Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition*. Cambridge, Mass.: Harvard University Press, 2005. Pp. xx + 214.

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I

This is a relatively short book on a complex subject, made even shorter by its guiding Heideggerian premises. Not only is it challenging to set out Leibniz's philosophy of law, as well as the German *Allgemeines Landrecht*, Savigny, and the Prussian *Bürgerliches Gesetzbuch* – among other topics – in the detail required for comprehension, given most non-Germanic scholars' unfamiliarity with these; but it is an even taller order to do so in the context of a strong interpretive thesis with a social mission. Berkowitz is explicit about his aims, noting that the book is "a work of political theory and philosophy as much as it is a work of legal history" (167). He might have added, as well, that it is also an instance of applied ethics or social critique, for it diagnoses (and laments) certain social ills and proposes remedies for them, albeit vaguely. This mix of objectives certainly makes the book richer in many respects, but also more difficult and frustrating – at least for more single-minded readers interested in a detailed historical account and an analysis with a weaker interpretive thesis. For if one does not accept Berkowitz's philosophical premises or political argument, or if one disagrees with his verdict about the ills of contemporary society, or even his concrete examples, one will find it difficult to follow his brief tale of how we supposedly got here.

As a work of conceptual history the book carries a considerable amount of baggage, arranged in a syncretistic fashion that mixes Platonic, Nietzschean, Heideggerian, and Weberian themes, among others. These are partly revealed in the chapter epigraphs and in the Preface and Conclusion to the work, which provide a kind of ideological orientation. Thus, Berkowitz recapitulates near the end: "Once the natural connection with the divine is severed, all efforts to support the enchantment of the world with science are destined to fail" (159); and, similarly, "… the ethical ideal of law as justice has fled the earth. Law, the last bastion of the ethical world's resistance to the rule of scientists and experts, has succumbed to the lure of social engineering" (160). These summary declarations resonate with statements at the front, where we read that "[l]aw … can only retain its authority to the extent that it lays some claim to a transcendent and more-than-human source … its traditional

and necessary connection to the ineffable" (xvi). Such vatic talk in the vein of Berkowitz's philosophical guides through the labyrinth of modernity makes one wonder – as in the case of all such pronouncements – whether there is enlightenment ahead or obfuscation, and whether one is heading out of the cave or into it. At the least, it leaves readers with some apprehension, and many questions, as they set out to follow their authorial guide.

As noted above, Berkowitz's negative verdict on the present is practical as well as theoretical. That is, the inadequacy of legal theory is suggestively linked to social decline. Evidence for the latter comes mainly by way of homey examples like the following, which supposedly exhibit our current predicament: hollow legalism without justice. Thus, a landowner (or company) able to purchase pollution credits to keep on polluting (and producing power, etc.), and a basketball player who intentionally fouls in the final seconds of a close game – or, Berkowitz might have said, who throws the ball out of bounds to stop the clock – are both following rules, but they also violate deeper moral and legal norms rooted in a transcendent reality. (x-xi) Berkowitz does not say exactly what this transcendent reality is, apparently assuming that the philosophical tradition shares some common view or interpretation of this; nor does he consider the predictable response of ordinary basketball fans, who may simply like a particular way of playing the game and thus support it with their enthusiasm and dollars. Yet this is where the fundamental disagreement lies. Berkowitz does not really care, it seems, whether pollution credits lead to an overall reduction of pollution, or who enjoys what kind of basketball. Instead, he suggests that certain things – no matter how justified by rules – should simply not be done (i.e., there should not be rules allowing them). Evidently there are deep substantive normative premises underlying Berkowitz's argument, and they have significant implications for practice. Even though (also following Heidegger) he denies it, his critique is animated by nostalgia (for Homer's Greece, Numa's Rome, Puritan New England – all of which exhibited a "close bond between law, tradition, and religion" [xii]), albeit one that seeks to open "a path to a different future" (xiv). This means apparently that pollution will not be allowed, no matter what the social benefits, that individual and collective interests (and rights) may not be balanced or traded according to rules of fairness, and that – using his own example – we must all play some ideal Berkowitzian game of basketball which we have learned through Platonic reminiscence or Heideggerian insight.

