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CRITICAL MODERNITIES: POLITICS AND LAW BEYOND THE  
LIBERAL IMAGINATION

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## Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham

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# Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham

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*This Article shows how three modern English thinkers — Hobbes, Locke and Bentham — construe the law as an intersection of secular eternity on the one hand and transience in modernity on the other, allowing for immovability and movement at the same time, combining stability with change. It details how these theorists, who undoubtedly have earned themselves places of honor in the canon of modern political thought, tried to solve the problem of self-grounding in three different and yet paradigmatically modern ways, each of them intertwining law and time in a different fashion, and each of them connecting both law and temporality to happiness.*

*Thus this Article shows not only that these three British thinkers claim in one way or another that while natural desires may provide pleasure, only the law can bring happiness, but also emphasizes that, in their view, the transformation of the former into the latter entails a transformation of temporal consciousness. Thereby this Article foregrounds two elements that are crucial to an understanding of how seventeenth and eighteenth century British thinkers envisaged the transformation of pleasure into happiness by means of the law: first, the notion that the law creates or reinforces duration in social life, and second, the idea that the law can harness the immediacy of desires by assuring the legal protection of enduring pleasures, which lead to happiness.*

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**INTRODUCTION: SECULARITY, SELF-GROUNDING,  
AND THE FORCE OF LAW**

"'Modern Times.' A story of industry, of individual enterprise — humanity crusading in the pursuit of happiness." This short line appears on the screen immediately after the credits of Charlie Chaplin's last silent film and introduces the viewer to the main theme of "Modern Times." As this Article will show, Chaplin's one-line synopsis not only sums up the subject matter of his famous film; it can also serve as a poignant summary of the capitalist, modern temporal consciousness that originated in England and also became dominant in North America.<sup>1</sup>

In the Anglo-Saxon world, moderns experience time as something that is not to be wasted, as something that promises happiness to enterprising individuals who pursue it with diligence. This sense of time addresses the future hopefully; carried by a progressive historical consciousness, these moderns are pleased that a radical and clean break with the past has been made, expecting new beginnings and developments to lead to a better world by means of reason, education, science, evolution and, if necessary, revolution. Most contemporary commentators on this type of modern consciousness of time draw on Walter Benjamin, who has pointed out that the time of modernity is empty, standardized and regular, for its units are indifferent to content and can be measured and isolated.<sup>2</sup> Following in the footsteps of Benjamin, Helmut Plessner describes modern, capitalist time as abstract time, "nothing more than a locus of possible changes, related to chronological modes."<sup>3</sup>

British modern thought forms one tradition of modern thinking. As Reinhart Kosellek has stressed, in general, the modern consciousness of time is linear; it assumes not only dissociation from the past, but also continuous change and renewal on a trajectory leading with increasing speed from the dark ages of the past to the bright lights of an open future, which has already begun.<sup>4</sup> The modern vision of modernity as moving forward tends to include an image of convergence, said to be brought about by a gradual or

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1 MODERN TIMES (Charles Chaplin Productions 1936).

2 WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 253, 261 (1968).

3 Helmut Plessner, *On the Relation of Time to Death*, in MAN AND TIME: PAPERS FROM THE ERANOS YEARBOOK 237 (Joseph Campbell ed., 1983).

4 REINHART KOSELLEK, KRITIK UND KRISE. EINE STUDIE ZUR PATHOGENESE DER BÜRGERLICHEN WELT (1973).

revolutionary cognitive transformation from a variety of traditional cultures into an encompassing and universal modernity, with one shared experience of time. Usually commentators on the temporal consciousness of modernity refer to it in a generic fashion, envisaging all modern societies as partaking in a universal temporal consciousness.<sup>5</sup> Together with Kosellek, Charles Taylor and Jürgen Habermas have also underlined that modern time is secular time, without any fixed link to eternity in the form of an immutable realm of ideas, the will of God or a tradition leading back to ancient origins in times immemorial.

Taylor has called attention to the radical nature of such a secular approach, which contrasts with the assumption of any pre-given metaphysical order of society, "with any idea of society as constituted in something that transcends contemporary common action."<sup>6</sup> The origins of this modern, secular view lie in the absolutist state, which, as Kosellek has argued, emerged as the political, legal and administrative response to the carnage of unstoppable religious civil war between confessional rivals.<sup>7</sup> The aim of the absolutist state was to de-theologize politics by limiting the role of the churches and to impose peace upon rivaling factions by creating a sphere of civil life that was not grounded in the promise of salvation, but in the act of state.

Habermas notes that as a result of its rupture with the past and its radical secularity, which means that the future towards which it is moving is without eschatological overtones, modernity "*has to create its normativity out of itself*". Modernity sees itself cast upon itself without any possibility of escape.<sup>8</sup> This problem of self-grounding of an age that regards itself as being in continuous flux, moving towards a better yet profane future, an age in which, in Marx's words, "all that is solid melts into air,"<sup>9</sup> necessitates an unremitting search for an intersection of the immovable and eternal on one hand and the fleeting and transient on the other — an intersection that is located within the boundaries of modernity.

This Article shows how three modern English thinkers — Hobbes, Locke and Bentham — construe the law as such an intersection of secular eternity and transience in modernity, allowing for immovability and movement at the same time, combining stability with change. It details how these theorists,

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5 E.g., HELGA NOWOTNY, *EIGENZEIT: ENTSEHUNG UND STRUKTURIERUNG EINES ZEITGEFÜHLS* (1989).

6 CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 93-98 (2004).

7 KOSELLEK, *supra* note 4.

8 JÜRGEN HABERMAS, *Modernity's Consciousness of Time and Its Need of Self-Reassurance*, in *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 1, 6 (1990).

9 MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1982).

who undoubtedly have earned themselves places of honor in the canon of modern political thought, tried to solve the problem of self-grounding in three different and yet paradigmatically modern ways, each of them intertwining law and time in a different fashion.

The approaches of Hobbes, Locke and Bentham are in many respects telling examples of modern thought, but they also clearly belong to a specifically British tradition of thinking about time and law. Of course, within the limits of a paper of this kind, it is impossible to do justice to an entire tradition of thinking, for even the presentation of the thought of the three thinkers to which this Article is devoted is necessarily sketchy and summary.<sup>10</sup> Nevertheless, in the last Part, an attempt will be made to compare the British approach to time and law, as it emerges from a discussion of these three thinkers, with that of German thinkers discussed in Philippe Nonet's paper, *Time and Law*.<sup>11</sup>

In stressing the cultural entrenchment of modern theorists, this Article follows Charles Taylor, who stands out as a theorist of modernities in the plural, rather than modernity in the singular.<sup>12</sup> The multiple modernities to which he refers share some crucial elements in that they are all modernities, thus sharing the elements highlighted above, but they also differ from one another in significant respects, and these differences are closely tied to their cultural heritage and context.<sup>13</sup>

Mostly, such cultural differences are discussed or alluded to in terms of rough and large-scale comparisons between modernity in the East, for instance, in Japan, India and China; and modernity in the West, that is, in Europe and America.<sup>14</sup> Moreover, culturalist understandings of modernity are often formulated, as it were, by zooming out or moving back and looking at social imaginaries and common practices of various cultures in broad terms, from afar. In contrast, this Article will zoom in, look closely at the way in

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10 In addition, questions may be raised as to what constitutes a tradition and whether this term can be used to include thinkers differing from each other as widely as Hobbes, Locke and Bentham. See CONAL CONDREN, *THE STATUS AND APPRAISAL OF CLASSIC TEXTS: AN ESSAY ON POLITICAL THEORY, ITS INHERITANCE AND THE HISTORY OF IDEAS* 66 (1985); James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 J. HIST. IDEAS 677, 694-96 (2002).

11 Philippe Nonet, *Time and Law*, 8 THEORETICAL INQUIRIES L. 311 (2007).

12 TAYLOR, *supra* note 6, at 195-96.

13 Charles Taylor and Benjamin Lee, *Multiple Modernities Project: Modernity and Difference*, <http://www.sas.upenn.edu/transcult/promad.html> (last visited July 1, 2006).

14 *Id.*; CAROL J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* (1996).

which time and law are knit together in the texts of three modern thinkers who belong to the same culture, though they may be said to represent different stages in modern thinking. As will become clear, although all three thinkers seek to show how modern temporal consciousness is decisively interweaved with a modern legal consciousness, and although all three present the law as an edifice located and built in secular time, they do so in different ways.

