation? Effectively, the person is presumed guilty, and as time goes on perhaps, the probability of a successful compilation of sufficient evidence against him is increasing. Even if not, this same person is under the stigma and suspicion endorsed by an official prosecution and, furthermore, by an official verdict called 'not proven.'

If the logic of the presumption of innocence is to be given some reality, then the criminal prosecution of a citizen must be considered an exceptional situation. Exceptional situations cannot be prolonged, nor can they be too frequent. Therefore, a verdict must be given at the end of every trial that puts *ad acta* the case and the prosecution against a particular defendant. If the prosecution has not succeeded in proving its case and acquiring a conviction and punishment against a particular defendant, then the presumption of innocence should regain full force and the defendant be left alone on that account, once and for all. He regains full social respect and is not to be bothered in this particular regard anymore.

The model of criminal procedure must necessarily be a model of a rational impartial adjudication. That model in itself dictates certain requirements that we tend to call procedural rights. These procedural rights can be seen as subjective rights granted because the defendant must enjoy certain safeguards, or they can be seen as objective requirements mandated directly by the logic of rational adjudication. One cannot have a khadi-justice situation where the same person accuses and judges: not only because this is against the rights of the person accused and judged, but primarily because this is manifestly irrational. Likewise, one must have other procedural safeguards not only because they protect the defendant, but also because the rational model of adjudication mandates them. Therefore, we are not choosing between granting and not granting certain procedural rights, rather we are choosing between a rational and irrational adjudication. If it is difficult to show today that criminal procedure can in fact follow the logical requirements of rational adjudication, this does not show the illogicality of the above argument. Rather, it shows the more and more transparent nature of the pretence that we have impartial adjudication according to the criteria of the substantive criminal law and not arbitrary imposition of force by the state.

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VIII. Procedural Rights and their Remedies

If we have established that there are certain inescapable principles in criminal procedure, the remaining question is how to sanction those rules. Every rule must have a disposition and a sanction, and the disposition without sanction is mere recommendation. The same holds true for procedural rules, i.e. if they have no sanction they will not be obeyed.[188] One of the central problems of the modern criminal procedure is how to organize the sanctioning of procedural violation. The United States' solution is unique in that respect, because of its acceptance of the radical exclusionary rule.

In principle, a violation of a procedural rule can be sanctioned in a substantive or in a procedural fashion. In the case of substantive sanctioning, a violation

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188 It can be shown that the peculiar 'procedural sanctioning' represents the very origin of the exclusionary rule. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 60 note 2, 16 L. Ed.2d 694 (1966), the Supreme Court said: 'We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its truths go back into ancient times. Perhaps the critical historic event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 HOW. ST. ER. 1315 (1637). He resisted the oath and he claimed the proceedings, stating: 'Another fundamental right I then contended for, was, that no man's conscience ought to be wrecked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretending to be so.' Haller and Davies, *The Leveller Tracts*, 1647-1953, 1944, at p. 454. On account of the Lilburn trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty Principles to which Lilburn had appealed during his trial gained popular acceptance in England. These principles worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. If exclusionary rule is to be interpreted as a procedural sanction, this can be done in at least two ways. First, the exclusionary rule can be interpreted as simple deterrent of illegal police practices. This has been the recent trend of the Supreme Court decisions: namely, to reduce the exclusionary rule to simple deterrents of police, while it is quite obvious that this is not the central reason for its existence. Second, the exclusionary rule can be interpreted as in the above quotation for *Miranda*. The simple initial logic of exclusionary rule is the logic of exclusion from the eyes and ears of the fact finder-adjudicator everything that violates the privilege against self-incrimination. The exclusionary rule is in that sense an evidentiary rule, rather than a procedural rule: it simply excludes what is not fit to be the basis for adjudicative decision-making. It would matter little today and in times of John Lilburn's trial in 1637 that the evidence in violation of the privilege against self-incrimination was obtained by police or somebody else. It is clear that what follows from the above quotation of that trial is not some attempt to educate the police of England: it is simple exclusion of information that would make the defendant an unwilling source of evidence against him, because this is violation of the very idea of adjudication. How can there be impartial adversary adjudication if one 'man's conscience ... be wrecked by oaths imposed, to answer to questions concerning self in matters criminal, or pretended to be so.'