Berkowitz's theoretical critique of roads not taken is brief but sweeping, as he dismisses contractarian (Rawls), utilitarian (Bentham), natural law (Finnis), norma-

tive (Habermas, Dworkin), and post-modern (Derrida, Cornell) accounts of law (and morality). These "modern conceptions of social justice based upon rules" involve merely "a fair and efficient balancing of interests in a way that produces legitimate legal outcomes" (x). To wit, they are nothing but expedient stratagems for resolving disputes among individuals and have nothing to do with justice as such, which has "fled our world" (ix). None require "the ethical activity of thinking" (as opposed to "calculating rationality") (xiv, 15, 85-86), none are open to transcendence, and none acknowledge or help to sustain an "ethical community with others" (x). Instead, and ironically, they reflect the very problems they are trying (unsuccessfully) to solve: that is, in attempting to remedy the baselessness of law they merely reveal and perpetuate it. This is because all such approaches are guilty of the "scientific impulse" (xiv) and its corollary, legal positivism, which motivate the modern codification projects at the heart of this study (6). Legal codes as such have a long history, as Berkowitz notes, but their character has changed over time. Unlike the pre-modern codes of Hammurabi, Solon, and Justinian, which merely collected and organized existing laws in order to facilitate their application, "modern" European codes since Leibniz have attempted to provide a systematic, reasoned justification of the whole body of law in both a formal and a substantive sense. This became necessary because modern legislation required a new source of authority in place of the quasi-religious patriarchal appeals (rooted in cultural tradition) that had provided unquestioned validation for pre-modern (non-positive) law. (4) Berkowitz defers here (not just rhetorically) to the anthropologist, Pierre Clastres, according to whom law "originates in mythical, prehuman time" and is "bequeathed by the great ancestors or cultural heroes … often signified by the name of Father, Grandfather, or Our True Father" (1, 4). Such talk seems unproblematic as a descriptive meta-statement about human beliefs. Yet Berkowitz accepts it also as a first-order claim, since he adds that contemporary positive law is an unfortunate result of this "loss of insight" (6).

Given what Nietzsche called the "death of God" – that is, in Berkowitz's terms, the loss of law's "traditional and religious foundations" (10) and its "connection to a higher truth" (5) – law was left to fend for itself. In the early modern era it appeared increasingly as nothing but the will of a sovereign backed by sanctions. (5) Such voluntarism in moral and legal thought, including its contrast to a realist intellectualism, is an old and familiar theme. However, Berkowitz does not simply accept the distinction and continue the debate; rather, he transforms it in what must seem odd to anyone familiar with late medieval and early modern discussions.[1]

For voluntarism is to him not merely the classic Thrasymachean, Juvenalian, or Hobbesian "might makes right" position, but a willful claim requiring legitimation through "scientific justification" (5, 156). That is, since will alone is not enough, modern voluntarists themselves were compelled to provide some reasoned justification for the sovereign's arbitrary command. This interpretation effectively sublates the traditional voluntarism / intellectualism distinction by claiming that the latter provides not an alternative to but a justifying account for the former. The two viewpoints are no longer contenders but collaborators, in joint contrast to premodern law, whose transcendent origins obviated the need for such "scientific" (i.e., rational – see below) explanations. The main opposition of the book is thus between a sort of noncognitivist mysticism, as it were, and a modern intellectualism-voluntarism amalgam with cognitivist aspirations – the early modern problem of scepticism, especially vis-à-vis classic and medieval realism, being a sub-theme of the latter approach. (Berkowitz terms his study "ontological," concerned with the question of what law "is," rather than epistemological. [xv])

What Berkowitz calls "science" corresponds more to the German *Wissenschaft* or knowledge (cf. Hegel's "science" of logic) than to the natural, material, or experimental sciences, even though he tends to conflate the two meanings by speaking vaguely of "the scientific worldview" (xiv), "natural science methodology" (6), and "scientists and experts" (160). (The discussion nowhere refers to empirical work in astronomy, optics, meteorology, dynamics, ballistics, medicine, and so forth, in relation to particular thinkers, but only to mathematics.) In fact, <u>any</u> effort to justify law in terms of anything but itself is "scientific" (5) in the relevant sense, including the contemporary theoretical alternatives mentioned above (i.e., Rawls, Habermas, Bentham, Derrida, et al.), not to mention Leibniz, Savigny, and other legal codifiers. All of these are also "positivists" – a term likewise expanded beyond its typical late nineteenth- and early twentieth-century meaning, which pits empirical verification and falsification against metaphysical claims – in seeking to justify law in terms of utility and efficiency, or also of integrity, fairness, equality, objectivity, and legitimacy (xiii, 3, 5, 10, 160). Uncoupled from its supra-human source, law loses its "natural authority" and becomes positive or arbitrarily (willfully) posited, and justified in terms of "the purposes and ends for which it exists" (7), which are various and disputable. Any reasoned attempt to justify law, that is, whether by appeal to empirical or rational considerations, is therefore "scientific" and "positivist," and complicit in "the death of law" (7). This highly unusual interpretation allows Berkowitz to claim that "all modern law" (1) is positive or

scientific, including British and American law – even though these legal traditions have not favored the comprehensive rationalistic codification schemes of continental Europe. Indeed, Berkowitz dismisses even the recent explicit "Dekodifikation" moves of European jurists (2-3) toward judicial precedent, for these too involve attempts to justify law in terms of the scientific categories noted above.