In line with his culturalist approach, Taylor suggests that modernity be regarded not simply as a period primarily defined by disenchantment, that is, by the disempowerment and removal of forces of the imagination that are said to confuse human reason, such as tradition, privileges, magic, religion and superstition. Taylor highlights the many ways in which modernity, too, builds on social imaginaries, that is, on culturally influenced collective self-understandings of social life, its possibilities and problems.<sup>15</sup> Thus he emphasizes that though the modern sense of time is progressive, progress means something different in different cultures.

This culturalist perspective is also relevant to the notion of happiness that enters into the picture of modern temporality, as it does in the opening line of Chaplin's film. If one is to believe Friedrich Nietzsche's ironic quip, the quest for happiness is a truly British one, for as he put it, "Man does not strive for happiness; only the English do that."<sup>16</sup> Of course, Nietzsche addressed his sarcasm at utilitarian thinking à la Bentham, but Hobbes and Locke can easily be included in his contemptuous pun, since all three thinkers belong to a hedonistic tradition, which regards happiness as intrinsically related to material comfort, pleasure and enjoyment, pronouncing it to be a good and hence a legitimate expectation of the future.<sup>17</sup> Though it deserves further discussion, the argument that British thinkers before Bentham, and not only he, provide hedonistic arguments for the rule of law is not a novel one.<sup>18</sup> In this tradition, law should prevent pain and suffering and allow modern individuals to pursue happiness.

This Article elaborates on this claim, while foregrounding the role of temporality, which hitherto has been neglected in discussions of this issue. It shows not only that the three British thinkers claim in one way or another that

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15 TAYLOR, *supra* note 6, at 50.

16 FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 6 (Duncan Large trans., Oxford Univ. Press 1998) (1895). On Nietzsche's critique of utilitarianism, see DIETER THOMÄ, VOM GLÜCK IN THE MODERNE 169-83 (2003).

17 FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL, para. 228 (Helen Zimmern trans., Dover Publications 1997) (1885).

18 FREDERICK VAUGHAN, THE TRADITION OF POLITICAL HEDONISM: FROM HOBBS TO J.S. MILL (1982).

while natural desires may provide pleasure, only the law can bring happiness, but also emphasizes that, in their view, the transformation of the former into the latter entails a transformation of temporal consciousness. Thus this Article foregrounds two elements that are crucial to an understanding of how seventeenth and eighteenth century British thinkers envisaged the transformation of pleasure into happiness by means of the law: first, the notion that the law creates or reinforces duration in social life, and second, the idea that the law can harness the immediacy of desires by assuring the legal protection of enduring pleasures, which lead to happiness.

Albert Hirschman has described most impressively how early modern philosophers attempted a disenchanting and systematic analysis of the role of human desires in social life, substituting science for religion and severing themselves from the strict commitment to the Christian tradition that had led medieval thinkers to regard desires primarily as forces of vice and sin.<sup>19</sup> Diverging from the medieval Christian view of desires as forces associated with evil and temptation, early-modern thinkers came to regard them as impulses necessary for all human action, good and evil alike. In this secular spirit Hobbes stated in the *Leviathan*, "The Desires, and other Passions of man, are in themselves no Sin. No more are the Actions, that proceed from those Passions, till they know a Law that forbids them."<sup>20</sup> According to Hobbes, Locke and Bentham, rational reasoning, rather than Divine command, ought to guide the law in its determination of the desires and passions that can be accepted as legitimate, the criterion being the common good, i.e. the interest of society as a whole. Hence they suggested that the law harness desires and direct them toward purposes that are both satisfying to the individuals pursuing them and have a constructive impact on the commonwealth, rather than seeking to extirpate or suppress them as sinful, as had been demanded by religious commands.

How can the law forbid desires whose satisfaction is detrimental to society? How does it have the power to restrain them? As we shall see below, the thinkers discussed in this Article assume that the law draws part of its power vis-à-vis passions from its ability to instill fear, namely the fear of punishment, including capital punishment. Fear is the basis of the push-effect of law, as it were, driving people away from the pursuit of destructive pleasures. However, all three thinkers also attribute a pull-effect

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19 ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977).

20 THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press rev. ed. 1996) (1651).

to legal norms, emanating from the promise of the law to protect individuals and society as a whole on their path to a greater pleasure, i.e. happiness, by ensuring stability. Stability, in turn, is achieved by providing a space for rational expectations, i.e. by creating a protected temporal dimension in which humans can satisfy their desires and conduct their affairs peacefully and by mutual consent.

In this British view, the aim of a legal order is not only to regulate relations among individuals; its goal is also to allow individuals to establish an internal order between reason on one hand and their passions on the other, to formulate preferences and arrange their desires according to a rational hierarchy. Reason, in this tradition, is always the reason of modern individuals and never a transcendental reason of history. It is the reason of individuals who live in a modern, secular time that is empty and devoid of transcendent meanings, as has been pointed out above, and that therefore can and has to be filled by the individual pursuit of subjective happiness. Pascal's wager, in which transient pleasures are to be renounced for eternal bliss, presupposes that one accepts the possibility of an afterlife and eternity. In contrast, Hobbes suggested a scientifically planned legal construction that would allow individuals to conduct future-oriented, continuous and secure lives in this world, gaining happiness by the continuous satisfaction of desires.

The belief that legislation based on scientific understanding can bring security and open the path to happiness was shared by Hobbes, Locke and Bentham; it was part of the optimism of British thinkers in the seventeenth and eighteenth centuries in general. As will be illustrated in detail by three examples, modern British thinkers presented happiness not only as closely related to desire, but also as the ultimate aim of the law, which, in turn, was regarded as located in secular time, in which it created opportunities for individual happiness.

### **I. THOMAS HOBBS: THE QUEST FOR A NEVER-ENDING PRESENT**

Usually, Immanuel Kant is the philosopher one refers to when addressing the necessarily temporal structure of the workings of our mind. However, already in the *Leviathan*, Thomas Hobbes argues on empiricist grounds that it is impossible to imagine eternity. He claims that since we cannot imagine anything that we have not sensed at least in part, "Whatsoever we imagine is finite . . . there is no idea or conception of anything we call infinite. No man can have in his mind an image of infinite magnitude; nor conceive infinite



swiftness, infinite time, or infinite force, or infinite power."<sup>21</sup> While Hobbes argues that we cannot even imagine eternity, he explains that the present is the only aspect of temporality that we can sense directly. Evidently, the past exists in our memory only, while the future is "but a fiction of the mind."<sup>22</sup> How, then do we come to gain an idea of the passing of time according to Hobbes? In his view, this concept is a result of the subjective experience of a train of thought, with one thought succeeding another: "it comes to pass in time that in the imagining of anything, there is no certainty what we shall imagine next; only this is certain, it shall be something that succeeded the same before, at one time or another."<sup>23</sup>

To sum up this initial point: Hobbes denies the possibility of imagining eternity, relegates the past to memory and the future to fiction, while he explains the idea of the passing of time as emerging from the inner experience of our own trains of thought. Since humans are capable of forming ideas of the past, present and future, as well as of the progression of time, they worry about what the future may bring and seek to increase their control over the present: "Anxiety for the future time disposeth men to inquire into the causes of things: because the knowledge of them maketh men the better able to order the present to their best advantage."<sup>24</sup>

This ability to remember events of the past and infer from them ideas for the future, to conceptualize causal chains with a temporal structure that lead from the past through the present into the future, and thereby to become conscious of the flow of time, is one of the distinguishing marks of humans in comparison with animals, which Hobbes describes as living in the present only:

[W]hereas there is no other felicity of beasts but the enjoying of their quotidian food, ease, and lusts; as having little or no foresight of the time to come for want of observation and memory of the order, consequence, and dependence of the things they see; man observeth how one event hath been produced by another, and remembereth in them antecedence and consequence; . . .<sup>25</sup>

Thus, even though Hobbes begins by explaining that only the present can be sensed and appears to push past and future into the background as fiction and memory; in fact, he creates a much more complex picture of

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21 *Id.* at 23.

22 *Id.* at 22.

23 *Id.* at 20.

24 *Id.* at 74.