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of procedural rule becomes just another substantive case that lives its life apart from its procedural mother-violation. For example, if a policeman threatens a suspect, the policeman has violated simultaneously the defendant's procedural right, but most probably also a substantive provision forbidding him from threatening criminal suspects. The policeman should accordingly be punished; the suspect, however, is because of that no less suspicious and if in fact guilty, no less guilty. There is in principle no trade-off between police misbehaviour and the guilt of a criminal. To questions of guilt or innocence, the procedural propriety seems to be totally extrinsic: if a killer confesses after torture, he is no less of a killer just because he has been tortured. This in substance is the view of most of the Continental criminal procedures.

In the above example, it is clear that we are dealing with two substantive violations, the suspect's and the policeman's. Both must be properly 'processed' and adjudicated, yet the policeman's violation should in principle have no effect whatsoever on the suspect's case simply because the procedural question of his threat is extrinsic to the question of the suspect's criminal responsibility, which ought to be decided by the criteria of guilt or innocence as defined in the substantive criminal law.

This view, however, is not logical if we see procedural rights as having an independent existence as outlined above (supra, VII). If procedural rights exist independently – are not merely ancillary to the substantive, to the truth-finding goal of criminal procedure – then these procedural rights in fact become specific substantive rights of somebody under criminal suspicion. These rights (right to counsel, the right to be free from unreasonable searches and seizures, the right to be free from compulsive self-incrimination, etc.) must be sanctioned within that very criminal process, because the loss of procedural advantage occasioned by police's procedural violation must be compensated within that very procedural context. A procedural loss on the part of the defendant occasioned by procedural misbehaviour of his adversaries (police, prosecution) must be compensated by a procedural advantage. If an adversary process is seen as a battle of two opponents, then an illegal move by one of the opponents must be answered by a compensatory remedy restituting the procedural balance of forces. In a chess match, for example, when one of the opponents makes an illegal move, it is logical to require that this illegal move be disannulled and the previous situation restored (*restitutio in integrum*). It would make little sense in such a context to allow the illegal move to remain while punishing, perhaps through the chess organization, the player who has made that illegal move. Unless the illegal move in *that game* is disannulled, the integrity of the whole game and the legitimacy of its outcome have been destroyed.[189]

[189] Judicial supervision of the administration of criminal justice in the federal court implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing of trial by reasons which are summarized by 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action in passing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly

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The exclusionary rule, consequently, is the only effective and logically inevitable form of procedural sanctioning. One must keep in mind that this implicates a certain view of criminal procedure as being primarily an adversary and therefore involves a relative pursuit of truth, rather than an absolute inquisitorial demand for truth.

The problem we outlined here points to a curious incompatibility between the substantive and procedural criminal law. This antinomy resides in the fact that the substantive criminal law pretends to give precise criteria of guilt or innocence as if the truth of that question is always ascertainable. There is no chance aspect to that perspective. The adversary criminal procedure, however, involves a chance aspect due to which the substantive question of guilt or innocence is decided not merely according to the substantive criminal law criteria, but also according to the procedural rules themselves. While substantive criminal law says that there are only guilty or innocent criminal defendants, the criminal procedure allows for a third category, namely those who would in view of procedural developments (procedural sanctioning, procedural accidents such as good defence confronted with bad prosecution, and other more or less accidental factors) fall under the category of the presumption of innocence. In other words, according to the substantive criminal law there are only guilty or innocent defendants, whereas according to criminal procedure we will pretend that a defendant is innocent even though he is not, if the procedural factors lead to that result. Typically, the Continental criminal law system resolves that conflict in favor of the substantive criminal law; whereas the American system adopts the exclusionary rule as a procedural sanction and therefore implicitly declares that the truth-finding function of criminal procedure is secondary to its protective function and that criminal procedure plays a role independent of the goals declared by the substantive criminal law.

The unfortunate side effect of the exclusionary rule is then a seeming trade-off between the procedural violation and the defendant's guilt. Whereas in the game of chess the result depends totally on the 'procedural' developments of the game, the game of criminal procedure is sufficiently separated from the rules of the substantive criminal law so that this discrepancy between the game and its result may arise. This discrepancy between the 'game' and the 'result' is perhaps due to the historical origin of the trial in criminal matters. In times of ordeals when guilt or innocence was decided by irrational criteria such as floating on the water or touching the hot iron, the result, i.e. the guilt or innocence, was dependant wholly on the 'game' of the ordeal. There were no substantive rules to speak of in that respect. In all other games that are in their nature adversary, such as soccer, tennis, chess and so on, the result

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irrelevant to the formulation and application of proper standards for the enforcement of federal and criminal law in the federal courts. The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution.