II

The Gift of Science chronicles the decline of law in three parts, each further subdivided into chapters. Part I, "from insight to science," focuses on Leibniz's pivotal role at the threshold of modernity, as he set out to relegitimate views and institutions whose traditional foundations were being eroded by the seventeenth-century crisis of authority. Part II describes the transition "from *Recht* to *Gesetz,*" or "right [*ius*] to positive law [*lex*]," in the Prussian *Allgemeines Landrecht* [ALR] of 1794, which exhibits clearly law's paradoxical positivization, as it were, in the very attempt to avoid it. Part III completes the so-called "self-overcoming of legal science" by way of Savigny's nineteenth-century historicizing of reason, which facilitated the devolution of science into social science. As a result, law – embodied thereafter in the Prussian *Bürgerliches Gesetzbuch* [BGB] of 1900 – was left a mere "technique" wielded arbitrarily by bureaucrats and other experts in their management of Weber's "modern welfare state" (85). Berkowitz's narrative of this extended process rests on a close analysis of texts, some of them unfamiliar or hard to obtain, and he exhibits an impressive familiarity with the relevant primary and secondary literatures (there are forty pages of notes). It is a strong reading, of course, as noted above, even a violent one, since major players like Leibniz (15-16) and Savigny (106-7) are portrayed as agents unwittingly working against themselves. Indeed, the title's "gift of science" (cf. the German *Gift*) whereby they sought to save law turned out to be – in appropriate mythic terms – a poisoned apple. (16, 51, 155)

Berkowitz rightly calls attention to the relatively scant notice paid especially by Anglo-American scholars to Leibniz's legal studies as such (Riley's "backward-looking" and "nostalgic" Leibniz [13-14] notwithstanding),[2] even though these were – particularly the codification efforts – a central concern throughout his life. Of course, as with all his projects, Leibniz worked on the topic sporadically, and there were three main periods devoted to this work. The first was before and during his residence at Mainz (1667-1672), when he produced numerous drafts and sketches for legal reform and announced (to the emperor himself) in 1671 his grand

intention to replace the Justinian *Codex Juris* with a Leibnizian *Codex Leopoldus*. The project was resumed during a second wave of enthusiasm that hit in 1677, at Hannover, and lasted through the mid-1680s, followed by another spurt in the early 1690s, when Leibniz developed extensive drafts for a *Tabula Juris* and a *Systema Juris* (issued, in part, by Grua). Indeed, the early *Nova Methodus* (1667) lay open on his desk when Leibniz died, in 1716, still being annotated. The goal of all these efforts was to produce a body of law that was systematic, complete, certain, usable, and above all justified in terms of more fundamental logical, metaphysical, and moral principles. In other words, Leibniz sought to reestablish law's authority not in tradition, custom, insight, or religion but in philosophic reason (i.e., science).

This meant more than guaranteeing law's precision and deductive certainty by means of geometric method, but its articulation in relation to "nature as a rational system" (19). Berkowitz spends considerable time linking Leibniz's legal thought to his substance metaphysics, associating the idea of (divine and human) will with force (*vis*) – *ius* is the "force of justice" (19, 46, 49, 63) – and presenting the simple elements of law as analogues and precursors to world-constituting substantial forms and monads. Like these, law is subject to the overarching principle of sufficient reason and the associated principle of perfection, which provide its ontological grounding and scientific character. Whether natural or conventional, it is explicable in terms of "a willed and posited conception of the good," ultimately by God's normative idea of justice as "the charity of the wise" (53, 62, 64), which humans seek to comprehend through a "science of happiness" (65). So understood, law (*ius*) becomes "knowable, measurable, and calculable as the well-willing of God" (66) in the best of all possible worlds where everything is implied by everything else. Early modern rationalists found this prospect appealing, but not Berkowitz, who is no friend of sufficient reason. For the "reasons and grounds" of law, even if rooted in natural theology, merely occlude or distort it; they sever "its natural connection to any ideas of truth and justice except those that are given as its justification." (52) In other words, any explanation of law necessarily becomes an inadequate substitute for the real thing.