25 *Id.* at 76.

humans, as beings immersed in a temporal self-understanding, in which they use their faculty of understanding and inference to learn from what has passed in order to anticipate what is to come. Temporality, therefore, is a defining element of human nature for Hobbes. However, he explains that this temporal consciousness is of no use in the state of nature, which Hobbes characterizes as a condition of war "of every man against every man." He stresses that this condition is not characterized by ongoing violence and the actual use of arms. Instead, he emphasizes its temporal aspect, describing it as

*a tract of time*, wherein the will to contend by battle is sufficiently known: and therefore *the notion of time is to be considered in the nature of war*, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto *during all the time there is no assurance to the contrary. All other time is peace.* . . . In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; *no account of time*; no arts; no letters; no society; and which is worst of all, *continual fear, and danger of violent death*; and the life of man, solitary, poor, nasty, brutish, and short.<sup>26</sup>

As we see, for Hobbes the state of nature is a period of time that is best characterized by a double negative: there is no assurance that violence will not be used. Hence the propensity to use violence is permanently present. In such a time there is no guarantee of continuity and duration of anything other than the fear of violence: "there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily alloweth men to live."<sup>27</sup> In a condition of permanent fear of violent death, there is no incentive for and no possibility of economic, cultural and scientific development — and no measurement of time, reinforcing the consciousness of perpetuity in the state of nature, which in turn strengthens the sense of being under a constant and endless threat. As this reading of Hobbes's representation of the state of nature as a war of all against all suggests, he portrays it as a

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<sup>26</sup> *Id.* at 88-89 (emphasis added).

<sup>27</sup> *Id.* at 91.

period of chaos, in which there is no memory of a past without fear and no expectation of a future without fear; hence people live in the consciousness of eternal fear; they are locked into a sense of time that leaves no room for change and development.

As is well known, for Hobbes, the only rational way out of total and permanent uncertainty is a social contract in which all agree to surrender their natural liberties, renounce both actual violence and the threat of violence, thus empowering an absolute sovereign to rule them and punish all offenders. Although it denotes a founding moment, the Hobbesian social contract is depicted as an agreement that can be brought about by a voluntary act based on rational deliberation in a purely secular time. It is not said to derive from or echo an ancient constitution; its legitimacy does not draw on a link to eternity, invoking the will of God, an immutable realm of ideas, or a tradition leading back to a mythical time of origin. At the same time, it is not portrayed as a real event, having taken place in the past, or one supposed to take place in the future. In fact, for Hobbes the social contract is an analytic legitimating device for absolutist rule, explaining why it is rational to consent to an absolute sovereign. Thus, while the rhetoric of the social contract may refer to it as an event, i.e. as something that happened at a particular moment in time, it functions as a device that illustrates and clarifies the rationality of absolutism. Hence the social contract cannot be changed or revised; its logic continuously underlies the absolutist state, just as the logic of uncertainty characterized the state of nature. In this sense, the social contract appears in Hobbes's text as an element that is simultaneously located in a moment of secular time and permanent.

According to Hobbes, an absolute sovereign is necessary to overcome chaos and to open up a space for happiness. Himself above the law, the sovereign imposes the law on his subjects by command and under the threat of violent punishment, including the death penalty. Although such a regime is based on the precepts of reason, in Hobbes's view it is not reason that makes the members of the commonwealth obey the law, but fear.<sup>28</sup> Thus, in Hobbes's account, even when articulated as law in the political realm, reason can be effective only as a supplement to fear: the immediacy of the pressure of unruly desires and temptation to use violence are neutralized by the permanent presence of the fear of punishment by the sovereign, and hence restraint, postponement and duration become part of human affairs.

While the law constrains the subjects of the commonwealth, depriving them of their natural liberties and threatening them with violence in case

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28 *Id.*, ch. 13.

of transgression, it protects them from the threat of unexpected, arbitrary and self-interested violence by others. In Hobbes's picture, this security and the possibility of rational expectations generate free time, which can be devoted to the pursuit of happiness. Hobbes's argument goes as follows: he promises that by constraining some desires and enforcing the renunciation of others, absolutism enables individuals to pursue some, but not all, activities that satisfy personal pleasures. He presents the social contract as a rational spatio-temporal trade-off, as it were, in which the range of satisfactions is narrowed in exchange for an increase in time for legitimate satisfactions. Hobbes presents this bargain in terms of a physical movement, a journey whose possible twists and turns are constrained in order to enable its continuation:

For the use of laws (which are but rules authorized) is not to bind the people from all voluntary actions, but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as hedges are set, not to stop travellers, but to keep them in the way.<sup>29</sup>

In Hobbes's metaphor of the laws as hedges, the goal of laws is to enable enjoyment to go on over time, to allow advancement from one object to another, accumulate wealth and possessions, and to plan for a future in which further satisfactions will be secured.

As we have seen, the problem of the state of nature is that humans cannot be sure that they will live until their natural deaths, hence they live in fear. Once an absolutist regime protects them and its laws point the direction to socially harmless and legally sanctioned satisfactions, they can pursue their happiness, until they die of natural causes. According to Hobbes, for the state to be able to provide the feeling of security and protection necessary for its subjects to abandon their fear of violent death, it has to project an image of steady continuity into eternity, that is, to ensure that its existence will go on beyond the natural death of its office holders and subjects. Hence Hobbes stresses that in order to guarantee peace and prevent a return to the state of nature, the regime of the *Leviathan* has to be endowed with the appearance of eternity. The social contract can bestow absolute power upon humans, but no power can make humans immortal; hence absolutist rule can obtain the appearance of eternity only by means of the right of succession, which is to be ordered efficiently and authoritatively to free the subjects from the fear of what may happen when the sovereign dies.

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<sup>29</sup> *Id.* at 239-40.

Of all these forms of government, the matter being mortal, so that not only monarchs, but also whole assemblies die, it is necessary for the conservation of the peace of men that as there was order taken for an artificial man, so there be order also taken for an *artificial eternity of life*; without which men that are governed by an assembly should return into the condition of war in every age; and they that are governed by one man, as soon as their governor dieth. This *artificial eternity* is that which men call the right of succession.<sup>30</sup>

Thus Hobbes suggests the following: Having moved out of a state of a war of all against all, in which they were bound in a rigid consciousness of eternal chaos, humans had to be immersed in an equally fixed, albeit artificial temporal consciousness of the eternity of the absolutist regime, which is based on an eternal order of succession, so as not to allow any instability of the political order. From what seemed to them like an eternity in which they lived short lives with temporary satisfactions at best, overwhelmed by the permanent threat of violent death, humans could move into an era of duration only if it equally projected an image of eternity, or at least of unquestioned continuity in succession. While this rhetoric presents the move from the state of nature to the *Leviathan* as an exodus from chaos into order, Hobbes aimed, of course, to convey a message of warning, rather than to describe a succession of events. His message was that if one did not construe absolutist rule as eternal and unchanging, one was doomed to slide down the slippery slope to a seemingly eternal chaos. While the uncertainty of the state of war meant that one could live in the present only, since there was no point in planning for the future, only a properly organized absolutist regime, whose laws ensured that there would be no conflicts surrounding the right of succession, could promise that the present would expand into an unending future.

For Hobbes, it is the consciousness of moving without hindrance into an open future that brings happiness. He makes clear in the *Leviathan* that it is the activity of flourishing in security and thriving towards affluence which generates and is accompanied by a feeling of happiness — not the actual and full achievement of an ultimate goal, which would entail rest and the absence of further goals towards which one can and wants to move, and hence would spell death:

Continual success in obtaining those things which a man from time to time desireth, that is to say, continual prospering, is that men call

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<sup>30</sup> *Id.* at 135 (emphasis added).

felicity; I mean the felicity of this life. For there is no such thing as perpetual tranquillity of mind, while we live here; because life itself is but motion, and can never be without desire, nor without fear, no more than without sense.<sup>31</sup>

In *Elements of Law*, Hobbes elaborates on the active and prospering quality of happiness somewhat differently, explaining it not only as a feeling that stems from and accompanies an ongoing successful activity rather than past successes and achievements, but also the insatiable, cumulative quality of human appetites:

Seeing all delight is appetite, and appetite presupposeth a farther end, there can be no contentment but in proceeding: and therefore we are not to marvel, when we see, that as men attain to more riches, honours, or other power; so their appetite continually groweth more and more; and when they are come to the utmost degree of one kind of power, they pursue some other, as long as in any kind they think themselves behind any other. . . . And men justly complain as of a great grief, that they know not what to do. FELICITY, therefore (by which we mean continual delight), consisteth not in having prospered, but in prospering.<sup>32</sup>

Since life is motion and stillness is death, what we all aim for is to lengthen the motion in which are engaged at the moment, to ensure its continuation or repetition into an open and ideally unending future, which is but an endless extension of the present. According to Hobbes, we do not seek happiness in a future that differs from the present by being a stage in which we are no longer bothered by desires, or in which all our desires are satisfied, but by guaranteeing that the present, in which we can satisfy our desires, will continue without end:

The felicity of this life consisteth not in the repose of a mind satisfied. For there is no such finis ultimus (utmost aim) nor summum bonum (greatest good) as is spoken of in the books of the old moral philosophers. Nor can a man any more live whose desires are at an end than he whose senses and imaginations are at a stand. Felicity is a continual progress of the desire from one object to another, the attaining of the former being still but the way to the latter. The cause

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<sup>31</sup> *Id.* at 46.