McNabb v. United-States, 318 U.S. 332, 341. This so-called McNabb Judicial Integrity Doctrine is the closest analogy to the chess game simile that is explained above. This integrity doctrine seems to be followed by the leading theorists in the United States. See Kamisar, *A Reply to Critics of the Exclusionary Rule*, 62 Judicat. no. 2, August 1978, at p. 82.

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depends on what happens in the 'procedure' itself. The substantive result is therefore wholly a consequence of the procedural happening. Insofar as there exist rules that govern that happening, these are wholly procedural rules. In the game of criminal procedure, however, the criteria by which guilt or innocence should be decided are not the procedural criteria; rather they are alienated from the procedural structure and embodied in the substantive criminal law. If criminal procedure were a game, the winner should clearly be the person who is procedurally more skilful. The procedure, therefore, would be an end in itself, and not ancillary to an end that is not embodied in its own rules. *Legal history, however, made criminal procedure a tool towards a goal that is totally alien to the game itself.* 'Procedural accidents' in the game of soccer, for example, legitimately result in the loss or winning of the game. Insofar as the result is due to luck that is seen as totally acceptable. Imagine, however, that the game of soccer or a game of tennis or a game of chess would decide not who is the winner in that particular game, but would decide which one of the two opponents is, for example, morally superior. Since moral superiority is extrinsic to soccer, tennis and chess games, it cannot be decided in the respective 'procedural' confrontations.

Insofar as criminal procedure is a game with its chance input and existence, and is independent of the question that it is supposed to decide, the same absurd result follows, namely, that the question of guilt or innocence does not depend merely on the substantive criteria of the substantive criminal law. Rather, it depends largely on the procedural chance of the 'game aspect' of criminal procedure. This incompatibility between the substantive and the procedural aspect of criminal law is made evident in the problems of exclusionary rule. It follows logically that procedural sanctioning through exclusionary rule is acceptable only if we see the 'game' of criminal procedure as having a purpose and existence independent of the goals of substantive criminal law.

In the Continental system where the goals of substantive criminal law are seen as clearly primary because the ascertainment of the truth as to the guilt or innocence of the defendant is seen as a primordial goal of criminal procedure, the exclusionary rule cannot be applied. Consequently, criminal procedure is a mere servant of the substantive criminal law, here. That is not due to some theoretical position held by Continental theorists; rather, it is due to the cultural and political attitudes towards authority.[190] If government is not seen as a mere opponent, but is rather seen as a State in a Hegelian fashion, then this same government and its definition of guilt or innocence cannot be reduced to a mere 'game' aspect of criminal procedure. The latter consequently becomes a linear pursuit of truth that does not tolerate the chance aspect so typical of the Anglo-Saxon criminal procedure. In the Anglo-Saxon system, individual freedom is more highly regarded than the state-defined criminal truth. This is essentially a value judgment in which certain optimism regarding the human nature prevails over thematic revenge. In this sense, the exclusionary rule is perhaps typically American.

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[190] See Damaška, *Structures of Authority in Criminal Procedure*, 84 Yale L. J., pp. 480-544.

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IX. Plea Bargaining

The exclusionary rule is a form of sanctioning procedural rules. We have already shown that the logic of procedure requires it because criminal procedure plays a double role. The protective part of that role – truth finding being the other part – must independently be sanctioned. Were it not procedurally sanctioned, the whole criminal procedure would be like a police manual: a series of recommendations, a series of purely instrumental rules.

Therefore, there emerges a conflict between the truth-finding and the protective role. Insofar as the demand for logical integrity and for the protection of the defendant established a separate ground for justifying procedural solutions, a ground separate from truth finding, the discrepancies and incompatibilities between the functions are inevitable. Were the goal of criminal procedure merely to find out how and why a past allegedly criminal event happened, one would then logically expect that some less cumbersome non-adversarial method should be used. Scientific discoveries are made by methods that are more similar to the inquisitorial procedure than to the accusatorial one. Without getting into the epistemological question of whether dialectical thinking (by thesis and antithesis) represents a superior approach to scientific problem-solving, and whether an adversarial method is superior to the inquisitorial one, I think it fair to say that the monocentric organization by thesis and antithesis in criminal law primarily sustains impartiality and the resolution of the conflict, rather than to further truth finding. Thus, the very wherewithal of criminal procedure and its way of doing things has very little to do with truth finding; the conflict is not there in order to serve truth finding. The reverse may be close to the truth: truth finding furthers the resolution of a conflict.[191]