One finds oneself in a kind of labyrinth in these chapters (2 and 3), a bit lost or not going anywhere. To be sure, Berkowitz manages like Leibniz to make most of the definitions link up, and he provides much information about Leibniz's classifications, subdivisions, distinctions, and examples of various kinds of law. However, the problem here – as with all restless and creative minds like Leibniz's, which are constantly revising and reformulating topics of investigation, and whose work is

perpetually unfinished in quite a literal sense – is that the outcome may be not more but less clarity. For details create imprecision as easily as precision, depending on their use. This might matter less if the goal were simply an accurate depiction of Leibniz's ideas, since one could choose to enter this baroque structure or not; but it seems more problematic if those ideas are enlisted, willy nilly, in a larger philosophical argument that is being pressed at the same time.

The next two chapters (4 and 5) describe the long transition from Leibniz's codification efforts to the ALR, and they are among the more interesting in this study. Berkowitz accepts Trendelenburg's claim that it was Leibniz who "sparked" the original move toward ALR through an (anonymous) essay found among the papers of the Brandenburg minister, Paul von Fuchs, who began the concrete process of legal reform by ordering the law faculty at Frankfurt-on-the-Oder, in 1700, to collect legal verdicts with an eye to standardizing judicial procedures. (69) This became the first of four stages of codification during the next century, under successive Prussian rulers. The project was for a long time in the hands of Samuel von Cocceji (1679-1755), who served as minister to both Frederick William I and Frederick II (the Great), for whom he produced a *Projet du corps de droit Frédéric* in 1750-52 (never adopted). Interestingly, Frederick himself wrote a *Dissertation sur les raisons d'établir ou d'abroger les lois* (1749), in which he agonized over the nature of such a code in terms that would characterize the later battles over the ALR. For he thought, on the one hand, that a law (*Gesetz*) *qua* sovereign command required no justification, even while appreciating, on the other hand, the need for a unified, coherent, and thus justified legal code effectively applicable to everyone in his territories.[3] The fourth stage began in 1780, when Frederick's new minister of justice, Count von Carmer, engaged the Silesian jurist, Carl Gottlieb Suarez, to begin work on a new legal code. The immediate impetus for this was, quite appropriately, a dispute between a nobleman and a commoner – indicating that much of the pressure for codification and legal reform in the eighteenth century arose from the practical needs of governing a diverse and changing society.

The ALR was not adopted until 1794, after a prolonged period of struggle over its name and interpretation. The original title favored by Suarez and his collaborator, Ernst Ferdinand Klein, was *Allgemeines Gesetzbuch*, but this was changed to *Landrecht* because of pressure from the nobility, who argued that *Gesetze* (positive laws) need only promulgation and sanctions, not the kind of systematic justification actually provided by the code. Their objection was not merely semantic, Berkowitz maintains, for any rule of law based on more than the *de facto* authority of superiors

issuing *Gesetze* undermines social distinctions, if only implicitly (the ALR in fact confirmed many aristocratic privileges). The name change suggested, therefore, that whatever was being published, it was in fact not formally a *Gesetzbuch* (a "book of positive law"). It may seem at first that the nobility gained little beyond the name, and that they lost much by way of the document's egalitarian implications. For even though some paragraphs elaborating the general principles of *Recht* (*ius*) were excised from the code, its general character remained intact. On a deeper level, however – and this follows the now familiar twist of Berkowitz's argument – the nobles should have been quite happy. For, as Suarez argued, the "scientific" justification in which the *Gesetze* are couched rests ultimately on a determination of the sovereign, who decides "what the basic legal concepts and principles are" (82). That is, given the inevitable vagueness of natural law, or our understanding of it, and the failure of all to agree about it, only a sovereign's determination can end such disputes and give clarity to positive laws justified in natural law terms. Such prioritizing of *Gesetz* over *Recht* (*ius*) is distinctively authoritarian, in fact Hobbesian. And so Berkowitz concludes that the ALR, the distant outcome of Leibniz's life-long codification efforts, is "the first embodiment of a Hobbesian conception of the posited will of the sovereign as the source of *Recht*." (84)

Berkowitz supports this ironic claim with Weber's sociological assessment of the ALR as Europe's gateway to the "modern welfare state," wherein sovereigns, legislators, jurists, and bureaucrats posit laws according to their own conceptions of society's security, good, and interests, and where the arbitrary ends-means calculi they employ lead supposedly to "the dehumanization of man." (85-86) Clearly there are significant gaps in this argument, which Berkowitz never fills and that cannot be further explored here. However, chapter 5 does provide a useful analysis of Suarez's so-called "Crown Prince Lectures" (in 1791-92), in which the latter instructed the Prussian heir about the grounds of *Recht* and thereby exposed the theoretical background to the ALR. In these presentations Suarez distinguishes law (*Recht*) from morality and limits it to external actions, particularly those affecting public order and security. Though legislation nominally still aims at the common good, this is no longer defined (as in Leibniz) according to God's will but only those of humans. In other words, positive law finally becomes secularized, de-moralized, and pluralized.