<sup>32</sup> THOMAS HOBBS, *ELEMENTS OF LAW NATURAL AND POLITIC*, ch. 7, para. 7 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1640).

whereof is that the object of man's desire is not to enjoy once only, and for one instant of time, but *to assure forever the way of his future desire*. And therefore the voluntary actions and inclinations of all men tend not only to the procuring, but also to the assuring of a contented life, and differ only in the way, which ariseth partly from the diversity of passions in diverse men, and partly from the difference of the knowledge or opinion each one has of the causes which produce the effect desired.<sup>33</sup>

It is important to look at this passage closely. Traditionally, ancient thinkers such as Plato and medieval Christian thinkers such as Thomas Aquinas defined happiness as a state of harmony and perfection in which humans do not experience any desires, for it was claimed that a person who experiences a lack or deprivation of any kind cannot be happy. Hobbes puts forward a drastically different concept of happiness, one that does not imply a sense of fullness and transcendence; instead he allows for the presence of desire even in happiness and, in fact, makes happiness contingent upon the presence of the continuous quest for satisfaction, since it results from the experience of moving from one desire to another. In Hobbes's radical inversion of earlier concepts, happiness does not supersede desires, thus implying their absence. On the contrary, Hobbes's happiness is of and for desiring beings only, for in his view, there are no living beings without desires, not even happy ones, for being without desire would mean without future, and being without future means to be dead.

This is indeed a radically secular and this-worldly vision of happiness; ordinary, material pleasures are its constituents; it consists above all in subjecting the momentary and limited activity of satisfying desires to a temporal consciousness, in which each fleeting satisfaction becomes part of an interminable chain of satisfactions. To be sure, Hobbes's argument is not that happiness is a matter of accumulation or quantity, that it is composed of the sum of satisfactions or total of pleasures that we acquire when satisfying our desires. Rather, it is the result of the consciousness — which distinguishes humans from animals — that no satisfaction in the present stands on its own, that progression to further pleasures is not only possible in the present and for desires that we experience now, but also guaranteed for desires that we may experience in the future. Thus happiness is matter of projecting the present into the future; of a projection by means of which brief and passing moments of satisfaction are no longer experienced

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33 HOBBS, *supra* note 20, at 70 (emphasis added).

as fulfillments of isolated and temporary desires, but gain an additional significance as part of happiness.

To conclude: Hobbes distinguishes humans from animals by their ability and tendency to think and worry about the future, that is, to live as temporal beings. Thus he portrays the projection of the present into the future as a natural fact in the state of nature, stressing that what turns it into a state of war is not ongoing actual violence, but the continuous fear that there is nothing that will put an end to the unrelenting possibility of violence. The future-oriented nature of humans also underlies the political necessity of projecting an image of the power of the *Leviathan* into an artificial eternity by ordering the right of succession, so as to provide the subjects with the enduring feeling of security they need in order to live in peace. Similarly, his concept of happiness addresses humans as creatures with a future-oriented consciousness, who can be happy only if they expect that they will be able to satisfy their desires forever, and who can provide a rational basis for such expectations only by protecting themselves by laws that are legislated and enforced by an absolute sovereign.

## II. JOHN LOCKE: THE APPROPRIATION OF PAST AND FUTURE BY THE PRESENT

Like Hobbes, Locke holds temporal consciousness central to the individual and society, and like Hobbes, he elaborates on happiness in the context of a discussion of time, desire, reason and liberty. As we have seen, Hobbes's theory of law, government and happiness was based, among other elements, on the assumption of a fundamental human tendency to extrapolate from the present into the future. As we shall see, Locke made the same assumption, but while Hobbes's absolutist program aimed at preventing change, thus ensuring that expectations will come true, Locke's endeavor was to devise a political structure able to cope with the fallacies and mistakes that must result from extrapolations, both due to the short-sightedness of humans and because, as Locke put it, "Things of this world are in so constant a flux, that nothing remains long in the same state."<sup>34</sup>

Like Hobbes before him, and clearly also in an allusion to Descartes, Locke attempts to give an empiricist account of the temporal self-consciousness of humans, by tracing its origin to a reflective consciousness capable of

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34 JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 157 (Thomas P. Peardon ed., Prentice Hall 1942) (1690).



contemplating the way in which, in a train of thought, one idea emerges after another:

It is evident to any one who will but observe what passes in his own mind, that there is a train of ideas which constantly succeed one another in his understanding, as long as he is awake. Reflection on these appearances of several ideas one after another in our minds, is that which furnishes us with the idea of succession: and the distance between any parts of that succession, or between the appearance of any two ideas in our minds, is that we call duration. For whilst we are thinking, or whilst we receive successively several ideas in our minds, we know that we do exist; and so we call the existence, or the continuation of the existence of ourselves, or anything else, commensurate to the succession of any ideas in our minds, the duration of ourselves, or any such other thing co-existent with our thinking.<sup>35</sup>

According to Locke, once humans acquire the idea of duration, and hence also of the temporal nature of their own existence and the existence of the world as a whole, they seek to measure it in order to judge its length and compare various types of duration with each other. "This consideration of duration, as set out by certain periods, and marked by certain measures or epochs, is that, I think, which most properly we call time."<sup>36</sup>

Similarly to the way in which he postulated the emergence of a temporal awareness in general, Locke proposed that the stable identity of individuals derived from a succession of passing, temporary elements; for him "the identity of the same man consists . . . in nothing but a participation of the same continued life, by constantly fleeting particles of matter, in succession vitally united to the same organized body."<sup>37</sup>

Reflection, too, plays a role in Locke's concept of identity. In his view, I am who I am, and I am aware that I am the same person over time, that my existence has duration, because I am capable of reflecting upon the fact that the entire succession of my actions ranging from the past into the present has been undertaken by me:

consciousness always accompanies thinking, and it is that which makes every one to be what he calls self, and thereby distinguishes himself from all other thinking things, in this alone consists personal identity,

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35 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. 2, ch. 14, para. 3 (Peter H. Nidditch ed., Oxford Univ. Press 1979) (1690).

36 *Id.*, bk. 2, ch. 14, para. 17.

37 *Id.*, bk. 2, ch. 27, para. 6.

i.e. the sameness of a rational being: and as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person; it is the same self now it was then; and it is by the same self with this present one that now reflects on it, that that action was done.<sup>38</sup>

Locke's account grounds personal identity in a temporal consciousness in which the present is not sharply distinguished from the past, but experienced as maintaining continuity between past and present. In a way, Locke's argument is that of a transcendental deduction. It is a given that individuals experience themselves as having a personal identity. Locke asks about the preconditions of such an experience and, attempting to deduce the conditions necessary for individuals to experience themselves in this fashion, is led to the answer of continuity in time.

Locke's answer implies that in living in the present, individuals always also live in the past, for they live in the present with a particular identity that is based on their acts in the past and their memory of the past. According to him, a human being is a moral agent, i.e. a person, only because human consciousness extends backwards, appropriating actions of the past, which although they have perished, as it were, nevertheless are preserved in memory in the present:

Person . . . is a forensic term, appropriating actions and their merit; and so belongs only to intelligent agents, capable of a law, and happiness, and misery. This personality extends itself beyond present existence to what is past, only by consciousness, — whereby it becomes concerned and accountable; owns and imputes to itself past actions, just upon the same ground and for the same reason as it does the present.<sup>39</sup>

Locke argues that moral and legal accountability derives from the human capacity to remember deeds of the past and to shoulder responsibility for them. Thus Locke grounds the possibility of law in memory, in the past-oriented temporal nature of individual identity. At the same time, Locke's argument can also be read as articulating the boundaries of law, for in his view, an individual can only be held legally accountable and punished for past actions that are remembered and hence part of his or her present consciousness. "For, supposing a man punished now for what he had done in

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<sup>38</sup> *Id.*, bk. 2, ch. 27, para. 9.