The problem with the exclusionary rule is that a substantive consequence of acquittal occurs 'because' of the procedural violation: the defendant is acquitted on a 'technicality.' He is after all no less guilty because of police over-zealousness. Nevertheless, we accept the judgment not so much on the practical ground of police deterrence, but more on the theoretical ground of the logical integrity of criminal procedure. The fact that the reasons are theoretical, should of course, not be interpreted as meaning that they are practically irrelevant. The integrity of criminal procedure has an immense impact on the processes of normative integration. After all, morality is a product of social practices and criminal procedure is one of them.

It is for these reasons that we accepted the extrinsic trade-off implied in the exclusionary rule. Plea-bargaining can be criticized on the grounds that it allows the conviction and the sentence by extrinsic factors that are not related to the defendant's guilt or innocence as measured by the substantive criminal law. While criticizing plea-bargaining, however, it is good to keep in mind that the trade-off in the 'real' criminal procedure happens because there is an adversarial relationship and *only* in view of that adversarial relationship. A game of chess, for example, in which one of

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[191] Insofar as conflicts in criminal procedure are rather contrived and artificial and created only to further impartial adjudication, the reverse may in fact be true. It is definitely true that a criminal trial is not a clash of two private interests. The victim, if there is one, is pushed aside and a representative of the Government represents rather diluted interests of society at the trial.

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the players makes an unorthodox move, is invalid and there would have to be a 'retrial' unless the move can be disannulled retroactively. Here the sanction of a 'procedural' violation is enforced within the 'procedural' context.

If we see criminal procedure as a chess game, then plea-bargaining is at best a simulation of that game. In almost every negotiation, insofar as it figures as a replacement of conflict, the negotiation itself develops in the light of the balance of forces (or rather in the light of the subjective perception of the objective balance of forces), should the conflict really break out. The negotiations between two potential war opponents usually take place instead of the war itself; however, they tend to reflect the probable outcome should the war break out in spite of negotiations. That does not mean, however, that the game of negotiation is the same as the game of war. Different rules govern the two difficult procedures, i.e. the procedures themselves are radically different even though the outcomes of negotiations would imitate the outcomes of war.

The first question to be addressed, therefore, as far as plea-bargaining is concerned, is whether it is still a criminal procedure at all. If it is, then the exclusionary rule and other 'technicalities' do play a valid role, and vice versa.

Criminal procedure is impartial adjudication. Can the plea-bargaining process be called impartial? Is it really adjudication?

The impartiality of adjudication is maintained by monocentric organization of decision-making so that there is only one question of guilt, with only two possible answers, all this so that proper incompatibility of hypotheses is maintained, and their proper alternation before the eyes of a passive adjudicator enables him to remain ambivalent and therefore uncommitted. In that sense, the conflict is essential to impartiality because without a well-structured conflict, the issue cannot be monocentrically organized.

Plea-bargaining is a collapse of conflict into collusion: collusion, it is true, that imitates the conflict in its taking into account the potential use of evidentiary and procedural rules, but is nevertheless not 'the real game.'

The difference between criminal procedure proper and plea-bargaining is the difference between certainty and probability. In criminal procedure, the defendant is either convicted or acquitted. The outcome is not at all reflective of pre-procedural probabilities because the *ex post facto* certainty makes otiose the previous probabilities. Probabilities per se do not influence the outcome.

Plea-bargaining, on the other hand, reflects the probabilities because they are never allowed to become certainty. Thus, a defendant's murder charge is reduced to manslaughter because the prosecutor believes that his chance to win in the trial is only 70 per cent. The reduction from murder charge to manslaughter is reflective of the prosecutor's estimate of the probability of his winning the case. The truth is one thing and its ascertainment something potentially quite different. They are after all separated in time, in space and in mode of perception. The discrepancy will be due to factors that have nothing to do with truth *per se*. These extrinsic factors reduce the

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hundred per cent truth to the seventy per cent probability that it will be ascertained beyond reasonable doubt.[192]

A real trial's outcomes statistically reflect the probabilities, but it is good to remember that probability is a statistical concept representing the connection between statistical certainties in large populations and the extrapolations from those certainties into the probabilities of individual cases. Glueck's prediction tables in juvenile delinquency cases are a typical example.[193] Probability thus is nothing but a subjective estimate and as such has nothing to do with the case. A defendant is not 70 per cent guilty of murder. He is either guilty or innocent. Consequently, it is absurd to translate this subjective estimate of procedural probabilities of winning the case into the reduction of charges.[194] This is, however, precisely what plea-bargaining does.