Like all codes aspiring to comprehensiveness, the ALR soon required addenda to deal with unforeseen problems and questions. It became moot, in any case, with the arrival of Napoleon. However, the idea of codification was not abandoned in

nineteenth-century Germany, and in 1873 the Bundestag assigned a committee the task of drafting what became, in 1900, the *Bürgerliches Gesetzbuch*. The latter's "amoral social-scientific positivism" eschewed the guidance of ethical principles entirely and lent itself, Berkowitz says, to the purely technical pursuit of "external social and political ends" (108). This was despite Savigny's intervening opposition to legal positivism, in the mid-nineteenth century, and his search for law's source and meaning in the evolving history, spirit, and consciousness of a people (*Volk*). (Savigny replaced Leibniz's divine will and the ALR's sovereign will with the "Volkswille" as the source of law. [112]) What ultimately defeated Savigny, like Leibniz before him, was the need to articulate law in a way that would allow it to be rationally understood, specified, and justified. For this again involved sovereigns, legislators, jurists, and eventually social scientists, whose purported "insight" (125-29) into the historical life of peoples, and the laws of history (in place of the law of reason), supposedly qualified them to identify, articulate, and impose appropriate positive norms. Leibniz and the ALR reduced law to science; Savigny and the BGB reduced it to mere social science (107, 137).

This humanization of law (both *Recht* and *Gesetz*), or the final elimination of any spiritual or transcendent dimension, was clearly expressed by Rudolf von Jhering, one of Savigny's followers, who stated bluntly that law is but a means invented by humans in the pursuit of their competing interests. Without any claim to ultimate substantive normativity, it became a purely formalized and politicized policy tool. (139-41) According to Berkowitz, the BGB exhibits these characteristics in its "overwhelming tendency toward abstraction" and "almost total rejection of detailed casuistry" (142). Despite its systematic formalism, however, and in contrast to the ALR, the BGB acknowledged its own incompleteness and sought to remedy it through an accompanying "science of legal interpretation" (145) that judges would use to interpret and apply abstract rules. Particular interpretations would be guided by analogy (with other laws), precedent, and attention to "the spirit of the legal order" (145), understood not in transcendent terms but according to the actual, positive history of the body of laws. Two basic principles underlie or motivate the legal order of the BGB, according to Berkowitz: first, "the protection of a subjective realm of personal freedom" (148) and, second, a resort to equity or fairness (*Billigkeit*), in the sense of equality rather than flexibility (152). Equality, in turn, is justified in terms of its value to the social order (155) – i.e., social welfare as understood by actual, contingent individuals, particularly "the nameless jurists and bureaucrats who draft and apply the new legal codes" (instead of, formerly,

"Gods, kings, nations, or legislators") (157). That is, freedom, fairness, and equality, as well as the ends and interests that justify them, are now become thoroughly mundane and malleable at will. In this way, the BGB completes the "descent" (158) of *Recht* into mere *Gesetz* and exposes humans to reciprocal arbitrariness.

III

Despite the welcome English-language access it provides to its subject, this study is inadequate both as an historical account of Leibniz and legal codification, and as a philosophical challenge to current legal philosophy and social practice – in part because the two aims interfere with one another. It may be true that a "philosophical inquiry into Leibniz's jurisprudential thinking must be guided, as must any meaningful philosophical and historical inquiry, by an interest in a problem of the present." (13) However, much depends on which problems, how they are formulated, and exactly how they shape the process of historical inquiry. Clearly, the questions of the past are not necessarily ours, and vice versa, so a search for answers in either direction is complicated; in the end we (or, some of us) may simply decide to settle for a certain degree of fit. The difficulty is exacerbated when a moral diagnosis has already been made and one is trying merely to understand the etiology of the disease. It is fairly clear in which direction this book was written. Despite some interesting and important background material, the examination of Leibniz and other historical figures is largely acontextual, both conceptually and historically. In fact, the links between different segments of the story are generic at best, carried more by the argument's interest in analogies than detailed historical evidence. That is, other than isolated points of contact such as Leibniz's supposed (anonymous) role in prompting Fuchs to undertake his legal reforms (69), the essay on "Leibniz" written by Gustav Hugo (Savigny's predecessor in the legal-historical school) (109), and Jhering's mention of Leibniz as a precursor to his own project (139), we find little to support the continuity of the narrative beside Berkowitz's own philosophical interest. This is not convincing to the more historically minded, particularly since it also induces him to claim that past thinkers and their interpreters have misunderstood themselves and their own projects. (15-16, 52-53, 107-8, 156) That is always a possibility, of course, but it takes much detailed work, thoroughly conversant with a past thinker's mind and its environment, to show that it is probable in any particular instance.[4]