<sup>39</sup> *Id.*, bk. 2, ch. 27, para. 26.

another life, whereof he could be made to have no consciousness at all, what difference is there between that punishment and being created miserable?"<sup>40</sup>

To sum up this point: for Locke, humans can be legal persons, and the possibility of imposing on them the rule of law arises because their consciousness construes their sense of personal identity on the basis of their memory of past actions. Without such a backward-looking individual self-understanding it would make no sense to demand accountability and enforce punishment in the future.

However, once Locke establishes the possibility of law and punishment on the basis of memory, he moves from the past into the present; and when he explores what places humans on their quest for happiness, his answer is an uneasiness that he very explicitly locates in the present, for, as he stresses,

the present uneasiness that we are under does naturally determine the will, in order to that happiness which we all aim at in all our actions. For, as much as whilst we are under any uneasiness, we cannot apprehend ourselves happy, or in the way to it; pain and uneasiness being, by every one, concluded and felt to be inconsistent with happiness, spoiling the relish even of those good things which we have: a little pain serving to mar all the pleasure we rejoiced in. And, therefore, that which of course determines the choice of our will to the next action will always be — the removing of pain, as long as we have any left, as the first and necessary step towards happiness.<sup>41</sup>

According to Locke, people do not err as far as their present experience of pleasure and pain are concerned, that is, they know what they do or do not enjoy here and now. But, he explains, they are prone to make mistakes with reference to future pleasures, and hence also with reference to happiness.<sup>42</sup> What is required, therefore, is a rational pursuit of happiness, in which reason suspends the pressure of those desires whose satisfaction may bring short-term pleasure but long-term suffering, due to mistaken projections.

How does reason acquire the power to interfere with the power of desires over the will? According to Locke, it can take a stand against desires since it acts in the service of happiness, which means that if reason demands suspension of the satisfaction of a particular desire, it does so in the name of

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, bk. 2, ch. 21, para. 36.

<sup>42</sup> *Id.*, bk. 2, ch. 21, para. 65.

a great and continuous pleasure that it invokes against a small momentary one.

As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty. The stronger ties we have to an unalterable pursuit of happiness in general, which is our greatest good, and which, as such, our desires always follow, the more are we free from any necessary determination of our will to any particular action, and from a necessary compliance with our desire, set upon any particular, and then appearing preferable good, till we have duly examined whether it has a tendency to, or be inconsistent with, our real happiness: and therefore, till we are as much informed upon this inquiry as the weight of the matter, and the nature of the case demands, we are, by the necessity of preferring and pursuing true happiness as our greatest good, obliged to suspend the satisfaction of our desires in particular cases.<sup>43</sup>

To recap: Locke locates the legal accountability of humans in their present memory of the past, and places the wellspring of all human action in a present unease, portraying the will as governed by a present desire directed toward the satisfaction required to remove the unease in question. Then, in a further step, he links the present to the future by introducing the possibility of mistaken judgments concerning future pleasures and happiness; hence the necessity to deliberate rationally on the future outcome of actions. This interference of reason with the determination of the will inevitably entails a delay or postponement of satisfaction. Ultimately, reason may allow the satisfaction of a desire if it is not harmful, or suspend its satisfaction as short-sighted, invoking the individual's interest in a greater and longer-lasting pleasure instead. This ability to put off or suspend immediate satisfaction, that is, to extend present unease for the sake of a future, greater satisfaction, which Locke identifies with happiness, is the foundation of human liberty for Locke.<sup>44</sup>

Again, Locke centers his discussion on the individual, rather than society as a whole. As we have seen, he argues that humans can become legal persons since their consciousness extends into the past, encompassing actions that have perished as such, but whose memory is still active in

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<sup>43</sup> *Id.*, bk. 2, ch. 21, para. 52.

<sup>44</sup> *Id.*, bk. 2, ch. 21, para. 53.

the present. He claims that humans acquire the power to act freely by delaying immediate satisfactions and rationally evaluating the long-term consequences of their actions. Thus, while he identifies the past with legal responsibility and accountability, he places the future under the heading of individual deliberation, uncertainty and happiness. Like Hobbes, he refers to happiness as an advanced type of pleasure, but unlike Hobbes, he does not tie it to a continuous movement from one object of desire to another.

In *Two Treatises on Government*, Locke's discussion turns from epistemology and individual motivation to social and political matters. There he develops his famous vision of the state of nature as a condition in which most humans live according to the precepts of natural law, but have to be afraid of a potentially violent minority that fails to do so. Under such conditions, keeping property — which at that stage he imagines mainly as that of hunters and gatherers — may be dangerous. Introducing a temporal dimension into his image of the state of nature, Locke claims, "The greatest part of things really useful to the life of man . . . are generally things of *short duration*, such as — if they are not consumed by use — will decay and perish of themselves."<sup>45</sup> Thus, in addition to exposing individuals to the possible aggression from others, Locke argues that it would be unjust to cause part of God's creation to decay by hoarding it. However,

if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these *durable things* as he pleased; the exceeding of the *bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it*. . . . And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.<sup>46</sup>

An individual holding on to perishable goods for too long would ruin them. Mutual consent leading to exchange and market mechanisms via the invention of money allows humans to overcome the temporal limitation on the use value of perishable goods, such as fruit, vegetables and animal produce. Cooperation between individuals allows humans to remove detrimental pressures of immediacy and extend the life span of private

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<sup>45</sup> LOCKE, *supra* note 34, § 46.

<sup>46</sup> *Id.* §§ 46-47 (emphasis added).

property — as well as allowing its accumulation. As long as all possessions were natural and short-lived, there was no real point in having a government. Locke's text ties the necessity of government to the invention of money and consumer durables, and contends that the protection of private property must be the central function of government.<sup>47</sup>

Like Hobbes, Locke uses the image of a social contract, a voluntary collective action in secular time, to explain the origins of government. But unlike Hobbes, he suggests no absolutistic solution to the lack of security and stability that characterizes the state of nature, and rather than attributing to government the possibility of establishing an appearance of eternity, his text is full of tales of changes, dissensions, dissolutions and new beginnings:

For there are no examples so frequent in history, both sacred and profane, as those of men withdrawing themselves, and their obedience, from the jurisdiction they were born under, and the family or community they were bred up in, and setting up new governments in other places; from whence sprang all that number of petty commonwealths in the beginning of ages, and which always multiplied, as long as there was room enough, till the stronger, or more fortunate, swallowed the weaker; and those great ones again breaking to pieces, dissolved into lesser dominions.<sup>48</sup>

Rather than seeking a form of government that could project an image of immutability over time, Locke's proposal for a parliamentary regime takes into account that the future will bring the unexpected and that therefore the process of legislation and execution of governmental tasks has to be designed so as to be able to cope with what cannot be anticipated.<sup>49</sup> He suggests that the legislative body, which is to hold supreme authority, will convene only for limited periods, while the executive power, although located below the legislative branch in the governmental hierarchy, will be in continuous activity. Locke explains the temporal distinction between the two powers as follows: "[B]ecause those Laws which are constantly to be Executed, and whose force is always to continue, may be made in a little time;

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<sup>47</sup> *Id.* §§ 3, 222.

<sup>48</sup> *Id.* § 115; see also *id.* §§ 211-43.