If the exclusionary rule is applied in an actual criminal procedure, it of course influences the probabilities of the outcome, but in the end, it is impossible to say to what extent the outcome is causally linked to the exclusionary rule. In addition, it is not the intent of the exclusionary rule to influence the outcome of a criminal trial. A procedural sanction merely guards procedural propriety and the respect for procedural rules. The influence its application has on truth finding is an undesirable by-product whose casual link to the outcome would ideally be absent. After all, procedural sanction should remain precisely that.

All this turns upside down in the plea-bargain whose outcome is a direct resultant of truth *and* procedural probabilities. The procedural probabilities do exist in a trial, but they are legally irrelevant. In a plea-bargain, they form the battleground of negotiation.

We object to plea-bargaining for many reasons, even though, for example, we do not object to the settlement and compromise in civil conflicts. There, it is clear

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[192] For the French version of the 'intimate conviction' beyond reasonable doubt, see art. 353, par. 2 of the French *Code de procedure penale*: La loi ne demande pas compte aux juges des moyens par lesquels ils se sont convaincu, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve ; elle leur prescrit de s'interroger eux-mêmes, dans la silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre le accuse, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs : 'Avez-vous *une intime conviction* ?' (Emphasis added.)

[193] Glueck and Sheldon, *Predicting Delinquency and Crime*, Harvard University Press, Cambridge 1959; Glueck and Sheldon, *Unravelling Juvenile Delinquency*, Commonwealth Fund, New York 1950. On the question of probabilistic extrapolations from small populations see A. Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prevention of Infrequent Events*, 18 Journal of Consulting Psychology 1954, pp. 397-407.

[194] There are, of course, many cases in which the trade-off is not between a procedural probability of conviction and the respective charge and consequently the structure. Many a plea-bargain is reached purely on the ground of potential bureaucratic inconvenience of having a full scale jury trial. These cases, however, are not problematic, since there the extrinsic nature of the trade-off is beyond any doubt and the problem of comparison with the similar side-effects of the exclusionary rule does not exist.

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that conflict resolution takes precedence over the ascertainment of truth and that in fact the latter is important only insofar as it serves the former.

In criminal procedure, on the other hand, it would be absurd to accept the settlement merely because both the prosecutor and the defendant have agreed to it. It is no business of the prosecutor to secure a guilty plea in exchange for a violation of truth. Our intuitive reaction here is that the categorical imperatives of the criminal law are not (or should not be) for sale; that it is one thing to settle for lower damages than those deserved, but another to reduce punishment below the one deserved. This, I think, is a clear indication of the difference between the cost-benefit approach of the civil law, and the deontological and moralistic approach of the criminal law. It is somewhat paradoxical then that there are many more 'settlements' in criminal law than in civil law conflicts.

Here, it is well to remember that the conflict in criminal law is not really one that would occur between two directly controversial parties. The immediate victim is not allowed to participate because insofar as the damage is concerned he can seek it in a civil suit, whereas vengeance is not seen as legitimate. Vengeance (retribution) is reserved for society and it is the prosecutor that represents it through the demand for impersonal punishment. Conflict is the fuel of adjudication. Thus, the lack of reality of conflict in criminal procedure predisposes it to collapse into collusion: prosecutorial discretion – paradoxically enough – is at the same time necessary for proper adversariness (if he does not want to prosecute, there can be no conflict), but it also enables the prosecutor to lower the charges in the process of destruction of adversariness. If he did not have the right to reduce the charges, plea -bargain would not be possible.[195]