Perhaps the prime example here is Berkowitz's characterization of Leibniz as a voluntarist. In fact, voluntarism had another meaning in the seventeenth century, and according to it Leibniz was not a voluntarist but an intellectualist, as it were. As Riley has shown well enough,[5] Leibniz spent a lifetime fighting voluntarism as he understood it – particularly as resurrected by Descartes, Hobbes, Locke, Pufendorf, Thomasius, and others. The historical tension between the two approaches has been much studied, and considerable stretches of early modern moral philosophy can be thematically organized by that rubric;[6] yet Berkowitz does not consider such details – even though Leibniz would have been thoroughly familiar and engaged with them. For instance, Hugo Grotius, whose "*etiamsi daremus*" remark in the "Prolegomena" to *De jure belli ac pacis* (1625) was at the center of the seventeenth-century debate, does not appear in the index; Pufendorf – the classic German voluntarist, and one of the most widely read authors of the late-seventeenth and early-eighteenth centuries – is mentioned cursorily once or twice; and Barbeyrac, who finally published Leibniz's (anonymous) attack on Pufendorf's voluntarism and then replied to it point by point, also goes unmentioned.[7] Indeed, given Leibniz's retention of elements from the classical and scholastic traditions, Berkowitz's characterization of him as a "modern" natural lawyer – as the argument requires – is unrealistic.[8] Indeed, the categorization comes not out of seventeenth-century scholarship but from early twentieth-century sociologists like Weber, who lived in altered circumstances and thus had rather different intellectual and practical concerns.

There are other specific oversights or omissions, such as Christian Thomasius' clear distinction between morality and legality (and propriety)[9] – which continued a discussion about perfect (external) and imperfect (internal) duties that lasted through the eighteenth century, at least until Kant.[10] Similarly absent is the subsequent conflict between Thomasians and Wolffians (who shared Leibniz's metaphysical perfectionism and eudaimonism) – roughly divided by their voluntarist and intellectualist leanings – which played out not only in the realm of ideas but also as a political "conflict of faculties" at Halle and other German universities, again up to Kant.[11] Moreover, the wider European context to which Leibniz himself was linked through his voluminous correspondence and voracious reading is also absent from the study, even though its philosophical conclusions are implicitly universal in both spatial and temporal terms. For instance, Samuel von Cocceji (1679-1755), whose codification work for Frederick the Great was mentioned above, was attacked by Leibniz (the supposed positivist) for his theological voluntarism about

the same time that the latter penned his anonymous critique of Pufendorf. Cocceji was related to Henry Oldenburg (first Secretary of the Royal Society) and, like his father Heinrich, had many British connections; indeed, he may have influenced Adam Smith's subjective rights theory.[12] To be sure, many of these developments were in the area of philosophy and not part of the narrow legal history that mainly interests Berkowitz. However, fields interact, people work in many areas, and it is impossible to understand particular positions apart from the broader contexts in which they are situated. Berkowitz's approach is strictly text-oriented in the main, and he does a commendably close, albeit interested reading of some familiar and unfamiliar materials. However, neither texts nor authors are placed within a matrix broad enough to allow us to understand them, or to assess whether Berkowitz's use of them to answer his own, contemporary questions is in fact historically accurate or appropriate. This is no historian's quibble, for our own (and others') mis/understandings of history have a formative impact on our current grasp of things, and on the intellectual problems with which we supposedly begin our inquiries.

There is a similar imprecision in Berkowitz's remarks about the twentieth century views he rejects, particularly the legal philosophies that he deems summarily to be the outcome of the positivist devolution being chronicled. Thus, he sloppily associates his original examples with Rawls's "justice as [mere] fairness" view (xi) – as if they were a proper outcome of that position, as if Rawlsians could offer no normative critique, and as if Berkowitz's own (undefined) perspective provided a more adequate response. As in the historical part of the discussion, one wishes for more precision, more argument, more details. Throughout the study Berkowitz uses terms like "utility," "fairness," "efficiency," "objectivity," "legitimacy," "rationality," "technique," "interest," and "welfare" – critically and dismissively in most instances – as if they had some shared, transhistorical meaning rather than carrying the imprint or hue of particular viewpoints or periods. The same goes for the purported agents of law's decline, both theoretical and practical: the scientists, legislators, jurists, judges, law professors, experts, social engineers, and bureaucrats whom he indiscriminately faults throughout for trying to make law scientific, justifiable, comprehensible, and applicable – in short, for bringing it down to earth, as it were. Indeed, even the central focus of the book is sometimes unclear: Is it justice (morality), (positive) law, moral law, jurisprudence, or something else? The examples in the brief conclusion are no more helpful than those at the beginning, for they suggest alternatives to law rather than remedies for it: the pharmaceutical company with the pollution license that chooses not to use it, a doctor engaging