<sup>49</sup> This discussion of the way in which Locke's theory of the separation of powers also implies a separation of temporalities is indebted to William E. Scheuerman, *Liberal Democracy's Time* 18-19, <http://theory.polisci.lsa.umich.edu/colloquium/scheuerman.pdf> (last visited July 1, 2006).

therefore there is no need, that the *Legislative* should be always in being, not having always business to do."<sup>50</sup> By contrast,

because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution*, or an attendance thereunto: Therefore 'tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force.<sup>51</sup>

Since the executive branch is continuously engaged in the business of government, it is also in charge of convening the legislative body to an additional, extraordinary assembly,

in a case where the uncertainty and variableness of human affairs could not bear a steady fixed rule: for it not being possible, that the first framers of the government should, by any foresight, be so much masters of future events, as to be able to prefix so just periods of return and duration to the *assemblies of the legislative*, in all times to come, that might exactly answer all the exigencies of the common-wealth.<sup>52</sup>

While Hobbes sought to stretch the present into eternity and to limit all uncertainty by devising an absolutist program with pretensions to artificial perpetuity, Locke's liberal parliamentary framework acknowledges the limitations of rational foresight, making allowances for uncertainty and revision. For Locke, deliberating about the future meant, among other things, planning mechanisms that will stand the test of time, allowing the government to execute laws in ways that could not be anticipated by the lawmakers. In other words, while Locke assumes that laws will have to be changed to safeguard the commonwealth, he suggests that it is possible for theorists to outline in advance the legal powers and mechanisms that will enable the legislators to revise laws in the future, if necessary.

For instance, Locke's image of the future as necessarily unforeseeable leads him to elaborate on the notion of *prerogative*: "Prerogative being nothing but a power, in the hands of the prince, to provide for the public good, in such cases, which depending upon unforeseen and uncertain occurrences, certain and unalterable laws could not safely direct."<sup>53</sup> Locke explains that due to the fact that legislators cannot predict the changes that

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50 LOCKE, *supra* note 34, § 143.

51 *Id.* § 144; *see also id.* § 153.

52 *Id.* § 156.

53 *Id.* § 158.

the future will bring, and hence cannot make legal provisions for what will happen, the executive must be legally empowered to act for the good of the community in ways that are not laid down by the law, and in some instances even against the law.<sup>54</sup>

The issue of prerogative raises a host of questions concerning the relationship between the executive branch and the legislative branch, the rule of law, trust and the abuse of power, which Locke addresses in various ways. In the context of this discussion of time and law, however, it highlights above all both the differences and similarities between Hobbes and Locke. On one hand, the frozen temporality of Hobbes's absolutism contrasts sharply with Locke's liberal temporality, which admits surprises. On the other hand, Locke aims to sketch a legal apparatus capable of coping with change, without changing its basic structure and procedures.

To conclude: on one hand, legislation and the law appear in Locke's discourse as devices entrusted with the task to formulate measures to cope with change; on the other hand, as was explained above, the fact that humans become legal persons by carrying their past over into the present as part of their identity justifies, in Locke's view, legal responsibility and punishment of those violating the law. Thus, while Locke bases the legitimacy of the rule of law over individuals on a spill-over effect of past actions into the present, he emphasizes that rational legislators and their laws have to take note of the unpredictability of the future by developing the legal mechanisms that are to remain fixed and stable, since such mechanisms are necessary for coping with changes in the future; thus extending the present into the future.

In this fashion Locke's approach, too, establishes the law as a site of intersection of eternity and change. Although his legal framework for parliamentary government and the separation of powers takes note of unanticipated changes, it also purposefully formalizes, in the present, the set of powers and procedures that are to initiate and direct future deviations from the laws laid down in the present. Thus, even though Locke depicts the future as unruly and unpredictable, he too, seeks to bring it under control by means of a legal apparatus.

### III. JEREMY BENTHAM: CALCULATING FOR A CERTAIN FUTURE

Like Hobbes and Locke, Jeremy Bentham was an empiricist and a materialist in his approach to time, law and happiness, but in contrast with Hobbes

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<sup>54</sup> *Id.* § 160.



and Locke he opposed theories of the social contract and natural rights, dismissing the latter most famously as "rhetorical nonsense — nonsense upon stilts." More radically than Locke, he insisted on the fallibility of legal practitioners of all ranks and on the necessity to devise mechanisms for legal revisions and improvements in the future, seeking to formulate a legal framework that could provide stable machinery for doing so. As is well-known, his wrath was directed at the common law and at the way it was practiced in his time, turning, as he put it, "the whole fabric of jurisprudence [into] a labyrinth without a clew" and a "vast hotbed of uncertainty."

It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do* — they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.<sup>55</sup>

For Bentham, the problem with the common law was not only its confusing complexity and obscurantist language, which resulted in arbitrariness, but the fact that it created uncertainty by its backward-looking temporal logic, which was retrospective not only in the way it made law, but also in the fashion in which the law imposed its punishments on subjects. First, the common law derived its norms and sanctions from precedents in the past; second, jurisprudential law addressed those who were subject to its norms and on whom legal sanctions were imposed for violating them only after they had committed a deed for which they were punished. Due to this retrospective dimension, Bentham addressed common law as dog-law, reproaching it for ignoring the uniquely forward-looking, calculating temporal consciousness that he attributed to humans, whose rational capacity to analyze and evaluate the pros and cons of future actions he turned into the bedrock of utilitarianism.

Bentham's plans for legal reform can be seen as driven by the quest to transform the temporal consciousness of the law. He opposed the common

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<sup>55</sup> 5 JEREMY BENTHAM, *Truth Versus Ashhurst; Or, Law as It Is, Contrasted with What It Is Said To Be*, in *THE WORKS OF JEREMY BENTHAM* 231, 235 (Russell & Russell 1962) (1843).

law because it was based on precedent and hence fundamentally past-oriented, while advocating legislation since it is future-oriented. He sought to sweep away the uncertainty about the future that resulted from the retrospective character of the common law, replacing it by what he regarded as the prospective certainty that could be instilled by a simply and clearly worded comprehensive legal code, by statutes whose norms and punishments would be known in advance to all citizens. By threatening certain actions with punishment, i.e. pain, the law could influence human actors not to undertake them, even though they might be pleasurable, if their rational calculations instructed them that the pains resulting from punishment would be greater than the pleasures that could be derived from the prohibited action.

This future-directed temporal logic pervades the entire Benthamian project, expressing itself in the consequentialist emphasis on ethics that is typical of utilitarianism in general, as well as, more specifically, on the utilitarian demand to attune punishments to their effects on future behavior rather than to retributive principles, which look backwards rather than forwards.

This is not the place to elaborate on the well-known principles of Benthamian utilitarianism and the hedonic calculus on which Bentham elaborates in chapter 4 of his *Introduction to the Principles of Morals and Legislation*.<sup>56</sup> Suffice it to say that Bentham postulates pleasure and pain as the ends of the legislator as well as the instruments through which the law operates, suggesting thus that it is necessary for lawmakers to understand their force. Bentham explains that it is possible for the law to exert its influence by means of pleasure and pain, because, as he writes in the immortal opening sentence of the *Introduction*, "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*."<sup>57</sup> Since individuals are pleasure-seeking and pain-avoiding creatures, and since according to Bentham they can calculate pain and pleasure in advance with almost mathematical precision, legislators can and should do the same, so as to guide behavior and maximize pleasure in society as a whole.<sup>58</sup>

A main feature of such legislative calculations is to make pleasures as certain as possible and as durable as can be expected by citizens. In the end

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56 JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 29-32 (Prometheus Books 1988) (1789).

57 *Id.* at 1.

58 For a concise and lucid critique of the irrationality of what purports to be most rational, see THOMÄ, *supra* note 16, at 146-50.

of chapter 4 Bentham explains that this feature of his theory conforms with common views on the pleasures to be derived from property:

An article of property . . . is valuable on what account? On account of the pleasures . . . which it enables a man to produce . . . [T]he value of . . . an article of property is universally understood to rise or fall according to the length or shortness of the time which a man has in it: the certainty or uncertainty of its coming into possession: and the nearness or remoteness of the time at which, if at all, it is to come into possession.<sup>59</sup>

Similarly, in chapter 7 of part I of the *Principles of the Civil Code*, he presents "the care of security" as the principal object of the laws. Providing security, we discover, means primarily protecting private property, he explains, for the durable protection of property allows humans to have rational expectations, i.e. to live fully as future-oriented creatures that they are:

[I]t is necessary to consider, that man is not like the brutes, limited to the present time, either in enjoyment or suffering, but that he is susceptible of pleasure and pain by anticipation . . . . The idea of his security must be prolonged to him throughout the whole vista that his imagination can measure.