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[195] On the Continent the principle of legality as applied to prosecutorial role prevents this discretion. Cf. Davis, *Discretionary Justice*, 1969, at pp. 188-212 as reprinted in Vorenberg, *Criminal Law and Procedure: Cases and Materials*, West Publishing Co., St. Paul 1975, at p. 813. Writers sometimes forget that there it is possible not to have prosecutorial discretion because the Court's role carries far more initiative. The prosecutor on the Continent essentially 'triggers' the procedure which then evolves with the Court's own initiative. The German *Instruktionsmaxime*, the institutionalized imitation of the investigating judge is seen as a main criterion for a differential diagnosis between accusatorial and inquisitorial procedures. The *Officialmaxime* i.e. 'the duty of the governmental organs to conduct the entire proceeding ex officio, by virtue of the office' likewise figures as a surrogate of conflict. Eberhard Schmidt, *Einführung in die Geschichte der Deutschen Strafrechtspflege*, 3rd ed., Göttingen, 1965, p. 86, as cited in J.H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France*, Harvard University Press, Cambridge 1974, at p. 131. If in adversarial context, conflict is inevitable because the case cannot proceed without prosecutorial pressure, then in Continental procedure the surrogates of *Instruktionsmaxime* and *Officialmaxime* supply the necessary incentive. We said that this is theoretically not acceptable, not because it is procedurally compulsive in its pursuit of truth, but because it precludes impartiality of the adjudicator. A measure of prosecutorial freedom is inevitable in a process that depends on his spontaneous initiative. Prosecutorial discretion, then, is a direct outgrowth of the demand for impartiality of the adjudicator. Reversely, however, the Court's virtually autonomous and spontaneous handling of the criminal case on the Continent prevents the free discretion that would make plea-bargaining possible in endemic proportions.

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Would the victim of the crime prosecute the case, the conflict would be much more genuine and negotiations much less likely. Adjudication is necessary where a total breakdown of communication occurs. Thus in civil disputes disjunction need not even be a requirement: it is a natural occurrence because the parties eschew one another.

In criminal procedures, however, there is no personal animosity between the parties. The prosecutor is willing to step outside the official conflict situation and negotiate with the defendant. He is willing to negotiate for reasons of mere bureaucratic and administrative convenience. He would not be willing to do this were his personal interests at stake. As it is, the conflict between the prosecutor and the defendant is devoid of flesh and blood of vengeance, is alienated from its grassroots, and it consequently collapses into collusion. This conflict is an artifact in which the abstract part called 'justice' (and lately 'society') is represented by a lawyer who has no direct stake in the success of his legal action. In a sense, this is a problem of bureaucratization of justice, where an impersonal institution has taken over something that was originally invented and operated by directly involved individuals.[196] In a sense, one could compare criminal justice to a planned economy that is detached from the grassroots of immediate human interest. The reverse logic applies to the defendant's position. He, for one, is not interested in having the 'conflict' resolved, because as far as he is concerned, there is no conflict. He is willing to 'quarrel' only after he has been physically restrained and because he has been physically restrained. The question of guilt is not in this respect like a dispute over a piece of property. There both parties actively claim the right, whereas in criminal procedure one party could not care less whether he is guilty or innocent – as long as he does not go to jail. Only then does the 'conflict' arise for him.[197] Consequently, there is less of a proba

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[196] See *Esmein, op.cit. supra* n. 167, p. 11: 'In the accusatory procedure, the detection and prosecution of offenses are left wholly to the initiative of private individuals, an initiative which may slumber through their inertia, fear, or corruption . . . But, on the other hand, the inquisitorial procedure has very serious defects; under it, the prosecution and the detection of offenses are entrusted exclusively to the agents of the states . . .'

Here and elsewhere, Esmein apparently assumes that the institution of a public prosecutor is clearly an inquisitorial institution, i.e. it does not and should not exist in the accusatorial system. Esmein does not explain this from a structural point of view; he only shows that this has historically been so. It is possible to show that no criminal procedure operating on the initiative of public prosecutor can be genuinely accusatory and adversarial: the very fact there has to be a paid public official who creates the conflict implies that there would be no conflict, were it not for this artificial bureaucratic initiative. Moreover, this implies that the very conflict is not genuine and it further implies that such 'accusatory' procedure is really not accusatory, but to the extent of artificiality of prosecutorial initiative, is in fact inquisitorial.

[197] It could be said that in civil disputes, both parties are interested in truth because both parties claim that the truth is 'on their side.' If they don't, the definition of the conflict often changes from civil to criminal. For example, if the dispute is over a piece of property, it remains a civil dispute as long as both parties explicitly claim that the property belongs to them; the dispute becomes criminal, however, the moment one party is not willing to argue that the property belongs to him, but simply disappears with that piece of property, in which case we have a problem of larceny, where the defendant is clearly not interested in the establishment of truth and is clearly not interested in

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bility of settlement in civil disputes, where there is a direct and irreconcilable conflict of interests. In criminal procedure – invented by imperfect analogy to civil disputes – the conflict over guilt or innocence of the defendant is not irreconcilable because guilt or innocence in reality do not matter. What matters is punishment, but that is not the centre of the conflict. Rather, it is the currency with which the conflict is settled. Partially, this stems from the presumption of innocence, because it is presumption of innocence that limits the conflict in criminal procedure to the question of guilt and innocence.