in *pro bono* work, a teacher conscientiously instructing and advising students (as required by his or her job description, one assumes), friends honestly criticizing and exhorting one another. Berkowitz describes such actions as heeding "[t]he call" and as "the thoughtful and ethical activity of justice." (159) However, this sounds like an exhortation to moral behavior or virtue – some of it clearly consisting of "imperfect duties" or supererogatory actions – not to legal reform. For it would surely require a more substantial argument to suggest that any or all of these actions should somehow become part of the legal code or law of the land.

Indeed, Berkowitz's poetic allusions to "the beauty of law's active presence" (160), its "unknowable origin in thinking … [and in] creative, thoughtful, and artistic insight" (xvi), to "the lost insightful ground of law" (158), the "beautiful dream of transcendence" (160), and "the reasons for law beyond the needs and interests of man" (158), are not helpful either, for either comprehension or action. They remind us, though, of the reasons why justification and codification became necessary in the first place during the period under investigation. It was not only the so-called disenchantment of the world (159) through natural scientific explanation (accomplished, for the most part, by deeply religious individuals) and the lure of mathematical rationality that motivated early modern attempts to systematize and justify law, but also and more so the concrete challenges – in post-Reformation and post-Westphalian Europe – of governing increasingly diverse territories and states (both in and out of the Empire), in which people disagreed fundamentally and often violently about the deliverances of insight, enthusiasm, piety, revelation, transcendence, and morality, as well as the concrete roles of church, state, and law itself. That is, the so-called crisis of authority was really a crisis of authorities and loyalties, in the plural. As most early modern lawyers realized (Leibniz, ironically, with his universalist assumptions, perhaps less so than others), the moral and legal requirements for society could no longer rest on theological, confessional, and metaphysical assumptions but had to be presented persuasively to human reason alone, operating in a practical and empirical mode. This approach still allowed (even required) minimalist appeals to natural religion, at least for a while, but it focused mainly on social and political ends, and on broadly shared human interests, particularly those of security, peace, and order. As recent history had made clear, these were no longer obtainable by simply controlling the beliefs and dispositions of others. Accordingly, early modern natural lawyers sought to develop a political philosophy and a legal framework that focused mainly upon external actions, and

to build a more tolerant, governable, multi-confessional state – not necessarily because they wanted but because they had to.

It is unrealistic and unfair to criticize such a state by saying that its "nameless jurists and bureaucrats" pursue mere "social and political ends" (157), and that they devise "empirically discoverable norms and conventions" (137) rather than legislating according to "mankind's highest ethical ideals" (108). The philosophers, theologians, poets, and prophets whom Berkowitz seems to prefer are nameless too, after all, and far less accountable. Indeed, as recent history has shown, the traditional and transcendent ideals that Berkowitz regards as unifying are in fact more often the very things that divide us. For the modern state is not a thick community of "friends and fellow citizens" (159) who share ideals of justice – except in the broadest terms – but an artificial institution established and reaffirmed by diverse groups and individuals who want (or must) simply live together on certain terms. Accordingly, the demands of citizenship, the meaning of patriotism, and the requirements of law are difficult to determine and have to be continually worked out in practice – based on people's particular beliefs, experiences, and interests. They do not typically "shine forth" (160) from anywhere. Instead, we make them up together in some sort of autonomous fashion (138-40) that is inevitably deficient, but that sometimes works. Contrary to Weber and Berkowitz, who quotes him approvingly (86), such autonomous self-reliance is humanizing rather than dehumanizing, and also less alienating.

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Notes

[1] Francis Oakley, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition," in *Natural Law, Conciliarism and Consent in the Late Middle Ages* (London: Variorum Reprints, 1984), ch. 15, pp. 811-83; M. M. James St. Leger, *The "Etiamsi Daremus" of Hugo Grotius. A Study in the Origins of International Law* (Rome: Pontifical University, 1962); Francis Oakley, *Natural Law, Laws of Nature, Natural Rights. Continuity and Discontinu-*

ity in the History of Ideas (New York and London: Continuum, 2005), pp. 63-70, esp. p. 67; Knud Haakonssen, *Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenment* (New York: Cambridge University Press, 1996), pp. 16-24 (on Suarez); W. Randall Ward, "Divine Will, Natural Law, and the Voluntarism/Intellectualism Debate in Locke," *History of Political Thought* 16/2 (1995): 208-18. Also see note 6 below.