This disposition to look forward, which has so marked an influence upon the condition of man, may be called expectation — expectation of the future.<sup>60</sup>

Reading Bentham for his comments on the temporality of law, one discovers that the means of legislators to enable citizens to gain lasting and certain pleasures is by protecting their private property over time. This is to be done by a variety of laws, civil and criminal, that are to be formulated according to utilitarian insights and by applying its principles, for only rational calculation of utilitarian reasoning can produce the best possible laws. Does, then, utilitarianism usher in a perfect form of legislation that cannot be improved upon? In other words, is there no development beyond utilitarianism? In *Of the Influence of Time and Place in Matters of Legislation*, Bentham seems to make this claim:

Until the grand principle of utility had been exhibited; . . . until, so to speak, all the legislative apparatus had been provided, and all the

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<sup>59</sup> BENTHAM, *supra* note 56, at 32.

<sup>60</sup> 1 JEREMY BENTHAM, *Principles of the Civil Code*, in THE WORKS OF JEREMY BENTHAM, *supra* note 55, at 297, 308.

fundamental truths had been arranged, it was impossible to form any precise notion of a perfect system of legislation. But if at length these different objects have been accomplished, the idea of its perfection is no longer a chimera: it is, so to speak, presented to him who knows how to appreciate it: he may trace the whole of its horizon; and though no one now living may be permitted to enter into this land of promise, yet he who shall contemplate it in its vastness and its beauty may rejoice, as did Moses, when on the verge of the desert, from the mountain top, he saw the length and the breadth of that good land in to which he was not permitted to enter and take possession.<sup>61</sup>

Although Bentham announces with Biblical verve that utilitarianism brings perfection, he does place it in the future, in a Promised Land to be contemplated but not entered. He elaborates on two difficulties that arise from this position, which are worth pondering; first, he questions whether this means that laws that are made in the present according to utilitarian precepts — which according to Bentham have to be considered the best laws possible — therefore need to be regarded as everlasting, or, as he put it, as "the best possible laws in all time to come." In this, Bentham deals with the intersection of permanence and change in legislation. His answer to the question he raises is twofold: he explains that acts "such as murder, theft, adultery, perjury" will always be forbidden and punished. "Upon this plan, we might make a variety of laws, of which the expediency might without impropriety be termed universal and immutable. But laws, while the expression of them is confined to terms so loose and so extensive, will never be found precise and clear enough for use."<sup>62</sup> To become applicable, general legal precepts, even if perfect, will have to be qualified and explicated in practical ways that do not allow indisputable and unchanging formulations. Thus Bentham concludes that the attribute of immutability can be applied rather "to certain grounds of law, than to the laws themselves."<sup>63</sup> In other words, Bentham interweaves stability and alteration by arguing that certain legal principles will remain unchanging, while their legislative articulation will be subject to transformations.

Interestingly enough, Bentham mentions adultery as an act that will always be punished by law, thereby unintentionally illustrating his argument on the difficulty of delineating immutable legal norms. However, Bentham

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61 1 JEREMY BENTHAM, *Of the Influence of Time and Place in Matters of Legislation*, ch. 5, § 2, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 55, at 169.

62 *Id.*

63 *Id.*

also raises a second, perhaps more critical issue, addressing the relationship between legislation and happiness by asking whether, if utilitarianism could prompt the legislation of perfect laws, this also meant that happiness would result from legal perfection. Despite Bentham's deep faith in legal codes, he circumscribes the power of the law in this respect, stressing that even perfect civil and criminal codes can at best relieve humans of a certain amount of evil, but not vanquish suffering or inequality and create a society where there is only good.

[M]en have obtained the maximum of their happiness, inasmuch as it depends upon the laws, when great crimes shall be known only by the laws which prohibit them . . . when the law, which should be the rule of human actions, shall be concise, intelligible, without ambiguity, and in the hands of every one. But to what will the happiness arising from all this amount? It may be described as *the absence of a certain quantity of evil*. It will arise from the absence of a part of the different evils to which human nature is subject. The increase of happiness which will hence result, is doubtless sufficiently great to excite the zeal of all virtuous minds in this career of perfection which is open to us; but there is nothing in it unknown or mysterious, and which cannot be perfectly understood. Every thing beyond this is chimerical. Perfect happiness belongs to the imaginary regions of philosophy, and must be classed with the universal elixir and the philosopher's stone. In the age of greatest perfection, fire will burn, tempests will rage, man will be subject to infirmity, to accidents, and to death. It maybe possible to diminish the influence of, but not to destroy, the sad and mischievous passions. The unequal gifts of nature and of fortune will always create jealousies: there will always be opposition of interests; and, consequently, rivalries and hatred. Pleasures will be purchased by pains; enjoyments by privations. . . . [T]here will be desires which cannot be satisfied; inclinations which must be subdued: reciprocal security can only be established by the forcible renunciation by each one, of every thing which might wound the legitimate rights of others. If we suppose, therefore, the most reasonable laws, constraint will be their basis: but the most salutary constraint in its distant effect is always an evil, is always painful in its immediate operation.<sup>64</sup>

This, then, is the dual message of Bentham's legislative vision, which, although prophesying a future with perfect laws, is by no means utopian,

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64 *Id.*

since it warns that even perfect laws cannot ensure perfect happiness. The only happiness humans can aim at is one which remains subject to the hedonic calculus, which for Bentham is synonymous with the felicific calculus, in which there will continue to be unfulfilled desires, conflicts, suffering, pain and death:

Let us seek only for what is attainable . . . We shall never make this world the abode of perfect happiness: when we shall have accomplished all that can be done, this paradise will yet be, according to the Asiatic idea, only a garden; but this garden will be a most delightful abode, compared with the savage forest in which men have so long wandered.<sup>65</sup>

### CONCLUSIONS: PROMISING THE FUTURE, TAMING THE FUTURE

This Article has undertaken an analysis of the way in which three classical modern British thinkers constructed models of the ways in which law can harness desires for happiness. Considering humans primarily as desire machines,<sup>66</sup> they regard the drive for unrestrained, full and immediate pleasures as destructive to social life and ultimately self-destructive to the individuals pursuing them. They suggest that by constituting itself as a machine that uses the power of desire and fear as fuel, the legislative apparatus can harness destructive pursuits of satisfaction by adding a temporal extension to some pleasures, promising to protect their repetition or continuation in time, thus transforming fleeting satisfactions into enduring happiness, while demanding in return the renunciation or moderation of divisive, harmful and vicious desires. In this fashion the modern law machine can become a stable apparatus, controlling the movement of human desire machines in social space.

The case these thinkers make for the rule of law is that a legally imposed social organization of desires and pleasures may demand restraint and delay, but will bring happiness in the long run, while the blind pursuit of immediate satisfactions, which may promise immediate pleasure, will wreak destruction in the long run. At the same time, all three thinkers redefine and downgrade the meaning of happiness from a grand, metaphysical concept to a realizable,

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<sup>65</sup> *Id.*

<sup>66</sup> GILLES DELEUZE & FÉLIX GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (Robert Hurley et al. trans., Univ. of Minn. Press 1983) (1972).

this-worldly type of safe, calculable material pleasures, whose durability is linked to the legal protection of durable goods.

On one hand, this British approach portrays the law as a creative instrument, capable of shaping the future of humankind, and with it future happiness, rather than as an effect or expression of historical consciousness. It postulates the ability of modern humans to pursue their happiness as temporal creatures in this world. On the other hand, this view of the law as enabling the happiness of humans in this world lacks any orientation toward a historical destiny of humankind. A short summary of the approach to time and law characteristic of the German thinkers discussed by Philippe Nonet, as well as of others who remained outside the scope of his paper — though they undoubtedly play a major role in the German tradition — such as Immanuel Kant and Karl Marx, will suffice to draw attention to some of the main differences that distinguish this British way of thinking on the relationship of law, time and happiness from the German tradition, in which destiny plays a central role.

As a rule, German thinkers from Kant to Nietzsche placed law in a history that is conceived in linear terms as progressing towards an end, teleologically driven by the force of a reason that will bring humanity as a whole to the full and free realization of its powers, such as in the Kantian ideal of eternal peace, the Hegelian absolute, Marx's socialism, or the age of the Nietzschean overman. This teleological perspective postulates a future in which humans will truly become humans by asserting sovereignty over their fate, even if, as in the case of Nietzsche, this may mean enduring senselessness, as Nonet stresses.