Therefore, the cause of plea-bargaining lies partly in the discrepancy between the interests of justice and society and those of their representative, the prosecutor. On the other hand, what is valid for prosecutorial initiative and discretion in the context of an adversary criminal procedure applies *mutatis mutandis* to the defendant's discretion not merely to confess, but also to plead guilty. If the parties negotiate and agree on the intended subject matter of the procedure, (guilt or innocence) there is no conflict, and consequently, no impartial adjudication. What remains is the polycentric question of punishment for something the defendant has not perpetuated. A truly surreal Kafkaesque predicament.

Conclusion

Near the end, we can no longer avoid reinstating the first statement of our hypothesis, although '[I]t may sound rather strange and needs to be pondered, lived with, and slept on for a long time:'[198] *Criminal guilt is not an appropriate subject matter for adjudication.* Adjudication is not an appropriate tool for ascertainment of truth in matters where truth is more important than the resolution of the conflict. And, in matters of criminal guilt, unlike in matters of civil conflicts and disputes, truth is first and resolution of conflict essentially secondary. The problem, of course, is one of definition: how seriously do we take the problem of criminal guilt?

In this paper by 'criminal guilt,' I mean an issue which is far too moral, moralistic, transcendental and metaphysical to be a subject and centre of a dispute that is basically nothing else but a structured and regulated quarrel. There is a great difference between 'guilt' in torts and generally in other civil law areas, and the criminal 'guilt.' That difference is manifested in the respective differences between the sanctions imposed by the civil law and those threatened by criminal law. Civil law is mostly about relationships between people concerning things, whereas criminal law is – at least historically – about the relationship between men and God. It is about soul and sin.

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participating in any truth-finding whatsoever.

Also, in civil disputes the parties can generally be seen as interested in truth and truth-finding, whereas in criminal procedure this interest may only be present in those defendants that consider themselves innocent and therefore see the criminal trial as the occasion to exonerate themselves publicly. It is not possible to overemphasize the already stated conclusion that all those problems stem from the original sin, the false analogy of criminal prosecution to private accusation, of criminal trial to civil trial.

198 F. Neitzsche, *Second Essay, On the Genealogy of Morals*, 1969, Sec. 84, at p. 84.

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Even the very 'act' in criminal law cannot be regarded as an objective gesture. It implies circumstances and reasonably expectable consequences – factors that relate not to objective reality but to its perception and apperception.[199] In civil law disputes, the concurrence of the rule violation and the casual link between an act and the harmful consequence will often suffice. In criminal law, the act, its consequences, the surrounding circumstances and the casual links that unite them into a whole, are most often mere symptoms of the defendant's state of mind.[200]

Private disputes arise over private conflicts of private interests. In criminal law, however, there is essentially no private conflict of interests, because the harm is considered done to society, morality, or some other non-palpable entity such as God,[201] society's collective sentiments, ancestors,[202] community as a whole,[203] etc. It is, I think, fair to say that the victim in criminal law – the real victim entitled to play a fully legitimate role in criminal process, the one with the true active legitimation in criminal matters – has so far not yet been identified. It has not been identified because the origin or civilization and the origin or morality, has so far not yet been identified. We merely know that there exists a certain compulsion[204] to punish and a strong demand for impersonal punishment.[205]

We mentioned before that judging is possible only if there is conflict and quarrel. The sharper the conflict, the greater the incompatibility of claims and the supportive assertions and proofs, and consequently, so much more intense the reduction to monocentricity and – in principle – so much greater the chance of impartiality. It is essential to our argument here that adjudication is philogenetically and ontogenetically inextricably entwined with quarrel and conflict. The whole idea of adjudication becomes pointless the moment there is nothing to 'adjudicate' because there is no conflict. The authenticity of judging depends on the authenticity of the conflict. In civil disputes, this represents no problem, since once the conflict has lost its intensity, settlement is a proper and genuine response. If the conflict is solely between the parties, it can also be resolved solely between the parties. The only precondition to that is that the subject matter of adjudication not transcend the limits of the conflict. In civil matters, the issue to be adjudicated is an issue merely because parties quarrel. It is *not* like that in criminal law.