[2] Patrick Riley, *Leibniz's Universal Jurisprudence. Justice as the Charity of the Wise* (Cambridge, MA: Harvard University Press 1996).

[3] This was the voluntarist requirement set out by Pufendorf in *De jure naturae et gentium* (1672), bk. I, ch. 6, that a law needs both a reason and a sanction in order to obligate.

[4] See Haakonssen, *Natural Law and Moral Philosophy*, pp. 8-14.

[5] Actually, Riley, *Leibniz's Universal Jurisprudence*, pp. 14-50, distinguishes Leibniz's "Christian voluntarism" – which is compatible with a Platonic rationalism – from the "radical voluntarism" of Hobbes and Pufendorf.

[6] J. B. Schneewind, *The invention of autonomy. A history of modern moral philosophy* (New York: Cambridge University Press, 1998), pp. 6-9, 59-62 (Suarez), 73-75 (Grotius), 95-100 (Hobbes), 138-40 (Pufendorf), 238-39 (Leibniz), and *passim*. Also see note 1 above, and J. B. Schneewind, "Voluntarism and the Origins of Utilitarianism," *Utilitas* 7/1 (1995): 86-96.

[7] See Leibniz's "Opinion on the Principles of Pufendorf" (1706), in *The Political Writings of Leibniz*, translated and edited by Patrick Riley (New York: Cambridge University Press, 1972), pp. 64-75. Jean Barbeyrac's "The Judgment of an Anonymous Writer on the Original of this Abridgment" [i.e., Leibniz's remarks on Pufendorf's *De officio hominis et civis* (1673)] originally appeared as an appendix to the fourth (1718) edition of his French translation of Pufendorf's *De officio*. It has been translated into English by David Saunders, interspersed with Leibniz's critique, as an appendix to Samuel Pufendorf, *The Whole Duty of Man, According to the Law of Nature*, translated by Andrew Tooke (1691), and edited with an Introduction by Ian Hunter and David Saunders (Indianapolis: Liberty Fund, 2003), pp. 267-305. Also see Ian Hunter, "Conflicting Obligations: Pufendorf, Leibniz and Barbeyrac on Civil Authority," *History of Political Thought* 25/4 (2004): 670-99, and Benjamin J. Bruxvoort Lipscomb, "Power and Authority in Pufendorf," *History of Philosophy Quarterly* 22/3 (2005): 201-20.

[8] See Richard Tuck, "The 'modern' theory of natural law," in *The Languages of Political Theory in Early-Modern Europe*, edited by Anthony Pagden (New York:

Cambridge University Press, 1987), pp. 99-119; and Knud Haakonssen, "Protestant Natural Law Theory. A General Interpretation," in *New Essays on the History of Autonomy. A Collection Honoring J. B. Schneewind*, edited by Natalie Brender and Larry Krasnoff (New York: Cambridge University Press, 2004), pp. 92-109.

[9] See Schneewind, *Invention*, pp. 163-66; and Werner Scheiders, *Naturrecht und Liebesethik. Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius* (New York: Olms, 1971), pp. 268-73.

[10] Joachim Hruschka, "Supererogation and Meritorious Duties," *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Vol. 6, edited by B. Sharon Byrd, Joachim Hruschka, and Jan C. Joerden (Berlin: Duncker & Humblot, 1998), pp. 93-108; and J. B. Schneewind, "The Misfortunes of Virtue," *Ethics* 101/1 (1990): 42-63.

[11] See Notker Hammerstein, *Jus und Historie: ein Beitrag zur Geschichte des historischen Denkens an deutschen Universitäten im späten 17. und 18. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1972); T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (New York: Cambridge University Press, 2000); Ian Hunter, *Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany* (New: Cambridge University Press, 2001); and Klaus-Gert Lutterbeck, *Staat und Gesellschaft bei Christian Thomasius und Christian Wolff* (Stuttgart: Frommann-Holzboog, 2002). Gerald Hartung, *Die Naturrechtsdebatte. Geschichte der Obligatio vom 17. bis 20. Jahrhundert* (Freiburg: Karl Alber, 1998), p. 158, notes that Suarez's teacher, Wolfgang Joachim Darjes, was a Wolffian.

[12] Haakonssen, *Natural Law and Moral Philosophy*, p. 47, note 57; p. 60; and pp. 135-48.