In this tradition of thought, which considers reason as the prime mover of history, law appears mostly as an externalized, highly articulated and objective expression of the development of humanity. Its main role is that of an indicator of something to be found in history, of the growth of reason towards a future of self-actualization. Although the German tradition presents reason as an active force, legal reason is considered primarily expressive rather than creative. Hence its possible contribution as educational tool, fostering the process of growing-up that it makes manifest, must remain limited.

Approaching law from the vantage point of the historical self-expression of humanity, thinkers in the German tradition are inclined to attribute relatively little importance to positive law imposed by legislators; they tend to refrain from examining its efficiency and utility as a technical means for the allocation of goods, rights and duties. Similarly, since the process in question is conceived as the development of world-history and

of humankind as a whole, national legislation is often taken as illustrating a universal process.

From this perspective German thinkers evaluate the shape of law primarily as a marker of a hypothesized temporal distance from what they regard as the archaic origins of humanity on one hand, and, on the other, as harbinger of an anticipated end point, which German thinkers have a propensity to place at arm's reach; perhaps because feeling close to the finishing line of history is comforting.

Immanuel Kant noted that "time itself cannot be perceived"; he is also renowned for having emphasized that we nevertheless cannot conceive of the world beyond the notion of time.<sup>67</sup> Martin Heidegger elaborated upon temporality as a characteristic of human consciousness, emphasizing, as he put it, that "[f]rom the dawn of Western-European thinking until today . . . Being is determined as presence through time."<sup>68</sup> Undoubtedly, we consider whatever we refer to as being, as enduring through time; hence existence inevitably implies duration or temporality, and our own existence is no different. Heidegger had in mind something slightly different. He stressed that we relate to ourselves in a temporal consciousness in which we continually project ourselves towards an open future that can be different from the present.

Nevertheless, it is typical of German thinkers to claim that the past cannot be left behind on the linear or dialectic march toward the future. They proclaim that we can reach our destiny — which according to Marx lies in a future in which law in the traditional sense of the word will no longer be necessary since class antagonisms will have been abolished, or which according to Nietzsche will be inhabited by aristocratic "overmen" who rightly consider themselves to be above the law — only by appropriating the past, that is, by understanding ourselves as fundamentally historical creatures, who are not only situated in time as all beings are, but as beings who can change over time and who need to become conscious of that fact. In other words, German thinkers tend to assume that we become fully human only insofar as we become wholly temporal in our self-understanding. For German thinkers, understanding ourselves as temporal beings means becoming aware of ourselves as beings who unfold from infancy into maturity, not only individually but also collectively or universally. Hence Kant calls upon humans to grow out of their self-imposed immaturity into

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67 IMMANUEL KANT, *CRITIQUE OF PURE REASON* 277 (Werner S. Pluhar trans., Hackett 1996) (1781).

68 MARTIN HEIDEGGER, *Time and Being*, in *ON TIME AND BEING* 1, 2 (Joan Stambaugh trans., Harper and Row 1972) (1969); see also Carol J. White, *The Time of Being and the Metaphysics of Presence*, 29 *MAN & WORLD* 147, 147 (1996).



maturity.<sup>69</sup> The idiom of growth is organic; it portrays humankind as a whole as if it were an individual writ large growing from childhood to adulthood. However, adulthood is not necessarily a period of happiness; rather it is a stage in which human conduct is supposed to be autonomous, guided by reason and, perhaps, experience. Adults may have a better understanding of themselves and the world, their possibilities, projects and aims; they may be more reconciled with who they are than children and youngsters, but not necessarily happier for that reason.

The three thinkers who in this Article have been taken as representing the British tradition conceptualized law within the context of an empiricist and materialist individualism, as a mechanistic means of regulating human action in the present, oriented at most toward a near and foreseeable future. This British approach knows no past worth preserving, and the law is not placed in the flow of history. Its aim is to provide foundations for a new beginning, in which the vestiges of the past can be overcome in order to allow for a more rational legal ordering of human affairs based on scientific insights. Legal precepts do not figure as markers of historical development, as indicating something to be found in history, but as something that is purposefully added to history.<sup>70</sup>

For the three thinkers dealt with in this Article, modern times as created by modern laws are times of individual choice, reciprocal social action and enduring contractual relationships, directed at accumulating satisfying experiences in the course of time, leading up to happiness, conceived as the consciousness that the activity of desire will not be stopped. This modern British image of happiness presents happiness not only as attainable and durable, but also as a space of active and social pursuits, taking the presence of others into account, rational in avoiding self-destruction. In modern British thought happiness has to do with the relationship to others living and moving in the same material and social space, not with God or an eternal, metaphysical realm of ideas.

As has been pointed out above, the British thinkers present law as a technical instrument that brings to the fore in humans that which nature — not history — has placed in them. On one hand, in this view the law is the foundation of the potential of humans to gain happiness as temporal, i.e. future-oriented, creatures. On the other hand, this view of the law as

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<sup>69</sup> IMMANUEL KANT, *An Answer to the Question What is Enlightenment?*, in PRACTICAL PHILOSOPHY 11 (Mary J. Gregor ed., Mary J. Gregor trans., Cambridge Univ. Press 1996) (1784).

<sup>70</sup> H.L.A. Hart, *Bentham and the Demystification of the Law*, 36 MOD. L. REV. 2, 7 (1973).

enabling the self-actualization of humans as future-oriented creatures has no orientation towards a historical destiny of humankind — it is destiny-less. By reducing complexity of social life and viewing human action as a sequential pattern of individual acts, it turns the future into "a string of anticipated presents," to use a term coined by Niklas Luhmann.<sup>71</sup>

Focusing on the way in which the British discourse introduced a particular modern temporality and a distinctly modern concept of happiness into arguments for imposing a legal order, as has been done in the course of this Article, reveals its function within a capitalist socio-economic order. For this understanding of happiness constitutes not only the future as governed by the image of down-to-earth happiness within reach, but also imagines the present as a time to be governed by a temporal *habitus* that is characterized by elements that are desirable in those who are supposed to contribute to the functioning of a capitalist social order, such as future-oriented postponement and self-constraint, rational expectations, property-ownership, duration and continuity.

In ancient conceptions of human nature and happiness, legislation had nothing to do with happiness, which was to be gained by contemplation. Plato acknowledged that desire brought pleasure, but in his view it could not bring happiness, which was reserved for philosophers. Moreover, Plato portrayed the control of passion by reason as the foundation of ethics. Medieval thinkers like Augustine promised that knowledge of the Divine would bring eternal happiness. The aim of these thinkers was to justify this-worldly discipline and denial in the present by a greater, metaphysical pleasure which they called happiness, to be gained in another world. Empiricist materialists with a secular temporality could hardly promise such happiness. What they could and did do, however, is to redefine happiness as a possible feature of this material world, located in a social space of lack, desire and even death, to be reached only by those who accept the legal and political regime these thinkers advocated.

In this sense, then, it is possible to say that the work of each of the three thinkers discussed here contains a version of what can be seen as a kind of post-Pascalian wager, which suggests that it is reasonable to renounce transient and dangerous pleasures in the present, though not for eternal bliss, which cannot be offered in a purely secular time, but for the ability to lead secure lives in this world and to gain the only happiness possible for humans in this world. Famously, Pascal offered his wager as a rational argument for

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71 Niklas Luhmann, *The Future Cannot Begin: Temporal Structure in Modern Society*, 43 SOC. RES. 130, 143 (1976).

human self-restraint and discipline, by arguing that they were a small price to pay for the promise of eternal bliss. The reading of Hobbes, Locke and Bentham offered in this Article suggests that the promise of an attainable type of happiness in a foreseeable future also takes part in what Norbert Elias called the "civilizing process"<sup>72</sup> of modernity, which includes, among other things, a temporal *habitus*; for, as Pitrim Sorokin and Robert Merton put it, "[a]ll time systems may be reduced to the need of providing means for synchronizing and co-ordinating the activities of the constituents of groups."<sup>73</sup> Thus, while the secular images of a near-future of happiness to be planned and controlled by law may have been expressions of both optimism and a skepticism characteristic of British modern thought, they also served as ideological vehicles in advocating a modern legal and temporal order.

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72 Simonetta Tabboni, *The Idea of Social Time in Norbert Elias*, 10 *TIME & SOC'Y* 5, 15 (2000).

73 Pitrim A. Sorokin & Robert K. Merton, *Social Time: A Methodological and Functional Analysis*, 42 *AM. J. SOC.* 615, 615 (1937).