In criminal law, the situation is reversed: the parties pretend to quarrel, because there is an issue. The prosecutor prosecutes and the defendant defends

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199 Cf. Hall, *General Principles of Criminal Law*, 2nd ed., 1960, pp. 171-180.

200 Even, for example, causality itself – considered an objective element of the *corpus delicti* par excellence – is in fact a subjective aspect of guilt, because it is relevant only insofar as it points to some human being either 'causing' the forbidden consequence, or else 'not causing' it, perhaps because there was an intervening cause in the form of another human being's act, or because of a mere accident. Scientific causality (a *contradictio in adiecto* anyway) does not play a role in criminal law.

201 Harold Berman, *The Origins of Western Legal Science*, 90 Harv. L. Rev. 89, p. 92.

202 E. Dühring, *The Value of Life: a Course in Philosophy*, as cited in Nietzsche, ibidem supra n. 171.

203 Id. at pp. 56-96.

204 Freud, *Totem and Taboo*, 1974, p. 92.

205 Ranulf, *Moral Indignation and Middle Class Psychology*, Schocken Books, New York 1964 and 1970.

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himself only because there is the question of criminal guilt that must be decided. The issue does not arise from the conflict between the prosecutor and the defendant, neither does it arise from the more metaphysical conflict between the state and the defendant. The conflict, insofar as it exists at all is intended to serve as an artificial framework within which there will be proper finding of guilt or innocence. (Procedure and adjudication here do not serve either truth finding or conflict resolution: they serve constitutional protective purposes.) It is beyond doubt that this was done through the analogy to the civil conflict regulation, the question being whether the issues are sufficiently similar to allow for the analogy.

Where the issue to be decided transcends the limits of the conflict itself – and insofar as it does – and where the conflict and its resolution become a means to the resolution of that transcending issue, rather than an end in themselves, adjudication as a process of truth finding is no longer appropriate. In adjudication, conflict resolution by the nature of things takes precedence over truth finding, as it is clear if one considers plea-bargaining or the general problem of the exclusionary rule. This is logical, because there would be no genuine adjudication, were it not for the conflict. In the last analysis, adjudication is not and never was a tool of truth finding. Insofar as there is truth finding in adjudication proper (not in criminal adjudication), it is merely an instrument toward conflict resolution.

Consequently, insofar as the issue of criminal guilt transcends the limits of the conflict between the parties, the process of adjudication is an inappropriate instrument. And, if it is historically true that criminal law evolved out of tort law, it is also true that the more criminal law separated itself from it, the more its accusatorial procedures became inadequate. By abstracting the role of the victim, not only has the conflict in criminal matters been watered down and consequently the probability of settlement disproportionately increased (plea-bargaining), simultaneously and by reverse proportion has the issue of criminal guilt been abstracted itself into a notion far beyond the individual injury.[206]

In simpler times when guilt was very much a question of causal link between an act and its consequence, adjudication would be appropriate. The spiritualization of criminal guilt brought about by the canonist movement of the 11th century, however, changed the concepts radically. The question can thus be seen either as procedural, there the answer being in introducing more inquisitorial elements, or, as substantive, the answer being to reduce the moralistic nature of criminal guilt and blameworthiness and shift the emphasis perhaps to more calculative or pragmatic considerations. In the latter case, however, the shift from monocentricity to policentricity would also become imperative – as it did in juvenile justice cases and in those

[206] It could be said that all the problems of criminal procedure stem from the fact that the 'truth' criminal procedure is addressing is supposed to be a broader, more constant, more transcendental, more spiritual, in other words, more important form of truth. In this sense, all the legal, technical and philosophical problems we are dealing with here have their origin in the Judaeo-Christian projection of societal super-structure into the realm of the mystical and the religious. In an atheistic society, where morality is seen as introjection by the individual of the needs of the society as a whole, the truth is too relative to justify its projection beyond the limits of individual conflict. This in the last analysis is the problem of criminal procedure and criminal law.

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of civil commitment – and that would again be something else, not adjudication proper. But, adjudication after all, is not an end in itself.

In criminal procedure, as we have established earlier, adjudication gives reality to the independent existence of procedural and constitutional rights and this is essentially a value choice and a political consideration: what balance of powers we were willing to strike between the individual and the state. From there on, the question is no longer a legal one.